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Spelunking in the Unnatural Cave:
Leo Strauss's Ambiguous Tribute to Max Weber

CLARK A. MERRILL
Salve Regina University

How then should human beings live? What is the best political order for man? Must social science restrict itself to accumulating knowledge about possible means for achieving the ends of policy, whatever those ends may be, without ever venturing to establish or judge the ends themselves? Max Weber's fact-value distinction says precisely that: no Ought can ever be derived from any Is. Why is that? Because the Is, the sensible facts of our existence, do not reveal our proper ends as human beings. In our moral perplexity, the universe remains silent. Yet politics must constantly assert the Ought. Should political candidates accept large financial contributions? Should the law execute murderers? Should the state compensate an individual when it takes his property for the public good? The language of politics is necessarily the language of good and bad, just and unjust, honorable and dishonorable. How are such questions to be answered if we cannot know the end at which we should aim? The question before us is whether Weber was right, whether science or human reason cannot, in fact, make any contribution to political discourse beyond the bare analysis of fact and comparison of means.

Since fifth-century Athens, political philosophy has been the science concerned with the relation between knowledge and action. Within the long tradition of political philosophy, the family of teachings that affirm the capacity of human reason to tell us how we should live has gone by the name of natural right or natural law. The greatest and most intriguingly ambiguous exploration of Weber's social science from the viewpoint of political philosophy is that by Leo Strauss in the second chapter of *Natural Right and History.* In this essay, I propose to undertake a detailed analysis of Strauss's argument in that densely written chapter.

THE SOCRATIC ANSWER

Strauss begins the chapter with a terse series of assertions and distinctions. Historicism claims to have demonstrated that natural right, the teaching that we can derive knowledge of our proper ends from knowledge of what is, is impossible because philosophy is impossible. Philosophy, to be possible, requires access
to an absolute horizon beyond the limited, contingent horizon given us by our particular time and place. Philosophy requires access to what is true without qualification, not simply what appears to be true to us here and now. But the possession of such an absolute horizon actually entails far less than we might at first imagine: philosophy does not require possession of wisdom or knowledge of the good; it merely requires knowledge of the fundamental problems, the fundamental alternatives, that constitute the permanent horizon of the human condition. Thus, philosophy requires far less than natural right. Natural right implies the possession of wisdom; it requires a solution to the fundamental political problem of how we should live. “[P]hilosophy is only the necessary and not the sufficient condition of natural right” (NRH, p. 35).

Yet political philosophy without a solution to the fundamental problem of politics is of no practical value; it cannot tell us how to act. Such a political philosophy would leave the goal of action to blind choice, to arbitrary will.

Having laid out these distinctions, Strauss then makes an astonishing claim: “The whole galaxy of political philosophers from Plato to Hegel, and certainly all adherents of natural right, assumed that the fundamental political problem is susceptible of a final solution” (NRH pp. 35–36). Philosophy can potentially provide not just the necessary but the sufficient condition for natural right; it is conceivable that the philosopher may eventually possess wisdom. This solution was discovered by the discoverer of political philosophy, and Strauss calls it by his name: the “Socratic answer.” But what is this Socratic answer? It consists in this: “By realizing that we are ignorant of the most important things, we realize at the same time that the most important thing for us, or the one thing needful, is quest for knowledge of the most important things or quest for wisdom” (NRH, p. 36).

This answer, this foundation of natural right, is deeply shocking to anyone concerned with active, political life. Indeed, it is so shocking that the minds of most readers will long resist and may in fact prove finally impermeable to the full implications of this answer. The Socratic answer tells us that the one thing we can know for certain about how we should live is that the final end of human life is to live as a philosopher. This answer denies that political or practical life, the life of action, possesses any rational order, any source of guidance, within itself. For Strauss, all arguments intended to ground the moral conventions of society in nature are, in fact, neither rational nor natural. Thus, according to Strauss, the Socratic answer approves (or at least does not deny) the claims of the historicists: all strictly political or moral claims about the good can stem only from well-intentioned ignorance or cynical lust for power or, more comprehensively, from the random conjunction of historical forces; in short, from fate.

Yet this Socratic answer does not reduce the standards of political life to mere arbitrariness. Instead, it preserves a peculiar sort of natural right. It has only one principle: the goodness of the philosophical life. Of course, this answer does not entirely do away with many of the moral precepts with which we are
all familiar: how can one philosophize or how can a young man or woman become seriously attracted to the philosophical life whose soul is distracted or enslaved by drunkenness, lust, greed, or any other form of bodily intemperance? But morality on this basis is greatly reduced from the status given it by political men. Morality, in light of the Socratic answer, is purely instrumental, a means to the end of philosophizing, a means which may be varied at need.2

This teaching is so foreign to our usual understanding of morality that it is difficult fully to grasp, let alone accept. Strauss himself put his finger on the point that makes it so shocking: “[I]f these virtues are understood only as subservient to philosophy and for its sake, then that is no longer a moral understanding of the virtues.”3 The question of the best order for active life can be answered only by referring to the needs of the contemplative life. The best political order is that which in the given circumstances best conduces to philosophizing by those who are able to philosophize.

In a certain sense, nothing more needs to be said. Yet the whole of Plato’s Republic, Aristotle’s Politics, and the entire corpus of later political philosophy show that a lot more can be said. There are two broad reasons for this loquacity: the philosophers must adapt their teachings about the best possible political order as circumstances change, and they must also find new words to justify the life of philosophizing to the vast majority of mankind who cannot think beyond the political, beyond the exigencies of the life of action. This means that natural right will always have two faces: an inward, permanent face, the Socratic answer, the real natural right teaching, that quest for wisdom is the one thing needful; and an outward, changing face, the apparent natural right teaching, that the principles of morality have a direct basis in nature. Only the first is true; the second is literally false but serves the truth. Both faces of political philosophy are necessary to implement the Socratic answer as long as philosophers do not rule—a most unlikely event, as the Socrates of the Republic is perfectly aware. Strauss does not say he accepts the Socratic answer. After all, if one rejects the Socratic answer, one only denies that philosophy in the form of political philosophy can be useful to the active life; philosophy itself remains possible. Thus there are true philosophers, the Epicureans, who reject the Socratic answer and have little use for political philosophy.

Now the life of reason, the quest for wisdom, which the Socratic answer proclaims the true, highest end of man, may lead its devotee to conclude that “wisdom is not the one thing needful” (NRH, p. 36). Reason may demonstrate that reason is not enough for man to achieve his highest end; but, as Strauss says, “the very disavowal of reason must be reasonable disavowal” (p. 36). This possibility—we might call it the anti-Socratic answer—constitutes one of the permanent features of the absolute horizon that makes philosophy possible. In this way, philosophy itself always preserves, not only the possibility of revelation, but the possibility of man’s absolute need for revelation. Yet reason’s own discovery that the human good may require more than reason appears to put
reason and unreason (or faith) on the same footing: each appearing to be the object of a choice that, on this premise, can only be arbitrary, since reason itself is one of the alternatives, not the common principle.4

FIRST ACCUSATION: WEBER AS NIHILIST

Strauss introduces his discussion of Weber by saying that Weber was a victim of this very confusion, that it led him to posit the ultimate equivalence of faith and reason, and that consequently he rejected the Socratic answer and, with it, the possibility of natural right and a useful political philosophy.

Strauss’s entire analysis of Weber’s teaching takes the form of a descent into an abyss, a reductio ad profundum.5 Each of Strauss’s arguments or explications is shown to be partial and provisional by the next step, which descends to a still deeper level, a truer understanding of Weber’s fundamental teaching.

Facts versus Values

Strauss begins by examining that part of Weber’s teaching remembered by even the most casual graduate student. According to this teaching, facts and values are entirely heterogeneous. Science, including social science, deals strictly with facts; values lie beyond its competence.

Who—aside from certain big children who are indeed found in the natural sciences—still believes that the findings of astronomy, biology, physics, or chemistry could teach us anything about the meaning of the world? . . . If these natural sciences lead to anything in this way, they are apt to make the belief that there is such a thing as the ‘meaning’ of the universe die out at its very roots.6

Weber goes on to quote Tolstoy: “Science is meaningless because it gives no answer to our question, the only question important for us: ‘What shall we do and how shall we live?’ ” (p. 143). According to Strauss, Weber attributes science’s meaninglessness to “the most fundamental of all oppositions, namely, the opposition of the Is and the Ought, or the opposition of reality and norm or value” (NRH, p. 41). Yet, Strauss immediately points out that the heterogeneity of Is and Ought does not logically entail the impossibility of an evaluating social science. If science possessed from some nonempirical source true knowledge of the Ought, this would legitimately guide all scientific investigation of the Is. Thus, when Weber maintains the impossibility of an evaluating social science, he reveals that he rejects any possibility whatsoever of knowing the Ought. “Weber denied to man 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" (NRH, pp. 41–42).

The Reduction to Nihilism

Having revealed the actual assumption underlying Weber's fact-value distinction, Strauss makes his first (and, as it turns out, provisional) accusation: "I contend that Weber's thesis necessarily leads to nihilism or to the view that every preference, however evil, base, or insane, has to be judged before the tribunal of reason to be as legitimate as any other preference" (NRH, p. 42). Yet Weber himself appeared to accept this same conclusion about the human predicament, that we must embrace values without the ability to demonstrate rationally why one value is superior to another, as evidence of a new, austere, and elevated conception of human dignity.

Man's dignity, his being exalted far above everything merely natural or above all brutes, consists in his setting up autonomously his ultimate values, in making these values his constant ends, and in rationally choosing the means to these ends. The dignity of man consists in his autonomy, i.e., in the individual's freely choosing his own values or his own ideals or in obeying the injunction: 'Become what thou art.' (NRH, p. 44)

Strauss sets about analyzing what Weber can possibly mean by this injunction. What is the dignity possessed by the autonomous human being who freely chooses to become what he is? Strauss does this by pursuing that injunction through six transformations, each representing a further clarification of what the injunction must really mean. (The following summarizes NRH, pp. 44–47.) At first, to "become what thou art" appears to imply a nonarbitrary standard: "Thou shalt have ideals." But Weber does not believe human beings can know what those ideals are. Thus to "have ideals" can only mean "Follow thy demon" or "Follow thy god or demon." Political life can never be based on the rational apprehension of a common good; the essence of politics must always be conflict among blindly asserted values. But even this formulation hides the implication that these gods or demons can as easily be bad as good. The fully articulated imperative is "Follow thy demon, regardless of whether he is a good or evil demon." Translated into nonmythic language, this injunction becomes "Strive resolutely for excellence or baseness."

But Strauss pushes Weber's meaning still deeper. Weber did not attach the usual, moral meanings to "excellence" and "baseness." No one can distinguish a good cause from a bad cause, and this incapacity underlies Weber's belief that the essence of politics is conflict. What then can he mean by excellent and base?
He cannot distinguish among causes; instead, Strauss argues, Weber distinguishes dedication to a cause, any cause, from lack of such dedication. "Excellence now means devotion to a cause, be it good or evil, and baseness means indifference to all causes" (NRH, p. 46). All the usual moral content has, by now, been squeezed out of Weber's imperative, but an attenuated core remains, captured in the command: "Thou shalt live passionately." Where all values are equally empty of cognitive content, the laurel goes to the most passionate. The degree of energy or commitment will supplant the quality of the action or the intended outcome as the criteria by which to judge an actor's "authenticity." It is in light of this preference for passionate commitment that we must understand Weber's contempt for "specialists without spirit or vision and voluptuaries without heart." Yet Weber must have known that he would ultimately be driven to deny even this core or remnant of objective morality; strict conformity to the fact-value dichotomy does not permit one to praise passion over apathy, commitment over self-absorption. Thus, following Weber's own logic, Strauss draws out the final transformation or reduction of the imperative "Become what thou art." It can be stated: "Thou shalt have preferences." (Note that Strauss twice used the word "preference" in his original accusation of nihilism, NRH, p. 42.)

If this is Weber's nihilism, it still rests upon a ledge somewhere above the final abyss. The passionate man, even the man who simply has preferences, ought to choose his preferences responsibly. Though each of us chooses in a moral void without objective norms, in darkness without external light, Weber holds onto one last principle: intellectual honesty. One must choose what, according to one's own internal light, one believes to be right. Weber would have us be responsible nihilists. Against this final redoubt, Strauss merely asks: Why, in the absence of all criteria, should one choose to adhere to some standard of responsibility rather than indulge in utter irresponsibility? If nothing is true, everything is permitted. Strauss thus pushes the fact-value distinction off the last ledge on which Weber had attempted to halt its descent. Noble nihilism is an oxymoron; complete nihilism is the logical terminus of Weber's fact-value distinction.

The Impossibility of a Value-Free Social Science

The nihilism inherent in the fact-value distinction, however, would make social science impossible. The student of human action who could not distinguish between good and bad, important and trivial, excellent and debased would be incapable of making sense of his subject, let alone writing intelligibly about it. Weber's practice was better than his theory. "His work would be not merely dull but absolutely meaningless if he did not speak almost constantly of practically all intellectual and moral virtues and vices in the appropriate language, i.e., the language of praise and blame" (NRH, p. 51).
The tactic Weber employed to accommodate the need to recognize and study values while, at the same time, isolating his method from contamination by those values was called "reference to values." The social scientist may, by this method, study how a value, such as freedom or industriousness, has operated as a source of cohesion or contention, stability or change, within a given society. Strauss, however, points out that a social science which conducted its study purely with reference to the values of those being studied, while itself making no value judgments,

would have to accept as morality, religion, art, knowledge, state, etc., whatever claimed to be morality, religion, art, etc. . . . But this limitation exposes one to the danger of falling victim to every deception and every self-deception of the people one is studying; it penalizes every critical attitude; taken by itself it deprives social science of every possible value. (NRH, p. 55)\(^10\)

Weber's own immense body of scholarship is only intelligible, let alone insightful and enlightening, because of the acuity and balance of his own value judgments lying behind the selection, analysis, and expression of the phenomena he studied. If Weber the theorist was a nihilist, Weber the practicing scholar was not.

**A Legitimate Historicism**

Then, in an apparent about face, Strauss claims there is a certain kind of scholarship that not only benefits from value-neutrality but is only made possible by an approach that "limits itself to understanding people in the way in which they understand themselves . . ." (NRH, p. 56). This argument justifies the methodology Strauss himself employed in his own historical scholarship. Now Strauss is simply not interested in the self-understanding of the common individual, social groups, mass movements, or institutions. He has in mind the great teachers, the originators of doctrines, the rare philosopher, prophet, law-giver, or theologian. In these cases, the proper approach is an historical interpretation unprejudiced by one's own values (which are likely to be the values of one's own time), an approach that "understands a teaching as meant by its originator."\(^11\) Strauss concedes that such value-free, purely historical scholarship is "merely preparatory or ancillary" (NRH, p. 57). One must presume that it is preparatory to a mature or final science which would be evaluative. Having understood the greatest thinkers, not of one age, but of all ages, as they understood themselves, one would have achieved a truly transhistorical vantage from which to pronounce upon the teaching of any time or place. Strauss never claimed to have completed this preparatory work; it is not clear he thought its completion possible. But he did argue that Weber failed to avoid allowing his
scholarship to become entangled in time-bound prejudices. Thus, for all its worth and its espousal of value-neutrality, Weber's work does not attain the level of purely historical scholarship that Strauss imposed on himself. Specifically, Weber's late-modern prejudice which "takes it for granted that objective value judgments are impossible cannot take very seriously that thought of the past which was based on the assumption that objective value judgments are possible, i.e., practically all thought of earlier generations." Value-free science is held captive by its own unacknowledged value; its historicism presupposes a transhistorical truth.

SECOND ACCUSATION: WEBER AS PROTO-POLITICAL THEOLOGIAN

At this point, there occurs the central transition in Strauss's explication of Weber's fact-value distinction. Having already completed twenty-six pages of dense analysis and pursued the logic of Weber's self-declared methodology to the depths of nihilism, Strauss announces that the preliminaries are over, and we can now proceed to consider what actually was Weber's central thesis. It has been demonstrated that a value-free social science is impossible; Weber certainly did not practice such a science, nor even when theorizing did he press the fact-value distinction to its logical conclusion. We may surmise that Weber was really not concerned about the practicing social scientist's supposed inability to make commonsense judgments to distinguish a serious religious thinker from a crackpot, a conscientious politician from a demagogue, self-denial from self-seeking, art from trash, an important issue from a trivial one.

The Ineradicable Conflict among Fundamental Alternatives

The fact-value distinction has obscured the real issue which, according to Weber, science is helpless to decide

the issue of religion versus irreligion, i.e., of genuine religion versus noble irreligion, as distinguished from the issue of mere sorcery, or mechanical ritualism versus the irreligion of specialists without vision and voluptuaries without heart. It is this real issue which, according to Weber, cannot be settled by human reason, just as the conflict between different genuine religions of the highest rank (e.g., the conflict between Deutero-Isaiah, Jesus, and Buddha) cannot be settled by human reason. Thus, in spite of the fact that social science stands or falls by value judgments, social science or social philosophy cannot settle the decisive value conflicts. (NRH, pp. 62–63)

Social science can distinguish the great scholar from the academic drone, but it cannot prove that the scientific life itself is superior to the life of the saint or
politician. Social science can distinguish the religious leader from the charlatan and the statesman from the functionary, but it cannot prove that the life dedicated to God is superior or inferior to the life dedicated to the state, or that either is better or worse than the life dedicated to science. Science cannot judge between the ultimate callings to which men dedicate their lives. With such questions, one enters the realm where “ultimate Weltanschauungen clash, world views among which in the end one has to make a choice” (Weber, “Politics as a Vocation,” p. 117).

Behind Weber’s premise of irreconcilable conflict among ultimate values, Strauss finds the presupposition that conflict is the fundamental condition of human existence; peace is illusory. Since real peace, a real resolution or harmonization of these fundamental conflicts, is impossible, the only possible simulacrum of peace must be the bovine somnolence of Nietzsche’s last men. But Weber does not stop at envisioning a world of perpetual international conflict dominated by “warrior ethics” and governed by Machiavellian “power politics.” In such a world, the individual could still be at peace within himself. Thoroughgoing conflict must penetrate the very soul, dividing each man against himself. The patriotic duties of political life, which entail strife, contradict the sacred duties of religion, which command love; and faith in either God or fatherland repudiates unbelieving science.12 Weber’s final teaching about the human predicament appears to be that man cannot plumb the existential depth, cannot experience the full tragedy of authentic existence, without confronting the irreconcilable claims of atheism and faith on the battleground of his own anguished soul (NRH, pp. 64–66). Strauss cautions us that Weber’s “unshakable faith in the supremacy of conflict” suggests that, to the extent his social science actually influences politics or the ideas of politicians, its influence is likely to be deleterious, since that faith “forced him to have at least as high a regard for extremism as for moderate courses” (NRH, p. 67). His social science tends to equate the extreme with the authentic, thereby undermining the virtues of moderation and statesmanship. This by itself is a serious charge against Weber’s social science.

Two Proofs

Strauss next considers some of Weber’s attempts to prove the irreconcilability of ultimate values. He seems uncertain, however, just how many proofs Weber provides. In a footnote, he says there are three or four; in the text, he says he will discuss two or three of these (NRH, p. 67 and n. 27). In the following pages, be clearly enumerates two proofs. Does he discuss a third and perhaps even a fourth without calling attention to them as such? I will argue that, after discussing and refuting the two clearly enumerated proofs, Strauss goes on to consider a third and fourth which he shows to be inconclusive but which he cannot definitively refute. It may be the profoundly disturbing implications of
his inability to refute Weber’s true, underlying arguments that cause Strauss to
disguise their significance in such a way that casual readers will overlook them.

The first two proofs need not long delay us. In the first, Weber sets out pairs
of opposed views about various moral questions, such as whether it would be
just for society to shower rewards or impose demands on an individual who has
distinguished himself by his superiority in some activity. Weber implies that no
objective criteria exist for determining which response would be truly just.
Strauss simply points out that, in any case where a just solution remains unclear
or where the choice lies between morally indifferent alternatives, society can do
whatever most expeditiously serves the public interest. Weber’s notion of justice
makes it a purely individual matter, cutting it off from any consideration of the
common good of society (NRH, pp. 67–69).

In his second proof, Weber contrasts the ethics of responsibility, which is
concerned with practical consequences, to the ethics of intention, which is con-
cerned with the realization of a preconceived ideal. By this opposition, Weber
purports to show that moral commitment requires us to override considerations
of social responsibility, while social responsibility demands that we turn a blind
eye to moral ideals. Strauss argues that this contrast betrays a fundamental con-
fusion on the part of Weber, a confusion between what can be known by human
reason and what can only be believed. Strauss dryly comments that Weber
“merely proved that otherworldly ethics, or rather a certain type of otherworldly
ethics, is incompatible with those standards of human excellence or of human
dignity which the unassisted human mind discerns.” Moral injunctions based on
revealed knowledge or some suprarational ideology are very far from posing a
problem for social science which is, after all, concerned strictly with “human
knowledge of human life,” and whose light is, after all, only the natural light.
Strauss even goes so far as to state that, “if genuine insights of social science
can be questioned on the basis of revelation, revelation is not merely above
reason but against reason” (NRH, pp. 69–71).13

Third Proof: Historicism or Fate

The fact that Strauss could so easily refute the first two proofs is an indica-
tion that they were merely the expressions or symptoms of a deeper problem
that made Weber despair of the adequacy of human reason. The question
whether human reason can judge of good and bad actions was not the core or
origin of Weber’s doubt. The core lies in his apprehension that “science or
philosophy is unable to give a clear or certain account of its own basis” (NRH,
p. 72). Is the life devoted to “the search for knowable truth” good? Is it worth-
while and choiceworthy? Or is it rather a curse? Does it turn its practitioners
from higher ends and make them the destroyers of human happiness through
the rationalization and disenchantment of the world? “By regarding the quest
for truth as valuable in itself, one admits that one is making a preference which no longer has a good or sufficient reason” (p. 72). In Weber, one sees a modern rationalism that has lost confidence in itself.

Even to the extent that Weber did, by his own example, assert that science can provide reliable knowledge about human things, can free human beings from delusion and establish the foundation for a free and self-reliant life for man, he still denied that we can affirm that the life devoted to science is simply best or that the truth it discovers is universally valid. Specifically, “he refused to say that science or philosophy is concerned with the truth which is valid for all men regardless of whether they desire to know it or not” (NRH, p. 73). Strauss speculates that it was the influence of historicism that prevented Weber from claiming for science the authority of universal truth. Weber suspects that the modern elevation of scientific knowledge and its intrinsic claim to universal- ity are, in fact, only the products of a unique, arbitrary conjunction of historical forces. “What claims to be freedom from delusions is as much and as little delusion as the faiths which prevailed in the past and which may prevail in the future” (p. 73). History, in this view, is fate.14 If Weber remained steadfast in his allegiance to the strict discipline of science, if he acknowledged only reason as the proper means for discovering truth and spurned the claims of faith, if he “refused to bring the sacrifice of the intellect,” it can only be due to when and where he was born, how he was educated, who he was—who, in short, history or fate determined him to be (NRH, pp. 73–74).

Fourth Proof: Science as a Vocation

No sooner does Strauss complete his compelling case for labeling Weber an historicist than he introduces a reservation which reveals that account, too, to have been only provisional and superficial; we have not yet quite reached the bottom. Weber was not an historicist.

What then lies at the bottom of Weber’s anguished doubts about the sufficiency, even the goodness, of science as a vocation? Strauss states the fundamental problem as follows: “Man cannot live without light, guidance, knowledge; only through knowledge of the good can he find the good that he needs.” If one starts from this concern, it is inevitable that the “fundamental question” will be “whether men 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” (NRH, p. 74). Furthermore, having raised the question of human or divine guidance, reason or revelation, philosophy or the Bible, Athens or Jerusalem, Strauss concurs with Weber’s conclusion: the choice can neither be evaded nor settled conclusively. The claims of the life dedicated to obedient faith and the life dedicated to free investigation contradict one another; neither side can
ultimately refute the other; and the two cannot be harmonized. In other words, having reached the core of Weber’s doubts about science or philosophy, we find Strauss agreeing with him!

This startling convergence between the critic and his subject, however, is followed by a very peculiar paragraph.

If we take a bird’s-eye view of the secular struggle between philosophy and theology, we can hardly avoid the impression that neither of the two antagonists has ever succeeded in really refuting the other. All arguments in favor of revelation seem to be valid only if belief in revelation is presupposed; and all arguments against revelation seem to be valid only if disbelief is presupposed. This state of things would appear to be but natural. Revelation is always so uncertain to unassisted reason that it can never compel the assent of unassisted reason, and man is so built that he can find his satisfaction, his bliss, in free investigation, in articulating the riddle of being. But, on the other hand, he yearns so much for a solution of that riddle and human knowledge is always so limited that the need for divine illumination cannot be denied and the possibility of revelation cannot be refuted. Now it is this state of things that seems to decide irrevocably against philosophy and in favor of revelation. Philosophy has to grant that revelation is possible. But to grant that revelation is possible means to grant that philosophy is perhaps something infinitely unimportant. To grant that revelation is possible means to grant that the philosophic life is not necessarily, not evidently, the right life. Philosophy, the life devoted to the quest for evident knowledge available to man as man, would itself rest on an un-evident, arbitrary, or blind decision. This would merely confirm the thesis of faith, that there is no possibility of consistency, of a consistent and thoroughly sincere life, without belief in revelation. The mere fact that philosophy and revelation cannot refute each other would constitute the refutation of philosophy by revelation. (NRH, p. 75).

On its surface, this paragraph carries the agreement further, seeming to move Strauss closer to Weber’s position. The very irresolvability of the dispute between reason and revelation would seem actually to decide in favor of revelation, for even the decision to pursue a life of skeptical rationality would have to begin with a leap of faith. It would seem that all one has to do is prove that revelation is possible (i.e., that reason cannot finally refute it) in order to force reason to concede to revelation the ultimate victory. If the justification for the philosophical life is not demonstrable, then it, like the life of obedient belief, must rest upon a blind decision. This realization lies at the heart of Weber’s tortured dedication to the vocation of science; it also lies at the center of the modern crisis of rationality.

But let us look more closely at this paragraph. Almost every sentence is in subjunctive mood or contains some other device to qualify its apparent sense. The paragraph begins with “If”; three times something is said to “seem” to be the case; the auxiliary “would” appears four times; two “perhaps,” a “not necessarily,” a “not evidently,” and the phrase “we can hardly avoid the impres-
sion that” round out the number of qualifiers. In short, this paragraph sets out the innermost core of Weber’s dilemma and demonstrates that it is the position Strauss too would be compelled to embrace if he had begun his thinking from the point at which Weber began. Thus, Strauss concedes that, given Weber’s starting place, the life dedicated to rational inquiry must ultimately be based, like dedication to any other god, on an act of faith. What Strauss specifically does not say is that he accepts Weber’s starting place, namely his assumption that men must have knowledge of the good if they are to have any basis upon which to guide their lives.

THE LAST SCIENTIST IN THE WHOLE WORLD

Strauss concludes his analysis by capturing the essence of Weber’s dilemma in two sentences:

It was the conflict between revelation and philosophy or science in the full sense of the term and the implications of that conflict that led Weber to assert that the idea of science or philosophy suffers from a fatal weakness. He tried to remain faithful to the cause of autonomous insight, but he despaired when he felt that the sacrifice of the intellect, which is abhorred by science or philosophy, is at the bottom of science or philosophy. (*NRH*, pp. 75–77)

As a judgment of Max Weber, this conclusion is ambiguous. It betrays Strauss’s sober respect, even admiration, but also his unblinking awareness of the fatal error which, in part through Weber’s influence, would rapidly infect the modern perception of the capacity of human reason and the estimation of the life dedicated to it. There is also Weber’s moral superiority to many of his successors who have retained his assumption that social science can neither refute the claims of revelation nor satisfy the demands of humanity for guidance and yet who, unlike Weber, seem either unaware or not deeply troubled by the implications of these failures. More specifically, Strauss respected Weber’s doctrine of the distinction between fact and value as having been a noble effort to insulate science from politics. Weber may be said to have erected the fact-value distinction as a bulwark to protect his scientific investigation into causal relationships from infection by any of the ideologies, such as nationalism, socialism, and communism, then rampant in German intellectual circles. Behind this philosophically defective barrier, he clearly succeeded in keeping his mind open to the experience of political reality, and it is this quality that gives his work its lasting value. Weber remained a master in magnificent command of his empirical materials. Thus, we may excuse, even admire, Weber’s methodology for having provided him “a means of critique against ideological politics disguised as science, a means of combating what Benda called ‘the betrayal of
the intellectuals'” (Eden, “Why Wasn’t Weber a Nihilist?” with quotation from NRH, p. 34). Strauss cannot but have admired Weber’s lifelong dedication to the attempt to preserve the possibility of rigorous science against the imperious demands of dogma, both theological and political. Strauss cannot but have concurred that beliefs should only constitute the object of investigation by the scientist studying human things. Both would abhor as a monstrosity the teacher-advocate or the philosopher-believer. I would guess that Strauss undertook the demolition of the philosophical framework of Weber’s life work as a painful task that must be carried out in order to force us moderns to recognize our need to recover a basis entirely different from the modern one upon which to justify and fortify the life dedicated to reason.

Part of Strauss’s admiration for Weber is surely due to Weber’s misgiving about Nietzsche’s moral influence on politics. Nietzsche’s teaching relegates the cultivation of mundane, limited political virtues to a plane vastly inferior to the philosopher’s quest for truth and the believer’s pursuit of a supernatural good. Having reduced philosophical ethics to history and announced the death of God, Nietzsche never seriously considered a return to classical political philosophy’s teaching about the virtues. Instead, in the absence of any ground, man must assume the task of creating his own values. At least in his scholarly practice, Weber preserved a place for political virtue, even though his philosophical assumptions contradicted the claims of such virtues. Indeed, one might even say that it is a mark of Weber’s stubborn nobility to have accepted the core of Nietzsche’s teaching while holding out for the claims of moral virtue and the practical exigencies of politics.19 If this is true, then Weber’s nobility was purchased at the cost of incoherence.

If Weber is a half-student of Nietzsche, he is the half-innocent precursor of Heidegger, and from there we pass under the shadow of Hitler.20 By denying the adequacy of human reason, Weber surrendered the governance of life to revelation and contributed to the destruction of the age-old tension between philosophy and revelation. In Heidegger, the fundamental tension between Jerusalem and Athens is finally demolished, or rather resolved. Heidegger pillories theory without commitment as the destroyer of man’s humanity.

Theory has culminated in the worldwide victory of technology and the end of philosophy... The task of thinking at the end of philosophy is to develop the depths in our Western thought ultimately derivative from the Bible, the East in us, but freed from those dogmatic underpinnings that might prevent them from becoming planetary.21

Strauss was, I believe, persuaded by Nietzsche’s and Heidegger’s critique of modern rationalism. In his estimation, they had proved that the modern grounding for the life of reason and the expectation that life should look to reason for guidance is fatally flawed. Yet, like Weber, Strauss did not, on this account,
give up allegiance to reason. Unlike Weber, however, Strauss did not resort to an irrational commitment to rationality. Instead, he undertook to discover or recover a truly adequate, alternative, nonmodern basis for the relation between reason and politics.

It may not be entirely misleading to compare “Politics as a Vocation” to Xenophon’s Hiero. Both can be read as attempts to instruct and moderate those whom passion has driven to aspire to political power in what must inevitably be an imperfect, a less than just, regime. In Weber’s lecture, as in Xenophon’s dialogue, a constant theme running below the surface of the text is the question concerning the choice worthiness of the life of the ruler, the political man, versus private life, the life of the thoughtful man. Weber could almost be another Simonides, judiciously enticing tyrants and would-be tyrants to listen to his advice about politics by speaking only of interest and power, while remaining silent about morality. Both adroitly position themselves to be able to use their wisdom for the greatest benefit of the city by instructing and moderating rulers who willingly listen to them. We imagine, however, that Simonides, behind his prudent reticence, really does possess an ethical teaching; Weber has none (On Tyranny, pp. 55–56).

Weber represents the impotence of wisdom, or rather a wisdom become impotent. He never becomes a sophist; he never prostitutes wisdom for money or privilege. But he has rejected or forgotten the classical connection between the philosopher who is concerned with truth and the gentleman who is concerned with courage and justice. Either Weber saw no reason to uphold the standards of the gentleman, or else he felt constrained by his own notion of scientific objectivity not to do so. That is, in his writing and teaching, he declined to provide arguments to moderate the passions of the nonphilosophers and induce them to acknowledge the nobility and usefulness of the philosophic or contemplative life. Weber was utterly deficient in what the Arab political philosophers called the art of kalâm. This deficiency leaves modern philosophy exposed, defenseless, and unedifying (On Tyranny, p. 42). Even worse, philosophy’s nakedness has permitted the growth of the vulgar opinion that wisdom itself is merely another contender for tyrannical power, since philosophy has left intact no argument that might contest the popular view that tyranny is the most pleasant life. The late modern lover of freedom is left to draw the demoralizing conclusion that, to preserve freedom against rationalized tyranny, humanity must reject the possibility of wisdom.

To repeat, the problem is the starting point. Weber is a moralist, or rather a scientist who believes moral concerns are of paramount importance for human life. He sees himself confronted by moral and political questions to which he, as a scientist, feels called upon to provide reliable answers. From this point of view, the value of science and the adequacy of reason itself stand or fall by reason’s ability to answer the pressing moral and political questions. In effect, the scientist or philosopher does not simply appear to submit to the judgment
of the *hominis politici et religiosi*; he submits in his own conscience.\textsuperscript{24} This means that if, from the point of view of moral and political life, science proves unable to provide guidance, wisdom, knowledge of the true end, then the scientist or philosopher cannot justify the scientific or contemplative life even to himself. Coming at the question of science from this starting place, what first comes into sight is the unavailability of any certain knowledge of natural right. Philosophy cannot provide the framework for praxis. Furthermore, having begun from the need for moral guidance, the rejection of natural right brings philosophy as a whole into doubt and disrepute. It was this reversal of the classical relationship between philosophy and natural right, followed by the apparent refutation of natural right, that precipitated the modern crisis of philosophy or rationalism.\textsuperscript{25}

While Weber himself steadfastly refused to surrender to the irrational, refused to bring the sacrifice of the intellect, he nonetheless conspired in the surrender of human reason to the irrational. Behind this surrender lies the secret belief that reason by its own light can know nothing of the most vital human questions, can know nothing of the good. All questions of value can only be decided by blind faith. Weber, in a sense the last scientist in the three-hundred-year tradition of modern science, is not an apostle of the Enlightenment; he is one of its pallbearers. Having attempted to illuminate all the caverns of human existence, Enlightenment brought about the deeper darkness of a second, unnatural cave. This story has the form of a Greek tragedy recounting the inevitable punishment of hubris: only by reaching too high has reason fallen so low. It was modern philosophy's exaggerated promises of comprehensive, rational control of nature that, being demolished, converted its descendants into unbelieving theologians who have despaired of finding the least precept of natural right.

**THE RETURN TO THE SURFACE**

Having penetrated to the furthest depth, the true, hidden origin of Max Weber's social science, Strauss makes one of the most startling transitions to be found in scholarly writing: "But let us hasten back from these awful depths to a superficiality which, while not exactly gay, promises at least a quiet sleep." He then begins the next sentence with the phrase, "Having come up to the surface again... (NRH, p. 76).\textsuperscript{26} Why "again"? When were we at the surface? What was the surface from which we set out on our journey to the center of the fact-value distinction? If you remember, the first two pages of the chapter on Weber were not about Weber but Socrates. To understand this transition and the contrast it is making, it will be useful to introduce a lengthy quotation from a later chapter of *Natural Right and History*:

Socrates seems to have regarded the change which he brought about as a return to 'sobriety' and 'moderation' from the 'madness' of his predecessors. In contradis-
tinction to his predecessors, he did not separate wisdom from moderation. In present-day parlance one can describe the change in question as a return to 'common sense' or to 'the world of common sense.' That to which the question 'What is?' points is the eidos of a thing, the shape or form or character or 'idea' of a thing. It is no accident that the term eidos signifies primarily that which is visible to all without any particular effort or what one might call the 'surface' of the things. Socrates started not from what is first in itself or first by nature but from what is first for us, from what comes to sight first, from the phenomena. But the being of things, their What, comes to sight, not in what we see of them, but in what is said about them or in opinions about them. Accordingly, Socrates started in his understanding of the natures of things from the opinions about their natures. For every opinion is based on some awareness, on some perception with the mind's eye, of something. Socrates implied that disregarding the opinions about the natures of things would amount to abandoning the most important access to reality which we have, or the most important vestiges of the truth which are within our reach. He implied that 'the universal doubt' of all opinions would lead us, not into the heart of the truth, but into a void. Philosophy consists, therefore, in the ascent from opinions to knowledge or to the truth, in an ascent that may be said to be guided by opinions. (NRH, pp. 123–24)

Note particularly that Socrates started from the "surface of things," from the phenomena, from the form or character things take in people's opinions, not from things as they truly are in themselves, an approach which would require radical doubt of all opinions. 27 Secondly, note that it is from this surface that philosophy begins its "ascent from opinions to knowledge or to the truth." Thus, against Weber's depths we have Socrates' surface, against the descent beyond the last glimmer of truth we have the ascent to knowledge and truth, against the dark void into which one falls by having made too direct an assault on the heart of truth we have at least the promise of a sun in whose light beyond the shadows of the cave we may at last see truth.

The fact-value dichotomy appeared to impose a severe intellectual austerity upon the scientist, constraining him with ascetic renunciation from any tendency toward intellectual hubris. In fact, it takes for granted that a claim of immense magnitude and palpable uncertainty has been definitively answered: namely, that all the opinions about the good and the bad are simply empty of truth. This is not philosophic skepticism; this is a radical claim to have reached the final truth about things. This is a declaration that we must not simply climb out of the cave of our pretheoretical perceptions, but that we must close our eyes to the cave and attempt mentally to construct some other starting place. Classical philosophy never lets one forget that science, or at least the philosophical exploration of the human things, emerges from opinion; it remembers its feet of clay. As a result, we are always reminded that, above all else, what we know is that we do not know. Modern science attempted to establish a foundation in absolutely indubitable propositions. In the event, it discovered that, not only did it not have feet of clay, it had no feet at all. Its hypotheses hung suspended over an abyss.
Is Strauss’s strange jest his dismissal, his quittance, of Weber’s tragic depths? Do those depths mark the dead end reached by the entire movement of modern thought after its wrong turn in the seventeenth century? Was not Descartes the exponent of the universal doubt of opinions? Did not Bacon and Hobbes (and Machiavelli before them) advocate as the proper starting point for gaining access to reality, not the contemplative acceptance of the appearance of things, but the invasive analysis, rigorous conceptualization, and aggressive control of nature? Max Weber was, in a sense, the last scientist in a long line of scientists who had taken a turn that led to the destruction of science. Weber’s tragic stance has been treated with utmost respect by one whose intellect and sympathy have recreated in a few dense pages the honesty and anguish of a philosophic man witnessing the self-destruction of mankind’s highest creation, the collapse of science or philosophy and the collapse of the possibility of a life devoted to science or philosophy, a vocation to which he had dedicated his own life and to which the brightest minds since Machiavelli had dedicated theirs. And yet, after the debacle, after the death in the last act, when the curtain falls and true philosophy walks back on stage, having been lost to sight since the first pages of the drama, it becomes suddenly possible to dismiss Weber’s tragic pose with a comic wink.

How then are we to begin to recover what we have lost? Strauss looks ahead along the path we must travel: “Only a comprehensive analysis of social reality as we know it in actual life, and as men always have known it since there have been civil societies, would permit an adequate discussion of the possibility of an evaluating social science.” Note well that Strauss does not claim such a social science would finally settle the conflicting claims made by different regimes, nor does he claim it would resolve the fundamental alternatives posed by reason and revelation. Such a social science would not constitute possession of the final knowledge of natural right; it would merely “supply a basis for responsible judgment on whether the conflict between these alternatives is, in principle, susceptible of a solution” (NRH, p. 78). Strauss’s prescription, then, is to start to recover the horizon that became lost with the dominance of modern science. That horizon is the natural, prescientific, pretheoretical world, what we called the surface of things, the phenomena simply as they appear and come to be articulated by human beings.

Yet Strauss warns us that we fool ourselves if we take his advice too literally and attempt to rediscover this natural horizon simply by looking around us at the world in which we live today. This world, our modern world, has been transformed and distorted by three centuries of modern science. Our eyes, the way we have been taught to see things from the time we learned speech, cannot adjust to seeing the pretheoretical reality as easily as putting on corrective lenses. An extensive, intellectually and morally demanding process of unlearning must precede any recovery of the view of the world that was natural before, say, 1513, the year Machiavelli wrote The Prince. “To say nothing of technol-
ogy, the world in which we live is free from ghosts, witches, and so on, with which, but for the existence of science, it would abound. To grasp the natural world as a world that is radically prescientific or prephilosophic, one has to go back behind the first emergence of science or philosophy" (NRH, p. 79). In this statement, Strauss acknowledges the Enlightenment’s benefits to humanity while, at the same time, drawing our attention to what it has cost. Modern science exorcised the ghosts from the machinery of the world. But what if these ghosts, these opinions, were a necessary part of our natural understanding containing the “soiled fragments of the pure truth,” from which alone we can ascend toward knowledge of the whole? These ghosts and witches are not Weber’s postscientific gods and demons to which science, having lost confidence in itself, feels compelled to genuflect. They are the prescientific gods who seem naturally to have populated men’s beliefs about the world; and it was in this naturally god-infested world governed by divine laws that classical political philosophy learned to live, bowing respectfully in acknowledgment of the gods’ irreplaceable sovereignty over the city, but without conceiving that the claims of the city could ever bring the philosophers to renounce the preeminence of contemplation nor, in the end, feel compelled to bring the sacrifice of the intellect.

Before leaving Weber, let us look once more at the peculiar paragraph, quoted above, in which Strauss appears to accept Weber’s conclusion that the life of science cannot justify its own choiceworthiness. Strauss begins the paragraph with an enigmatic image: “If we take a bird’s-eye view of the secular struggle between philosophy and theology, we can hardly avoid the impression that neither of the two antagonists has ever succeeded in really refuting the other” (NRH, p. 75). We have already shown that Strauss admits—indeed, it is one of his most forcefully articulated teachings—that neither philosophy nor revelation ever can refute the other. Yet this sentence introduces a paragraph ostensibly denying the very possibility of the Socratic answer. The key lies in the image of the “birds-eye view.” To understand the image, first call to mind Plato’s image of the cave as a metaphor for the city. Then imagine a landscape with the entrances to a number of such caves scattered across it. Finally, imagine a bird soaring above this landscape, looking down on the many caves. This is the view adopted by early modern philosophy toward the natural world, the world as it appeared and was articulated by political, moral men. Modern philosophy or science aspires to a point of view entirely above the opinions held in the various caves, a view which, looking down on the caves, sees their opinions as only so much delusion, superstition, and ignorance. This aspiration, as we have already shown, has the unfortunate effect of making philosophy itself assume direct responsibility for the enlightened governance of the world, since it has proclaimed itself the sole true source of wisdom. It was the eventual, inevitable collapse of this project that led to the crisis of confidence among philosophers themselves. The bird’s-eye view is fatal.28
Until all men become philosophers, the true science attainable by the few and the highest way of life attainable by the many must remain entirely distinct. Science or philosophy is a purely theoretical art; morality and politics have no part in it. Nor can philosophy, as such, concern itself with morality and politics. That leaves the best way of life to be supplied by a nontheoretical or practical art, the art of lawgiving or statesmanship. The point of view that holds these two aspects of life, the theoretical and the practical, in a tense and necessary relationship while, at the same time, preventing either from collapsing into the other, is political philosophy.

The shocking aspect of Platonic political philosophy, the aspect requiring that a veil of reassuring rhetoric be pulled over it, is its denial of any independent or self-subsistent status for morality. Man does not have access to any first principles of practical reason which would give a truly moral basis for morality. “[T]he first principles of action and therefore also of politics [must be] supplied by theoretical reason or natural science: it is natural science which makes clear what the end of man is.” The end of man as man is “the perfection of his mind.” The function of practical reason will be deliberation concerning how in any given circumstances one can best conduct one’s life so as to become perfect as a man of speculation. Virtue will continue to be an important concern for the philosopher, both for the ordering of his own life toward contemplation and for the ordering of society. “But . . . if these virtues are understood only as subservient to philosophy and for its sake, then that is no longer a moral understanding of the virtues.” Strauss paraphrases a passage from Nietzsche’s *Genealogy of Morals* to make the Platonic teaching clear: Nietzsche compared the instrumental asceticism of the philosopher to “the asceticism of a jockey, who in order to win a race must live very restrainedly, but that is wholly unimportant to the jockey, what is important is to win the race.”

The feature that identifies this teaching as the uniquely Platonic political philosophy is that, in the most perfect case conceivable, the lawgiver or king or prophet who possesses the political art in the highest degree is also a philosopher. Thus, the laws providing the best way of life flow from a mind that knows that the highest end of human nature lies in the quest for knowledge. Political philosophy provides the absolutely essential context within which the Socratic answer can be articulated and lived out.

The distinction between the theoretical art and the practical art can perhaps most instructively be understood as the distinction between “philosophy (as quest for the truth about the whole) and self-knowledge (as realization of the need of that truth as well as of the difficulties obstructing its discovery and communication)” (“Farabi’s Plato,” p. 400). When the philosopher turns from contemplating the whiteness of all beings to consider the world of opinions or beliefs in which human beings actually live, he realizes (if he is a pupil of Socrates) that he can only know that world by observing what is going on in his own soul. His own soul-knowledge becomes the finely tuned instrument by
means of which his understanding begins, as it were, from the cave floor and ascends toward the purest light. Self-knowledge is the origin of the dialectical art by which the philosophical investigation or questioning of opinion reaches toward knowledge of the whole. This turn of philosophy toward the human things proved Socrates the greatest psychologist in antiquity; it was he “who examined souls from the perspective of truth,” that is, from the orientation toward truth which he discovered in his own soul.31

NOTES

1. (Chicago: The University of Chicago Press, 1953), hereafter NRH.
4. Cf. Leo Strauss, “Progress or Return?” in The Rebirth of Classical Political Rationalism: An Introduction to the Thought of Leo Strauss, ed. Thomas L. Pangle (Chicago: The University of Chicago Press, 1989), pp. 269–70. Strauss makes it clear that it is modern philosophy or science that is vulnerable to this reduction to an act of faith. This leaves unstated the possibility that there was an older philosophy or science that escaped this reduction. I think the opening of the second chapter of Natural Right and History makes it clear that Socratic philosophy does avoid the reduction to faith. I believe that it is in silent contradistinction to the particular, Socratic approach to philosophizing that Strauss prefaced the passage just quoted with an enigmatic sentence: “And here when I use the term philosophy, I use it in the common and vague sense of the term where it includes any rational orientation in the world, including science and what-have-you, common sense.” It is the common or vague approach to philosophizing, the approach that does not begin with the Socratic answer, that tends to reduce philosophy to an arbitrary choice, the equivalent of faith.
5. “Strauss’s quest takes the form of a continuous descent in which we are compelled to abandon all hope as we spiral down in pursuit of the basic problem of the social sciences or the most fundamental disclosure of Weber’s moral preferences.” Robert Eden, “Why Wasn’t Weber a Nihilist?” in The Crisis of Liberal Democracy: A Straussian Perspective, ed. Kenneth L. Deutsch and Walter Soffer (Albany: State University of New York Press, 1987), p. 224. Eden’s excellent essay traces this descent to its penultimate step but fails to notice that Strauss takes the argument down one further crucial step. The bottom is not historicism or fate; it is man’s need for moral guidance in the face of which Weber could offer no solution.
7. “How one becomes what one is” is the subtitle of Nietzsche’s autobiographical Ecce Homo, trans. R. J. Hollingdale (London: Penguin Books, 1979). Nietzsche answers the question how one becomes what one is in the chapter “Why I Am So Clever,” sec. 9. “That one becomes what one is presupposes that one does not have the least idea what one is.” The danger of understanding oneself too early is that it would preempt the gradual process of the revaluation of all values. If one succeeds in becoming what one is, one will have gone beyond all ideals to affirm in perfect freedom what is. “My formula for greatness in a human being is amor fati: that one wants nothing to be other than it is, not in the future, not in the past, not in all eternity. Not merely to endure that which happens of necessity, still less to dissemble it—all idealism is untruthfulness in the face of necessity—but to love it...” (sec. 10).
8. For Weber, “the gods of the various orders and values” are engaged in continuous struggle.
One can never finally decide among their conflicting claims because “different gods struggle with one another, now and for all times to come.” “Science as a Vocation,” p. 148; see pp. 147–49.

9. One of the three decisive qualities of the politician, along with responsibility and proportion, is “passion in the sense . . . of passionate devotion to a ‘cause,’ to the god or demon who is its overlord.” Max Weber, “Politics as a Vocation,” in From Max Weber, p. 115.

10. Cf. Strauss’s summary of Georg Lukács’s critique of Max Weber’s conception of social science: “Weber more than any other German scholar of his generation tried to save the objectivity of social science; he believed that to do so required that social science be made ‘value-free’ because he assumed that evaluations are transrational or irrational; but the value-free study of ‘facts’ and their causes admittedly presupposes the selection of relevant facts; that selection is necessarily guided by reference to values; the values with reference to which the facts are to be selected must themselves be selected; and that selection, which determines in the last analysis the specific conceptual framework of the social scientist, is in principle arbitrary; hence social science is fundamentally irrational or subjectivist.” The Rebirth of Classical Political Rationalism, p. 19.


12. Consider Weber’s contrast of the ethic of ultimate ends versus the ethic of responsibility. The politician must make decisions based on a judgment about the consequences they will have for the nation. The pious must make decisions based on unconditional duties regardless of consequences. Thus, the ethic of ultimate ends (enjoined by religion) is not reconcilable with the ethic of responsibility required by politics. Weber, “Politics as a Vocation,” pp. 122, 126, and see pp. 117–26. This passage would appear to put Weber’s references to man’s gods and demons in a new light: our demons consist in our attraction to the exercise of political power; our gods consist in our religious impulses. This formula offers no grounds for a reconciliation or even a modus vivendi between religion and politics, love and violence. Indeed, it implies that any attempt to embody religious insight in political reality must end by subverting both politics and religion. Weber would seem to allow no place for prudence.

13. Strauss’s translation “ethics of intention” corresponds to what our translation calls “ethics of ultimate ends”; see NRH, p. 67.

Thomas Aquinas solves this problem of reason and revelation by saying grace completes nature. Weber’s dilemma was, by this argument, the consequence of an erroneous theology. To make the contrast between the social scientist and the saint even more pointed, we may recall that Weber often said that belief in revelation entailed belief in the absurd. Strauss may have had Aquinas in mind when he wondered wryly whether Weber’s view “is compatible with an intelligent belief in revelation” (NRH, p. 71). We must, for now, leave open the question whether it is, in fact, reasonable that human reason sometimes acknowledge the supra-rational insights of revelation.

14. According to this account, Weber exemplifies the school of thought called historicism which Strauss discussed in the first chapter of Natural Right and History. Historicism leads to the conclusion that “the limitations of human thought are set by fate” (p. 21). “All human thought depends on fate, on something that thought cannot master and whose workings it cannot anticipate” (p. 27).

15. The term “vocation” arose in the context of divine providence. Weber salvaged the term from its apparently moribund theological context and applied it to the individual’s commitment to a way of life or calling—his leap in the dark. Thus, for Weber, vocation remains ultimately in the service of the gods. For a more extended statement of the same dilemma, see Leo Strauss, “Progress or Return?” in An Introduction to Political Philosophy (Detroit: Wayne State University Press, 1989), pp. 285–89.

16. I am reminded of a passage describing the art of esoteric writing in Strauss’s book specifically devoted to expounding the philosopher’s art of writing: “For is not every sentence rich in potential recesses? May not every noun be explained by a relative clause which may profoundly affect the meaning of the principal sentence and which, even if omitted by a careful writer, will be read by the careful reader? Cannot miracles be wrought by such little words as ‘almost,’ ‘perhaps,’ ‘seemingly’? May not a statement assume a different shade of meaning by being cast in the form of a conditional sentence? And is it not possible to hide the conditional nature of such a sentence by turning it into a very long sentence and, in particular, by inserting into it a parenthesis of some length?” Persecution and the Art of Writing, p. 78.
17. Weber notes the attempts by the higher religions to present their creeds in rationalized forms and their appropriation of philosophical reasoning for use in systematic theology and apologetics. But he concludes: “There is absolutely no ‘unbroken’ religion working as a vital force which is not compelled at some point to demand the credo non quod, sed quia absurdum—the ‘sacrifice of the intellect.’” From Max Weber, p. 352.

18. In an autobiographical passage, Strauss admits that as a young man: “I had been particularly impressed, as many of the contemporaries in Germany were, by Max Weber: by his intransigent devotion to intellectual honesty, by his passionate devotion to the idea of science—a devotion that was combined with a profound uneasiness regarding the meaning of science.” “An Introduction to Heideggerian Existentialism,” in The Rebirth of Classical Political Rationalism, p. 27. Strauss’s contemporary, Eric Voegelin, makes a strikingly similar testimonial: “If Weber nevertheless did not derail into some sort of relativism or anarchism, that is because . . . he was a staunch ethical character. . . . So he knew what was right without knowing the reasons for it.” Autobiographical Reflections, ed. Ellis Sandoz (Baton Rouge: Louisiana State University Press, 1989), p. 12.


23. Weber’s separation of values from any possible basis in nature is in line with the modern notion of man’s freedom as self-legislation. This, the essence of postmodern ethics, is thought to be required by a nonteological science of nature (B Increns, “The Prescientific World and Historicism,” p. 174). This appears to be Strauss’s meaning in a difficult passage (NRH, pp. 48–49) in which he mentions another possible interpretation of Weber’s imperative “Become what thou art”: “According to this interpretation, Weber rejected objective norms because objective norms are incompatible with human freedom or with the possibility of acting.” Strauss neither approves nor expands this interpretation.

24. Outwardly in his public profession of scientific objectivity, Weber refused to subscribe to any sect or “ism.” In this respect, Weber was one of Nietzsche’s “scholars or scientists” subservient solely to philosophy. All his life Weber severely restrained any impulse he might have felt to indulge the ecstasy of the “poets or the homines religiosi.” Strauss, Studies in Platonic Political Philosophy (Chicago: The University of Chicago Press, 1983), p. 186. My point is that the core of Weber’s teaching makes such a refusal impossible; even dedication to science involves becoming what one is by choosing one’s god or demon.

25. “Not only has rationality disappeared from the behavior studied by science; the rationality of that study itself has become radically problematic. All coherence has gone. We are then entitled to say that positivistic science in general, and therefore positivistic social science in particular, is characterized by the abandonment of reason or the flight from reason. The flight from scientific reason, which has been noted with regret, is the reasonable reply to the flight of science from reason.” Strauss, “Relativism,” in The Rebirth of Classical Political Rationalism, pp. 18–19.

26. The precondition for practice of Nietzsche’s gay science is that one should be able to “laugh out of the whole truth” when “the comedy of existence” will have “become conscious of itself,” i.e., when man will have left behind the age of religion, morality, and tragedy. Gay science laughs at all tragedians, all the teachers of purpose, all propounders of a truth. It is inevitable that every dogma will be overcome by laughter, reason, and nature. (Friedrich Nietzsche, The Gay Science, trans. Walter Kaufmann [New York: Vintage Books, 1974], p. 74). Nietzsche also tells us that
mankind in the age of Christianity (or Platonism for the people) was like a sleeper in the grip of a nightmare. The present age, characterized by the final overcoming of Christianity, promises an exuberant wakefulness for those few free spirits, like Nietzsche, and, for the rest, at least a healthier sleep. (Beyond Good and Evil, trans. R. J. Hollingdale [London: Penguin Books, 1973], p. 32). Standing behind Weber, we sense Nietzsche as Strauss’s true antagonist. Against Nietzsche, Strauss observes that to see every teaching as only a partial perspective is to make oneself not a free spirit but a prisoner to the typically late-modern perspective and, thus, unable to understand other teachings as they were meant or take them seriously. Strauss does not propound Nietzsche’s gay science. On the other hand, Strauss also repudiates Weber’s assumption that philosophy must, above all else, answer the question how we should live. Thus, Strauss is also not an advocate of “Christianity” who would inflict further nightmares on the world. The quiet sleep Strauss offers is perhaps the fruit of political philosophy, which moderates (but never dreams that it can overcome) the opinions that animate political life.

27. Strauss learned from Edmund Husserl the wrongheadedness of modern natural science’s approach to knowing nature. See Leo Strauss, “Philosophy as Rigorous Science and Political Philosophy,” in Studies in Platonic Political Philosophy, p. 35.

28. Strauss’s thinking is characterized by his refusal to take the bird’s-eye point of view. Much of the criticism or incomprehension of Leo Strauss derives, I think, from modern philosophy’s long- ingrained habit of taking the bird’s-eye view.

29. These remarks about the lack of a moral basis for morality occur at the point in an essay where Strauss clarifies the tradition of Platonic political philosophy which a Christian Aristotelian, Marsilius of Padua, has received via the Arab Aristotelians. Leo Strauss, “Marsilius of Padua,” in Liberalism Ancient and Modern (Ithaca: Cornell University Press, 1989), p. 200. Strauss goes on to imply that Marsilius began the degradation of this tradition by treating the subordinate ends of the active, political life almost as though they were independent from the true human end of contemplation. In this way, Marsilius may be seen as transitional between the political philosophy of Averroes and Hobbes; he retains contemplation as the ultimate end, but he treats the ordering of political life almost without reference to contemplation.

The paraphrase of Nietzsche is in “A Giving of Accounts,” in Jewish Philosophy and the Crisis of Modernity, p. 465. In this public conversation with Jacob Klein, Strauss, speaking with unusual directness and in his own name, embraces the tradition of Platonic political philosophy represented by Alfarabi, Averroes, and Maimonides, a tradition which interprets Aristotle’s teaching on practical reason as fundamentally in harmony with Plato’s reservation of truth to the activity of the speculative intelligence. Thus any claim concerning knowledge of the good cannot be taken literally, but must be interpreted as rhetoric or dismissed as ignorance.


Stanley Fish’s Miltonic Interpretation of Martin Luther King

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One of the many problems faced by the Miltonist Stanley Fish and other supporters of affirmative action policies derives from something that was said by one of the leaders of the American civil rights movement on an occasion which he thought was the greatest demonstration for freedom in the history of his nation. In his “I Have a Dream” speech, which he delivered before the Lincoln Memorial in August 1963, Martin Luther King described the American Constitution and the Declaration of Independence as the nation’s promise “that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.” Although America according to King, “in so far as her citizens of color are concerned,” had so far failed to make good on this promise, he proceeded to affirm his hope and his faith that it would finally do so. He does this by describing his dream of how things would be once this had happened in a series of sentences all beginning with “I have a dream,” one of which is the following: “I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character” (p. 219).

King’s dream of a nation in which his children and, if we read this expression figuratively, all people, are judged not in accordance with the color of their skin but in accordance with the content of their character poses a problem for supporters of affirmative action, at least where the expression “affirmative action” is understood in a particular way. For although, as many have pointed out, the expression “affirmation action” was used in the early 1960’s to refer to activities such as monitoring hiring and promotion decisions and spreading information that encouraged members of racial minorities to apply for jobs, it has come to mean something different now. Today, the expression “affirmative action” is commonly used to refer to policies that call for people to make judgments about who gets hired and who does not, about who is let in and who is not, in part or in whole on grounds of race or sex. And it is on the basis of such judgments that the people who make them then proceed to hire some and not to hire others, to admit some and to turn away others. Given that some affirmative action policies call for judgments of people in part by the color of their skin, where these would be judgments of them by their race, King’s dream of a nation in which his and all children are not judged by the color of their skin would appear

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to be a dream of a nation in which, just for starters, there would be no affirmative action policies. The problem posed for supporters of affirmative action policies by the "I Have a Dream" speech is thus that according to one interpretation of something he said in this speech, King appears to have come out against them. How can affirmative action policies be right if the leader of the civil rights movement condemned them?

In the early 1640's, John Milton had the same kind of problem. Shortly after he married in 1642, Milton's wife, Mary Powell, left him; shortly after this, Milton was publically promoting a policy which would grant divorce on grounds of what he calls "antipathy" and what we now call "incompatibility." Milton's problem derived from something that was said by the leader of his cause in what was perhaps his most important speech on a rather historic occasion. The leader is Christ, the speech is the Sermon on the Mount, and the apparently damming words for people who shared Milton's views are these: "whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced comitteth adultery" (Matthew 5:32). On a later occasion, when he was responding to questions put to him by the Pharisees, Christ says almost exactly the same thing: "whosoever shall put away his wife, except it be for fornication, and shall marry another, comitteth adultery: and whoso marrieth her which is put away doth commit adultery" (Matthew 19:9). To most of Milton's contemporaries, to the writers of canon law, and to an entire tradition of biblical commentators, Christ on these occasions seemed to be claiming that all those who leave their spouses and remarry commit the sin of adultery, except those who leave their spouses for the reason that they committed what he calls "fornication." It is because those who leave their spouses for the reason of fornication are no longer married but are divorced that when they remarry and fornicate they are not committing adultery. Those who leave their spouses for any other reason besides fornication, however, are still married, which is why, should they proceed to remarry and fornicate, they will be guilty of adultery, where adultery is the act of a married person fornicating with someone other than his or her spouse. Christ thus appears to be saying here that the only case in which married people are truly divorced, or at least the only case in which married people should be recognized as being truly divorced, is where they separate for the reason that one has committed fornication. Should a person leave his or her spouse on grounds of incompatibility, then, that person is not divorced and should not be recognized as such. Given this understanding of what Christ's words mean or what Christ was doing when he spoke them, Milton's problem was thus that the leader of the movement to which he belonged appeared to have spoken in a way which clearly signalled his opposition to the policy he advocated and the actions that would follow from it. How can divorce on grounds of incompatibility be right if Christ condemned it?

Although the issues are different, the problem Milton has with Christ on
divorce is thus in essential respects the same as the problem Fish has with King on affirmative action: the leaders of the movements to which they ally themselves appear to have spoken against the policies they support and therefore seriously weakened, if not destroyed, the legitimacy of those policies. By closely reading these apparently disparate documents, we can see that the solutions these authors adopt to solve their problems are also essentially the same. More specifically, we can see that Fish solves his problem by adopting a particular strategy of interpretation and derision which he observes Milton following in his divorce tracts. Besides allowing us to see that the fierce hermeneutical spirit of Milton lives on in the political writings of one of his greatest critics, this kind of close reading also helps us to see that the solutions themselves are deeply problematical. And by observing this, we may come to think more clearly not only about Milton and Fish, but about divorce, affirmative action, and what the prophets said.

Milton attempts to solve his problem by tackling it head on: citing in full the problematical words of his prophet, he argues that they in fact mean something which is perfectly consistent with what he wants. In order to accomplish this remarkable feat, Milton does nothing less than to elaborate a theory of linguistic meaning and interpretation and then present his interpretation of Christ’s words as one which is consistent with this theory and therefore correct. At the same time, he identifies the standard interpretation of Christ’s words, one which issues in a condemnation of the policy he supports, as one which violates these rules and is therefore incorrect. This procedure is clearest in The Doctrine and Discipline of Divorce, which Milton published in 1642 and again, with revisions, in 1643. In the full title of this tract, he identifies the general rule which is to govern our interpretation of scripture as “the rule of charity,” and he refers to it throughout the tract.3 “Charitie,” he claims, is “the interpreter and guide of our faith” (p. 145), and “the general and supreme rule of charitie” is a rule that will allow us to avoid “stubborn expositions of particular and inferior precepts” (p. 163. For further assertions of the law of charity, see pp. 170, 175, 176, 183, 185, 189, 190.). Although Milton begins simply by assuming what charity is, he eventually provides a more explicit explanation: “if we mark diligently the nature of our Saviours commands, wee shall finde that both their beginning and their end consists in charity: whose will is that wee should so be good to others, as that wee be not cruel to our selves” (p. 179). Now Milton makes clear early in the tract that refusing to grant divorce to spouses who are incompatible is uncharitable: no law can “be of force to ingage a blameles creature to his own perpetuall sorrow, mistak’n for his expected solace, without suffering charity to step in and doe a confest good work of parting those whom nothing holds together, but this of Gods joyning, falsly suppos’d against the expresse end of his own ordinance” (p. 148). Given that all interpretations of Scripture must
conform with the principle of charity, and given that the refusal to grant divorce on grounds of antipathy violates this principle, any interpretation of Scripture which issues in such a refusal must be mistaken.

But if the rule of charity allows Milton to tell us what Christ’s words cannot mean, it falls short when it comes to telling us exactly what they do mean. This is why, when he comes to deal with “some” who will question all his reasonings on grounds that “the words of Christ are plainly against all divorce, except in case of fornication,” Milton identifies more specific rules of interpretation: “All places of Scripture wherein just reason of doubt arises from the letter, are to be expounded by considering upon what occasion every thing is set down: and by comparing other Texts” (p. 164).

Implicitly granting that a literal interpretation of Christ’s words does indeed issue in a violation of charity and therefore cause just reason of doubt—that is, results in the meaning that Christ forbids divorce on all grounds save those of fornication—Milton immediately follows his two specific rules to solve the problem. “The occasion which induc’t our Saviour to speak of divorce,” he begins, “was either to convince the extravagance of the Pharisees in that point, or to give a sharp and vehement answer to a tempting question.” Milton then claims that on this kind of occasion where Christ is dealing with the Pharisees, men who according to Milton had taken advantage of Moses’ law that permitted divorce on grounds of incompatibility, “we are not to repose all upon the literal terms.” As evidence for this general claim, Milton cites the “many instances” recorded in the Gospels where Christ “meant not to be talk’n word for word, but like a wise Physician, administering one excesse against another to reduce us to a perfect mean.” Given, then, that when Christ is dealing with the Pharisees he is not speaking literally but administering one excess against another, and given that when Christ appears to speak plainly against all divorce, except in case of fornication, he is really dealing with the Pharisees, Christ was not speaking literally when he spoke against divorce. That is to say, he was not forbidding divorce on all grounds, including incompatibility, except fornication. What he was doing was engaging in a kind of overstatement which he intended as a correction to the excesses of the Pharisees, while at the same time granting permission to good, unhappily married men to divorce on grounds of incompatibility. This fact is further evident from other things he says on this occasion:

So heer he may be justly thought to have giv’n this rigid sentence against divorce, not to cut off all remedy from a good man who finds himself consuming away in a disconolate and uninjoy’d matrimony, but to lay a bridle upon the bold abuses of those over-weening Rabbies; which he could not more effectually doe, than by a countersway of restraint, curbing their wild exorbitance almost into the other extreme; as when we bow things the contrary way, to make them come to thir naturall straitnes. And that this was the only intention of Christ is most evident; if we attend but to his own words and protestation made in the same Sermon not many verses before he treats of divorcing. . . . (Pp. 164–65)
Having achieved his desired result by observing the "occasion" on which Christ spoke the problematic words on divorce and "comparing" these words with other texts, Milton adds that one further consequence of reading Christ literally here would be that Moses' pronouncement on divorce recorded in Deuteronomy, a pronouncement which appears to grant legitimacy to divorce on grounds of incompatibility, would be "impure, unjust, and fallacious," and then concludes his exposition with the claim that all of it is indeed consistent with the general rule of charity: to read Christ literally, not to read him as Milton urges we do, consists "neither with his former and cautionary words, nor with other more pure and holy principles, nor finally with the scope of charity, commanding by his expresse commission in a higher strain" (p. 166).

The problem posed by Christ's words on divorce in the Sermon on the Mount is thus solved, but in case we missed it, Milton goes on for another thirty pages elaborating upon the exposition and reiterating the rules of interpretation which ostensibly govern and sanction it. In so doing, he introduces some new material. His comparison of texts expands to cover passages on marriage and divorce in Genesis and Deuteronomy, and other passages in the Sermon on the Mount and the Gospels. He situates Christ's words in the context of the Gospels which, because they are a covenant revealing grace rather than a law demanding a new morality, cannot contain anything that would contravene the laws laid down by Moses in Deuteronomy, including the law which granted divorce on grounds of incompatibility (pp. 167, 179). He asserts the general principle that we must take into account God's purposes and intentions in commanding us to do things in order properly to understand the scope of those commands. He argues at great length that when Christ uses the word "fornication" in his pronouncement on divorce, he means not just "actual fornication" (p. 180) but also "divers obvious actions, which either plainly lead to adultery, or give such presumption wherby sensible men may suspect the deed to be already don" (p. 181). Incompatibility Christ means when he cries fornication. And the rule of comparison is slightly modified in light of the fact that

there is scarce any one saying in the Gospel, but must be read with limitations and distinctions, to be rightly understood; for Christ gives no full comments or continu'd discourses, but scatters the heavy grain of his doctrin like pearle heer and there, which requires a skilfull and laborious gatherer; who must compare the words he finds, with other precepts, with the end of every ordinance, and with the general analogy of Evangelick doctrine. (P. 182)

But the basic procedure for dealing with the problem of Christ's pronouncement on divorce in Milton's first direct and rapid engagement with the problem remains intact. First, he presents a theory of meaning by which the meaning of an utterance is a function of the intention of the person who produces it, of what that speaker "meant" on that occasion. Secondly, he presents a theory of
interpretation which conforms with this theory of meaning: in order to determine the meaning of an utterance, where this would be to determine the intention of the person who produces the utterance, one must follow rules of comparison, contextual analysis, and charity, rules which he claims are themselves drawn from Scripture. That is to say that Milton asserts that validity in interpretation is a function of following rules which are sanctioned by Scripture. Thirdly, he claims to interpret Christ’s words on divorce in accordance with these rules. Fourthly, he claims that the result of interpreting Christ’s words on divorce in accordance with these rules is the understanding that Christ, rather than being against people such as himself who were arguing for the legitimacy of divorce on grounds of incompatibility, was in fact for them. Fifthly, Milton argues that because this interpretation of Christ’s words is in accordance with the rules that, when followed, guarantee validity in interpretation, this interpretation is valid.

The problem is solved, but Milton does not leave it at that. One other element of his solution is a sustained attack on both the intellectual and moral integrity of those who persist in the customary reading of Christ’s words as a hard and fast condemnation of divorce on grounds other than fornication. Those who interpret Christ this way are “resting in the meere element of the Text” and expounding the text “too immoderately” (p. 145). These readers are “sworn” to the “letter of the Text” (p. 146) and bound by “the strictnes of a literall interpreting” (p. 147). This is why they produce “stubborn expositions of particular and inferior precepts” and “are still bent to hold this obstinate literality” and “alphabetical servility” (pp. 163–64). Their problem is that they “repose all upon the literall terms of so many words” (p. 164), and confine the meaning of Christ’s words “to that which meerly amounts from so many letters” (p. 166). Christ’s words are thus “vulgarly tak’n” by these “extreme literalist[s]” (pp. 179, 183). It is “that letter-bound servility of the Canon Doctors” that had “laid this unjust austerity upon divorce” (p. 184); we must not be “literally superstitious” (p. 185). Worst of all, these interpreters violate the fundamental teaching of Christ from which Milton draws his most essential rule of interpretation—charity. Thus, those who fail to see that what Christ’s words mean is what Milton says they mean are not only literal-minded, servile, vulgar, superstitious, stubborn, and obstinate. They are also bad Christians.

It is not difficult to observe several weaknesses in Milton’s solution to his problem. First, Milton’s account of the “occasion” on which Christ spoke against divorce on grounds other than adultery is highly questionable, since in the Sermon on the Mount, which is recorded in Matthew 5, and which, as is clear from his reference to the “sermon” in which Christ claims not to abrogate the law, is the text Milton is commenting upon in his first engagement with the problem, Christ was not speaking to the Pharisees but to the multitudes and his disciples. It is only much later that the “Pharisees also came unto him, tempting him” (Matthew 19:3) and that, in response to them, Christ repeats what he said about divorce in his Sermon on the Mount to the multitudes (Matthew 19:3–9).
That is to say that Milton obfuscates the fact that Christ says the same thing on two very different occasions. Even if Christ had intended not to teach but “to quell and put to nonplus the tempting Pharisees; and to lay open their ignorance and shallow understanding of the Scriptures” on the latter occasion (p. 170), it is difficult to see why he would have had the same intention in the Sermon on the Mount when, as Matthew claims, he was teaching his disciples and the multitudes (Matthew 5:1–2).

Milton’s attempt to make “fornication” mean something much wider than “actual fornication” is also surprising given his argument from occasion. If Christ really intended “but to lay a bridle upon the bold abuses of those overweening Rabbies” (p. 165), there is no need to get “fornication” to mean something approaching incompatibility. It is only on the assumption that Christ was not doing this to the Pharisees but in fact saying what he meant that this argument serves Milton’s cause. The argument from “fornication” thus proceeds as if there really is no argument from occasion. Moreover, the argument from general interpretive theory is circular. Christ’s words are supposed to warrant the rules and help identify the intention which are to govern Milton’s interpretation of Christ’s words, but Christ’s words must themselves be interpreted in order to get these rules. As Fish puts it in his commentary on what he refers to as Milton’s “audacious interpretive program,” the words of Christ we use to determine his intention on one occasion are presumably also

to be understood intentionally, and therefore the support they give as evidence of an intention must itself be supported by additional evidence that will in turn display the same deficiency. . . . Once words have been dislodged as the repository of meaning in favor of intention, no amount of them will suffice to establish an intention since the value they have will always depend on that which they presume to establish.  

That which Milton claims governs his interpretation and makes it valid is in fact the product of a prior act of interpretation which is sanctioned by nothing but Milton’s own powerful belief that it is right.

In spite of these difficulties, Milton’s solution to the problem of what to do when your leaders appear to speak against the policies you support lives again. For Fish’s solution to the problem King’s “I Have a Dream” speech poses for supporters of affirmative action is the same in several important respects as Milton’s solution to his problem with Christ on divorce. In an essay he wrote for a series of debates on American university campuses he had with Dinesh D’Souza in 1991–92 and which he published in There’s No Such Thing as Free Speech . . . and It’s a Good Thing, Too, Fish does not avoid the text that poses the problem but tackles it head on. He in fact opens his essay with the very sentence that poses the problem: “‘I have a dream one day my four little chil-
dren will live in a nation where they will not be judged by the color of their skin, but by the content of their character” (p. 89). Observing that these words are “being employed in the service of the racism [King] spent his life combating,” Fish appears to be on the point of directly engaging with the problem, but he defers and proceeds to document other cases of what he takes to be the bigotry, bad faith, hypocrisy, ignorance, and deceit of what he refers to as “conservative ideologues” and the “ideological right.” Included within this group are “those who have declared themselves against curricular reform, multiculturalism, affirmative action, deconstruction, feminism, gay and lesbian studies, etc.” (p. 92). The essential practice of these people, Fish argues, is to use “a vocabulary of moral purity” (p. 91)—words such as “merit,” “level-playing field,” and “fairness”—to promote policies which in fact serve “prejudices rooted in personal interest” (p. 92). It is after having pointed to and sharply condemned several instances of this practice that Fish again cites King’s words and concludes his essay by directly dealing with the problem they, and those who are using them, pose for proponents of race-conscious policies such as affirmative action.

Fish’s solution is grounded in an antiliteralist contextual theory of meaning and interpretation. Objecting to those who work by “detaching [King’s] words from the history that produced them” (p. 99), Fish implies that the meaning of any particular utterance is in part a function of the circumstances in which it is produced. And objecting to those whose practice consists in “bowing down to the letter at the expense of the spirit” (p. 100), Fish makes clear that these circumstances include the spirit or intention with which that utterance is produced. Although he does not go into much detail in elaborating this contextual theory of meaning, it emerges in the essay as an alternative to the “plain meaning philosophy of language” which is adopted by his opponents, the view that meaning is a function solely of the literal meaning of words, or of an intention that is transparent (p. 90). Given that the meaning of utterances is a function of circumstances, where these include not just the intention and spirit of the speaker but also the history of the particular circumstances in which the utterance is produced, it follows that to understand any particular utterance, we will have to do certain things. We will have to look past the literal meaning of the words used and take into account the circumstances in which the utterance was produced. Validity in interpretation, Fish implies, is a function of following this general procedure.

Fish presents his interpretation of the sentence from King’s speech as one which conforms with this procedure dictated by his antiliteralist, contextual, intentionalist theory of meaning and interpretation. He begins his exposition by insisting that King’s words “were part of a historical occasion” (p. 99), one which was defined by the fact that “blacks were still being denied access to the ballot box, restaurants, hotels, neighborhoods.” King’s purpose in speaking was to press for legislation which would put an end to these discriminatory practices.
In describing King’s purpose, what he wanted, and his “target,” Fish takes himself to be identifying an intention that was not general, but specific to that occasion, “an intention that was locally sincere.” And, given this intention, Fish claims that what King was saying in this sentence was not “Let’s get rid of all forms of racial discrimination,’ but only “‘Let’s get rid of these Jim Crow laws.’” More importantly, Fish claims that “what he was not saying was, ‘Once they are removed, the job will be done and business can then proceed as usual’” (p. 99).

By looking at the circumstances in which King was speaking, then, Fish claims that we can see that, in the sentence that poses the problem, King was not talking about affirmative action policies but Jim Crow laws. And what he meant was that he hoped his children and other black Americans would no longer be subject to them. That this sentence does not signal King’s condemnation of affirmative action policies is further evident, Fish proceeds to argue, if we take into account other features of King’s spirit and intention as they are revealed by other parts of the speech. Fish singles out King’s assertion that he and his supporters will not be satisfied “‘until justice rolls down like waters and righteousness like a mighty stream,’” not until “‘the crooked places shall be made straight and the glory of the Lord will be revealed and all flesh shall see it together’” (p. 99). These words, Fish claims, reveal that King was not “a man who is calling for the reign of neutral principle, or for a merely procedural justice that detaches itself from history.” They rather reveal him to be a man who was “committed to nothing less than the transformation of American life.” And this transformation, Fish claims, “will be far from accomplished if legal discrimination is ended while the inequities that have been produced by discrimination are left untouched and continue to do their evil work” (p. 99). Now, for Fish and other authorities such as Michel Rosenfeld whom he cites, the fact is that race-neutral policies leave untouched the inequities that have been produced by a history of discrimination against blacks. Race-conscious policies such as affirmative action effectively redress them. Since the spirit of this speech is committed to a nation in which these inequities are redressed, and since race-conscious policies such as affirmative action effectively redress them, King cannot have meant on this occasion that race-conscious policies such as affirmative action are wrong. One the contrary, “‘race-neutral’ and ‘color-blind’ are just two more of the coded phrases by means of which Martin Luther King’s legacy is not honored but betrayed” (p. 100).

Was, then, King saying that he wanted his children to be judged by the color of their skin? Although Fish claims he “is not saying that Martin Luther King would have wanted his children to be judged by the color of their skin, as if that were in and of itself an entitlement,” Fish nevertheless proceeds to claim that King would have wanted his children to be judged to some extent and in some situations by the color of their skin: “neither would he have wanted the color of their skin to be wholly irrelevant to the determination of what they had
to offer to society” (p. 100). This is clear from the spirit of the speech which Fish further describes by appealing to other parts of it. Citing King’s claim that “‘you have been the veterans of creative suffering,’” Fish explains that King here recognizes the fact that the color of the skin of his followers has caused this suffering. And what this means is that although King appears in the problematic sentence to be asserting the difference between skin color and character content, he is in fact asserting in the speech at large that they are to some extent the same: “in short, the color of their skin has in some measure been the content of their character” (p. 100, Fish’s emphasis). Given that this is what King really means in other passages of his address, policies such as affirmative action policies which respect and take into account the fact that skin color is in some measure the content of character are “faithful to the spirit of King’s vision . . .” (p. 100). Rather than condemning affirmative action policies, then, King’s sentence about skin color and character condemns only Jim Crow laws. It is part of a larger text, the spirit of which is committed to the total transformation of American society. The spirit of his speech is, moreover, committed to the practice of taking into account the color of people’s skins when determining their merit as a means of bringing about this transformation. Affirmative action policies are thus true to the spirit of Martin Luther King’s “I Have a Dream” speech.

Those who interpret King’s words as a stricture against affirmative action policies are thus of the same party as those “hard-core literalists” Fish describes earlier in the essay, those who “say things like ‘How can it be racist to be for equality?’ or ‘My objection is simply to preferential treatment for anyone,’ or ‘I just want decisions to be made on a basis that is fair’” (p. 90). Just as these demand that their own utterances be interpreted literally or in accordance with an intention that they claim is obvious to all, so those who cite King against affirmative action, working on a plain meaning philosophy, interpret his words literally and are thus “bowing down to the letter at the expense of the spirit.” They stand by “a pinched and narrow reading of his words.” They stand by “the letter” (p. 100). And, as we have already seen, this literalism makes them not only bad interpreters, but bad people, for they are violating the principles of equality, fairness, civil rights, and freedom in the name of which King spoke and in the name of which they themselves claim to be speaking. Those who take and cite King’s words as a stricture against affirmative action are employing them “in the service of . . . racism” (p. 89); they are working “to retard the changes that King began” (p. 99); they are aiming “to prevent that history [of racism] from being truly and deeply altered” (p. 99). These literalists for “whom the morality of the civil rights movement is anathema,” are, in short, “wolves in moralists’ clothing” who, like the others Fish indicts, have become adept “at encoding a virulent message in the most high sounding terms” (p. 100).

The performance is thoroughly Miltonic. Like Milton, Fish affirms an antiliteralist theory of meaning. According to this theory, the meaning of any particu-
lar utterance on any particular occasion is a function mainly of the spirit and intention of the person who performed the utterance. Like Milton, Fish affirms an antiliteralist theory of interpretation, by which valid interpretation is the act of accurately identifying the meaning of an utterance, where this is essentially what the speaker intended to say on that occasion. Like Milton, Fish claims that this can be done only by looking at the literal meaning of the words used, the situation in which the person spoke the words, the history of that situation, and other things the person said on that and on other occasions. Like Milton, Fish identifies a particular speaker's spirit or intention by considering the occasion on which that person spoke, the history of that occasion, and other things the speaker said. Like Milton, Fish claims to interpret a problematic text in a way that he claims is consistent with the spirit and intention of the utterance as he understands it. Like Milton, Fish implies that because he interprets the text in this way, he abides by his theory of meaning and interpretation. And because he abides by his theory, Fish, like Milton, proffers his interpretation as one that is valid. Like Milton, Fish, in light of his interpretation of the text, claims that the policy he supports is sanctioned by the leader of his cause, and he therefore implicitly enlists himself as one of the faithful. And like Milton, Fish denigrates the competing interpretation by identifying it as the product of those who are not just literal-minded, but also violators of the cause for which all claim to be fighting. "A pinched and narrow reading"—the Miltonic flavor is unmistakable.

But like Milton's solution, Fish's, too, is open to many objections. First, the description of the going interpretation of King's sentence as literal-minded is inaccurate, since a literal interpretation of the sentence would issue in the view that King was not talking about how he wanted all Americans to be treated but only his children. Those "conservative ideologues" who read the sentence as a critique of affirmative action policies to which all American citizens would be subject must read "my children" not literally but as a figure—a synecdoche—for all American citizens. Similarly, they must read "the color of their skin" as a figure—a metonymy—for race. And it is questionable that a literal reading would issue in the understanding of "judge" in this sentence as comprehending all those acts of hiring, refusing to hire, admitting, and refusing to admit people on grounds of race which are called for by affirmative action. The reading to which Fish objects is neither literal nor pinched and narrow, but rather inventive.

Second, there is the problem with Fish's identification of the spirit of the speech in relation to which he rules out the anti-affirmative-action reading of the problematic sentence and claims support for his own pro-affirmative-action reading. In his discussion of the problematic sentence, Fish recognizes King's concern with civil rights legislation, but he loses sight of it when he proceeds to establish the spirit of the speech at large as one that is committed to "the transformation of American life," by which he means the transformation that would be brought about by redressing the inequities that have been produced by all of the racial discrimination of the past. It is mainly on grounds of this larger,
more comprehensive vision of social change that Fish rejects the view that King is signalling his disapproval of affirmative action. But in discounting King’s commitment to a society that was subject to comprehensive civil rights laws in his account of the spirit and vision of the speech, Fish betrays his own commitments to the specificity of the occasion and the speech itself. As King’s biographer David Garrow makes clear, although King and the other organizers of the march wanted more than the passage of President Kennedy’s civil rights bill which at that time was before the Senate, the passage of that legislation was one of the dominant aims of King and the march organizers from start to finish. And that fact is writ large in the speech itself. In response to those who ask him and his followers when they will be satisfied, King does not respond by saying not until they have legislation which redresses the inequities caused by past injustices. He rather answers very specifically that they will be satisfied when an end is put to police brutality against blacks, the exclusion of blacks from hotels, the forcing of blacks to live in ghettos, “for whites only” signs, and the denial to blacks of the right to vote. And because the sentence about justice and righteousness rolling down comes immediately after this specific description, it seems reasonable to think that this state of affairs is what King means by “justice.” The just nation that King describes in some detail on this occasion, that is, is a nation in which blacks are free, where this means being free from forms of discrimination and persecution, and where blacks are equal, where this means having the same rights as whites.

This is not to say that King and the other leaders of the march on Washington were not committed, as Fish claims, to the transformation of American life. But the particular transformation that was uppermost in King’s mind on this occasion was not the total transformation that Fish and others think can be brought about only by preferential policies. It is the limited transformation of American life that King believed would result from legislation that would ensure that blacks enjoy what King in his speech calls “citizenship rights” (p. 218). It is the transformation that he thought would occur when blacks went from being denied civil rights to having them. That is why King describes himself and his followers on this occasion not as proponents of policies aimed at redressing past injustices, but as “devotees of civil rights” (p. 218). And that is why when, after King had spoken, Bayard Rustin, one of the organizers of the march, identified the specific goals of the march as being the passage of Kennedy’s civil rights bill, a two-dollar minimum wage, desegregation of schools, a federal public-works job program, federal action to bar racial discrimination in employment practices, but not preferential policies (Garrow, p. 284). By identifying the goals of the protestors in this way, Rustin indicates that the main idea was not to achieve a society in which past injustices against blacks had been redressed (as if that were ever possible); it was to achieve a society in which blacks would no longer be segregated from whites, persecuted, and discriminated against, especially in the job market. In claiming that the spirit of King’s speech is committed to a
society in which the effects of all past injustices to blacks were redressed, then, Fish fails to live up to his commitment to the historical specificity of the occasion and therefore misidentifies the spirit of the speech.

Once we recognize that the spirit of the speech is committed to a society in which there is the same freedom and equality for blacks as there was for whites, we can see that King was not talking about policies such as affirmative action which are aimed at redressing injustices committed in the past. And because he was not talking about such policies on this occasion, it is not clear what he thought of them on this occasion, and what he would have thought of them once civil rights legislation was passed. That King was dreaming of a nation in which his children would not be discriminated against because they were black does not necessarily mean that once legislation was passed which outlawed that discrimination, he would not proceed to dream about and fight for a nation in which the ongoing effects of past discrimination were redressed through race-conscious policies. Taking into account the occasion and spirit of the speech does not, then, as Fish claims, allow us to see that King was clearly signalling his support for affirmative action policies; neither does it allow us to see that King was clearly signalling his opposition to them. Taking into account the spirit of the speech allows us to see that it is unclear what King thought, or would have thought, about them.

But even if Fish were right in claiming that the spirit of the speech is committed to a society in which the ongoing effects of past racial injustice have been redressed, it is not the case that taking it into account would allow us to see that King in this speech signals his agreement with Fish and Rosenfeld that race-conscious policies such as affirmative action are the way to achieve it. As we have seen, Fish tries to argue that King would have agreed with him on this specific point by citing King’s claim that “you have been the veterans of creative suffering.” But it seems unreasonable to think with Fish that in saying this King meant that the color of the black protestors’ skin has in some measure been the content of their character, especially since a few sentences later King differentiates between the color of his children’s skin and the content of their character. Even if we do think this, it seems unreasonable then to infer that King here signals his approval of race-conscious policies such as affirmative action to redress past racial injustice. The fact that King was saying that the color of the black protestors’ skin has been the content of their character and has generated their suffering would not necessarily imply anything about how King thought that fact should be redressed.

Indeed, if we are going to discount the historical specificity of the speech and read it as an indication of what King thought about policies which are aimed at redressing past injustices, there are some indications that King would have been bothered by affirmative action. King would seem to indicate that he thinks racial discrimination is not a good thing by referring in this speech to the “chains of discrimination” (p. 217), and by referring to “the evils of segregation and
discrimination” in an earlier speech from which he took some material for his “I Have a Dream” address (see “The American Dream,” in King, p. 216). King is on these occasions talking about the discrimination of whites against blacks, but it is hardly self-evident that, while condemning discrimination against blacks, he is recommending or would recommend it against whites. Now as Fish himself concedes in one of the other essays he wrote for his debates with D’Souza, “You Can Only Fight Discrimination with Discrimination,” affirmative action calls for a particular kind of racial discrimination (and it is precisely because it does so that, according to Fish, it can be an effective means of re-dressing racial injustice. See There’s No Such Thing . . ., pp. 70–79). So, affirmative action calls for racial discrimination, King in this speech and elsewhere indicates that discrimination against blacks is a bad thing, and King gives no explicit indication in this speech that state-sponsored discrimination against non-blacks would be a good thing.

Given all of this, it seems reasonable to doubt that King thought the racial discrimination called for by affirmative action was necessary to achieve a society in which past racial injustices had been redressed, even given that this is what he had in mind. That is to say that there are some indications in the speech that King would have agreed with affirmative action babies such as Stephen Carter and other post-civil-rights black scholars such as Shelby Steele and Thomas Sowell who, desiring more social change than that brought about by the civil rights legislation, doubt that affirmative action is the way to achieve it.7 This is why, as we have seen, Fish must resort not to King’s speech but to himself and Rosenfeld to get the claim that affirmative action policies are the only way to redress the ongoing effects of past injustices. And this is one reason why people such as Sowell can reasonably maintain that affirmative action has been a perversion rather than an extension of the civil rights movement led by King.

In bringing Miltonic strategies to bear upon his problem, then, Fish is thus fair enough in claiming that King’s sentence about his children is about a society in which his children would enjoy civil rights and thus cannot legitimately be read as proof of King’s opposition to affirmative action (which Fish rightly equates with discrimination against nonblacks). Not content to disarm the problematical sentence by showing that it is basically irrelevant to the issue of affirmative action, however, Fish proceeds to turn it into evidence of King’s support for affirmative action by making its meaning serve what Fish mistakenly identifies as the “spirit” of the speech. This amounts to saying that in a short speech in which King said, “I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character,” he really meant that the color of his children’s skin is the content of their character and that he is therefore dreaming of a nation in which they will be judged in part by the color of their skin. In saying this, Fish
Stanley Fish’s Miltonic Interpretation of Martin Luther King presents an interpretation which, as he says of Milton’s interpretation of Christ on divorce, “is so strenuous that even the word ‘manipulation’ is too mild to describe it” (“Wanting a Supplement,” p. 54).

NOTES


Discussion

Constitutional Government and Judicial Power
The Political Science of The Federalist

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Athenian Stranger: Is it a god or some human being . . . who is given the credit for laying down your laws?
Kleinias: A god, stranger, a god.

Plato, The Laws

One who asks the law to rule . . . is held to be asking god and intellect alone to rule . . . Hence law is reason without passion.

Aristotle, The Politics

The [civil] magistrate may also, in a more strict and proper sense, be said to be ordained of God, because reason, which is the voice of God, plainly requires such an order of men to be appointed for the public good.

Samuel West, sermon delivered during American Revolution

But it is the reason of the public alone that ought to control and regulate the government.

Publius, The Federalist

Publius writes in Federalist 78, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." Publius goes on to explain why the court is the "least dangerous" branch of the national government:

The executive . . . holds the sword of the community. The legislature . . . commands the purse. . . . The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹

¹
But this opinion of the judiciary as the weakest branch of government—unable to implement its own decisions, and in fact dependent upon the elected branches for the “efficacy of its judgments”—is not shared by the conservative intelligentsia today. To the contrary, many conservatives think the judiciary, in particular the U.S. Supreme Court, but also the federal circuit and appellate courts as well, has become the most powerful, influential, and tyrannical branch of the national government.

Perhaps one of the best examples of the antijudicial fever running high in conservative circles is the now-famous (or infamous?) First Things symposium on judicial activism, and the ensuing turmoil it sparked. “The End of Democracy? The Judicial Usurpation of Politics” was originally a collection of essays published in the November 1996 edition of First Things, but it created such a firestorm among conservative intellectuals and scholars, including special features in the pages of National Review, Commentary, and The New Republic, that it formed the basis of a book published a year later. As the title indicates, the central question was whether activist judges had “usurped” political power from the people by “displacing” the constitutional arrangements of self-government via judicial review (the nullification of congressional law by the Supreme Court). Moreover—and this proved to be the real source of controversy—the question was raised, “whether we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime” which the courts have created. Some participants in the symposium went so far as to compare the rise of judicial activism during the past forty years as a prelude to an American regime comparable to Nazi Germany: “America is not and, please God, will never become Nazi Germany, but it is only blind hubris that denies it can happen here and . . . may be happening here.” With regard to the courts’ most egregious violations of the Constitution as well as the sustained attacks on traditional morality, such as their stand on abortion, euthanasia, pornography, and their radical misreading of the “establishment” and “free exercise” clauses of the First Amendment, some conservative critics have concluded that “[t]he government of the United States of America no longer governs by the consent of the governed.” According to the editors of First Things, this is because “the judiciary has . . . declared that the most important questions about how we ought to order our life together are outside the purview of ‘things of [the American people’s] knowledge.’” (See End of Democracy? pp. 3–5.)

One might say that “judicial activism” has become the rallying cry for mainstream conservatism. During the Cold War, conservatives, amalgamated from a variety of political theories and perspectives, were united primarily if not solely by the fight against communism abroad and socialism at home. But in the post-Cold War era, the destruction of the Soviet Union has left conservatives searching for another common enemy against which they can coalesce. That common enemy might turn out to be our own Supreme Court.

The move for constitutional reform, then, is becoming increasingly popular
among conservative scholars and jurists. Because of the judicial threat to self-government, the argument goes, we must invent some new legal-constitutional tool by which the elected branches can check what the courts do. In particular we must limit the damage courts can inflict using judicial review. Judge Robert Bork, for example, wants to alter the constitutional separation of powers with an amendment that would either subject Supreme Court decisions to modification or reversal by Congress, or simply deprive the court of the power of judicial review altogether (*The End of Democracy?* p. 17). The reason for Bork’s easy-going attitude about changing the nature of the Constitution is that he thinks the Constitution was flawed from the beginning. Bork writes, “On the evidence, we must conclude, I think, that this tendency of courts, including the Supreme Court, is the inevitable result of our written Constitution and the power of judicial review.” This criticism of the Constitution, however, flows from Bork’s more fundamental criticism of America. Bork believes that the principles for which the Patriots of ’76 fought the Revolution and upon which the American regime was built—principles bound up in the “laws of nature and of nature’s God”—were inherently flawed. (See *Slouching*, pp. 56–82.) He has attacked the central teaching of the Declaration as the basis of modern liberalism, including the development of what has become known as the administrative or regulatory state, as well as the sexual revolution of the 1960’s. Of course, the same natural rights theory enshrined in the Declaration, with human equality as its core, can be found in numerous documents from the American Founding, including many of the original state constitutions. The Massachusetts Constitution, to cite but one example, states that “All men are born free and equal, and have certain natural, essential, and unalienable rights.” Despite such evidence, Judge Bork holds the opinion that “Our constitutional liberties arose out of historical experience... They do not rest upon any general theory.”

As I shall discuss shortly, judicial review is required only if there are certain things which are permanent and unchangeable—things which are beyond the scope of majority rule because they are the very ground from which majority rule arises—things such as unalienable rights which all men possess by nature. These must be protected from an abusive majority by a branch of government insulated from the immediate tides of majority will. The judiciary is the only such branch. As I shall also make clear, however, if one rejects the idea of natural rights, then there is no rational argument against the majority tyrannizing the minority. Absent the idea of natural rights, democratic rule becomes unqualified majority rule, and an independent judiciary armed with the power of judicial review becomes an impediment to that rule. This, I believe, is the case with Judge Bork. By rejecting the theory of natural rights, he embraces unqualified majoritarianism, which is incompatible with an independent judiciary as well as a constitutional regime that protects minority rights. In the end, Bork, a leading conservative judge and scholar, rejects both the theory and practice of American constitutional government as envisaged by the Founders.
But conservatives by definition want to “conserve” or “preserve.” They must be willing to ask themselves, therefore, what it is they are conserving or preserving. In general conservatives like what is traditional and old. They are skeptical of change. As a matter of historical fact, an independent judiciary, equipped with power of judicial review, is part of our constitutional tradition. Thus our first inclination should be to revere the judicial branch as a traditional and desirable feature of the Constitution. Intelligent conservatives, however, understand that not all that is traditional is good: there are, after all, bad traditions. Thus what is traditional should be revered not simply because it is old, but because it is good. That is to say, the task for conservatism seems to be a matter of separating—of judging—what in our tradition is good from that which is not, and defending the former while reforming the latter.

In his decision in *Marbury v. Madison*, Chief Justice Marshall remarked that the “essence of judicial duty” is to “say what the law is.” But, according to Marshall, this function of the judiciary is to be understood in light of the fact that “the Constitution...is superior paramount law, unchangeable by ordinary means” (5 U.S. 137). It is because the Constitution is superior law that the role of an independent judiciary is so important. Thus the question of changing the nature of the judicial power should come only after serious reflection on the relationship between the Constitution, the courts, and the moral and political problems we are faced with today. We should remind ourselves, at the same time, that it was the legislative branch that Publius warned would be the most serious threat to individual liberty.

Thus our first duty, as Americans, as conservatives, is to understand the nature of the judiciary and the separation of powers as originally intended by those who wrote and ratified the Constitution. Then we must determine whether reform is desirable. We can find no greater assistance in such an endeavor than by turning to the political science of *The Federalist* and looking in particular to the remarks of Publius concerning separation of powers and the creation of an independent judiciary.⁶

Judge Bork’s proposal to subordinate the judiciary to the elected branches brings to light one of the tensions running throughout the pages of *The Federalist*: namely the juxtaposition of self-government, or republicanism, and good government. One aspect of this tension is the combination of protection for individual liberty with the necessity of having stability and energy in government.

Americans in those early years were distrusting of a strong centralized government; they had, after all, just fought a war against England, a government they thought too strong and too centralized. Their inclination was to decentralize and therefore defuse political power among the states and citizens. But at the same time all were painfully aware that the government created under the Articles of Confederation was weak and impotent. Fresh in the memory of Ameri-
cans during the debate over ratification was Shays’s Rebellion of 1786, where a group of enraged Massachusetts farmers managed to close the courts in Berkshire, Hampshire, and Worcester counties, preventing lawsuits for the collection of debts, and nearly took the federal arsenal at Springfield. Shays’s Rebellion demonstrated the dangers to which the new nation was vulnerable. As Publius points out in *Federalist* 15–22, under the Articles of Confederation corruption at the state level combined with the inability of the national government to enforce its own law would lead to “the violent death of the Confederacy” (*Federalist* 16, p. 114).

The Americans had fought the Revolution because they claimed that only self-government was legitimate government. Self-government meant government by consent, but it also implied governmental protection of individual rights. In the years between the Revolution and the Constitution, however, Americans were “consenting” to violate the rights of their fellow citizens. Property rights in particular were trampled upon by such means as the issuing of worthless currency and nullification of contracts. American democracy was being destroyed by democratic means. If the American experiment in self-government failed, it would show the world that the claims to freedom and self-government were utopian. Self-government needed a “republican remedy,” and it needed a republican advisor: Publius.

The foremost object of the Constitutional Convention, then, was to design a system of republican self-government in such a way as to prevent it from turning into mob rule. This problem underlies Madison’s famous statement in *Federalist* 51:

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.

Men are not angels, and therefore unchecked majoritarianism provides little hope for good government. The arbitrary will of the majority is incompatible with the “safety and happiness” of the people. In order for government to be good it must not simply follow the unstable and changing whims of the majority, but it must do what is right. More specifically, government must “establish justice,” meaning primarily securing the unalienable natural rights of individuals, which is not the same thing as following the dictates of the majority or most powerful will. (Cf. Plato’s *Republic*, bk. 1.) It is to say that in a self-governing republic, the government (through public policy) should emphasize andcapitalize on what is good in public opinion, and de-emphasize, if not reform, what is bad. It is also to say that public opinion in many ways sets a limit as to what
government can or cannot do at any given time. Government (as well as an individual) is therefore confined to doing what is most right and reasonable in a particular political situation, or at a minimum doing what is least wrong and unjust. Prudence, as opposed to a categorical imperative, provides guidance for action in the service of justice. To paraphrase Aristotle, it means natural right is a part of political right *(Nicomachean Ethics, 1134b–1135a)*.

From the perspective of *The Federalist*, justice is not identical to the will of the majority: the majority may from time to time be possessed of a *good* will, but the principles of justice and right are a feature of an unchanging nature, a nature that is discernible by unassisted reason. From its inception, however, the Constitution has been attacked for distancing itself too far from the will of the people, for being too antimajoritarian, as if majority will and right were one and the same. This was the central criticism of many Anti-Federalists, most famously "Brutus." And as the Supreme Court is the most undemocratic feature of the Constitution, it is understandable why it was attacked as setting up an obstacle to self-government. Indeed, Robert Bork is far from being the first person to suggest bringing the Court under the direct control of the elected branches. During the Founding Era similar reservations about the Court’s power were voiced by various constitutional critics, including the author of the Declaration of Independence, Thomas Jefferson.

Before we proceed any further, however, a few preliminary remarks are in order concerning the structure of *The Federalist*.

*The Federalist* can be divided into two parts: of the eighty-five papers, numbers 1–36 are concerned with the general subject of union, and in particular the necessity of union for the *safety* of the states. The first part of the book deals with what is lowest in political life: *necessity*. The theme of the second part of the book, numbers 37–85, is republicanism, or the merits of the proposed Constitution. The underlying theme of part two is the relationship between the general form of republican government and the particular structure of the proposed Constitution. Publius wants to show that the Constitution is not merely republican, but republicanism at its best. The second part, then, goes beyond necessity to a discussion of what kind of government is *good*. From part one to part two the argument moves from the low to the high. And within part two the discussion of the structure of the proposed Constitution moves from the most democratic branch of the national government, the House of Representatives (numbers 52–58), to the least democratic branch, the judiciary (numbers 78–83). Both the structure of the book as a whole and the structure of the second part serve a rhetorical purpose: the book as a whole begins on ground common to both potential friends and enemies of the Constitution, that is, the necessity of safety, and thus union. The second part begins with the most democratic branch, to meet the objection that the proposed Constitution is not representative
enough. One sees that insofar as the primary threat to republican government is
the legislature, the movement from most democratic to least democratic reflects
the movement of the book as a whole: from the low to the high. (Cf. Kesler,
"Federalist 10," pp. 19–21.)

The separation of powers—the first in the catalogue of improvements in the
science of politics announced in number 9—is the subject of Federalist papers
47–51, preparing the way for a discussion of the particular structure of the
proposed Constitution in the remaining papers. The issue under consideration is
not whether separation of powers is necessary for good government, but how
best to keep the powers of the different branches separate from one another: "It
is agreed on all sides," Publius writes, "that the powers properly belonging to
one of the departments ought not to be directly and completely administered by
either of the other departments. It is equally evident, that none of them ought
to possess, directly or indirectly, an overruling influence over the others, in the
administration of their respective powers. It will not be denied, that power is of
an encroaching nature, and that it ought to be effectually restrained from passing
the limits assigned to it." After laying out the theoretical limits of power as-
signed to the legislative, executive, and judicial branches, however, "the next
and most difficult task is to provide some practical security for each, against
the invasion of the others." Indeed, how best to secure each branch in its as-
signed power "is the great problem to be solved" (Federalist 48, p. 308).

In papers 48, 49, and 50 Publius discusses three proposals, respectively, for
maintaining the separation of powers, rejecting each of them in turn. He then
presents his own teaching on the subject in Federalist 51.

Number 48 asks whether "it be sufficient to mark, with precision, the bound-
daries of these departments, in the constitution of the government, and to trust to
these parchment barriers against the encroaching spirit of power?" But as
Publius demonstrates, these "parchment barriers" are inadequate to prevent the
legislative branch from encroaching on the other two branches, given that
"parchment barriers" are legislative in nature, and that "the legislative depart-
ment is everywhere extending the sphere of its activity, and drawing all power
into its impetuous vortex."

The purpose of separation is not only to keep power dispersed among the
various branches, but in particular to work against the tendency of the regime.
In a monarchy that tendency is for power to accumulate in the executive, but in
republican America the tendency is for power to accumulate in the legislative
branch: "[I]t is against the enterprising ambition of [the legislative] department
that the people ought to indulge all their jealousy and exhaust all their precau-
tions." Publius gives three reasons why the nature of legislative power is the
most threatening in a republican form of government: (1) "... [I]n a representa-
tive republic, where the executive magistracy is carefully limited, both in the
extent and the duration of its power ... the legislative power is exercised by an
assembly, which is inspired by a supposed influence over the people with an
intrepid confidence in its own strength.” Being more attached to the people directly, the legislative branch believes it is the true voice of the people and has a “supposed influence” the executive and judiciary lack, therefore operating with “intrepid confidence.” (2) “Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.” The powers of the executive and judiciary are much more limited and simple, and therefore transgressions of their assigned power are much easier to detect than in the legislature. (3) “As the legislative department alone has access to the pockets of the people . . . and a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.” The legislature alone has the power of the purse, and therefore controls the salary of other office holders. This creates a financial dependency on the legislature by the other branches.

Publius’ Constitution solves these problems with three corollary constitutional responses: (1) The composition of Congress, especially the election of Senators by state legislatures, reduces their claim of being the true voice of the people (Art. I, sec 3). In particular, it is the judicial branch that will defend the constitutional rights of the people against an encroaching or usurping legislature, therefore in many respects being a more important voice for the people, and thus attaching their sentiments to the Constitution, instead of the legislature. (2) By enumerating and specifying the legislative powers, the Constitution defines in a fairly clear manner what Congress can and cannot do (Art. I, secs. 8, 9). (3) And by prohibiting changing the rate of “compensation” for the executive and judicial branches during tenure of office, Congress cannot bribe or threaten the other branches with salary increases or decreases (Art. II, sec. 1; Art. III, sec. 1).

In papers 49 and 50, Publius considers whether direct and easy recourse to the people is an effective deterrent against breaches of constitutional authority. Number 49 discusses Jefferson’s proposal for occasional conventions to decide controversial constitutional questions, while number 50 examines the idea of regular, periodical appeals to the people.

Thomas Jefferson had “subjoined” to his Notes on the State of Virginia a proposed constitution for that state. Jefferson’s draft provided that “whenever any two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number, that a convention is necessary for altering the constitution or correcting breaches of it, a convention shall be called for the purpose” (Federalist 49, p. 313. Emphasis original). Publius begins number 49 by saying that Jefferson’s plan, “like every thing from the same pen, marks a turn of thinking original, comprehensive and accurate; and is the more worthy of attention, as it equally displays a fervent attachment to republican government, and an enlightened view of the dangerous propensities against
which it ought to be guarded.” Publius acknowledges that an appeal directly to the people for questions of constitutional interpretation is not only “worthy of attention,” but “displays a fervent attachment to republican government.” Perhaps, however, Jefferson’s plan is a little too republican, too democratic?

Publius acknowledges that “the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived.” And therefore “it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government,” but also “whenever any one of the departments may commit encroachments on the chartered authorities of the others.”

According to Publius, “[t]here is certainly great force in this reasoning.” As a result, there should be a mechanism by which recourse to the people can be made. But Publius wants to limit its use to “certain great and extraordinary occasions.” There are, Publius will explain, “insuperable objections” against the idea that frequent appeals to popular opinion will keep “the several departments of power within their constitutional limits.”

To begin, Jefferson’s plan fails in the case “of a combination of two of the departments against a third.” Publius does not dwell on this objection, however, as “it may be thought to lie rather against the modification of the principle, than the principle itself.” More important is the tendency of frequent recurrence to the people to diminish the “veneration” or reverence the people will have for the Constitution:

[A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would in great measure deprive the government of that veneration, which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.

People venerate what is old and traditional. What is new is by nature suspect, it has not proven itself to be good. Veneration requires the passage of time. As time passes, the people become increasingly distant from the Constitution. Or, rather. they become increasingly distant from the creation of the Constitution, thus forgetting that the Constitution is a product of their own making. Time bestows veneration because time allows the people to become more attached to the principles and goodness of the Constitution, and reflect less on the act of creation. Time allows constitutional founding (the giving of law) to evolve into constitutionalism (the rule of law).

But why does “the requisite stability” depend on “veneration?” Free government, which in the post-classical world means limited government, requires the citizens to acknowledge the superiority of the law, the highest in America being the Constitution. The problem with self-government is getting the people to acknowledge the superiority of something they made. For if the Constitution is
a product of their will, then their will can be taken as the measurement for what is right, and how then does one choose between the will that creates the Constitution and the will that wants to destroy it? The answer is to show that the Constitution is the embodiment not simply of self-government, or popular will, but good government, that the Constitution rests upon a principle of inherent right. This means that the goal for Publius is not so much to show how the Constitution accommodates public opinion, but rather to shape public opinion in support of the Constitution. In doing so, the people will come to venerate the Constitution not only as their own, but as good. This veneration will over time mold and shape popular opinion in support of the Constitution:

If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion. The reason of man, like man himself is timid and cautious, when left alone; and acquires firmness and confidence, in proportion to the number with which it is associated. When the examples, which fortify opinion, are ancient as well as numerous, they are known to have a double effect.

Opinion, then, is strongest when supported both by time and numbers. The problem with a frequent recurrence to the people is that it detracts from the tradition of the Constitution and therefore will lower the number of people who revere it. The solution to this problem, offered by Publius, is to combine an emphasis on the republicanism of the Constitution, thus attracting the support of a large number of the people, while preventing frequent recurrence to the people by making the amendment process difficult, though not impossible. In doing this the source of law becomes obscure over time, and the Constitution appears more and more magnificent, if not somewhat divine. (Cf. Plato’s Laws, 634d–e).

This entire discussion of the need for “veneration” points to the defect in republicanism. For self-government to be identical with good government, self-government would need to be perfectly rational government. The people who govern themselves would need to be perfectly rational beings. According to Publius, this could only be expected in something as fantastic as Plato’s doctrine of philosopher-kings:

In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws, would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato. And in every other nation, the most rational government will not find it a superfluous advantage, to have the prejudices of the community on its side.
Here we see in Publius a classical understanding of politics and human nature: “Enlightened reason” tells us that in a “nation of philosophers” the reason of the law alone would inculcate a “reverence for the laws.” (We note that even philosophers, however, are in need of law. Cf. Strauss, *Philosophy and Law*, Eve Adler translation, p. 39.) But for ordinary, political men, reason will not suffice. Man by nature is a mixture of reason and passion, the latter frustrating the former. (See, e.g., Aristotle’s *Politics*, 1287a25–33.) Human affairs, i.e. politics, can never be entirely rational—men can never become angels—and thus man is by nature limited in his ability for self government. That is why we need time to bestow veneration on the Constitution, because however reasonable the law may be, even be it perfectly rational, the judgment of the people is always less than rational. Or as Publius says, even “the most rational government will not find it a superfluous advantage, to have the prejudices of the community on its side.” The Constitution must become the object not only of our reason, but of our “prejudices.”

The defect of human reason is the defect of the republican theory of government, and is thus the reason why mere “parchment barriers,” which are nothing but human legislation, are insufficient to remedy the republican problem. The defect of human reason is also the reason why at least one branch of government must be insulated to a considerable degree from the changing, temperamental will of the people.

This, however, does not exhaust the reasons why Publius opposes frequent recurrence to the people for constitutional questions. “The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society.” The passions of the people are provoked, usually, at the expense of “tranquility,” or stability. Publius admits that during the wave of state constitution-writing during and shortly after the Revolution, reference was made, repeatedly, to the people, and without ill consequence for the stability of the state governments. But this was due, Publius explains, to the fact that the circumstances under which those constitutions were written were rare. They had a common enemy, England, that distracted them from their internal differences:

We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. (*Federalist* 49, p. 315)
The future constitutional crises that will require participation on the part of the people will stem not from a common external enemy, but from internal divisions of opinions. Hence the passions of the people will not be united; they will be directed against one another. Moreover, we must keep in mind that the Articles of Confederation were written under the same circumstances as the state constitutions, with a view to England as the common enemy, and they turned out to be a dismal failure. And even the state constitutions were far from models of good government: most of the corruption America was experiencing in 1787 and 1788 was at the state level. Hence, Publius concludes, "the experiments [of frequent recourses to the people] are of too ticklish a nature to be unnecessarily multiplied."

Finally, Publius states what is "the greatest objection of all," that "the decisions which would probably result from such appeals [to the public], would not answer the purpose of maintaining the constitutional equilibrium of the government." The reason is that a constitutional convention is ill suited for the purpose of judging the merits of claims to power between governmental branches. As Publius explained in Federalist 48, it is the legislature that most threatens the "constitutional equilibrium of the government." "The appeals to the people therefore would usually be made by the executive and judiciary departments," writes Publius. The convention would in the end be performing the function of a trial, with the judicial and executive branches on one side, the legislature on the other, and the people sitting as judges via their elected delegates. Publius then raises the question, "Would each side enjoy equal advantages on the trial?"

The answer: No. The primary reasons are twofold: First, the legislature has more sway with the people. Publius writes:

The members of the executive and judiciary departments, are few in number, and can be personally known to a small part only of the people. The latter by the mode of their appointment, as well as, by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy: And their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue. (Federalist 49, p. 316)

Secondly, the legislators would most likely be elected as the delegates to the convention. "The same influence which had gained [the legislators] an election into the legislature, would gain them a seat in the convention." In other words, they would be the judge in their own case: "The convention in short would be
composed chiefly of men, who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them." According to John Locke, that is the definition of the state of nature (Second Treatise, chap. 2). Such a convention would actually be a regression from civil society back to the state of nature.

The problem arising when there are conflicts of constitutional interpretation points to the importance of judging, or choosing well. As Publius makes clear, conventions would be called only under conditions of constitutional crisis, and therefore cannot be relied upon to reach a judgment in a cool and well-reasoned manner. Hence the problem arising from maintaining the separation of powers points to an independent judiciary whose job is to pass judgment in such cases in a disinterested manner. It also points to the necessity not only of keeping the judiciary separate from the legislative, but separating the will of the people from the maintenance of the Constitution. Regardless of whether a convention was called occasionally due to crisis or periodically by plan, the decision it would render could "never be expected to turn on the true merits of the question." By questioning the ability of the public to reason about such things, Publius prepares the rejection of the proposals considered in numbers 49 and 50.

According to Publius, under the most favorable circumstances the people would still be too partisan to judge properly:

[The decision of the people] would inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. (Federalist 49, p. 317)

The objections to frequent or occasional conventions, however, go far beyond the simple question of how best to settle constitutional questions. What Publius is here saying is that when the people themselves deliberate either en masse or via delegates—at least most of the time—they are not really governing themselves. The people are less inclined to deliberation and rational reflection, they are not good at judging. Instead their opinions are made by parties, or "persons of distinguished character and extensive influence in the community." (Perhaps Publius aspires to be such a person?) And their reliance on parties or "distinguished" individuals itself is not wholly rational. Hence it is "the passions" Publius concludes, and not "the reason, of the public, [that] would sit in judgment." But for government to be good it must be rational. It is "the reason of the public alone that ought to control and regulate the government. The passions ought to be controuled and regulated by the government." This arguably is the central thesis of the political science of The Federalist: Republicanism alone is not identical to good government. The goodness of a government is
directly proportionate to its rationality. In a republic, where the people are to rule, it is their reason that must "sit in judgment." It means that government by consent must be government by enlightened consent, and that those who consent to be governed recognize the rule not necessarily of wise individuals—for as Publius says in number 10, "[e]nlightened statesmen will not always be at the helm"—but of wisdom simply.

The challenge is to mix the republican principle with the rule of reason. In a republic, the greatest threat to the rule of reason is the passion of "the public." As Publius asks in number 6, "Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities?" The public, therefore, must be distanced from the government. Or rather, reason must ultimately rule the passion of the public, but must do so through government. Hence government controls the passions of the people, but is itself controlled or ruled by the reason of the public. This means that while republican government is "government of the people, by the people, and for the people," the government is not identical to or synonymous with "the people." In Federalist 63, after a discussion of numerous examples of ancient governments that employed some form of representation, Publius writes, "The true distinction between these and the American governments, lies in the total exclusion of the people, in their collective capacity, from any share in [America], and not in the total exclusion of the representatives of the people from the administration of the [others]" (Federalist 63, p. 387. Emphasis original). Under Publius' Constitution, then, we can speak of "the American people" and "the government" as two related, yet ultimately separate things.

The "reason of the public" is manifested not in unprincipled majority will, but in expressions of that will that are good and reasonable. It is manifest in the separation of powers, because it shows that the public understands the limits of their own reason. And the separation of powers is crowned by the judiciary, because it is the branch best capable of protecting the public's reason from their passion. The Court does this by defending the Constitution, the manifestation of the public's reason par excellence. The Constitution is what is ultimately wise and reasonable, and therefore entitled to rule. Nevertheless, that claim to rule is limited—it must be diluted: the people are the original source of authority for the Constitution, and therefore the Constitution can rule only with the consent of the governed.10

The foregoing discussion of the separation of reason from passion, and therefore the people from government, points toward an independent judiciary, and in particular judicial review, to which we now turn our attention. Papers 78 through 83 of The Federalist expound the nature of judicial power under the proposed constitution. But it is 78 that we will focus on, as it provides Publius' memorable defense of judicial review.

Publius begins 78 by reminding us that in the earlier papers he had already
explained the "utility and necessity of a federal judicature." Furthermore, says Publius, "it is the less necessary to recapitulate the considerations there urged" because "the propriety of the institution in the abstract is not disputed." We recall, however, that in Federalist 22, the want of a national judiciary power was said to "crown the defects of the Confederation." Perhaps that which repairs the greatest defect is in effect the greatest asset?

There are two questions concerning the composition of the Supreme Court: (1) the mode of appointing the justices, and (2) the tenure by which they will hold office. In a strange and sudden move, Publius simply dismisses the former: "As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition" (Federalist 78, p. 464). Moreover, he points to "the last two numbers," i.e., numbers 76 and 77, concerning the executive, as the "full discussion" on the mode of appointing judges, but he fails to remind us that he also discussed that subject in 51. What we are left with is the fact that in 78 Publius discusses the life tenure of the justices but opts to ignore the method by which they are appointed, while in 51 he defends the method of appointed judges, saying we need "a mode of choice which best secures" the "peculiar qualifications" of judges, but simply asserts the idea of permanent tenure. It seems as though Publius does not want us to consider these two elements of the court at the same time. Perhaps Publius is afraid that if we do we will see plainly the un-republican nature of the court?

The remainder of 78, then, concerns primarily the tenure of judges. According to the Constitution, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior" (Art. III, sec. 1). Allowing judges to serve "during good behavior" is "certainly one of the most valuable of the modern improvements in the practice of government" (Federalist 78, p. 465). It is a modern improvement of "government," but it is not necessarily republican. According to Publius, life-tenured judges improve a monarchy no less than a republic: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body." The principle of life-tenured judges is the best check against that body in any regime that tends to accumulate the most power, and "it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." (Cf. Aristotle, Nicomachean Ethics, 1134a35–b2.)

Publius moves quickly to show that a judiciary composed of judges serving during good behavior is not a dangerous threat to the other branches. Here we see again the passage with which we began, but this time in full:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political
The executive and legislature combined possess four powers: honors, the sword, the purse, and the rules by which the duties and rights of every citizen are to be regulated. According to Publius, it is only the sword and the purse over which the courts have no influence, implying that the courts may well have power with regard to dispensing honors and regulating the rights and duties of citizens. Moreover, even the "sword" and "purse" are transformed into "force" and "will," of which Publius again assures us the judiciary has neither. But if we look back to Federalist 51, we see Publius there saying that each branch of the national government has its own will, in fact, the entire schemata of separation of powers outlined in 51 is built upon that premise: "it is evident that each department should have a will of its own," in order that "[a]mbition . . . be made to counteract ambition." Thus it is only "force" that the court lacks. But even this may be an understatement: for while the court has no means of physical enforcement, it certainly is empowered with legal force. In fact, Publius begins the next paragraph by saying that what he has just described is the "simple view of the matter," thus suggesting that his "simple" claim of the judiciary's weakness may conceal some of its potential, though perhaps indirect, power.

Although the court may from time to time misjudge in particular cases, and therefore violate the rights of particular individuals, it can never be a serious threat to the "general liberty of the people" so long as "the judiciary remains truly distinct from both the legislative and executive." Publius then appeals to Montesquieu as an authority for his opinion: "For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" Publius seems to use Montesquieu to defend the idea that one of the reasons the court is weak and need not be feared is because the court should and will be kept entirely distinct from the executive and legislative branches. Interestingly, however, Publius had used the same quotation from Montesquieu back in number 47. There Publius said that Montesquieu's rule should not be taken literally:

From these facts by which Montesquieu was guided it may clearly be inferred, that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or "if the power of judging be
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not separated from the legislative and executive power,” he did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted. (Federalist 47, pp. 302–3)

In number 47 Publius interprets Montesquieu very loosely: shared power is only a threat when one branch controls all the power of another branch; therefore it may be permissible to let the coordinate branches have “partial agency” in the acts of each other. Upon this premise, the court could have some authority over the acts of the other branches, such as judicial review, and could then be possessed of considerable power. But in number 78, Publius is trying to score rhetorical points with those who fear the judiciary, and he therefore emphasizes the weakness of the court by emphasizing its independence. Publius goes on to say that the best way of maintaining the independence of the judiciary, and therefore preventing it from becoming a powerful threat, is the permanent tenure of its judges. In this way it is much less likely the court will have an incentive for collusion with the legislature. Publius concludes the paragraph under discussion by saying the judiciary, composed of judges with permanent tenure, is “the citadel of the public justice and the public security.”

Publius next connects the “complete independence of the courts” with the notion of a “limited constitution.” Strangely, he defines a limited constitution as “one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bill of attainder, no ex post facto laws, and the like.” This definition is different than the definition given in number 41, where a limited government was understood to be a government of enumerated and limited powers. But in 78 it seems as though the legislature, without regard to Article I, section 8 of the Constitution, has a general grant of power, but with certain exceptions. The exceptions to the legislative power “can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.”

Publius takes up the question whether the court is superior to the legislature due to the ability of the former to strike down the acts of the latter. This discussion will take place, however, in terms of the “rights” of the courts: “Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.” In the previous paragraph (quoted above), where judicial review is introduced, judicial review is a duty of the “courts of justice.” But now judicial review is described as a right of the judiciary. By putting these statements together, one
can say that the nature of the court, or the function of the court, brings rights and duties together. The power of judicial review is a right stemming from the duty of the court to uphold what is right—what is right being manifestly the Constitution. If the Constitution is simply an expression of will, then there can be no duty to defend it: Why is the arbitrary will of the people to be preferred to the arbitrary will of the judge? Why should the judge, or anyone else, have a duty or obligation to respect that which has no intrinsic worth? But if the Constitution is grounded in something intrinsically right, we as moral beings have a duty to respect the conditions of the Constitution, and in particular judges have a moral duty to protect it.11

Publius wants to remove the "perplexity" that has arisen because of an "imagination that the doctrine [of judicial review] would imply a superiority of the judiciary to the legislative power." This requires a "brief discussion of the grounds on which it rests."

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the Constitution can be valid.

Contrary to a general grant of legislative power, restricted only by "specified exceptions," legislative power is now understood as "delegated." The legislature in particular is bound by the "tenor" of the "commission" granted by the public via the Constitution. The public is the source of legislative authority. However, as we saw in Federalist 49, they are not an effective check on legislative abuse. Furthermore, Publius points out that the legislature cannot be the "constitutional judges of their own powers" because it would violate the "natural presumption" that the representatives can "substitute their will to that of their constituents." But it is not the will of the constituents qua will that makes it superior to the will of the legislature. Publius understands the will of the people in light of their intention; and their original or fundamental intention is the Constitution: "... in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." Only an independent branch, then, whose job is judging, can check legislative abuse. This suggests that the doctrine of judicial review is inherent in the idea of a limited constitution.

But the court should defend the Constitution not merely because it is willed by the people. The Constitution is more than will. As was shown in the discussion of number 49, the Constitution is the embodiment of right because it is reasonable. Throughout The Federalist, right and reasonable are treated as interchangeable terms.12 The Constitution should be defended because it is reasonable; and the power of judicial review is the best way of protecting the Constitution from an encroaching legislature; therefore judicial review embodies right reason—judicial review represents the reasonable and good will of the public.
It may be said that to understand fully the argument of *Federalist* 78, one must read it in light of number 49. Publius says in 78 that the power of judicial review does not "by any means suppose a superiority of the judicial to the legislative power." On its own terms, and that is the way modern conservatives understand judicial review, that statement is untrue. If "superiority" is identified with power, then the court is superior to the legislature insofar as it can exercise judicial review. This problem plagues the next sentence by Publius as well:

It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. (*Federalist* 78, p. 468)

Judicial review "supposes that the power of the people is superior to both." But why is the power, or will, of the people superior to that of the court or the legislature? Why "ought" the judges (or the legislators) be governed by the will of the people? Why are the laws willed by the people "fundamental," while those willed by the legislature are not? These questions cannot be answered without recourse to something higher than the Constitution. These questions ultimately point to nature, to what is inherently rightful and reasonable. Publius does not given an account in number 78 as to why the Constitution is reasonable, and therefore, based on 78 alone, these questions remain unanswerable. But, again, if one looks back to 49, we see that the Constitution embodies right reasoning. The Constitution is reasonable, and the proof is in the fact that it is a limited constitution, and above all in the separation of powers crowned with an independent judiciary. To know what reason is means to know the nature, or limits, of human reason. The Constitution limits and separates power because of those limits. This was the argument of number 49, therewith explaining why the Constitution as the manifest will of the public "ought" to govern as supreme law.

As Publius also explained in number 49, the danger in referring to the public for constitutional questions is the tendency of the public to be guided more by passion than reason. As the legislature is closest of the three branches to the turbulent tides of public opinion, then, it seems reasonable to assume that its motives will be grounded more in passion than reason, that acts of the legislature will tend to be more willful than rightful.

Publius builds on this argument as he proceeds in number 78: If there exists some rational ground that two conflicting laws share, reason and law should "conspire" in order to reconcile the differences. But more often than not, such common rational ground may not be present in statutory law. Thus when two acts of ordinary legislation conflict, it may be an inappropriate rule of construction to judge them by their reasonableness:
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The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law, but from the nature and reason of the thing.

Perhaps it would be more accurate for Publius to say it is the absence of reason in the “nature and reason of the thing” that dictates the rule of preferring the most recent law. That is, as expressions of will, there exists no principle upon which one can judge one law as superior to another, except that the last in time is the most recent expression of the will of the legislature: It is “reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will, should have the preference.”

But when there exists a conflict between a statutory law and the Constitution, it is a conflict of something less reasonable with something manifestly reasonable. This accounts for the reversal of the rule of constitutional construction in number 78:

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority: and that, accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

Publius again assumes the argument of 49. He says “the nature and reason” of the conflict between the Constitution and ordinary legislation implicitly points to the superiority of the former. If time confers superiority, then it would be redundant for Publius to say “the prior act of a superior.” What is prior would ipso facto be superior. The same applies to his invocation of “the subsequent act of an inferior and subordinate authority”; “Subsequent” would imply “inferior” and “subordinate.” The nature and reason of the conflict, however, must be understood in light of the reasonableness of the Constitution. Nature and reason come together in the Constitution. The Constitution embodies reason, and the precepts of reason are eternal and unchanging; therefore future legislation, in order to be good law, must begin from the rational basis upon which the Constitution rests. If the Constitution is rational, then any law that deviates from the principles of the Constitution is proportionately less rational. Legislation that subtracts from the rationality of the Constitution contradicts the “manifest tenor” of the Constitution. When it does, the court has a reasonable duty to strike down such law as violating the Constitution, which is in turn in the service of reason.

According to Publius, the superior law is that which is rational. That which is rational is the Constitution. As was the good fortune in America, that which is rational is also prior. As part of the act of founding, the Constitution precedes
in time all subsequent and derivative statutory law. The Constitution is the original law, and although the source of its authority is the people, it is given to us by Publius. As we saw above, Publius identifies the Constitution with the will of the people, but distinct from the will of the legislature. The public is the source of the first law, which is a good and reasonable law, but the legislature is the source of all subsequent law. The court, by exercising judicial review, defends not only the Constitution, but that which is oldest. In a sense, then, we can say the court defends tradition. Thus judicial review ultimately promotes "veneration" of the Constitution, which, according to number 49, is necessary for the "stability" required for the rule of law. It could be said that judicial review is the necessary corrective to the arbitrary rule of passion.

The people can choose to live under a constitution, and they can choose to limit the powers of the government formed by that constitution. But the fact that they can choose implies a standard of how they ought to choose. That is, in choosing their government, the people must recognize that each one of themselves is endowed with the same freedom by nature. The recognition of the equal rights in each individual sets the limit to what the government can rightfully or legitimately do. James Madison explains this succinctly in his essay "On Sovereignty,"

The first supposition is, that each individual being previously independent of the others, the compact which is to make them one society must result from the free consent of every individual. . . . But as the objects in view could not be attained, if every measure . . . required the consent of every member of the society, the theory further supposes . . . that the will of the majority was to be deemed the will of the whole. . . . Whatever be the hypothesis of the origin of the lex majoris parties, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in and exercisable by the majority, may do anything that could be rightfully done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legitimate reach of sovereignty, whenever vested or however viewed. (Emphasis added.)

The function of just government points above beyond mere willfulness: it points to nature. Judicial review reflects the limited capacity of man to govern himself. It is rare that man wills for himself a government as rational and good as the American Constitution. And once he does, he is likely to deviate from that goodness by passing laws that contradict the rational principles of its origin. Thus man demonstrates his ability to reason above all by choosing a constitution with an independent judiciary, and he allows that judiciary the full power of judicial review by granting permanent tenure to judges:

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argu-
Publius gives two other reasons in support of permanent tenure for judges: (1) to guard against the "ill humors" of those who seek to undermine the principles of the Constitution; (2) to insure the appointment of men "who will have sufficient skill in the laws to qualify them for the stations of judges." While the latter is certainly worthy of discussion, especially its supplement to number 51, I shall conclude with a brief mention of the former, as it points to the current political problems with which I began the paper.

Publius warns us that "the rights of individuals" are endangered "from the effects of those ill humours which the arts of designing men . . . sometimes disseminate among the people themselves, and which . . . have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." Here Publius takes very seriously the principle that ideas have consequences. Indeed, the Constitution itself is built upon a definite set of ideas. But when those ideas become "ill humored," the possibility of constitutional government itself becomes questionable. Moreover, destructive ideas become a serious threat to freedom when propagated by "designing men," or, as Publius refers to them elsewhere, "visionary" men (Federalist 6, p. 56). As Publius pointed out earlier, the public is moved more often by passion than reason, and in particular a passionate attachment to men of influence. Yet the public is responsible for electing legislators who in turn will pass laws that will in part shape future public opinion. The challenge posed to the public is similar to the problem of Plato's Republic: The public will not possess the wisdom of a statesman, but they must nonetheless possess enough wisdom, or the kind of wisdom, that will enable them to differentiate statesmen from swindlers. Here we note the word "demagogue" appears only twice in The Federalist: numbers 1 and 85, the first and last of the papers. It may be said that self-government, as presented in The Federalist, is literally surrounded by the problem of demagoguery.

The ideas most threatening to "the rights of individuals" are those which deny individuals have rights. If the legislative body is able to "qualify their attempts" to undermine the Constitution with such ideas, it will "have more influence upon the character of our governments than but few may be aware of," because eventually these ideas will "disseminate among the people themselves" (Federalist 78, p. 470).

Earlier I quoted the editors of First Things questioning whether the United States could ever become Nazi Germany. And while America is not now a Nazi regime, the editors correctly state that "it is only blind hubris that denies it can happen here and, in peculiarly American ways, may be happening here." It is
"blind hubris" because, as Churchill said, "the future, though imminent, is obscure," and we can never know for certain if the people's adherence to the rational principles of the Constitution will remain steadfast. Indeed, it looks as if it may not.

In order to remain free we must remain firm in our devotion to the rational principles of the Constitution and Declaration, principles rooted in nature. As Lincoln wrote in a letter to Henry Pierce, those principles "today, and in all coming days . . . shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression." Without those principles, the moral and rational foundation of the law are dissolved. In the introduction to The City and Man, Leo Strauss put it this way: "[A] society which was accustomed to understand itself in terms of universal purpose, cannot lose faith in that purpose without becoming completely bewildered." Strauss identifies that "universal purpose" with the universal principle of human equality as understood by the American Founders. He begins Natural Right and History by quoting the Declaration of Independence: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." Strauss points out that "the nation dedicated to this proposition has now become, no doubt partly as a consequence of this dedication, the most powerful and prosperous of the nations of the earth." He then asks a question—a paraphrase, actually, of the challenge put forth by Lincoln at Gettysburg—that all Americans should ask themselves: "Does this nation in its maturity still cherish the faith in which it was conceived and raised? Does it still hold those 'truths to be self evident'?"

Abraham Lincoln said in an 1856 speech, "Our government rests in public opinion. Whoever can change public opinion, can change the government, practically just so much." If our government rests in public opinion, then there is no more important object of our opinions than the Constitution and the principles that animate it. The "veneration" of the Constitution requires the support of public opinion. Lincoln followed his observation by saying, "Public opinion, on any subject, always has a central idea, from which all its minor thoughts radiate. That central idea in our political opinion, at the beginning was, and until recently has continued to be, the equality of men." The self-evident truth of human equality, implying as it does individual natural rights, is the basis in nature for the reasonableness and goodness of the Constitution. As Publius writes in Federalist 78, the Constitution serves justice by its "inflexible and uniform adherence to the rights of . . . individuals." Human nature provides the telos of the Constitution, and the natural phenomena of human equality is intrinsic to the politic science of The Federalist. It is a moral truth that infuses a political document such as the Constitution with goodness.

Public opinion is always shaped in part by "elites." Today that influence is greater than ever. The professoriat of our universities and law schools shape the
opinions of our future lawyers, judges, politicians, and those Publius called “persons of distinguished character and extensive influence in the community.” But the reigning doctrine in those institutions is moral relativism. Thus we see distinguished jurists such as Judge Bork reject the natural law foundation of the Constitution in favor of legal positivism and unqualified majoritarianism. But according to moral relativism, the “reason” of the public is indistinguishable from its “passions.” On such premises, the political science of The Federalist collapses because the distinction between good government and mob rule becomes nothing but preference or prejudice. What was the moral purpose of government for Publius, and the final cause for the Constitution as defended in The Federalist, becomes meaningless.

According to Bork, the moral principles of the Declaration are incompatible with the positive, procedural structure of the Constitution. The Constitution concerns only means, not ends. For Bork ends are nothing but “value judgments,” which by definition are irrational and subjective. “There is no way to decide these questions [of competing ‘values’] other than by reference to some system of moral or ethical imperatives about which people can and do disagree. Because we disagree, we put such issues to a vote and . . . the majority morality prevails.” This raises the question, however, if ends are purely subjective, why not the means as well? And if all value choices are equally arbitrary, why is the value preference of a majority superior to the minority? or to any individual?

It is difficult to imagine any position more alien to the understanding of those who wrote and ratified the original Constitution, or wrote its greatest defense in The Federalist. For, as we have demonstrated, the theoretical high point of The Federalist, number 49, relies upon the natural distinction between reason and passion, a distinction intrinsic to the idea of human nature as a normative standard. Moreover, the Constitution, drained of its moral and rational content, becomes an empty vessel. The question then becomes a matter of deciding with which “values” to fill it: liberal or conservative? But qua “values,” both sides seem to agree there is no rational ground available upon which such questions can be decided. Based upon Judge Bork’s position, there is no reason to prefer a jurisprudence of original intent over that of a “living constitution.” In arguing against the judicial activism of the left, legal positivists such as Bork have unwittingly given it its most sophisticated defense.

Strauss writes that modern social science would “give advice with equal competence and alacrity to tyrants as well as to free peoples,” except for the fact that “it prefers—only God knows why—generous liberalism to consistency.” If all moral judgments are relative to time or place or culture, and are therefore ultimately arbitrary, there is no reason to prefer freedom over tyranny, much less constitutionalism over arbitrary rule, and thus no reason why not to give consistent advice to tyrants as well as democrats, or perhaps instead of democrats. It is this relativism which poses the biggest threat we face today. The courts are not a threat to the liberty of Americans. Rather, moral relativism has
attacked and jeopardized the principles of our Constitution, and therefore all the institutions built upon them. And it has done so under the authority of modern science. The corruption of the judiciary is only one symptom of a much more serious disease. Thus our job today is not to destroy or weaken the Court, but to articulate the moral truths upon which our freedom rests. We must repair the moral fabric of America if we are to recover the rational basis of law. And this means we must challenge the relativism and historicism entrenched in our universities and public offices. We must build a majority party that will defend the principles of freedom, and that can be maintained in office for a considerable amount of time. Only then can the we appoint judges who will uphold the Constitution and restore the proper separation of powers. The job before us is neither constitutional nor legal, but manifestly one of public philosophy. We are in need of a philosophy of the conditions of freedom, and scholarship in support of that philosophy, until such philosophy becomes what Lincoln called "the political religion of the nation."

NOTES

3. See Robert Bork, Slouching Towards Gomorrah: Modern Liberalism and American Decline (New York: Regan Books, 1996), p. 15. See also, pp. 96–122, 318–19. Assuming that Judge Bork knows the power of judicial review is not explicitly granted in the Constitution, it seems odd that he blames both "our written Constitution and the power of judicial review." Does Bork mean to say that judicial review is implicit to a proper understanding of a written constitution? As we shall see, this is the argument Publius makes in The Federalist. But if Bork is against judicial review, and judicial review is implicit in a written constitution, does it follow that Bork is against a written constitution? And if this is the case, is he ultimately against constitutionalism, as opposed to unprincipled majoritarianism or some other form of arbitrary rule?
4. "Tradition and Morality in Constitutional Law," a lecture at the American Enterprise Institute, reprinted in M. Cannon and D. O'Brien, eds., Views from the Bench: The Judiciary and Constitutional Politics (Chatham, NJ: Chatham House Publishers, 1985). In arguing that the Constitution does not rest upon any general theory, and that the courts are too antimajoritarian, Bork unwittingly aligns himself with the arguments of Charles Beard in his 1913 book, An Economic Interpretation of the Constitution of the United States, arguably one of the most influential books in the development of Progressive thought. Of course, thirty years after publishing his Economic Interpretation, Beard published The Republic, in which he greatly modified many of his earlier opinions and acknowledged that the theory of individual natural rights was a central feature of the original Constitution. If Bork continues his Beardian train of thought, perhaps he too will come to acknowledge the natural rights theory that dominated the political thought of the American Founding.
5. For a thorough discussion of the moral relativism of contemporary conservative jurisprudence, including that of Bork and Chief Justice William Rehnquist, see Harry V. Jaffa, Original Intent and the Framers of the Constitution: A Disputed Question (Washington: Regnery Gateway, 1994).
6. I wish here to acknowledge my debt to Professor Charles Kesler for his insightful commentaries and seminars on The Federalist. To the best of my knowledge, he is the first Federalist scholar


8. Intrinsic to modern republicanism is the theological-political problem, or the problem of political obligation. In the ancient polis the fundamental law was divine law. Both law and lawmaker were higher than citizens, and there was no question of political obligation: one obeyed the law because it was God's law. This, I believe, is Strauss's point when he praises Fustel de Coulanges, who "above all others . . . have made us see the city as it primarily understood itself as distinguished from the manner in which it was exhibited by classical political philosophy: the holy city in contradistinction to the natural city" (The City and Man [Chicago: Rand McNally, 1964], pp. 240–41.) In this light ancient Israel was typical of any ancient city. One could also argue that the establishment of Christianity in the Roman Empire followed the same logic, but only on a universal scale. As the empire crumbled, new states came into existence, each claiming the allegiance of its citizens, yet Christianity remained the religion of the Western world. And thus was born a problem unknown to the ancient city: the earthly city and the heavenly city now represented two competing sources of obligation. This problem would be the source of religious wars for a millennium and a half. It would remain unsolved until the American Founding, where nature—as represented in the idea of human equality and natural rights—provided the rational ground not only for civil but also religious liberty. See Harry V. Jaffa, The American Founding as the Best Regime: The Bonding of Civil and Religious Liberty (Claremont, CA: Claremont Institute, 1990).

9. Cf. Abraham Lincoln's "Lyceum" speech of 1838: "As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primers, spelling books, and in Almanacs:—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars."


11. In the Declaration of Independence it is not only the right but the duty of a people to resist tyranny when it is prudent to do so. This is a rejection of the precepts of modern political philosophy, especially that of Hobbes. In Hobbes what is highest is self-preservation, therefore there can be no "duty" to sacrifice oneself for something higher, because there is nothing higher than life itself. Also absent in Hobbes is the idea of "honor," because honor implies some standard of goodness above mere life. The Declaration, however, ends with the signers pledging their "lives, fortunes, and sacred honor." See also the 1776 sermon of Samuel West, "On the Right to Rebel against Governors."

12. Thomas Aquinas defines natural law as the rational creature's participation in the eternal law, by which God governs the universe. According to Aquinas, that which is reasonable is right. Summa Theologica, Query 93, Article 2.

13. James Madison, "On Sovereignty" (1835). Madison introduces the foregoing discussion on sovereignty as follows: "To go to the bottom of the subject, let us consult the Theory which contemplates a certain number of individuals as meeting and agreeing to form one political society, in
order that the rights the safety & the interest of each may be under the safeguard of the whole.” He concludes by stating: “Of all free government, compact is the basis and the essence.....” According to Russell Kirk, neither Madison nor Hamilton looked to “such artificial constructions as the pretended Social Contract.” The Politics of Prudence (Bryn Mawr, PA: Intercollegiate Studies Institute, 1993), pp. 45–46. Recall also the comment of Bork, that “[o]ur constitutional liberties... do not rest upon any general theory,” cited above.


Book Reviews

A Cornucopia of Rousseau Translations

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1. The Collected Writings of Rousseau, ed. Roger D. Masters and Christopher Kelly:
   Volume 6, Julie or the New Heloise, Letters of Two Lovers who live in a small Town at the Foot of the Alps, trans. Philip Stewart and Jean Vaché (Hanover and London: University Press of New England, 1997), xxxi + 728 pp., $75.00 cloth, $25.00 paper.

2. Cambridge Texts in the History of Political Thought:

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Never before have English readers had access to so many excellent translations of the provocative, all too tantalizing writings of Jean-Jacques Rousseau, that elusive, at times even reclusive, citizen of Geneva who so confounded the world of letters of his day and continues to stimulate discussion among thoughtful students of politics even today. In addition to the eight volumes listed above and the three additional volumes of the Collected Writings in various stages of preparation, there are Allan Bloom’s excellent translations of the Letter to M. d’Alembert—published under the title Politics and the Arts, Letter to M. d’Alembert on the Theatre (Ithaca, NY: Cornell University Press, 1960)—and Emile or on Education (New York: Basic Books, 1979), as well as Alice W. Harvey’s translation of the sequel to Emile, namely, Emile et Sophie ou les Solitaires, published as “Jean-Jacques Rousseau’s Emile and Sophie, or Solitary Beings,” in the volume edited by Pamela Grande Jensen, Finding a New Feminism: Rethinking the Woman Question for Liberal Democracy (Lanham, MD: Rowman & Littlefield Publishers, 1996), pp. 193–235. Still, as proof that the gifts we receive here below are never free of some adulteration, it happens that an overlap or a duplication of effort occurs with respect to the texts published in three of the volumes of the Collected Writings and Gourevitch’s two volumes. That overlap or duplication seems destined to continue, for the announced seventh volume of the Collected Writings contains a new translation of the Essay on the Origin of Languages first published by Gourevitch in 1986 and republished here in the volumes entitled The Discourses and other early Political Writings.

Why such duplication of effort has occurred is difficult to fathom, since neither of the parties has chosen to contrast either set of translations with the other or vaunt the merits of the one by pointing to defects in the other. And that is just as well, for links between the translators in shared premises about the principles and goals of translation and even about the significance of Rousseau’s teaching are so numerous that such juxtapositions would be difficult to draw. Both sets of translations strive for and achieve fidelity to Rousseau’s original text, adhere to the principle of translating key terms uniformly, and seek to capture in English the eloquence for which Rousseau was famed. They differ as to words from time to time and more frequently with respect to sentence structure, but in no case can one translation be judged so incoherent or wrong as to have left a void the other was obliged to fill. None of the Masters and Kelly translations redone by Gourevitch and none of the Gourevitch translations redone by Masters and Kelly is in any manner comparable to the simply inadequate Barbara Foxley translation of the Emile that Allan Bloom’s version replaces or the equally faulty William Kenrick translation of the Julie that has
now been replaced by the new Philip Stewart and Jean Vaché translation. (Nor, let it be noted, does the new electronic revision of the Foxley translation save that work from its deserved reputation.) Leaving aside, then, a question that can most likely not be answered, let us focus instead on the general characteristics of each set of translations in order to highlight their shared features as well as their distinct qualities.

At the rate of almost one volume a year, Roger Masters and Christopher Kelly have been publishing excellent translations of Jean-Jacques Rousseau's extensive writings. Volume 7, which contains Rousseau's *Essay on the Origin of Languages*, as noted above, as well as his writings related to music along with some by Grimm, Raynal, and Rameau in the same vein, is about to appear; and volume 8, with the writings on botany, the *Reveries of the Solitary Walker*, and the *Letter to M. de Franquières* is in preparation. A ninth volume will contain Rousseau's *Letters from the Mountain* plus his plays and diverse writings about the theater. Clearly, these volumes do not present Rousseau's writings in a chronological order; rather, the plan followed by the editors in publishing these translations is that of grouping Rousseau's writings according to common subjects and themes.

In addition to its overall quality, the Masters-Kelly undertaking is set apart, above all, by its extent and uniform thoroughness, despite being a group effort both in the editing and the translation of texts. Each volume is a perfect example of what a translation should be. Having settled upon a precise and nuanced technical vocabulary at the outset, the editors have adamantly insisted on adhering to that vocabulary in subsequent volumes. Especially commendable is that they do so not only for their own translations, but also for those of others invited to contribute translations of particular works. Consequently, clarity and consistency reign throughout the series.

The volumes are carefully and thoroughly annotated without notes being cumbersome or pedantic. The notes serve to identify persons, places, works, and incidents alluded to in the text as well as to clarify literary, political, or philosophical allusions and sometimes to shed light on particularly obscure or complicated arguments. In short, they help the reader follow Rousseau's exposition, rather than bear undue witness to the erudition of the editors or translators. Great care has also been taken to make these books attractive: a different engraving of Rousseau sits opposite the title page of each volume, and the general layout of the text—large font and wide margins—is most appealing. The volumes themselves are also larger than usual without being unwieldy, 6¾ by 9½ inches or 15.5 by 23.5 centimeters.

Other special features of the series include a running head at the top of the righthand pages to indicate the corresponding pages in the now generally accepted standard French text for Rousseau's *Oeuvres Complètes*, namely, the
Pléiade edition published by Gallimard or, when a particular writing has not been printed in that work, to other trustworthy editions of Rousseau’s writings and correspondence. Moreover, each volume contains a concise introduction that explains the place of the writings it contains within Rousseau’s own thought and literary career. There is also a chronology at the head of each volume; in volume 1, it is of Rousseau’s life and in each succeeding volume of the works presented there. Finally, each volume has an index for names of persons, places, and works cited as well as of key terms developed in the text.

The first volume in the series presents a work never before translated into English, the famous autobiographical work *Rousseau Judge of Jean-Jacques: Dialogues*. It is an excellent translation of a very difficult writing—clear, precise, and faithful to Rousseau’s style. In the second, third, and fourth volumes, revised versions of writings originally translated by Judith R. Bush such as the *Discourse on the Sciences and Arts*, the *Discourse on the Origins of Inequality* (1964), and the *Social Contract* (1978) are presented along with newly translated complementary, albeit lesser known, writings by Rousseau or his contemporary critics that provide a fuller picture of Rousseau’s thought and the consternation to which his writings gave rise. Thus, volume 2, containing the *Discourse on the Sciences and Arts*, presents many of the attacks upon it along with Rousseau’s replies to them, among which is the Preface to his play *Narcissus*. The next, volume 3, containing the *Discourse on the Origins of Inequality*, does the same; that is, it presents a revision on the basis of new material of Judith R. Bush’s translation of that famous *Discourse*, plus criticisms of the *Discourse* and Rousseau’s replies to them. Also to be found here are “Three Fragments from Early Versions of the *Discourse on Inequality*,” of which more later; Rousseau’s famous letter to Voltaire in defense of God occasioned by Voltaire’s poem about the earthquake at Lisbon, along with Voltaire’s brief reply; another exchange between the two; Diderot’s *Encyclopedia* article on natural right; and, finally, Rousseau’s *Discourse on Political Economy*, first published in the same *Encyclopedia* volume as Diderot’s natural right essay. In addition to the *Social Contract* and its original version, the Geneva Manuscript, volume 4 contains the provocative *Discourse on the Virtue most necessary for a Hero* and two fragments not found in the Pléiade text, “Fragments on Freedom” and “Comparison of Socrates and Cato,” plus a series of short essays known as the *Political Fragments*, most of these translated into English for the first time.

Thorough, but unassuming, scholarship undergirds this whole series. While adhering to a uniform vocabulary in all of the translations, the editors have compared the Pléiade or other texts with the manuscripts of Rousseau’s writings wherever possible and also have had recourse to new critical editions of particular works. Nowhere is such painstaking scholarship more evident than in the new translations of the *Confessions* along with the *Letters to Malesherbes* that comprise volume 5, both due to Christopher Kelly, and also in that of the *Julie*
or the New Heloise in volume 6 effected by Philip Stewart and Jean Vaché. Both volumes present carefully controlled texts in elegant and impeccably faithful translations along with pertinent notes. The latter contains, moreover, the twelve illustrations drawn by Hubert-François Bourguignon, known as Gravelot, that Rousseau wished to have accompany his text. (As it happened, they were printed separately with inscriptions indicating where they were to be placed in the text—but that is another issue.) Volume 3 is also something of a novelty in the way it draws upon Heinrich Meier’s justly acclaimed critical edition and German translation of the French text of the Discourse on the Origins of Inequality (see Diskurs über die Ungleichheit [Paderborn: Schöningh, 1984]) in order to correct the Pléiade text and to add a section entitled “Three Fragments from Early Versions of the Discourse on Inequality.” The editors clearly indicate where these fragments belong with respect to the Discourse and thus provide the reader dependent upon translations a rare glimpse into the way Rousseau’s text evolved through various drafts.

Victor Gourevitch’s undertaking is no less impressive. Indeed, insofar as it has been carried out by a single individual, it may perhaps be considered more astounding. Some parts of the volume on Rousseau’s early political writings were originally published over a dozen years ago under the title The First and Second Discourses, together with the Replies to Critics and Essay on the Origin of Languages (New York: Harper & Row, 1986). They have been reviewed and revised for this edition, and the volume has been enhanced with new translations of three important early writings by Rousseau: the letter to Voltaire defending God against the implications in Voltaire’s poem about the earthquake at Lisbon, and essay entitled “Idea of the Method in the Composition of a Book,” and also the “Discourse on the Virtue a Hero most needs.” All of the translations presented in the volume on Rousseau’s later political writings are new: the “Discourse on Political Economy,” the Social Contract along with some selections from the Geneva Manuscript, a reconstruction of the fragment “The State of War,” the Considerations on the Government of Poland, and a few selected letters.

Gourevitch is an eminently thoughtful and conscientious translator, a man who appreciates the nuance of particular words while respecting the need for consistency in terminology. To apprise the reader of how he will proceed in these translations, Gourevitch draws attention to Rousseau’s advice to his friend and patroness, Mme d’Épinay, that she will have to learn his dictionary. This is necessary, says Rousseau, because “my terms rarely have their usual meaning” (see Gourevitch, The Discourses, p. xlv; and The Social Contract, p. xliii). Building on that advice, Gourevitch then goes on to explain what he makes of Rousseau’s dictionary or vocabulary, word by word.

To help the reader compare the translation to the French text, Gourevitch
indicates at the beginning of each writing where it is to be found in the Pléiade standard text. In addition, he numbers the paragraphs of each work to facilitate references to it. Given Gourevitch’s stated scruples about respecting Rousseau’s punctuation, such that he hesitates to break up Rousseau’s sentences (see p. xliii in each volume), one must infer that he would consequently never deign to restructure any of Rousseau’s paragraphs. Hence the numbered paragraphs provide a marvelous tool for locating corresponding passages within the French works. Gourevitch is equally circumspect about annotations, limiting them to the purpose of identifying “persons, events, texts or passages, and sometimes doctrines which Rousseau mentions or alludes to.” Although he admits to using notes occasionally to “call attention to parallels with what [Rousseau] says in other writings,” he insists that “they remain at or near the surface of the texts” and “do not analyze or interpret” (see The Discourses, p. xliii; and The Social Contract, p. xliv).

For each volume, Gourevitch has composed a short introduction setting forth a general account of the arguments Rousseau advances in the writings to follow and explaining, in an equally general manner, the significance of Rousseau’s broader teaching. Differently stated, Gourevitch has prefaced his volumes with short essays that serve to introduce the reader to the contents of the volume and that prepare the reader to explore the issues raised in those writings without resolving or explaining away those issues beforehand. A chronology of Rousseau’s life and a short bibliographic essay on the relevant secondary literature also form part of the prefatory material to each volume. In this essay, Gourevitch demonstrates his deep familiarity with, and gentlemanly appreciation of, Rousseau scholarship. Finally, each volume has two indices. One refers to citations of the editors, translators, and annotators of Rousseau’s writings. The other, a general index, refers to persons and ideas or subjects cited in the volume.

These volumes are smaller in format than those in the Collected Writings series, measuring 5½ by 8½ inches or 13.75 by 21.5 centimeters. Consequently, the font and margins are correspondingly smaller, but still easy to read. Although they are attractively printed and presented, neither volume has any of the marvelous illustrations that grace the Masters-Kelly volumes.

In addition to translations of writings not found in the Masters and Kelly Collected Writings, these two volumes by Gourevitch contain translations of several writings published in volumes 2–4 of that series. Specifically, the volume on Rousseau’s early political writings presents translations of two writings absent from the Collected Writings, that of the “Essay on the Origin of Languages” and of the writing entitled “Idea of the Method in the Composition of a Book,” as well as translations of material found in volumes 2 and 3 of the Masters-Kelly series, while the volume on the later political writings presents translations of three writings not found in the Collected Writings, that of the fragment “The State of War,” of the Considerations of the Government of Poland, and of four letters from Rousseau to selected individuals, in addition to
translations of material found in volumes 3 and 4 of that series. The differences between what has been published in each collection seem to stem, above all, from the diverse goals of the two sets of translators and editors. That is, while Masters and Kelly decided not to publish Rousseau's writings in a chronological order, but to group them according to subjects and themes, Gourevitch, as is patent from the titles of his two volumes, has focused on writings concerned with politics while limiting himself to particular time frames. In this sense, his endeavor is less comprehensive than that of Masters and Kelly.

Here, then, are the differences between Gourevitch's two volumes and the corresponding volumes of Masters and Kelly. In volume 2 of the Collected Writings are to be found, in addition to the translation of the Discourse on the Sciences and Arts, translations of the writings of those criticizing it and of Rousseau's replies, including the Preface to his play Narcissus. Gourevitch's volume on the early political writings presents, along with his translation of the Discourse on the Sciences and Arts, translations only of Rousseau's replies to the critics of the Discourse as well as the Preface to the Narcissus.

Similarly, in the Collected Writings, volume 3, Masters and Kelly publish their translation of the Discourse on the Origins of Inequality, plus a translation of the "Three Fragments from Early Versions of the Discourse on Inequality" alluded to above along with translations of the letters from Rousseau's critics concerning the Discourse, including Voltaire's wickedly witty attack on it, and of Rousseau's replies. They also publish their translations of the exchange between Rousseau and Voltaire on the latter's poem about the earthquake at Lisbon, of Diderot's essay on natural right for the Encyclopedia, and of Rousseau's Discourse on Political Economy that was first published in the same Encyclopedia volume as Diderot's article. Consonant with his focus here on Rousseau's early political writings, Gourevitch translates and publishes in this volume the Discourse on the Origins of Inequality, but only Rousseau's replies to two critics other than Voltaire, namely, M. Philopolis and Charles-Georges Le Roy. Still, as noted above, it also contains Gourevitch's translation of Rousseau's letter to Voltaire protesting the implications of the Lisbon poem and translations of three other writings: one is an essay not found in the Masters-Kelly Collected Writings, namely, the "Idea of the Method in the Composition of a Book," another the "Essay on the Origin of Languages" to be published in their forthcoming volume 7, and yet another the "Discourse on the Virtue a Hero most needs" translated and published in volume 4 of their series.

That fourth volume in the Masters-Kelly series includes translations of the entire first version of the Social Contract, the Geneva Manuscript, and of the Social Contract itself as well as of two fragments not found in the Pléiade text, namely, the "Fragment on Freedom" and the "Comparison of Socrates and Cato," plus a series of short essays known as the Political Fragments. Goure-
vitch's volume on the later political writings contains, in addition to his translation of the "Discourse on Political Economy" (see Masters and Kelly, volume 3), a translation of the Social Contract along with that of some selections from the Geneva Manuscript, and translations of a reconstruction of the fragment "The State of War" as well as of the Considerations on the Government of Poland and of letters by Rousseau to Messieurs d'Offreville, Usteri, Mirabeau, and de Franquières. Thus, whereas volume 4 of the Collected Writings presents a translation of the complete Geneva Manuscript in addition to translations of the two essays the "Fragment on Freedom" and the "Comparison of Socrates and Cato," this volume of Gourevitch presents translations of "The State of War," of the Considerations on the Government of Poland, and of the four letters by Rousseau. Perhaps this can be expressed more clearly in outline form:

Gourevitch, Early Political Writings

Discourse on the Sciences and Arts
Replies to criticisms

Discourse on the Origins of Inequality
Replies to some critics
Letter to Voltaire re Lisbon earthquake

"Essay on the Origin of Languages"
[See Later Political Writings]
"Idea of the Method in the Composition of a Book"
"Discourse on the Virtue a Hero most needs"

Gourevitch, Later Political Writings

Discourse on Political Economy
Social Contract
Geneva Manuscript, selections
"The State of War"
Considerations on the Government of Poland
Letters to Messieurs d'Offreville, Usteri, Mirabeau, and de Franquières

Masters & Kelly, Collected Writings, vol. 2
Discourse on the Sciences and Arts
Criticisms, plus Rousseau's replies

Masters & Kelly, Collected Writings, vol. 3
Discourse on the Origins of Inequality
"Three Fragments from Early Versions of the Discourse on Inequality"
Criticisms, plus Rousseau's replies
Letter to Voltaire re Lisbon earthquake and Voltaire's reply
Diderot, "Essay on Natural Right"
[to appear in vol. 7, forthcoming]
Discourse on Political Economy

[See Collected Works, vol. 4]

Masters & Kelly, Collected Writings, vol. 4
"Fragment on Freedom"
"Comparison of Socrates and Cato"
Political Fragments

Social Contract
Geneva Manuscript, entire
In sum, the Gourevitch volumes provide a fuller sampling of Rousseau's political writings, albeit one that abstracts from the criticism to which he was subjected for his controversial ideas. While presenting that criticism along with some of Rousseau's political writings, the Masters-Kelly volumes offer a more limited sampling of those political writings.

The extensive overlap between these two efforts is baffling precisely because both are so far superior to what existed previously and because both sets of translators acknowledge in their footnotes and, in the case of Gourevitch, introductory essays that they are aware of each other's translations. Yet, apart from the replies to the critics with respect to the Discourse on the Sciences and Arts and the Discourse on the Origins of Inequality, all of the writings translated by Gourevitch in his two volumes were published subsequently to those of Masters and Kelly. As has already been noted, his translations of the Discourse on the Sciences and Arts, Discourse on the Origins of Inequality, Letter to Voltaire, "Discourse on the Virtue a Hero most needs," Discourse on Political Economy, Social Contract, and even parts of the Geneva Manuscript neither substantially differ from, nor improve upon, theirs. Likewise, in no appreciable respect can it be claimed that their translations of the replies to the critics of the two Discourses differ from, or improve upon, his. Although in most cases Gourevitch's translations are slightly more readable than those in the Masters-Kelly series, this greater readability comes at the price of his versions being slightly freer than theirs. Still, rather than stumble around the gift horses proffered by these fine scholars any longer, it seems more fitting to express heartfelt gratitude to them for providing such an abundance of the citizen of Geneva's writings in translations that are so excellent and readily accessible.
Nature, History, and the Human Individual:  
On Pierre Manent’s Modern Liberty and Its Discontents

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Pierre Manent is one of the most outstanding students of political philosophy writing today. This expertly edited collection of the French scholar’s recent essays provides a most personal, engaging, and witty introduction to the depth and distinctiveness of his thought. Here Manent explains the guiding intention of his work from An Intellectual History of Liberalism to The City of Man, his latest and most ambitious book. He makes clear what he learned and how he dissents from the two greatest thinkers of our century, Leo Strauss and Martin Heidegger. He adds to the brilliant interpretation of Tocqueville he presented in Tocqueville and the Nature of Democracy. He defends the nation as the modern embodiment of political life in several ways, most notably in a moving tribute to the hero Charles De Gaulle, but also in an appreciation of the liberalism of his teacher, Raymond Aron, and an analysis of the origins of totalitarianism in opposition to both liberalism and the nation. He also elaborates in a most original and provocative way the relationships among philosophy, political life, and God and His church, tipping his hat to two other thinkers who shared these three loves, Charles Peguy and the unjustly neglected Aurel Kolnai. The book is introduced by Daniel J. Mahoney’s lucid, measured, and perceptive account of Manent’s accomplishments as a whole.

Because Mahoney has already written such a fine overview, I will limit myself here to distinguishing Manent from Strauss. I want to show him both as an able student of Strauss and as an independent thinker. Aron introduced him to the origins of modern liberalism and its totalitarian alternative in Machiavellianism. To keep him from being immersed in twentieth-century polemics, Aron advised him to read Strauss’s book on Machiavelli.

Manent learned how to read Machiavelli, and modern philosophers generally, from Strauss, and he learned how important it is to read carefully in coming to understand our world and our experience of being human. Modern man experiences himself as an individual, as the being with rights. That understanding was a creation of modern philosophers from Machiavelli onward, who wrote to free man from both nature and God. Modern philosophy, for Manent, has been the partly successful effort to change man, and he learned from Strauss and Aristotle
how to judge such change with detachment. Man has become both better and worse. It is good to be a human individual, or to be more free than a merely political animal. But the development of individuality might be at the expense of humanity. The wholly free or disconnected individual would be without distinctively human experiences and so without human content. For Manent, the human individual is a mixture of diverse qualities, or not simply an individual.

Manent views Strauss and Heidegger as presenting the two best, and fundamentally incompatible, interpretations of the modern, philosophic attempt to use reason and will to master nature and displace God. According to Heidegger, the large extent of the success of this effort at transformation means that man is fundamentally a historical being. His being changes over time, and so Being itself changes or has a history. Strauss holds that nothing fundamental, in truth, changes. Man, despite the modern philosophers’ best efforts, remains a natural being. Those philosophers delude themselves in a moralistic fashion when they attempt to transform instead of comprehend human nature. Being and human being successfully resist manipulation. The being with rights is based on the untrue doctrine of the apolitical and asocial state of nature. That being, in fact, is abstracted from fullness of actual human experience, and the modern philosophers have never succeeded in making that mental construction real. Human beings have and will always be political animals and never liberated individuals. For Strauss, the authority of history is a misanthropic illusion.

The strength of the Straussian position is dispassionately presented by Manent in two of the pieces in this book. The first explains that Strauss criticizes Nietzsche for being too Christian or biblical, for preferring morality to philosophy, which, to be clear, is the same as preferring practice to philosophy. Nietzsche, in the decisive sense, followed the lead of the homo religiosus Pascal. The attempt to conquer nature and replace religion links “intelligence” with “decision,” as do the Christians. And so in the decisive sense Nietzsche means to replace one religion or morality with another. For Strauss, the inability of the historicist thinkers to overcome Christianity becomes even more clear in Heidegger, who views human beings in terms of conscience, anguish, guilt, and “being toward death.” The “rational animal” or philosopher who lives according to nature is serenely free from such miserable experiences and so is able to view the world and himself theoretically. According to Manent, Strauss’s criticism of modern atheism is that it is not atheistic or anti-Christian enough. Strauss’s task, ironically, is really to achieve the allegedly modern goal of overcoming the theoretical influence of biblical morality. Only the theoretical apprehension of the truth about nature can overcome fear of death and the gods and moral illusion. Manent presents the crux of Strauss’s effort so well that the reader barely notices that he pointedly does not affirm its success. Students of Strauss also cannot but notice that Manent’s interpretation of Strauss’s project is controversial. Manent sees Strauss as more closed to the possible truth of revelation or Pascalian psychology than Nietzsche.
Strauss's claim for the overcoming of Christianity, I must emphasize, is theoretical. Manent adds that, for Strauss, "The only way of life capable of living morally without thinking morally, of overcoming the 'human, all too human,' of living according to nature, is that of the philosopher, of Socrates" (p. 207). The Socratic combines moral action with thought undistorted by moralism. So he combines praise of the practice of biblical morality with theoretical awareness of its limitations. Strauss's practical conservatism is opposed to the various forms of Nietzschean or seemingly anti-Christian atheism that aim to surmount moral illusion in the name of probity. The Straussian recovery of the separation of theory and practice, from his natural view, is what allows the philosopher to appreciate morality for what it is. Manent appreciates the greatness of Strauss's recovery of the moral-political horizon largely on its own terms, but he wonders whether he finally does justice to all of the human longing for freedom.

Manent's second Straussian presentation is of the argument in Allan Bloom's *Love and Friendship*. Love and friendship are not, as the radically modern Rousseau says, some mixture of irony, illusion, and deception. Human eros is finally the desire for knowledge and self-understanding, and that natural desire "is not in vain." Bloom's severe teaching is "that life is worthy of being loved because it is capable of being understood" (p. 165). Manent, again, presents this Straussian conclusion without comment, leaving us to wonder about the impersonality of its severity. For the Augustinian or Pascalian Christians as well as the moderns, what is human is free from nature and so contingent and mysterious. The modern project, from one perspective, is to make what is human controllable and so understandable, but at the expense of love. For the Christians, what makes human beings lovable is being made in God's image or being connected, through grace, with supernatural mystery. The modern thinkers follow the Christians in connecting love with mystery, although they often cannot decide whether the mystery is merely an illusion or an error to be eradicated. But they differ with the Christians in opposing themselves, in the name of reason, to the mystery of love and in their confidence that reason can abolish or domesticate mystery. Bloom's connection between loving and understanding seems more humane, but does it really do justice to the love of one human being for another, or to man's love for God? And does it attribute to the philosopher personal knowledge that only God could have?

Manent causes us to wonder whether Bloom's seemingly Straussian or classical view of wisdom and human longing can really survive the psychological attack of St. Augustine and Pascal. He shows in *The City of Man* how the case for grace and the supernatural undermined nature and paved the way for history in a way that does not depend on belief in grace. It does depend on the psychological accuracy of the Christian virtue of humility as at least a corrective to the Aristotelian virtue of magnanimity. Surely it is a virtue to acknowledge one's limitations and dependence on others, and so to affirm an equality that is at least as fundamental as undeniable natural differences. The modern rebellion
against both nature and grace, in Manent’s view, originates both in the strength of criticisms of grace from the perspective of nature and of nature from the perspective of grace.

In the Christian-Aristotelian world, Manent explains, the human being belonged to two societies, the natural city and the supernatural church, each of which seemed repressive in light of the other. Because neither society seemed capable of defeating the other, human liberation seemed to require freeing the human being from society altogether. The result of that “effort of abstraction” was the free individual, who is dependent on neither nature nor God. But his dissatisfaction with his natural dependence was revealed to him or at least immeasurably heightened by Christianity. Manent reports that “only a historical accident could have obliged us to dismiss Aristotle and given us a reason to invent the notion of the sovereign will” (p. 102). And as a result of that invention the human being came to view himself as a historical being, and so an inexplicable accident from nature’s perspective. There is something unnatural, as Manent says, about the modern rebellion against nature. It is evidence, as the Christians say, that the human being really is not a merely natural being.

Modern philosophy, like philosophy generally, aims to deliver human beings from the thrall of the idea of God. The idea of nature had delivered human beings from fear of punitive gods. Any divinity who remained was indifferent to human affairs. But that natural criticism cannot touch the supernatural God of the Bible. Its discrediting of pagan religion, in fact, paved the way for the Christian alternative. And so Machiavelli could not use nature to undermine the authority of the Christian God. His effective criticism of Christianity had to be a criticism of natural or pagan philosophy and politics as well, and his criticism of paganism had to owe something to Augustine’s criticism of natural theology. The constant “intersection” of the Christian and Machiavellian critiques of nature and their limited but real success are evidence of the limits of natural purposes and satisfactions for human beings.

Strauss, Manent complains, does well in describing how man attempted to free himself from nature, but he is unclear on why philosophers got so carried away from philosophy’s origination in the discovery of nature. Sometimes he seems to understand that movement as mostly an intensely hostile revolt against Christianity, but on other occasions he understands it with no mention of Christianity and makes it clear that the philosophers’ modern world is no secularization of Christianity. Yet he criticizes modern or historical philosophy, finally, for not separating itself from biblical morality. Strauss fails, in Manent’s eyes, to explain clearly the relationship between Christianity and history. More importantly, he is unable to incorporate all the human experiences attributed by some to grace and history in his understanding of nature.

Manent’s own work understands “the condition of modern man, in accordance with a triangularization that takes seriously the ancient, modern, and Christian poles.” The Christian part of this triangle allows Manent “to escape
from the alternatives of Straussian ‘naturalism’ and Heideggerian ‘historicism,’ while preserving the phenomenon of nature and that of history” (p. 213). But does not the phenomenon of history depend on human nature being an oxymoron, on the distinction between nonhuman nature and human history? Manent’s preservation of the phenomena is based on the observation that both Strauss and Heidegger are partly right in what they observe about the modern condition, but the perspective by which he understands that observation can be neither Strauss’s nor Heidegger’s. Manent is not clear or forthcoming enough on what that alternative perspective is. He does say it comes from taking Christianity seriously—but seriously as truth, as a persistent modern influence, or both? Manent says he agrees with Strauss in rejecting the secularization thesis, because it understands Christianity as having existed for democracy or modern liberty, and so as no longer relevant and never true. Taking Christianity seriously, for Manent, seems to mean considering the possibility that the greatest Christian thinkers, such as Augustine or Pascal, may have taught the truth.

Naturalism and historicism are both anti-Christian and atheistic doctrines. In Manent’s view, neither reflects completely what we modern men really know: “One could say that modern men have a knowledge of human nature that is invincible to any form of historicism and that we have an experience of history that is invincible to any antihistoricism.” Strauss and Heidegger have not been faithful “to the equilibrium of this uncertainty” (p. 42). The invincibility of both nature and history and so our inability to answer reasonably, faithfully, and precisely the question What is man? is the foundation of our authentic experience of the human individual. It is also the foundation of Manent’s belief that both political life and Christianity have some sort of future.

With his affirmation of the goodness of political life and the need human beings have to regard their political community as sacred, Manent rejects the Christian extremism of Augustine and Pascal. And he writes of the political history of religion, and of the intertwining of the fate of religion and of the modern movement toward democracy. Manent finds even the most discerning modern author, Alexis de Tocqueville, caught in a contradiction. Tocqueville writes of the naturalness of religious longing, and so he seems to approve of the Americans’ view of the naturalness of the separation of religion and politics. But he also reports that the Americans affirm religious dogma for the sake of democratic political liberty. Their religion is really a limitation of freedom of thought concerning transpolitical human longing, a thoughtless and insincere form of conformism. So the Americans, instead of separating religion and politics, consciously use religion to serve democracy. For Manent, the American example supports the Catholic Church’s longterm resolution to oppose modern democracy politically. If the individual’s will is sovereign, as the being with rights says, then the human being is not subordinate to the law of God. Manent’s more general observation is that the religious being is also a political animal, and thinking about religion cannot be separated from thinking about political
forms. The thought that religion is wholly natural in the modern sense places it in the state of nature, where man is asocial and so could not be either political or religious.

But in recent decades the church has largely reconciled itself to democracy. Manent presents this change as morally regrettable. Religion no longer serves to moderate democratic excesses in the way Tocqueville envisioned. It was as a partly aristocratic and somewhat antagonistic institution, when it emphatically did not view its mission as serving democratic "values," that the church was a genuine moral support for democracy.

But Manent’s final word is that the church’s “political submission” to democracy might actually be “fortunate.” When the church dominated political life, it denounced indignantly the impiety of the modern, philosophic effort to emancipate the will. The philosophers, opposing piety and anger with reason, at that point had the “dialectical advantage.” Today’s willful democrats have the political power but lack the self-knowledge to use it well. The democratic human being declares that he was willed himself, but he does not really know himself. He does not really know himself as wholly self-created. Manent observes that the church, and only the church, still asks What is man? And “its most astute representatives” are able to “make known with a benevolence tinged with irony the import” of the willful democrat’s “lack of self-knowledge.” So now the church combines “political submission” with the “dialectical advantage” that characterized the philosophers at the Enlightenment’s beginning (p. 115). Democrats now have no political reason not to benefit from that advantage, and Manent suggests the possibility of a different kind of enlightenment, the way back to understanding the human being more in terms of nature and grace. The dialectical triangle of the church, political rule, and philosophy has not come to an end, and today the church’s astute representatives, far more than democracy, stand with philosophy. We can only speculate on whom Manent thinks most astutely represents the church, but surely any list would begin with the present, unusually philosophic pope.

Perhaps the most pressing practical aspect of the democratic failure to confront the problem of the lack of self-knowledge is the near extinction of the nation-state. The nation, which incorporated or nationalized the church in some large measure and inspired almost unprecedented human devotion, almost necessarily succumbs to democratic criticism of its bellicose and particular nature. The differences that constitute nations seem destined to go the way of the differences that constituted class. Manent observes that “Today, universal humanity tends to overwhelm difference so much that it sometimes seems between the individual and the world . . . nothing intrudes except maybe a void where various ethnic, religious, and sexual ‘identities’ float, each demanding ‘respect’” (p. 186).

Identity “is a terribly impoverished substitute for the old term community” (p. 190). And according to Aristotle’s articulation of human nature, “the com-
“community par excellence” is the political community. Manent agrees that human beings can only fulfill their natures as free and rational beings in a political community. So although Manent clearly loves France, he defends the nation not as primarily a predemocratic expression of particularity, but as the way universal, political human nature must find concrete expression today. Only within such limits can the human longing for liberty and the good in common be effective, but democracy as such does not recognize human nature and so limits to human will. Thus democratic self-assertion leads to practical paralysis. Manent doubts that France has much of a political future and that “Europe” will be an effective political body. (That Manent does not consider sufficiently the case of the United States, and even Tocqueville’s separation of actual American from democratic experience, is one shortcoming of his being French and Catholic.)

The nation, Manent concludes, “no longer owns the future.” Neither does the political domestication of the church by the nation. The frustration of the human longing for political devotion may give religion or religious longing a larger place in Europe’s self-definition. Manent asserts that “The quite visible diminution of religious practice should not lead us to the dogmatic conclusion that this tendency is destined to continue indefinitely” (p. 112). There are dialectical reasons to suggest an alliance between philosophy and the church against the excesses of democracy and on behalf of political life. The church and the political community are the ways most human beings experience the social and universal dimensions of their existence. The asocial and abstract universality of the being with rights is inhuman and unfulfilling, and becomes more so as it radicalizes itself over time. Manent is uncertain but more hopeful than either Strauss or Heidegger about the future of the triangle of philosophy, political power, and the church, because he is certain about the inadequacy of either naturalism or historicism to account adequately for the present condition of human beings.

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*The Supreme Court and American Constitutionalism* is the last volume in a trilogy of books on American constitutionalism sponsored by the John M. Ashbrook Center for Public Affairs. Editors Bradford P. Wilson and Ken Masugi assemble an array of accomplished scholars whose refreshing approach to the subject consists of looking carefully at the actual text of the Constitution and taking it seriously. As anyone who studies American political institutions knows, the favored mode of scholarship on Congress, the presidency, or even the Supreme Court has not been to approach these institutions from the perspective of their overall place in the constitutional order, or, as the book's editors put it, to examine "their relation to the forms and ends of republican constitutionalism" (p. vii). Rather, as Akhil Reed Amar observes in his contribution to this volume, "it is remarkable how little attention many leading scholars and distinguished judges have paid to the text of the Constitution" (p. 118). Wilson and Masugi are certainly right to suggest in their preface that the book's contributors span many schools of thought, yet almost all of them seem to concur on the manner in which serious study of the Supreme Court ought to be conducted. The result is a book well worth reading for those who, with good cause, worry about the decline of constitutionalism in contemporary American politics.

The book is formally divided into two parts, with the first addressing the extent to which the Supreme Court has acted and should act as a teacher of our republican principles. The question of the Court and its role as a teacher or primary authority on American constitutionalism is really the theme of the entire volume, since authors in the second half of it address specific lessons the Court has taught and ought to teach about our Constitution. Walter Berns lays out the theme in his opening essay, where he identifies the chief characteristic of American constitutionalism as the founders' promotion of republicanism over democracy. It is, of course, this distinction that has largely become lost in our contemporary, democratized politics, and Berns wants to know how effectively—or ineffectively—the Supreme Court has taught the distinction in its role as our "republican schoolmaster."

Chief Justice John Marshall, according to Berns, was the "greatest of the Supreme Court's republican schoolmasters" because he set the example of how justices should use their opinions as educational tools (p. 8). Berns contends that

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the twentieth-century Court has not followed Marshall. He cites this century's censorship rulings as a prime example of the Court's having provided exactly the wrong kind of lesson about the true meaning of the Constitution. Berns also raises an issue that has been vigorously debated among students of *The Federalist* (and especially students of Martin Diamond's essays on *The Federalist*), when he suggests that the system established by the framers is not self-executing. The constitutional framework is not sufficient, he reasons, without a people who recognize the dangers of excessive democracy and the virtues of republican restraint. Whether or not the framers themselves recognized this insufficiency in the system Bern does not say, but he does note that "not everyone was confident that [the framers'] remedy would prove to be sufficient." He cites the Anti-Federalists and Benjamin Franklin as prominent examples of those who had their doubts (p. 4).

While Berns's essay contrasts the teaching of the early Court to that of the Court in this century, Randall Kennedy offers a specific example of how the twentieth-century Court, in his view, has failed to teach properly the principles of American constitutionalism. In addressing the period he calls the "second reconstruction" (1954-1970), Kennedy justifiably criticizes the *Brown v. Board of Education* decision for arriving at the correct result without actually teaching us anything about the inherent contradiction between segregation and our constitutional principles. What the Court should have taught in its desegregation decisions, Kennedy suggests, was the "haunting lesson" of its own complicity in the "moral crimes of racial injustice" (p. 25). While owning up to the serious flaws in its prior jurisprudence on segregation would be an appropriate place to begin, however, the Court's confessing to past sins is the extent of the alternative that Kennedy offers. The logical next step, an explanation of how the principles of the Constitution are antithetical to racial discrimination, is never suggested. The difficulty with that logical next step is that a discussion of the conflict between our fundamental principles and racial discrimination necessarily leads to recognizing the conflict between those principles and various racial preference programs that so many continue to hold dear. This may help us to understand why it is that, in his criticism of the *Brown* opinion, Kennedy does not simply suggest Justice Harlan's dissent in *Plessy v. Ferguson* (where Harlan famously argues that the Constitution is "colorblind") as an alternative constitutional argument against segregation. Harlan's dissent both reaches the correct result and teaches a vital lesson about American republicanism in doing so.

If the Court needs to do a better job teaching the principles of the American Constitution, and if most of the contributors to this book agree that careful attention to the text is the best pedagogical approach to such a mission, it is Hadley Arkes' fine essay that explains why our constitutionalism is worthy of being taught. As Arkes reminds us, we ought not to teach American constitutionalism just because it happens to be ours, but because it is grounded in sound philosophical principle. In other words, American constitutionalism requires a
pedagogy that rejects legal positivism. Arkes contends that one of the "deepest lessons" the founders "had to impart was the understanding of the difference between the positive law and those principles of lawfulness, or natural law, that lay behind the positive law" (p. 30). The great teacher of this constitutional principle was, for Arkes, James Wilson. Wilson is chosen because he teaches that American constitutional principles are opposed to skepticism and to the moral relativism and legal positivism at the heart of skeptical legal philosophy. This comes out most clearly for Arkes in Wilson's argument "against the legal positivism of Blackstone," where "Wilson would assert the foundation of the American law in natural right" (p. 28). John Marshall is also a hero of Arkes' essay, since Marshall did not hesitate to write opinions that "could be drawn deductively from a deeper principle of law that did not depend for its validity on its mention in the Constitution" (pp. 33–34).

Arkes' argument against legal positivism makes it all the more ironic that he chooses to conclude his essay by pointing to Justice Scalia as a contemporary example of a jurist who teaches in the mode of Wilson and Marshall. Arkes' selection of Scalia, whom he is careful not to equate with Wilson and Marshall, is odd, because the legal positivism which Arkes rightly distinguishes from the principles of American constitutionalism is at least as prevalent on the right today as it is on the left, and Justice Scalia is a prime example of it. In recent remarks at the Gregorian University, Scalia embraced precisely that positivistic legal philosophy that Arkes identifies as antithetical to the principles of the founding. Scalia's remarks are worth quoting at some length:

> The whole theory of democracy . . . is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines that there are certain minorities or certain minority positions that deserve protection. . . . The minority loses, except to the extent that the majority, in its document of government, has agreed to accord the minority rights. . . . To talk about the natural law is not to talk about something we all agree upon. . . . If you're going to be a faithful, loyal democrat, if you do not like the Nuremberger laws, your duty is to persuade others.¹

Scalia's legal positivism is shared fully by Chief Justice Rehnquist, who endorses and relies upon the moral skepticism of Oliver Wendell Holmes in asserting that, when

> a society adopts a constitution and incorporates in that constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by a people.²

One would have difficulty reconciling such argumentation with the early American principles of constitutionalism that Arkes so capably expounds in his own essay.
Like Arkes, James R. Stoner, Jr., reasons that we must have access to the unwritten principles of the Constitution in order to access the fuller meaning of the text itself. It is not only the theory of natural rights or natural law that must be understood as underlying the American Constitution, Stoner contends, but also the tradition of the common law. While Arkes bases his essay at least partly on the early Americans' natural law rejection of Blackstone, Stoner contends that the common law tradition offers a less "contentious" alternative. He cites, for example, the "radically different conceptions of law and political life in classical natural law on the one hand and modern natural rights on the other" as evidence of the problems one encounters in relying too heavily on the natural law argument (p. 48). Stoner does not reject the natural law argument, suggesting instead that "at the time of the Founding, natural law and common law were seen as complementary" (p. 49). In the end, however, the common law perspective really is, as Arkes shows, a fundamentally different way of understanding the Constitution than the one suggested by the natural law tradition, Stoner's effort to reconcile the two notwithstanding.

Contributors to this volume not only offer different visions of what ought to be taught about our constitutionalism, they also offer different accounts of who should be primarily responsible for doing the teaching. For Berns and many of the book's other contributors, the Supreme Court must be the teacher of republicanism, since both the legislature and the executive are either unable or unwilling to take the lead role. Berns argues that, "of the various organs of the new government, the Framers expected the judiciary to be best situated to do its part in the 'forming [of] a certain kind of citizenry'" (p. 10). Such is the assumption of several of these essays, including Michael Zuckert's. Zuckert proclaims that "the Supreme Court was originally intended to be the crown jewel of American constitutionalism" because it was expected to hold the other branches accountable to the Constitution (p. 129). Yet while one might expect the Court to be so regarded in a book on the Supreme Court and American constitutionalism, some of the authors offer alternatives. For Stanley C. Brubaker, judges have only a limited, internal perspective on the Constitution. "Although we occasionally hear claims to the contrary," he reasons, "it does not follow from the fact that we have a constitution, even a written constitution, that the best perspective for viewing it will be that of the Court" (p. 74). Brubaker mainly doubts that "a court is a better equipped institution to give a more authentic expression to the underlying character of a regime" (p. 76). Why do courts, for instance, know more about the inherent principles of republicanism than the people's representatives? For Brubaker, the "good or serious citizen" has the best perspective for understanding the Constitution. Such a citizen is not a blind patriot; he does not love his country "right or wrong." Instead, he loves his country because he loves his country's constitution, and he loves his country's constitution because he recognizes that it is a good and just constitution. Brubaker does not say how, exactly, citizens are to come to an understanding
of what constitutes a just constitution, but he does suggest that they cannot be taught it, as least not completely, by the courts. George Anastaplo concludes the first part of the book by agreeing that the courts ought to have virtually no role in providing citizens with the "proper education" that is so important to a healthy polity. Instead, he contends, "in most of our public controversies the role of the courts should be subordinated to the guidance provided by legislatures" (pp. 104–5).

While Part One of the book addresses the broader and, in many respects, more fundamental questions of the Court's role as an educator of constitutionalism, Part Two turns a good deal of its attention to suggesting possible lessons that the Court needs to teach, and to analyzing the effectiveness or ineffectiveness with which the Court has undertaken this mission. Amar posits criminal procedure as an issue of current importance, given the increasing scrutiny that some Warren-era precedents are undergoing and the lack of direct ties among the Court's current personnel to those Warren-era decisions. In suggesting a new direction, Amar urges that we cease to read the Constitution as requiring protection of the guilty. "The guilty," he argues, "receive procedural protection only as an incidental and unavoidable byproduct of protecting the innocent" (p. 121). Nelson Lund looks at recent cases dealing with the separation of powers and concludes that the Court has become more interested in late in keeping Congress in its proper place. He traces this new interest to a revival of Madison's doctrine in Federalist 48 that the legislature is the most dangerous branch of government. Jeremy Rabkin assesses where the Court stands with respect to the growing importance of international law and the issue of American sovereignty. The tendency of the current Court, he admits, has been to show "a great coolness to arguments that international law should pose any serious constraint on American policy." The Court has, at the same time, "shown almost no interest in articulating constitutional limits on the authority of the American government to commit itself to international norms" (p. 278). Rabkin does believe, however, that only slight changes in the makeup of the Court could very well lead it to become more active in international law issues.

Both Zuckert and Randy E. Barnett, in separate essays, suggest that the Court ought to avoid "novel constitutional theories," and that it can do so by taking seriously the theory of rights that underlies the Constitution. Zuckert admits that this is not an easy task, due to "the silence, or polysemy, . . . of the Constitution itself" (p. 132). He looks to the debate over the Civil Rights Act of 1866 as a means of obtaining guidance on interpreting the Fourteenth Amendment, and concludes that there was a theory of rights clearly understood by those in that debate. There is, therefore, something "substantive" to guide our understanding of the Fourteenth Amendment, although Zuckert warns that "the act itself clearly does not justify a substantive due process jurisprudence" (p. 155). For Barnett, understanding that a primary purpose of the Constitution is to protect the people's "pre-existing rights of nature" suggests the proper man-
ner in which the Court ought to interpret the “necessary and proper” clause. That clause should be regarded primarily as a protection of the people’s rights against infringement by the government. Accordingly, certain laws might be deemed “necessary,” but if they threaten fundamental rights they would not qualify as “proper” and would therefore be prohibited by the “necessary and proper” clause (pp. 157–59).

As is the case with several of the essays, the piece by Robert P. George and Gerard V. Bradley identifies the New Deal as marking a turn for the worse in the Court’s constitutional jurisprudence. On the one hand, they contend, the Court significantly expanded and defended the rights of individuals or “discrete and insular minorities” against legislative majorities through a series of activist decisions. Yet on the other hand, the Court has refused to rein in legislative majorities when those majorities appear to act in a manner contrary to the two key structural features of the Constitution: separation of powers and federalism. Taking up federalism in particular, George and Bradley make a compelling case that the Court ought to defend federalism with an increasingly aggressive use of the interstate commerce clause. They are especially heartened by the recent case of United States v. Lopez (1995), where the Court struck down the federal Gun-Free School Zones Act as an abuse of the interstate commerce clause (pp. 195–96).

The most contentious aspect of George and Bradley’s very fine essay is its praise for Justice Thomas’ dissent in the 1995 case in which the Court struck down state attempts to limit the terms of federal lawmakers (U.S. Term Limits, Inc., v. Thornton). Thomas’ dissent is, in fact, urged on us by the authors as a model for future Court action in defense of federalism. For George and Bradley, the great virtue of this dissent is that it affirms the central role of the states, qua states, in the establishment and legitimization of the Constitution: Thomas “squarely rejected the notion that, in his words, ‘the undifferentiated people of the Nation as a whole’ are the ultimate source of the Constitution’s authority.” According to their view, and the view they attribute to Thomas, the Preamble to the Constitution should effectively read: “We, the people(s) of the (several) United States . . .” (p. 208). There are, of course, several questions that might be raised with respect to this proposed reading. Some might ask about the words that follow in the Constitution’s Preamble, which state that the goal of the 1787 Constitution is to “form a more perfect Union. . .” Such language presumably suggests that some union consisting of “we the people” already existed; otherwise, exactly what “union” was it that needed to be made “more perfect”? Others might point to the Declaration of Independence, which refers explicitly to “one people” in laying out the common principles of the new nation. Still others might remind us that, as much as George and Bradley wish the Preamble had been written with the revisions they suggest, it was not so written. This fact compels those who are particular about the actual words of the Constitution to come to terms with the phrase “We the people.”
The essay also provides grounds for quarrel in emphasizing one of the very few (if not the only one) of Justice Thomas' opinions that could possibly make him sound like a paleoconservative. George and Bradley do well not to assert that the Thornton dissent is characteristic of Thomas' jurisprudence, since there are grounds for believing that he, more than any of those fellow justices who are interested in defending federalism, embraces a constitutional philosophy largely at odds with the one the authors advocate. Thomas generally affirms the centrality of the Declaration of Independence in establishing "the people" of the United States and defining the principles that unite them. He has argued that these principles give meaning to the Constitution of 1787. Justice Thomas' concurring opinion in the case of Adarand v. Pena (1995) is but one of the more typical illustrations of his views. In that case, Thomas opposed a government racial classification program, writing that "the paternalism that appears at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence."^3

The potential problems with George and Bradley's understanding of the Constitution's origins are addressed directly by David K. Nichols' excellent contribution in this volume. Nichols, in fact, makes his remarks in the context of criticizing Thomas' atypical Thornton dissent, and he largely follows Madison's reasoning in Federalist 39. As Nichols explains, the intent of the 1787 Constitution was to "insure that the national government was a government of the people rather than a league of state governments as was the case under the Articles. The people were to have a relation with the national government that was not filtered through state government" (p. 226). It is in this spirit that Madison explains in Federalist 39 that the Constitution is "neither wholly national nor wholly federal."^4 Nichols concludes that Thomas' dissent in the term limits case, which is praised by George and Bradley as the model for future defenses of federalism, "rests on the assumption that the people speak to the national government through the state governments, an assumption that was decisively rejected by the Constitutional Convention" (p. 226).

Nichols' essay also makes an important contribution to this volume by more fully exploring an issue to which several of the authors allude. Many in the book contend that the quality of the Supreme Court's constitutional jurisprudence has declined in the twentieth century. Berns even remarks that the presidency began to lose its ability to teach the virtues of republicanism during this same period (p. 6). Yet it is Nichols who explains why it is that such a decline is no coincidence, but is instead closely related to the rise of the Progressive movement. While Berns rightly points to Holmes as a chief influence on the changing jurisprudence of the twentieth century, Nichols does well to consider Woodrow Wilson in showing that constitutionalism faces a threat from the growing legitimacy of the administrative state. For the Progressives, Nichols explains that the problems of government were not so much political as administrative, and so the important questions were "not about the form or ends of government but
about the means.” As a consequence of this transformation, “the doctrine of limited government loses is relevance. We have nothing to fear from government,” since “government is merely there to help us to get what we all agree we want” (p. 211). Yet Nichols also realizes that the modern administrative state is a reality, and so the problem becomes one of dealing with this reality in the context of promoting a proper understanding of our constitutional order. In proposing a way of dealing with this tension, Nichols reminds us that many of the founders, especially Hamilton, appreciated the centrality of administration to governance. The important point is to draw a clear distinction between the founders’ constitutionally bounded administration and the modern administrative state. For while Hamilton recognized the need for administration, he “also recognized the importance of constitutional government. Only in such a government would the rights of the people be secure, because only in such a government would even popular will be limited, at least in the short run, by the Constitution. Administration must find its field of action within the limits established by popular will and the Constitution” (p. 231). So it is that we are reminded of the importance of a proper understanding of constitutionalism in contemporary times.

And so it is also that one can appreciate the salience of the issues that are examined in The Supreme Court and American Constitutionalism. The editors do us the service of bringing together some of our most important thinkers on these vital questions. The editors have also succeeded in providing a diversity of viewpoints on American constitutionalism. These viewpoints cannot in every case be reconciled with one another, and so they point out to the reader important choices that must be made. What is universally true about the essays in this volume is the seriousness with which they treat the Constitution, and the importance they attach to grounding any understanding of our current political order in an understanding of our constitutional order.

NOTES

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