2-1-1975


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Recommended Citation
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AMERICAN CONSTITUTIONALISM AND THE VIRTUE OF PRUDENCE: PHILADELPHIA, PARIS, WASHINGTON, GETTYSBURG

by George Anastaplo*

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed,—that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes....

—The Declaration of Independence

PROLOGUE

1.

We sketch out on this occasion a discussion of the Constitution of the United States. This discussion culminates (if only for the time being) in a preliminary inquiry into the Gettysburg Address, that inspired evocation of the passions underlying the principles, institutions and precedents we are privileged to recognize as constitutional government.

The statesmen utilized in Part I of this article are those who attended the Constitutional Convention in Philadelphia; in Part II, Gouverneur Morris in Paris; in Part III, Daniel Webster in Washington; and in Part IV, Abraham Lincoln at Gettysburg. The differences among these statesmen—in what they said and in what they tried to do—can perhaps be attributed in large part to the different circumstances in which they found themselves. What may have been constant throughout the

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century-long political odyssey shared by these men was their determined and informed application of prudence to the affairs of the day.

Prudent men can be depended upon to understand each other—and to recognize how others’ circumstances affect them. If they should differ, they are guarded in expressing their reservations, since they realize that the good can be fragile and that what unites them is far more important than what temporarily divides them. (Thus, their differences may be relegated to such out-of-the-way places as footnotes.) Prudent men, it should also be added, may be as much the product of a truly good regime as are the constitutional forms and institutions such men devise or work with. Both men and forms must take into account, in any attempt to realize the ends of the regime, the experiences and expectations of the people to be governed.

2.

Part I of this article, with its systematic analysis of the Constitution of 1787, can be understood to examine the formal cause of American constitutionalism; Part II, with its descriptions of peoples which can and cannot sustain constitutional government, the material cause; Part III, with its glimpse at heroic efforts to keep the Constitution working in desperate circumstances, the efficient cause; and Part IV, with its delving into the Gettysburg restatement of the fundamental aspirations of America, the final cause.

These four causes are, perhaps necessarily, interdependent. Yet each can be, to some extent, understood separately, so much so that each part of this article can for some purposes stand alone. In fact, it may even seem that the four parts need not be read in the order in which they happen to appear here. Certainly, each of the four parts is directed to concerns which may be developed somewhat independently of the other three and developed in such a way as even to make the other three seem somewhat superfluous. The separability of the four parts is indicated as well by the differences in style among them.

One must, in dealing with each part properly, take due account of prosaic matters which have little to do with the other parts. This points up the difficulty, in practice, of making the four sets of concerns fit together. Indeed, it is only in the rarely realized “best regime” that all things may seem to “fit together” the way they do in works by artists of genius. Our effort here to impose upon pre-existing materials a unified account of the American regime—our effort to make sense of the
whole—should remind readers both of the challenges and of the limitations of politics.

Part III, by far the shortest of the four parts of this article (an article which is an implicit dialogue), would ordinarily be thought to require, if a "due account" is to be rendered of its subject, the most detailed information, dealing as it does with the decades of argument and maneuver which led up to the Civil War. It is in Part III that political and constitutional historians would make their most extended contributions to our "likely story" of American constitutional development. Yet that part may be, for our immediate purposes, the least important of the four parts of this article. Enough is suggested there, it is hoped, to set the immediate stage for what Lincoln tried to do at Gettysburg as well as to indicate the kinds of considerations which troubled the Constitutional Convention.

The grander stage, or pulpit, upon which Lincoln stood was provided by the Constitution itself, by the Declaration of Independence, and by the character and sentiments of the American people. Indeed, to conclude as we do (in Part IV) with the Gettysburg Address is once again to try to return to the timeless questions about the very nature of political things which are touched upon by the Declaration of Independence and which can be said to have been anticipated for us by such instruments as Magna Carta and the Mayflower Compact.

There is always, for serious political men, the practical problem of providing constitutions appropriate for peoples in circumstances as different as those described in Parts I and III of this article. Parts II and III can be said to emphasize the role of body, and hence chance, in political affairs; Parts I and IV, the role of soul, and hence reason. Thus, there may be seen in Parts II and III the factors which limit the purity of the constitutional design examined in Part I, those factors which always remain to remind us of the essential vulnerability, and hence the mortality, of political institutions despite such remedies as the dramatic constitutional purgation found in Part IV.

One really knows what one is doing when one realizes that there is only so much that one can do.

I. THE LANGUAGE OF THE CONSTITUTION

1.

We of Abraham Lincoln's Middle West may approach the Constitution somewhat differently from citizens of the original contracting
States. Indeed, perhaps we can appreciate better than they the significance of the Gladstonian observation to the effect that the British constitution excelled all those which emerged from the womb of time whereas the American constitution was the most outstanding of those constitutions brought forth at a given time out of the mind of man.

The Constitution is, for Massachusetts and Virginia, more nearly something issuing out of the womb of time than it is for us of the Middle West. The original colonies had a century and a half to “mature and continue” the commonwealths which came together to form the Union. We of the Middle West, on the other hand, take our political bearings and our constitutional language more from the Constitution itself. We must wonder, however, whether the “new birth” of 1863 did not throw all States, original and subsequent alike, into a common dependence upon the Constitution.

In any event, it is from the perspective of the Middle West that we begin, ignoring as much as is feasible the American experience prior to, and even in, the framing of the Constitution. We confine ourselves, in the first part of this article, to the 4,500-word document written in 1787 by the Constitutional Convention in their effort to provide for the heirs of the Declaration of Independence a “government of the people, by the people, for the people.”

Once we have before us the original Constitution, if only in outline, we may be better equipped to appreciate what both Webster and Lincoln, in their somewhat different circumstances, tried to do in order to preserve it.

2.

We begin with the words of the Philadelphia Constitution, the words as they appear to us without benefit either of legal reasoning or of the political accommodations evident in the third part of this article. At the risk of being thought unrealistic, we first address ourselves, as great lawyers such as Webster and Lincoln might have done, to the question of what the words themselves signify in the context in which they are found. One must take issue—both as citizen and as student—with the popular but mischievous sentiment of Charles Evans Hughes, “We are under a Constitution, but the Constitution is what the judges say it is.” Even the long-suppressed notes of the drafters of the Constitution are fundamentally irrelevant. We are interested, at this stage of our in-
quiry, in the Constitution as it should have appeared to the people who first adopted it.\(^1\)

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1. See **ARISTOTLE, THE ATHENIAN CONSTITUTION** ch. 9; note 26 infra.

Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order . . . . The writing down of the fundamental law . . . . offers exact and enduring language as a test for official conduct at the risk of imposing outworn standards upon current activities. Hamilton, *Constitutionalism*, in 4 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 255 (1931). Constitutionalism is more than this—but this can well serve as the beginning of one's account. See note 38 infra.

On the four causes, see **ARISTOTLE, PHYSICS** bk. 2, ch. 3 (Aristotle's discussion of the four causes is preceded by a discussion of nature and is followed by a discussion of chance). Cf. **PLATO, SYMPOSIUM** 26-27, 30a sq. Cf. also Aristotle's caution about “deceptive geometrical accuracy in moral arguments.” 2 **EDMUND BURKE, WORKS** 226-27 (World Classics ed. 1930) (see, e.g., **ARISTOTLE, NICOLOMAECHI HERITICS** 1084b12). (On geometrical reasoning, see G. **ANASTAPLO, RACE, LAW AND CIVILIZATION** (Prologue and Epilogue), in *HUMAN BEING AND CITIZEN: ESSAYS ON VIRTUE, FREEDOM AND THE COMMON GOOD* (to be published in 1975 by Swallow Press). A dozen of the author's articles cited in this article (in notes 1, 2, 24, 28, 51, 54 & 57 infra) are included in the seventeen essays collected in the Swallow Press volume.)

For an earlier American attempt to apply the four causes to political matters, see Abraham Lincoln's July 4, 1861 message to Congress:

A right result at this time will be worth more to the world than ten times the men and ten times the money. The evidence reaching us from the country leaves no doubt that the material for the work is abundant, and that it needs only the hand of legislation to give it legal sanction, and the hand of the executive to give it practical shape and efficiency. One of the greatest perplexities of the government is to avoid receiving troops faster than it can provide for them. In a word, the people will save their government if the government itself will do its part only indifferently well.

2 **COMPLETE WORKS OF ABRAHAM LINCOLN** 61 (J. Nicolay & J. Hay eds. 1902) (hereinafter cited as LINCOLN) (emphasis added) (see note 64 infra). There are to be found in the notes to this article not only several observations on Lincoln's constitutional opinions, but also a critique of the impious efforts made from time to time by imprudent theoreticians to set Lincoln (or any other citizen) above the Constitution, a place where the patriotic Lincoln (for one) should not have liked to be displayed.

For another "likely story," see **PLATO, TIMAEUS** 29b-d. On “nature and continue,” see note 25 infra.

This article on American constitutionalism should be read in conjunction with Anastaplo, *The Declaration of Independence*, 9 St. Louis U.L.J. 390 (1965). (In that article, "refutes," at line 15 on page 395, should read "denies"; "do," at line 24 on page 410, should read "pursue"; and a concluding sentence for Part I, Section iii, at page 398, should be added so as to read, "It is as a reminder of absolutes, and indeed of the nature of man, that the Declaration of Independence remains our founding instrument.") See also Anastaplo, *On Civil Disobedience: Thoreau and Socrates*, 54 S.W. Rev. 203 (1969); note 54 infra.

Some two score publications by the author are cited by him in this article. (He also, as is his practise, liberally cites others, especially his "friends" both ancient and modern, whom he believes to have said, or to have usefully challenged, or to have developed further, what he says.) This unorthodox recourse by the author to his own work has long had to be his pedagogical custom in print. He is known also for his distributions of offprints, a practise which, no doubt, he can ill "afford." He thereby guides his leisureed
We notice, first of all, the use of capital letters with which almost all substantives begin: this is seen in the body of the original Constitution. By the time of the amendments, even the earliest (those of the Bill of Rights which were written in Congress in 1789), the prac-

to a number of extended presentations by him and others of various arguments, presuppositions and reservations which can be no more than alluded to on any particular occasion. Perhaps even more critical, he also attempts thereby, at a time when the American "intellectual community" is fragmented, scattered, and perhaps hardly a community at all, to weave together and thus to reexamine from time to time and to correct what he has presumed to say here and there on various subjects of importance. Similarly, when he undertakes a serious review in print of another author's book, he usually makes an effort to familiarize himself with everything which that author has thought fit to publish. See, e.g., note 57 infra. (Respondeo: Is there not something unhealthy, unfriendly, and distressing about the way American authors are obliged to scatter their thoughts among the many publications available to them? That is, they have, unless they are either narrowly specialized or expansively political, no single community which they may continuously address and which they must consistently take into account. They are thus deprived both of a useful discipline and of a sustaining satisfaction. Indeed, such profound separation between author and community, which the magnitude, mobility and resources of our country encourage if not require, should remind us of one of the features which characterized and helped condemn the sophists of antiquity: they were, in their capacity as sophists, always "on the road" and hence "belonged" nowhere; they were consequently at liberty to say different things in different cities; they thereby corrupted, but in different ways, both themselves and their listeners; in a word, the sophists did not have to live with or to learn from the consequences of their opinions. The observations we have just made about authorship and community bear on what we say in this article and elsewhere about the problem of shaping properly under the American Constitution our citizens, our privileges, and our institutions—and so we have availed ourselves of the opportunity to explain, or at least to "justify," on this occasion our well-established practises, immodest though they may seem to many. Three additional sets of "justifications" we reserve for other occasions. See, e.g., notes 18, 19 & 54 infra.) See Xenophon, Memorabilia bk. 1, ch. 6, § 14; Plato, Phaedrus 276d; cf. Plato, Meno 70c; Plato, Sophist 224a-c; Plato, Republic 344d. But see Plato, Apology 31b-c; Plato, Euthydemus 283e sq; Plato, Gorgias 521d; Plato, Symposium 199a-b. Then there is always Shakespeare: "I am in blood/ Stepp'd in so far that should I wade no more,/ Returning were as tedious as go o'er." Macbeth act 3, scene 4. (A personal bibliography, with several hundred items, is available from the author. See Plato, Euthyphro 3d; cf. Plato, Apology 34a, 38b; Plato, Gorgias 447d-448a; Plato, Phaedo 59b. But see Plato, Gorgias 458a. "Every man is said to have his peculiar ambition. Whether it be true or not, I can say, for one, that I have no other so great as that of being truly esteemed of my fellow-men, by rendering myself worthy of their esteem. How far I shall succeed in gratifying this ambition is yet to be developed. I am young, and unknown to many of you." 1 Lincoln, supra at 4 (Mar. 9, 1832). See Aristotle, Nicomachean Ethics 1095b23-1096a4; cf. note 64 infra.) But, it should at once be added, the notes provided here may not be necessary for a "first reading" of the text of this article. Even so, notes are secluded places where an author's "personality" may usefully be permitted a disciplined but revealing license, harmlessly contributing thereby to both his self-examination and the instruction of others. See Plato, Laws 639d, 649d sq; Plato, Epistles II 314c, VII 344c-d; note 48 infra.
tise had been virtually abandoned in official documents. One may wonder whether the older practise in writing the substantive did not reflect, if only dimly, a recognition of the significance of the name, the realization that the naming of something is not only a recognition of the grasp men’s minds have of it but even of its enduring existence. Or, to put it another way, may not the abandonment of the practise, perhaps partly for the sake of convenience in printing, reflect an essentially modern attitude toward the arbitrary character of all names and perhaps even of language itself?

However this may be—for this is a development not peculiar to the Constitution—substantives are capitalized. This usage, along with that of the older spelling for words such as “Honour,” “Behaviour,” “controul,” and “chuse” and that of the coupling of the plural verb with subjects such as “Congress” and “United States”—all these conspire to give the original Constitution, even when presented in modern type, the appearance of something ancient, an appearance which may contribute to the veneration with which it is regarded.

We must notice, next, the use of certain words. If we lay aside “the” and “of,” the word most frequently used in the original Constitution is “shall”—usually in the sense of prescribing what is or is not to be. Here is a plan of government, one in which various powers are elaborated and limited. The extensive use of “shall”—it is employed about one hundred and eighty times, as compared to some twenty-five uses of “may”—suggests that something is clearly intended, that ambiguity and uncertainty are being guarded against as much as language and circumstances permit. Indeed, the reader finds, as he works his way through the document, that its pieces have been fitted together in a craftsman-like manner, in order, first, to make reasonably clear what is intended, and, second, to provide for starting the machinery of government and keeping it in operation.

2. See Anastaplo, Natural Right and the American Lawyer: An Appreciation of Professor Fuller, 1965 Wis. L. Rev. 322, 334 n.35; John 1:1; cf. Genesis 2:19-20.

For a further discussion on language and names, see Plato, Sophist; Confucius, Analects bk. 13, ch. 3 & bk. 20, ch. 3; 5 Works of Daniel Webster 343 (E. Everett ed. 1869) [hereinafter cited as Webster] (“this empire, if I may give that name to a republic”); notes 21, 39, 41, 47, 53 & 63 infra.

The quotations from Gouverneur Morris, reproduced in Part II of this article, exhibit the older practise with respect to capitalization, as does the epigraph to this article taken from the broadside edition of the Declaration of Independence published in Philadelphia by John Dunlap, July 4, 1776. See A Casebook of the Declaration of Independence (Ginsberg ed. 1967). Cf. note 5 infra.
We proceed through the seven articles of the Constitution, indicating briefly the content of each in the setting of the original document. For the moment we pass by the Preamble, that restatement in this context of the general principles and ends of government set forth in the Declaration of Independence and partially redefined in the Gettysburg Address.  

3. Further discussion of the original Constitution (as well as of the amendments) may be found in G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (1971) [hereinafter cited as THE CONSTITUTIONALIST]. The following corrections should be made in The Constitutionalist: p. 119, l. 9: for "not an absolute rule", read "not inflexible rules"; p. 182, l. 31: for "the Smith Act", read "Smith Act-type"; p. 192, l. 29: for "northerner", read "Illinoisan"; p. 194, l. 16: for "explicitly", read "properly"; p. 200, l. 19: add "There is, that is, no substitute for education."; p. 201, l. 6: for "evaluation", read "assessment"; p. 201, l. 10: add "both to proclaim and to examine."; p. 223, l. 23: for "Book II", read "Book IV"; p. 278, l. 19: for "best regime", read "best possible regime for human beings"; p. 293, l. 15: add "((with minor typographical modifications))"; p. 296, l. 27: add "Small capitals indicate bold face type."; p. 305, l. 21: add before l. 22 a divider line; p. 419, bottom of page: add "See, for additional corrections, chap. 9, n.12, below."; p. 424, l. 31: for "Selbstbehauptung", read "Selfbehauptung"; p. 431, l. 18: delete the line with respect to Montesquieu; p. 421: the deleted Montesquieu line, with "21" changed to "11," should be in ch. 2, n.2; p. 437, l. 27: for "other-worthyly", read "other-worldly"; p. 464, l. 23: the citation should be "391 U.S. 563"; p. 464: add "He should also be able to figure out, once he believes he has the solution, where that solution may be confirmed in this labyrinth of notes."; p. 499, l. 12: add "(The italics are Justice Gibson's.)" (these words should be deleted in line 5); p. 514, first line: for "of", read "for"; p. 546, l. 36: add, within the parentheses, "Compare the mating which requires the joint efforts of three gray whales."; p. 553, l. 21: for "chap. 7, n.38", read "chap. 6, n.38"; p. 610, l. 44: for "reporting?", read "spending?"; p. 645, last line: for "the black man", read "the man of color"; p. 707, l. 4: change citation to read, "See p. 635 (Caesar), chap. 8, n.70, above, chap. 8, n.96, below; Paine, Writings 1: 99 ("in America the law is King"), 2: 396-400."; p. 736, l. 2: for "gracious", read "graceful"; p. 736, l. 31: for "hence reading", read "hence careful reading"; p. 738, l. 3: for "chap. 9, n.12", read "chap. 9, n.19"; p. 748, l. 4: for "chap. 8", read "chap. 9"; p. 779, l. 18: add "(Is there any unchanging teaching about change?)"; p. 781, first line: for "exotic", read "exoteric"; p. 787; l. 10: for "the finest lines.", read "their finest lines."; p. 802, l. 9: for "Plato's readers", read "Plato's immediate readers"; p. 807, l. 40: italicize the "the" in the "explanation". In addition, the following corrections should be made: p. xii, l. 18: for "of Hugo L. Black", read "of Hugo L. Black and of William W. Crosskey"; p. 31, l. 24: for "in this temporal realm, an effect through eternity as well:", read "by what he does here and now, a decisive effect in eternity as well:"; p. 817, col. 1, line 1: for "33, 280, 401, 433, 513," read "335, 341, 380, 401 (items 3, 32), 433, 513, 616-17,"; p. 818, col. 2, l. 3: for "8, 40, 90, 130," read "8, 50, 90, 130,"; p. 820, col. 2, l. 10: add "St. John's College, 613, 660-61, 731"; p. 824, col. 2, l. 18: for "Harlan, John M. (current)", read "Harlan, John M. (imitation)".  

At p. 798, l. 41, The Constitutionalist, "Antigone 836-45" should be "Antigone 904-20." Consider as well, with respect to Antigone, Plato, Republic 457c sq, 469c-e.  

In The Constitutionalist, as in other publications by the author, "cf." means "compare" and usually points to a qualification of or something different from what has just
3.

Article I is the legislative article. This comprises one half of the Constitution of 1787, the constitution which came out of the Philadelphia Convention. What is said in this article determines, and sets limits to, everything else: the extent and concerns of the General Government are established. And, we are told, "All legislative Powers..."

been said or cited. On The Constitutionalist, see note 58 infra.


The Republican Congressman who placed the first "Impeachment" article in the Record of December 22, 1973, quoted from Federalist No. 65 and then observed:

Mr. Anastaplo's approach to the issue is philosophical. It is by no means one favorable to the incumbent President. His thesis is that we may be going too far, that we may be 'playing with fire' on the impeachment issue because in his opinion it is not good for the country. Since Mr. Anastaplo's views present a somewhat different perspective on Presidential impeachment than the majority of those being offered, I insert the article for the benefit of my colleagues.

See note 33 infra. (All citations heretofore and in this article to the Congressional Record are to the Daily Edition.)

For a provocatively useful discussion of some of the issues raised in this article, see Kendall, The Civil Rights Movement and the Coming Constitutional Crisis, in CONTRA MUNDUM (N. Kendall ed. 1971). The same may be said of William W. Crosskey's monumental work, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953) [hereinafter cited as CROSSKEY]. (The most useful introduction to Mr. Crosskey's work (see note 18 infra) is Sharp, Crosskey, Anastaplo and Meiklejohn on the United States Constitution, 20 U. Chi. L. School Rec., Spring 1973 at 3. Also useful for the student of American constitutionalism is Mr. Sharp's The Classical American Doctrine of "The Separation of Powers," 2 U. Chi. L. Rev. 385 (1935).)

On the Preamble, see THE CONSTITUTIONALIST, supra at 151-52, 581-90 nn. 44, 54 & 65; pt. I, § 10 infra; note 57 infra.

4. "General Government" is used in this article, and in The Constitutionalist, to refer to what some call "federal government" and others "national government." Both "federal" and "national" reflect more partisan interpretations of the Constitution than does "general." Our use of "General Government" and our capitalization of both this term and "States" revive, if only for pedagogical purposes, the usages in the First Congress and for many years thereafter. See THE CONSTITUTIONALIST, supra note 3, at 428-
herein granted shall be vested in a Congress of the United States . . . . " The primacy of the legislature, the law-making department of the Government, seems to be assumed. This is true with respect to both the General Government and the State Governments: when any department is mentioned as representing or acting for the States, it is likely to be the legislative.

Thus, in article I, section 8, it is the legislature of the State which may sell places to the Government of the United States “for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”; in article II, section 1, it is the State legislature which directs the mode of appointment of presidential electors; in article IV, section 4, the duty of the United States Government to protect a State “against domestic Violence” depends on the request of that State—the request of the State to be recognized “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened)”; in article V, provision is made for constitutional amendments to which the States must agree—that is, “the Legislatures of three-

29 n.20 (which includes citations to Lincoln's uses of "General Government"). Cf. 1 LINCOLN, supra note 1, at 507: "We have no power as citizens of the free States, or in our federal capacity as members of the Federal Union through the General Government, to disturb slavery in the States where it exists." The opinions of the Supreme Court of the United States still capitalize "State" when referring to a member of "the Federal Union."

Editors, naturally enough, find it difficult to accept these usages. See, e.g., Anastaplo, Freedom of Speech and the First Amendment, 42 U. DET. L.J. 55, 59, 64, 65, 69 & 72 (1964). (A more precise rendering of the author's thought at critical points in the text of that article (p. 58, l. 10; p. 59, l. 25-26; p. 61, l. 7; p. 62, l. 29; p. 64, l. 1; p. 66, l. 21; p. 67, l. 14) may be found in an unedited lecture, from which the article was taken, in Anastaplo, Notes on the First Amendment 571 (unpublished dissertation, Univ. of Chi., 1964) [hereinafter cited as Notes on the First Amendment] (see note 65 infra). Thus, for example, “locus in quo” (whatever that means) should read "premises." See THE CONSTITUTIONALIST, supra note 3, at 62.) An unsuccessful attempt was made also to employ various old-fashioned usages in The Constitutionalist. But editors (even very good ones) do have their ways—as well as control of what finally goes to the print shop. It is even difficult to put openly “on the record” the kind of things one is not permitted to do. See id. at 787, ll. 3-8; note 3 supra.

On the other hand, it is only fair to acknowledge that notes as complicated as these do invite difficulties, especially when an editor attempts to recast them to conform to his style book. (Even so, it is well to remember that the Sabbath is made for man, not man for the Sabbath.) However that may be, it is not generally recognized that editorial revisions (even if merely in the order of citations in a note) all too often depend on an interpretation of what is being said by an author. Indeed, there must be a special place reserved for the souls of departed editors—where they can hear the wailing of mangled sentences and distorted thoughts without any longer being able to render assistance. (See the end of Stave One of Charles Dickens' Christmas Carol.)
fourths of the several States”; finally, in this catalogue of indications of the primacy given to the legislative department of government, there is in article VI the order used in listing the various officers, of both the General and State Governments, who are to be bound by oath to support the Constitution: “The Senators and Representatives . . . , and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States . . . .”

This primacy of the legislative respects the orientation of the opening words of the Constitution, “We the People of the United States”: the legislative is that department of government which should be closest to the people, setting the policy and tone of government, and over which the people exercise the most intimate and frequent control. It is the legislative department which provides the form (or constituting word) for the activities of the Government; the other departments will merely apply or interpret that word. (Is not all this implied by the rule of law?)

The activities of Congress, as laid down in article I, relate generally to those activities which concern the country as a whole, particularly as the country confronts other countries and as one section of the country deals with another. In fact, it may be said that the activities or powers of Congress are limited to those which were thought to be necessary for the common defence, for domestic tranquillity and for the general welfare. Thus, in its relations with other countries, the United States

5. George Washington, in his capacity as President of the Constitutional Convention, reported on September 17, 1787, in transmitting the Constitution to the Continental Congress:

The friends of our country have long seen and desired, that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union: but the impropriety of delegating such extensive trust to one body of men is evident—Hence results the necessity of a different organization [from that established by the Articles of Confederation with its one-branch legislature].

See The Constiuitionalist, supra note 3, at 151, 586 n.56.

It was said, in Federalist No. 23:

The principal purposes to be answered by the Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks—the regulation of commerce with other nations and between the States—the superintendence of our intercourse, political and commercial, with foreign countries.


Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers to lay and collect taxes; to bor-
government has power to deal with war and peace (including diplomacy), the army and navy, tariffs on imports, crimes on the high seas and against the laws of nations, and commerce with foreign nations.

At home, on the other hand, we see provision made for powers to deal with commerce among the several States, to deal with the establishment and regulation of weights and measures, patents, money, post offices, and bankruptcy, and to deal with the determination of claims upon one another of citizens of different States. The domestic concern is primarily with matters which are better dealt with on a country-wide basis, particularly with a view to easing intercourse of one section of the country with another. It should be noted, furthermore, that the dominant concern of the domestic legislative powers given Congress is commerce. Indeed, must we not pay more deference than we usually do to the observation of a Massachusetts President that the business of America is business?²⁶

¹²

row money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution.

Id. at 407-08. See note 18 infra.

6. Another Massachusetts-man, Fisher Ames, observed in the First Congress:

I conceive, sir, that the present Constitution was dictated by commercial necessity more than any other cause. The want of an efficient Government to secure the manufacturing interests, and to advance our commerce, was long seen by men of judgment, and pointed out by patriots solicitous to promote our general welfare.

1 ANNALS OF CONG. 221 (1789).

Professor Crosskey considers the Commerce Clause critical for a sound understanding of the Constitution. (His suggestions about the rationale for the powers enumerated in article I, section 8 are instructive, even when not fully persuasive. See note 18 infra.) Is the business of the United States business? Or is its business self-government, for which the first amendment is critical? Or is its business neither business nor self-government but that (virtue and happiness?) toward which both self-government and business should be directed? See MONTESQUIEU, SPIRIT OF THE LAWS bk. 20, ch. 1-2.

The pursuit of gain, and of the standard of living and the security which gain promises us, can corrupt us in various ways—and can make us either decadent and apathetic or insecure and desperate. Business inevitably (?) looks to a larger and larger market: we thus become an association of producers and consumers rather than a community of citizens, "the masses" rather than "the public." See THE CONSTITUTIONIST, supra note 3, at 213 § 5, 499 n.116, 661 n.115; pt. III, § 3 infra; notes 21, 24, 29, 34, 37, 45, 51 & 57 infra; EPILOGUE infra. On "the proneness of prosperity to breed tyrants," see 1 LINCOLN, supra note 1, at 202-04, 215-16.

Both Webster and Lincoln recognized that the "natural" desire to make money had deflected the South from the course laid out by the Declaration of Independence with
In the final two sections of article I we find limitations upon the powers of government. A few of these limitations apply to both the General and the State Governments—the prohibition of *ex post facto* laws, of bills of attainder, of duties on exports, and of the grant of any title of nobility. There is a concern as well that Congress not discriminate in favor of or against any State. Finally, we see limitations upon the States with a view primarily to keeping unimpaired the power of the General Government with respect to specified matters. Thus, for example, the States are prohibited from exercising any treaty power, and from coining or otherwise interfering with the money of the country.

4.

*Article II*, which is devoted to “the executive Power,” is the second longest article in the Constitution, comprising one-fourth of the original document. The most complicated part of this article, unlike anything in either the legislative (article I) or the judicial (article III), describes the selection of the principal officer with whom the article is chiefly concerned, the President. Well over one-half of the article is assigned to the description of this procedure, recognizing thereby the special problem and dangers that the Presidency poses. The elaborate selection procedure is designed to give each State a share in the selection and to designate the body of men by which this selection is to be made.7

“The executive Power,” we are instructed, “shall be vested in a President of the United States of America.” The most evident attribute of the executive power is that implied in its name: the execution of

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7. The twelfth amendment, ratified in 1804, and the twenty-fifth amendment, ratified in 1967, testify to the intrinsic difficulty of providing adequately for the selection of this officer and of anticipating responsibly the ravages thereafter of chance and of misconduct. See notes 17, 24, 33 & 56 *infra.*

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*respect to human bondage. Thus, Lincoln argued on October 13, 1858:*

*More than that: when the fathers of the government cut off the source of slavery by the abolition of the slave-trade, and adopted a system of restricting it from the new Territories where it had not existed, I maintain that they placed it where they understood, and all sensible men understood, it was in the course of ultimate extinction . . . .*

*Id. at 480. See, e.g., 5 WEBSTER, supra note 2, at 334, 336-38; pt. III, § 2 *infra.*

*We can only note here our opinion that the legislature is so provided for under the Constitution that one house is more apt to reflect the concerns of the many; the other, the concerns of the propertyd as well as of the States as States. The tyranny of one part of the community over the other is thus made less likely. On the oligarchic tendencies of the Senate, see 5 WEBSTER, supra note 2, at 417.*

*7. The twelfth amendment, ratified in 1804, and the twenty-fifth amendment, ratified in 1967, testify to the intrinsic difficulty of providing adequately for the selection of this officer and of anticipating responsibly the ravages thereafter of chance and of misconduct. See notes 17, 24, 33 & 56 *infra.*
the laws made by Congress. The most nearly independent power of
the President, on the other hand, is with respect to foreign countries:
the United States must act abroad with dispatch and unity. This ac-
counts for the extensive presidential control of the armed forces and
of foreign relations.

Nevertheless, even in his capacity as Commander-in-Chief of the
Army and Navy, the President is largely dependent on the provisions
of Congress, not only in the form of taxes with which armed forces
of a prescribed size are to be supported, but also in the "Rules for
the Government and Regulation of the land and naval Forces." In
addition, the Senate confines the President by reviewing the appoint-
ments of diplomats and other officers of government as well as by pass-
ing on treaties with foreign nations. And the Congress must make the
decision to declare war.8

It is significant that "the last word" in the Executive Article, unlike
the other articles, is a provision for the impeachment, conviction and
removal of the officers which it empowers.9 We find here what is seen

8. The reader should not need to be reminded that this circumscribed Presidency is
that of the original Constitution, not that of the Constitution as it has come to be inter-
preted (or distorted) and applied. Cf. J. Locke, The Second Treatise of Govern-
ment § 159 [hereinafter cited as Second Treatise]:

For the legislators not being able to foresee and provide by laws for all that may
be useful to the community, the executor of the laws, having the power in his hands,
has by the common law of nature a right to make use of it for the good of the
society, in many cases, where the municipal law has given no direction, till the leg-
islative can conveniently be assembled to provide for it.
(Emphasis added). See 2 Lincoln, supra note 1, at 59-60.

Does not war tend to undermine constitutional self-restraint (as well as moral sensi-
tibilities)? Did not the Civil War leave the Executive permanently strengthened as
against the Congress, and the General Government as against the States? See notes 13
& 33 infra.

For Lincoln's Lockean position with respect to property, see 2 Lincoln, supra note
1, at 81, 471-72, 491; Second Treatise, supra § 159; The Constitutionalist, supra
note 3, at 687 n.35. Compare Mr. Jaffa's observations on Locke and Lincoln, note
64 infra.

We discuss in Part IV of this article the opportunity provided the President (and other
leaders of the country) to shape the people and, hence, the Constitution of the United
States. See The Constitutionalist, supra note 3, at 434 n.34; note 37 infra; cf. note
36 infra (on the enduring character of the Athenian people).

9. Judges, also, are governed by this provision. Members of Congress, on the other
hand, may be disciplined by their respective Houses. See the articles on impeachment
cited in note 3 supra and the Letter to the Editor quoted in note 33 infra. See also
Anastaplo, The Education of Spiro T. Agnew—And Of Us All, Chi. Tribune, Oct. 12,
1973, at 18.

Mr. Nixon came to realize what should be apparent to every careful student of the
Constitution, that the President is intended to be ultimately subordinate to the will of
throughout the Constitution: a prudent provision of opportunities for the correction of mistakes. There is no provision for formal impeachment and trial of rulers in *The Republic* of Plato: but, on the other hand, *their* education and qualifications are carefully provided for. Education and qualifications are not mentioned in the Constitution except to the extent that they are implied in the citizenship, age and residence prerequisites for various offices, prerequisites which presumably assure the people and the institutions of the country an *opportunity* to form properly any prospective officer.

5.

*Article III* is devoted to the allocation of the judicial power of the United States. The jurisdiction of the courts of the General Government is established by the Constitution. The jurisdiction of the Supreme Court itself, but for specified exceptions having to do with suits in which sovereigns are parties, seems completely within the control of Congress.

There is found in the judicial article a curious combination of dependence and independence: the size of the courts is to be determined by Congress as is much of the jurisdiction of the Supreme Court; the creation and perhaps even the continuation of various inferior courts are within the control of Congress (although not all inferior courts may be eliminated at once?); on the other hand, tenure in judicial office, without reduction of pay, is (in effect) lifetime. These provisions seem to be related: comprehensive and continuing control must be available over tribunals which are staffed with officers whose virtue depends, in large part, upon their aristocratic independence. Nothing is said about any power in these courts to review the constitutionality of

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Congress. Is it not in Congress that, for better and for worse, the enduring moral sense of the American people resides?

The history of this nation suggests that when profound moral issues like this one [relating to "Watergate" and its cover-up] settle in the national soul, nothing will deny a final, convulsive resolution. Certainly the Civil War was such an issue. No fancy legal footwork or geographical compromises or maneuvers by politicians could prevent the final act of war. Perhaps the civil rights upheavals of the 1960s were similar outpourings that would not be denied. If we have not passed the point of no return on the resignation . . . of Richard Nixon, we are very near to it.

Sidney, *The Presidency*, TIME, Dec. 24, 1973, at 12. The "point of no return" was certainly passed when the White House tapes were released in April, 1974. (This was immediately confirmed by the response of the Chicago Tribune on that occasion.) See *The Constitutionalist*, supra note 3, at 240-53; notes 33 & 56 infra.

See Senator Frank Church's insistence on Senatorial prerogatives and duties, 115 CONG. REC. S9715 (Aug. 12, 1969).
acts of Congress, although such a power to review both the constitutions and the laws of the States is indicated in article VI.

Once again, "the last word" is significant. Article III concludes with an elaborate limitation upon the law of treason. Both Congress and the courts should be controlled by this limitation, reflecting the opinion of the authors of the Constitution that it is by means of the law of treason, with its derivations (by judges and legislators) in the branches of sedition, that a strong government is most apt to subvert the power of a people to govern itself.\(^{10}\)

6.

Article IV provides for relations between the States, including that most critical of relations, that which is evident in the provision for the establishment of additional States: the Government ordained by the Constitution does not depend on a territory or a people of a fixed size.\(^{11}\)

We see, first of all, how States are to act with respect to one another: "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State"; no discrimination may be practised in any State against citizens of another State; wanted persons, fugitives either from justice or from slavery, are to be given up to the State from which they have unlawfully fled.\(^{12}\) Next, there is the provision of Congressional power to form and admit to the Union additional States. Finally, we see how the integrity of the States for constitutional purposes is to be preserved and insured:

\(^{10}\) See note 21 infra. On the intended role and on the irreducible jurisdiction of the Courts of the United States, see Crosskey, supra note 3; note 15 infra.

\(^{11}\) Compare Lincoln’s First Inaugural address ("physically speaking, we cannot separate") with Webster’s concern (as seen in Part III and note 24 infra) about the size of the country. See 1 Lincoln, supra note 1, at 290; 2 Lincoln, supra note 1, at 268-70; note 11 & 61 infra.

Consider as well the discussion of these matters in works such as Plato’s Republic and Laws, Aristotle’s Politics, and Thomas More’s Utopia. See text accompanying note 32 infra. It is hard to speak the truth about what is truly (naturally?) one’s own—especially with respect to family or political or religious concerns. See, e.g., Plato, Republic 414c. See also notes 41 & 48 infra.

\(^{12}\) Slavery is described only by indirectation, as befitted an odious institution which was merely being tolerated. Notice that the fugitive slave, unlike the accused criminal, is not referred to as one “flee[ing] from Justice.” Was it thereby recognized that the lawful and the just need not be coterminous? The Constitutionalist, supra note 3, at 601 n.13, 730-31 n.122 (for Ralph Waldo Emerson’s bitter attack on both the Fugitive Slave Law and Webster); 5 Webster, supra note 2, at 433; 6 Webster, supra note 2, at 551-63, 582-83, 589; Anastaplo, On Civil Disobedience: Thoreau and Socrates, 54 S.W. Rev. 203 (1969); pt. III, § 2 infra; notes 13, 45, 56 & 58 infra; text accompanying note 20 infra.
The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

This provision indicates why one State can be usually depended upon to honor the acts and requests of another: the assurance of "a Republican Form of Government" means that all the States may be assumed to be controlled by the same kind of people as those who control the General Government. Thus, in ordinary circumstances, the official conduct of one State is apt to make sense to the people of the other States.

The framers of the Constitution, in laying out a form of government for the country, had to take due account of the existence and nature of the sovereign States as well as of the expectations and temper of the American people. It cannot be doubted that the States are vital to the life of the country as a whole: one has only to be reminded of the almost exclusive power in the States with respect to most crimes, to education and religion, to property and marriage laws—that is, with respect to most of the institutions which shape a people. Each State is left free, within the limits of republicanism, to provide for a people with distinctive local interests and problems. Should not one expect unpredictable and even fundamental alterations in the American way of life to follow from sweeping changes among us in the role and power of the States?13

13. Lincoln reaffirmed, at the outset of his First Inaugural Address, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." 2 LINCOLN, supra note 1, at 1. See The CONSTITUTIONALIST, supra note 3, at 592 n.71; 601-04 nn. 14 & 17; 1 LINCOLN, supra note 1, at 359, 659, 661-62, 673-74; 2 LINCOLN, supra note 1, at 6; 5 WEBSTER, supra note 2, at 306; Anastaplo, Is U.S. Prosecution of Local Politicians Healthy?, Chi. Tribune, Apr. 22, 1973, § 2, at 3; cf. notes 45 & 56 infra.

On the significance of the "Republican Form of Government" guarantee, see Anastaplo, Natural Right and the American Lawyer, 1965 Wis. L. Rev. 322, 334 n.35. See also 2 LINCOLN, supra note 1, at 65, 333, 408; The CONSTITUTIONALIST, supra note 3, at 428 n.20, 493-96 nn.102-03 & 107, 647-49 nn.84-86, 665 n.120, 676-77 n.13, 683 nn.22-23; cf. note 48 infra.

Political parties and presidential nominating conventions seem to be performing among us today some of the functions and exercising some of the restraints originally intended for the States to perform and exercise under the Constitution. But, whatever the usefulness of certain restraints in bringing out the best in the community, Lincoln argued that "We, the People" (and not the States) remain sovereign. See, e.g., 2 LINCOLN, supra note 1, 61-64.
Article V is devoted to the manner of ratification of amendments to the Constitution. Once again it can be noted that perfection is not anticipated. The provision for amendments is, in a sense, an extension of article IV with its concern for the States. Critical to the amendment process is the role of the States: even Congress may be relegated to a mere ministerial function, without any effective discretion, if two-thirds of the States apply for a "Constitution for proposing Amendments" (which would be, at least with respect to the objects specified in its call, a convention similar to that which drafted the Constitution in 1787). In any event, the States are to have the final word on amendments, either through their legislatures or through State conventions called by their legislatures. Thus, the States control the changes to be made in the Constitution.

But, on the other hand, the amending procedures are complicated enough to make it likely that changes will be orderly and to give each of the significant sections of the country an effective veto over the result (since three-fourths of the States must ratify a proposed amendment). The most noteworthy and, in some ways, troublesome feature of the 1961 District of Columbia presidential electors amendment (the Twenty-third) is that an alteration of the Constitution was for the first time made without the assent of a single Southern State—that is, without any concurring votes from one significant section of the country.14

7.

Article VI affirms the supremacy of the Constitution and of "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States . . . ." The question of judicial review of acts of Congress for constitutionality may depend, in part, on whether "in Pursuance thereof" means "in conformity thereto."15

14. Unless Tennessee, which did ratify the twenty-third amendment, may still be regarded as Southern. Cf. 2 Lincoln, supra note 1, at 58-59. Even the thirteenth, fourteenth and fifteenth amendments, on the other hand, required the formal (if sometimes coerced) approval of several of the legislatures of the States which had attempted to secede from the Union. See id. at 675.

15. See The Constitutionalist, supra note 3, at 229-37; 2 Crosskey, supra note 3, at 990-1002; 1 Lincoln, supra note 1, 228, 255, 421, 445-47; 2 Lincoln, supra note 1, at 5. It is appropriate, if treaties made "under the Authority of the United States" shall be part of "the supreme Law of the Land," that they be ratified by two-thirds of the Senate: the Senate represents the States which ratify amendments (for which the assent of three-fourths is required); a treaty is in some respects a partial and temporary constitutional amendment.
Oaths must be taken by all governmental officers, State and General, in acknowledgment of this supremacy of the Constitution: these officers obligate themselves "to support this Constitution." And, despite the religious sentiments of the people (of which one gets glimpses in the exception of Sundays in the computation of the days during which the President might veto a bill and in the concluding reference to "the Year of our Lord"), "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Article VII, the final provision of the Constitution, provides for its Ratification:

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

It should be noticed that the convention method was used for ratification, as opposed to ratification directly by the legislatures of the States. The State legislatures did call these conventions, but such conventions were likely to be more directly responsive than legislatures to the will of the people (if only because the conventions were immediately elected by the people for the single purpose of considering the proposed Constitution).

It is "We the People" who "ordain and establish this Constitution." The State legislatures are put in a subordinate role. The Constitutional Convention evidently believed that direct approval by the people not only would be more likely but also would be of more enduring significance than State legislative ratification. It should also be noticed that if the three-fourths requirement for amendments had been established for ratification of the Constitution, ten states, rather than nine, would have been necessary for establishment of the Constitution. But, on the other hand, ratification of the Constitution affected only those States which did ratify, while ratifications of proposed amendments bind all States which have heretofore become part of the Union.

Finally, it should be noticed that although amendment of the Constitution is explicitly provided for in article V, nothing is said in the Constitution, original or amended, about whether States or combinations of States might secede from the Union. Perhaps the Declaration of Independence must remain "the last word" on this problem.16

16. The Articles of Confederation established a "perpetual Union." Would not the "more perfect Union" promised in the Preamble to the Constitution of 1787 be "perpetual" as well? But could not the United States be dismembered legitimately by constitutional amendment? Might not disunion be the "more perfect" condition in some cir-
8.

There have been made, in the course of this summary description of the articles of the Constitution, preliminary assessments and comments about various features of the instrument. We turn now to a more general commentary which anticipates as well what we say below about the Gettysburg Address.

We have already observed that the Constitution incorporates a plan of government, one in which various powers are elaborated and limited. Of the two dozen uses of the word "power" in the present Constitution, well over two-thirds are found in the original Constitution, only ten appearing in the amendments (and almost all of these since the Civil War). The disparity in the use of the word "right" in the present Constitution is even more striking: of the fourteen instances, only one is found in the original Constitution. It is in the amendments, as in the Declaration of Independence, that one sees the insistence upon the rights of citizens: the original Constitution, although it has as one of its objectives the securing of "the Blessings of Liberty," is immediately and primarily concerned with the establishment and the operation of the government of the United States.

Indeed, one might conclude that it is through the proper ordering of the powers of government that the objectives of the Preamble are intended to be realized. The intention seems to be to arrange the powers of government so as to make republican government both efficient and safe. There are not found in the body of the Constitution the more general expressions of principles seen not only in the Declaration of Independence and the Gettysburg Address, but also in the written constitutions of other countries and of many of our States. Rather, there are such detailed and technical provisions as those providing for

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17. There are not included, in these calculations, the eight uses of the phrase "powers and duties" found in the twenty-fifth amendment. That phrase merely refers to the otherwise established powers and duties of the office of the President. See note 7 supra. Nor do we include the repealed eighteenth amendment in our count.

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Cf. 1 LINCOLN, supra note 1, at 673-74; 2 LINCOLN, supra note 1, at 3; note 25 infra. But see 1 LINCOLN, supra note 1, at 105, 660; 2 LINCOLN, supra note 1, at 6, 586; note 43 infra. In any event, both Webster and Lincoln warned that it was folly to expect, at that time, secession without violence. See, e.g., 2 LINCOLN, supra note 1, 3-5; 5 WEBSTER, supra note 2, at 361-62; note 11 supra; note 61 infra.

In any event, both Webster and Lincoln warned that it was folly to expect, at that time, secession without violence. See, e.g., 2 LINCOLN, supra note 1, 3-5; 5 WEBSTER, supra note 2, at 361-62; note 11 supra; note 61 infra.

For a discussion of rights and duties, and their relation to the nature of man, see Anastaplo, The Declaration of Independence, 9 ST. LOUIS U.L.J, 390, 409-12 (1965); note 51 infra.
how Congress is to organize itself and thereafter to conduct its business (article I, sections 4 and 5).

The proper ordering of the powers of government includes an elaborate network of what we call “checks and balances.” The checks and balances take two principal forms. By and large, no one may hold more than one position at a time under the Constitution: that is, a member of Congress cannot be an officer in the Executive Department or sit on the Supreme Court. Furthermore, no department of the Government—legislative, executive, or judicial—can proceed altogether independently of the other two. The selection of judges depends on the President and the Senate; the existence of various courts and the extent of their powers depend somewhat on Congress; the veto of the President affects legislative activity, just as the appropriations of Congress limit the President (who, besides, should be largely confined by the laws he is obliged to enforce).

In addition, Presidents and judges may be impeached; members of Congress can be prosecuted for violation of the laws, to say nothing of being subject to the power of each House of Congress to expel a member. It is important to note that the States have, in their capacity as States, not only direct control of the composition of the Senate but also indirect control of the election of members of the House of Representatives as well as of the election of the President. There is, in addition, the power assigned to the States to amend the Constitution.

But, it should also be noticed, there is not denied, in the reservoir of General and State Government powers, any significant or possibly needful power. Such a denial, it seems to have been thought, would be as much of a disservice to good government as would be the grant of too much power to any man or body of men. One cannot be certain that circumstances may not arise which have in no way been anticipated: almost all powers that governments might exercise are left somewhere in the total constitutional dispensation set forth in 1787.

There are, in addition to the prohibition of taxes on exports (and even these may be levied by a State when “absolutely necessary for executing its inspection Laws” or if it has the consent of Congress), two principal exceptions to the practise of leaving all significant (perhaps, one might simply say, all) powers with either the General or State Governments. First, both the States and the United States are prohibited from making ex post facto laws and from passing bills of attainder: these seem to have been repudiated as perversions of law
(whereas Congress, for instance, is empowered to make laws). Second, both the States and the United States are denied the power to grant titles of nobility: this prohibition, it seems to have been thought, is absolutely necessary for preservation of the republican form of government which the Constitution establishes, guarantees, and depends upon.

The alternative to having each possible power available to some constitutional officer is to place before responsible men from time to time the evident necessity of usurpation—with the permanent subversive effect such precedents can have.  

9.

The network of checks and balances is one aspect of the proper ordering of the powers of government. Still another, and related, aspect is seen in the implicit reliance in the Constitution upon the rule of law. We have referred to the tendency to restrict each man to one job; similarly, there is an appropriate task for each department of the Government. This is related to the reason why bills of attainder are prohibited: such bills are legislative substitutes for judicial process. A similar evaluation can be made of the critical threat to constitutional government posed by those congressional committee investigations which have been most notorious: that is, such committees, unless carefully restricted, tend toward legislative usurpations of the functions of judicial tribunals.

18. The bearing of this observation on problems of freedom of speech is suggested in Anastaplo, Freedom of Speech and the First Amendment, 42 U. Det. L.J. 55, 59-60, 65-66 (1964), and is developed further in The Constitutionalist, supra note 3, particularly in chapter seven. See also id. at 478-79 n.56, 481-83 n.60. Mr. Crosskey (whose generally useful work is unjustly neglected by established constitutional scholars) is particularly instructive with respect to the constitutional distortions which resulted from the comprehensive ex post facto prohibitions. (The most useful thing about Mr. Crosskey's work is that it induces citizens to look at the Constitution itself, instead of relying, as is usually done, on the opinions of judges and scholars. There is, as in the Crosskey tradition, little recourse in this article to Supreme Court opinions or to scholarly treatises as we try to understand both the Constitution of 1787 and what Webster and Lincoln tried to do pursuant to that constitution. We do not say, however, that it did not matter what the Courts said. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); The Constitutionalist, supra note 3, at 431 n.28, 710 n.83, 720 n.109.) On the vagaries of constitutional interpretation by the courts, see Hamilton, Constitutionalism, in 4 Encyclopedia of the Social Sciences 257-58 (1931); pt. IV, § 1 infra. See also F. D. Roosevelt's sometimes careless speech of Sept. 17, 1937.

19. The shortcomings of the American bar in recent decades are revealed by the fact that so much unlarrylike misconduct on the part of investigating committees has been
The appropriate task of each department is defined in the Constitution: limitations are spelled out and relations are established. The balance is delicate, yet realistic. The lawful, if the Constitution is to be permitted to do its proper work, must begin with disciplined conformity to the more or less technical requirements of the Constitution. However conventional, and even arbitrary, the lawful might be, it does provide (as we shall see in the third part of this article) a significant standard of justice to those fortunate enough to live under a genuine constitution.20

permitted by legislatures which are dominated by lawyers. Cf. In re Anastaplo, 366 U.S. 82 (1961), Berns, Two Old Conservatives Discuss the Anastaplo Case, 54 CORNELL L. REV. 920 (1969); The CONSTITUTIONALIST, supra note 3, app. F; Pritchett, Book Review, 60 CALIF. L. REV. 1476 (1972). Cf. also Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black, 405 U.S. xxvii-xxviii (1972). Cf. as well 2 LINCOLN, supra note 1, at 507. Also notorious, of course, are the many casually de-principled lawyers exposed because of the Watergate debacle. On the rule of law, see notes 33 & 64 infra.

20. See PLATO, REPUBLIC bk. 1; ARISTOTLE, NICOMACHAEN ETHICS bk. 5; pt. III infra; cf. PLATO, STATESMAN 294a-297d; note 12 supra. Consider the tension in Lincoln's First Inaugural Address between the arguments based on agreement and law and the arguments (to which men are eventually (naturally?) driven in desperate circumstances) based somehow on nature. See 2 LINCOLN, supra note 1, at 3, 6; pt. II, §§ 5 & 6 infra; EPILOGUE infra; note 11 supra; note 42 infra.


(The ambiguities in the use of "nature" are indicated by Hobbes' use, as quoted in note 45 infra and in our own uses in this article in part III, section 4, part IV, section 1, and notes 4 & 6 supra—all uses referring to a "nature" which may legitimately be held in check. See also pt. II, § 5 infra). Consider as well the assumption, evident throughout Caesar's Gallic Wars, that it is natural both for the Gauls and Germans to desire their liberty and for Rome to try to conquer them.

Various questions about nature which we touch upon in this article (see, e.g., notes 48 & 64 infra) are illuminated in a talk on Leo Strauss by Laurence Berns (delivered at a Memorial Ceremony, St. John's College, Annapolis, Md., Oct. 31, 1973, and published there in 25 THE COLLEGE, Jan., 1974, at 4-5):

Philosophy and science come into the world, according to Strauss, with the discovery of nature; and the fundamental intraphilosophic issue, the issue between the ancients and the moderns, concerns their different understandings of nature and nature's status. Mr. Strauss concentrated especially on the study of human nature. This is not the place to go into how the study of human nature is complicated by the rediscovery of exotericism, except perhaps to remark that the study of what most of the greatest writers prior to Kant mean by human nature is inseparable from the study of the implications of their rhetoric. The connection between nature and human nature becomes evident by questions such as these: Are we correct to speak of what is good for man by nature? Are we equipped by nature to understand nature, to understand what is good by nature? Or is nature indifferent or hostile to man's highest aspirations? Is it naive to think that the human intellect
The assurance by the Constitution that all powers are available to some constitutional officer makes it possible, we have argued, for responsible men to remain law-abiding. Even so, there can be emergencies for which the usual constitutional processes, perhaps even the usual constitutional allocations of powers, are inadequate.

It is in the provision for emergencies that the Constitution reassures us that its ordering of the powers of government is realistic. True, the treason power—that instrument of oppression which emergencies or the anticipation of emergencies can magnify out of all proportion to genuine need—is carefully restricted. But, on the other hand, as is constituted by nature so as to understand nature, that nature is so constituted as to be understood by the human intellect? If it is naive, as the moderns argue, is not nature rather to be studied with a view to its ultimate conquest, with a view to its intellectual conquest by means of the art of symbolic mathematics and experiment and its physical conquest by the technological arts concomitant with mathematical physics? Is nature then to be studied with a view to the ultimate triumph of human art? But if nature cannot provide us with standards, how are we to determine the purposes to which that art is to be put? The dilemmas, not to speak of horrors, consequent upon the modern project require a careful tracing back of our steps, the rediscovery of the fundamental notions and assumptions that brought us to this impasse. That means, to speak in the broadest outline, the rediscovery of the fundamental notions and assumptions that underlie the modern understanding of nature, the rediscovery of the fundamental notions and assumptions of the classical understanding of nature which the moderns reject and thereby presuppose that they understand. And lastly it means the rediscovery of the basic insights and assumptions that underlie the original discovery of nature, the original discovery of philosophy and science. This last task brings us face to face with the alternatives to philosophy. Philosophy, either in its quest to understand itself, or simply as full open-mindedness, is obliged to examine, to articulate, the serious alternatives to philosophy. Philosophy, as the quest for a rational account of the whole, is always faced by the rival accounts of the whole laid down by the revealed religions. Both revealed religion and philosophy look upon such accounts as indispensable to the guidance of human life.

(consider also Bertrand Russell's observation: "Physics is mathematical not because we know so much about the physical world, but because we know so little: it is only its mathematical properties that we can discover." Quoted in A. Koestler, The Roots of Coincidence 99 (1972). See also K. Riezler, Physics and Reality: Lectures of Aristotle on Modern Physics (1940); J. Klein, Greek Mathematical Thought and the Origin of Algebra (1968); Wigner, The Unreasonable Effectiveness of Mathematics in the Natural Sciences, 13 Communications on Pure and Applied Mathematics 1 (1960); the positing of the "ultron" in Anastaplo, On Leo Strauss: A Yahrzeit Remembrance, U. Chi. Mag., Winter, 1974, at 31; The Constitutionalist, supra note 3, at 803-08 n.38-39; Sharp, Crosskey, Anastaplo and Meiklejohn on the United States Constitution, 20 U. Chi. L. School Rec., Spring, 1973, at 18 n.52.

21. May conduct designated as "treason" before 1787 now be called something else and thus be revived as a crime? See The Constitutionalist, supra note 3, at 519-59 nn. 65, 78, 118-20 & 142, 572 n.25, 588-89 n.61. In any event, the use of that name, with its dreadful implications, is carefully restricted by the Constitution.

On the difference between "secession" and "rebellion," see 2 Lincoln, supra note 1, at 61. Lincoln preferred to speak of the "Middle States" rather than the "border States"
other emergency powers are recognized. Perhaps the most critical is 
that found in article I, section 9: "The Privilege of the Writ of Habeas 
Corpus shall not be suspended, unless when in Cases of Rebellion or 
Invasion the public Safety may require it."

The power to suspend the privilege of the writ of habeas corpus 
means essentially that ordinary legal processes and standards may be 
held in abeyance. It means, in effect, that the Constitution is, in cer-
tain vital respects, suspended. But this formidable power to suspend 
the privilege carries with it two safeguards: there must be rebellion 
or invasion (not, as seen elsewhere in the Constitution, "imminent 
Danger"—certainly not merely a "clear and present danger"), and not 
only rebellion or invasion, but rebellion or invasion which can truly be 
said to threaten "the public Safety." The second safeguard consists 
in the seriousness of the step taken: the criminal courts are suspended 
or markedly curtailed by the suspension of the privilege—and this is 
likely to affect the entire community, not merely an unpopular minor-
ity. The sober-minded and responsible citizen cannot help but be 
moved by an announcement of the suspension of the privilege. Even 
the usually thoughtless subject may be compelled to wonder whether 
things are really so bad as to require such an extreme measure.

Thus, the Constitution seems to say, if things get bad enough, radical 
remedies are available; until then, there must be reliance upon the ef-
cfficacy of ordinary processes and standards. Otherwise, republican 
government would suffer more from some of its well-meaning friends 
than from the infrequent real emergency. Ours is not a form of gov-
ernment which tries to protect against all risks—but such a fearful gov-
ernment, the men of 1787 no doubt thought, would not be worthy 
of or possible for self-governing freemen.22

"("Middle" assumed the country to be a whole, whereas "border" recognized a division?). 
Id. at 58-59. What is remarkable about Lincoln's wartime statements is the evident con-
sistency in his thought about the country as one. On names, see 1 LINCOLN, supra note 
1, at 673-74; note 2 supra.

22. To what extent does modern technology, which is reflected both in nationwide 
economic interdependence and in widely distributed weapons of mutual annihilation, 
make obsolescent the constitutional arrangements of another age? See Anastaplo, 
Utopia or Tyranny: The Universal Declaration of Human Rights, in Notes on the First 
Amendment, supra note 4, at 790; Anastaplo, Natural Right and the American Lawyer, 
1965 Wks. L. REV. 322, 338-40; Anastaplo, The Pentagon Papers and the Rule of "No 
Prior Restraint," U. Chi. Mag., Mar.-Apr., 1972, at 16; Anastaplo, Preliminary Reflec-
tions on the Pentagon Papers, U. Chi. Mag., Jan.-Feb., 1972, at 2; note 6 supra; notes 
33 & 43 infra. On the "clear and present danger" language, see THE CONSTITUTIONAL-
IST, supra note 3, at app. B & 478-79 n.56. On habeas corpus, see id. at 209, 478-79 
n.56; 2 LINCOLN, supra note 1, at 348-51, 361, 407. See also FEDERALIST No. 23, at
10.

We have already referred to the role of the States both in the workings of the Constitutional arrangement (for example, in the selection of Senators and in the ratification of amendments) and in the functions left to the States by the Constitution, functions with which the General Government was originally intended to have relatively little to do. Thus, as we have noted, the States retain under the Constitution of 1787 the responsibility for regulating crime and education, religion and the public peace, marriage and property. In short, the States retain the major responsibility for the official governmental activities which most immediately and intimately affect and shape the people. And, in turn, it is State Government which is most closely connected with the people, in which the people can be presumed to have the most immediate voice.

It is easy and even fashionable today to dismiss the States as nuisances, if not even dangers. But the distinctive feature of the Preamble of the Constitution—for most of the ends listed there would apply to any country—is the combination of the first and last ends of our General Government: the formation of "a more perfect Union" under this Constitution promotes the securing of "the Blessings of Liberty to ourselves and our Posterity ...."

Perfection of the Union does not mean simply the amalgamation or extinction of the States (for that would bring about not Union but Consolidation). Rather, perfection of the Union must mean the creation of an order, or of a relation, which is most likely to provide opportunities for both the General and the State Governments to do that for which each is best suited. In this way, perhaps, the finest form of liberty can be achieved, that form in which the blessings of liberty are secured and (is it not implied?) its curses and dangers are reduced, if not eliminated.

11.

In both the General and State Governments, ultimate control is left in the hands of the people.23 The people's control of government is

147 (J. Cooke ed. 1961) (A. Hamilton) ("[t]he circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed"). On the need for a good city to take certain risks, see Plato, Republic 467b. See also note 33 infra.

23. This is reflected even in the institution of trial by jury, which is explicitly recog-
regulated and moderated, but it is nevertheless there—and ultimately it can be as decisive as the people choose to make it. This control is further assured since the people supply the officers of the country: it is a rankless society, one which is more likely to be kept so by the inability of either the States or the United States to grant titles of nobility.

The advantages of both Union and popular control are assured, or at least made more likely to be enjoyed, by an arrangement whereby those best equipped to select the men to fill each post under the Constitution are given the power to make such selections. Those best equipped are presumed to be those who are most likely to know the candidates best: the original Constitution provides, that is, for the coordination of the decisions of relatively small "electorates." Thus, the State legislatures (made up of members chosen in small legislative districts in each State) select the Senators; the members of the House of Representatives are chosen, in effect, by electoral districts within the States (even when the voting is at large rather than, as is now common, by congressional district); the President is chosen by a body of electors (whom we call the Electoral College: they are chosen as the State legislatures prescribe); the other officers of the General Government, including the judges, are nominated by the President and consented to by the Senate or are selected by the President alone or by one of his lieutenants.

The largest "electorate" under the Constitution of 1787—the largest body of men who have to pass on the qualifications of "candidates" for any office in the General Government—is likely to be that of the congressional district. The "candidate" can be known, and known well, by those who must select him: one is never obliged to choose among complete strangers. The people retain ultimate control—but they are a people so organized as to bring out the best in them.

Bearing upon the role of the people and the decisions they must make by means of this system of what we choose to call "coordinated electorates" is the provision made throughout the Constitution for reliance upon discussion. Somehow, reason—or, at least, that organized deliberation which informs the members of the "electorates"—is to play a part. Free debate is guaranteed in Congress, subject only to

nized in the original Constitution: popular and local control over the administration of justice is thereby enhanced and preserved. See THE CONSTITUTIONALIST, supra note 3, at 217; pt. IV, §§ 5-6 infra.
the power of either House to discipline a member; the President, when he vetoes a bill, must return it "with his Objections" to that House of Congress in which the bill originated, which objections shall be entered on the journal of each House as it proceeds to reconsider the bill. Furthermore, the very selections in the States upon which the Presidency and Congress, directly or indirectly, depend—these selections imply, if republican institutions are to be effective—a meaningful discussion of issues and men by the relevant selectors. 24

12.

The Constitution is a form of government: what is the matter to which form is to be given?

The Constitution itself allows us glimpses of this material, which includes earlier "forms" such as the constitutional arrangements preceding those of 1787. The United States, we can calculate from the concluding passage of the Constitution, goes back to 1776 as an independent Union. 25 Old names are referred to—such as New Hamp-


On the relation to one another of the right of revolution, the Declaration of Independence, and freedom of speech, see The Constitutionalist, supra note 3, at 89, 104-05, 220, 332, 519-20 n.65, 672 n.4; Schaefer, Federalism and the First Amendment, 3 Publicus, Spring, 1973, at 31, 49-52; cf. The Constitutionalist, supra note 3, at 14, 657-58 n.107.

On "coordinated electorates," see The Constitutionalist, supra note 3, at 612 n.35. Bearing on this are Webster's arguments against so expanding the size of the country as to make it ungovernable. See, e.g., 5 Webster, supra note 2, at 56, 343, 349; Letter of Jefferson to John Adams, Oct. 28, 1813; note 6 supra.

25. "[D]one in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." See pt. III, § 3 & pt. IV, § 4 infra. The words italicized here represent a fairly successful public effort to make the Philadelphia Convention appear far less divided than it really was. See Benjamin Franklin's speech of Sept. 17, 1787 at the Constitutional Convention.

Compare the chronology employed by Lincoln in his First Inaugural Address:
The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly pledged and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was "to form a more perfect Union." 2 Lincoln, supra note 1, at 3 (emphasis added). See id. at 599 (on the "fathers" who framed the Constitution, as distinguished from the "fathers" of 1776); note 16 supra; notes 42 & 44 infra.
shire, Massachusetts, Rhode Island and Providence Plantations—names which reflect both the Old World and the New; the States are listed in geographical order, running from north to south; dates are given—it is late in the Eighteenth Century; and the names of the months and days are used again and again, names which hint at the religious and political history of Western Civilization. This is a form of government ordained and established by and for a people which exists at a certain time and place. It is not an “ideal” or the best possible earthly constitution which would draw simply on the nature of men, independent of time and circumstances. Nor does it, in its sobriety, have the “mystical” sense of ultimate (perhaps even transcendent) goals pointed to in the Gettysburg Address.

We also catch glimpses of a long-standing system of law, one which is incorporated in and continued by the Constitution: there are references to the common law, to trial by jury, and to the sequence of indictment, trial, judgment and punishment; there are references also to habeas corpus and to the now obscure “Letters of Marque and Reprisal.” Such references would have to be examined carefully in order to arrive at the complete meaning of particular provisions of the Constitution.

Both form and matter have undergone alterations the last two centuries. An understanding of the Constitution in practice would have to take account of not only the explicit amendments of that instrument but also the constitutional customs which have emerged as conditions and expectations have changed. But such change cannot be properly grasped without some understanding both of the original and originating arrangements which we have just examined and of the purpose or end of the regime which may be discerned in the Declaration of Independence or, perhaps, in the Gettysburg Address.26

26. See PLATO, SOPHIST 248d-249d. Must there not be an overriding and constant being (nous?) which keeps in their proper “places,” and makes sense of, the age of Cronus and the age of Zeus described in Plato’s Statesman? See PLATO, PHAEDO 97b sq; THE CONSTITUTIONALIST, supra note 3, at 582-84 n.50, 779 n.4.

What does it mean that we worry about what the Constitution means? Is not an overall constitutional order presupposed? Is not this a way of plausibly considering fundamental questions, guarding against both legalistic quibbling and revolutionary upheaval? Cf. note 1 supra.

The Bible of verbal inspiration begat the constitution of unquestioned authority . . . . The signers, of the average age of forty-three, became the Founding Fathers; their will was to be discovered and obeyed; the great document claimed veneration and accorded vindication.


As indicative of the problems of constitutional customs and conditions, see THE CON-
13.

We have still to consider the matter with which the authors of the Constitution had most to contend, to which this form of government had to be applied: the people. What kind of citizen does the Constitution require?

No explicit distinctions are made in the instrument between rich and poor, between the educated and the ignorant, between the leisured class and the working class. There is not even a distinction drawn between good men and bad men, except to the extent that this is implied in such provisions as those which dictate the means of removal from office of any civil officer who has committed “Treason, Bribery, or other high Crimes and Misdemeanors.” The only critical distinction, and this is only for some purposes, relates to that between citizen and non-citizen: but even this distinction can be removed by naturalization, except as it affects eligibility for the Presidency.

This absence of distinctions exhibits a remarkable (or is it a thoughtless?) confidence that American political institutions will continue to produce Americans. Does the very conduct of affairs under the auspices of these institutions guarantee, or at least make likely, the perpetuation of the citizen body for which the Constitution was established? Or does the perpetuation both of the required citizen body and of the Constitution itself depend on the efforts of gifted statesmen?

Do the most gifted statesmen arise only by chance? Are they somehow above the Constitution? Or does the American form of government liberate and provide useful training and opportunities and guidance for the considerable talents naturally available in every sizeable civilized community?

II. THE PEOPLE OF THE CONSTITUTION

1.

We must step outside the Constitution, and indeed outside North America, to get a better view than we might otherwise have of the people for whom our form of government was designed.27

27. “Geography is half of character,” Alfred North Whitehead suggested in “The Education of an Englishman,” in his Science and Philosophy (1964). See 2 C. SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 172-73 (1939); note 45 infra. “If we could first know where we are, and whither we are tending, we could better judge what to do and how to do it.” 1 LINCOLN, supra note 1, at 240.
The observations of one man, an important draftsman of the Constitution, can be useful for us. We refer to Gouverneur Morris, who was at the Constitutional Convention as a delegate from Pennsylvania. He happened to be in Paris a few years later during a critical period of the French Revolution. One can glean from the letters and journals he wrote while abroad an approach to constitutional problems which may be seen as well in the speeches and writings of many of the other Founding Fathers. We see revealed here an appreciation of the opportunities, dangers and limitations of constitution-making.28

2.

Americans were still something of an attraction in Paris in 1790. Benjamin Franklin had gone there a dozen years before, with a scientific reputation and a homespun demeanor, to charm a monarchy into aiding rebellion against royal authority. Thomas Jefferson followed with his reputation as one of the apostles of liberty. Thereafter the thirty-eight-year-old Morris attracted interest. He recorded in his journal a visit to an archbishop's home29:

His Domestics know not what to make of me, a Thing which frequently happens at my first Approach, because the Simplicity of my Dress and Equipage, my wooden Leg and Tone of republican Equality, seem totally misplaced at the Levée of a Minister.

The simplicity of Morris’ attire matched his reputation as a republi-


29. The bracketed references in Part II of this article are to the two-volume collection, A DIARY OF THE FRENCH REVOLUTION (B. Davenport ed. 1939) [hereinafter cited as DIARY]. The dates of the diary entries in this edition are from February, 1789 to January, 1793.

Morris went to France in 1789 as a commercial agent (see note 6 supra), succeeded to the post of American Minister in 1792 (after Thomas Jefferson had returned home to become Secretary of State) and remained in that post until 1794. 
can statesman, even as one of the principal founders of a republic. He soon had the reputation of a prophet as well: again and again, his predictions about the course of events during the fast-moving Revolution were borne out. Thus, he was told by the French Ambassador to England, "Vous dites toujours des choses extraordinaires qui se réalisent." [1, 554] From the beginning of his stay in France, long before his appointment as the American Minister, Morris had thrown his support to the King and Queen against the republican faction. Indeed, he was even to make suggestions about a constitution for France and to offer other advice which the King might have followed with advantage [2, 477].

Morris appreciated his apparently anomalous position. He wrote to the American Chargé des Affaires at Madrid:

... I have here the strangest Employment imaginable. A Republican and just as it were emerged from that Assembly which has formed one of the most republican of all republican Constitutions, I preach incessantly Respect for the Prince, Attention to the Rights of the Nobility, and Moderation not only in the Object but also in the Pursuit of it. All this you will say is none of my Business, but I consider France as the natural Ally of my Country and of Course that we are interested in her Prosperity—besides (to say the Truth) I love France and as I believe the King to be an honest and good Man I sincerely wish him well, and the more so as I am persuaded that he earnestly desires the Felicity of his People. [1, x1]

He assumed, however, that the United States would recognize whatever "new form" that "the great Majority of the [French] Nation adhere[d] to,”

because in the first place we have no right to prescribe to this Country the Government they shall adopt, and next because the Basis of our own Constitution is the indefeasible Right of the People to establish it. [2, 533]

30. Lord Acton has written:

At every step downward [the King and Queen] were the authors of their own disaster. The French Republic was not a spontaneous evolution of social elements. The issue between constitutional monarchy, the richest and most flexible of political forms, and the Republic one and indivisible (that is, not federal), which is the most rigorous and sterile, was decided by the crimes of men, and by errors more inevitably fatal than crime. There is another world for the expiation of guilt; but the wages of folly are payable here below.

J. ACtON, LECTURES ON THE FRENCH REVOLUTION 239 (Noonday Press 1962) (emphasis added). He had observed that Morris, "whose ready pen had put the American Constitution into final shape five years before, aided [the royalists] in drawing up an amended scheme of government . . . ." Id. at 230.
We notice, in passing, how he regarded a constitution. Consider, first, how the term is used when he described grain: "The Grain looks blighted, and indeed it must have a very strong Constitution to resist Drought and the Alternative of great Heat and great Cold in so short a Period." [2, 202-03] The constitution of a state, he advised the King in a "Memoire on the present State of Things," must concern itself with the distribution of the legislative, executive and judiciary powers: this distribution "is of great importance." And he added, as he turned to a detailed criticism of a proposed constitution, "It must now be seen whether you have provided for this in such a way that none can encroach upon the others." [2, 252]

The problem of power was discussed in still another way by Morris in a letter to an English General:

You are right in your Idea that our [American] Contest has given a confused Notion of Liberty to this Country. But there are many Persons here [in Paris] whose Views are very clear and distinct. It is highly probable that a Constitution will be established as free as is consistent with their Manners and Situation, in which Case the King will gain more abroad than he looses at Home, if indeed it can be called a Loss to part with the Power of doing Mischief and retain only the Power of doing Good. [I, xliv]

The news of the establishment of the American Constitution reassured him that, however confused the "Notion of Liberty" may have been in France, it was properly grasped by his fellow-citizens in the United States.31 Morris was able to write President Washington:

It gave me very sincere Pleasure to learn from you the good Tidings which you communicate respecting our new Form of Government. I know that you are not liable to the Dupery of false Hopes and groundless Expectations; and therefore I am confirmed in the Opinion I have

31. Morris had sailed from the United States in late 1788. The First Congress (under the Constitution of 1787) convened March 4, 1789 (but was not formally organized until April 6, 1789). President Washington was inaugurated on April 30, 1789.

On "the power of doing Mischief" and "the Power of doing Good," see note 38 infra. Does Morris' use of "clear and distinct" ("there are many Persons here whose Views are very clear and distinct") hearken back to Descartes' standard? Does such a standard, attractive as it might sound, tend to ask too much with respect to an understanding of political things? That is, does such a standard make unlikely the spirit of accommodation (the prudential sense?) required for republican government? Does the Cartesian influence on the Continent help explain why constitutional government has not fared as well in Continental Europe as it has in Great Britain and the United States? (Was not the ill-starred John Calhoun the American politician with "clear and distinct" ideas? See note 33 infra.)
invariably entertained that the new Constitution is such a plain, calm, sensible Appeal to the Interest, Feelings and Common Sense of our Countrymen that it must by its own intrinsic Weight bear down all Opposition. [1, 380]

Morris’ analyses of and predictions about French affairs drew upon his experience and reflections in America. Significant uniformities in the actions of men in like circumstances are to be expected:

After Supper de Narbonne tells us that he is authorized by Franche Comité to accuse the Comité des Recherches. This Committee is very like what was called in the State of New York the Tory Committee of which Duer was a leading Member. A Committee for detecting and defeating all Conspiracies &c. &c. &c. Ths it is that Mankind in similar Situations always adopt a correspondent Conduct. [1, 323]

What were the circumstances of France, a nation which he described as one which loved to read but hated to think? [1, 385]

3.

Morris recognized that “the State of Things in France was such as to necessitate a Change of some Sort . . . .” [1, 439] This lamentable state of things had been generations in being formed:

The Tyranny of deceased Monarchs is expiated on their Progeny. The Ambition of those who sought rather than the public Good their private Glory, meets what it merits and the rage of the present Hour, as it is greater than those which precede, will of course precipitate the Actors with more Rapidity towards their Fate, for there is nothing eternal but that which is founded on and supported by Justice and Truth. [2, 505-06]

He recognized also his own country’s influence as promoting resistance to tyrants. Many of the French leaders on the side of liberty, he wrote, “have imbibed their Principles in America and all have been fired by our Example.” [1, 60] The death of Franklin, in the course of the Revolution, did not go unnoticed: “Several societies & clubs [another American wrote] have followed the enthusiasm of the national assembly & have worn mourning for him & given other marks of their admiration of his great virtue & talents.” [1, 546] But this sympathy in sentiment concealed vast differences in circumstances and in practical judgment.

There was an anticipation of these vast differences in an early journal entry by Morris which indicated the peculiar nature of the metrop-
olils of Paris, especially when that city was compared to American towns:

We have had a little Riot here yesterday and the Day before and I am told that some Men have been killed, but the Affair was so distant from the Quarter in which I reside that I know Nothing of the Particulars. [1, 61-62]

The great distance between quarters of the city was slight compared to that between the ranks of its people:

I stand at this Moment on a vast Monument of human Pride and behold every Gradation from Wretchedness to Magnificence in the Scale of human Existence. Oh! my Country, how infinitely preferable that equal Partition of Fortune's Gifts which you enjoy! Where none are Vassals, none are Lords, but all are Men. [1, 73]

Morris' response to the problems created by "Gradation from Wretchedness to Magnificence" differed from that of Jefferson, of whom he wrote:

He, with all the Leaders of Liberty here, are desirous of annihilating Distinctions of Order. How far such Views may be right respecting Mankind in general is I think extremely problematical, but with Respect to this Nation I am sure it is wrong and cannot eventuate well. [1, 113]

Indeed, Morris was disturbed, even before the taking of the Bastille, by the prospects before France:

All these Things in a Nation not yet fitted by Education and Habit for the Enjoyment of Freedom gives me frequently Suspicions that they will greatly overshoot their Mark, if indeed they have not already done it. Already some People talk of limiting the King's Negative upon the Laws. And as they have hitherto felt severely the Authority exercised in the Name of their Princes, every Limitation of that Authority seems to them desirable. Never having felt the Evils of too weak an Executive the Disorders to be apprehended from Anarchy make as yet no Impression. [1, 130]

A few days later he went "to Mr. Jefferson's to Dinner," where he engaged in political conversation with the Marquis de Lafayette:

32. See ARISTOTLE, POLITICS 1276a25-31 (on Babylon). See also THE CONSTITUTIONALIST, supra note 3, at 612 n.35. On how the "mass media" both brings us together and keeps us apart (in the style of Babylon), see Anastaplo, SELF-GOVERNMENT AND THE MASS MEDIA: A PRACTICAL MAN'S GUIDE, in MASS MEDIA, supra note 3, at 161. (The concluding paragraph of the Epistle to the Barbarians (id. at 231) should read: "Of course, barbarians are not likely to read letters to the editor. But perhaps their acquaintances do—and can explain to them what we have both a right and a duty to expect of one another as members of an academic community. Consider, as an alternative, the fate of Mycaleseus described by Thucydides (VII, 29.").)
I urge him to preserve if possible some constitutional Authority to the Body of Nobles as the only means of preserving any Liberty for the People. The current is setting so strong against the Noblesse that I apprehend their Destruction, in which will I fear be involved consequences most pernicious, tho' little attended to in the present moment. [1, 134]

Morris observed, in a letter to Washington, that the French "have all that romantic Spirit and all those romantic Ideas of Government which, happily for America, we were cured of before it was too late." [1, 171] But the French cure had to run its course: for, as he warned Lafayette, the friends of the new French constitution have flattered the People with such extravagant Notions of Liberty that I see it is out of their Power to alter that Organization until Experience shall have made them wiser. [1, 412]

Elsewhere, he recorded another conversation with Lafayette:

I reiterate to him the Necessity of restoring the Nobility, at which of Course he flinches and says that he should like two Chambers as in America. I tell him that an American Constitution will not do for this Country & that two such Chambers would not answer where there is an hereditary Executive. That every Country must have a Constitution suited to its Circumstances, and the State of France requires a higher toned Government than that of England. He starts at this with Astonishment. I pray him to remark that England is surrounded by a deep Ditch and being only assailable by Sea, can permit many Things at Home which would not be safe in different Situations. [2, 72]

33. General Eisenhower revealed in his memoirs that the use of atomic weapons had been seriously considered in the Korean War and that his opinion still remained that "it would be impossible for the United States to maintain the military commitments it now sustains around the world (without turning into a garrison state) did we not possess atomic weapons and the will to use them when necessary." D. EISENHOWER, MANDATE FOR CHANGE 180 (1963) (emphasis added). See THE CONSTITUTIONALIST, supra note 3, at 491-93 n.101, 769-70 n.190.

A critical, perhaps even central, problem for Americans with respect to international relations is, what should we be willing to do to defend ourselves? What price should we be willing to pay (and to exact from the human race) to "insure" our security or even our survival? Compare with each other two novels by Allen Drury, ADVISER AND CONSENT (1959) and THE THRONE OF SATURN (1971). One can see here the degeneration which self-centered Cold War dogmas and Agnewesque simplifications may induce in a journalistic novelist of some talent. See THE CONSTITUTIONALIST, supra note 3, at 747; notes 6, 8 & 22 supra.

One must wonder whether political paranoia leads to degeneration in judgment, or whether such degeneration leads to political paranoia. The possessed and possessive genius of John Calhoun comes to mind. See LORD CHARNWOOD, ABRAHAM LINCOLN 42-43 (1917); note 31 supra. A letter to the editor by the author, which has appeared
America, too, he saw as enjoying the isolation of England—and would

in several American newspapers (see, e.g., Wash. Post, Dec. 5, 1973, § A, at 31), has this to say on the subject of “political paranoia”:

We disrupt orderly political life among ourselves by indulging in unending speculations about the failings and fate of the President. Indeed, it should be recognized that there may be in the current demands for investigation and impeachment, a considerable amount of silliness and self-indulgence, if not even hysteria. There may be as well too much of the political paranoia which has, for a quarter of a century, corrupted the crowd around Richard Nixon. Some of Mr. Nixon’s crowd have long seen foreign subversion lurking behind every domestic dissenter. Some of his critics, on the other hand, now manage to see an incipient dictator even in a President who is very much on the run. Both camps of extremists should be counselled, along with the American people and the American press, to “take it easy”—a most salutary prescription for the perpetuation of constitutionalism in the United States.

Cf. note 9 supra. (“Anastaplo said [at St. John’s College] that the passions behind the impeachment movement had exceeded ‘the limits of rationality and had to be checked’—a situation he blamed on both the ‘excessive fervor of the critics’ and the shameless maneuvering of the President himself.’” Annapolis Evening Capitol, May 1, 1974, at 3.)

Ordinarily paranoia means that some unexamined (and perhaps unexaminable) passion is the prism through which (and the prison out of which) everything is seen, and seen as threatening. Anger and fear contend for the possession of one’s soul. Even someone who tries to be compassionate or helpful can be cunningly dismissed as hostile or devious. (Of course, all this can be tiresome, if not depressing, as well as dangerous, for others. But it can also be instructive.) The paranoiac does care, and care deeply, for something, if only for his own survival. What he in his self-centered ambition does not, perhaps cannot, care for, however, is the truth. See note 41 infra. If “truth” means anything to him, it is as something dependent on his sovereign will, not on his reason: it is to be made, not found—and, indeed, a serious search for it is regarded by him with suspicion, if not even dread. (He dare not rely on what the Declaration of Independence calls “a candid world.”) His paranoia may even be a sign of vitality and energy—but vitality and energy which he does not know how to use and consequently is afraid of. Does enfeebling old age tend to disarm and hence “cure” him?)

What the paranoiac may “really” want are freedom and love: that is, to be unrestrained himself, even while others are fully restrained with respect to him. See Plato, Gorgias 452d; notes 45 & 48 infra. Thus, another way of putting these observations is to say that the paranoiac is both menaced and menacing because the vulnerable child in him does not enjoy either the carefree freedom or the comforting love for which he happens to yearn. Anything less than these—any serious questioning (even if disguised as playfulness)—leaves him insecure and resentful. The truth, it should be added, is somehow sensed by him—if only the truth of the meaninglessness of his life, as he “understands” it. Perhaps he senses that he is (and “intends” to remain) unjust, not really lovable, and quite unfriendly: this seems to him safer than a genuine examination of himself. He may even want to bring out the worst in others, thereby more easily concealing his own inadequacies from himself and his sympathizers. Ultimately, the paranoiac is both murderous and suicidal, with death the thing most to be avoided and yet somehow much to be desired. The hated enemy is also somehow the best friend: the enemy represents a promise, as well as a threat, of release.

Perhaps paranoia is, at least on the social level, distinctively the psychic affliction of an insecure, nuclear age—a desperate age in which the heightened expectations nurtured for mankind by Christian influences must coexist with the radical skepticism of modernity. See note 58 infra. It should again be noticed that the reasonable man appreciates the limits of reason in dealing prudently with others (that is, with most men). See L. Strauss, Xenophon’s Socrates 39-42 (1973). See also Philosophical Papers and
be even more isolated when "great and rapid Progress in useful Manufactures" had been made:

This alone is wanting to compleat our Independence. We shall then be as it were a World by ourselves, and far from the Jars and Wars of Europe, their various Revolutions will serve merely to instruct and amuse. Like the roaring of a tempestuous Sea which at a certain Distance becomes a pleasing Sound. \[2, 277\]34

But however important isolation might be—one has only to recall the locations of the “ideal” commonwealths of literature—there seem to be even more critical prerequisites for the success of republican government.

4.

Morris was obliged, on more than one occasion, to challenge Jeffer-

Letters of Leibniz 431-32 (L. Loemaker ed. 1956) (on the relation of prudence to the “fact” that we do have bodies and passions); PLATO, MENO 81c-d, 86b; Dreyfus, Why Computers Must Have Bodies in Order To Be Intelligent, 21 REV. METAPHYSICS 13 (1967).

L. STRAUSS, SOCiATES AND ARiStOpHAnES 281-82 (1966). See Melville, Benito Cereno, in SELECTED WriTIngS OF HERMAN MEViLLE 256, 351 (Modern Library ed. 1952) (“acuteness might have cost me my life, without saving another’s”).

However that may be, was not moderation called for in the public responses by intellectuals to the Nixon pardon? See Anastaplo, In Defense of Forthright Decency, Chi. Tribune, Sept. 30, 1974, § 2, at 6 (abridged); HYDE PARK HERALD, Oct. 9, 1974, at 5. Impassioned partisans should have called to their attention the salutary “moral” of Winston Churchill’s history of the Second World War (emphasis added):

In War: Resolution
In Defeat: Defiance
In Victory: Magnanimity
In Peace: Good Will.

See note 56 supra. Does not the pardoning power sustain the rule of law?

On the distinction between discovering and making, see THE CONSTITUTIONALIST, supra note 3, at 559 n.143; note 26 supra.

34. Sweet it is, when on the great sea the winds are buffeting the waters, to gaze from the land on another’s great struggles; not because it is pleasure or joy that any one should be distressed, but because it is sweet to perceive from what misfortune you yourself are free. Sweet it is too, to behold great contests of war in full array over the plains, when you have no part in the danger.

LUCRiTEUS, ON THE NATURE OF THINGS bk. 2, 11. 1-7. See 1 LINCOLN, supra note 1, at 161-62.

On Morris’ "deep Ditch," see THE CONSTITUTIONALIST, supra note 3, at 491-93 n.101. Morris evidently did not appreciate the extent to which "useful Manufactures" and commerce make countries interdependent and hence vulnerable. Compare, in Plutarch, the Lives of Lycurgus and of Numa. See note 6 supra.
son, whom he saw as having a too sanguine Expectation of a downright republican Form of Government. The literary People here, observing the Abuses of their monarchical Form, imagine that every Thing must go the better in Proportion as it recedes from the present Establishments and in their Closets they make Men exactly suitable to their Systems, but unluckily they are such Men as exist nowhere and least of all in France. [1, 104]

A typical journal entry recorded his misgivings:

Go from hence to Club and then to the Count de Montmorin's. Before Dinner the Duc de Liancourt & Montesquiou being there, in the Course of Conversation on the Actings and Doings of the Assemblée I say that the Constitution they have proposed is such that the Almighty himself could not make it succeed without creating a new Species of Men. [2, 67]

It was particularly dangerous, he warned again and again, not to take account of experience or, as in this instance, of inexperience. He described the King as “an honest Man . . . [who] wishes really to do Good, but he has not either Genius or Education to shew the Way towards that Good which he desires.” [1, 136] Later on, Morris would, in exasperation, refer to Louis XVI as “the miserable Creature which God has given.” [2, 212]

There is, he insisted, no substitute for experience. He recorded the news that La Rochefoucault “is terribly puzzled about the Affair of Impositions,” adding the comment:

[T]his is always the Case when Men bring metaphisical Ideas into the Business of the World. That none know how to govern but those who have been used to it and such Men have rarely either Time or Inclination to write about it. The Books, therefore, which are to be met with, contain mere Utopian Ideas. [2, 54]

Earlier he had observed:

The middle Party, who mean well, have unfortunately acquired their Ideas of Government from Books and are admirable Fellows upon Paper; but as it happens somewhat unfortunately that the Men who live in the World are very different from those who dwell in the Heads of Philosophers, it is not to be wondered at if the Systems taken out of Books are fit for Nothing but to be put into Books again. [1, 381]

A man of experience recognizes that France “is used to be governed and must be governed, that if [one] expects to lead them by their Affection he will be the Dupe.” [1, 239] “We must always remind ourselves,” Morris advised a Count, “that it is no longer a question of
liberty. Only of who shall be the master.” [2, 192] Certainly, there was nothing sentimental in Morris' thought about government. His advice on the handling of mutinous seamen conveyed his attitude as to what was needed in France in the midst of revolutionary turmoil: "I advise him to hang a few in each Port and keep some for the Purpose of an Execution at the Yard Arm of each Vessel going out of Port." [2, 316]

On the other hand, those in France who were "inspired with an enthusiastic Love of Freedom... are disposed to drive every Thing to Extremity." [1, 136] The role of Lafayette was significant. Morris, in a letter to Washington, drew a distinction:

Our friend La Fayette (who by the bye is trying to stir up a Revolution in the King of Prussia's Dominions) burns with Desire to be at the Head of an Army in Flanders and drive the Stadholder into a Ditch. He acts now a splendid but dangerous Part. Unluckily he has given in to Measures as to the Constitution which he does not heartily approve, and he heartily approves many Things which Experience will demonstrate to be injurious. He left America, you know, when his Education was but half-finished. What he learned there he knows well, but he did not learn to be a Government Maker... [1, 377]

On the making of governments, Morris wrote to another American:

Our American Example has done [the French] good; but like all Novelties, Liberty runs away with their Discretion, if they have any. They want an American Constitution with the Exception of a King instead of a President, without reflecting that they have not American Citizens to support that Constitution... Different Constitutions of Government are necessary to the different Societies on the Face of this Planet. Their Difference of Position is in itself a powerful Cause, their Manners, their Habits. The scientific Taylor who should cut after Grecian or Chinese Models would not have many Customers either in London or Paris: and those who look to America for their political Forms are not unlike those Taylors in the Island of Laputa who, as Gulliver tells us, always take Measure with a Quadrant. He tells us indeed, what one would naturally expect from such a Process, that the People are seldom fitted... [1, 136; 2, 457]

5.

The American Constitution was understood by Morris to depend on American citizens to support it. A comparison of the peoples of France and of the United States can be drawn from Morris' observa-
tions. The implications of this comparison are central to the concern throughout this article about the role of prudence in political affairs.

Good government, Morris insisted, depends on “Moderation.” [1, 564] His sympathy for France and his hopes for the cause of freedom in Europe were not permitted to dull his powers of perception or to color his judgment:

I wish much, very much, the Happiness of this inconstant People. I love them. I feel grateful for their Efforts in our Cause and I consider the Establishment of a good Constitution here as the principal Means, under divine Providence, of extending the Blessings of Freedom to the many millions of my fellow Men who groan in Bondage on the Continent of Europe. But I do not greatly indulge the flattering Illusions of Hope, because I do not yet perceive that Reformation of Morals without which Liberty is but an empty Sound. [2, 581]

He referred again and again to the “utter Prostration of Morals,” to a “Degree of Depravity” which could never be conveyed to an “American Mind.” [1, 61] There was, he informed Washington,

one fatal Principle which pervades all Ranks [in France]. It is a perfect Indifference to the Violation of Engagements. Inconstancy is so mingled in the Blood, Marrow and every Essence of this People that when a Man of high Rank and Importance laughs to Day at what he seriously asserted Yesterday, it is considered as in the natural Order of Things. [1, 61]

This inconstancy was found in connubial manners as well. The prudishness of Americans was common knowledge. [2, 337] Indeed, a noble lady wished to learn of him, Morris reported, “whether I have the Virtue of an American which she doubts, because she is pleased to say I have the Amiableness of a Frenchman.” [2, 142]

The connubial manners of the nobility were best summed up by Morris in an observation to Alexander Hamilton that

there has been a Practise here from Time whereof there is no Memory of Man to the contrary, viz that one Sett of Men were employ’d in [be-] getting Children for another Sett. [2, 573]

“It requires the strong Stomach of Monarchy,” he wrote another American, “to digest such rank Manners.” [1, 567] The greatest concession

35. In these free French practises Morris joined with enthusiasm and success, even though he insisted, “on the Subject of Gallantry,” that “there is nothing of the Kind in America.” 1 DIARY, supra note 29, at 23. (We merely notice here that the problem of obscenity today (see note 3 supra) cannot be properly understood without considering what dependence American political institutions may have upon “the Virtue of an American.”)
he could make to French sensibility was found in a letter to the King: “[The French nation] seldom notices the good but goes into ecstacies over the beautiful.” [2, 268]

Even this concession could not be extended by Morris to the Paris mob. Consider his reaction to a scene the week the Bastille was taken:

After Dinner walk a little under the Arcade of the Palais Royal waiting for ny Carriage. In this Period the Head and Body of Mr. de Poulon are introduced in Triumph. The Head on a Pike, the Body dragged naked on the Earth. Afterwards this horrible Exhibition is carried thro the different Streets. His Crime is to have accepted a Place in the Ministry. This mutilated Form of an old Man of seventy five is shewn to Bertier, his Son in Law, the Intendt. of Paris, and afterwards he also is put to Death and cut to Pieces, the Populace carrying about the mangled Fragments with a Savage Joy. Gracious God what a People! [1, 158-59]

Paris, he was to record later,

is perhaps as wicked a Spot as exists. Incest, Murder, Bestiality, Fraud, Rape, Oppression, Baseness, Cruelty; and yet this is the City which has stepped forward in the sacred Cause of Liberty. The Pressure of incumbent Despotism removed, every bad Passion exerts its peculiar Energy. How the Conflict will terminate, Heaven knows. Badly I fear, that is to say in Slavery. [1, 266]

“America in the worst of Times,” he wrote to Washington, “was much better because at least the criminal Law was executed, not to mention the Mildness of our Manners.” [2, 333-34]

In both the American and French revolutions, he insisted, “it is the great Mass of the People,” not (as some say) certain leaders, “who occasion every Thing.” [1, 186] The “nature” of the people was thus seen by him as decisive. Public spirit, he was certain, “cannot exist among a People so lately emancipated.” [1, 283]

“In Effect Time is needful to bring forward Slaves to the Enjoyment of Liberty. Time. Time. Education. But what is Education? It is not learning. It is more the Effect of Society on the Habits and Principles of each Individual, forming him at an early Period of Life to act afterwards the Part of a good Citizen and contribute in his Turn to the Formation of others. Hence it results that the Progress towards Freedom must be slow . . . .” [2, 387]

36. Is not the nature of a people slow to change? Plutarch (in his Life of Pelopidas) could speak of the Athenians’ “natural hereditary inclination to be kind” (PLUTARCH, Pelopidas, in PLUTARCH’S LIVES), a trait which Thucydides had noticed five hundred years earlier (as revealed in his account of the salutary reluctance of the Athenian row-
In celebrating his verse his “dear natal Soil, Freedom’s favorite Child,” Morris spoke of it as a land “Where Bliss flows spontaneous & Virtue grows wild.” [1, 503-04] Virtue, he seems to say (with the Constitution?), is the fruit of a tree difficult to bring to maturity but relatively easy thereafter to preserve.

Religion was seen by Morris as vital to the establishment and preservation of morals. In letters to two men who, in their respective ways, opposed certain religious observances, he addressed himself to this subject. To Lord George Gordon, the leader of the anti-popery riots in England, he expressed his belief “that Religion is the only solid Base of Morals and that Morals are the only possible Support of free governments.” [2, 452] And to Secretary of State Jefferson he wrote:

With Respect to the present Temper of the People of this Country I am clearly of Opinion that the great decided effective Majority is now for the Republic. What may be the Temper and Opinion six Months hence, no prudent sensible Man would I -think take upon him to declare. . . . whether they can establish an Authority which does not exist, as a Substitute (and always a dangerous Substitute) for that Respect which cannot be restored after so much has been done to destroy it; whether in crying down and even ridiculing Religion they will be able on the tottering and uncertain Base of Metaphisic Philosophy to establish a solid Edifice of Morals; these are Questions which Time must solve. [2, 564]

The “Temper” and “Opinion” of Paris had already shown themselves in a series of massacres. Thus, Morris had reported to Jefferson:

We have had one week of uncheck’d Murders in which some thousands have perish’d in this City. It began with between two and three hundred of the Clergy who had been shut up because they would not take the Oath prescrib’d by Law and which they said was contrary to their Conscience. Thence these Executors of speedy Justice went to the Abbaye where the persons were confin’d who were at Court on the Tenth. These were dispatch’d also, and afterwards they visited the other prisons. All those who were confin’d, either on the accusation or Suspicion of Crimes, were destroy’d. Madame de Lamballe was I believe the only woman kill’d and she was beheaded and emboweled, the Head and entrails paraded on Pikes thro’ the Street, and the body dragg’d after them. [2, 540]
Ignoring an earlier resolve to conduct himself in the manner expected of an accredited diplomat, Morris gallantly came to the aid of desperate nobles whom he had known in happier days, even going so far as to give them shelter in his official residence. [2, 522] It was during this period that the French Foreign Minister, under the revolutionary regime, addressed to Morris assurances of this nature:

[...]

The similarities of the American and French revolutions were evident to all; but the differences seemed to Morris significant, differences which were summed up by Morris in a declaration to Jefferson: “Thank God we have no Populace in America and I hope the Education and Manners will long prevent that Evil.” [2, 483]\(^{37}\)

Morris’ observations of the French National Assembly corresponded to his estimates of its constituency in the streets. From the earliest days of the Assembly, he could refer to “a great Deal of noisy Debate on various Subjects, if indeed such Controversy may be dignified with the Name of Debate.” [1, 232] To Washington he reported:

[T]hey discuss Nothing in their Assembly. One large half of the Time is spent hallowing and bawling. The Manner of speaking to a Question is as follows. Such as intend to hold forth write their Names on a Tablet kept for that Purpose and are heard in the Order that their Names are written down, if the others will hear them, which very often they refuse to do but keep up a continual Uproar till the Orator leaves the Pulpit. [1, 382]

In the Execution of the King there was found the same intolerance of unwanted expression carried to its dreadful extreme. Morris described the scene to Jefferson:

The late King of this Country has been publicly executed. He died in a manner becoming his Dignity. Mounting the Scaffold he express’d anew his Forgiveness of those who persecuted him and a Prayer that his

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37. Morris advised President-elect Washington, in a letter from Paris:
Will you excuse me, my dear Sir, . . . for making one Remark on the Subject of Economy and Example taken into joint Consideration. I think it of very great Importance to fix the Taste of our Country properly, and I think your Example will go very far in that Respect. It is therefore my Wish that every Thing about you should be substantially good and majestically plain; made to endure.

1 DIARY, supra note 29, at 380. See note 6 supra.
deluded people might be ‘benefited by his Death. On the Scaffold he attempted to speak but the commanding Officer, Santerre, ordered the Drums to be beat. The King made two unavailing Efforts but with the same bad Success. The Executioners threw him down . . . . [2, 601-02] 38

It is with a passage from Morris' first journal entry that we close this survey of his reflections on constitutional government and its dependence upon the character of a people. A nobleman engaged him in conversation at a party:

[He], for Want of Something else to do, asks me many Questions about America in a Manner which shews he cares little for the Information. By Way of giving him some adequate Idea of our People, when he mentioned the Necessity of Fleets and Armies to secure us against Invasion I tell him that Nothing would be more difficult than to subdue a Nation, every individual of which in the Pride of Freedom thinks himself equal to a King, and if Sir you should look down on him would say: I am a Man, are you any Thing more?—“All this is very well [the nobleman replies] but there must be a Difference of Ranks, and I should say to one of these People: You Sir, who are equal to a King, make me a Pair of Shoes.”—Our Citizens Sir [Morris explains], have a Manner of thinking peculiar to themselves. This Shoemaker would reply: “Sir, I am very glad of the Opportunity to make you a Pair of Shoes. It is my Duty to make Shoes and I love to do my Duty. Does your King do his?” [1, 2]

And, Morris concluded this report, “This Manner of thinking and speaking however is too masculine for the Climate I am now in.” [1, 2]

This, then, is how Americans saw themselves and others at the time of the framing of the Constitution. The reader may have noticed the singularly undoctinaire character of Morris' analysis of political problems, an analysis much closer to traditional political philosophy than to the then emerging ideologies of the subsequent two centuries. We

38. Compare accounts of the execution of Charles I or even of John Brown. The adoption of electrocution as our principal means of execution in the twentieth century may reflect and reinforce a marked decline in civility. (Is not this an aspect of that “rationalization,” stemming from the Enlightenment, which threatens States' Rights? See note 56 infra.) In addition, are not some of the tactics which have recently become fashionable in the struggle to secure human dignity intrinsically self-defeating insofar as they are deliberately undignified or even demeaning?

Much of Morris' discussion of the French character and of the institutions called for by the character and circumstances of the French is of considerable value to the student of modern Greek politics. See note 28 supra.
have been primarily concerned to investigate, through the eyes of a major draftsman of the Constitution, the proper relation between republican government (or, for that matter, any form of government) and the character of a people. The passages which have been set forth here provide us an introduction to the thought of some of the Founding Fathers, that thought of which Lincoln was so creatively eloquent (but perhaps not altogether faithful) an heir. The tone and language of these passages provide us an indication as well of the quality of the men who ordained and established the Constitution of the United States.\(^9\)

39. See Anastaplo, *Declaration of Independence*, 9 St. Louis U.L.J. 390, 414-15 (1965). However "undoctrinaire" may have been the character of the men who ordained and established the Constitution, the slavery question remained to torment them and their posterity. Thus, Lincoln could quote in 1852 (in a eulogy on Henry Clay) from a statement made by the elderly Jefferson thirty years before (when the Missouri Compromise had had to be worked out):

> I had for a long time ceased to read newspapers or to pay any attention to public affairs, confident they were in good hands and content to be a passenger in our bark to the shore from which I am not distant. But this momentous question, like a fire-bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence. A geographical line coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated, and every irritation will mark it deeper and deeper. I can say with conscious truth that there is not a man on earth who would sacrifice more than I would to relieve us from this heavy reproach in any practicable way. The cession of that kind of property—for it is so misnamed—is a bagatelle which would not cost me a second thought if in that way a general emancipation and expatriation could be effected, and gradually and with due sacrifices I think it might be. But as it is, we have the wolf by the ears, and we can neither hold him nor safely let him go. Justice is in one scale, and self-preservation in the other.

1 Lincoln, *supra* note 1, at 173. (On the balancing of justice and self-preservation especially where slavery is involved, see H. Melville, *Benito Cereno*. Consider, furthermore, the different circumstances, initials, and characters of the two sea captains in that story as well as their respective fates.)

Lincoln himself understood the limits of reasonableness in working things out, in small matters as well as in great. See, e.g., his telegram of May 15, 1863, to several men in St. Louis:

> Your despatch of to-day is just received. It is very painful to me that you in Missouri cannot or will not settle your factional quarrel among yourselves. I have been tormented with it beyond endurance for months by both sides. Neither side pays the least respect to my appeals to your reason. I am now compelled to take hold of the case.

2 Lincoln, *supra* note 1, at 337.

But was not Lincoln himself somewhat more doctrinaire (and, to that degree, less reasonable) than the more prudent among the Founding Fathers? See, e.g., notes 52 & 64 *infra*. Certainly, Morris (unlike Jefferson?) did not want to leave the impression that it was his opinion that only one form of government is legitimate or that any particular form of government can possibly last forever on the earth. For Lincoln's opinions on these subjects, see pt. IV, § 5 *infra*.

The divergence between the doctrinaire and the prudent may be suggested in a remark attributed to Lord Melbourne, evidently in circumstances where patience was called
6.

Does the very conduct of affairs pursuant to a constitution such as ours guarantee, or at least make likely, the perpetuation of the citizen body for which that constitution was established and upon which our political institutions depend?

As Americans we cannot help but be concerned with the problem of the character of the American people, a problem in which there may be implied (as we have already indicated) the most critical defect in the American Constitution. Have the success of the American experiment and its consequent material prosperity undermined the moral strength and civic-mindedness of its people, tempting us not only to forget the principles of our form of government, but also to neglect both the nature and the deliberate development of the people for which that form was designed and on which it depends?

7.

In any Event, it is the Role of the Statesman, in Times when Liberty is misconceived, to remind his People that the dutiful American Citizen could once be praised in the Courts of Europe as a Man who, “in the Pride of Freedom,” thought “himself equal to a King.”

III. THE EXECUTION OF THE CONSTITUTION

1.

We Americans have come a long way since the Eighteenth Century. And, we often tell ourselves, we have yet far to go.

To say that we have “far to go” does suggest that we “know where we are, and whither we are tending . . . .” It suggests, that is, that we have objectives, or standards, which we are somehow aware of and toward which our constitutional institutions are somehow directed. In order to see what those institutions mean in practise, we turn for help to Daniel Webster, the distinguished New Englander who was a son of the American Revolution.

Edward Everett’s assessment of Webster, which concludes a biographical memoir prepared for the 1851 edition of Webster’s works, for: “‘If I hear people saying that something must be done,’ . . . I know that they contemplate doing something damn silly,’” J.C. Masterman, The Double-Cross System 31-32 (1972). (One is reminded of the arguments a few years ago for deeper and deeper American involvement in Indochina.) See Anastaplo, Politics vs. Ideology: The Greek Case, J. Hellenic Diaspora, Fall, 1974, at 28.
should remind us of the overriding importance, for men such as Web-
ster and Lincoln, of “preserv[ing], protect[ing] and defend[ing],” at
almost all costs, the Union under the Constitution. The costs will-
ingly borne included, for one man, soul-searching compromises with
slavery; for the other, a devastating civil war.

The Everett assessment of Webster, which we reprint here, serves
as a transition between the first and second halves of this article—
between the epoch of constitution-framing and that of constitution-
saving:

Such, in a brief and imperfect narrative, is the public life of Mr.
Webster, extending over a period of forty years, marked by the occur-
rence of events of great importance. It has been the aim of the writer
to prevent the pen of the biographer from being too much influenced
by the partiality of the friend. Should he seem to the candid not wholly
to have escaped that error, (which, however, he trusts will not be the
case,) he ventures to hope that it will be forgiven to an intimacy which
commenced in the youth of one of the parties and the boyhood of the
other, and which has subsisted for nearly half a century. It will be
admitted, he thinks, by every one, that this career, however inade-
quately delineated, has been one of singular eminence and brilliancy.
Entering upon public life at the close of the first epoch in the political
history of the United States under the present Constitution, Mr. Webster
has stood below none of the distinguished men who have impressed
their character on the second.

There is a class of public questions in reference to which the opinions
of most men are greatly influenced by prejudices founded in natural
temperament, early association, and real or supposed local interests.
As far as such questions are concerned, it is too much to hope that, in
times of high party excitement, full justice will be done to prominent
statesmen by those of their contemporaries who differ from them. We
greatly err, however, if candid men of all parties, and in all parts of
the country, do not accord to Mr. Webster the praise of having formed
to himself a large and generous view of the character of an American
statesman, and of having adopted the loftiest standard of public conduct.
They will agree that he has conceived, in all its importance, the position
of the country as a member of the great family of nations, and as the
leading republican government. In reference to domestic politics it
will be as generally conceded, that, reposing less than most public men
on a party basis, it has been the main object of his life to confirm and
perpetuate the great work of the constitutional fathers of the last gener-
at.
By their wisdom and patriotic forethought we are blessed with a system in which the several States are brought into a union so admirably composed and balanced,—both complicated and kept distinct with such skill,—as to seem less a work of human prudence than of Providential interposition.* [* This idea is beautifully expressed in the following passage of a late letter from Mr. Webster, in reply to an invitation from the citizens of Macon, Georgia:—"The States are united, not consolidated; "Not, chaos-like, together crushed and bruised,/But, like the world, harmoniously confused,/Where order in variety we see;/And where, though all things differ, all agree."] Mr. Webster has at all times been fully aware of the evils of anarchy, discord, and civil war at home, and of utter national insignificance abroad, from which the formation of the Union saved us. He has been not less sensitive to the obstacles to be overcome, the perils to be encountered, and the sufferings to be borne, before this wonderful framework of government could be established. And he has been firmly persuaded that, if once destroyed, it can never be reconstructed. With these views, his political life has been consecrated to the maintenance in all their strength of the principles on which the Constitution rests, and to the support of the system of government created by it.

The key to his whole political course is the belief that, when the Union is dissolved, the internal peace, the vigorous growth, and the prosperity of the States, and the welfare of their inhabitants are blighted for ever, and that, while the Union endures, all else of trial and calamity which can befall a nation may be remedied or borne. So believing, he has pursued a course which has earned for him an honored name among those who have discharged the duty of good citizens with the most distinguished ability, zeal, and benefit to the country. In the relations of civilized life, there is no higher service which man can render to man, than thus to preserve a wise constitution of government in healthful action. Nor does the most eloquent of the statesmen of antiquity [Cicero] content himself with pronouncing this the highest human merit. In that admirable treatise on the Republic, of which some precious chapters have been restored to us after having been lost for ages, he does not hesitate to affirm, that there is nothing in which human virtue approaches nearer the divine, than in establishing and preserving states: 'neque enim ulla res est, in qua propius ad deorum numen virtus accedat humana, quam civitates aut condere novas aut conservare jam conditas.'

2.

We see again and again in Senator Webster's career in Washington an insistence upon himself not as a Massachusetts-man, not as a North-
erner, but rather as an American and as a member of Congress. Indeed, he is above all a “dutiful American Citizen.” His insistence upon Americanism may have become most fervent at the close of his life (he died in 1852), on the eve of the Civil War. Perhaps it is because it has always been a question for “us” what it means to be an American—a question made more or less pressing as circumstances dictate—that Webster was moved to emphasize that he was indeed an American.

Americans seem always to have had the question of who they are—if not always before them, at least always just beneath the everyday surface of their existence—in a way that Frenchmen, say, or Englishmen have not. But, on the other hand, Webster seemed quite often in his speeches to present Americans as shaped and defined in essentially the same way other peoples are—that is, as determined by the vagaries of geography and of history. Thus, Americans could be portrayed by him as a people who happen to share, in critical respects, a certain space and time.

To see Americans thus may respect the critical role of chance in shaping this (as any other) people. It may deny, however, that there is a meaning to America: men have to have countries; America happens to be the country of this particular people; it is useful for most men to take seriously the concerns as well as the very existence of the country in which they happen to find themselves.

Webster could conclude one of his last speeches, a speech in the Senate on July 17, 1850, “No man can suffer too much, and no man can fall too soon, if he suffer or if he fall in defence of the liberties and Constitution of his country.” This sentiment seems to imply that one’s cherished constitution, for which the greatest sacrifices can and should be made, need not be special.

In this sober attitude toward the American experiment, the Daniel Webster we have conjured up on this occasion may sound more like a Gouverneur Morris than like an Abraham Lincoln or his sometime mentor, Thomas Jefferson. That is, Webster and Morris can easily be seen as “practical men”; Lincoln and Jefferson, as “visionaries.” But would not both sets of categorizations, however useful they may be for the explorations of this article, be oversimplifications? That is, do not such categorizations fail to take due account of the radically different circumstances which confronted these four statesmen at the most decisive moments of their respective lives?
3.

Webster, although a dutiful son of the Revolution, was not called upon to be a revolutionary. He did not, in his public addresses, permit himself the luxury (which intellectuals often enjoy and sometimes abuse) of publicly searching out the foundations of the regime in which he happened to find himself. Did he not consider himself obliged to insist upon an Americanism rooted in the constitution which he and his countrymen had inherited?

The constitutional contract was evidently vital to him. What had been agreed upon at Philadelphia was decisive, good and bad alike. And the bad included the distressing obligation to return fugitive slaves to their masters. It included as well the obligation to allow the Southern States complete authority over the domestic governance of their peculiar institution.

Justice, Webster seemed to be willing to be taken as saying, consists primarily in an evident respect for one's word. That is, one takes an oath to be governed by the Constitution—and one is bound by that oath. One's word, as every practised politician and lawyer knows, must be regarded as binding if the everyday affairs of the world are to be managed properly. Consider the criticisms Gouverneur Morris had made of French inconstancy.

The lengths to which Webster went to emphasize the value of faith-keeping may be seen in an exchange he had with John Calhoun (of South Carolina) on the floor of the Senate (March 7, 1850):

Webster: “[He [Calhoun] did not disguise his conduct or his motives.”
Calhoun: “Never, never.”
Webster: “What he means he is very apt to say.”
Calhoun: “Always, always.”
Webster: “And I honor him for it.”

It remains a problem, however, whether such truth-telling is indeed “always, always” honorable. And, if so, is not the honorable sometimes self-righteous, unjust and most irresponsible?

4.

Webster realized, of course, that there are conditions upon which any constitutional contract depends, in practise if not on its own terms. He knew, for example, the strain placed upon constitutional government by great diversity within the citizen-body.
Thus, he was appalled by the prospect of incorporating into the Union the territory taken from Mexico, a territory with substantial concentrations of an alien people. The greater the diversity within the population of a country, the greater the difficulty of inducing all to truly regard one another as fellow citizens. He resisted, therefore, the emergence of a continental republic, especially one which ratified and even extended slavery. But once his countrymen did gather together a republican empire from sea to shining sea, he appealed (in his efforts to keep the country together under the Constitution) to the inevitable pride of Americans in this remarkable acquisitive enterprise.

Another condition for the establishment and perpetuation of the Constitution, he occasionally reminded Southerners, was the general understanding in 1787 that slavery would be gradually, but surely, eliminated by the States. He realized that the accidentally augmented role of cotton had unfortunately deflected Southerners from honoring the original understanding and had even driven some of them to argue for slavery as a positive good.

To Webster, American-style slavery was clearly an evil—that slavery which “every body agrees” (as he put it on August 12, 1848) “is against natural law, or at least against the common understanding which prevails among men as to what is natural law.” He (unlike Stephen A. Douglas?) never repudiated an abhorrence of slavery; but he evidently did not believe it useful to dwell upon his abhorrence, or even upon the original understanding about the eventual voluntary elimination of slavery among the States. It sufficed to oppose the extension of slavery—and to preserve the Constitution, however imperfectly or precarious it had come to be executed in Washington and however distracted the country may have come to be by the slavery issue.

5.

Webster, like Lincoln after him, seemed to believe that the Union, if it could somehow be preserved, would mean the gradual elimination of the South’s peculiar institution.

He seemed to believe, that is, that the American constitutional regime—with its rule of law, its deep-rooted egalitarian impulse, and its astonishing social as well as physical mobility—could not help but be fatal to slavery. He did not care to make all this explicit—but Southern slaveholders evidently feared the very development which Webster hoped for and so they began their rebellion in 1860, before they be-
came even weaker, with respect to the North, than they had become in the preceding century.

Webster’s espousal of faith-keeping can thus be understood to have been designed to hold spirited Southerners fast to the troubling bargain made at Philadelphia. The South could thereby be imperceptibly but eventually reformed for its good and the country’s, to say nothing of humanity’s. Or failing that, Webster’s policy of conciliatory yielding can be understood to have permitted the steady strengthening of the free forces of the country for the “great civil war” which lay ahead.

6.

The problems created by size and hence diversity continue among us. National emergencies can provide, if only temporarily, a basis for fellow-feeling. A sensible concern to preserve ourselves can draw us together as can the natural desire to better our lot, to have the greatest possible opportunity to use our talents as producers and consumers. But once brought together on the grand scale called for by military strategy and by political economy, how are we to be governed?

Empires, it should be remembered, do tend to be ruled by emperors—and an emperor all too often is, as in Rome, ultimately dependent on his prestige and powers as commander-in-chief of the armed forces. It is often noticed that we are inclined to exalt our commander-in-chief unduly, at least so long as emergencies confront us.

But does there not remain, in the breasts of Americans, a residual envy of their “betters,” an envy which draws upon our egalitarian heritage and experiences and which undermines efforts to raise one above all? Does envy suffice to keep public servants in their place? Should it suffice? Is there not something more elevated, and hence elevating, by which we can take our bearings?

What, indeed, is the meaning of America? Does not such a question presuppose that it is possible in political affairs for the Word to become Flesh? Flesh is material and hence changeable and hence mortal. Do we ask too much by seeking as a people for the meaning of a country? Do we, that is, fail thereby to appreciate and enjoy the generations of justice and peace which a decent (but not introspective or “meaningful”) regime can provide?

Dare a people as a whole look beyond the constitutionalism of a Webster to that “natural law” which Webster himself may not have thought it politic to make much of in public? If we dare do so, he
can be understood to teach us, we should do it with the utmost caution—and in such a way as not to disturb unduly the tangible and hence solid attachments most men have to what they (by a kind of prescription) unquestioningly come to regard as naturally their own.

And, Webster can also be understood to teach us, whatever constitution a people does adopt (or reform) will require from time to time distressing compromises and adaptations to circumstances, those very adaptations and compromises which thoughtless visionaries can irresponsibly condemn as betrayals and capitulations and which narrow-minded practical men can selfishly fasten upon as ends in themselves.

7.

Is not the Constitution of 1787 itself an instructive exercise in compromise? Thus, for example, the original document opens with “We the People” and closes with “the States so ratifying the Same.” It opens, that is, with a proclamation of the aspirations of a united people; it closes with a recognition of the reality of disparate States. Both aspirations and reality were needed to make the Constitution work by taking advantage of what both the Union and the States could contribute to the common good.

What was the ground upon which aspiration and reality could meet without overtly sacrificing either? It was ground which depended upon the reputations and dedication of the signatories to the document, upon recourse to the seeming unity of a carefully contrived “Unanimous Consent,” and upon the common sense and the character of the American people. Otherwise, there would be the bloody ground of civil war from which it would take the country more than a century to recover.

A civil war puts a constitutional contract to its decisive test, a test which seems to make the bold conciliator in one great lawyer obsolete overnight and which calls forth the cautious revolutionary in another. We are obliged to move, that is, from the floor of the Senate to the very battlefields which the prudent Webster (who had lost his younger son in the Mexican War) may always have kept in view.

IV. THE END OF THE CONSTITUTION

1.

This introduction to American constitutionalism, which conventional students of this subject may prematurely dismiss as unduly poetic if
not even mythic, would not be complete without at least an attempt to suggest how the true statesman may legitimately employ the forum available to him to shape, or to reshape, the institutions of his country so as to contribute to their perpetuation. Such a leader need not "hold and enjoy any Office of honor, Trust, or Profit under the United States." In fact, his effectiveness in office may depend, in part, on how well he has (before assuming any office) prepared himself, his fellowcitizens, and his colleagues to recognize and confront the fundamental rather than the transient issues of their time.

The perpetuation of our political institutions was the task to which Abraham Lincoln, a devoted grandson of the Revolution, can be said to have dedicated himself from the days of his youth in Springfield—he was not yet thirty when he spoke on this subject to the Young Men's Lyceum—until the hour of his assassination on Good Friday, in the year 1865. The most effective perpetuation, it can also be said, can amount to a new founding. Such a founding can remind a people of what was required for the original establishment of its constitution and of what is called for by the meaning (or end) of the country and people which the constitution was designed to serve.

Lincoln's 1837 Springfield Lyceum speech discerned a threat to American political institutions in the rise of what he referred to as the...

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For what is still the best life of Lincoln, see LORD CHARNWOOD, ABRAHAM LINCOLN (1917). For a most perceptive comment by Charnwood on Lincoln, see note 65 infra.

On the true statesman, see PLATO, STATESMAN 293b, 305e. See also PLATO, EPHINOMIS 992d; PLATO, GORGIAS 521d; PLATO, GREATER HIPPIAS 284-85; PLATO, STATESMAN 259a-b; cf. PLATO, GORGIAS 473e-474a, 480e-481b.

On the theme of Lincoln's "Perpetuation Speech," see PLATO, GORGIAS 483e-484a; PLATO, REPUBLIC I (the argument of Thrasymachus and its tentative refutation). See also Calhoun, South Caroline Exposition and Protest, in THE POLITICAL THOUGHT OF AMERICAN STATESMAN 121, 140 (M. Frisch & R. Stevens eds. 1973) ("preservation is perpetual creation"). The wartime Lincoln can remind one, in various ways, of Julius Caesar (the Caesar of the Gallic Wars more than of the Civil Wars).
“mobocratic spirit” which was then being exhibited in extralegal attacks upon life and property. This lawlessness on the part of mobs, and the insecurity and disgust which it creates, would, he warned, undermine the attachment of the best citizens to their government and give an opportunity to “men of sufficient talent and ambition” to overthrow republican institutions.

The threats to American political institutions were particularly critical at that time, Lincoln argued, because the former supports of the regime were disappearing: the passions and memories of the Revolution were fading with the rapidly disappearing heroes of that war; furthermore, there was no longer available the opportunity for individual success and glory which the men of the Revolution had to induce them to support the regime.

Men of the loftiest genius and greatest ambition—men who belong “to the family of the lion, or the tribe of the eagle”—would no doubt arise, and it was only natural, he thought, that such men would thirst for distinction, for far more distinction than could be offered by “a seat in Congress, a gubernatorial or a presidential chair.”

“Towering genius,” he warned, “disdains a beaten path. It seeks regions hitherto unexplored. It sees no distinction in adding story to story upon the monuments of fame erected to the memory of others.” Such a man, he indicated, is essentially lawless—or, rather, he hearkens only to the law of his nature, not to that reflected in any constitution or regime. When a man of this nature arises, Lincoln counseled, “it will require the people to be united with each other, attached to the government and laws, and generally intelligent, to successfully frustrate his designs.”

Thus, such a man evidently disdains the law-abiding. But since he is one and the people are many, he can be restrained, if the people are united by being conscientiously law-abiding themselves. The mobocratic spirit undermines this attachment of the people. Lincoln urged, therefore, that “reverence for the laws” should “become the political religion of the nation.” He identified, in the concluding passage of this speech, the problem confronting the founders of such a political religion:

Passion has helped us, but can do so no more. It will in future be our enemy. Reason—cold, calculating, unimpassioned reason—must furnish all the materials for our future support and defense. Let those materials be molded into general intelligence, sound morality, and, in particular, a reverence for the Constitution and laws . . . .
Reason, not passion, was to provide the critical support of the regime. Passions threatened the institutions—the passions of the mob (of men who want to secure justice outside the law) and the passions of the exceptional man (of the man who can likewise be said to want to secure justice outside the law)—and it was to reason that Lincoln looked for the proper training of the people to defend themselves against the ill effects of folly or of apathy. But, as he indicated elsewhere, reason might well use the passions to buttress its position.

Whether the Civil War resulted from the kind of insatiable ambition that the young Lincoln warned against can remain for us a problem for another occasion. That war can be understood as merely the final stage of a rise of the mobocratic spirit which would prepare the ground for an “Alexander, a Caesar, or a Napoleon.” Is it not evident, in any event, that President Lincoln (in his effort to preserve and perpetuate the Union under the Constitution) deliberately and skillfully trained and molded the people he was leading?

The Gettysburg Address remains the most distinctive distillation of Lincoln’s “political religion.” We shall consider it, then, as an introduction not only to his thought but also to the problems addressed and, in turn, inevitably created by that thought. By so doing, we illustrate, even as we examine further, what we have said about the role of the statesman among us, as well as what we have said about the role and limits among us of genuine constitutionalism.41

It is a little more than a century now since Lincoln delivered in 1863

2.

41. See PLATO, STATESMAN 259a-b. “[C]old, calculating, unimpassioned reason” can alienate one from “one’s own” if they should sense how “uninvolved” such a reasoner may really be. See the opening pages of J. HALEVI, KUZARI (the exchange with the philosopher). See also THE CONSTITUTIONALIST, supra note 3, at 788-89 n.16, 739 n.141, 766-67 n.181; notes 11 & 33 supra. For Lincoln’s interest in Shakespeare’s Macbeth, see 2 LINCOLN, supra note 1, at 393.

The remarkable features of the Gettysburg Address may be best seen against the background of the Constitution and its sobriety. (One must, in such circumstances as Lincoln found himself, guard against both harshness and sentimentality.) Has not Lincoln been, among Americans, the Constitutionalist? See THE CONSTITUTIONALIST, supra note 3, at 420 n.3, 625 n.62. The competent lawyer in Lincoln may be seen in his address of July 4, 1861, and in the Emancipation Proclamation. See id. at 477 n.54, 602 n.15; 2 LINCOLN, supra note 1, at 433, 529. Indeed, the similarity of his constitutional thought to that of the mature Webster can be striking.

Would Webster have thought Lincoln’s promises with respect to perpetuity illusory? Would he have believed that Lincoln himself “believed” them? Was not Lincoln markedly affected by the suffering and sacrifices of the war? Would he have been “inhuman” not to have been thus affected? See notes 43, 49, 58, 61 & 64 infra.
his address dedicating a military cemetery near a Pennsylvania village. But it is only little more than a century—and we have talked to men who were alive then. Yet it seems much, much longer than a century. Indeed, it can be argued that his statement was intended to have from the outset the grandeur and venerability which we usually associate with such "ancient" constitutional documents as the Mayflower Compact, the Declaration of Independence and the Constitution of the United States.

The lyrical compactness of the Gettysburg Address, its sense of authority and its sublimity make it seem a pronouncement out of an even more distant past than its venerable American predecessors. It is delivered to us from a great height in intellect, in time and in moral stature. Indeed, it resembles in its solemnity and pithiness the Lord's Prayer which is handed down in the Sermon on the Mount. And like that Prayer, it begins with an invocation of the paternal and concludes with a vision of the everafter.

The language seems deliberately archaic, particularly in the opening section which is itself devoted to the past: "Four score and seven years" makes the interval since the founding of the country seem longer than it really is, much more so than "eighty-seven years" or even "three generations" would have sounded. The language is not only archaic, but (here as elsewhere) even Biblical in its connotations.42

42. See, e.g., Luke 2:36. Compare the First Inaugural Address: "It is seventy-two years since the first inauguration of a President under our National Constitution." 2 LINCOLN, supra note 1, at 2. Lincoln also observed in the Address that the Union was "much older" than the Constitution. See id. at 3; note 25 supra. "Much older" meant, in this case, a mere thirteen years at most. Did not Lincoln, again and again, buttress with signs both of antiquity and of the divine the useful constitutional contract which chance had permitted reasonable men (who were somewhat aware of the nature of things) to establish?

[The Gettysburg Address] tacitly obscures the rational foundations of the proposition to which it says the nation was dedicated. It associates the new birth of freedom with the idea of the release of the spirit from the bondage of sin, the idea with which the people were familiar from their ancient revealed religion. By this very association Lincoln gave the idea of political freedom, which was so new to the Western world, a sense of the dignity which is naturally associated only with things that are old.


Lincoln, however, achieved, on the level of the moral imagination, a synthesis of the elements which in Jefferson remained antagonistic. He incorporated the truths of the Declaration of Independence into a sacred and ritual canon, making them objects of faith as well as of cognition. Through his interpretation of the Civil War as both a Hebraic and Christian ritual atonement, this canon was made sacred to the American people as the Declaration of Independence, of itself, could not be made. This interpretation did not depend for its conviction upon the intellectual acknowledgment of the truth alone—an acknowledgment which, of itself, Lincoln
We are further reminded of the Biblical in the chronology which is attributed to the life of the country. The fathers ever so long ago brought forth on a new continent a new nation: one might be tempted to think of the Creation account in *Genesis*; certainly, one is meant to think of Moses and the companions who also went to a new continent, ever so long ago, and founded a new nation, a nation of and for a particular people.

This new nation, once established—we return now to the Gettysburg Address—this new nation became the wonder of the world, if only for its unique aspirations. The goal is not reached, however, when the holy land, this hallowed ground, is occupied. The new nation—will it not, if it should be true to itself, always remain essentially “new”?—has within it a deadly division. Demands arise for its perfection, for the elimination of that which has been heretofore an ugly but necessary compromise with the temporal, with the here and now. The here and now must be taken fully into account, but it must be transcended. One is reminded of the crisis in Israel which culminated, as the Christian views it, in the ministry of Jesus, a ministry which embraces all mankind.

The crisis leads to struggle and to death—and from this death, new life comes, “a new birth of freedom”—but a life, now that there is a rebirth, which is superior to its predecessor, if only in that it has become perpetual. Who, then, would deny that it is ultimately good that all this struggle and suffering came? Death and resurrection—and eternal redemption: there is culmination in a life that is expanded beyond limit.

Even the structure of the sentences Lincoln employed in sketching this development reflects and reinforces the content. The lengths of

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*in 1838 showed was a feeble barrier to the passions—but upon a passionate and passion-conquering conviction born of the sense of the awful price exacted by that truth of its votaries.*

*Id.* at 229. See *id.* at 145; note 61 *infra.*

“Again, what is long established seems akin to what exists by nature . . . .” *Aristotle, Rhetoric* 1387a16. See note 20 *supra* and notes 58 & 64 *infra.* Compare *Shakespeare, Henry VI, Part 3,* act 3, scene 3:

> But for the rest, you tell a pedigree
> Of threescore and two years; a silly time
> To make prescription for a Kingdom’s worth.

It was said in reply, thereby again exposing for us the tension between the contractual and the natural (which the venerable or prescriptive suggests?):

> Why Warwick, canst thou speak against thy liege,
> Whom thou obey’dst thirty and six years,
> And not bewray thy treason with a blush?
the sentences get generally shorter and shorter, down to, "It is altogether fitting and proper that we should do this." We reach the dedication for which they had gathered, having moved "down" from the continent to the nation on that continent to a battlefield in that nation to a portion of that field.

Then the movement is reversed: from here to the end, there is an expansion in sentence lengths, heralded by, "But in a larger sense." The sentences get longer and longer—as does the dedication of the country, which had theretofore contracted—and the scope of vision becomes larger: he moves from a "portion of [a] field" to "the earth." The time with which he deals also expands, moving from "four score and seven years" and the contest over whether this government "can long endure" to the recitation of deeds which will never be forgotten and to the expression of the resolution that this government "not perish from the earth." This sense of expansion is reinforced by the final sentence, the last of ten, which contains almost one-third of the entire address. This sentence, which marches steadily along to the drumbeat of a high proportion of one- and two-syllable words, runs on and on, as if forever.

That which is to be established—which might be established upon purgation of the crippling and perhaps fatal compromise—surpasses, as the infinite does the finite, all that which has gone before.43

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43. On arguments based on similitude, see QUINTILIAN, INSTITUTIO ORATORIA bk. 5, ch. 11, 22 sq & bk. 8, ch. 3, 72 sq. See also the essays on Lincoln in R. WEAVER, THE ETHICS OF RHETORIC (1953), and in E. WILSON, PATRIOTIC GORE (1962), as well as Zyskind, A RHETORICAL ANALYSIS OF THE GETTYSBURG ADDRESS, 4 J. GEN. EDUC. 202 (1950), and Brann, A READING OF THE GETTYSBURG ADDRESS, THE COLLEGE, April, 1969, at 6 (also, in its way, something of a tour de force? (see note 40 supra)). On rhetoric, see note 48 infra.

Does not the last sentence of the Gettysburg Address anticipate, and contribute to, the pervasive authority of the people and hence to such developments as the exaltation of the Presidency among us? See THE CONSTITUTIONALIST, supra note 3, at 655 n.103; 1 LINCOLN, supra note 1, at 584; 2 LINCOLN, supra note 1, at 3; note 8 supra. On the significance of public opinion in the United States, see 1 LINCOLN, supra note 1, at 187, 208, 225, 298, 422, 619; 2 LINCOLN, supra note 1, at 594. Lincoln observed on October 19, 1864:

[The people's] will, constitutionally expressed, is the ultimate law for all. If they should deliberately resolve to have immediate peace, even at the loss of their country and their liberty, I know not the power or the right to resist them. It is their own business, and they must do as they please with their own.

2 LINCOLN, supra note 1, at 586. Compare Lincoln's December 6, 1864 statement:

I repeat the declaration made a year ago, that "while I remain in my present position I shall not attempt to retract or modify the Emancipation Proclamation, nor shall I return to slavery any person who is free by the terms of that proclamation, or by any of the acts of Congress." If the people should, by whatever mode or means, make it an executive duty to reënslave such persons, another, and not I,
3.

A new nation was established—"brought forth" by males, it should be noted—but more than a nation is founded. For unlike other nations (one can ignore the neighbors to the north and south on the same continent, for they are not essentially new), this nation is uniquely con-

must be their instrument to perform it.

id. at 615. Cf. also id. at 620-21 ("[n]othing justifies the suspending of the civil by the military authority, but military necessity; and of the existence of that necessity, the military commander, and not a popular vote, is to decide"); Confucius, Analects bk. 11, ch. 23; note 58 infra.

Do we not see dimly reflected in the concluding lines of the Gettysburg Address a faith in progress which is rooted in the Enlightenment, and perhaps in the technology which the Enlightenment depended upon and promoted? See The Constitutinalist, supra note 3, at 666 n.122; note 20 supra; notes 54 & 64 infra. "The work of the Plymouth emigrants was the glory of their age. While we reverence their memory, let us not forget how vastly greater is our opportunity." 2 Lincoln, supra note 1, at 619. See 1 Lincoln, supra note 1, at 672.

It is "a new world," one in which men have by now gotten used to hearing such remarkable things as this: "What are galaxies? No one knew before 1900. Very few people knew in 1920. All astronomers knew after 1924." Structure and Evolution of the Galaxy 10 (L. Mavrides ed. 1971). See also id. at 208 ("[W]e are entering a new era in which, thanks to radio, microwave and infrared astronomy, the direct observational information on the medium from which we believe that stars are born and on the initial phases of their lives will become increasingly abundant and precise . . ."). But see id. at 215, 284, 288, 293 ("[I]f from what has been discussed here it can be concluded that we are a long way from understanding the evolution of the galaxy. We cannot understand its early history until we are able to deduce what kind of universe we live in"). See note 49 infra. Perhaps even more remarkable, and indicative of the "kind of universe [we believe ourselves to] live in," is "our" recent beaming into "deep space" of a radio message which should take at least 48,000 years for our descendants here to receive an answer to. New York Times, Nov. 20, 1974, at 77; Time, Dec. 2, 1974, at 12. Is there not about this ambitious effort something wonderfully Odyssean as well as deeply generous—that is to say, essentially human? See, e.g., Dante, Inferno, Canto 26. Some, of course, would prefer to see such monies spent on the poor. Cf. John 12:8.

44. Cf. Luke 2:4, where Mary is said to have brought forth her firstborn. Lincoln ignored here the role of females, stressing instead the role of fathers. But see his speech at a Sanitary Fair in 1864. 2 Lincoln, supra note 1, at 500-01. It was Edward Everett who voiced at Gettysburg "the tribute to our noble women." Id. at 440, 631. (For an emphasis on "fathers," see 1 Lincoln, supra note 1, at 504-05. For the presumption in favor of the fathers, see id. at 129, 604. The Gettysburg Address moves from "our fathers" to "the people"—from the ancestral (if not natural) and "instinctive" to the national (if not universal) and "rational"? Is there not about such a movement something unpatriotic? See notes 38 & 41 supra; notes 49, 54 & 56 infra. Cf. note 42 supra; notes 52, 61, 62 & 64 infra.)

We are reminded both of the virtual absence of references to the daughters' mother in Shakespeare's King Lear, and of the relation between Zeus and Athena. See Berns, Gratitude, Nature and Piety in King Lear, 3 Interpretation, Autumn, 1972, at 27; The Constitutinalist, supra note 3, at 790 n.20.
stituted: it is "conceived in liberty and dedicated to the proposition that all men are created equal."

But liberty has come to be abused: some presume to claim the liberty to make, and to keep, others slaves. They have come, that is, to claim the liberty to preserve indefinitely the institution of slavery by extending it to new territory—with the result that the principle of equality has been decisively challenged if not repudiated. That which had been announced in the Declaration of Independence as a "self-evident" truth, "that all men are created equal," is now, at best, but a proposition, something which must be tested if it is to be maintained.

The test is, at least for the moment, that of battle—and it may not be essentially peculiar to this nation. No names are mentioned, no dates; what is happening here and now could happen anywhere, anytime; it is of universal significance. But that which is determined here may be decisive not only now but, it seems, always, not only here but everywhere.

It is equality, particularly, which is threatened. And in the course

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Consider, as well, the following passages from Lincoln's inaugural addresses:

One section of our country believes slavery is right, and ought to be extended, while the other believes it is wrong, and ought not to be extended. This is the only substantial dispute. The fugitive-slave clause of the Constitution, and the law for the suppression of the foreign slave-trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured; and it would be worse in both cases after the separation of the sections than before. The foreign slave-trade, now imperfectly suppressed, would be ultimately revived, without restriction, in one section, while fugitive slaves, now only partially surrendered, would not be surrendered at all by the other.

2 LINCOLN, supra note 1, at 5-6.

One-eighth of the whole population were colored slaves, not distributed generally over the Union, but localized in the Southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was, somehow, the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union, even by war; while the government claimed no right to do more than to restrict the territorial enlargement of it.

Id. at 657. (President-elect Lincoln observed, in a private letter of December 11, 1860, "You know I think the fugitive-slave clause of the Constitution ought to be enforced—to put it in its mildest form, ought not to be resisted." 1 LINCOLN, supra note 1, at 658. See 6 WEBSTER, supra note 2, at 562.) See also notes 12 & 13 supra; note 56 infra.

46. For a far less inspired version of the Gettysburg Address, see 2 LINCOLN, supra note 1, at 366; and, for private remarks on the death of a Union Army officer, see id. at 52. See also id. at 600; 1 LINCOLN, supra note 1, at 167; 6 WEBSTER, supra note 2, at 601; note 48 infra.
of its defense all are here made equals: friends and enemies; all the living—perhaps the immediate dead alone are temporarily of superior worth. In a sense, even the fathers are placed on the same level as ourselves, since we can do now what they did once; perhaps we can do even more. Furthermore, the activities of the common man are ennobled: the anonymous soldiers, volunteer and conscript, friend and enemy, living and dead, share with us, those present and those to come, in the great endeavour. We notice also that he does not speak of “crusade” or even of “mission,” but rather of “work” and of “task”: the commonplace is elevated in this reaffirmation of equality.

But equality cannot be left, as it is said by some of its partisans to have been left in the Declaration of Independence, without qualification: certain objections must be met and limitations recognized, if there is to be a realistic dedication to equality. Liberty, too, that liberty for which the vanquished in the civil war can be said to have fought, must be redefined: liberty is qualified by the necessity of recognizing the principle of equality; it becomes “freedom,” a word connoting more of restraint and reflection than does “Liberty.” Thus, liberty is transformed into a newly-born freedom, a freedom which may be seen as somehow subordinated to the cause of responsible popular government.47

We return to the development of equality. It, too, is transformed into, or at least culminates in, “government of the people, by the people, for the people.” This suggests the total dedication to popular government, to a regime which recognizes in this manner the political relevance of the equality of all men.48 Equality, thus perfected or,
at least, transformed in its trinitarian garb, becomes politically defensible. Indeed, this equality, coupled with an essentially subordinated liberty, can even become permanent. Republican institutions, thus somehow transformed, can be perpetual.

Does not a noble rhetoric help men put up with the "partial and temporary departures" from the "leading object of the government"—departures which "necessity" imposes upon a community? In fact, does not rhetoric implicitly deny the existence of equality among men? That is, it assumes (even in the best of circumstances) that there are two kinds of men in the world, those who know (or can be led to know) and those who do not know (or who cannot be led to know) but who have to be otherwise guided to do what is good or sensible. See, e.g., Aristotle, Rhetoric 1382b1-8, 1415a37-b20 ("It is plain that such introductions are addressed not to ideal hearers, but to hearers as we find them"); id. at 1419b7 ("Irony better befits a gentleman than buffoonery; the ironical man jokes to amuse himself, the buffoon to amuse other people"). (Rhetorical means, in practise, no footnotes: that is, qualifications, sustained substantiation and documented evidence are neither necessary nor useful; a "first reading" suffices for most people. See notes 1, 11 & 25 supra. See also The Constitutionalist, supra note 3, at 735-36 n.135, 766-67 n.181).

Does not the conclusion of the Rhetoric—which shows Aristotle himself doing what he describes as appropriate for the conclusion of a rhetorical address (that is, "For the conclusion, the disconnected style of language is appropriate, and will mark the difference between the oration and the peroration. I have done. You have heard me. The facts are before you. I ask for your judgment.") Rhetoric 1420b)—suggest that his work as a whole is, in a sense, rhetorical (on behalf of a genuinely good-intentioned rhetoric?) and that it itself is organized according to rhetorical principles and must be examined accordingly?

The power, as well as the limitation, of rhetoric may be seen in what Everett had to say in the biographical memoir of Webster, from which we have quoted in part MI of this article:

A speaker could not, if he attempted it, anticipate in his study the earnestness and fervor of spirit induced by actual contact with the audience; he could not by any possibility forestall the sympathetic influence upon his imagination and intellect of the listening and applauding throng. However severe the method required by the nature of the occasion, or dictated by his own taste, a speaker like Mr. Webster will not often confine himself "to pouring out fervors a week old." He must entirely possess himself beforehand of the main things which he wishes to say, and then throw himself upon the excitement of the moment and the sympathy of the audience.

The unforeseen incident or locality furnishes an apt and speaking image; and the discourse instinctively transposes itself into a higher key.

It is illuminating that the Gorgias, which may be Plato's principal dialogue on rhetoric, should open with a worldly politician (an admirer of rhetoricians) invoking (if only in jest) a proverb which takes personal selfishness for granted (and even legitimates it). Rhetoric, since it does not have intrinsic to it an end (unlike, say, the art of medicine), is at the service of the desires the user of rhetoric happens to have (desires which may even be "unpatriotic," e.g., the desire to arrive at a battle at its conclusion, instead of when one can help one's city?).

Rhetoric can be touted as permitting one to free oneself and to enslave others. See Plato, Gorgias 452d. (See also Plato, Meno 71e, 76b; the quotation from Hobbes in note 45 supra.) Thus, users of rhetoric try to get the better of one another as practi-
Men begin by wondering about the durability of their uniquely-constituted regime. This one, properly tested—for the magnitude of the sacrifices seems to drive and permit partisans to make the necessary qualifications of the conflicting principles which were originally proposed at their fullest—this regime, then, properly tested (that is, tempered, as well), will endure forever. And thus the struggle will not have been in vain.49

(See PLATO, REPUBLIC 349a sq.) In this respect, then, the “art” of rhetoric is like the art of war, with each practitioner looking out primarily for his interests. Socrates does recognize, however, that Gorgias can do things which Socrates himself is “temperamentally” unable to do, things which could, if properly directed, serve Socrates’ philosophical concerns. See note 20 supra. See also PLATO, REPUBLIC 459c-460a.

Consider the salutary blending, for self-confident republican government, of “freedom” and “equal” in Morris’s description of America as “a Nation, every Individual of which in the Pride of Freedom thinks himself equal to a...” [Note 1 DIARY, supra note 29, at 2. See 2 LINCOLN, supra note 1, at 570; cf. PLATO, CRITO 44c, 49d; PLATO, EPISTLES II 314a; PLATO, REPUBLIC 473c sq; PLATO, STATESMAN 293b.

Consider, also, Morris’s endorsement of the relative equality among Americans: “Oh! my Country, how infinitely preferable that equal Partition of Fortune’s Gifts which you enjoy! Where none are Vassals, none are Lords, but all are Men.” [Note 1 DIARY, supra note 29, at 73. (For the context of these remarks, see text accompanying note 32 supra.)

49. This may have been the first of the wars to end all wars.

The timeless character of the Address is suggested by the absence of proper names and of dates. The “four score and seven years ago” could be anytime. Not even the identity of the speaker is indicated. Is not the eternal characterized by its lack of dependence upon particulars? Cf. notes 52-53 infra.

The yearning of the political man, for his kind of immortality, may be seen in the closing sentence of the Gettysburg Address. See THE CONSTITUTIONALIST, supra note 3, at 796-97 n.30. There are, in the long closing paragraph of the Address, a half dozen or so uses of “here.” It seems to be said thereby that the proper attention to the here and now can lead to something which endures forever. Is not this, in modernity, the essentially political claim (or expectation or delusion)? (God is brought in to ratify and reinforce the political effort, but it is all essentially man’s doing? Thus, God does help those who help themselves? Thus, also, Nikos Kazantzakis can have one of his characters say, in his 1910 play, Protomasteras, “Why prattle about God, when man is omnipotent, or can be?” [Note 43 supra.)

But on the other hand, the central sentences of the Address (“It is altogether fitting and proper that we should do this. But, in a larger sense, we cannot consecrate—we cannot hallow—this ground”) may reflect the essential ambivalence of political things: one aspires and yet one realizes that one cannot really do it, that the enterprise cannot have the perfection or even the permanence for which one yearns. There is a sense, however, in which the political man must believe his own rhetoric insofar as he takes seriously what he is doing in devoting his life to public service.

Thus, does not Lincoln do with the Civil War what the South had been obliged to do with Slavery? [Note 1 LINCOLN, supra note 1, at 55-56, 175; 2 LINCOLN, supra note 1, at 243-44, 509. That is, is it not a move of desperation (as well as an expression of confidence in the underlying order of the universe?) to regard a great affliction as a...
The limitations of the political are transcended: the kingdom of God is brought forth on this earth.

4.

This prophetic, perhaps even messianic, statement opens with an emphasis on the deed. We have been reminded of both the Creation of *Genesis* and of the Exodus. This emphasis on the deed, however, is but an appearance: for is it not the word which marks the true beginning? The "four score and seven years" go back, as we have seen, to 1776 and the Declaration of Independence, from which, as well, the "created equal" language is drawn.

The deeds would be seen, one might say, in the Revolution itself, which began in 1775 and continued until 1783; or the deeds are seen, in a sense, in the Constitution ordained and established in 1789. But 1776 is indicated as the decisive date for bringing forth the new nation—and with this designation there is foreclosed a constitutional controversy which had racked the Republic for decades. A nation, not a union—the word "union" is not used (just as "nation" is not used in the Constitution)—a nation was formed in 1776. That nation is older than the Constitution: it is a nation which can somehow be said to be one—and, of course, separation and dissolution of that nation would be unnatural as well as impious.

The word constitutes the beginning. Yet, the self-effacing statesman notes, "The world will little note, nor long remember what we say here, but it can never forget what they did here." We, of course, know better; but perhaps he did too. He remembered what was said in 1776. But had others? Had the deeds of the Revolution been remembered but its words forgotten? Are fresh words needed every generation or two? However that may be, this was but one of many battles of the war—in fact, it was three battles—in some ways inconclusive, not necessarily the bloodiest of the war. Yet this is the battle which is remembered—but primarily because of the word which has

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positive good? To what extent is this a response shaped by Christian (or Biblical?) sentiment? See, e.g., 2 LINCOLN, supra note 1, at 657 ("[t]he Almighty has his own purposes"); 3 WEBSTER, supra note 2, at 78; notes 26 & 41 supra; notes 53, 58, 61 & 64 infra. For the sanctified sufferer, see SOPHOCLES, OEDIPUS AT COLONUS; SOPHOCLES, PHILECTETES; N. HAWTHORNE, THE SCARLET LETTER. Consider AUGUSTINE, CONFESSIONS; J. CONRAD, THE HEART OF DARNEDNESS; T. MANN, THE MAGIC MOUNTAIN; H. MELVILLE, TYPEE; L. TOLSTOY, THE DEATH OF IVAN ILYITCH.
become associated with it and which has helped make it what we take it to be, the turning point of the war.

Still, the deeds of men are extolled. They are unsurpassable, at least as measures of devotion and sacrifice. But even these unforgettable deeds will have been in vain if continued effort is not made. However great the deeds up to now have been—the deeds both of the fathers and of the brave men living and dead who struggled here—however great these deeds have been, they can be lost forever.

The first of the deeds to follow immediately upon those which have gone before consists of the dedication of this field. The dead must be properly buried. But the dead are left to bury the dead: “we cannot dedicate—we cannot consecrate—we cannot hallow—this ground.” We cannot, we will not, perform the duty we came to do.\footnote{50. This passage is also discussed in the preceding note. Cf. 1 LINCOLN, supra note 1, at 691-92 (wherein Lincoln does “proceed to the very agreeable duty assigned to [him of raising a flag]”); \textit{Genesis} 50:25-26; \textit{Exodus} 13:19; \textit{Joshua} 24:32; \textit{Sophocles, Antigone}. But see \textit{Matthew} 8:22. But cf. \textit{Matthew} 26:12-13.} The dead are left to themselves as are, one might even say, the fathers who have gone before.

Another task, a greater task, awaits us, awaits those who share in the words which are delivered. A new nation is brought forth, one which first came to light in “ancient” words but which can now be realized to a degree impossible with its predecessor. It is the role of the political poet—a poet who knows that “heard melodies are sweet, but those unheard are sweeter”—it is this poet’s role to make that word manifest. Do we move from fallible fathers to a father whose word can be universal and whose regime is perpetual?

This dedication he seems to conceive to be his duty. But we have seen him unable to perform one duty. The devotion and sacrifices of many are required for effective dedication: and the many continually change. Does he bring forth a goal which is both realistic and illusory—realistic in that it can enlist the efforts of world-wide multitudes, but illusory (and hence deceptive) in that it is doomed to eventual disappointment?

The primacy of the word is, as we have seen, implied by Lincoln’s thought. And yet, but for the support of many deeds, many unsung and even many unknown deeds, words are without effect. It would
be painful for us to imagine how the Declaration of Independence and the Gettysburg Address would be regarded today had their authors gone down in defeat. But, on the other hand, victories alone do not insure undying glory: they must be explained, extolled, and utilized.

Deeds do depend on circumstances. Words are much more flexible: the eternal city can be enshrined in words. Indeed, one who makes much of words may ignore the particular, the concrete. But the Declaration of Independence does recognize limitations: no single form of government is advocated. That is, there can be circumstances when any particular form of government might be harmful and undesirable. It is hard to imagine the authors of the Declaration speaking of any one form of government as enduring forever or even for as long as the earth remains.

But the claim need not really be made that the form of government

51. Pericles' famous funeral address is part of a total account which shows the "victory" (that is, the grandeur) of Athens. That address, unlike Lincoln's, shuns the subject of death. See L. Strauss, THE CITY AND MAN 194-95 (1964). Lincoln, we have suggested, can be said to have both extolled and abandoned the dead. (An essay on death concludes HUMAN BEING AND CITIZEN, supra note 1.) On the relation of public to private interest in Athens (and in Pericles' thought), see L. Strauss, THE CITY AND MAN 192-209 (1964). Lincoln's address, unlike Pericles', shuns the subject of private interest: that is, he seems to proceed on the assumption that private interest can be completely "dedicated to the great task remaining before us . . . ." Does, however, the affirmation of equality induce each man to make more of his private interest, even at the expense of the very public which sanctifies that affirmation? We Americans need to consider, among other things, what we mean by "need." To what extent can a community such as ours rely upon what Lincoln called "the patriotic instinct of the plain people"? LINCOLN, supra note 1, at 65. Or, put another way, "Can you tell me, Socrates, whether virtue can be taught? Or is it not teachable, but to be acquired by practise? Or is it to be acquired neither by practise nor by learning, but does it originate in human beings by nature, or in some other way?" Plato, MENO 70a. See pt. I, § 13 supra; notes 6, 36 & 48 supra.

On the funeral address in Plato's Menexenus, see THE CONSTITUTIONALIST, supra note 3, at 801-02 n.36; on Sophocles' Antigone, see id. at 798 n.32; on Plato's Meno (which may be studied with the greatest care, if one does not know Greek, in the John Gormly translation), see id. at 534 n.94, 792 n.22, 799 n.32. See also Anastaplo, Law and Morality: On Lord Devlin, Plato's Meno, and Jacob Klein, 1967 Wis. L. REV. 231.

It should be noticed, with respect to the distinction between words and deeds, that once Lincoln assumed the Presidency he seldom made the long, discussion-like public speeches (grounded in the Declaration of Independence) he had frequently made earlier. That is, his speeches then became, as pronouncements, more like deeds? See 1 LINCOLN, supra note 1, at 623; 2 LINCOLN, supra note 1, at 513; note 54 infra. Consider also CONFUCIUS, ANALECTS bk. 15, ch. 40 ("The Master said, In official speeches all that matters is to get one's meaning through").

On unheard melodies, see John Keats' Ode on a Grecian Urn. "The hidden harmony is better than the obvious." Heraclitus, FRAGMENT 54.
of which Lincoln speaks will always be present on the earth. Rather, one might suggest, it is only that the possibility of its reincarnation will always exist once it has been tested and found adequate. The memory of it as successful will endure; and so it will remain continually available, continually attractive to men who will again and again establish it when and where conditions permit. On the other hand, the failure of the test now could discredit forever this form of government.

But is the Gettysburg Address this restrained? Do not the passions of war usually make prudence and selective restraint less attractive to a suffering people than they would be in ordinary times? The tenor and effect of Lincoln’s argument do point to a single form of government which can be made permanent and, by extension, available to (if not even the best for) all peoples.52 Does not such single-mindedness lose sight of the ends of government and of the limitations imposed by those ends?

There may be, in the Gettysburg Address, except for what is implied in the reference to “fitting and proper,” no invocation of standards outside or above the very regime which is to be perpetuated. Perhaps there cannot be. Perhaps that would constitute a limitation upon that

52. We recall that the world-wide scope of Lincoln’s vision emerges from attention to a particular “portion of that field.” Parallel to this development is the movement from eternal rest (after the earlier motion of “our fathers”) to perpetual motion. The universal, in Lincoln’s thought, seems to be reflected in, perhaps to be even dependent upon, the particular. Is this an inspiration which the practical man shares with the poet? Cf. note 49 supra. See the Epilogue to Anastaplo, Obscenity and Common Sense, in TOOTHING STONES: RETHINKING THE POLITICAL 205 (R. Meagher ed. 1972). Do not both Lincoln and the Marxists draw upon the same post-classical doctrines in their yearning for a comprehensive vision which can be realized in practical affairs? See notes 39 & 43 supra; notes 54, 58 & 64 infra.

See, as an anticipation of Lincoln’s closing words in the Address, certain remarks by Webster in 1824 in support of the revolution in Greece against Turkish despotism:

The civilized world has done with “the enormous faith, of many made for one.” Society asserts its own rights, and alleges them to be original, sacred, and unalienable. It is not satisfied with having kind masters; it demands a participation in its own government; and in states much advanced in civilization, it urges this demand with a constancy and an energy that cannot well nor long be resisted. There are, happily, enough of regulated governments in the world, and those among the most distinguished, to operate as constant examples, and to keep alive an unceasing panting in the bosoms of men for the enjoyment of similar free institutions.

3 WEBSTER, supra note 2, at 70. Cf. THE CONSTITUTIONALIST, supra note 3, at 732 n.127.

Is there not something salutary in the use by Webster of the term “regulated governments”? It suggests, that is, the prudence which should moderate the claims of both liberty and equality, thereby making republican government durable. But, unlike Lincoln, Webster did not consider the United States the only model of good government then available? See the very end of note 65 infra.
all-inclusive popular sovereignty seen in "of the people, by the people, for the people." The only test suggested—aside, perhaps, from the deference which seems to be paid to the permanent public or world opinion—is that of endurance. Nobility is seen in terms of sacrifice; the principal virtue—but of course this is a time of war—is courage. Nothing is said explicitly of human excellence generally or of beauty.68

Still, both nobility and beauty are exhibited in the flowering that is Abraham Lincoln. Perhaps he can be seen as the peak of the regime he seeks to perpetuate, at least before that regime is transformed. For there had been in that regime an element which seems to have been eclipsed by the Civil War, an element which could be regarded as aristocratic. This is evident not only in our constitutional documents, but also in the men who produced those documents. There is implied by this element, which may be seen in its more material manifestation in the beauty and grace of Jefferson's Monticello, a regard for excellence for its own sake. The writings of Lincoln, on the other hand, as well as what is generally known of his life, strike a curiously utilitarian—a sublimely utilitarian—note. Would not politics, rather than philoso-

53. Plutarch, in The Comparison of Pelopidas with Marcellus, expresses "frank indignation" that good men "would waste all their other virtues upon that of bravery [by] throwing away their lives . . . ." (Lincoln concluded his address to Congress and the country on July 4, 1861, "And having thus chosen our course, without guile and with pure purpose, let us renew our trust in God, and go forward without fear and with many hearts." 2 LINCOLN, supra note 1, at 66.) For a most sensible analysis of the ambiguous virtue of courage, see the extended discussion in Aristotle's Nicomachean Ethics. That discussion was usefully summed up for us a decade ago in a tale by a second grader of uncommon common sense: "Once upon a time there was a little brave mouse who lived in a living room. One day he was walking and he saw a cat. The brave little mouse ran away." Cf. THE CONSTITUTIONALIST, supra note 3, at 239 (on the noble folly of John Quincy Adams with respect to the anti-slavery petitions submitted to and suppressed by Congress). But see id. at 730 n.122. See also PLATO, REPUBLIC 486a-b.

Consider, with respect to the test of "endurance": "There are two ways of establishing a proposition. One is by trying to demonstrate it upon reason, and the other is, to show that great men in former times have thought so and so, and thus to pass it by the weight of pure authority," 1 LINCOLN, supra note 1, at 551. Can events (or the "competition of the market") be relied upon? Only if "the Almighty Ruler of Nations, with his eternal truth and justice," referred to by Lincoln in his First Inaugural Address, does manage the affairs of men? Do events depend ultimately on chance, no matter how prudent one has been? See, e.g., MACHIAVELLI, THE PRINCE ch. 7 (on the fate of Cesare Borgia). Lincoln's name does survive in part as a result of what he chose to do with the Gettysburg Address. But so does that of an otherwise undistinguished Mr. Getty? Consider, also, the dubious origins of the name, "America." Does philosophy alone stand a chance of freeing itself from the here and now and hence from chance? Cf. ARISTOTLE, RHETORIC 1379a34-35. See THE CONSTITUTIONALIST, supra note 3, at 763-65 n.177, 805-08 n.39; notes 2, 41, 49 & 52 supra; note 64 infra.
This utilitarian note seems related to the egalitarian inclination of Lincoln's political thought. That inclination, with its reflection of Christian influences, may be responsible for what we have several times noted about the ambiguous status of human excellence under this regime. It must be doubted whether the highest human excellence can be nurtured in a people as a whole, however much a popular regime recognizes an aspect of justice which the confident aristocrat may tend to overlook.

6.

Our regime, it has been said, can be made perpetual: the essentially political may thereby be transcended. Men will sacrifice for such a regime, especially men who have been nourished (in a Christian era) on a yearning for immortality. But does not the refusal to recognize limitations conceal dangers? Does not, for example, the dedication to establishment of equality—as distinguished from the conception in liberty—lead to an insistence upon unqualified popular government

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54. One exception to the utilitarian note may seem to be Lincoln's remarkable talent for humorous stories. His wit could somehow assert itself, although transposed, even in grim circumstances. See, e.g., 2 Lincoln, supra note 1, at 250, 307, 438, 468, 495, 520, 662, 737-38. See also 1 Lincoln, supra note 1, at 198, 234, 370, 421, 464, 482. Also remarkable (but unphilosophical?) was his periodic melancholy. (For instructive, if sometimes perverse, comments on wit and melancholy, see Hobbes, Leviathan bk. 1, ch. 8.)

On the relation of the useful and the noble, see The Constitutionalist, supra note 3, at 651 n.91, 670 n.2; Aristotle, Rhetoric 1389a33-35, 1389b35-1390a5, 1393a13-16.

On the relation of politics to philosophy, see Anastaplo, Human Being and Citizen: A Beginning to the Study of Plato's Apology of Socrates, in Ancients and Moderns: Essays on the Tradition of Political Philosophy in Honor of Leo Strauss (J. Cropsey ed. 1964). (Some corrections for that article are noted in The Constitutionalist, supra note 3, at 419-20 n.1, 785-87 n.12. Even more may be found in the version of the article to be published in Human Being and Citizen, supra note 1.)

Lincoln, with his lifelong interest in technology and progress, which seems to fit in temperamentally with a dedication to effective equality, would have "appreciated" such "pushing back of the frontiers of knowledge" as is reported and promised by modern astronomy. See note 43 supra. But would not his appreciation have been directed primarily to the practical, not the speculative? Deeds would be paramount, not words, except as words serve deeds? That is, words for their own sake look to an emphasis upon understanding for its own sake, as something superior to nobility and even to morality? See Klein & Strauss, A Giving of Accounts, The College, Apr., 1970, at 1. See also The Constitutionalist, supra note 3, 803-05 n.38, 805-08 n.39; note 64 infra; cf. the conclusion of pt. III, § 1 supra.
and, in principle, upon eventual unquestioning conformity to all which the people decrees, especially through its government?55

This is not to say that Lincoln should not, in the circumstances in which he found the country, have thrown his weight on the side of equality: for the case for equality is, at its roots, the case for social justice. The struggle for equality among us seems to have been successful: thus, for example, one can, not unreasonably, observe today that the critical racial problem in this country has been (for at least a generation now) placed “in the course of ultimate extinction.” The general, as well as the better, public opinion on this issue seems to be deepening and is reinforced by the effective law.

But, on the other hand, liberty may have become more dubious than it has ever been. It is perhaps intrinsically more fragile than equality, since the people at large can more readily see the stake they have in equality and the institutions (including the economic institutions) in which equality is expressed. One encounters in the Twentieth Century more and more complaints about the dangers of liberty, about its limitations, about its self-contradictions. This is reflected as well in the move among us toward the consolidation of a comforting General Government and in the distrust of local self-government. Thus, does there not continue to this day something valid in the claim which was heard in Lincoln’s day, that the South is the champion of American liberty?56

55. See THE CONSTITUTIONALIST, supra note 3, 499-500 nn.116-17; notes 23 & 48 supra. A religion, political or otherwise, to be effective must be, to some degree, single-minded and even ruthless: the prerogative generously exercised by Jesus in healing on the Sabbath may have threatened Israel no less than did those in the desert who selfishly worshipped the golden calf. See id. at 436 n.38, 667 n.124, 677 n.14, 784 n.10.

56. Shades of Governor Wallace! Consider, however, General Grant’s reflections at Appomattox Court House:

What General Lee’s feelings were I do not know. As he was a man of much dignity, with an impassible face, it was impossible to say whether he felt inwardly glad that the end had finally come, or felt sad over the result, and was too manly to show it. Whatever his feelings, they were entirely concealed from my observation; but my own feelings, which had been quite jubilant on the receipt of his letter, were sad and depressed. I felt like anything rather than rejoicing at the downfall of a foe who had fought so long and valiantly, and had suffered so much for a cause, though that cause was, I believe, one of the worst for which a people ever fought, and one for which there was the least excuse. I do not question, however, the sincerity of the great mass of those who were opposed to us.

PERSONAL MEMOIRS OF ULYSSES GRANT 629-30 (1894).

Lincoln had, on July 4, 1861, questioned “this magical omnipotence of ‘State Rights,’” having already asserted:

This sophism derives much, perhaps the whole, of its currency from the assumption that there is some omnipotent and sacred supremacy pertaining to a State—to each State of our Federal Union. Our States have neither more nor less power than that reserved to them in the Union by the Constitution—no one of them ever having been a State out of the Union.
However this may be, the many who belittle liberty among us do not seem to realize that in a regime such as ours, where equality is vital, and perhaps unavoidable, liberty provides an opportunity as well as an incentive for excellence.\(^5\) Lincoln's recognition of this can be said to have been testified to by the extraordinary care he took to pre-

2 LINCOLN, supra note 1, at 61-62. Does not this underestimate somewhat (however usefully for the occasion) the role of the States in the 1787-1789 period? Does it not conveniently ignore, for example, the implications of the “power” of the States at that time to stay out of the newly reconstituted Union? Lincoln's attitude against States' rights comes down to our day. Its transmittal to us may be seen in such forms as that evident in a letter of November 23, 1912, from Theodore Roosevelt to Charles E. Merriam (University of Chicago Archives):

I was very anxious to get the Republican Party back to what it was in the days of Abraham Lincoln and make it the real progressive party of the country; because I do not believe that the Democratic Party can ever become such a progressive party because it is tied to absolutely outworn principles, especially to the ruinous principle of States' rights.


We venture to suggest that the political eclipse of President Nixon really began well before “Watergate,” when his Administration decided to proceed with the prosecution in Illinois of a former governor, a Democrat, on charges with respect to his conduct of State business. Was not this the decisive signal to Mr. Nixon’s “enemies” that “the wraps were off,” that the previously accepted standards of political toleration would not continue to be respected, that the General Government could not be depended upon to “mind its own business”? This threatening imprudence was anticipated by the disruptive folly of the Chicago Conspiracy Trial prosecution in 1969. On the Conspiracy Trial, see THE CONSTITUTIONALIST, supra note 3, at app. D; on the Kern Trial, see Anastaplo, Is U.S. Prosecution of Local Politicians Healthy?, Chi. Tribune, Apr. 22, 1973, § 2, at 3.

The “in the course of ultimate extinction” language may be found at, among other places, 1 LINCOLN, supra note 1, at 480; cf. id. at 252. See note 6 supra.

57. See Anastaplo, Book Review, 41 N.Y.U.L. REV. 644 (1966); note 40 supra; note 64 infra.

Our adversaries have adopted some declarations of independence in which, unlike the good old one, penned by Jefferson, they omit the words “all men are created equal.” Why? They have adopted a temporary national constitution, in the preamble of which, unlike our good old one, signed by Washington, they omit “We, the People,” and substitute, “We, the deputies of the sovereign and independent States.” Why? Why this deliberate pressing out of view the rights of men and the authority of the people?

2 LINCOLN, supra note 1, at 64. Does not the doctrine of equality, once accepted, tend to be harmonizing, even though it runs the risk of legitimating mediocrity? Does not the doctrine of liberty tend to promote distinction, even though it runs the risk of provoking disruption? See notes 6 & 48 infra,
serve the liberties of citizens even in the midst of clear, present and
overwhelming dangers to constitutional government. It can even be
seen in his First Inaugural Address (delivered on the eve of a terrible
rebellion)—in his reaffirmation there of the right of revolution, that
most paradoxical doctrine of the Declaration of Independence, a doc-
trine which acknowledges the right and the duty of man to look beyond
any particular government, any particular regime, to standards above
all regimes.

Indeed, it may be that the right of revolution, properly qualified,
should be for us today, especially in a century of totalitarian govern-
ments and "mass movements," that affirmation of the Declaration of
Independence as appropriate to our immediate concerns as the "cre-
ated equal" affirmation was to Lincoln's: for, as we have suggested
on more than one occasion, the right of revolution looks ultimately to
a standard of human excellence and hence to nature. This contem-
porary cause on behalf of natural right may call for the articulate sac-
rifice and dedication which Lincoln's did. Effective dedication de-
pends on a return to an understanding not only of the fundamentals
of this regime but also of the nature of men and hence of all regimes.
We must return, that is, not only to the Founding Fathers, but also to
their teachers.88

88. Do not the ancient lights kindled in Greece and Rome somehow shine through
the Declaration of Independence more than through the Gettysburg Address? See notes
41, 42, 43, 51 & 54 supra; note 61 infra.

Is it not one ancient teaching, with which Americans (insofar as they are moderns)
are somewhat uncomfortable, that "men have no right to what is not reasonable, and
to what is not for their benefit"? 5 E. BURKE, WORKS 68. Something of the ancient
教学 is indicated in Lincoln's observation that "nothing should ever be implied as
law which leads to unjust or absurd consequences." 2 LINCOLN, supra note 1, at 63.
But if the law should happen to be explicit in ordaining "unjust or absurd conse-
quences," what then? And what if the "sovereign people" should insist upon injustices
or absurdities? That is, would not both Webster and Lincoln agree with Morris that
"the Basis of our own Constitution is the indefeasible Right of the People to establish
it?" 2 DIARY, supra note 29, at 533. See 2 LINCOLN, supra note 1, at 586 (note 43
supra); 5 WEBSTER, supra note 2, at 433; cf. 1 LINCOLN, supra note 1, at 510 ("But
if it is wrong, he cannot say people have a right to do wrong"); 2 LINCOLN, supra note
1, at 586 ("If the people should, by whatever mode or means, make it an executive duty
to enslave such persons, another, and not I, must be their instrument to perform it");
id. at 615; cf. also PLATO, APOLOGY 32b-d; 1 DIARY, supra note 29, at xlv; The Con-
stitutionalist, supra note 3, at 458-60 n.35.

Is it not another ancient teaching, with which pious Americans are somewhat uncom-
fortable, that only human reason can (but that it can) truly guide human conduct, even
with respect to the proper place among us of divine worship? (See, e.g., the passage
from 2 LINCOLN, supra note 1, at 509, quoted in note 64 infra.) The post-classical view
takes two curiously related forms, that of modern relativism and that of revelation.
Traditional political thought emphasized the dependence of the commonweal upon religious support for the moral and even political virtue of the citizen body. This awareness is reflected in an 1846 handbill by Lincoln in which he replied in this cautious fashion to the charges of infidelity made against him in the course of a congressional election campaign:

I do not think I could myself, be brought to support a man for office, whom I knew to be an open enemy of, and scoffer at, religion. Leaving

Consider, for example, George Santayana's pronouncement (made from a Christian perspective):

Shakespeare's world . . . is only the world of human society. The cosmos eludes him; he does not seem to feel the need of framing that idea. He depicts human life in all its richness and variety, but leaves that life without a setting, and consequently without a meaning.

G. SANTAYANA, Absence of Religion in Shakespeare, in Little Essays 189 (L. Smith ed. 1967). Consider as well, the admonition of Pope Paul VI, in his Christmas 1973 message: “Today many people substitute anthropology for theology. They see in Christianity a human value that is acceptable to all; they do not see the divine truth that gives this human value its reason for being and its infinite worth.” Or, to put the ancients-moderns distinction in another way, the ancients, even when they sensed the impermanence of all things, including of human existence, were not so self-centered as to indulge themselves in an apocalyptic view of the world. See note 33 supra. Or, to put the ancients-moderns distinction in still another way, “It is baffling to reflect that what men call honour does not correspond always to Christian ethics.” Winston Churchill, as quoted in H. JAFFA, THOMAS AND ARISTOTELIANISM ii (1952). See note 20 supra; note 61 infra.

It is our opinion, it should be noted in passing, that Churchill is himself “post-classical” in certain decisive respects, just as is (we argue in note 64 infra) Lincoln himself. (And, it should also be noted with a view to our discussion below, Shakespeare may also be, although to a lesser degree, “post-classical”: this may be seen in the emphasis in Shakespeare's work on the “conscience” (that conscience which is so much a part of modern “individuality”). Compare the discussion, in Aristotle's Nicomachean Ethics, of “shame,” something which is decisively more social than is “conscience”? Thus, the difference between “conscience” and “shame” is critical in any serious assessment of the fate of Sir Thomas More. See Confucius, Analects bk. 2, ch. 3.)

Curiously enough, one reviewer has seen The Constitutionalist as assuming that “principles must be given priority over consequences.” 68 Am. Pol. Sci. Rev. 774, 775 (1974). Such a self-centered assumption (however noble it can sometimes appear) would have as one consequence the virtual elimination of prudence and hence of responsible politics. Even more bizarre is the polemicist who concluded his review of the book: “In short, Professor Anastaplo, despite his surface admiration of Plato and Aristotle, does not have a classical perspective of politics. In this regard he is truly representative of the Straussian school of political theory.” 17 Modern Age 93, 94 (1973). Cf. Willmoore Kendall's endorsement of the same classical studies, 61 Am. Pol. Sci. Rev. 783 (1967); 16 Revue Francaise de Sciences Politiques, Feb., 1966, at 115.

Is not the Gettysburg Address more distinctively “American” than either the Declaration of Independence or the Constitution in that it was written by someone who had been an American all his life, unlike the authors of 1776 and 1787?
the higher matter of eternal consequences, between him and his Maker, I still do not think any man has the right thus to insult the feelings, and injure the morals, of the community in which he may live.59

Lincoln accepted under the Constitution the practical necessity for separation between the Church and the General Government. Thus, we find him, as President, insisting on more than one occasion, in directives to the military governors of occupied rebel territory:

[T]he United States Government must not . . . undertake to run the churches. When an individual in a church or out of it becomes dangerous to the public interest, he must be checked; but let the churches, as such, take care of themselves. It will not do for the United States to appoint trustees, supervisors, or other agents for the churches.60

And again, to a complaining citizen:

I have never interfered, nor thought of interfering as to who shall or shall not preach in any church; nor have I knowingly or believably tolerated any one else to so interfere by my authority. If any one is so interfering by color of my authority, I would like to have it specifically made known to me. . . . I will not have control of any church on any side.

But Lincoln never lost sight of the reliance that government places upon the religious sentiment of its people. Even more vital, and this is seen in several of his proclamations as well as in the Second Inaugural Address, religious passions may be needed, especially in a continental popular government (where glory cannot be depended upon either to sustain or to restrain massive action and where political tradition may be sapped by egalitarian doctrines)—religious passions may be needed to provide the transcendent supports which the essentially temporal and temporary political enterprise seems to require.

The excellent man must guide and shape. He alone can give an enduring grace and meaning to the deeds and even the aspirations of men. Lincoln did so by taking the materials at hand and devoting them to a restatement of the American creed. He saw the Declaration of Independence as a way to establish a religious and moral foundation for the nation. He believed that the government should not interfere with the religious institutions, but it should also not refrain from using religious sentiments to guide its actions. Lincoln's emphasis on religious passion reflects his commitment to the idea that the nation's success depends on the moral and spiritual support of its people.
of Independence—perhaps because of its aristocratic accents and its historical associations—he seems to have seen the Declaration as somewhat compromised in his time. Its doctrines, especially what he regarded as its most immediately vital doctrine with respect to equality, had to be adapted to his circumstances and then reinforced by the use of the religious fervor and imagery which the authors of the Declaration itself had not seen it either fit or necessary to use.\(^{61}\)

\(^{61}\) In this respect, the authors of 1776 may have been more like the classics, mindful of the observation in Matthew 6:24, that no man can serve two masters. We notice, however, in Part II, Section 5 of this article, that the attitude of Morris differed in this respect from that of Jefferson. See also the chapter, *Religion and the Social Order*, as well as the Appendix, in P. Boller, *George Washington & Religion* 45-65, 163-94 (1963). Washington's sentiments are indicated in the passage cited in note 62 infra. For Webster's public reliance upon Christianity, see 3 Webster, *supra* note 2, at 75; 4 Webster, *supra* note 2, at 234, 371; 5 Webster, *supra* note 2, at 330-31. Consider, for Lincoln's views, such public statements as that found in the First Inaugural Address: "Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust in the best way all our present difficulty." 2 Lincoln, *supra* note 1, at 7. See id. at 254, 452-53, 478.

What were Lincoln's private opinions on this subject? Does the truly political man eventually cease to have private reservations with respect to the most important questions? Can he preserve, that is, a deeprooted reliance upon "Reason—cold, calculating, unimpassioned reason"? 1 Lincoln, *supra* note 1, at 15. Should we want him to do so? So perceptive an observer as Alexander H. Stephens, the Vice-President of the Confederacy, said of Lincoln that "the Union with him in sentiment rose to the sublimity of a religious mysticism." Quoted in E. Wilson, *Patriotic Gore* 96-97 (1962). See note 21 supra. This is not to say, however, that mysticism rules out considerable political skill. Is not Moses a case in point? See Machiavelli, *The Prince* ch. 6. Charles Peguy is said to have characterized religion as "beginning in mysticism and ending in politics." Quoted in The Chi. Sun-Times, Dec. 29, 1973, at 36. Cannot a case be made as well for the opposite movement? See Plato, *Republic* 415c-d.

In any event, neither Lincoln nor Webster was so doctrinaire in this respect, or so reckless, as to permit himself to be labelled by his contemporaries as was the author of the Declaration of Independence, "Mr. Jefferson, the atheist Virginian." 29 Encyclopedia Americana 147 (1956 ed.). Does modern republicanism depend on that political impotence of religion which tends to result from a multiplicity of sects even while it relies on the moral character and, on occasion, even the intense fervor promoted by religious sentiment? Consider the pious hope expressed by Webster in 1833:

Heaven grant that it may be the glory of the United States to have established two great truths, of the highest importance to the whole human race; first, that an enlightened community is capable of self-government; and, second, that the toleration of all sects does not necessarily produce indifference to religion.

1 Webster, *supra* note 2, at 306. (He had said, shortly before, "So far as we can trace the designs of Providence, the formation of the mind and character, by instruction in knowledge, and instruction in righteousness, is a main end of human being." *Id.* at 305.)

We have been discussing in this note the relation of the life of reason to the life of faith. Laurence Berns has observed (in the talk on Leo Strauss quoted from in note 20 supra):

The most impressive alternative to philosophy in the life of Leo Strauss is sum-
The Declaration of Independence does invoke divinity—but it is not simply the God of Israel or the God of the Christians. Instead, we find in the Declaration the moulding of God to political institutions: the divine order of the universe conforms to the trinitarian separation of powers of Eighteenth Century American political thought. Lincoln, on the other hand, employed the God of the Bible: this is reflected in the Gettysburg Address even in his “under God” under-

moned up by the name of a city, Jerusalem, the holy city. What if the one thing most needful is not philosophic wisdom, but righteousness? This notion of the one thing most needful, Mr. Strauss argued, is not defensible if the world is not the creation of the just and loving God, the holy God. Neither philosophy nor revealed religion, he argued, can refute one another; for, among other reasons, they disagree about the very principles or criteria of proof. Leo Strauss was a Jew, a Jewish scholar, and, if I know anything about the meaning of the word, he was a philosopher; but he insisted that strictly speaking there is no such thing as Jewish philosophy. This mutual irrefutability and tension between philosophy and Biblical revelation appeared to him to be the secret of the vitality of Western Civilization.

Cf. D. Hume, An ENQUIRY CONCERNING HUMAN UNDERSTANDING (“Of Miracles”):

Eloquence, when at its highest pitch, leaves little room for reason or reflection; but addressing itself entirely to the fancy or the affections, captivates the willing hearers, and subdues their understanding. Happily, this pitch it seldom attains. But what a Tully [Cicero] or a Demosthenes could scarcely effect over a Roman or Athenian audience, every Capuchin, every itinerant or stationary teacher can perform over the generality of mankind, and in a higher degree, by touching such gross and vulgar passions.

Id. at § 10, pt. 2. Cf. also the Epilogue to Anastaplo, Obscenity and Common Sense: Toward a Definition of “Community” and “Individuality,” in TooTINO STONES: Rethinking the Political (R. Meagher ed. 1972). See notes 42 & 48 infra.

62. See Anastaplo, The Declaration of Independence, 9 St. Louis U.L.J. 390, 404-06 (1965). See also the remarks of Jaffa in note 42 supra. Had not the Declaration presented divinity in the image of the political? Did not Lincoln present the political in the image of divinity? Did the passions and memories of the Revolution temporarily (for some three score years?) take the place of religion? And then “conventional” religious passions reasserted themselves, often in bizarre forms? That is, did the different circumstances in 1776 and 1863 require different “rhetorical” responses on the part of public-spirited statesmen? Grandeur and daring, as well as mere expediency, may be seen on both occasions. See EURIPIDES, THE BACCHAE.

This shift in the character of public sentiment is indicated by Webster’s observation of May 15, 1850:

Circumstances have occurred, within the last twenty years, to create a new degree of feeling, at the North, on the subject of slavery; and from being considered, as it was at the adoption of the Constitution, mainly as a political question, it has come to be regarded, with unusual warmth, as a question of religion and humanity.

6 WEBSTER, supra note 2, at 551. Did not this mean that men, both North and South, would be less apt than their grandfathers to act sensibly? Consider, for example, the career in the House of Representatives of John Quincy Adams. THE CONSTITUTIONALIST, supra note 3, at 239. For counsels of moderation addressed especially to intellectuals, see THE CONSTITUTIONALIST, supra note 3, at 735 n.135; Anastaplo, Book Review, Chi. Sun-Times, Jan. 6, 1974, (Book Week) at 14; Anastaplo, Book Review, Chi. Sun-Times, July 8, 1973, (Book Week) at 1; Anastaplo, An Amnesty on Discussions of Amnesty?, Chi. Tribune, Feb. 25, 1973, § 2, at 2 (reprinted 119 CONG. REC. H3280-81 (May 2, 1973)). See also, on the Pentagon Papers, 118 CONG. REC. S11560 (July 24, 1972).
pinning to the final resolve, the great oath which the embattled American people is, in effect, to take. In his thought, in fact, the political history of the nation is seen as somehow conforming to, if not duplicating and perhaps even replacing, the spiritual or divine history of the world.

One can wonder about the circumstances which permitted and entitled Lincoln to employ the imagery and draw upon the passions he did. A century earlier such an endeavour might have been regarded by some as blasphemous and by others as sentimental and irrelevant; a century after him, it would have been dismissed as either affected or anachronistic. The religious devotion of his people was still strong, but already weakening: not too strong to resent an exploitation of religious sentiment for political purposes; not too weak to make such a dedication of religious sentiment ineffective. In any event, the passions aroused by the terrible fratricidal struggle proved to be such as to permit, perhaps even to compel, the public identification of the entire experience with the Passion.

63. We find two of Lincoln's sons with non-Biblical names, in marked contrast to the names of his forebears. See note 2 supra. (It should be noticed that his sons were born before the Civil War—before, that is, whatever influence toward the revival of Biblical language the passions of the War might have had on Lincoln.)

64. “Our republican robe is soiled and trailed in the dust. Let us repurify it. Let us turn it white in the spirit, if not the blood of the Revolution.” 1 LINCOLN, supra note 1, at 203 (Oct. 16, 1854). Consider H. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 228 (1959); note 40 supra. (One sees even the free-thinking Jefferson (see note 61 supra) resorting to the theological and the supernatural when most moved by the slavery question. See JAFFA, supra at 242-43.) Consider as well the inscription above the statue in the Lincoln Memorial (Washington, D.C.): “In this temple as in the hearts of the people for whom he saved the Union the memory of Abraham Lincoln is enshrined forever.”

We have in this article assigned to Webster and to Lincoln very high places in the pantheon of American constitutional heroes. See, e.g., note 41 supra. But having done so, we find ourselves obliged and, we trust, equipped and entitled to question those who would assign them (and especially Lincoln) an even higher place. May not this make too much of chance opportunities and developments? (On Lincoln’s ambition, see note 1 supra.)

It is difficult to canonize Lincoln without playing down the Constitution. But a Lincoln we do not have with us always, or if we do, it is a Lincoln who must, in large part, be understood in terms of the immediate problems confronting him, whereas a constitution should provide more enduring guidance. A good constitution is, in a sense, prudence institutionalized. It should be more the product of deliberation, and less of chance, than any particular statesman or his career.

We must be, as were both Webster and Lincoln, somewhat cautious in directing citizens to a “higher authority which sits enthroned above the Constitution and above the law.” 6 WEBSTER, supra note 2, at 558 (footnote omitted). Thus, Lincoln could instruct his political lieutenants, May 17, 1860: “I agree with Seward in his Irrepressible
Some students of politics have warned that the development in a people of a lively taste for personal immortality robs the temporal, the


Consider, as an instructive challenge, the elevation of Lincoln evident in Harry V. Jaffa's talk on Leo Strauss, 25 NAT'L REV. 1353, 1355 (1973) (Mr. Jaffa is so talented that we are confident that if there should happen to be anything both novel and of merit in the comments prompted here by his talk he will be able to take due account of it as he continues the studies of Lincoln which he has thus far so nobly advanced):

I have been asked to say a word about my own studies of Lincoln, and the American regime, in their relationship to Strauss. The most obvious connection is between Strauss's many expositions of Locke and Locke's massive influence upon America. Locke certainly represented modernity in its soberest form, although Strauss was careful to emphasize Locke's ultimate, if concealed, insobriety. But Strauss also thought that American politics at its best showed a practical wisdom that owed much to a tradition older than Locke. Indeed, Locke's esoteric teaching, which emphasized that older tradition, was taken with the greatest seriousness here. But the American regime was not formed only by Locke. Many a frontier log cabin, which had in it no philosophical works whatever, had the King James Bible—and Shakespeare. And Shakespeare was the great vehicle within the Anglo-American world for the transmission of an essentially Socratic understanding of the civilization of the West.

Most American studies begin, and properly begin, with the Constitution. The Constitution does not define the regime, but it is the most public and visible expression of it. It is part of the defect of modern politics that it looks to the character of the law, more than to the character of the men who make and enforce the law, however intimate the connection between them necessarily is. However admirable the character of the American Constitution, it was not, I thought, the most admirable expression of the regime. The Constitution is the highest American thing, only if one tries to understand the high in the light of the low. It is high, because men are not angels, and because we do not have angels to govern us. Its strength lies in its ability to connect the interest of the man with the duty of the place. But the Constitution, in deference to man's non-angelic nature, made certain compromises with slavery. And partly because of those compromises, it dissolved in the presence of a great crisis. The man—or the character of the man—who bore the nation through that crisis, seemed to me—and Strauss gave me every encouragement to believe it—the highest thing in the American regime. The character of Lincoln became intelligible, not on the basis of The Federalist—profound as that work is—but on that of the Nicomachean Ethics. In the final analysis, not only American politics, but all modern politics, must be clarified on the basis of classical political philosophy. That is because [quoting Leo Strauss] "It is safer to try to understand the law in the light of the high than the high in the light of the low. In doing the latter one necessarily distorts the high, whereas in doing the former one does not deprive the low of the freedom to reveal itself fully as what it is."

Does not Mr. Jaffa, in his noble partisanship, sometimes go too far? However that may be, it is not what Mr. Jaffa says that is questioned below so much as what he might be taken by the careless to have said.

In the first place, it should be noticed that the Constitution simply did not "dissolve in the presence of a great crisis." Rather, a terrible storm was weathered by the regime, partly because of what had been accomplished theretofore pursuant to the Constitution. American constitutionalism had provided a Lincoln the opportunities and guidance he needed to develop his great natural talents; it had permitted and encouraged the development of the resources, both spiritual and material, with which the country could (with or without Lincoln) conduct and endure a great civil war; it had developed a people
political, of its significance: that is, man is diverted from a proper regard for his present human condition to a concern for rewards which

willing and able to be led, through much uncertainty and many sacrifices, to do what was necessary to preserve institutions which had shown themselves worthy of and beneficial to free men. Thus, Lincoln could say in April 1864, "I claim not to have controlled events, but confess plainly that events have controlled me." 2 LINCOLN, supra note 1, at 509. Certainly, it would be a mistake to underestimate the resiliency and fundamental good sense of the American people, both the people who gave us Lincoln and the people given us by Lincoln and his fellow soldiers in the Civil War. See text accompanying note 36 supra.

In the second place, it should be noticed that the "compromises with slavery" made by the Constitution were ratified and even repeated by Lincoln. See, e.g., note 45 supra. Is there any reason to believe that a Lincoln, in like circumstances, would not have made the 1787 compromises or that the more thoughtful framers of the Constitution would not have acted as Lincoln did in his circumstances? That is, is there not an essential sameness to truly prudent men? Thus, Webster insisted in 1850, "firmness, steadiness of principle, a just moderation, and unconquerable perseverance, are the virtues the practice of which is most likely to correct whatever is wrong in the constitution of the social system." 6 WEBSTER, supra note 2, at 561. See the end of note 65 infra.

In the third place, it should be noticed that Lincoln himself (especially by his virtual sanctification of equality) was obliged, in turn, to make compromises of his own and to leave expectations and hence problems which may lead to even greater crises among us than those we have already endured, crises affecting not only the American people but even the fate of mankind. It does not deny a political hero's memorable contribution to his regime if one should have to question both his uniqueness and his infallibility. (Consider, for example, the political intemperance of Churchill during the First World War, that most foolish war which led both to many of the horrors of the twentieth century and to Churchill's own inspiring efforts during the Second World War. See THE CONSTITUTIONALIST, supra note 3, at 784 n.11. On the modernity of Churchill and, to a lesser extent, of Shakespeare, see note 58 supra.)

Indeed, among the problems left by Lincoln, our fellow Illinoisan, is that he may well have, as one result of his egalitarian teachings and example, helped turn serious American thought away from that classical political philosophy recommended by Mr. Jaffa. Does not the "divine" take the place, in Lincoln's public thought (his thought of and for the public?), of "nature," that nature upon which classical political philosophy rests? (See PLATO, SOPHIST 265e. Does not the sacred, notwithstanding its association with and dependence upon the traditional, look (or seem to look) to the essence of things? But the pious votary cannot understand this fully? He has lost sight of nature, the causes of things, and chance? In addition, does not the liberty which the ancients seem to have preferred to equality look more than equality to virtue (to human excellence) and hence to nature? See Anastaplo, Book Review, 41 N.Y.U.L. REV. 644 (1966).)

Consider, in assessing Lincoln's religion-based sentiments, the "republican robe" quotation with which this note opens. Consider, also, the element of mysticism (induced, in part, no doubt by the great passions of the war) referred to already. See notes 61 & 42 supra. Consider, as well, the Christian imagery and tone which permeates much of Lincoln's later public statements, perhaps even his most private thoughts. See, e.g., 2 LINCOLN, supra note 1, at 243-44. On the "positive good" of the wartime affliction, see note 49 supra. Whatever the political usefulness or the ultimate sincerity of such sentiments, they do seem somehow more impassioned, somewhat less urbane, than those which one associates with classical political philosophy or (for that matter) with the Declaration of Independence. See note 54 supra. Do not these sentiments differ in crit-
despise the worldly and the temporal. Did Lincoln, on the other hand, make religion, and particularly American Christianity, this-worldly, by

...ical respects from that godlike virtue of which Cicero speaks (in the quotation from Everett in Part III, section 1 infra)? Certainly, there is to Lincoln's sentiments a familiar Midwestern accent.

Thus, philosophy—the "essentially Socratic understanding"—seems, by the end of Lincoln's life, not to have (if it ever did have) the status one finds assigned to it in classical political thought or even among the Founding Fathers of the Eighteenth Century. See, e.g., 2 Lincoln, supra note 1, at 574 ("All the good Saviour gave to the world was communicated through this book [the Bible]. But for it we could not know right from wrong. All things most desirable for man's welfare, here and hereafter, are to be found portrayed in it."). The sentence we have italicized is hardly classical in its inclination. Cf. Plato, Republic 414b sq., 427b sq. However, the circumstances in which these remarks were made by Lincoln do bear upon how they are to be understood, as is true of the circular found in the text accompanying note 59 supra. See 1 Lincoln, supra note 1, at 77 ("he whose wisdom surpasses that of all philosophers has declared that 'a house divided against itself cannot stand'"). See also id. at 265.

Lincoln seems to have been, in certain decisive respects, a child of the Enlightenment, dedicated to the hope, if not the expectation, of continuous and unlimited progress. See note 43 supra. In this way, too—indeed, independent of the effects upon him of a soul-searching war—he seems to have been open to modern influences which are distantly grounded in Christian doctrines. Modernity may be detected as well in the sentiment, "But the game is caught; and I believe it is true that with the catching end the pleasures of the chase." 1 Lincoln, supra note 1, at 13. For Lincoln's Lockean inclinations, see note 8 supra.

It may well be true, of course, that "the character of Lincoln [becomes] intelligible not on the basis of The Federalist—profound as that work is—but on that of the Nicomachean Ethics." But that should be true of all complex characters, good and bad, noble and base, just and unjust, to say nothing of ancient and modern—since the Ethics does provide us a serious study of character. It would be quite another thing to say, however, that something like the Ethics which may indeed be needed to understand a Lincoln was itself understood, especially in its teachings about the intellectual virtues, by Lincoln. But without some awareness of the intellectual virtues, and of the preeminent status of the contemplative life (so critical to the overall argument of the Ethics), can there be a sufficient opening toward a respect for classical political philosophy? (One is reminded, by the cast of Lincoln's mind, of the highly moral and yet quite practical sense of Confucian thought: if philosophy does provide an underpinning for that thought, it is well concealed and hence is not as instructive as philosophy can be. See Anastaplo, One Introduction to Confucian Thought, U. Chi. Mag., Summer, 1974, at 21.)

There may have been in America more of an opening toward classical political philosophy before 1800 than after 1860. Consider such developments, after 1860, as pragmatism and behaviorism. (Americans have had the benefit, since the 1930s, of European refugees trained in serious classical studies.) However that may have been, should not we say that the founders of good regimes are not above the constitution they bring forth, in that they are but midwives? That is, they do not create or innovate, but rather discover and help realize what is called for in the circumstances they confront. And, whatever they may find it prudent to say, they surely do not believe, if they are truly prudent men, that only one form of government is legitimate or that any particular form of government can possibly last forever.

Are we not obliged, because of Mr. Jaffa's usefully provocative suggestions, to con-
subtly identifying it with the political enterprise made manifest in the Constitution? Does such a blending, if successful, contribute eventually to the undermining among a people of the sublime sentiments upon which the patriotic poet relies?65

Consider further our "unwritten constitution," the regime which shaped both Lincoln and the Constitution? Are not the Constitution and Lincoln, properly understood, both means to an end which transcends political men and political institutions? For a proper understanding of that end, must not the American student of classical political philosophy come to terms with the Declaration of Independence?

Or would Mr. Jaffa quietly compel us to concede that they who really understand Lincoln—those happy few—are, with Lincoln, "the highest thing in the American regime"? But what about those among us, perhaps even fewer, who perceive what was wrong, as well as what was right, with Lincoln? Dare we conclude that they are higher than all regimes, including the American regime? This would surely be, if not a "concealed insobriety," an unobtrusive enthronement by implication. "Ambition should be made of sterner stuff."

65. One must wonder what it is that the contemporary statesman has to draw upon comparable to the materials Lincoln had at hand five score and eleven years ago in the Declaration of Independence, in Shakespeare, and in the Bible. Do we have (of these) only the Declaration, and a somewhat neglected Declaration at that, to serve as a popular underpinning of our venerable Constitution? Lincoln, on the other hand, could still depend on a substantial uniformity in the literary tastes and in the orthodox religious sentiments of his community, tastes and sentiments which the respectable literature and the influential intellectuals of his day did not openly challenge. (See, in David Hume's Enquiry Concerning Human Understanding, the closing pages of section 10 and the opening pages of section 11.)

We may detect these basic problems in our current church-and-state concerns: are we most explicitly concerned today about "the separation of church and state" because it is an epoch when the blending of these two by the creative statesman is much more difficult than it has ever been among us? The particular legislative measures and judicial decisions which have aroused controversy among us in recent decades may relate merely to essentially desperate skirmishes in a battle already over. One faction has a victory which it may not yet know it has won; the other has suffered a defeat which it may be futilely trying to reverse. The victor overestimates the strength of political institutions; the vanquished underestimates the relentless skepticism of modern relativism.

The problem of "church and state" may have become so acute because we are at last in an era when the relation between the state and the church is coming to reflect more than formal or legal separation. What had once been taken for granted—a seemingly inexhaustible quarry of religious sentiment independent of government control or concern—has had to be abandoned. The attempt to encourage by law what had once been produced by the community at large raises far-reaching issues of public policy and constitutional law. (Also far-reaching, and difficult to determine, are the effects of the opinions a people has. Thus, the belief among the Gauls in personal immortality may have promoted military valor. See Caesar, Gallic Wars bk. 6. But may not such a belief, even when not coupled with softening injunctions to charity, incapacitate a people for war by deflecting it from extensive temporal concerns and hence from the development of the technology often necessary to support that valor against the mechanized onslaughts of a more worldly people? Cf. Montesquieu, S.L. bk. 20, ch. 1.)

No doubt, the Gettysburg Address will continue to move men so long as the English
Even so, what else should one expect of political life but that the very triumphs of a people are likely to generate crises among their posterity? Perhaps this is yet another way of saying that it is most difficult, if not virtually impossible, in the large-scale affairs of this world, really to know what one is doing.

EPISODE

1.

The end of the American way of life—the standards and purposes implied by it—is still most authoritatively set forth for us in the Declaration of Independence.

The tension which should be evident in an article such as this may be inevitable for anyone who is drawn as we are to both the Apology of Socrates and the Declaration of Independence—for anyone, that is, language is read. But one must wonder whether the Address can continue to have its intended effect now that its theological foundations have been worn away. Even so, is not the Gettysburg Address likely to remain more captivating to modern man than Lincoln's Second Inaugural, in that it is less explicitly theological and more obviously political than that inaugural address? Cf. 2 Lincoln, supra note 1, at 661. Moreover, the Second Inaugural does seem designed primarily for immediate concerns and thus stands, with respect to the Gettysburg Address, much as the Constitution does with respect to the Declaration of Independence.

The reader may find instructive a comparison of this article with the talks from which it has been adapted (and to which extensive notes have since been added). Parts I and II of this article are adapted from a talk, The American Constitution of 1787: Form and Matter, delivered on May 5, 1961, at St. John's College, Annapolis, Maryland. Part III is adapted from a talk, Daniel Webster and the American Revolution of 1776: A Rhetorical Beginning, delivered July 4, 1973, in Chicago, Illinois. Part IV is adapted from a talk, The Gettysburg Address: America's Political Religion, delivered on March 3, 1963, at the Hillel Foundation Jewish Student Center, The University of Chicago. The Gettysburg Address talk was the last of a series, on Religion and the Commonweal, dedicated to the memory of Rabbi Maurice B. Pekarsky (1905-1962). (The series was inaugurated with a lecture by Leo Strauss, The Tradition of Political Philosophy.) The Constitution talk and the Gettysburg Address talk are included among the Lectures on Constitutional Government appended in 1964 to Notes on the First Amendment, supra note 3. The author's remarks about Rabbi Pekarsky may also be found in his dissertation (id. at 600). Those remarks included the following observation about Rabbi Pekarsky's directorship at Hillel House, remarks which bear upon our understanding of Lincoln's efforts:

Hillel House was, of course, to be primarily dedicated to the special requirements and interests of Jewish students [at the University of Chicago], but at the same time it was to be, and was, a place where students from any faith would feel welcome because it provided a forum in which the examination of even many Jewish problems and affairs revealed their roots in the affairs and problems of all men, that is to say, of all thoughtful men. This may well have been the master stroke of his policy: he could, with his taste for quality and his peculiar talent for harmony, appeal to both the iconoclastic student and the instinctive believer in the young Jew.

For a list of the libraries where multilith copies of the author's dissertation may be
who somehow finds himself drawn (if only because of his circumstances) to two public declarations which are, despite their superficial compatibility, radically divergent in their presuppositions and implications with respect to liberty, to duty and to equality. This instructive tension comes in part from trying to adapt ancient teachings to our modern circumstances.

The standards legitimated by the Declaration of Independence are reflected in the Constitution of the United States and in our reliance as well upon precedent and procedure for guidance in the conduct of our affairs. The end of our regime is both restated and implicitly questioned most effectively, at least for the time being, in the Gettysburg Address. It is to these documents, and to instruments such as these, that Americans must repeatedly return for light on where they stand and where they should go. Repeated attempts to examine and understand the problems we have touched upon in this article—problems which emerge from any serious study of American constitutionalism—seem necessary on behalf of a people dedicated to the proposition that all men are created equal, a people which must not permit itself, in a fearful rebellion against liberty, to forget the conditions, the causes and, at least, the utility if not the majesty of human excellence.

There can be, we have noticed, a certain justice to claims of equality. But, we have also noticed, there are serious problems with the triumphant equality which is one legacy of the Civil War. These are the problems, some of the implications of which we have yet to realize, which we now have to live with and rise above or at least counteract. The “self” tends to become more important, the “community” less so, as technology and self-gratification conspire to raise our standard of living, our desires, and our sense of insecurity. Thus, for example, our current temporary need for austerity is seen as an emergency, if not even a disaster, rather than as an opportunity, and even a blessing.

Since all men are equal, all opinions are equally valuable, or at least found, see Anastaplo, *Freedom of Speech and the First Amendment*, 44 U. Det. L.J. 55, 195 (1964).

The epigraph for the Gettysburg Address talk (of March 3, 1963) was taken from Lord Charnwood, *Abraham Lincoln* 8 (1917): “... But his muscular strength was great, and startling statistical tales are told of the weight he could lift and the force of his blows with a mallet or an axe. To a gentle and thoughtful boy with secret ambition in him such strength is a great gift, and in such surroundings most obviously so.”

See also id, at 41: “Daniel Webster must have been nearly a great man”
equally authoritative. Public opinion becomes ever more influential even as it becomes less informed and more volatile. Devastating power and joyless mediocrity go hand in hand—and rule by chance (and hence recklessness) becomes the order (or the disorder) of the day.

All talents are liberated and given opportunities to be employed. There is about this something humane. But there is also about it something dangerously sentimental. For “all talents” include the self-serving as well as the self-sacrificing—and we should be reminded of “the proneness of prosperity to breed tyrants.” “All talents” also include the petty ones, those which have nothing to recommend them but presumption and the tyranny of numbers.

But to speak (or, at least, to think) in this way is to entertain certain unfashionable opinions about vital differences among men. One is obliged, that is, to consider the nature of man and the different natures among men. Responsible public servants, such as Senator Webster and President Lincoln, can usefully be understood to have been obliged in their day to moderate extended appeals to nature, lest such appeals vindicate abolitionists on the one hand and secessionists on the other. They were obliged to insist upon the Constitution and a legitimacy grounded in “antiquity,” in common sense, in contract, in sacrifice, and in religion. They understood justice and a long overdue emancipation to depend ultimately upon the preservation of a Union which had somehow once been agreed upon. Or, put another way, they too drew (but, for the most part, implicitly) upon fundamental notions about nature and the good in determining which conventions should be made much of and how in their particular circumstances.

One is obliged to return, in any serious discussion of the nature of nature, to the discussions and teachings of the ancients—to the true ancients, not just to those patriotic latecomers usefully conjured up and celebrated by responsible statesmen as our fathers (and hence “ancients”). Among the teachings of the ancients, who were always aware of the limits of men’s power in the affairs of this world, is an insistence upon a deep moderation both in speech and in deed. (Consider the cautious use of “most likely” in the epigraph to this article taken from the Declaration of Independence, an instrument influenced somewhat by ancient teachings.) Only if one is genuinely prudent may one be empowered and entitled to size up and employ properly—that is, as circumstances require—both calm constitutional language and daring flights of eloquence.
We are reminded of the youthful Lincoln’s impassioned advocacy of “[r]eason—cold, calculating, unimpassioned reason.”

3.

Reasonableness is indeed what one should find upon returning to the official language of American constitutionalism—a disciplined reason applied by the Founding Fathers, in 1787 and perhaps in 1863, to the affairs of men in the circumstances in which they found themselves.

The Constitution of 1787, with its grounding in the Declaration of Independence and its dependence upon “the sovereign States,” continues to offer itself as an altogether fitting and proper point of departure for any responsible consideration of the causes of American constitutionalism.

Thus, article I is the legislative article. This comprises one half of the Constitution of 1787, the constitution which came out of the Philadelphia Convention. What is said in this article determines, and should set limits to, everything else: the extent and concerns of the general government are established. And we are told, “All legislative Powers herein granted shall be vested in a Congress of the United States . . . .” . . .