

# Seven Answers for Professor Anastaplo

Harry V. Jaffa\*

## I.

The first of Professor Anastaplo's seven questions is: "What more should be said on behalf of Attorney General Meese with respect to the matters touched upon by Mr. Jaffa?"

In addressing this question, I am reminded irresistibly of a scene in *Duck Soup*. The revolution in Fredonia is at its climax, and the four Marx brothers are manning the guns. Shells fly overhead and crash behind them. Mrs. Teasdale enters stage right and asks: "What's going on here?" Groucho replies: "We're defending your honor, which is more than you ever did."

Similarly, Professor Anastaplo is attempting more on behalf of the former Attorney General than either Mr. Meese, or anyone in the Justice Department, or any of the conservative think tanks has ever done. The short answer—indeed the sufficient answer—to Professor Anastaplo's question is "nothing." It is Professor Anastaplo, not Mr. Meese, who couldn't care less, and who takes issue with my assertion that no one, on or off the Supreme Court, has ever expounded the theory of original intent with greater eloquence or conviction than Chief Justice Taney did in the case of *Dred Scott*.

Professor Anastaplo finds it difficult to credit either with eloquence or conviction "an argument that is patently false." But surely, an argument need not be true to be eloquently expressed. Consider Antony's speech, of unsurpassed eloquence and equally unsurpassed hypocrisy, over the dead body of Caesar, in Shakespeare's *Julius Caesar*. Antony was utterly cynical about the truth of his speech. But I am aware of no reason to think that Chief Justice Taney was saying something he did not believe to be true.

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Professor Anastaplo and I both find the critical defect in Chief Justice Taney's opinion to be his assertion that "[N]egroes of the African race" were, at the time of Revolution, and at the time of the adoption of the Constitution, believed to be "so far inferior that they had no rights which the white man was bound to respect." For this reason, Chief Justice Taney maintained, they could not have been included in the humanity referred to in the Declaration's proposition "that all men are created equal." Professor Anastaplo points to Blackstone for evidence of the opinion of most Americans in 1776 as to the humanity of blacks and their natural rights. He could have supplemented this evidence with countless contemporary quotations of Americans at the time of the Revolution to prove the truth of this contention. None of this, however, has any bearing on whether Taney was sincere in his mistaken belief.

Chief Justice Taney himself conceded that the words of the Declaration seem to have included black men no less than white. But, he said, the state of public opinion at the time was such that these words could not have meant what they said. It was inconsistent with the character of the men who signed the Declaration, Taney said, to have included Negroes in the proposition that all men are created equal, and then to have failed to abolish slavery. Taney certainly seems to have assumed, apparently unconsciously, and certainly without any argument, that the ground of morality is something like Kant's categorical imperative.

"Original intent" as Taney understood it would be an inference, not so much from what the documents of the Revolutionary period said, as from the maxims upon which the statesmen of the period were supposed to have acted. It is proper to point out that this assumption of Taney's is not intrinsically unreasonable, and provides an internally consistent interpretation of the Founding. It is mistaken nonetheless in that it does not understand the Founding Fathers as they understood themselves. More importantly, it does not recognize that prudence and a prudential morality, unlike the categorical imperative, was the ground of their statesmanship as they understood it. There was, in fact, nothing inconsistent with recognizing the wrongfulness of slavery while at the same time understanding that such recognition was only the first

step in a long process leading to the "ultimate extinction" of slavery.

Professor Anastaplo also finds it difficult to credit Taney with sincerity. But why? Taney's opinion about the Founding is almost universal among the "intellectuals" of the academy, his colleagues and mine, today. I recall an evening at St. Johns College, Annapolis, not many years ago. I had given a lecture on "How to Think About the American Revolution." After the lecture, the discussion began, and it lasted until one o'clock in the morning. We spoke of only one topic for the entire four hours: "Why did the Founding Fathers not abolish slavery, if they were sincere in asserting that all men are created equal?" As I recall, I made virtually no headway in persuading the members of the St. Johns College community that the failure of the Founding Fathers to abolish slavery did not detract from the sincerity of their conviction that slavery was morally wrong. I pointed out what Lincoln had shown, in his speech on *Dred Scott*, that it never was in the power of the statesmen of the Revolution to abolish slavery, no matter how much they may have wished to do so. I pointed out that it was not at all wonderful that a nation of slaveholders, all thirteen states as of 1776, had not abolished slavery.

What was wonderful, however, was that a nation of slaveholders had declared that all men are created equal, and thereby had made the ultimate abolition of slavery a moral necessity. Finally, I pointed out that the fourscore and seven years required to accomplish this abolition was a very short period in human history, particularly since slavery was perhaps the oldest institution of human civilization next to the family.

Although the St. John's students and faculty who participated in the discussion were, for the most part, experienced exegetes of the Nicomachean Ethics, they seemed uninterested in applying Aristotle's conception of prudential wisdom to the historical and moral reality of the American Founding. Despite the reference to the dictates of prudence contained in the Declaration of Independence itself, they took it for granted, as did Chief Justice Taney, that the morality of the Founding Fathers could only be vindicated on Kantian grounds. Although few of them knew who Chief Justice Taney was, their view of the Founding was dogmatically Taneyite.

The near universality of Taney's opinion today is seen in

its equal appeal to both the radical Left and the radical Right. Judge Leon Higginbotham, a distinguished scholar and federal appeals court judge, who nominally belongs to the Black Power wing of contemporary American historiography has written that, had the authors of the Declaration stated that "all white men" or "all white men who own property" are created equal, they would more accurately conveyed their meaning. Although I do not think that Judge Higginbotham is a Marxist, this also happens to be the Marxist interpretation of the Founding. Ironically, the old line state's rights conservatives, whose views predominated in the Meese Justice Department, are in fundamental agreement with Judge Higginbotham and the Marxists. State's rights Conservatives tend to fluctuate between the Calhounites, who think that the Declaration did include Negroes and therefore was irrelevant, and the Taneyites who think the Declaration was relevant, but only because it did not include Negroes. For the latter, the equality of the Declaration is a collective equality, as it is in the proletariat of Karl Marx.

Consider the following: "Whereas the original Constitution and the Bill of Rights [as originally understood] have enjoyed the universal acclaim of thoughtful conservatives, a number of amendments, particularly the 14th, have proved to be anathema . . ."<sup>1</sup>

That the Constitution *with slavery* has enjoyed "the universal acclaim of thoughtful conservatives" implies the acceptance of either Chief Justice Taney's or Calhoun's constitutionalism. This view is reinforced by McClellan's vigorous assertion that the amendments abolishing slavery and attempting to guarantee the equal protection of the laws to all persons are "anathema." Left and Right, each for its own reasons, agrees with Chief Justice Taney's or Calhoun's opinion.

Professor Anastaplo writes that: "Mr. Meese is correct in sensing that Chief Justice Taney did not believe in 'original intent,' else he would have approached the slavery question quite differently . . . One can see in Chief Justice Taney, as in Calhoun, how reason can be subverted by passion." I do not see how Mr. Meese could have sensed anything about Taney's

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1. The Constitution from a Conservative Perspective, A Lecture at the Heritage Foundation by James McClellan, President of the Center for Judicial Studies (known to the cognoscenti as the Headquarters of the Army of Northern Virginia) (Mar. 10, 1988).

belief in "original intent," because, as far as I know, he did not know that it existed. Following Chief Justice Rehnquist, Mr. Meese found the evil of *Dred Scott* only in the Court's alleged usurpation of the powers of Congress. Neither Mr. Meese nor Chief Justice Rehnquist found the dehumanization of the Negro to be an objectionable feature of Taney's opinion. Rehnquist, we know, could not have found so in any case, because he does not believe in anything that might be called an "idea of natural justice," such as is implied in the concept of dehumanization. For Rehnquist, an uncompromising legal positivist, the Declaration of Independence has no more status in constitutional interpretation than it had for Calhoun. It is all very well for Professor Anastaplo to say that one can see how, in the Taney and Calhoun opinions, reason can be subverted by passion. But he must recognize that reason has been subverted in exactly the same way in the great majority of our contemporaries, including the luminaries of present-day jurisprudence.

Professor Anastaplo writes that one should not "accept as readily as Mr. Jaffa seems to do the Taney proposition that the Constitution is friendly to slavery. Rather, the Constitution of 1787 can be read as reflecting a grudging accommodation to slavery . . ." The operative expression in the foregoing is "can be read." Indeed, the Constitution can be read as reflecting the aforesaid accommodation. That is how I read it. Professor Anastaplo and some few of our contemporaries also read it that way. But it can be so read only if one makes the principles of the Declaration the touchstone of the Constitution, as those principles were interpreted by Abraham Lincoln. Without this touchstone, the Constitution "can be read"—indeed it can hardly be read otherwise—than as a pro-slavery document. On one occasion, Attorney General Meese did read the Constitution in the Lincolnian way and I congratulated him for having done so. This occurred during a speech at Dickinson College on September 17, 1985. But his record from that day forward is one of apparently complete amnesia of what he said on that occasion. Let me here record my conviction that the Dickinson speech, perhaps accidentally, was written under the influence of the Lincolnian understanding. But the reaction of the Confederate constitutionalists in the Department of Justice was so sharp and strong that the experiment was never repeated. I am confident that Mr. Meese himself was blissfully

unaware of this re-enactment of the Civil War resulting in a Confederate triumph within his own public persona.

Professor Anastaplo writes:

Two other dubious features of the Taney opinion in *Dred Scott*, which Mr. Jaffa seems to acquiesce in should be noticed. One is that Congress could not act to restrict slavery in the Territories if slaves were regarded as merely property. But due process should not be taken to mean that particular kinds of property cannot be singled out for special legislative treatment (and even complete suppression) in various circumstances. It is hardly likely that the State legislatures that abolished property in slaves from 1776 on violated the due process clauses in their constitutions.<sup>2</sup>

Before the Civil War, there was no question that states had a sovereign right either to include or to exclude slavery from among their domestic institutions. There is no proper analogy, therefore, between the bearing of "due process" upon the right of States, on the one hand, and of Congress or a Territorial legislature on the other hand, to abolish property in slaves. Chief Justice Taney's opinion, moreover, did not regard slaves *merely* as property. In erroneously asserting that the right to property in slaves was "expressly affirmed" in the Constitution, Chief Justice Taney held, with perfect consistency, that slave property was indeed "singled out" for protection by the due process clause of the fifth amendment.

The second "dubious feature" of Chief Justice Taney's opinion, in which Professor Anastaplo asserts I acquiesce, is "the assumption that what the Court said in defining the powers of Congress with respect to the Territories was binding upon the Congress." Professor Anastaplo "doubts the propriety of judicial review" in such matters, and thinks that Lincoln, although perhaps exercising a prudent reserve, doubted it too. Happily, this is one of the most discussed issues in the Lincoln-Douglas debates, and if Lincoln exercised any reserve about it, I have not been able to detect it.

The person who doubted the effective power of the Court to bind the Congress was not Lincoln, but rather was Douglas. It was Douglas who repeated, over and over again, that the power of the Court either to authorize or to forbid slavery in the Territories was merely "abstract." According to Douglas,

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2. Anastaplo, *Seven Questions for Professor Jaffa*, 10 UNIV. OF PUGET SOUND L. REV. 507, 515 (1987).

the practical or effective power, either to protect slavery or to exclude slavery, rested neither with the Court nor with the Congress, but with the people of the Territories. Only they could pass the local police regulations upon which the actual existence of slavery depended. If they denied slave owners that protection, slavery would by that fact be excluded. If they provided such protection, then slave property could be held safely and enjoyed. That was what Douglas meant by popular sovereignty.

Lincoln ridiculed this doctrine insofar as it asserts that a thing, slavery, could lawfully be driven from a place, the Territories, where the Supreme Court said it had a lawful right to be. As we have seen, Chief Justice Taney had held, and Douglas would not dispute, that the right to hold slaves in any United States Territory was a right "expressly affirmed" in the Constitution. To say that such a right might be barren and worthless because of the failure of either a Territorial legislature or of the United States Congress to enact the laws necessary to make it valuable, was entirely inadmissible according to Lincoln. "Why, there is not such an abolitionist in the nation as Douglas after all," were Lincoln's last words in the joint debates. Lincoln's statement leading to that conclusion was as follows:

I suppose that most of us . . . believe that the people of the Southern States are entitled to a Congressional fugitive slave law, that it is a right fixed in the Constitution. But it cannot be made available to them without Congressional legislation. In the Judge's language, it is a "barren right" which needs legislation before it can become efficient and valuable to the person to whom it is guaranteed. And as the right is constitutional I agree that the legislation shall be granted to it, and that not that we like the institution of slavery . . . why then do I yield support to a fugitive slave law? Because I do not understand that the Constitution, which guarantees that right, can be supported without it. And if I believed that the right to hold a slave in a Territory was equally fixed in the Constitution with the right to reclaim fugitives, I should be bound to give it the legislation necessary to support it. I say that no man can deny his obligation to give the necessary legislation to support slavery in a Territory, who believes it is a constitutional right to have it there. No man can, who does not give the Abolitionist an argument to deny an obligation enjoined by the Constitution to enact a fugitive slave law . . . I say if that *Dred Scott* decision is correct then the

right to hold slaves in a Territory is equally a constitutional right with the right of a slaveholder to have his runaway returned . . . I defy any man to make an argument that will justify unfriendly legislation to deprive a slaveholder of his right to hold his slave in a Territory, that will not equally, in all its length, breadth, and thickness furnish an argument for nullifying the fugitive slave law.

Lincoln's words, it must be noted, gave a great impetus to the movement of events towards secession and civil war. The deep South believed sincerely that Chief Justice Taney's opinion in *Dred Scott* was correct, and that the only power granted by the Constitution to Congress over slave property in the Territories was "the power coupled with the duty of guarding and protecting the owner in his rights." The phrase "coupled with the duty" embodied precisely what Lincoln said at the end of his debates with Douglas. From Lincoln's perspective, if Taney was right, then the deep South was justified when, at the Democratic National Convention in Charleston in May 1860 it insisted that a federal slave code for the Territories be included in the platform. It was the refusal of the Douglas Democrats to accede to this demand that led to the secession of the deep South from the national party. This was the beginning, and alone would have been a sufficient cause of the secession of the states from the Union after Lincoln's election. In this respect, the question for Lincoln was not whether the Court could bind Congress, but whether the Court understood the Constitution correctly. If Chief Justice Taney was correct in holding as he did in *Dred Scott* that it was the constitutional power and duty of Congress to protect slavery in the Territories, then there was no question in Lincoln's mind that that opinion would have been binding on Congress. The Lincoln-Douglas debates leave no room for doubt on this point.

In concluding this point, I would refer readers to what is said in "Who Killed Cock Robin?"<sup>3</sup> concerning a hypothetical "reverse" *Dred Scott* decision. There is no question but that Abraham Lincoln would have considered binding on Congress a Supreme Court decision holding that the constitutional power of Congress in the Territories was the power, coupled with the duty, of assuring the exclusion of slavery. At the time of the Wilmot Proviso, Lincoln observed that, according to the

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3. To be published in the spring 1990 issue of the *University of Puget Sound Law Review*.



laws of nature, freedom followed the flag, and that any and all territory acquired by the United States was *a priori* free territory. Only positive law could make slavery lawful. Therefore, in the absence of positive law, the natural condition of any United States Territory was one of freedom. Congressional legislation was necessary, he thought, to make this exclusion unambiguous and effective. Lincoln's position resembled that of Madison on the Bill of Rights. In 1787, Madison maintained that a bill of rights would be superfluous because the United States had no constitutional power to do those things that the Bill of Rights would forbid it to do. Nevertheless, he led the way in the first Congress in drafting and adopting the first ten amendments. He did so, not because he thought his previous views were mistaken, but rather, because he had come to believe that what was merely implicit had to become explicit if the public mind was to rest secure in its belief in these limitations upon federal power.

## II.

In Professor Anastaplo's second question, he asks: "[d]oes Mr. Jaffa recognize sufficiently the shortcomings of the equality which he so eloquently extols?"

Among those alleged shortcomings are "an emphasis upon self-centeredness and upon private right, [which] . . . can promote relativism, if not even nihilism, and hence another kind of tyranny. In any event, is it not 'freedom,' even more than 'equality' which appeals to mankind's noblest opposition to slavery?" Abraham Lincoln would have been puzzled, if not astounded, at the thought that the equality he so eloquently extolled could be set in opposition to the freedom, or liberty, he extolled with equal eloquence. After all, his opposition to slavery as a denial of liberty was grounded in the principle of equality.

In the language of the Revolution, freedom and equality had been largely synonymous. If they differed at all, it was as complementary, rather than as opposing or contrary terms. Consider Virginia's Declaration of Rights of June 12, 1776, "[t]hat all men are by nature equally free and independent" and that of Massachusetts in 1780, that "[a]ll men are born free and equal." It is in Tocqueville's *Democracy in America* that equality and liberty are set against each other. But Tocqueville ignored the Declaration of Independence, and the theory it

embodied, in his analysis. For Tocqueville, equality meant, in essence, an equality of condition. The liberty to which he opposed it was the liberty of men to cultivate their talents and pursue their ambitions in such a way as to produce inequality of condition. He saw egalitarianism, as does Professor Anastaplo, as a leveling force, using the power of the majority to discourage, or even punish, those who excel by their talents and achievements.

Certainly, in our time, we have seen the spurious appeal to equality as a force for redistributing wealth, not as a charitable aid to the deserving poor, but to punish enterprise and industry. Its most powerful motive is envy. Perhaps the most lucid expression of this kind of egalitarianism is Marx's classic formula for distributive justice in a Communist society: "From each according to his abilities, to each according to his needs." This divorce of the idea of work from the idea of reward for work is not merely utopian; it is, at its root, against nature and hence against the idea of natural rights and natural justice embodied in the Declaration of Independence. By abandoning the connection between justice and nature, it does indeed lead both to the nihilism and the tyranny that Professor Anastaplo so justly fears.

In a celebrated passage of the tenth *Federalist*, Madison speaks of "the protection of different and unequal faculties of acquiring property" as "the first object of government." It would be perfectly correct to amend this passage to say that it is the *equal* protection of *unequal* faculties which is intended. As such, the passage is in perfect harmony with the principle of equality, *rightly* understood. We must remember that this is said in the context of the Madisonian solution for the problem of faction, above all of the problem of majority faction. The entire tenth *Federalist* is devoted to showing how a Republican regime can be made to serve the principles of natural justice over against a naked majoritarianism based upon a false notion of equality.

The passage in the *Federalist* concerning the protection of "different and unequal faculties" is usually interpreted to mean that the rights of property shall be protected from appropriation or expropriation by a merely numerical majority. This interpretation is correct yet insufficient. A fuller interpretation provides that the poor or weak shall not be unjustly deprived of their equal right to their own property. In facing

the terrible prejudice against Negroes, Lincoln conceded that in some respects they were not his equals. The only respect in which he ever actually made this concession was color. However, to say that black is not equal to white, means no more than that black is not white. Of the black woman, Lincoln once declared: "In some respects she certainly is not my equal; but in her natural right to eat the bread she earns with her own hands without the leave of anyone else, she is my equal, and the equal of all others." Of course, a natural right to eat the bread one earns implies a natural liberty to earn that bread and to earn it in a free market. Furthermore, a *free* market is one to which all breadwinners have *equal* access. No one may arbitrarily be excluded from the free competition of the market place or compelled to labor at an occupation inferior to one which freedom of contract might entitle him or her. Freedom of contract, one should remember, is a necessary implication of the natural right of ownership of one's own person, with respect to which all men are created equal.

Concerning the envy of the rich by the poor, animated by a false idea of equality, leading in turn to class warfare, Lincoln wrote as follows:

Nor should this [the rights of labor] lead to a war upon property. Property is the fruit of labor, property is desirable, is a positive good in the world. That some should be rich, shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another; but let him labor diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.

I do not think that the essential harmony of liberty and equality, rightly understood, can be better or more eloquently expressed than this.

### III.

In his third question, Professor Anastaplo asks: "Does Mr. Jaffa mean to leave the impression that theory alone determines political practice?" To this he adds: "Not enough seems to be made by Mr. Jaffa of nature (or personal temperament) and of circumstances in everyday political life. If he did make more of these, he would not be as apt as he is to subject political men to the most exacting philosophical scrutiny."

Let me reply, first of all, by saying that I was convinced

long ago, as I believe Professor Anastaplo was, both by Aristotle and by Leo Strauss, that the best possible regime is one ruled not by philosophers, but by gentlemen. The gentleman qua gentleman does not need a reason for being moral. Indeed, the true gentleman tends to regard the giving of such reasons as demeaning. In this attitude lies both a gentleman's strength and his weakness. But Leo Strauss, more than Aristotle, persuaded me that the philosophy that Socrates called down from the heavens was a necessary adjunct to the regime of gentlemen. This was because gentlemen qua gentlemen are nearly defenseless against false gods and false theories. Such theories might, and frequently do, destroy the ground of virtue in the souls of non-gentlemen, and sometimes even in the souls of gentlemen.

Gentlemanship means the activity of the moral virtues guided by practical wisdom. Gentlemanship implies a harmony between the moral virtues and the regime in which the gentlemen predominate. Gentlemanship requires that the gods of the city, in classical terminology, look with favor upon these virtues and those who practice them. The rule of gentlemen is *a priori* possible only within the cities that look to such gods. Philosophy, insofar as it renders doubtful the belief in such gods, or any gods, may justly be regarded as a doubtful blessing, if not a curse. This is of course *a fortiori* true of the poetry by which philosophic teachings are transmitted to the young, and thereby to future citizens. Where the gods of the cities are hostile to moral virtues, where they elevate bad faith, cruelty, or selfishness over morality, it may be necessary for Socratic philosophy to turn the city towards a more pure religion. Consider the quest of the King of the Khazars for a better religion, in Judah Halevi's *The Kuzari*.

It may also happen that non-Socratic philosophy, or the influence of such philosophy, may elevate bad faith, cruelty, and selfishness over morality. We see this above all in Machiavelli and the Machiavellians who, with notable exceptions, have dominated the theoretical landscape for over four hundred years. We see this in the poetry that they have given us as well as in their philosophy. We can see the pernicious possibilities of philosophy and poetry more than a millennium before Machiavelli in the comical, but serious, debate between the just and the unjust in Aristophanes' *Clouds*. From that debate we may infer that a new Socrates, different from the

one presented in the play, will and indeed must come to the aid of the just speech, as he does in the encounter with Thrasymachus in the first book of the *Republic*. The refutation of the thesis that justice is the interest of the stronger, found in the first book of the *Republic*, must be seen as the reversal of the result of the contest in *Clouds*. That encounter between Socrates and Thrasymachus is reproduced, in its essentials, in Lincoln's debates with Douglas in 1858. The Gettysburg address, as the last word in the Lincoln-Douglas debates, is Socratic poetry in the service of gentlemanship and morality.

The political life of the West was transformed by the establishment of Christianity within the Roman empire. That establishment was anticipated a century before by the extension of citizenship from Rome to the provinces. In principle, and in its own collective mind, the city of Rome became the world. Since there was now, in principle, but one city, there could now, in principle, be but one God. This view was a precursor to the end of the ancient city, and of the possibility of a natural harmony between gentlemanship and the gods of the city.

Christian monotheism was not the religion of one particular people as was the monotheism of ancient Israel. In claiming the authority of truth with respect to the human soul qua human soul, Christian monotheism broke the bonds that had hitherto connected the laws of each particular city with a particular God or gods. There was no such thing as an "establishment of religion" in any ancient city. The idea of establishment implied an act by a pre-established political order. In the ancient city, however, the city arose from a pre-existing relationship of men and their gods. The God of Israel freed the Israelites from bondage, led them out of Egypt, gave them their laws, and made them, by these acts, a polity. The Christian God comes to sight as the savior of each individual human soul. He may break the bondage of Original Sin but not the shackles of those compelled to "make bricks without straw." The Christian God is not the lawgiver of a particular polity.

The establishment of Christianity, by banning the ancient gods, broke the bond between God or the gods and law that had characterized ancient Israel, ancient Rome, and every other ancient city. From this tension between the merely

human and particular cause of law and the universal and divine character of the justification of law, arose the millennial struggle for supremacy between the secular and the sacred, between Popes and Emperors within the Holy Roman empire. This struggle continued in different forms throughout the Reformation.

The ancient legislating gods required primarily obedience, but the One God of a universal empire required primarily faith, or belief. The political establishment of a universal religion elevated "theory" over "practice" in a way unknown in the ancient world, creating a problem unanticipated in Aristotle's *Politics*. Political life henceforth was dominated, not by the requirements of laws directing human actions as such, but by the requirements of faith directing men's souls toward eternity. If men's dearest interests were in another world, if the interests which they shared with aliens and enemies who were fellow-Christians were in some sense dearer than those they shared with friends and fellow-citizens who may not have been Christian, then citizenship became problematic in a way unknown to the ancient city. Coercion in matters of faith, coercion unrelated to morality or to disobedience to any laws prescriptive of justice or the common good, was virtually unknown in the ancient city. This coercion was incompatible with the idea of gentlemanship and now became central to the political process. Henceforth Western man was faced not with the "political problem" but with the political-theological problem. One might, in this connection, consider the differences between the laws against atheism in Plato's *Laws* and the laws against heresy and infidelity in the Holy Roman Empire or in any of the Christian states of the Reformation. These differences illuminate and indeed explain why the status of gentlemanship, and of untheoretical politics, became so problematic in the post-classical world.

Suffice it for the present that the foregoing problem remained unsolved for nearly fifteen hundred years. Its solution is to be found in the principles of political obligation set forth in the Declaration of Independence and in the principles of religious liberty that are set forth in the Virginia Statute of Religious Liberty, both of them the work of Thomas Jefferson. Of course, Jefferson's practical statesmanship was an outgrowth of the work of the philosophical statesmanship of Spinoza and of John Locke. It would, however, be a mistake to

see Jefferson as nothing more than the epigone of his teachers. The American Founding represents such a harmonization of the claims of reason and of revelation as to make possible, perhaps for the first time, the rule of Christian gentlemen.

The true theory of civil liberty may be found in Lincoln's "abstract truth, applicable to all men and all times," that all men are created equal, that there is no such distance between man and man, as there is between man and beast, or between man and God, implies that no man has any right to govern another without the other's consent. This is the basis of the rule of law, of ruling and of being ruled. A universal ground of political obligation is found in the particular act of each consenting individual. Without any church or intervening religious authority, the sanction of monotheistic religion is preserved nonetheless in the idea that the rights authorizing the consent of the governed are rights with which we have been endowed by our Creator. Respect for the rights of man becomes a part of our duty to God.

Religious liberty is grounded in the metaphysical freedom of the mind. Because of this freedom, coercion in matters of faith is destructive of all merit in professions of faith. Therefore, a man's civil rights can have no more dependence upon his religious opinions than upon his opinions in physics or geometry. These wise theories of civil and religious liberty are necessary conditions of gentlemanship in the modern world, not substitutes for it. But gentlemanship, the qualities necessary for the deserved supremacy of the untheoretical moral virtues within the political community, is possible only within the framework of these theories. In this sense, the emancipation of practice from theory must be a work of theory.

Professor Anastaplo writes that "[i]t is imprudent to regard as radically flawed human beings those political men who hold dubious theoretical opinions." Such an attitude, he adds, "can be discerned to have been critical to the intolerance both of the Inquisition and of Stalin." To which I reply, exactly so. But the decency of the gentleman was virtually helpless against the Inquisition. This is illuminated by the scene in Dostoevski's *Brothers Karamazov*, in which Jesus, a gentleman, was silent before the Grand Inquisitor's theoretical arguments on behalf of tyranny. Moreover, since gentlemen are ordinarily pious, their Christian piety is often at war with their decency. It took the principle of separation of church and

state, as set forth in the Virginia Statute, to reunite their piety and their decency and thereby to liberate both their religious faith and their gentlemanship.

Professor Anastaplo reminds us of the intolerance of Stalin's regime, and he might have mentioned Hitler's as well. This brings to mind how a morally neutral, or morally indifferent, Universal Science has replaced God as the highest authority for modern man. He suggests, therefore, that the authority of Science has been utilized to undermine morality, and thereby gentlemanship and human decency. He reminds us that the evil done in the name of Science is no less than what was done, in an earlier age, by theological intolerance in the name of God. The arguments vindicating the absolute authority of the Party, as advanced in the confession of Rubachev (Bukharin) at the Moscow show trials of 1936, as portrayed by Koestler's *Darkness at Noon*, are virtually the same as those vindicating the Inquisition, as portrayed by Dostoevski in *The Brothers Karamazov*.

We must remember that two of the greatest minds of the twentieth century were in the service of the two greatest tyrants of all time, Heidegger for Hitler, and Alexander Kojeve for Stalin. Gentlemanship is powerless to deal with such a phenomenon. Only a Leo Strauss could make the case against both Heidegger and Kojeve. The self-destruction of reason in modern philosophy was the necessary condition for the nihilistic loyalties generated in the regimes of Stalin and Hitler. Only by Strauss's destruction of this self-destruction has it been possible to restore the intelligibility of the political horizon of gentleman.

Strauss made possible not only the restoration of gentlemanship, but of that highest form of gentlemanship, statesmanship. It was Strauss who directed his students to both Lincoln and Churchill, who not only were great gentlemen, skilled in the political arts, but understood, as mere gentlemen could not, the evil wrought in the practical and political world by false theories. Without Strauss's destruction of historicism, and without his restoration of the idea of understanding the great books as their authors understood them, the attempt to recapture the meaning of the statesman's art, by understanding Lincoln and Churchill as they understood themselves, would never have been possible.

According to Professor Anastaplo,



Too much of an emphasis upon the theoretical may even be seen in Mr. Jaffa's insistence upon the natural-right tradition of the Declaration of Independence to the virtual exclusion of the prescriptive rights of the English-speaking peoples. This is to ignore the central place given in the Declaration to the grievances grounded in the British Constitution.

In documents I have cited in "Original Intentions" of the Framers" it is clear that the elements of right in the British Constitution to which the colonists appealed in the revolution, were regarded by them as being at one and the same time, prescriptive and natural. Therefore, with respect to this concept of right, it was asserted that "it is an essential, unalterable right, in nature, engrafted into the British Constitution, as a fundamental law." Prescriptive right was authoritative only when it was in accordance with or at least not contrary to natural right. I believe that all of the grievances mentioned in the Declaration were regarded as violations of rights in nature. They may also have represented violations of British constitutionalism, but that in itself is merely incidental. Prescription, by itself, could furnish no ground of right, once the die had been cast for independence. In 1776, nothing lay closer to the historical and prescriptive heart of the British Constitution than the establishment of the Church of England with an hereditary Protestant monarch at its head. But nothing was more an anathema to Americans, after independence. Prescription could no more make religious establishment or hereditary monarchy acceptable than it could those "twin relics of barbarism, polygamy and slavery."

#### IV.

In his fourth question, Professor Anastaplo asks: "Is there not an inevitable tension, because of the very nature of things, between philosophy and the city?"

I believe I have already given the substance of my answer to this question in the foregoing. Let me observe that the relationship between philosophy and the city is equally one of tension and of mutual dependence. Philosophy cannot subsist without the city. But the health of the city depends, not upon philosophy, but upon morality. The natural representative of morality is not the philosopher, but the gentleman. However, the gentleman cannot survive without the assistance, not of

philosophy *per se*, as we see in the *Clouds*, but of *political* philosophy, such as we see in the *Republic* and in the Lincoln-Douglas debates.

Professor Anastaplo thinks it is unfair of me to hold political men such as Mr. Meese, Chief Justice Rehnquist, and Justice Brennan to standards of theoretical scrutiny that, he concedes, are proper in the case of a "professional philosopher" like Leszek Kolakowski. But the former are essentially gentlemen gone astray like the legendary Whiffenpoofs, while the latter is merely pretentious.

Let us consider for a moment the phenomenon of "professional philosophy." A philosopher is by definition a lover, a lover of wisdom. Another name for a professional love, however, is prostitute. At the risk of mixing my metaphors, how a whole profession came to pin the tail of the donkey on itself, in humorless unconsciousness of what it was doing, is a matter of some curiosity. Philosophy became a profession, however, not when those called philosophers accepted pay, but when they became but one of the many disciplines of the modern university. Each of these disciplines certified the competency of its practitioners by a degree called doctor of philosophy. The original pre-modern meaning of philosophy was that it was the attempt to replace opinions about the whole universe by knowledge of that whole. The recollection of this meaning is preserved in the word "university," as characterizing the institutional home of philosophy. It is also preserved by the fact that each of the disciplines called its peculiar, but very partial, limited and non-philosophic knowledge "philosophy." Now, however, a doctorate of philosophy *in philosophy* is only one of many doctorates *of philosophy*. In more ways than one, as Leo Strauss often said, the discipline now called philosophy is only the rump of the original animal. Modern science, he said, represents the successful branches of modern philosophy, and what is still called by the name of philosophy represents only its residual elements.

I quoted from Professor Kolakowski's Jefferson lecture of 1986 at the beginning of Appendix B of "Original Intentions of the Framers." The self-evident truths of the Declaration of Independence were, he said, in the light of the philosophic tradition "either patently false, meaningless, or superstitious." I need not repeat what I have already said about this assertion. The Declaration of Independence expresses an opinion about

man, God, and the universe, seen as a whole. This wholeness is simply beyond the range of Professor Kolakowski's comprehension. As a genuine "professional" he has no more notion of what the Declaration of Independence meant than if it had been inscribed on the Rosetta Stone. Truly, the rump does not know what the head once thought. Whatever their shortcomings, Mr. Meese, Chief Justices Rehnquist and Justice Brennan are important people, because they hold, or have held, important offices. Most of their errors are what have been certified to them as truth by professional philosophers. This was notably evident in Rehnquist's casual and unquestioning acceptance of the fact/value distinction. This distinction, which underlies all of his jurisprudence, is one he accepted on authority, apparently without the least acquaintance with the proofs, real or alleged, upon which it rests.

I agree with Professor Anastaplo that we should address the professional philosophers on their own turf, and he and I have both done so. But we cannot wait to instruct jurists and other political men until we have transformed the academic study of philosophy. Political men are victims of false doctrines that are given currency by the academy, and given authority by being characterized as science. As members of the polity, we are all victimized by them together. In our free society, resting as it does upon the exchange of ideas, we can be emancipated only by truth, and truth rests upon hard reasoning, reasoning for which there is no substitute.

## V.

In his fifth question, Professor Anastaplo asks: "Does Mr. Jaffa mean to leave the impression that 'the consent of the governed' is for the Declaration of Independence, as well as for himself, a necessary basis for legitimate government in all circumstances?"

Professor Anastaplo knows my answer to this so well that I can only assume he is asking it on behalf of others. I have remarked time and again that the consent referred to in the second paragraph of the Declaration must be understood to mean *enlightened* consent. In a memorable passage I often quote, George Washington declared that "[t]he foundation of our empire was not laid in the gloomy age of ignorance and superstition, but at an epoch when the rights of mankind were better understood and more clearly defined than at any former

period." The Declaration itself refers to both "barbarous ages" and "merciless savages." One must assume that the consent that gives rise to the just powers of government is neither barbarous nor savage, but rather grounded in that understanding of the rights of man of which Washington wrote. It may certainly be the case that, in ages and places of ignorance and superstition, despotism in some form or other may become legitimate because of necessity.

Certainly the existence in human societies of cannibalism, human sacrifice, slavery, polygamy, suttee, or untouchability, requires government that does not rest upon the consent of the barbarians or savages themselves. In fact, the Civil War amendments to the United States Constitution, although nominally grounded in consent, were, with full justification, imposed upon the defeated South by the victorious Union armies. Having fought for the principle that some men might govern other men without their consent, the former Confederates could not reasonably complain of this compulsion on behalf of consent. However paradoxical it may appear to be, it was only by accepting the principles embodied in those amendments that the erstwhile rebels could be re-admitted to a government grounded in the consent of the governed.

Barbarism, however, must not be equated with primitivism, as it cannot be in the case of those antebellum Americans who fought for slavery, not as a necessary evil, but as a positive good. There is scientific barbarism as well, represented in our time by both Nazis and Communists. The failure of the Weimar Republic to outlaw the Nazi and Communist parties became the death sentence of much more than the Weimar Republic itself. The adherents of these murderous regimes had no more right than cannibals to participate in a free government. The right of revolution proclaimed in the Declaration of Independence, the right to alter or abolish governments, is a natural right to be exercised only when governments become "destructive of these ends." The ends are "to secure these rights," that is, the equal natural rights to life, liberty, and the pursuit of happiness. To destroy or to enslave other human beings, whose rights are equal to our own, is not a permissible end of the right of revolution. Nazis who followed Hitler, or Communists who followed Stalin, had no right to anything but an emancipation from their dangerous delu-

sions. How this right might prudently be implemented is another question. But the principle is clear.

Professor Anastaplo says that "the consent of the governed" in the Declaration of Independence "can be translated into terms used by Plato and Aristotle, but not without significant distortion. Certainly, Plato and Aristotle, as well as the Bible, recognize the possibility of just regimes without benefit of the consent of the governed. Mr. Jaffa, in his stance here, seems more in the spirit of Rousseau . . ." As I have argued above, the problem of political obligation became a moral and political problem only with the establishment of monotheism as the predominant form of the religion of the West. For Plato, Aristotle, and the Bible, the source of political obligation was to be found in the divine lawgivers of the city. This is as clear in Plato's *Laws* as it is in the *Torah*. One of the attributes of a gentleman is that he needs no argument as to why he should be law-abiding. The *Nicomachean Ethics* is addressed only to those who are already disposed towards virtue and are only in need of instruction in how to become virtuous. However, as to most of the citizens, it is clear that for Aristotle as for Socrates, Xenophon, and Plato, the gods of the city remain the ground of the obligation of law.

I have not distorted the relationship between the teaching of the Declaration, and the teaching of the classics, because I have never identified the two in the sense implied by Professor Anastaplo. The classical political solutions are, strictly speaking, only for the ancient city. The Declaration addressed a problem peculiarly that of the Christian West; a problem that was not addressed by Plato or Aristotle, arising from the conflicting claims of reason and of revelation. The idea of human equality, independent of sectarian identity, led to the idea of the enlightened consent of the governed as the ground of law. This idea, that consent framed the basis of law, enfranchised Aristotle's concept of law as "reason unaffected by desire" by removing from the jurisdiction of theology and of theologians the judgment of rationality. The Declaration was no less pious in doing so, because it incorporated into the idea of enlightened consent respect for the rights with which all mankind had been endowed by their Creator. Thus, the Declaration made obedience to law, based upon consent, among our duties to God. In the Declaration, and more generally in the American Founding, we find a principled ground for law that we cannot

find in Aristotle. What we find, however, is fully in accordance with Aristotle's intention, within a framework consistent with biblical religion.

I believe my argument must be distinguished radically from Rousseau's since it both admits and requires for its foundation such an understanding of morality as one finds in the *Nicomachean Ethics*. The consent arising from the general will is a formal substitute for moral rationality, not a means of implementing it. The moral rationality of the *Nicomachean Ethics* and of the *Politics*, like that of the Declaration of Independence, is grounded in the objectivity of the distinctions between man, beast, and God. These distinctions in turn imply that "great chain of being" which is the metaphysical ground of the universe, and the object of philosophical speculation. For Rousseau, as I understand him, these distinctions have blurred, and both philosophy and politics have thereby lost their respective sovereignties.

## VI.

In his sixth question, Professor Anastaplo asks, "Does Mr. Jaffa recognize sufficiently the merits of that freedom which he routinely subordinates to equality?"

In his second question, Professor Anastaplo challenged me to recognize the shortcomings of equality, and now he repeats the same question by calling my attention to the merits of freedom. But as he well knows, I deny the premise of both forms of the question, and in particular deny that I, any more than Abraham Lincoln, have ever subordinated freedom to equality. I do not believe it is possible to do so, because the subordination of the one to the other would imply the misunderstanding of both. The fact that black human beings and white human beings are equally human beings is the ground of their equal right to freedom. To deny one can only lead to the denial of the other. To affirm one is also to affirm the other. As Alice learned in Wonderland, words can be made to mean whatever one wants them to mean. But in the vocabulary of Lincoln and of the Declaration of Independence, no such distinction between freedom and equality, such as that suggested by Professor Anastaplo, is tenable. The Gettysburg Address moves from the proposition of human equality, to the "new birth of freedom," and hence to the preservation of popular govern-

ment. That these three are one was surely Lincoln's faith, as was his faith in the oneness of God.

For Lincoln, the essence of *liberty*, was to give to all an *equal* chance. A fair start in the race of life is precisely the ground upon which the recognition of excellence depends. In removing the shackles of class, race, religion, and ethnic origin, the principle of equality provides the rewards of liberty hitherto denied to talent and virtue.

Professor Anastaplo observes that "freedom can deteriorate into simply living as one likes," that is to say, into license. We add here that the principle of equal rights can deteriorate into what Leo Strauss called "permissive egalitarianism." It is easy to see that, in their corruptions, freedom or liberty and equality are one. But equality, uncorrupted, rests upon the recognition of the inequality of man and beast, and of man and God. This equality implies an objective order of being, upon which is founded a prescriptive moral order. Liberty can deteriorate into license only as one forgets or ignores that one's liberty arises from one's nature. Liberty can never be used to reject or defy "the laws of nature and of nature's God." Our equality with other human beings is an equality within the boundaries of those same laws. It is an equality which arises from our rational nature, and which obligates us to know and to obey the laws of that nature. It is an equality not only of one's rights, but of the duties arising from those rights. There is no ground here for mere permissiveness.

## VII.

Finally, in his seventh question, Professor Anastaplo asks: "What more should be said on behalf of Chief Justice Rehnquist and Associate Justice Brennan with respect to the matters touched upon by Mr. Jaffa?"

He thus ends as he began, now entering pleas on behalf of the two Justices, one conservative and the other liberal, as he did on behalf of former Attorney General Meese. Professor Anastaplo takes heart in the fact that "Justice Brennan could say, upon the recent elevation of Justice Rehnquist, '[h]e's going to be a splendid Chief Justice.'" From this he concludes that "[d]ecent conservatives and decent liberals do have much in common." But I would remind Professor Anastaplo that I ended " 'Original Intentions' of the Framers" with the observation based, I believe, upon compelling evidence, that "modern

liberalism and modern conservatism . . . stand upon common ground. They are mirror images of each other. They differ only as to where Right and Left are located in the images."

Although I have no doubt that Justice Brennan and Chief Justice Rehnquist are decent men, it is not their decency that is so conspicuous among the things they hold in common. It is their denial of the idea of natural justice, of "the laws of nature and of nature's God" that animated the generation of the American Founding. I am certain that Chief Justice Taney was every bit as decent a human being as Justices Brennan and Rehnquist. He was a man of strong moral and religious convictions, who was personally opposed to slavery and who freed his own slaves. Had he lived his life in a private station, that life might have been noted only for its purity and blamelessness. But as Aristotle says, "rule shows the man." As Chief Justice and author of the opinion of the Court in the case of *Dred Scott*, Taney was one of history's greatest disasters. Justice Brennan, albeit a decent man, concurred in the Court's decision in *Roe v. Wade*, which many competent judges both of law and of decency regard as a disaster equaling, if not surpassing, *Dred Scott*.

In *Roe v. Wade*, then Justice Rehnquist dissented on the ground that the Court, in ruling unconstitutional the abortion laws of fifty states, was usurping the legislative authority of the people of those states. This opinion was, I believe, perfectly correct. I find no fault with Justice Rehnquist for carefully avoiding any moral arguments with respect to abortion. In the circumstances of that case, such avoidance was correct. I only observe that his dissent in *Roe v. Wade*, as far as it went, was entirely consistent with his legal positivism. It is difficult to imagine an exercise of state, or federal, legislative power that Justice Rehnquist would not uphold.

Professor Anastaplo also has good things to say about Mr. Justice Rehnquist's opinions with respect to the free speech guarantee of the first amendment. He finds it "difficult to see what practical differences there are likely to be, in terms of how cases should be decided, between Mr. Jaffa and the Chief Justice, whatever theoretical shortcomings Mr. Jaffa may discern in the Chief Justice." However, Rehnquist's patronage of free speech is less an attachment to the cause of free speech, seen as a necessary ingredient of free government, than it is a manifestation of his inability to find any rational standard by



which to distinguish free speech from any perversion or corruption of speech. What follows is a critique of the Chief Justice's opinion for the Court in the case of *Falwell v. Flynt*.

The Supreme Court of the United States, in a unanimous decision, reversed a lower court ruling, which had upheld a jury's award of \$200,000.00 to the Reverend Jerry Falwell in his suit against Larry Flynt, publisher of *Hustler* magazine. Flynt had published a fake advertisement for Campari Liqueur, in which Falwell was portrayed as a drunk whose first sexual experience had been with his mother in an outhouse. The jury held that since this "satire" had been labeled, albeit in small print, as fiction, Falwell had not, strictly speaking, been libeled. However, they awarded him damages for his mental pain and suffering.

The jury clearly felt that the image conjured up in the minds of many thousands of people of the young Falwell and his mother in the outhouse, whether or not they had paid any attention to the disclaimer, was so degrading and debasing that Flynt should be punished and Falwell indemnified. But the Supreme Court of the United States has decided that the jury was wrong and that the representation of Falwell as having had sex with his mother in an outhouse is speech protected by the first amendment.

Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed to contribute to the free interchange of ideas and the ascertainment of truth.

Thus spoke the Court in *Garrison v. Louisiana* (1964), in a passage cited to justify the *Falwell v. Flynt* decision. But, can the Court honestly believe that such a representation of the Reverend Falwell and his mother contributes to "the free interchange of ideas and the ascertainment of truth?" Larry Flynt, the publisher of *Hustler*, is a declared enemy of all traditional morality and human decency, whether that of the Bible or of unassisted human reason. Whether it is fornication, adultery, incest, or sodomy, Flynt wishes to destroy the dignity of moral restraint by mocking and ultimately destroying our sense of shame with respect to such things. His intent was not so much to make Falwell ridiculous as to make the horror of incest and the dignity of the human family ridiculous. I, for one, would not deny Flynt full freedom of speech to argue, if

he wishes, that all moral precepts such as that embodied in the prohibition of incest are primitive superstitions. But Flynt has no interest whatever in the "free interchange of ideas," and he has about as much interest in promoting "the ascertainment of truth" as he has in promoting chastity. I do not think that public exhibitions of shamelessness, or of pornographic exhibitionism, have anything to do with promoting the ends of free speech.

The opinion of the Court was written by Chief Justice Rehnquist, who placed the case in the context of political cartooning, as a feature of "public and political debate" in a free society. He gave a number of examples of such cartoons, beginning with one of George Washington riding a donkey, with the caption underneath asking, "[w]hich one is the ass?" Yet even Mr. Rehnquist sensed that it strained credulity to imply that "the caricature of respondent and his mother in *Hustler*" belonged to this genre. It was, he admitted, "at best a distant cousin" of even the most acerbic and hostile of the political cartoons he had described, "and a rather poor relation at that." In fact, the Chief Justice admitted that *Hustler's* portrayal of Falwell and his mother did not really deserve first amendment protection at all, but he thought that genuine political cartoons and satire would be endangered unless it received such protection. Rehnquist stated:

If it were possible by laying down a principled standard to separate one from the other, public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one.

One might paraphrase the Chief Justice's argument at this point, by saying that if we do not permit George Washington's mother to be called an incestuous whore, we might prevent someone from calling George Washington an ass!

Chief Justice Rehnquist did not deny that, however broad the protections afforded speech by the first amendment's principles they

like other principles, are subject to limitations. We recognized in *Pacifica Foundation*, that speech that is "'vulgar,' 'offensive,' and 'shocking'" is "not entitled to absolute constitutional protection under all circumstances." In *Chaplinsky v. New Hampshire*, we held that a state could lawfully punish an individual for the use of insulting "fighting'

words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

But, the Chief Justice concluded, "the sort of expression involved in this case does not seem to us to be governed by any exception of the general first amendment principles." It is difficult for us to imagine what expressions are exceptions and not deserving of first amendment protection if calling a man's mother an incestuous whore is insufficiently "vulgar, offensive, and shocking." What insults are there that are so much more insulting, as to constitute the "fighting words" of *Chaplinsky*? Chief Justice Rehnquist thinks that "outrageousness in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."

But why is "outrageousness" subjective, while "vulgar" "offensive" and "shocking" are not? How do "outrageous" words differ from "fighting" words with respect to their subjectivity? I would wager that in a poll of adult American males, the vast majority would say that calling a man's mother an incestuous whore is ample justification for punching someone in the nose. I am also confident that they would be supported by the vast majority of American women. The public would be amazed, I think, to learn that the insult to Reverend Falwell, and to the memory of his mother, was merely subjective, and that the jury's reaction to "whore" or "incest" was merely a matter of taste, or that it merely reflected their subjective dislike of particular expressions. Furthermore, what happened to the Chief Justice's famed jurisprudence of "original intent"? There is not even a whisper of it. Here would have been an occasion to have asked what the framers and ratifiers of the first amendment had in mind, in distinguishing speech that does deserve, from that which does not deserve, constitutional protection. Are we not led to suspect that "original intent" is invoked only when it supports the Chief Justice's own subjective "value judgments"?

Larry Flynt, shot by a previous outragee, is confined to a wheelchair, and Reverend Falwell is a minister of the Gospel. Hence, there was no question here of any recourse to physical chastisement for redress. We may, however, recall the bloody caning of Senator Sumner of Massachusetts on the floor of the Senate by Representative Preston Brooks of South Carolina in

1856, one of the events presaging the Civil War. Sumner, in "The Crime Against Kansas," had singled out Senator Andrew P. Butler of South Carolina, for extraordinary vilification. In the words of David Potter,

For good measure, Sumner had sneered at "the loose expectation" of Senator Butler's speech, alluding to the imperfect labial control of an old man . . . Brooks, who was related to Butler . . . felt the obligation of the southern code to retaliate for an insult to his elderly kinsman . . .<sup>4</sup>

We may be confident that the "southern code" is not merely a geographical phenomenon and that it did not pass away with the era of the Civil War. Those who are infuriated by what they consider intolerable indignities, particularly to family members, are just as likely now as then to turn to violence, and all the more so if they believe that there is no legal redress. This then is a setback, not a victory, for the cause of free speech. This decision, moreover, may likely have a chilling effect upon many who might enter public life, but are unwilling to accept such abuse, particularly when it may be directed, not against themselves, but against their wives, mothers, or daughters.

Let me conclude my formal reply to Professor Anastaplo's seventh query by reminding him of the legal positivism grounded upon moral relativism, which constitutes the heart of Justice Rehnquist's jurisprudence. Justice Rehnquist holds that all moral judgments are "value judgments," and as such, they are equally indemonstrable and equally immune to rational discrimination. All constitutional rights are grounded in moral preferences or "values." Justice Rehnquist's opposition to "judicial activism" consists in holding that in a democracy, the preferences of the people expressed through their elected representatives, and not by non-elected judges, ought to decide what these "values" mean and how they are to be implemented. As I have already pointed out, however, this is a non-sequitur. If all values are equally subjective there is no reason to prefer one to another. There is nothing in a "preference" for democracy that decides whose definition of democracy one ought to prefer. Hence, there is nothing that requires one to prefer the legislature's value judgments to the judiciary's. Chief Justice Rehnquist's preference for legislative over

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4. *The Impending Crisis*, New York, Harper & Row, 1976 p. 210.

judicial interpretation of the Constitution is based upon his own definition of democracy, which is no more than his own "value judgment."

What if the people themselves *want* the Supreme Court to be the arbiter of the relationship between majority rule and minority rights? If that is what the people want, why is it not democratic? That was the thesis of Judge Bork's 1968 *Fortune* article. It is precisely at this point that Justice Brennan, and his followers, have the better of the argument. But, as Judge Bork observed in the same article, the argument for the court as arbiter of the relationship between majority rule and minority rights is grounded in what he called the Madisonian system of natural rights. But this system, to use Bork's phraseology, assumes that constitutional rights are derived, not from subjective "values," but from objective reality. According to Madison, and all the Founding Fathers, nature is the unchanging ground of our changing experience of the moral phenomena. Value judgments are not. Principles derived from nature do not evolve, as Justice Brennan supposes. Their application, however, should be guided by prudence, which always reflects an awareness not of changing principles, but of changing circumstances.

While commending Chief Justice Rehnquist, Professor Anastaplo also warns him, when he writes:

It is to be hoped that the Chief Justice will not so forget himself and his high calling as to subvert the teaching function of his office by proclaiming from the bench what one of his predecessors did (in order to justify packing some Communist Party leaders off to jail in 1951) . . . .

What Professor Anastaplo found so offensive was the following passage from Chief Justice Vinson's opinion for the Court in *Dennis v. United States*:

Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature . . . . To those who would paralyze our government in the face of impending threat by encasing it in a semantic strait jacket, we must reply that all concepts are relative.

Professor Anastaplo and I agree that "the teaching function" of the office of Chief Justice, and indeed of the Supreme Court

as a whole, is not surpassed in importance by any of its other functions. That is why I find Chief Justice Rehnquist's moral relativism and legal positivism so harmful, even though they do not always necessarily lead to opinions or decisions with which I disagree.

I am quite confident, however, that Chief Justice Rehnquist, had he been sitting on the high Court in 1951, Professor Anastaplo notwithstanding, would have agreed with the majority and upheld the Smith Act. The same reasons that led him to vote against the majority in *Roe v. Wade* would have led him to vote not to usurp the legislative power of Congress to decide upon the means to prevent the success of a conspiracy to overthrow the government of the United States by force and violence. I must confess that I think he would have been as right in the one case as in the other. This does not mean that it is impossible that the President and Congress might not in fact be engaged in a conspiracy against the constitutional rights of unpopular minorities.

As we shall see, Chief Justice Vinson conceded that the Court must be prepared to review the action of Congress to make sure that this does not happen. However, he held, there is a strong presumption in favor of the political branches of the government when it comes to political judgments as to the political dangers that the country may be facing. Justices Black and Douglas, in dissenting in the *Dennis* case, believed that Congress in passing the Smith Act, and the executive, in prosecuting Communist Party leaders under it, were simply responding to a popular hysteria, and not responding to real danger. I believe that these dissenting Justices, and those who, like Professor Anastaplo, agree with them, were wrong.

Let me at this point enter my own dissent to Professor Anastaplo's assumption that the Court's opinion in the *Dennis* case rested upon moral relativism. The "relativistic" passage which he cites is preceded by the assertion that "[t]he basis of the first amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse."

What Chief Justice Vinson called the "inherent value of free discourse" is not what Chief Justice Rehnquist means by a "political value judgment." Vinson implies that the benefits of

free speech are intrinsic to the speech itself. Moreover, Chief Justice Vinson is not a relativist when he declares that "[s]peech is not an absolute, above and beyond control of the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction." This is a mere truism, and one which Chief Justice Rehnquist repeated in the case of *Falwell v. Flynt*. All speech is not free speech. Free speech has never been understood to include the right falsely to shout "fire!" in a crowded theater, or to include the right to libel, slander, obscenity, fighting words, speech aimed at conspiracies in restraint of trade, the speech of employers to their workers to dissuade them from joining unions, and incitement to crime.

Among the kinds of speech inciting crime that Congress has a right to prevent are speeches inciting acts to overthrow the government by force and violence. It is generally recognized that the speeches may be found criminal only to the extent of the probability that criminal acts might actually occur as a consequence of the speech. Falsely shouting "fire" in an empty, rather than a crowded theater, might be judged no crime at all. Or the "false" shout of "fire" might be part of the play that the audience in the crowded theater is watching. Of course, as already noted, Congress, or the President, may not strike at someone's freedom of speech on the pretext that a danger exists when there is none, and the Court has a duty to consider whether such may not be the case. To repeat: that the danger from the Communist Party was merely a pretext engendered by hysteria was the hypothesis of Justices Black's and Douglas' dissents. That there was reasonable ground for regarding the danger as real was the hypothesis of Chief Justice Vinson's opinion for the Court. Who was right?

Constitutional cases are not decided in a vacuum. For good or for ill, all law is a by-product of the political process. Politics is the fundamental reality of which constitutional law is an epiphenomenon. No answer to the foregoing question can have any validity unless we are aware of the circumstances in which the Smith Act was passed and of the events that intervened between its passing and the prosecutions under it that culminated in the *Dennis* case.

The Act was passed in 1940, at a time when the two bloodiest tyrants of all time, Hitler and Stalin, were allies. Nothing, not even the Moscow trials of 1936, revealed the character of

the American Communist Party, and the international organization of which it was a part, more completely than the reversals of the Party line, first on August 23, 1939, and then on June 22, 1941. Prior to the first of these two dates, American Communists were supporting, with the fanatical zeal and rhetorical extravagance with which they pursued all their enterprises, a "popular front." This meant an alliance of the Western "bourgeois" democracies and the Soviet Union against "fascism," meaning the Rome-Berlin-Tokyo Axis. With the signing of the Molotov-Ribbentrop pact, all talk of such a "front" ceased. From the moment that France and Britain declared war on Germany, shortly after the Nazi invasion of Poland on September 1, 1939, the American Communist Party declared that the war was one between capitalist powers and in which the peoples of the world had no stake in the outcome.

Stalin's invasion and annexation of the eastern half of Poland, which Hitler had agreed to in their pact, drew no criticism whatever. Nor did the American Communist Party recognize Stalin's murder of the entire Polish officer corps. The Polish Army, in 1939, had surrendered to the Soviets as they retreated from the Nazis. Some 15,000 commissioned officers were interned separately from about 300,000 non-commissioned officers and enlisted men. After the Nazi invasion of the U.S.S.R. some 22 months later, the Polish Army, minus its officers, who were never again seen alive, was released from internment and formed into units of the Red Army to fight against the Wehrmacht, which they did very effectively. The bodies of fewer than half the missing officers were discovered by the Nazis in July, 1941, in shallow graves in the Katyn Forest, in what had been Soviet-occupied Poland. That they had been dead long before the Nazi invasion was confirmed at the time by the International Red Cross. Of course, Stalin's propaganda machine denied the allegations and called it all a Nazi plot. But the Poles and Western intelligence knew that what the Red Cross confirmed was true.

After the fall of France in June, 1940, with all of western Europe subjugated, Hitler stood at the very summit of his fortunes and on the very edge of complete victory. If the Nazi occupation of eastern and western Europe was any threat to the future of human freedom, the American Communist Party failed to recognize it. If there was any danger to the United States from what appeared to be the imminent conquest of



Churchill's Britain, the American Communist Party failed to notice it. All this changed overnight, however, when on June 21, 1941, the Wehrmacht crossed the Soviet border. Then, and only then, did Hitler again become the threat to freedom which the American Communists had recognized before August 23, 1939.

Since the end of the Second World War, Communists, and their dupes and apologists, have insisted that Stalin's agreement with Hitler in August, 1939, was intended only to buy time to prepare for the assault that he knew was coming. The real guilt, they say, was that of the Western appeasers, who at Munich deliberately turned Hitler to the East, expecting that if he were given a free hand to build his empire there, he would leave the West alone. Churchill called this feeding the crocodile, in the hope that he would eat you last.

As a rejection of the policy of appeasement, taken by itself, the position of the Communists is perfectly correct. Everything in Hitler's propaganda, about Slavs, Jews, and Bolsheviks, suggested that the *Drang nach Osten* was what he cared about most. As a justification of Stalin's deal with Hitler, which unleashed the assault upon Poland and initiated the Second World War, it is one of history's damndest lies. It implies that Stalin anticipated Hitler's attack and was preparing for it. In fact, Stalin stubbornly refused to believe that the attack was imminent, even up to the minute before it began. The movement of German troops, tanks, artillery, and supplies to the Soviet borders was so enormous that there could scarcely have been anyone in Europe who was not aware of it. Both Roosevelt and Churchill sent warnings to Stalin that were ignored. In all, they were capitalists, and Hitler was a brother socialist. History does not record a more paranoid assassin than Josef Stalin: before the war he had murdered almost all of his old Bolshevik comrades and had wiped out virtually the entire officer corps of the Red Army, upon suspicions that no one else believed or dared to challenge. Yet Stalin, for one time only in his life, put his trust in someone, and that someone was Adolf Hitler.

The evidence of that trust is found in the circumstances that cost the Red Army, in the early weeks of the war, several million men, two million of whom died in captivity. Not only were the Soviet divisions not in a state of readiness, but whole army groups were deployed in positions near the frontiers

where they were exposed to the same blitzkrieg tactics that had destroyed the French army only a year before. Every school child in Russia knew that Russian strategy in dealing with Napoleon consisted of counterattacking after allowing the invader to dissipate his forces over the great distances, bad roads, and bad winters of Russia. In the end, this is how the Russians defeated the Wehrmacht. But they probably took more than twice the casualties that they would have taken had Stalin not been such an incompetent dupe. Hitler's attack employed little deception and yet he achieved complete tactical surprise. These facts refute any idea that Stalin had been warily preparing for the assault he knew was coming.

If one takes into account Stalin's aid to Hitler's war machine during the period of their collaboration, it is impossible to accept the justification that Stalin was buying time in order to prepare for Hitler's attack. His pact with Hitler went far beyond non-aggression. Pursuant to his agreement with Hitler, he had greedily annexed the eastern half of Poland, together with Lithuania, Latvia, Estonia, and parts of Finland, eastern Galicia, and Bessarabia. Pursuant to secret elements in the same agreement, he supplied the German war machine with huge supplies of all kinds, principally oil and grain. Indeed, at the very moment the Wehrmacht crossed the Soviet frontier, there were hundreds of loaded Russian freight cars moving supplies towards German destinations.

We should remember that it was the British blockade which brought Germany to her knees in World War I. When Germany surrendered in 1918, her armies were still in France and were unconquered in the field. But the home front behind them had collapsed because of food and material shortages. Had Hitler kept his part of the bargain, Stalin's pact with him would have assured Germany that this would not happen again.

Stalin must have seen that Hitler's true goal after the fall of France was the defeat of Britain. We have Liddell Hart's assurance that Hitler could almost certainly have accomplished this defeat had he concentrated his resources upon the Battle of the Atlantic. Churchill virtually concedes as much in his history of the Second World War. Stalin must have known, as President Roosevelt knew, that if Britain fell, an overwhelming maritime supremacy would have fallen to the Axis. Had Hitler controlled the British fleet, together with the German,

French, and Italian fleets he would, together with Japan, have so surpassed the United States in naval power and resources as to leave its coasts indefensible. The United States would have had no option but to accommodate itself to Hitler's new world order.

From every rational point of view, it was Britain, not Russia, that stood between Hitler and his dreams of a Thousand-Year Reich. With victory over Britain, the Third Reich, in partnership with Italy and Japan, would have inherited the British, French, Dutch, Portuguese, and Belgian colonial empires. All this was within Hitler's reach, if only he had retained Stalin as his partner. Stalin never expected him to jeopardize such sure success by making Napoleon's mistakes all over again. Yet this is what Hitler did. But let us make no mistake about it: the policy supported by the American Communist Party was one which envisaged the end of American freedom in a world dominated by Hitler and his allies, including the U.S.S.R. The offer of a junior partnership in the Thousand Year Reich, which Churchill rejected with such scorn after the fall of France, was eagerly sought by Stalin and his followers.

The American Communists were not the isolated band of crackpot revolutionaries Justices Douglas and Black supposed them to be in their dissenting opinions in the *Dennis* case. However ineffectual they might have appeared to others, every one of them carried his marshal's baton in his knapsack. Their purpose was not merely to hold academic seminars on Marxism-Leninism. The American Communist Party was no more "theoretical" than the powerless radicals who surrounded Lenin in Zurich. "To the Finland Station" was inscribed on their banners, as it was on the banners of all the members of the Comintern. The "seminars," like Lenin's in Zurich, were designed to create the morale that would enable them to serve as Fifth Columns, and as the core of future governments. This is what the Nazi organizations in Norway and the Communist parties in eastern Europe did, and what the Bunds in the United States and Latin America were prepared to do. The American Communist Party, during the period of the Nazi-Soviet Pact, at the time the Smith Act was passed, expected to be the vanguard of a new totalitarian world order, in which democracy and civil liberties would be wiped from the face of the earth.

Six months after the Wehrmacht invaded the U.S.S.R., the United States was attacked by Japan, and shortly thereafter Hitler declared war on the United States. The United States and the U.S.S.R. became allies. The United States had begun providing lend-lease aid to the U.S.S.R. even before Pearl Harbor. It continued to do so, in ever increasing amounts, up until the final victory in Europe. Thereafter it supplied food, fuel, and medical supplies to the Russian people, as it did to war ravaged peoples everywhere. From the moment the United States entered the war on the side of the U.S.S.R., the American Communist Party gave full support to the American war effort. Communists enlisted and served with distinction in all theaters, many attaining high rank as officers. But the Party always regarded as paramount Stalin's interests as he understood them. This was evident when the clamor arose in 1942 for a "second front now."

An attempted invasion of Europe by Anglo-American forces in that year would have been disastrous. Only Churchill's influence prevented it. There were many lesser episodes of this kind, nearly all of them exploiting ancient American prejudices against British "imperialism," with the effect of steadily lessening Churchill's influence in the strategic planning of the combined chiefs. As Leo Strauss was wont to say, the American conception of an empire, encouraged by the Communist Party, was one of a regime whose dominions were separated by water.

When the war ended, the admiration and affection of the American people and their government towards the Red Army, the Soviet peoples, and "Uncle Joe" was boundless. There was no largess that would have been denied to the Soviets in helping them to repair the devastation of war and to rebuild their economy. The Soviet Union and all of eastern Europe was invited to participate in the Marshall Plan. In the Baruch Plan of 1946, the United States offered to place its nuclear weapons program under international control in a partnership with the U.S.S.R., which had not yet detonated its first nuclear device. These overtures were refused by Stalin and the Iron Curtain descended. Communist Parties under Stalin's absolute control, backed by the Red Army and the Secret Police, imposed on eastern Europe a despotism every bit as ruthless as the one from which they had so recently been liberated. Stalin's pledges, made at Yalta, to provide free elections

in eastern Europe were ruthlessly thrust aside. The Cold War had begun. Once again, the American Communist Party showed unmistakably where its unquestioned loyalties lay. It blindly endorsed Stalin's tyranny in everything it did, and worked tirelessly to obstruct and oppose every effort to resist and contain the spread of the new Soviet empire. But, the American Communist Party had important allies in its crusade because the pre-Pearl Harbor isolationists were nearly as vigorous in opposing resistance to Stalin as they once had been with respect to Hitler.

In the politics of those years, the myth that the Communist Party was just an American political party, and not part of an international conspiracy, was an essential feature of Stalinist propaganda. Because it co-opted the rhetoric of liberal democracy and of liberal internationalism, Communism was in certain respects a greater danger than National Socialism had been. In the name of Communism, Stalin claimed to speak for the whole human race, where Hitler had spoken only of Aryan supremacy. In denying credibility to this Stalinist myth, the prosecutions under the Smith Act, like the prosecution of Alger Hiss and the Truman administration's loyalty and security programs, performed a necessary and invaluable political service. Together with the Un-American Activities Committee of the House, and the Internal Security Committee of the Senate, they voiced those fears of the American people that enabled them to come to grips with their new international responsibilities: preserving from Stalin the freedom which they had just saved from Hitler and the Axis.

In the years following the war, Stalin came very close to succeeding where Hitler had failed. In 1946, in the words of Winston Churchill, nothing stood between the Red Army and the English Channel but the American monopoly of the atom bomb. Churchill's Iron Curtain speech sounded the tocsin of Western resistance and led to the formation of NATO. The unheeded advice which he had given a decade earlier now fell on more receptive ears. The disintegration of the Stalinist empire, which we may be witnessing four decades later, was what Churchill prophesied would happen if the West stayed the course against it. As he said in the Iron Curtain speech, the Russian Communists did not want war, they wanted only the fruits of war.

Professor Anastaplo and I do not, I think, differ on the

essential nature of the free speech guarantees of the first amendment. We differ concerning the *Dennis* case because we differ as to the facts concerning the nature of the Communist conspiracy, both at the time of the passage of the Smith Act and at the time of the prosecutions of the Communist Party members in 1950. In *The Constitutionalist*, Professor Anastaplo quotes the following from Justice Black's dissent in *Dennis*:

These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind . . . . They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government . . . .

The political naivete of this passage is remarkable considering that, when it was written, the United States, under the aegis of the United Nations, was at war with communist North Korea, a nation supported and supplied by Stalin. Needless to say, the American Communist Party took the communist, not the American, view of this conflict. It was also widely believed at the time, correctly in my opinion, that Stalin's goals in this conflict were not only to dominate Japan and the Far East, but to drain American military power into the Far East as to compel its disengagement from Europe.

In *The Constitutionalist*, Professor Anastaplo reproduces passages from a letter of Earl Browder, published in the *New York Times* of January 8, 1954. Browder writes that he had given sworn testimony before a Senate Committee "that the Communist Party under my leadership from 1930 to 1945 was not a conspiracy for the overthrow of the existing Government of the United States, that it did not engage in espionage for Russia, that it did not accept orders from Moscow, and did not wish to subordinate America to Russia."

It is not clear whether Professor Anastaplo expects us to take this assertion seriously. No one who accepted the evidence upon which Alger Hiss's conviction in 1948 was based could doubt that members of the American Communist Party engaged in espionage. Concerning the denial by Browder that

the Party was engaged in a conspiracy to overthrow the government of the United States, I submit the following from an interview by Roy Howard with Stalin, published in the *New York World-Telegram* of March 4, 1936. At one point in the discussion, Howard called to Stalin's attention Mr. Litvinov's letter of November 16, 1933, to President Roosevelt, containing the famous paragraph 4, reading:

not to permit the formation or residence on its territory of any organization or group . . . which has as an aim the overthrow or the *preparation for the overthrow* of . . . the political or social order . . . of the United States . . . [Italics added.]

Howard then asked Stalin, "[d]id not Browder and Darcy, American Communists, appearing before the Seventh Congress of the Communist International in Moscow last summer, appeal for the overthrow by force of the American government?" Stalin replied:

I don't recall what Browder and Darcy said. Maybe they said something of that nature, but the Soviet people did not found the American Communist party. The American Communist Party was created by Americans. Its existence in the United States is legal . . . . What Browder and Darcy may have said in Moscow probably will be said a hundred times in stronger terms on American soil. It would be unfair to hold the Soviet government responsible for the activities of American Communists.

No Muscovite since Stalin would doubt Stalin's disingenuousness in pretending not to remember what Browder and Darcy said. There were no speeches at the Seventh Congress that had not been approved beforehand by the Kremlin, if not actually written under its direction. In any case, we have Roy Howard's word for it that Browder and Darcy had in fact called for the overthrow of the American government. In remarking that what Browder and Darcy "may have said" in Moscow would be said "a hundred times stronger on American soil," Stalin indicates that Browder was lying in the 1954 letter to the *New York Times*.

Roy Howard then pressed Stalin, asking "is it not a fact that their activities [those of the American Communist Party at the Seventh Congress] occurred on Soviet soil contrary to the terms of paragraph 4?" Stalin's reply was as follows: "[y]ou mention the activity of American Communists on Soviet

soil; what does activity of the Communist party mean? Organization meetings, sometimes strikes, demonstrations, etc. They couldn't possibly organize them on Soviet soil. We have no American workers in the U.S.S.R."

If, as Stalin implies, the functions of the American Communist Party were directed to organizing American workers, why were Browder and Darcy in Moscow at all? Above all, why were they, as part of an American political party represented by ballot in national elections, noted even by Stalin as calling for the overthrow by force of the American government? Is it not plain that they were doing so as members of the Communist International, and that this was no mere academic exercise in Marxism-Leninism? Their intent, at every level of their activity, was to act to as great an extent as possible with other Communist parties and governments to bring about a condition in which the overthrow of the government of the United States would become possible. This was precisely what they were charged with doing under the Smith Act.

From all of the foregoing, I conclude that the result reached by the Court in the *Dennis* case, whatever its technical legal merits or demerits, was fundamentally sound.

A word must be said about the political sentiment of anti-Communism, sometimes called "McCarthyism," in the period following World War II. Professor Anastaplo was to some extent a victim of this sentiment, when, in 1950, he was asked by the character committee of the Illinois bar the wholly improper question whether he had ever been a member of that unpleasant band of enemies of human freedom, the American Communist Party. I say the question was improper since there was no ground for supposing that Professor Anastaplo, any more than the man asking the question, had ever countenanced the aims of the Communist Party. It was also irrational because, as the case of Alger Hiss proved, had he been a secret Communist he would not have hesitated for a moment to deny his connection with that party. It was apparent from the outset that Professor Anastaplo refused to answer the question because the very idea that he might have been a Communist impugned his integrity, and he believed that in defending that integrity he was defending the integrity of the American Constitution and the principles upon which it was based, the principles of the Declaration of Independence.

I think it important to recognize that there was no differ-



ence between Professor Anastaplo and his inquisitors as to the tyrannical nature of Communism. His inquisitors failed to realize that the very reason for his refusing to answer their questions was what made him an indomitable enemy of tyranny. He, on the other hand, failed to realize the importance of the political exigencies under which they labored, which were due to the treachery of Stalin and his American allies. The political change that had led to the replacement of Henry Wallace with Harry Truman as Roosevelt's Vice-President in 1945 measures how close Stalin might have come to complete success in the years immediately following Roosevelt's death.

Nothing could have prevented Stalin's complete victory over freedom, had the President of the United States been his witting, or even unwitting, accomplice. Furthermore, Wallace's behavior in the years following 1946 provides ample reason for believing he would have been just such an accomplice: Wallace belonged to the ranks of those who saw in Truman's Churchillian resistance to Stalin a betrayal of the legacy of Franklin D. Roosevelt. For these people, British imperialism, symbolized by Churchill, and not Communism, was the real enemy. It was Truman who invited Churchill to Westminster, Missouri, and who sat on the platform as he delivered the Iron Curtain speech. In the eyes of the political left, Truman soon became, along with Churchill, an arch demon of the Cold War. At the same time, it was Truman's supreme political achievement to persuade the Republicans, in the person of Senator Vandenberg, to abandon their isolationism, while persuading the Democratic Party to abandon Roosevelt's fatuous illusions about Stalin. Truman's expulsions of Wallace from his cabinet, and of Wallace's followers from the government were a necessary foundation for the anti-Communist foreign policy he followed from late 1946 onwards. The loyalty-security programs of the Truman years were the heart of what later was incorrectly known as "McCarthyism."

The driving out of the government of the Communist and proto-Communist followers of Wallace was a necessity for Truman's policy of containment. Because of it, Wallace broke with the regular Democratic Party and formed the Progressive Party in the 1948 presidential election. By doing so, he hoped to split the Democratic vote and defeat Truman. But it was precisely the rallying behind Wallace by the Communists and their fellow-travelers that proved Truman's anti-Communist

credentials to the American people, and led to his stunning upset victory. All this is brilliantly explained and documented in Samuel Lubell's *The Future of American Politics*, the definitive work on the 1948 presidential election. It would have been more than one could reasonably have expected of human nature to think that the politics that had carried Truman to victory in 1948 would have been abandoned in 1950. But in a popular government such as ours, it would have been impossible to carry on a bipartisan foreign policy, representing a break with strong traditions in both parties, without the strongest popular support.

I would conclude by reminding my readers that, before the publication of *Crisis of the House Divided*, American historical scholarship was nearly unanimous in condemning Lincoln for fanning the flames of the slavery controversy, in the *House Divided* speech, and in the Lincoln-Douglas debates. It was said that he exploited an emotion-laden issue for the sake of his own political ambition. This same scholarship saw the Civil War as an unnecessary war, because the question that divided North and South was a moral question, which could not be resolved by any rational means. It was thought that true statesmanship would have worked for a practical solution that ignored the moral differences.

Lincoln's policy was one of containing slavery and preventing its spread, although leaving it untouched, ultimately to wither and die in the states in which it already existed. What Lincoln saw as fundamental to that policy was recognition of the moral wrong of slavery. Without recognizing that, the people would not be prepared to make the sacrifices that might be required to oppose the spread of slavery. All the practical compromises that ignored the moral question would sooner or later break down, Lincoln thought, because it would always be in someone's interest to enslave other human beings. It seems to me that Churchill's, Truman's, and Strauss's policy with respect to Communism directly parallels Lincoln's with respect to slavery. Like Lincoln's policy, if it was to succeed, it required, first and foremost, a moral condemnation of Communism in the popular mind. It required a hatred of Communism, like slavery, as something intrinsically evil. Such moral condemnations cannot be expressed with the equivocations and reservations of philosophic casuistry. The hunt for copperheads during the Civil War was not always as humane or

restrained as Lincoln himself might have wished. What was supremely important was that the Union was preserved, slavery was destroyed, and the rule of law as an expression of human equality was vindicated. If we see Communism today beginning to reveal itself to be "in the course of ultimate extinction," and I pray we do, it is because, like slavery in 1860, it was resisted at the crest of its power, at a moment when it might easily have triumphed.

#### AN ANSWER TO THE EPILOGUE

To his seven questions, Professor Anastaplo has added three appendices. These are lectures, given at different times, not originally directed specifically to me. Nonetheless, they have the most profound relevance to the ground, not only of American constitutionalism, but of all constitutionalism, as seen in the light of the work of Leo Strauss.

##### *A. The Founders of Our Founders: Jerusalem, Athens and the American Constitution*

The lifework of Strauss can perhaps best be summarized as the attempt to comprehend the meaning of that civilization constituted in its center and at its peak by Jerusalem and Athens. Strauss's work, of course, was also an attempt to preserve such a civilization from the self-destruction of reason, and the destruction of faith wrought by modern philosophy.

The lifework of Professor Anastaplo, and of myself, can perhaps be best understood in the light of the relationship of Jerusalem and Athens to the American Constitution or, alternatively, of the relationship of the American Constitution to Jerusalem and Athens. Our work also is devoted, of course, to preserving the dignity of the American Founding from the corrosive effects of that relativism, dissolving into nihilism, against which Strauss had warned.

Professor Anastaplo has raised for my consideration this question: Is not the American Constitution, as an expression of the principles of the Declaration of Independence, an expression of the attempt by modern philosophy to solve the problem of political life by lowering its goals? That is, is it an attempt to remove from political concern and contention differences concerning what is the human good, the good of the human soul, which is the central concern of both classical philosophy and of the Bible? Further, is it an effort to replace that concern with concern for the good of the body? Professor

Anastaplo has, I believe, indicated his own position with respect to this question by declaring "the Founders of Our Founders" to be Jerusalem and Athens.

However, Professor Anastaplo wishes me to address this question because there are among the "Straussians" those who maintain, whether in his own person or disguised as John Locke, that the true philosophic progenitor of the American Constitution is the radically modern Thomas Hobbes. Hobbes replaced the *summum bonum* with the *summum malum*, fear of violent death, as the central concern of political philosophy. Hobbes was able to do this by insisting that the only ultimate reality was body and its motions, that the only good of a body possessed of sensation was pleasure, and that the idea of an immaterial soul, or an immaterial God or good, was a delusion. According to this school, the Founders and Hobbes believed that while maintaining outward piety, mankind might, once it had been persuaded to accept materialism, hedonism, and atheism as the ground of political life, enjoy an immortal peace.

From this perspective the true, albeit clandestine, intention of the Founders was a regime that might sing of the Star Spangled Banner, while being in truth "the land of the fearful and the home of the coward." There would then be little ultimate difference between a regime built upon the principles of the Declaration of Independence, and one built upon the principles of the Communist Manifesto. Marx is seen as a latter day version of Hobbes, more specifically, of Hobbes so modified by Rousseau that modern natural right is transformed into history. If the difference between Capitalism and Communism becomes one of means, and not of ends, an intelligent Communist might be persuaded that a free market and not centrally directed collectivism is the true road to peace and prosperity. But we may be confident that "the God that failed" Communism would in the end also fail a liberal democracy that had no higher view of man and his destiny than that of Hobbes or Marx. That the free market can prevent the dehumanization of man is no part of the argument of free market economics. I think, as I believe Professor Anastaplo does, that a mankind dehumanized by Hobbes's or Marx's (or their nihilist successors') conception of the soul might be as likely to seek its fulfillment in war and genocide, as in peacefully grazing in the lush meadows of modern consumption.

However plausible the view of the American Founding as

radically modern Hobbesian, crypto-Marxist, or neo-nihilist, it is radically mistaken because it ignores the way in which the Founding Fathers and Abraham Lincoln understood themselves. The radically modern view has been plausible, I might add, because of the successful sophistry with which materialism, atheism, and hedonism have for over four centuries presented themselves as alone consistent with the ground of modern science. Science has been visibly and tangibly successful in providing, through technology, the goods of the body, both by increasing the supply of goods for consumption, and by conquering so many of the diseases to which the body, by the uncontrolled efficient causes in nature, is heir. These are the very things, health and wealth, for which most people, through most of human history, have prayed. Certainly, what is called religion today often, whether consciously or not, replaces God with science, even as it prays to God, as when people pray that science will find a cure for cancer, or for AIDS. One might even say that the consummation of contemporary religion, from its own point of view, would come on that day when Science had answered all its prayers, for health, wealth, peace, and freedom. There would then be nothing left to pray for, and God might be conveniently forgotten. This is what Hobbes and Marx expected to happen. The withering away of the State and the withering away of revealed religion, not to mention philosophy, are part of the same process.

The virtues of science are not to be gainsaid. The question with which we are faced is not whether the goods of Science are real, nor whether the free market and democratic institutions are not better able than Communist institutions to produce such goods and deliver them with reasonable fairness. That the needs of the body should be satisfied decently is not to deny that they should be satisfied. The question is whether the Founding Fathers believed, any more than the representatives of Athens and Jerusalem, that the goods of the body are the only, or the most important, of human goods. Did they not believe, as I think Professor Anastaplo and I believe, that the goods of the body are conducive to genuine happiness only when they are in the service of the immaterial goods of the soul? Aristotle in the *Nicomachean Ethics* says that men wish for and pray for the external goods. But, he says, what they should pray for is that these goods be good *for them*. The men who pledged to each other their lives, fortunes, and sacred

honor meant to found a regime in which life, liberty, and property would be more secure than in any regime which had preceded it. But, they were keenly aware that concern with a long and prosperous life could be either honorable or dishonorable. Only an honorable concern would have been consistent with their intentions as Founders. They could not, therefore, have been disciples of someone, for example, Hobbes, who taught that courage was not a virtue, and that honor was not a good.

Leo Strauss, writing of Aristotle's *Politics*, observes that "[t]he moral virtues cannot be understood as being for the sake of the city since the city must be understood as being for the sake of the practice of moral virtue." To this he added that "Aristotle is the founder of political science because he is the discoverer of moral virtue."

We would note that Aristotle's understanding of the relationship of morality and the city, as endorsed by Strauss, is precisely the one I attribute to the American Founding Fathers. To say, on the contrary, that morality is for the sake of the city implies that the non-moral ends of the city determine the content and character of morality. This would be the Machiavellian reversal of Aristotle which the Founding Fathers rejected. I believe that this, or something very similar, is what Strauss had in mind when he wrote, in *Thoughts on Machiavelli*, that "[t]he United States of America may be said to be the only country in the world which was founded in explicit opposition to Machiavellian principles."

Be it remembered that the United States justified itself, that is to say, maintained that it was acting justly, by invoking "the laws of nature and of nature's God." Clearly these laws were understood to be moral laws, as is confirmed by the fact that the signers of the Declaration appealed to "the Supreme Judge of the world for the rectitude of [their] intentions." But it is equally clear that these laws were understood to be antecedent to, and independent of, the will of those who were founding a new regime. The American Founding Fathers cannot then be understood as Machiavellian princes.

That the American Founding lowered the goals of political life is presumed shown by its supposed rejection of both the best regime of classical political philosophy, and the truths of divine revelation, as the guiding theme of its politics. Those who see the American Founding as Hobbesian believe that classical reason and biblical revelation have been replaced by

comfortable self-preservation. But the American Founding, the *novus ordo seclorum*, understood itself to be the best regime of Western civilization, not the best regime of Plato or Aristotle and not the best regime according to the Bible. It understood itself in this novel way precisely because it addressed itself to a peaceful and civilized resolution of the conflict between these two conceptions concerning what was the best regime. These conflicting roots of the civilization they found within their own souls might now flourish in this new kind of polity. "Free argument and debate" would replace the demand for orthodoxy and the punishment of heresy as attributes of good government. Thus the Founding Fathers believed that it was possible to have the grandeur without the misery of the equal presence within their regime, of Jerusalem and Athens. The American doctrine of separation of church and state transformed the theoretical dissonance of Jerusalem and Athens into a practical harmony.

Professor Anastaplo writes that "thoughtful men have worked out responsible accommodations between these contending approaches" between Jerusalem and Athens. To this he adds that "however smooth and enduring an accommodation may be, it cannot help but regard one or the other of the two approaches as ultimately authoritative." I do not, however, regard the resolution found in the American Founding merely in the light of an accommodation, however smooth and enduring. It was indeed an accommodation, but one grounded upon principle. As I have argued above, the end of the ancient world, marked by the extension of Roman citizenship to the provinces, followed by the establishment of Christianity, created a problem unprecedented in human history. All law in the ancient city was, directly or indirectly, divine law. By breaking the link between God and law, the Roman Empire, having become "holy" according to its own understanding of itself, understood political obligation as devolving from Pope and/or Emperor downward to the lower ranks of polities and of persons. This, however, gave little ground either for individual freedom or for political independence.

Western man's allegiance was moreover divided between the City of God and the City of Man. After some 1,500 years of *stasis*, the American Declaration of Independence resolved the contradictions inherent in the *ancien regime* by pronouncing the authority of law to be derived from the social contract as

approved by the enlightened consent of the governed. The authority of that consent was itself said to be derived from the rights with which all men had been equally endowed by their Creator under "the laws of nature and of nature's God." Thus was forged the chain which linked the municipal authority of legitimate human government with the divine government of the universe while restoring moral autonomy to political life.

Professor Anastaplo quotes a professor of church history who contrasts the "infallible and divine truth" taught by Jesus with "the uncertain philosophical conclusions" of "limited and finite minds," even minds such as those of Socrates, Plato, and Aristotle. But if we ask what Jesus's moral teaching was, we will find nothing more fundamental than the golden rule, the injunction found in Matthew 7:12 that "whatever you wish that men would do to you, do so to them." Let us ask, however, who is the "you" to whom this admonition is addressed? Is it not all human beings everywhere? Does not Jesus presuppose that with respect to their possession of rights, and their corresponding obligation to respect the rights of others, "all men are created equal"? In short, the doctrine of the Declaration is already implied in the Judaeo-Christian ethic. In a sense, it is the ground of that ethic. Certainly Lincoln had nothing less in mind when he spoke of the great proposition as "an abstract truth applicable to all men and all times." And this truth is itself a truth no less of unassisted human reason than of divine revelation.

As the epigraph of his Appendix A, Professor Anastaplo has given us *Deuteronomy* 4: 5-6, a passage cited unforgettably by Leo Strauss in his autobiographical preface to *Spinoza's Critique of Religion*. In it, Moses tells the children of Israel to keep the statutes and judgments that the Lord God had commanded. For this, Moses says, "is your wisdom and your understanding in the sight of the nations, which shall hear these statutes, and say, Surely this great nation is a wise and understanding people." But surely, if Moses, and God, expected the nations of the world to recognize the wisdom and understanding of Israel, then recognition of that wisdom and understanding must somehow be a human potentiality. As such, it must belong to what we call human nature, whether or not we believe that nature to be God's creation. If the recognition of wisdom and understanding is possible in those to whom revelation has not been vouchsafed, then that recognition is not itself



caused by divine revelation. Let us recall Meno's dilemma: how can one recognize something of which one is altogether ignorant? St. Paul, in the Letter to the Romans, says that "[w]hen the Gentiles, who have not the law, do by nature what the law requires, they are a law to themselves. They show that what the law requires is written on their hearts . . . ." From this it would appear that the concept of "the laws of nature and of nature's God," by which the good people of the colonies justified their independence before all the nations, had ample foundation in both the Old and New Testaments.

No one has expressed more powerfully than Leo Strauss the apparent impossibility of deciding between Jerusalem and Athens, between revelation and reason. "Yet," he has written, "this very disagreement presupposes some agreement." In disagreeing, they must at least agree on the importance of what they are disagreeing about. "Negatively," says Strauss, "there is perfect agreement between the Bible and Greek philosophy in opposition to those elements of modernity" in which morality is deprecated as a merely human contrivance, having no ground in either God or nature, and no obligation beyond whatever utility it may be judged at any moment to have. Moreover, says Strauss, "[o]ne can say, and it is not misleading to say, that the Bible and Greek philosophy agree in regard to what we may call, and we do call in fact, morality."

Let us repeat that, according to Leo Strauss, Jerusalem and Athens are agreed negatively in their opposition to the moral relativism, dissolving into nihilism, of modern philosophy. They are also agreed affirmatively, for all practical purposes, as to what that morality is that civil society ought to protect and promote. There is no reason from Strauss's perspective, and no reason grounded in either modern philosophy or modern science, why one should not understand that "the city [whether ancient or modern] must be understood as being for the sake of the practice of moral virtue." At any rate, I am convinced that this is what the American Founding Fathers understood when they expressed such sentiments as that in the Northwest Ordinance that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education, shall forever be encouraged."

I am in agreement with Professor Anastaplo and Leo Strauss that there is no final resolution that we can imagine

between the ultimate differences of Jerusalem and Athens. According to Strauss, however, the "unresolved conflict" between the two "is the secret of the vitality of Western civilization." Indeed, "the very life of Western civilization" is the fundamental tension of these "two conflicting roots." However, the genius of the American Founding consists, above all, in freely permitting this tension and this conflict to be *the* transcendent end of political life, the end which the activity of moral virtue ultimately serves. In this way, the very differences of Jerusalem and Athens become the highest ground of harmony and peace.

There was never any intrinsic reason why the theoretical conflict of Jerusalem and Athens, any more than the theoretical conflicts between philosophy and biblical religion, should have racked Western civilization with sectarian political struggle. Unresolved theoretical questions call only for continuing, perhaps eternal, discussion. They ought not to make enemies of those who, on moral grounds alone, are friends. On the contrary, such discussions, according to Aristotle, are the ground of the highest form of friendship. In such discussions, unlike those of politics which call for decision and action, truth alone is the goal, and friendship itself requires that the friends do not defer to each other's opinions for the sake of any good extrinsic to the discussion itself. True theory ought, therefore, always to strengthen friendship, and therewith morality and good citizenship. Whatever undermines the moral consensus, however, undermines the possibility of true theory, of genuine philosophy and genuine religion.

### *B. The Ambiguity of Justice in Plato's Republic*

Professor Anastaplo's discussion of the theme announced in the foregoing title is acute. To address each of the difficulties that he raises would require little less than a full commentary on the *Republic* itself. The relevance of these difficulties to the American Founding lies, however, in the following consideration. The *Republic*, the dialogue on justice, cannot define justice except by resort to myths or noble lies. The non-mythical truth about justice would seem to be as obscure at the end of the dialogue as at the beginning. Yet the American Founding boldly and confidently asserts that there are self-evident or rational truths, which are the basis of the just powers government.

In taking up this difficulty, we turn to part of that lengthy passage in Leo Strauss's *The City and Man* quoted by Anastaplo:

One cannot help contrasting the *Republic* with the other dialogues which raise the question of what a given virtue is; those other dialogues do not answer the question with which they deal; they are aporetic dialogues. The *Republic* appears to be a dialogue in which the truth is declared, a dogmatic dialogue. But since the truth is set forth on the basis of strikingly deficient evidence, one is compelled to say that the Republic is in fact as aporetic as the so-called aporetic dialogues.

A Socratic dialogue originates in the premise that we know only that we know nothing. But knowledge of ignorance is not essentially ignorance, it is essentially knowledge. We cannot know *that* we do not know, without in some sense knowing *what* we do not know. By inquiring into what we do not know we learn more about our ignorance, and thereby we may make progress in wisdom. In the *Republic*, we learn more and more of the enigma that lies at the heart of the problem of justice. As we learn more about this problem we become more just, even without knowing it any final sense what justice is. Progress in wisdom always enlarges our awareness of our ignorance as our inquiries reveal more and more of what it is that we do not know. The wisest man in the world, for example, Socrates, is wisest precisely because he knows better than anyone else what it is that he does not know. Starting from Socratic premises, there is no real expectation that philosophy or the love of wisdom will ever transform itself into wisdom proper. As we learn from Plato's *Apology of Socrates*, eternal felicity, as imagined by Socrates, is not the final contemplation of the eternal truth, supposedly the activity of Aristotle's God, but rather is eternal questioning of those presumed wise, to unmask their unwisdom.

Philosophic activity, thus understood, however, is in tension with moral and political life. As Strauss puts it "The theme of the *Republic* is political in more than one sense, and the political questions of great urgency do not permit delay: the question of justice must be answered by all means even if the evidence needed for an adequate answer is not yet in . . . ." To put the matter bluntly, we cannot wait until we have an adequate answer to such questions as "what is courage?"

before we train an army for war. Our enemy does not wait upon the outcome of our seminars before attacking. The motivation of a Platonic dialogue is not contingent upon its utility for any political or nonphilosophic purpose. Just as for the orthodox Jew, the reward for the fulfillment of the Torah's commandment is the commandment, in a Socratic conversation the reward for the dialogue is the dialogue. The *aporia* of the dialogue, which reveals hitherto undisclosed knowledge of ignorance, is its own end. Yet, there is a political purpose in this self-contained human activity. It demonstrates that end-in-itself which the city is intended to serve, that end, which alone among human activities can make the city good and thereby just.

It is also true, moreover, that each time Socrates exposes the ignorance of someone else, he displays his superiority. The accusation against Socrates, that he seeks victory, rather than truth, has a certain plausibility. Socrates' dialectical victories demonstrate what it is that can ultimately justify the sacrifices that the city must ask of its citizens when it sends them into battle. That Socrates' art is the perfectly political art is shown by the fact that in the *Gorgias*, apparently contradicting what he says in the *Apology*, Socrates declares that he alone among the Athenians practices the art of the statesman. Although Book I of the *Republic* is aporetic with respect to the definition of justice, it is not aporetic with respect to the superiority of Socrates to Thrasymachus. In proving himself "stronger" in the decisive respect, Socrates establishes his right to rule on Thrasymachus' own premises. Philosophy is stronger than sophistry, and sophistry can become strong only by becoming the handmaiden of philosophy. In the end, it is by sophistic myths that Socrates confirms his rule, the rule of philosophy, in the *Republic* taken as a whole. Still, it is clear that the philosophers in the *Republic* are not ruled by the myths. For them, as for Socrates, progress in wisdom, understood as progress in knowledge of ignorance, is sufficient to justify their way of life. That way of life is objectively best, and the morality that serves it is the objectively true morality.

Let us conclude here by observing that the theme of the *Republic*, the objective superiority of philosophy among all the arts which direct human life, itself suffers none of the defects that may be found in the definitions of justice. The ambiguity to which Professor Anastaplo points does not undermine, but

rather supports, this conclusion. The superiority of philosophy, of purely theoretical activity having no end beyond itself, mirrors the self-contained activity of God in the universe, which the polity can at best only imperfectly reflect.

The idea of "the laws of nature and of nature's God" is derived from classical political philosophy. Like Socrates in the *Republic* and in the *Gorgias*, the Declaration of Independence identifies despotism as the quintessence of injustice because of its violation of the laws of nature. It does not define justice, but speaks rather of "the just powers of government." Those powers, derived from the consent of the governed rest upon the mutual recognition by the governed, of one another's humanity. The consent of the governed must be enlightened, because it clearly does not authorize a government either of barbarians or savages. Barbarians and savages are those who do not understand the essential meaning of what it is to be a human being: that there is no such difference between man and man as there is between man and beast, or between man and god, that intrinsically justifies despotic government.

The government whose powers are just will not only be non-arbitrary, a government of law, but will be a limited government: only a limited government can reconcile majority rule with minority rights. But the ultimate reason that government should be limited is that human wisdom is limited. Unassisted human reason cannot solve the problem of the ambiguity of justice. Reason cannot rule upon the claims of faith, nor faith upon the claims of unassisted reason. Only if philosophy could be transformed into wisdom proper, the ultimate aim of modern philosophy, particularly evident in the contentions of Hegel and Marx, could the case be made that government might be at once beneficent and despotic. This was the contention of Kojève, and the ground of his Stalinism, vigorously refuted by Strauss, in their famous confrontation in *On Tyranny*.

The essentially aporetic character of the Socratic dialogue is supreme testimony to the proposition that philosophy cannot be transformed into wisdom, and that moderation ought therefore to govern human affairs. Moderation thus conceived is not moral indifference, rather it is the opposite of such indifference. It is the virtue which lies at the heart of the rule of law, and of that moderate constitutionalism which is taught by the Declaration of Independence.

*C. Private Rights and Public Law: The Founders Perspective*

Professor Anastaplo's third lecture is, as always, acute and profound in its treatment of its topic. I think, however, that I have already met the challenge it presents to my arguments. The case for private rights in public law rests essentially upon the case for limited government. Limited government presupposes the distinction between state and society, which is itself derived from the distinction between church and state. These are distinctions unknown to the ancient city, but indispensably necessary to good government in the post-classical world, for reasons we have amply given.

Above all, however, the rule of law and the concept of limited government, whether in the ancient city or in the modern state, depend equally upon the Socratic insight which transcends the distinction of ancient and modern politics. This is the insight into the limits of human wisdom. Every Socratic dialogue, and especially the *Republic*, is a lesson in the limits of human wisdom, and therewith a lesson in the need for moderation. Intrinsic to that moderation, as an element of what we call western civilization, is the recognition of the possibility that divine revelation may cast light where Socratic inquiry can uncover only knowledge of ignorance. But the light of divine revelation can be truly enlightening, rather than blinding, only when it enters the soul without the adventitious intervention of worldly rewards or punishments. The American doctrine of separation of church and state, Jefferson's doctrine of religious liberty, is therefore at the very heart of all private rights, of all minority rights beyond the control and of the majority.