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Reaction or Reformation?: Leo Strauss and American Constitutional Law

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REACTION OR REFORMATION? LEO STRAUSS AND AMERICAN CONSTITUTIONAL LAW

Andrew C. Spiropoulos*

This article explains the importance of the work of the political theorist Leo Strauss to the study of American constitutional law. The foundation of Strauss's work was his belief that the civilization of the West faces a profound crisis. This crisis, he argued, was a crisis of modernity, by which he meant modern political philosophy. The nature of this crisis is the West's loss of faith in reason, the cornerstone of its way of life. This loss of faith threatens the intellectual, spiritual, and even physical health of the West. Strauss argued that this crisis came about because of the nature of modernity to devolve into nihilism, the denial of the power of reason to know the truth. If modernity is destined to collapse, then America, the quintessential modern state, should be in jeopardy as well. In discussing the crisis of modernity and its relationship to American constitutionalism, I examine: (1) Strauss's account of the nature of the crisis and how it came about, beginning with the modern rejection of classical political philosophy, with its belief in natural right, and its replacement with the theory of modern natural rights; (2) the arguments of Strauss and his students that America is exceptional and suffers less from the maladies of modernity than the rest of the West; (3) three areas of constitutional law doctrine that, approached from a Straussian perspective, are in need of reform.

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INTRODUCTION

It is curious that a professor of political science, dead for almost for forty years and specializing not in the more politically “relevant” fields such as political economy or foreign policy, but rather in the writing of learned (if not arcane) commentaries on old works of political philosophy,¹ should be accused of wielding deep influence over our current politics. Leo Strauss (1899-1973), best known for his work as a scholar and teacher at the University of Chicago, has been (depending on one’s perspective) credited or blamed for the Reagan Revolution, the 1994 Republican takeover of Congress, and the second President Bush’s War on Iraq.² These charges are, given Strauss’s determined—and successful—effort to avoid engagement with contemporary policy issues of any kind, at best unproven and at worst defamatory.³ Nonetheless, Strauss does deserve serious study by students of law and government, particularly, as I intend to show, those of American law and government. While not a policy maven, Strauss was one of the profound political theorists of the 20th century and study of his analysis of the state of Western philosophy and politics—indeed, Western civilization—is invaluable for understanding the current debate regarding the state of our nation’s politics and, as Strauss might say, soul.

The foundation for Strauss’s work was his belief that the civilization of the West faces a profound crisis, one that threatens both its physical and spiritual existence. This crisis, Strauss believed, is caused by the erosion of the intellectual and spiritual core of the West, its belief in the power of reason. The West is defined by its belief in the existence of permanent truths, knowable by reason, and the commitment that these truths, once discovered, must form the basis of both our social institutions and the good life of the individual person. If the West loses its faith that these truths exist or that they can be known, both society and the people that make up that society are deprived of both the substantive

¹ THOMAS L. PANGLE, *LEO STRAUSS: AN INTRODUCTION TO HIS THOUGHT AND INTELLECTUAL LEGACY* 7 (2006) (“Leo Strauss’s writings consist mostly of interpretative commentaries on the works of major thinkers of past ages. Strauss thus comes to sight as a scholar of the history of thought. But he utterly transforms the meaning, the scope, and the significance of such study. His meticulous textual interpretations are intended to show that there are a few key books and authors from the past that should be studied as sources of powerful, even though clashing, claims to wisdom.”).

² CATHERINE & MICHAEL ZUCKERT, *THE TRUTH ABOUT LEO STRAUSS* 8-15 (2006). [hereinafter ZUCKERT] The Zuckerts provide a thorough account of the various charges, including a demonstration of how many of the most extreme charges against Strauss can be traced to the work of Lyndon LaRouche and his followers.

³ *Id.* at 3 (“[T]here is little evidence that the reporters and columnists have ‘done their homework,’ that is that they have read much of Strauss at all, to say nothing of reading him with the kind of care that their own description of his work suggests is necessary for understanding his elusive and politically remote thinking.”).

foundation for their understanding of the meaning of existence and the way of life that leads to that understanding. The loss of faith in one's principles and way of life necessarily leads to intellectual confusion and spiritual paralysis.⁴

Strauss believed that the profound problems faced by the West are rooted in its dominant philosophy. He characterized the West as believers in modern philosophy, particularly modern political philosophy, which he called "modernity."⁵ The crisis of the West, Strauss believed, follows from the problems of modernity. Strauss, citing Spengler, identified the West, not as the whole of Western Civilization, but as "modern western culture," which "emerged around the year 1000 in Northern Europe."⁶ That this modern culture—modernity—is in crisis is "obvious to the meanest capacities," and thus, to understand this crisis, one "must first understand the character of modernity."⁷

The key to understanding the character of modernity is to understand that that "modern culture is emphatically rationalistic, believing in the power of reason" and that "all knowledge which deserves the name is scientific knowledge."⁸ Thus, it is no coincidence that the advent of modernity is also marked by the emergence of modern natural science, which differs from the old, not simply in its understanding of nature, but in how it conceives the purpose of science. The purpose of science, in modern science, is no longer simply to understand nature and the cosmos but to conquer it for the benefit of humanity.⁹ As Strauss states, modern man believes the purpose of science is "for the relief of man's estate, for the conquest of nature, for the maximum control, the systematic control of the natural conditions of human life."¹⁰ The most important benefit of this new conception of science is the development of advanced technology, which makes possible the production and distribution of heretofore unimaginable wealth. This economy of abundance then stimulates the desire for even more wealth and technology, resulting in a

⁴ PANGLE, *supra* note 1, at 8 ([T]his culture of ours cannot lose faith in reason, as the ground for universally evident and valid human norms, discoverable in nature or human nature, without losing faith in itself, in its very core. As a consequence, we inhabit a culture slipping into spiritual disintegration and bewilderment.").

⁵ Leo Strauss, *The Three Waves of Modernity*, in AN INTRODUCTION TO POLITICAL PHILOSOPHY: TEN ESSAYS BY LEO STRAUSS 81, 82 (Hilail Gilden ed., 1989).

⁶ *Id.* at 81.

⁷ *Id.* at 81.

⁸ *Id.* at 82.

⁹ For an amusing, but telling, discussion of modernity's faith in the power of science to control nature, see Jonathan V. Last, *Free Willy Horton*, THE WEEKLY STANDARD, March 15, 2010, at 5, in which the author, in discussing the recent killing of a Sea World trainer by an orca or "killer whale," points out that no orca had harmed a human being until they were captured and put in theme park shows. Last concludes that "American culture convinced itself that the orca was a cute, tame, amusing creature. Of course, that view of the cuddly, domesticated killer whale is just another mirage of modernity."

¹⁰ Strauss, *supra* note 5, at 88.

more productive society but also one more focused on the possession and enjoyment of material goods.

The modern faith in the power of reason extended as well to the human sciences. The same rationalist spirit that led human beings to believe themselves capable of solving the scientific puzzles that had confounded man for centuries also convinced the leaders of the Enlightenment that they had solved the problem of how to best organize government and society. The West, as exemplified by its paradigmatic thinkers, Thomas Hobbes and John Locke, believed at least for a while, that its understanding of the natural rights of man, founded on self-evident truths known by reason and science, provided the template for the best regime for all times and all places.

The political wing of modernity, however, did not succeed as well as the scientific; perhaps ironically, this is in part because of perverse uses of the technology developed in the wake of the scientific revolution. By the middle of the 20th century, when Strauss entered his most productive years, the wreckage of modernity was clear to all. The West had suffered through two world wars (with the immediate prospect of a third) and the establishment of terrifying and brutal totalitarian regimes which both engaged in mass extermination and possessed weapons capable of destroying all life on earth—all fueled by the technology produced by modern science. The intellectual wreckage was also impressive and, to Strauss, even more dangerous. Modernity, because of the painful experience of its reign and the erosion of its intellectual premises caused by waves of critics (including Rousseau, Marx, Hegel, and Nietzsche) had long since lost its hold on the minds of the peoples of the West.

Instead of the Enlightenment faith that reason can find the right answer to the highest philosophical and political problems, Strauss writes:

[M]odern western man no longer knows what he wants . . . he no longer believes that he can know what is good and bad, what is right and wrong. Until a few generations ago, it was generally taken for granted that man can know what is right and wrong, what is the just or the good or the best order of society—in a word, that political philosophy is possible and necessary. In this time this faith has lost its power.¹¹

We do not simply doubt that we in the West can know right from wrong—we doubt that it is possible for anyone to know the truth regarding the highest human concerns.¹²

¹¹ Strauss, *supra* note 5, at 81.

¹² PANGLE, *supra* note 1, at 7 (“Under the influence of our highest intellectual authorities, we no longer confidently believe in the rationally demonstrable, universal, and permanent truth of the principles, purposes, and way of life that we share and defend. Still worse, or more fundamentally, we gravely doubt the very possibility that any

It is not, however, that we have entirely given up our faith in reason or science—we still believe, more than ever, in the veracity, efficacy, and utility of natural science. We have lost our once certain belief, however, that human reason is capable of discovering the truth about human affairs. Once we lose our faith that we can discover what is true and false by nature, what Strauss call the idea of natural right, it is impossible to claim that reason guides our actions. Indeed, in the words of Strauss:

[N]atural right is impossible because philosophy in the full sense of the term is impossible. . . . [P]hilosophy is only possible if man, while incapable of acquiring wisdom or full understanding of the whole, is capable of saying what he does not know, that is to say, of grasping the fundamental problems, and therewith the fundamental alternatives, which are, in principle coeval with human thought.¹³

Instead of a politics based on confidence that we can understand the fundamental nature of man (i.e., a politics of natural right), our social science, following Max Weber, reconciles our confidence in natural science with our impotence regarding the social, by distinguishing between facts—which are measurable and thus knowable—and values, which are neither. Weber—and the modern social science he founded—posits that “Facts and values are absolutely heterogeneous, as is shown directly by the absolute heterogeneity of questions of fact and questions of value.”¹⁴ This “absolute heterogeneity of facts and values necessitates the ethically neutral character of social science; social science can answer questions of facts and their causes; it is not competent to answer questions of value.”¹⁵ As human beings cannot possess

any science, empirical or rational, any knowledge, scientific or philosophic, of the true value system: the true value system does not exist; there is a variety of values which are of the same rank, whose demands conflict with one another, and whose conflict cannot be solved by human reason. Social science or social philosophy can do no more than clarify that conflict and all its implications; the solution has to be left to the rational and free decisions of each individual.¹⁶

principles, any purposes, any way of life can be shown by reason to be simply true; that is, truly right, truly good, for all humanity as such.”).

¹³ LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 35 (1953).

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 40.

¹⁶ *Id.* at 41-42; *see also* PANGLE, *supra* note 1, at 10 (“[L]ate-modern science has ever more explicitly discovered and proclaimed of itself—and of reason or rationality altogether—that it is constitutionally incapable of offering to humanity any ultimate guidance as to how the ever increasing power that science brings into being is to be used rather than abused. Late-modern science has sternly announced that it judges, and that it is only competent to judge, ‘facts’ not ‘values’—the ‘Is’ not the ‘Ought.’”).

This claimed incapacity to know what is true and false regarding the fundamental questions of social existence, Strauss argues, amounts to nihilism, “the view that every preference, however evil, base, or sane, has to be judged before the tribunal of reason to be as legitimate as any other preference.”¹⁷ While “[m]any social scientists of our time seem to regard nihilism as minor inconvenience which wise men would bear with equanimity, since it is the price one has to pay for obtaining that highest good, a truly scientific social science,” in reality, nihilism is the negation of the modern belief in reason’s power to guide the life of the community and, ultimately, of the individual. If reason cannot tell us which way of life is better than another or which choice will lead to a more fully human, and thus genuinely happy, existence, we will have lost our capacity to make and act upon sensible decisions about the most important matters. As Strauss explains, while our science, both natural and social, provides us great knowledge about the material world, “we have us to be resigned to utter ignorance in the most important respect: we cannot have any knowledge regarding the ultimate principles of our choices”—this is “retail sanity and wholesale madness.”¹⁸ But intellectual confusion and impotence is only one aspect of the crisis. Strauss’s core premise is that “Man cannot live without light, guidance, knowledge; only through knowledge of the good can he find the good that he needs.”¹⁹ Once the people of modernity lose faith in reason, their source of understanding of the good, they are not merely intellectually enfeebled—they are spiritually impoverished.

The crisis of modernity, however, threatens even more than our intellectual and spiritual well-being—it endangers existence itself. Ironically, modernity’s signal success—the achievement of modern natural science—when understood in the context of the intellectual and spiritual failure of its social science, poses an existential threat to humanity. The threat arises because of humanity’s success in translating the discoveries of modern natural science into advanced technology that can alter the very fabric of life including: weapons that can destroy the world; biotechnology that can alter how we are born, die, and our biological destiny; and the means for industrial exploitation of the planet’s resources, even at the risk of its destruction. It is imperative that such immense power over humanity and the world be wielded only by those sure of the higher purposes of their society and lives and whose purposes will serve the good of humanity. We moderns, of course, do possess this power, but, because of the loss of our faith in reason, do not understand how to rightly or wrongly use it—indeed, if Strauss is right, we do not believe it is even possible to judge the moral or immoral

¹⁷ STRAUSS, *supra*, note 13, at 42.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 74.

exercise of power. Our inability or refusal to articulate moral standards for our choices makes it impossible to provide effective guidance for or set real limits on the use of our extraordinary power. Without a notion of the good to guide us, we find it difficult, if not impossible, to combat threats to our existence, which leaves modern humanity with a justified sense of fear and anxiety. As Thomas Pangle laments, the horrors we have experienced during the era of modernity “have instilled or resuscitated a pervasive sense of unease and fear in the face of the ungovernable power that technology places in the hands of a human race that seems in no whit morally improved or even morally enlightened by its acquisition of domination over nature.”²⁰

If modernity is truly in the grip of an acute crisis, we Americans should be among the most fearful and anxious about our fate. For America is the paradigmatic modern regime, one explicitly founded on human reason’s capacity to apprehend “self-evident” truths.²¹ The core commitment of the American regime, as expressed in the Declaration of Independence (which contains words largely derived from the work of the modern political philosopher, John Locke²²), is a belief in the natural rights of all human beings. The idea of natural rights is a product of modern political philosophy, which itself is a reaction against the classical notion of natural right. Classical political philosophers believed political regimes ought to be judged against the standard of the best possible regime, one that would facilitate the highest forms of human excellence. Natural right, what is right by nature and, thus, embodying the virtues of human excellence, the ancients believed, should guide political practice.

Modern political philosophers, however, starting with Machiavelli and Hobbes, rejected the idea that politics should aim at the unattainable, and often divisive, aspiration of human excellence. Instead, they counseled that political regimes ought to aim at a goal that can be achieved. Hobbes, in particular, believed that the idea of natural right should be rejected in favor of natural rights, rights based on what all human beings share—the desire for self-preservation. Rather than a politics that seeks to change individual character to produce virtuous human beings, government should seek to protect the means of self-preservation—life, liberty, and property. Government must give up its goal of making over man and instead devote itself to building institutions

²⁰ PANGLE, *supra* note 1, at 9.

²¹ The Declaration of Independence para. 2 (U.S. 1776); *see* ZUCKERT, *supra* note 2, at 60 (“When Strauss says that America is modern, he means that it is a nation shaped to a large degree by the ideas that emerged within modern political philosophy.”).

²² ZUCKERT, *supra* note 2, at 63 (“The American Declaration of Independence, for example, consists mainly of paraphrases of the text of John Locke, one of the chief modern philosophers in Strauss’s catalog of moderns and a chief articulator of the new doctrine of rights.”).

that will protect liberty and property, thus allowing human beings to pursue happiness in their own way. Only by reducing its ambitions can a political regime guarantee peace and prosperity to its citizens.

Modernity in general, and America in particular, have certainly succeeded in producing prosperity (peace, for most of the West, is another matter). The problem, as we have seen, is that the vision of peace and prosperity that inspires the institutions guided by modern natural and social science is not sufficient to satisfy the highest human needs. Inevitably, human beings become alienated from a modern society that does not speak to their highest aspirations and deepest passions, leading to the crisis of the West that frames Strauss's work.

Surprisingly, however, despite Strauss's deep reservations about modernity, he was an affirmative friend of both of liberal democracy and of America. Strauss, a German Jew who fled the Nazi regime, was no doubt grateful to America for providing him refuge from a murderous, totalitarian regime; and certainly America and the other liberal democracies were more attractive than either the fascist or the communist regimes that loomed so large during Strauss's life.²³ But his approbation was rooted in something deeper than personal gratitude or the available alternatives. Strauss believed that living under a decent regime made possible a good life, concluding, "Wisdom requires unhesitating loyalty to a decent constitution, and even to the cause of constitutionalism."²⁴ Strauss recognized that liberal democracy, with its dependence on constitutionalism and the rule of law, its recognition of the importance of the liberty of individuals, and its respect for limits on the arbitrary exercise of power, made possible, even if it did not guarantee, the pursuit of natural right sought by the ancients. In his words, "Liberal or constitutional democracy comes closer to what the classics demanded than any alternative that is viable in our age."²⁵ Liberal democracy may survive the crisis of modernity, in contrast to the more vicious—and, thankfully, largely extinct—modern political regimes, because the former "derives powerful support from a way of thinking which cannot be called modern at all: the premodern thought of our western tradition."²⁶

If liberal democracy is the modern regime that most approaches the best possible regime envisioned by the ancients, then America is the best extant liberal democracy. What makes America exceptional and is responsible for making it the "most powerful and prosperous of all the nations of the earth," is its commitment to the securing of the natural

²³ Strauss, *supra* note 5, at 98 (remarking that "the superiority of liberal democracy to communism, Stalinist or post-Stalinist, is obvious enough.").

²⁴ LEO STRAUSS, *LIBERALISM: ANCIENT AND MODERN* 24 (1968).

²⁵ LEO STRAUSS, *ON TYRANNY* 194 (2000).

²⁶ Strauss, *supra* note 5, at 98.

rights of all human beings, as embodied in the Declaration.²⁷ While the Declaration's idea of natural rights is a modern one, the American commitment to the principle that there is a standard of right and wrong independent of positive right inoculated America against the destructive nihilism that threatens the West.

Strauss, despite his prodigious scholarly output, wrote little about the America regime, and therefore, never explained how the American Founders and their successors buttressed the modern foundation of their regime with sufficient premodern elements to ward off the storms of alienation and nihilism.²⁸ This challenge was taken up by successive generations of his students who have produced an extensive literature on both the Founding and the historical development of the American regime.²⁹

These American Straussians, however, have disagreed with each other over how to best understand America, a rift that has gone so far as to produce two principal schools, East and West Coast Straussians.³⁰ East Coast Straussians believe that America is fundamentally modern and that the premodern aspects of American society, most especially religion, that help protect America from the worst excesses of modernity, are remnants of a superseded culture and are thus constantly being eroded by the core values and institutions of the regime. One should still work to preserve these elements, but it is an uphill, and probably losing, battle; it is difficult to fight the essence of who we are. West Coast Straussians, on the other hand, while acknowledging that America is a product of the modern Enlightenment, do not believe either that the American Founders intended to or did found a purely modern regime or that America is a purely modern society. Rather, the Founders self-consciously constructed a regime that provided for both the securing of modern natural rights and the fostering of virtue through counter-modern institutions such as religion and local self-government—indeed, they believed that one could not secure the former without the latter. The Founders understood, the West Coasters argue, that one could not wholly dispense with the aspiration to human excellence that marked the classical approach to politics. At the very least, one's regime must both produce, through a proper liberal education, and empower the able statesmen necessary to preserve any regime. A purely modern society, with its corrosive

²⁷ STRAUSS, *supra* note 13, at 1.

²⁸ William A. Galston, *Leo Strauss's Qualified Embrace of Liberal Democracy*, in THE CAMBRIDGE COMPANION TO LEO STRAUSS 206 (Steven B. Smith ed., 2009).

²⁹ *Id.* at 206; see also STEVEN B. SMITH, READING LEO STRAUSS: POLITICS, PHILOSOPHY, JUDAISM 166-67 (2006). For a comprehensive examination, see, LEO STRAUSS, THE STRAUSSIANS, AND THE AMERICAN REGIME, (Kenneth L. Deutsch & John A. Murley eds., 1999).

³⁰ SMITH, *supra* note 29, at 167.

relativism and ruthless egalitarianism, is incapable of reliably producing the leaders needed to perpetuate our institutions.

Thus, with few exceptions, Straussians, East and West, agree that the surviving premodern elements of American society and culture help Americans prevent or postpone the worst excesses or mutations of modernity. Where they disagree is about whether the regime was designed to make space for these premodern elements and thus how hopeful one can be that these elements—and therefore the regime—can be preserved. In this essay, approaching this debate as a student of constitutional law, I will explain the ground of agreement between the American Straussians and demonstrate that this consensus, rooted in their shared understanding of the importance of social institutions and norms that moderate the pernicious effects of modernity, leads—or should lead—to a largely shared understanding of how American constitutional law doctrine should be modified. No matter what brand of Straussian you encounter, they will advocate that our constitutional law be cured of the virus of nihilism and excessive egalitarianism and thus permit the state to foster virtue and encourage the cultivation of excellence by both potential leaders of the nation and citizens generally.

In Part I of the essay, I will first explain Strauss's critique of modernity, demonstrating, using Strauss's hypothesis regarding the three waves of modernity, that the nature of modernity produces the cycle of critique and reaction that drives modernity into the profound crisis it now faces. Next, I will explain the Straussian account of why America, compared to the rest of the West, has more successfully avoided or at least moderated the worst effects of modernity. The linchpin of this relative health is the continued vitality—again relatively speaking—of institutions and ideas that counter the tendency of modernity to degrade into nihilism and radical egalitarianism such as religion, the spirit and practice of republican self-government, the fostering of public morality, and the creation of constitutional space or discretion for the exercise of statesmanship.

In Part II of the essay, I will suggest three areas in which Straussians of either persuasion would reform American constitutional law doctrine in order to most effectively preserve and even increase the strength of those institutions and norms that help America to resist the seemingly unavoidable crisis, and probable death, of modernity. The areas ripe for Straussian reform include: (1) First Amendment Establishment Clause doctrine, much of which is based on distrust of and perhaps hostility toward religion rather than on the legitimacy and indispensability of state accommodation of religious practice and belief; (2) First Amendment speech doctrine, whose core idea that self-expression enjoys near absolute protection from regulation based on the content of that expression is premised upon the acceptance of a relativist or nihilist understanding of freedom and law; and (3) Fourteenth Amendment

Substantive Due Process doctrine, a significant part of which, like First Amendment speech doctrine, is founded on relativist premises.

I. THE GENESIS OF THE CRISIS OF MODERNITY AND UNDERSTANDING AMERICAN EXCEPTIONALISM

A. *The Waves of Modernity*

For Strauss, the story of the crisis of modernity begins with the modern rejection of the classical idea of natural right. Strauss believed that modernity, the rise of modern political philosophy, marked “a cataclysmic break with the older philosophy, a break of such magnitude that all that came before was simply a working out of the implications of that break.”³¹ Strauss was a partisan in the conflict between the ancient and modern understanding of politics. He stood with the ancients and “traced the ills of modern philosophy and many of the ills of modern politics to that break with ancient philosophy and the consequences thereof.”³²

To understand the nature of the break and Strauss's preference for the ancients, one must begin with first premises and ask what good do human beings seek and what is the role of politics in pursuing that good. To Strauss, following Plato and Aristotle, the human good

consists in living thoughtfully, in understanding, and in thoughtful action. The good life is the life that is in accordance with the natural order of man's being, the life that flows from a well-ordered or healthy soul. . . . It is the life according to nature. . . . The life according to nature is the life of human excellence or virtue, the life of a 'high class' person, and not the life of pleasure as pleasure.³³

In pursuing human excellence or virtue, the proper end of the life according to nature, we must understand that the essence of humanity's nature is that we are rational and social animals.³⁴ To perfect ourselves, we must live in society and pursue the life of reason.

As rational animals, we believe that to pursue the good we must have knowledge of the nature of the good and guidance in pursuing it. To Strauss, philosophy is this pursuit of the knowledge of the good. But philosophy is only possible if human beings “while incapable of acquiring wisdom or full understanding of the whole, [are] capable of knowing what [they do] not know, that is to say, of grasping the fundamental problems and, therewith, the fundamental alternatives,

³¹ ZUCKERT, *supra* note 2, at 31.

³² *Id.* at 31.

³³ STRAUSS, *supra* note 13, at 127.

³⁴ Strauss, *supra* note 5, at 85.

which are, in principle coeval with human thought."³⁵ Strauss believed that the great human dilemma—what he called the theologico-political problem—was the choice between the two great alternative paths for knowing the human good—reason and revelation.³⁶ As he put it, "The fundamental question, therefore, is whether man can acquire that knowledge of the good without which they cannot guide their lives individually or collectively by the unaided efforts of their natural powers, or whether they are dependent for that knowledge on Divine Revelation."³⁷ Strauss did not believe that this fundamental problem would ever be resolved; neither reason nor revelation will ever successfully refute the other. Even if it were possible, this refutation would not be desirable; it is this very tension, even conflict, between philosophy and religion—as long as both alternatives remain viable—that is the source of the intellectual and spiritual vitality of the West.³⁸ The conflict and dialogue between these two competing paths to the good forces the partisans of one path to engage the arguments of the other, sharpening and enlivening them both.

It is difficult however, no matter which path we choose (or both), to pursue the good on our own. We are by nature social beings and "constituted so that [we] cannot live, or live well, except by living with others"; we, therefore, can only perfect ourselves "in society or, more precisely, civil society."³⁹ Thus, the purpose of civil society, or politics, is to assist human beings in perfecting their nature as rational and social beings. As Strauss puts it, political action is only properly directed if "it is directed toward human perfection and virtue."⁴⁰ But not all civil societies are equally effective in facilitating the pursuit of excellence and virtue; in order to reach the highest pinnacle, one "must live in the best kind of society, in the kind of society that is most conducive to human excellence."⁴¹ The best kind of political society is one that is dedicated to the pursuit of justice rightly understood; the key to that proper understanding is recognizing that human beings, by nature, are rational and social, and this nature defines what is right and wrong, just and unjust.⁴² By pursuing what is right by nature—natural right—human

³⁵ STRAUSS, *supra* note 13, at 35.

³⁶ PANGLE, *supra* note 1, at 27 ("The fundamental problem of human existence is a theologico-political, and not merely a theological problem because its most important meaning and bearing is not only theological but political; at stake is the ultimate source of our norms of justice or righteousness, the norms by which we guide our lives as citizens, ultimately citizens of the world, obligated to one another, and not merely concerned with and for our poor individual selves.").

³⁷ STRAUSS, *supra* note 13, at 74.

³⁸ PANGLE, *supra* note 1, at 30; ZUCKERT, *supra* note 2, at 45.

³⁹ STRAUSS, *supra* note 13, at 129, 130.

⁴⁰ *Id.* at 134.

⁴¹ *Id.* at 135.

⁴² *Id.* at 129.

beings perfect their nature. It is difficult, however, to understand and act upon the principles of natural right if one lives in a political society that does not recognize the existence or importance of natural right.

The best kind of society, then, requires that its leaders be wise, meaning that they have a proper understanding of natural right. It also, however, requires that the people of that society consent to be ruled by these wise people. Given the rarity of genuine wisdom, it is reasonable, even prudent, for the people of a society to doubt the wisdom of those who would rule them, causing political conflict. The great problem of politics, to Strauss, "consists in reconciling the requirement for wisdom with the requirement for consent."⁴³ For the ancients, wisdom took precedence over consent, but they understood that wise rulers are rare. They therefore counseled reliance upon not the rule of wise men, but of wise laws, administered equitably.⁴⁴ These laws would both facilitate the fostering of the good and limit government's ability to inflict harm. These limits on government were also strengthened by the classical, particularly Aristotelian, understanding that natural right is difficult to embody in abstract propositions; it must instead "reside in concrete decisions, rather than in general rules."⁴⁵ Whether a decision is consistent with natural right (or is just) depends not on some abstract rule but on the context of the decision; what action is called for by natural right can change depending on the circumstances. Because we understand the essence of our rational and social nature, "[t]here is a universally valid hierarchy of ends"; but because what is right can change, "there are no universally valid rules of action."⁴⁶ For example, an act of violence that one would normally condemn as immoral might be defensible given the threat to the public one seeks to avert. As Strauss concludes, "Natural right must be mutable in order to cope with the inventiveness of wickedness."⁴⁷

The Aristotelian understanding of natural right and how the state should act on that understanding, therefore, moderated the ambition and power of government. Because what is required by natural right could change depending on the circumstances and because it is difficult to be certain what is right, wise rulers hesitated in articulating rules of right and wrong and acted cautiously when enforcing them. This ambivalence, however, greatly diminished with the arrival of Christianity in general and Thomist thought in particular. Thomas Aquinas' synthesis of reason and revelation freed natural right of "the hesitations and ambiguities"

⁴³ *Id.* at 141.

⁴⁴ *Id.* at 141-42; See ZUCKERT, *supra* note 2, at 54 ("The classical view of politics that Strauss advocated involved a recognition that since the wise will not rule, government ought to be limited, and that those limits should take the form of laws.").

⁴⁵ STRAUSS, *supra* note 13, at 159; see also Andrew C. Spiropoulos, *Aristotle and the Dilemmas of Feminism*, 18 OKLA. CITY U. L. REV. (1993).

⁴⁶ STRAUSS, *supra* note 13, at 162.

⁴⁷ *Id.* at 161.

characteristic of Aristotelian natural right; as such, "No doubt is left, not only regarding the basic harmony between natural right and civil society, but likewise regarding the immutable character of the fundamental propositions of natural law."⁴⁸ Thus, natural right is transformed into natural law, which unlike Aristotelian political science, does indeed provide a body of legal rules that human beings are commanded to follow.

It is this edifice of Christian natural law that the first moderns sought to tear down. Led by the great innovator, Niccolo Machiavelli, the moderns believed that Christian politics, including the Thomist natural law, had failed. Its certainty had led to efforts to impose the natural law on recalcitrant peoples, sparking religious wars. The natural law's goal of cultivation of human excellence and virtue was unattainable and guaranteed the failure of the political regime. So, the moderns saw the classical regime as both overambitious and complacent. The ancients were too ambitious in aspiring to foster human excellence and virtue; this excellence is dependent upon the development of human reason and character and such development is both rare and often the product of pure chance. They were also too complacent in accepting that human societies would routinely suffer civil strife and ubiquitous poverty. The moderns believed that instead of seeking to develop human reason, the highest part of man, one should seek to build upon the passions, which are low but solid, and give human beings what they want, not what a small elite thinks they need. By lowering the goals of political life "in harmony with what most men actually desire," one can conquer chance and make the political problem a technical problem, one that can be solved by the application of modern science.⁴⁹ The goal should not be to change people, but to channel them; "what is required is not divine grace, morality, nor formation of character, but institutions with teeth in them."⁵⁰

The first step toward establishing this new politics is the expulsion of religion from public life. Its irrationality and overweening ambition pose an obstacle to the advent of a politics that seeks to deliver not salvation but peace and prosperity.⁵¹ The founders of modernity, including Machiavelli and Hobbes, sought "to mock and to laugh revealed religion out of existence."⁵² Their goal was to re-found politics and, in the case of

⁴⁸ *Id.* at 163.

⁴⁹ Strauss, *supra* note 5, at 87.

⁵⁰ *Id.* at 87.

⁵¹ ZUCKERT, *supra* note 2, at 48 ("Modern philosophers tended to present theory solely as a means of achieving better practice, defined not in terms of the moral character or relations among citizens, but in terms of the more palpable outcomes of peace and prosperity.").

⁵² *Id.* at 48.

Hobbes, natural right itself, on a more reliable ground—one, unlike religious faith or philosophical principle, shared by all people.

Hobbes sought to deduce a new political science from "the most powerful and the most fundamental of all natural desires, the initial desire, the desire for self-preservation."⁵³ If "the desire for self-preservation is the sole root of all justice and morality, the fundamental moral fact is not a duty, but a right"; indeed, "[o]nly the right of self-preservation is unconditional or absolute."⁵⁴ The state, then, "has the function, not of producing or promoting a virtuous life, but of safeguarding the natural rights of each."⁵⁵ The state's purpose, compared to the classical regimes, is limited, but it is expected to accomplish its purpose. To protect the natural rights necessary to self-preservation, including the rights to life, liberty, and the ownership of property, the state must give up its desire to make its citizens better people, and instead, secure for them the material means of self-preservation, including physical safety and material wealth. The modern state must encourage acquisitiveness, and even selfishness, in order to inspire the people to produce the wealth necessary to preserve the peace. In place of the classical emphasis on intellectual and moral education, the early moderns constructed both a market economy to produce wealth and political institutions, such as an independent judiciary and an elected legislature, to enable the government to control the passions unleashed by liberating the acquisitive spirit.⁵⁶

This first wave of modernity culminated in the political thought of John Locke. Locke, like Hobbes, posits that "The most fundamental of all rights is . . . the right of self-preservation."⁵⁷ But human beings seek to do more to survive; nature has implanted in them a desire for happiness and an aversion to misery. In fact, "The desire for happiness and the pursuit of happiness have the character of an absolute right, of a natural right."⁵⁸ Nature has also provided human beings with the means necessary for the gratification of their passions—their reason. Reason teaches us that we are in responsible for our selves and what is necessary and useful for our lives.⁵⁹ Reason also teaches us we are all equal in our desire and right to preserve ourselves and pursue happiness; because of this natural equality, Locke demonstrates that "Hobbes's principle—the right of self-preservation—far from favoring absolute government,

⁵³ STRAUSS, *supra* note 13, at 181.

⁵⁴ *Id.* at 181.

⁵⁵ *Id.* at 181.

⁵⁶ ZUCKERT, *supra* note 2, at 62 ("Instead of moral education through law as the core of politics, we see a great new role for political institutions; we also see a great new emphasis on political economy, that is, on the organization of society to produce and distribute material goods.").

⁵⁷ STRAUSS, *supra* note 13, at 227.

⁵⁸ *Id.* at 226.

⁵⁹ *Id.* at 227.

requires limited government."⁶⁰ This limited government must be formed by consent because "[n]othing which is incompatible with the basic right of self-preservation, and hence nothing to which a rational creature cannot be supposed to have given free consent, can be just."⁶¹ The only government that can guarantee the rights of individuals is one that is limited by the rule of law, embodied in a constitution that provides the people the principal role in the making of the law and subordinates the executive power to the law.⁶² Locke's moderation, relative to Machiavelli and Hobbes, is also reflected in his treatment of religion. Locke is neither an open scoffer nor dismissive of religion; he instead relegates its concerns to the private realm because its purpose, the salvation of souls, is not relevant to the purpose of politics.

Following the path of his modern predecessors, Locke believes that the purpose of government is not to create virtuous people but to protect the natural rights of individuals, which are rooted in common passions of human nature. Thus,

since self-preservation and happiness require property, so much so that the end of civil society can be said to be the preservation of property, the protection of the propertied members of society against the demands of the indigent—or the protection of the industrious and rational against the lazy and quarrelsome—is essential to public happiness or the common good.⁶³

Not only does the liberal regime not discourage the passion for the acquisition of wealth or even greed, it positively relies upon it to spur the prosperity that is the reward for maintaining peace and safety. It is far more reliable to found one's government on the low, but solid, ground of the passion for peace and material wealth than on a futile pursuit of virtue. Once natural science, which is also the application of reason to human affairs, makes possible through new technology the conquest of nature, the modern society will generate extraordinary wealth. The regime characteristic of the first wave of modernity, with America as the best example, does succeed in delivering the peace and prosperity it promises by limiting the authority and scope of the state by both law and aspiration.

Strauss, however, demonstrates that, despite the tangible successes of the first modern regimes, they almost immediately came under attack by critics—the leaders of what Strauss calls the second wave of modernity—who argued that while the Lockean regime may be good for the body, it degrades the soul. Led by Rousseau, the second wave

⁶⁰ *Id.* at 231.

⁶¹ *Id.* at 231.

⁶² *Id.* at 234.

⁶³ *Id.* at 234.

moderns rejected the reduction of questions of morality and politics to technical problems, solvable by the encouragement of trade and the amassing of wealth. Finding the first wave's denigration of the role of politics stifling, they sought to restore the place of politics in the pursuit of human perfection.⁶⁴ They did not, however, wish to return to the classical understanding of virtue and human excellence. Indeed, they did not believe that man is born either rational or social, rejecting even the first wave of moderns' belief that human reason can devise, compared to the ancients, a limited, but true, science of human affairs. Instead, they believed that

man's humanity is due not to nature but to history, to the historical process, a singular or unique process which is not teleological; the end of the process or its peak was not foreseen or foreseeable but it came to sight only with the approach of the possibility of fully actualizing man's rationality or humanity.⁶⁵

To the second wave moderns, human beings are perfectible but they cannot perfect themselves by developing their innate individual reason. Human beings actualize themselves by becoming part of history, by identifying the direction of and participating in the evolution of humanity. The second wave thinkers differed in how they viewed the path of humanity's development through history and in how they counseled people to take part in that evolution. Rousseau, for example, believed one would find true freedom by participation in governance as part of the general will. Kant believed freedom depended upon adhering to norms that can be universalized. Marx believed humanity would perfect itself with the passing away of the state and the arrival of the communist utopia. No matter one's paradigm, it is not only the exercise of one's individual reason that determines one's fate—all of us are subject to the waves and tides of history. In any event, one will live a life more fully human than that entailed by the Lockean perpetual pursuit of wealth, famously described by Strauss as "the joyless quest for joy."⁶⁶

This second wave of modernity, however, is itself subject to the critique by the third, and final, wave of modernity. This wave, whose seminal thinker is Nietzsche, reacts against the idea, which originates with the second wave and reaches its apex in Hegel's "end of history", that history has an intrinsic meaning, a distinct direction, that will

⁶⁴ Strauss, *supra* note 5, at 89 ("Rousseau protested in the name of virtue, of the genuine nonutilitarian virtue of the classical republics against the degrading and enervating doctrines of his predecessors; he opposed both the stifling spirit of the absolute monarchy and the more or less cynical commercialism of the modern republics.").

⁶⁵ *Id.* at 90.

⁶⁶ STRAUSS, *supra* note 13, at 251.

culminate in the peak and end of history, the perfectly rational state. Nietzsche believed that history had no such progressive meaning and, if it did, would degrade our humanity. Rather, he believed that "All ideals are the outcome of human creative acts, of free human projects that form that horizon within which specific cultures were possible; they do not order themselves into a system; and there is no possibility of a genuine synthesis of them."⁶⁷

This insight, combined with Nietzsche's rejection of the idea that nature, whether understood through reason or revelation, limits man's freedom, made possible his argument that man is the creator of his values. Man's destiny is not constrained by God, nature, or history; his fate depends on his will to power. Human beings, at the end of the modern era, have a choice of whether to live as the "Over-man" or the "Last-man." The Last-man, the ultimate product of the modern end of history and, perhaps, the perfected form of Lockean man, is "the lowest and most decayed man, the herd man without any ideals and aspirations, but well fed, well clothed, well housed, [and] well medicated by ordinary physicians and by psychiatrists."⁶⁸ The superior man will find this way of life intolerable and will instead reject the comfortable straightjacket of equality and property offered by modernity. He will, choosing the path of the Over-man, seek to create his own reality, even if this means he will overpower or cruelly treat others.

We have arrived, then, with the end of the third wave, at the crisis of modernity. Modernity has seemingly produced two human types, one unattractive and unworthy and the other menacing. The first, and the one most characteristic of first wave regimes like ours, is the Last-man, human beings who care much about their property and comfort and little about their soul.⁶⁹ The Last-man, a product and consumer of mass culture, lacks virtue and thus is incapable of defending modernity—meaning the West—against its enemies, internal and external.⁷⁰ The second human type, who is likely to become one of these enemies, is the person who will not accept the life of the Last-man. Rather than withdrawing into a comfortable private life, as Locke and perhaps the founders of America seem to encourage, this kind of human being will seek a public life, one of political idealism, and one likely to be dedicated to radically changing the society responsible for the Last-man. Because the end of modernity has already seen the severe erosion of the idea of natural right and, hence, any moral limits on one's actions, this

⁶⁷ Strauss, *supra* note 5, at 96.

⁶⁸ *Id.* at 97.

⁶⁹ ZUCKERT, *supra* note 2, at 66 (Describing the Last-man as "human beings with nothing to strive for beyond a house in the suburbs with a patio and a gas-fired barbeque grill, a decent job, and the ability to get their children into good schools.").

⁷⁰ *Id.* at 66 ("The 'last man' is man weakened. Weak man is vulnerable not only to the strong outsider, but also to the social pressures he experiences all around him.").

modern man lacks moderation and ruthlessly pursues one's revolutionary agenda with little concern for the consequences.⁷¹ When combined with the power of modern technology, as we have seen repeatedly in the modern era, whether it be the Jacobins, the Nazis, or the Soviets, these political ideologues can pose a severe threat to the peace or even the existence of late modern society.⁷² We see then the unfolding of the crisis of modernity; our society seems to consist of those who seek to destroy our way of life and those incapable of defending it.

B. Whither America?

If modernity is in crisis, so much so that its existence is in question, it would seem that America, the paradigmatic modern nation, must also be threatened by this crisis and, more importantly, foster the inferior ways of life characteristic of late modernity. Strauss, however, was on the whole positive about America and believed the Constitution a decent one that committed the regime to the rule of law.⁷³ Perhaps the best testament to his respect for America and its regime is the commitment of generations of his students to explaining, defending, and discovering the means of preserving the American regime. As Thomas Pangle remarks,

It is fair to say that the most massive legacy of Strauss as a university teacher has been the legion of scholars and teachers he has spawned who have devoted their writings and their own teaching to a renewal of the critical reverence for the high moral and intellectual achievements of American democratic statesmanship, citizenship, and political thought.⁷⁴

It must be said, however, that given Strauss's decidedly negative judgment of modernity and his preference for the classical approach to politics it jettisoned, it is, at first glance, difficult to understand how anyone who shares Strauss's premises can revere or even respect America.

Straussian defenders of America do not deny Strauss's diagnosis of the ills of late modernity. They agree, for example, that the characteristic regimes of the second wave, such as communism, and the third wave, such as fascism, have inflicted grievous harm on both individuals and

⁷¹ *Id.* at 67 ("We have here not merely an ambition to rule (to be the tyrant) but a political idealism with no discernible limits, which leads to one political horror after another in the name of the highest goals . . .").

⁷² *Id.* at 70 ("Living in the nuclear age, the age of terrorism, and the age of biotechnology, it is easy to see what Strauss feared . . . the very explosive combination brewed up by modernity—highly ideologized politics *plus* technology.").

⁷³ *Id.* at 74; Galston, *supra* note 28, at 193.

⁷⁴ PANGLE, *supra* note 1, at 75.

societies.⁷⁵ What they contend, however, is that America is an example, indeed the supreme example, of a first wave modern regime.⁷⁶ First wave regimes possess several important advantages that result in a decent, more just politics. First, while their understanding of reason is not as rich as that of the classical political philosophers, the first wave moderns did possess faith in human reason and therefore were capable of articulating and adhering to principles of justice: principles that became the source of genuine limits on the power of the state. The theory of natural rights, for example, as elucidated by Locke and incorporated in the Declaration of Independence, places firm limits on the power of the state to deprive anyone of their life, liberty, and property, and indeed, states that the purpose of government is to secure these goods.⁷⁷ Second, the first wave's recognition of the natural equality of human beings led them to construct institutions that respect the right of human beings to consent to their government and thus provide them the mechanisms to ensure the government does not violate their rights. These institutions include constitutionalism and the rule of law, representative democracy, and the separation of powers, all of which both limit the power of government and provide opportunities for wise individuals to influence the course of governance.⁷⁸

In addition, the first wave emphasis on reducing the ambition and scope of government, while a rejection of the classical concern with human excellence and virtue, did, paradoxically, provide a space for the fostering of these goods.⁷⁹ First wave regimes, by making the primary purpose of government the securing of peace and prosperity, left the formation of character to the private realm. Unlike the second and third wave regimes (particularly in their totalitarian variants), which collapse the distinction between state and society (or public and private), first wave regimes, by permitting and protecting a private realm, make it possible for private institutions such as churches and universities to assume the job of cultivating human excellence and teaching virtue.⁸⁰

⁷⁵ *Id.* at 74 ("Proven conclusively inferior . . . are the politics generated by the 'second wave'—of Rousseau and German idealism, culminating in Marx and Marxism, and by the 'third wave,' of Nietzsche and Heidegger.").

⁷⁶ ZUCKERT, *supra* note 2, at 75 ("It was under the spell of the first wave that America was founded; its regime was and is a first-wave regime.").

⁷⁷ PANGLE, *supra* note 1, at 17.

⁷⁸ ZUCKERT, *supra* note 2, at 76.

⁷⁹ Galston, *supra* note 28, at 203 ("The United States then enjoyed enviable good fortune that might appear paradoxical; its civil society both provided a counterweight to liberal democratic principles and was open to their influence, in both instances to the advantage of liberal democracy.").

⁸⁰ *Id.* at 203; See STRAUSS *supra* note 24, at 61 ("Liberalism stands and falls by the distinction between state and society or by the recognition of a private sphere, protected by the law but impervious to the law.").

Even granting the advantages of the first wave regimes, it is still difficult to read Strauss and not believe that America is deeply flawed and faces a difficult, uncertain future. America's genesis as a first wave regime is no answer, in and of itself, to Strauss's critique of modernity. The point of Strauss's analysis is that modernity generates the critiques which lead to the next wave of critics, inevitably resulting in the destructive nihilism produced by the third wave. In other words, the important question is whether America's principles and institutions, no matter their original purpose or meaning, carry the seeds of their own destruction.⁸¹

Straussians argue that America is not destined to fall because it not a completely modern society; in Strauss's words, liberal democracy—and America in particular—“derives powerful support from a way of thinking which cannot be called modern at all: the premodern thought of the western tradition.”⁸² America, compared to the rest of the West (particularly Europe), is exceptional; many Americans, for example, even in the most advanced modern economy in the world, are deeply religious; and, in a society based on the principle of equality, many reject the radical egalitarianism rampant in the rest of the West and instead believe that merit entitles some to rise above others, both economically and politically.⁸³ These beliefs, which have, as Tocqueville noted, formed a substantial part of American public opinion, are not at all modern and are certainly not consistent with the “God is dead” premise of late modernity.⁸⁴ These beliefs do not come from nowhere; they are a product of premodern institutions and opinions that have been a part of the American regime since before the Founding and have persisted to this day.

The best way, Straussians argue, to understand the American regime is that it is an amalgam of modern and premodern (ancient) elements.⁸⁵ The regime, with its primary political commitment to the securing of modern natural rights and the pursuit of peace and prosperity, is certainly constituted as a first wave modern regime. But other elements of American society are distinctly pre- or even anti-modern including: a

⁸¹ PANGLE, *supra* note 1, at 25 (“To what extent is the historical outcome, in our time, of the specifically modern natural rights doctrine that inspires and finds expression in the Declaration of Independence necessary or inevitable—thereby revealing a lack of solid grounds for that doctrine from its inception?”).

⁸² Strauss, *supra* note 5, at 98.

⁸³ Galston, *supra* note 28, at 208 (“America (unlike Europe) has stubbornly resisted Max Weber's thesis that modernization and secularization go together, and also that the aspiration to meritocracy rather than the reproduction of oligarchy remains alive and well, however far our system of education and employment may diverge in practice from the ideal.”).

⁸⁴ ZUCKERT, *supra* note 2, at 79.

⁸⁵ SMITH, *supra* note 29, at 167 (“The American regime appears to be an amalgam—an unsteady and perhaps incoherent amalgam—of ancient and modern principles.”).

complex constitution whose use of devices such as separation of powers, checks and balances, indirect election, and long tenure of office draws on the classical political science of the mixed regime⁸⁶; the persistence of strong religious belief, which inculcates virtue in the mass of citizens⁸⁷; the commitment to active involvement by citizens in government, particularly at the local level, the necessity of which is justified by arguments drawn from classical republicanism⁸⁸; and the belief that the leaders of the regime ought to be (at least in times of crisis), in some sense, superior to the mass of citizens and the consequent toleration, and even active support, of elite institutions, such as the liberal arts universities, that are intended to foster human excellence and virtue.⁸⁹

Straussians agree that these premodern elements of the regime are indispensable to its survival—otherwise America, like its modern European cousins, will, given the dynamic of modernity, degrade into nihilism.⁹⁰ They disagree whether the founders of America consciously integrated these premodern elements into the regime and whether this amalgam is sustainable. Strauss, without examining the issue in any detail, seemed to fear that this amalgam was not sustainable because the premodern elements were slowly being eaten away by the acid of America's dominant modernity. He once wrote, discussing these premodern elements, that "We must disregard here the older traditions which fortunately still retain some of their former power; we must disregard them because their power is more and more corroded as time goes on."⁹¹ More than a few Straussians believe that Strauss viewed the American tradition as disharmonious and permanently plagued by tension between its classical and biblical heritage and its essential modernity.⁹²

The Straussians who followed what they understood to be Strauss's skepticism about the sustainability of the amalgam of the ancient and modern and his pessimism about America's prospects have been called "East Coast" Straussians. Their premise is that America is, in essence, a modern society and therefore, is in grave danger of suffering the full range of the ills of modernity. They, following Strauss, worry that the

⁸⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 105-161 (Harvey C. Mansfield & Delba Winthrop eds., 2000) (1835).

⁸⁷ *Id.* at 275-88, 417-25.

⁸⁸ *Id.* at 57-79.

⁸⁹ *Id.* at 251-58; *see also* SMITH, *supra* note 29, at 167; Galston, *supra* note 28, at 213 (drawing upon Martin Diamond's analysis of the virtue forming institutions of the regime and also pointing out that the first wave modern foundation of the regime encourages important virtues, as well, including industry, frugality, and civility).

⁹⁰ ZUCKERT, *supra* note 2, at 200 ("It is no accident that Strauss spoke the language of crisis—America is in a real sense good, but the inherent dynamic of modernity is robbing it of that goodness.").

⁹¹ STRAUSS, *supra* note 24, at 23.

⁹² PANGLE, *supra* note 1, at 77.

natural tendency of a modern, democratic regime is to push the regime in a more modern, democratic direction and thereby sacrifice its premodern elements.⁹³ Eventually, these elements are so weakened that the regime is infected by relativism and radical egalitarianism.⁹⁴ Anyone who pretends that America is not subject to the ills of modernity is her flatterer, not her friend.⁹⁵

Other Straussians are far more positive about both the original design of the regime and its prospects. These "West Coast " Straussians do not quarrel with Strauss' critique of modernity—what they do quarrel with is the notion that America is, in essence, a modern regime. They deny that the Declaration of Independence and its central doctrine of natural equality is merely a summary of Lockean natural rights theory; they believe that the Declaration, rightly understood, articulates a commitment to principles of morality, constitutionalism, and the larger western tradition of natural right.⁹⁶ The Declaration—and the American tradition—is best understood through an Aristotelian, and hence non-modern, lens.⁹⁷ When the East Coast Straussians read Locke—and the Declaration—as purely modern, they forget both that Locke portrayed himself as respectful of the classical tradition and the Founders may have believed him.⁹⁸ If the Founders did indeed read at least some of the principles of classical political science into the nation's seminal principles, then, in the fight against the degradation of late modernity, American principles are not only not part of the problem, they, assuming they remain vital, are part of the solution.⁹⁹

At the end of the day, however, for the purpose of understanding how Straussians should approach constitutional law doctrine, what the two Straussian schools agree upon is far more important than their differences. They all agree on Strauss's diagnosis of the crisis of the West and his view that this crisis is really the crisis of modernity. They also agree that the American regime possesses a good constitution and deserves both loyalty and a defense against its critics. Most importantly, they agree that what makes the American regime a decent one, in the face of the danger caused by the degradation of modernity, is its premodern elements. These elements, for the regime to survive and prosper, must be preserved and revitalized; they provide the ballast

⁹³ ZUCKERT, *supra* note 2, at 78.

⁹⁴ PANGLE, *supra* note 1, at 77.

⁹⁵ *Id.* at 88.

⁹⁶ ZUCKERT, *supra*, note 2, at 246.

⁹⁷ *Id.* at 248 ("The founders do not require correcting in nonmodernist terms because . . . in the decisive respect they were already not moderns.").

⁹⁸ *Id.* at 249.

⁹⁹ *Id.* at 248.

necessary to withstand the storms of modernity.¹⁰⁰ Thus, in thinking about constitutional law, Straussians of all varieties ought to seek to curb the worst aspects of our modern regime and encourage the vitality of the premodern elements that protect us against those aspects.

II. A STRAUSSIAN AGENDA FOR CONSTITUTIONAL REFORM

A. General Principles

Just as Straussians agree on what they fear—the effects of a corrosive modernity—they also generally agree on what aspects of the American regime they wish to preserve. The touchstone for Straussian thinking about the American regime is the Constitution. The Constitution (when read with its predecessor constitutional document, the authoritative statement of the political theory upon which it is based, the Declaration of Independence) is not merely a blueprint for our political institutions; it embodies and applies the fundamental principles of political theory that underlie our regime and our society.¹⁰¹ The Constitution expresses what kind of people we are and what kind of people we wish to be. The Constitution, therefore, and the decisions of the judges and political actors interpreting it, must be understood through the prism of political philosophy. In order for the Constitution to reach its fullest potential as a means for fostering the human good, political philosophy—the study of the fundamental questions regarding the human good and how it is best achieved—must both guide the decisions made pursuant to it and our study of these decisions.¹⁰²

As to who should have the authority to interpret the Constitution, Straussians, in principle, favor the institution of judicial review. The judiciary, because of their superior (and hopefully liberal) education; their insulation from political judgment which provides them extraordinary independence; and the freedom that their life tenure provides them to see and work toward the permanent good, are uniquely placed to both apply and explain the fundamental principles of political

¹⁰⁰ PANGLE, *supra* note 1 at 83 (Defenders of the American regime must "become all the more aware of the need for thoughtful action not only to defend modern liberalism but to shore it up—in part by supplementing it with ancient liberalism . . .").

¹⁰¹ *Id.* at 104 ("At the heart of American politics, in Strauss's view, is the Constitution and its evolution—viewed as the working out of the altogether harmonizing basic principles enunciated in the Revolution (above all in the Declaration of Independence) and subsequent Constitutional Founding. To discover the Constitution's full meaning as the basic law of the regime is to achieve clarity about the overarching moral goals, the way of life, the human types, that the Constitution fosters and, conversely, those it discourages.").

¹⁰² *Id.* at 89.

theory that are at the heart of the Constitution.¹⁰³ It should be noted, however, that this respect for judicial review does not mean that judges ought to be the sole interpreters of the Constitution. The political branches, as well, have an independent obligation and authority to interpret the Constitution and provide reasons for their actions, reasons that should draw upon the political principles embodied in the Constitution.¹⁰⁴ Thus, Straussians find worthy of serious study all efforts, whether they are Supreme Court opinions or Presidential addresses, to apply the principles of the American constitutional order to particular circumstances.¹⁰⁵ Straussians believe that serious study of these documents will clarify the meaning of the principles of our regime.

In interpreting the document, Straussians are dedicated to explaining and applying the original meaning and structure of the document.¹⁰⁶ If the Constitution is a work of political theory, largely, for example, of first wave modernity, then in order for these principles to operate to full effect, they must be faithfully applied and not altered on the authority of five judges; the people, of course, may avail themselves of their authority to amend the Constitution. In addition, the premodern elements integrated into the constitutional order must be protected from the inevitable attacks emanating from the increasingly modern culture. Only a dedication to vindicating the original meaning of the Constitution can effectively preserve the premodern elements of the regime from the inevitable attacks that will arise from a dynamic, modern society.

B. Doctrinal Applications

In scrutinizing current Supreme Court doctrine to uncover the areas most in need of reform, the Straussian analyst should seek, first, to identify those doctrines that are infected with the virus of late modernity. Any doctrine that is founded on nihilist or relativist premises undermines both the principles of classical natural right and modern natural rights—both are based on faith in reason's capacity to know the truth—and thus undermine the true foundation of the regime. Second, the Straussian interpreter will take care to articulate an understanding of the Constitution and craft a doctrine that will nurture the ancient—and thus

¹⁰³ *Id.* at 106 (Contending that "the higher judiciary, in the U.S. system, is uniquely delegated to deliver a publicly reasoned justification of the constitutional law through which, above all else, the regime evolves.") Pangle, also, consistent with his perspective as an East Coast Straussian, believes that the Court's authority and independence enables it to question and perhaps moderate the modern principles of the regime. *See id.* at 108.

¹⁰⁴ *See* Ralph A. Rossum, *The Supreme Court: Republican Schoolmaster*, in LEO STRAUSS, *THE STRAUSSIANS, AND THE AMERICAN RESUME* 369 (Kenneth L. Deutsch & John A. Murley eds., 1999).

¹⁰⁵ *Id.* at 363.

¹⁰⁶ *Id.* at 367.

counter-modern—elements of the regime. I will briefly describe three doctrinal areas that are ripe for Straussian reform.

1. Establishment Clause Doctrine

The Straussian understanding of the Constitution's principles regarding the proper relationship between religion and the state has much in common with that of Tocqueville.¹⁰⁷ To be sure, Tocqueville does not advocate the formal establishment of religion (the pernicious effects of which he witnessed in his own nation), observing that all Americans he encountered "attributed the peaceful dominion that religion exercises in their country principally to the complete separation of church and state."¹⁰⁸ Once one puts aside the expeditiously rejected idea of a state church,¹⁰⁹ the question then is how, in a liberal regime, should religion and the state interact.

Over two centuries' of thinking about this question have produced two primary paradigms for the relationship between religion and the state. The first, and most familiar, is the idea of the strict separation of church and state. As Michael McConnell describes,

In this model, the public sphere is strictly secular: Laws are based on secular premises, government programs and activities are completely secular, and religion is deemed to be irrelevant to the determination of the citizens' civic obligations Religious exercise is protected, so long as it is confined to the private sphere of home and church.¹¹⁰

The second model is the pluralist or accommodation model, in which

[r]eligious citizens, like everyone else are entitled to advocate laws that reflect their best judgment of what will promote the public good, even if their premises derive from religious teaching To tell religious citizens that their conceptions of justice or the common good must be 'bracketed' is to treat them as second class citizens.¹¹¹ This approach by, for example, the support of favorable tax treatment of religious and charitable groups, also "encourages communities of conscience to

¹⁰⁷ Rossum, *supra* note 104, at 381 n.78 ([Straussian scholars in this field] all rely heavily on Tocqueville's arguments in *DEMOCRACY IN AMERICA* and Washington's "Farewell Address" to support their argument that governments must collaborate with religious institutions to curb licentiousness and corruption and promote morality and common decency.").

¹⁰⁸ TOCQUEVILLE, *supra* note 86, at 283.

¹⁰⁹ MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 69 (2002) (Noting that only three state establishments existed at the time of the ratification of the First Amendment and these were all terminated by 1833).

¹¹⁰ Michael W. McConnell, *Religious Souls and the Body Politic*, 155 *THE PUBLIC INTEREST* 135 (2004).

¹¹¹ *Id.* at 139.

preserve the institutions necessary to perpetuate their distinctive ways of life and to pass these on to future generations.¹¹²

There can be little doubt which model Tocqueville preferred—he believed that religion was central to the health of the American polity and thus could not be banished to the private realm. To understand his argument for the importance of religion in the American political regime, we must begin with Tocqueville's argument that no society can function without

dogmatic beliefs, that is, opinions men receive on trust without discussing them . . . for without common ideas there is no common action, and without common action, men will still exist, but a social body does not. Thus in order that there be society, and all the more, that this society prosper it is necessary that all the minds of the citizens always be brought and held together by some principal idea.¹¹³

Tocqueville left no doubt what was the source of that principal idea—it was the Americans' Christian faith. "Religion, which, among Americans, never mixes directly in the government of society, should . . . be considered as the first of their political institutions, for if it does not give them the taste for freedom, it singularly facilitates their use of it; indeed, "Americans so completely confuse Christianity and freedom in their minds that it is almost impossible to have them conceive of one without the other."¹¹⁴

Religion, meaning Christianity, is so important to politics because "it directs mores" and therefore governs how Americans think about politics and which principles they seek to embody in law.¹¹⁵ This "spirit of religion" is indispensable to the success of the regime because while modernity (what Tocqueville calls equality) "introduces great goods into the world, [it] nevertheless suggests to men very dangerous instincts . . . it tends to isolate them from one another and to bring each of them to be occupied with himself alone. It opens their souls excessively to the love of material enjoyments."¹¹⁶

Religion counters the ills of modernity because it inspires "wholly contrary instincts." Tocqueville explains:

There is no religion that does not place man's desires beyond and above earthly goods and that does not naturally raise his soul toward regions much superior to those of the senses. Nor is there any that does not impose on each some duties toward the human species or in common

¹¹² *Id.* at 139-40.

¹¹³ TOCQUEVILLE, *supra* note 86, at 407.

¹¹⁴ *Id.* at 280, 281.

¹¹⁵ *Id.* at 278.

¹¹⁶ *Id.* at 419.

with it, and that does not thus draw him, from time to time, away from contemplation of himself Religious peoples are therefore naturally strong in precisely the spot where democratic peoples are weak; this makes very visible how important it is that men keep to their religion when becoming equal.¹¹⁷

President Washington, in his Farewell Address, had already counseled the American people about the importance of religion to the public realm:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and cherish them. A volume could not trace all their connections with private and public felicity.¹¹⁸

Turning to the practical application of these principles, to enable religion to play this indispensable role in moderating the pernicious effects of modernity and draw citizens to the higher matters of the soul, the constitutional treatment of relationship between religion and the state must permit at least two interactions. First, Americans must be able, if religion is the principal source of their opinions, to base their political opinions and legislation on their religious beliefs. While all agree that a particular faith cannot be officially established or non-believers cannot be coerced to practice any faith, religious believers must be able to embody the moral content of their beliefs in law.¹¹⁹ If they cannot, then the primary basis of many Americans' understanding of the world will be lost from politics as will the beneficial effects of religion's moderation of the selfishness engendered by modernity. Second, religious Americans must be able, as long as no one is coerced, to express as a community their religious beliefs. Only if the community can express their religious convictions can religion serve as the indispensable unifying force of the society.

The regnant doctrinal paradigm of the Court, however, treats religion in the exact opposite manner from that suggested by Tocqueville. The

¹¹⁷ *Id.* at 419.

¹¹⁸ George Washington, *Farewell Address*, in AN AMERICAN PRIMER 221 (Daniel J. Boorstin ed., 1966).

¹¹⁹ McConnell, *supra* note 110, at 139 ("Advocates of the secular state claim that laws based on religious reasoning demean the status of nonbelievers as equal citizens. The pluralist would respond that no citizen is demeaned by laws that he disagrees with, so long as he has an equal right both to press for laws he deems just and to disagree with arguments he does not find persuasive.").

Court's approach, as articulated in *Lemon v. Kurtzman*¹²⁰ could not be more wrongheaded from the Straussian perspective. *Lemon* articulates a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."¹²¹ The statute must pass all three parts of the test to be held constitutional and is designed to invalidate any possible interaction between religion and the state—religion must remain an entirely private matter.¹²²

The first part of the test, especially as vigorously enforced by the Court in *Edwards v. Aguillard*¹²³ and *McCreary County v. ACLU of Kentucky*,¹²⁴ requires that the predominant purpose for any law be secular; if it is demonstrated that the law was motivated by religious convictions, it will be struck down. This requirement makes it impossible for religious believers to participate in politics on the same footing as non-believers—it, in effect, treats them as second-class citizens. Justice Scalia, in his dissent in *Edwards*, articulated the pluralist approach, arguing that the Establishment Clause cannot be read to forbid

legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved [P]olitical activism by the religiously motivated is part of our heritage [W]e do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process.¹²⁵

The Court's approach, however, does exactly what Scalia warns against. So instead of religion being the primary source of public opinion, and thus the basis of legislation, it is affirmatively excluded from politics. This exclusion cripples the capacity of religion to act as a check on the corrosive effects of modernity.

¹²⁰ 403 U.S. 602 (1971).

¹²¹ *Id.* at 612.

¹²² ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1202 (3rd ed., 2006) ("The *Lemon* test is favored and used by Justices taking the strict separationist approach to the establishment clause Justices favoring the accommodationist approach urge the overruling of the *Lemon* test.").

¹²³ 482 U.S. 578 (1987).

¹²⁴ 125 S.Ct. 2722 (2005).

¹²⁵ *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

Second, as demonstrated in the Court's school prayer cases, most recently in *Lee v. Weisman*,¹²⁶ in applying the second prong of *Lemon*, the Court has prohibited the government from advancing or endorsing religion because it may not place itself on the side of the religious convictions of the majority for fear of either treating believers as favored insiders or non-believers as disfavored outsiders.¹²⁷ But as Justice Scalia emphasized in his dissent in *Lee*, prohibiting the majority of a community from expressing its deepest convictions is contrary to the nation's principles and long practice, writing,

The reader has been told much in this case about the personal interest of [the plaintiffs], and very little about the personal interests of the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.¹²⁸

As the Straussians and Tocqueville would argue as well, this line of cases undermines the principles and institutions of the regime because it makes it almost impossible for the majority to express its religious convictions. This censorship makes it difficult for the community to inculcate its beliefs, beliefs that are necessary to moderate the destructive individualism of modernity.

So what should be done? Straussians should argue that the *Lemon* test ought to be overruled in favor of a new test that will allow religious believers, just like everyone else, to embody their views in law. Religious believers, if they constitute a majority of the community, should also be empowered to publicly express their religious opinions as long as no one is coerced to participate in the expression of these views. Only if religious believers are permitted by the Court to bring their convictions to bear on the public realm can religion effectively moderate the selfishness and social atomization that accompany the unchecked progress of modernity.¹²⁹

¹²⁶ 505 U.S. 577 (1992).

¹²⁷ While it is true that the opinion of the Court in *Lee*, written by Justice Kennedy, found that the middle-school student in *Lee* was treated coercively when her school included a prayer at her graduation, the other four Justices in the five person majority wrote or joined concurring opinions making it clear that, in their view, the plaintiff need not have proved coercion to prevail. It was sufficient that, by including a prayer at the public ceremony, the government had endorsed religion. *Id.* at 604, 606 (Blackmun, J., concurring) and 618-19 (Souter, J., concurring).

¹²⁸ 505 U.S. at 632 (Scalia, J., dissenting).

¹²⁹ It is ironic that the strict separationist application of the excessive entanglement prong of *Lemon* would invalidate any state endorsement or support of religion because it

2. First Amendment Free Speech Doctrine

Straussians certainly do not dissent from the American consensus that self-government requires that the Constitution, and thus the courts protect the right to political speech against state invasion.¹³⁰ Government by consent is, by definition, government by deliberation, and citizens would be incapable of deliberating upon which candidate to support or which policies to advocate or oppose if they could not speak or listen to others express their political views.¹³¹ The difficult question is what kind of speech, or as the modern Court holds (perhaps wrongly), expression, should be protected beyond the political.

Courts and commentators have posited that one cannot decide which types of speech or expression should be protected without deciding why speech or expression should be protected in the first place.¹³² If the only reason freedom of speech or expression is protected is for the sake of democratic self-government, it is difficult to justify protecting any speech other than the political. The Court has never, however, stated that only political speech is protected by the First Amendment. It has articulated two other theories for why speech is protected. The first is the search for truth, famously described by Justice Holmes as the "marketplace of ideas," meaning that speech or expression must be protected in order to promote competition in ideas so that society may discover the truth about the world.¹³³ The argument is that truth will emerge from the clash of ideas; this rationale puts enormous stock in the ability of human reason to discern truth from falsehood.¹³⁴

The third theory, and the one often invoked by the modern Court, is the theory that expression ought to be protected in order to advance personal autonomy or personhood; some refer to it as the ability to actualize one's self.¹³⁵ This theory is the broadest in that it does not require that one's expression take form as an idea or a rational argument. One actualizes one's self by the expression of emotions as much as by

could cause political division when it is in fact the exclusion of the potentially unifying force of religion from communal life that aggravates the dangerous American tendency to lapse into excessive individualism, the most potent cause of social disunity. See TOCQUEVILLE, *supra* note 86, at 482-83.

¹³⁰ Rossum, *supra* note 104 at 373-74 (discussing Straussian agreement that political speech must be protected but disagreement regarding the extent of that protection).

¹³¹ CHEMERINSKY, *supra* note 122, at 926-27.

¹³² *Id.* at 925 ("[T]he Supreme Court inevitably must make value choices as to what speech is protected, under what circumstances, and when and how the government may regulate. Such analysis is possible only with reference to the goals that freedom of speech is meant to achieve.").

¹³³ *Id.* at 927.

¹³⁴ *Id.* at 928.

¹³⁵ *Id.* at 929.

articulating ideas; all expressions important to one's sense of self ought to be protected. The classic doctrinal articulation of this theory is the Court's opinion in *Cohen v. California*.¹³⁶ There, the Court, in an opinion by Justice Harlan, overturned a conviction for disturbing the peace, involving an individual publicly wearing, to protest the Vietnam War, a jacket displaying a profane and offensive expression. The government argued that it did not seek to censor the anti-war message of the speaker; it was only concerned with the offensive nature of the words used, words that had no part in the expression of ideas. The Court, in rejecting the government's arguments, opined that the state

has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.¹³⁷

It is vital that the individual determine his mode of expression because expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force."¹³⁸ In sum, the Court held that the First Amendment protects one's ability to express one's true self, including one's raw emotions, even if this expression is vulgar, offensive, and does not express an idea.

In weighing these suggested theories for the protection of speech, many Straussians are ambivalent towards, or even attracted to, the search for truth rationale.¹³⁹ This theory, as should be no surprise, is a paradigmatic example of first wave modern thought, for good and ill. Its reliance on and faith in individual human reason is admirable but, if human reason needs more guidance than permitted by first wave thinkers, then significant social harm may result from limiting the power of government to restrict speech that is not political.

However, no matter what they may conclude about the search for truth theory, few, if any, self-respecting Straussians can accept the self-

¹³⁶ 403 U.S. 15 (1971).

¹³⁷ *Id.* at 25.

¹³⁸ *Id.* at 26.

¹³⁹ Rossum, *supra* note 104, at 372 (discussing the argument of Straussian scholars that free speech is protected to promote thought and deliberation, thereby resulting in an enlightened republic).

actualization theory, particularly as it is articulated in *Cohen*.¹⁴⁰ The very essence of the opinion, as exemplified by the famous "lyric" line, is the equating of the principle of freedom of expression with moral relativism, if not nihilism. The establishment of a legal doctrine forbidding the state from regulating vulgar, offensive or otherwise socially harmful expressions that do not express ideas for the sake of mere venting of one's emotions is an excellent example of the damage wrought by late modernity. A Straussian First Amendment doctrine would reject the actualization of self as a reason to protect expression and would instead permit the state to regulate expression in order to foster the character necessary for self-government.¹⁴¹

3. Substantive Due Process Doctrine

Putting aside, for the sake of argument, the question of whether the Court may legitimately under the Fourteenth Amendment, the Ninth Amendment, or any other clause of the Constitution, protect rights not enumerated in the text of the document, one must ask, if such rights are to be protected, how should the Court go about identifying them?¹⁴² The Court currently employs two methods for identifying such rights under the Due Process Clause of the Fourteenth Amendment (or, more commonly, substantive due process), one of which is a ripe target for Straussian critique.

Michael McConnell has usefully categorized the Court's two approaches to substantive due process analysis.¹⁴³ He calls the first the "traditionalist" approach to substantive due process jurisprudence, which he argues the Court adopted in *Washington v. Glucksberg*.¹⁴⁴ He argues that the Court, in rejecting a claim for the protection of the right to assisted suicide, articulated a methodology for determining whether the asserted right is supported by a sufficiently long-standing practice or tradition to warrant its protection under the Due Process Clause. There are three core elements of this doctrine. First, "a person challenging a law

¹⁴⁰ *Id.* at 372 (Stating, and referring to *Cohen*, that "Straussian constitutional scholars criticize the Court for protecting, and thereby legitimizing, unrestrained self-expression at the expense of self-rule.").

¹⁴¹ *Id.* at 372 (arguing that the protection of expression as an end to itself will undermine "the moral character and decency of the citizenry needed to sustain self-government").

¹⁴² For arguments that, from the perspective of liberal political theory, the protection of unenumerated rights is illegitimate under the Constitution, see Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181 (2009) and Andrew C. Spiropoulos, *Rights Done Right: A Critique of Libertarian Originalism*, 78 UMKC L. REV. 661 (2010).

¹⁴³ See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665 (1997).

¹⁴⁴ 521 U.S. 702 (1997).

on substantive due process grounds must satisfy a 'threshold requirement' of demonstrating that the 'challenged state action implicates a fundamental right.'¹⁴⁵ Second, "this threshold requirement may be satisfied only by showing either that the asserted right is textually based (like the right of freedom of speech) or that it is 'objectively, deeply rooted in this Nation's history and tradition.'¹⁴⁶ Finally, this inquiry "must be based on a 'careful description of the asserted fundamental liberty interest.'¹⁴⁷

McConnell argues that this approach is "wise, workable, and firmly grounded in principles of American constitutionalism."¹⁴⁸ He believes that this method for defining and protecting unenumerated constitutional rights is legitimate because it does not authorize judges to define these rights by reference to their own political or philosophical views. Rather, judges will decide whether a particular right should be protected by examining the objective facts of history; if there is no proof of long-standing tradition establishing a right, the issue reverts to the legislature.¹⁴⁹

McConnell contrasts the traditionalist approach to what he calls the "moral philosophic" approach, which he defines as the view that the

open-ended language of the Constitution is an invitation to judges to decide, on the basis of 'their own views about political morality,' what liberties Americans should enjoy, and to limit the power of the government to invade those supposed rights in the absence of what the judges deem to be sufficient reasons.¹⁵⁰

This approach, being philosophical, rather than historical, is not "inductive and experiential"; it instead is "deductive and theoretical, deriving specific prescriptions from more general theoretical propositions."¹⁵¹

While Straussians, as good originalists and believers in republican self-government, would oppose the use of the moral philosophic approach by judges seeking to impose their own political morality on their fellow Americans, they are not necessarily opposed to relying upon moral philosophy in constitutional interpretation.¹⁵² For at least some

¹⁴⁵ McConnell, *supra* note 143 at 670 (quoting *Glucksberg*, 521 U.S. at 722 (1997)).

¹⁴⁶ *Id.* at 670 (quoting *Glucksberg*, 521 U.S. at 703).

¹⁴⁷ *Id.* at 671 (quoting *Glucksberg*, 521 U.S. at 721).

¹⁴⁸ *Id.* at 681.

¹⁴⁹ *Id.* at 672-73.

¹⁵⁰ *Id.* at 667 (citations omitted).

¹⁵¹ *Id.* at 672.

¹⁵² For arguments by a prominent Straussian for the necessity of interpreting the Constitution in light of political theory and the legitimacy of substantive due process analysis employing theories of natural right, see HARRY V. JAFFA, *STORM OVER THE CONSTITUTION* (1999).

Straussians, the legitimacy of philosophic argument in substantive due process doctrine may depend less on the inherent illegitimacy of employing these arguments than on the substance of the philosophy imported into the law.¹⁵³ The Court's most recent comprehensive statement of the moral philosophic approach to substantive due process doctrine comes from the joint opinion of Justice Kennedy, O'Connor, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁵⁴ The joint opinion defined the liberties that ought to be protected under the Due Process Clause as those

matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy At the heart of liberty is the right to define one's own concept of existence, of meaning, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁵⁵

Whatever any disagreements Straussians may have over the legitimacy of the protection of unenumerated rights and the relative importance of tradition versus political philosophy in constitutional reasoning, they would surely agree that the joint opinion's approach to defining protected liberties is wrong and ought to be discarded. As with *Cohen* in the First Amendment context, *Casey*'s asserted right to define one's personhood as one sees fit is not consistent with the tradition of ordered liberty of the Founding, which recognized the necessity and legitimacy of moral limits on one's freedom. Rather, it is a claim in favor of the unlimited power of the self to define one's own values and, thus, a textbook illustration of the nihilism engendered by the third wave of modernity. The division on the Court between those who would adhere to the Nietzschean approach of *Casey* and those who apply the traditionalist approach, tracks the division among our legal and political elites over whether we should embrace the consequences of a galloping modernity or whether we ought to consider those goods lost in the maelstrom of change.

CONCLUSION

When all is said and done, one cannot help but note that the Straussian prescription for saving liberal democracy and its most important outpost, America, is deeply similar to that of Tocqueville.

¹⁵³ It should be noted that Strauss criticized Burke's traditionalist approach for its rejection of the importance of reason and his consequent rejection of classic natural right. See STRAUSS; *supra* note 13, at 316, 318-19.

¹⁵⁴ 505 U.S. 833 (1992).

¹⁵⁵ *Id.* at 851.

This is no surprise; both self-consciously described themselves and acted as friends, but not flatterers, of liberal democracy. Both men also sought to save the modern regime of liberal democracy by infusing it with elements of classical political theory and practice.

Where they differ, however, is that while Tocqueville was willing to call himself a liberal or at least to conclude that the triumph of liberalism is inevitable, Strauss was not as sanguine about the future of modernity. Unlike Tocqueville, perhaps he had lived through too much of the wreckage caused by modernity to be optimistic about its fate. Strauss, however, did not give into despair and, in some ways, can be seen as more hopeful than Tocqueville. While Tocqueville believed that both the irresistible age of modernity was at hand and the age of aristocracy—his way of describing the classical regime—was dead, Strauss seems to suggest that it is at least possible to return to the principles of classical political science or at least possible to recapture something of their thought. While Tocqueville urges Americans to retain what they already have—the sprit of liberty embodied in active self-government and the sprit of religion—Strauss attempts to do something much harder. He wants to persuade Americans to recapture what they have lost.

The practical question for Americans is how we can reform our regime to avert the crisis of modernity. To constitutional lawyers, the obvious place to begin is with the Court, the nature of which presents both a problem and an opportunity. The problem is that the Court is an elite institution and it is the nation's elites who have been the main carriers of the virus of late modernity. The American people as a whole have more effectively resisted the charms of modernity and are more attached to at least some of its premodern elements, particularly religion. The opportunity is that the work of Strauss and the generations of his students who have made their vocation the study of America, if attention is paid, can produce a new elite, one that has turned to the ancients for guidance. One may be permitted to hope that a reformed elite might, over time, recapture the Court and restore the possibility of a liberal democracy fortified by the wisdom of the ancients.

