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Abstract

Given the complex nature of nuclear weapons strategy for instituting W.W. II,-a subject (survival) for which most of us display intense feelings that tend to cloud our objectivity-I decided to ask my illustrious friend Dr. Jeremiah Pangloss, to write an introductory piece for this symposium.

KEYWORDS: interview, prelude, debate

An Interview with Jeremiah Pangloss—A Prelude to the Constitutional Debate

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Given the complex nature of nuclear weapons strategy for instituting W.W. III,—a subject (survival) for which most of us display intense feelings that tend to cloud our objectivity—I decided to ask my illustrious friend Dr. Jeremiah Pangloss, to write an introductory piece for this symposium. I know no more versatile dilettante. Not weighted down with the myopic effect of very much knowledge, he is able to see the big picture, identifying the worst and the best in any given scenario by employing the simple Procrustean strategy of ignoring the finer points of argumentation. Also, I knew that his distress over the death in 1876 of the last Tasmanian, Lalla Rookh,—an event he perceived as a manifestation of the global movement toward cultural homogeneity and concomitant loss of alternative cultures—made him acutely sensitive to the nuclear threat to our collective existence.[1] Unfortunately, I was unable to convince him to write an introduction but he did read the symposium articles and was willing to permit publication of our subsequent discussion.

OL: Dr. Pangloss, what makes you think that you possess the requisite expertise to evaluate something as technologically complex as nuclear weapons strategy?[2]

JP: Well, first I would point out that my legal education has enhanced

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1. *See* Lewis, *Universal Functional Requisites of Society: The Unending Quest,* 3 CASE W. RES. J. INT'L L. 360 (1970).

2. The problem of evaluating the risks in nuclear power generation is equally complex.

> Even if the complex facts [concerning nuclear power] were completely exposed and explained by a neutral group of experts, there is little indication that the public could develop a consensus. For example, little capability exists to weigh the tradeoffs between cheaper electricity produced by nu-

my analytical skills and sense of relevance—especially the capacity to take both sides of any question. And as you know, the legally trained generalist displays the capacity to think of something inextricably connected to something else without thinking about what it is connected to. In this sense, legal analysis is value free.[3] Thus, I can analyze nuclear strategy without thinking about the obscene and grotesque consequences of a nuclear blast for the three hundred million individuals killed or tortured by the blast. The Justices of the Supreme Court have frequently provided evidence of this capacity by employing neutral principles that transcend the immediate result achieved in a particularly hard case.[4]

OL: Are you suggesting that there *are* two sides to the question of survival? I thought that all sane persons agreed that survival is a minimal value without which no other value artifacts can exist! Certified geniuses from Aristotle to H.L.A. Hart have agreed on that!

JP: Well, consider Woody Allen's assessment that mankind is at the crossroads—one road leading to despair and hopelessness, the other to extinction. It's pretty much a Hobson's choice.

OL: But we have made considerable progress since Eve ate from the tree of knowledge, especially if progress is measured by the availability of conceptual schemes for ordering reality. We have solved some of our perennial problems and generally improved our problem-solving capacity. Consider Robert Nozick's assessment:

> clear power reactors and the small probability of a major catastrophe. Nor does society have the experience to address the delicate question of whether or not any technology that includes a very small attached risk of catastrophe is acceptable. In addition, if all competing values could be completely explicated, no mechanisms are available for resolving strongly held preferences.

PRESIDENT'S COMM'N FOR A NATIONAL AGENDA FOR THE EIGHTIES, PANEL ON SCIENCE AND TECHNOLOGY: PROMISES AND DANGERS IN THE EIGHTIES 58 (1981).

3. *See generally* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication,* 27 U. CHI. L. REV. 661 (1960).

4. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 19 (1959). *See, e.g.,* Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977).

> The great reductionist views of Freud and Marx, computer modeling and neurophysiological reduction, behavioral psychology and economic analyses, just join and extend the long list of human accomplishments, striving, and excellence: Shakespeare and Kant and Plato and Goethe and Gandhi and the Baal Shem-Tov and Newton and Picasso and Homer and Rembrandt and Turner and George Eliot and Galileo and Tolstoy and Aurobinde and Weber and Bach and Garrison and the authors of the Hebrew Bible and Sophocles.[5]

The fact is that there "has been striking progress in the control of disease, in the methods of farming, in material productivity, in the reduction of backbreaking labor, in the techniques of rapid mass communication, in the spread of literacy and probably in the reduction in the amount of violence in everyday life."[6]

JP: Actually, there really is no basis for assuming progress. Our exosomatic evolution—autos, telephones, telescopes, computers, etc.—has brought us to what Arthur Miller elsewhere has described as a "climacteric" or convergence of crises. We are drowning in a sea of information. So even with this "progress," or because of it our survival is at best problematical. Probably the most comprehensive statement of the climacteric is provided by Kirkpatrick Sale:

> An imperilled ecology, irremediable pollution of atmosphere and ocean, overpopulation, world hunger and starvation, the depletion of resources, environmental diseases, the vanishing wilderness, uncontrolled technologies, chemical toxins in water, air and foods, and endangered species on land and sea.
>
> A deepening suspicion of authority, distrust of established institutions, breakdown of family ties, decline of community, erosion of religious commitment, contempt for law, disregard for tradition, ethical and moral confusion, cultural ignorance, artistic chaos, and aesthetic uncertainty.
>
> Deteriorating cities, megalopolitan sprawls, stifling ghettoes, over-

5. R. NOZICK, PHILOSOPHICAL INVESTIGATIONS 644 (1981).

6. Frankel, *The Idea of Progress,* 6 THE ENCYCLOPEDIA OF PHILOSOPHY 483, 486 (1967). The criteria for judging progress are not self-evident. *See* Ginsberg, *Progress in the Modern Era,* 3 DICTIONARY OF THE HISTORY OF IDEAS 633, 649 (1973).

crowding, traffic congestion, untreated wastes, smog and soot, budget insolvency, inadequate schools, mounting illiteracy, declining university standards, dehumanizing welfare systems, police brutality, overcrowded hospitals, clogged court calendars, inhumane prisons, racial injustice, sex discrimination, poverty, crime and vandalism, and fear.

The growth of loneliness, powerlessness, insecurity, anxiety, anomie, boredom, bewilderment, alienation, rudeness, suicide, mental illness, alcoholism, drug usage, divorce, violence, and sexual dysfunction.

Political alienation and discontent, bureaucratic rigidification, administrative inefficiency, legislative ineptitude, judicial inequity, bribery and corruption, inadequate government regulations and enforcement, the use of repressive machinery, abuses of power, ineradicable national debt, collapse of the two-party system, defense overspending, nuclear proliferation, the arms race and arms sales, and the threat of nuclear annihilation.

Economic uncertainty, unemployment, inflation, devaluation and displacement of the dollar, capital shortages, the energy crises, absenteeism, employee sabotage and theft, corporate mismanagement, industrial espionage, business payoffs and bribes, white-collar criminality, shoddy goods, waste and inefficiency, planned obsolescence, fraudulent and incessant advertising, mounting personal debt, and the maldistribution of wealth.

International instability, worldwide inflation, national and civil warfare, arms buildups, nuclear reactors, plutonium stockpiles, disputes over laws of the sea, inadequate international law, the failure of the United Nations, multinational exploitation, Third World poverty and unrepayable debt, and the end of the American imperial arrangement.

Or to put it another way:

Vietnam, Watergate, New York City bankruptcy, gas lines, Mirex, Equity Funding, ITT, riots, Medicaid fraud, redlining, CIA, drug-testing, hostages, price fixing, Vesco, nursing homes, coffee prices, product recalls, assassinations, heroin, the Middle East, Rio Rancho, Kepone, skyjacking, the SLA, Hustler, Spiro Agnew,

> saccharin, the square tomato, Harlequin books, Los Angeles, OPEC, Wilbur Mills, power failures, My Lai, Charles Manson, PCB, the SST, Andy Warhol, Appalachia, organized crime, Three Mile Island, Valium, the Wilmington 10, REITs, TV violence, strip-mining, FBI break-ins, the Sahel, microwaves, McDonald's, Kent State, Penn Central, Attica, the Torrey Canyon, psychosurgery, mercury, and Chile . . .[7]

OL: But then the dilemma confronting us is of our own making. We have developed a honeycombed store of knowledge, with disciplines segregated to the extent that experts are afflicted with specialized deafness. We question whether it is even possible to see the big picture while applying the knowledge and techniques of the diverse and sophisticated disciplines required to resolve the complex problems of our climacteric era.

> Moreover, the classical boundaries of the earth sciences—geology, meteorology, oceanography, and so on—are being eroded and replaced by a planetary multidisciplinary view. For example, portraying and understanding the long-term evolution of climate depends on understanding the movement of crustal plates and the interpretation of deep-sea cores and sediment samples. Understanding and predicting the shorter period changes in climate depends on knowledge of the oceans, their temperature, currents, ability to act as a reservoir, and their role in the global energy cycle.
>
> A central theme is that the new knowledge gained by the vigor of earth sciences and by pertinent technology is now vital to the wise management of our planet. Plate tectonics is essential to the effort to understand and predict earthquakes and to improve reconnaissance for new mineral deposits. Atmospheric chemistry enables us to make a reasoned estimate of the likely future effects of trace amounts of chlorofluoromethanes on trace amounts of ozone in the stratosphere. Basic work in marine biology and ecology is indispensable to structuring effective policies for managing the living resources of the seas. Research on the chemistry of ocean water will enable us to fix more precisely the role of the oceans as a reservoir for CO_2, helping to yield, in time, precise estimates of the climatic effects of CO_2 and a more rational base on which to plan the future

7. K. SALE, HUMAN SCALE 21-22 (1980).

use of fossil fuels.

> Our appraisal of recent trends in the earth sciences is dominated by the role of technology and the approach to planetary problems through organized and collaborative efforts of institutions and scientists—big science. There is a current question about big science and its relation to the science of individual investigators. It should be noted that the big science effort described here grew from little science—the ideas of individuals—and provide to individual scientists data that could be obtained in no other way.[8]

JP: The best response to the question you posed concerning my competence in matters as complex as nuclear weapons strategy was supplied by the physicist Erwin Schrodinger: "I can see no escape from this dilemma . . . than that some of us should venture to embark on a synthesis of facts and theories, albeit with second-hand and incomplete knowledge of some of them—and at the risk of making fools of ourselves."[9]

OL: And what then is your assessment of the current state of affairs?

JP: I think the big picture comes into focus by telescoping our finite existence on this globe into a thirty-day span. During the first 29 days, 22-½ hours, mankind was a nomadic predator. Only during the last hour and 25 minutes did he settle into framing and in the last five minutes he finally moved to an urban setting. Within this time frame the Renaissance consumed 4 minutes, the Industrial Revolution 1-½ minutes, and the Electronic Era 10 seconds.[10] The acceleration in rate of change and technological capacity is quite apparent. During the last moments of our 30 days, the ineluctable movement toward annihilation

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8. SCIENCE AND TECHNOLOGY 50 (National Academy of Sciences 1979). It is suggested that international as well as interdisciplinary collaboration is also necessary for progress. See *id.* at 14-15.

9. E. SCHRODINGER, WHAT IS LIFE? vii (1945).

10. There is considerable disagreement among anthropologists concerning man's first appearance on this planet. "Lucy" appeared 3.5 million years ago, and other hominids over 5 million years ago. See evolutionary chart in D. JOHANSON & M. EDEY, LUCY: THE BEGINNINGS OF HUMANKIND 10-11 (1982). Compare the earlier (and now obviously erroneous) chart in 1 W. DURANT, THE STORY OF CIVILIZATION: OUR ORIENTAL HERITAGE 90 (1954).

of the human species is equally obvious. How clear it now appears, even though each early step was at the time taken, apparently innocuous. Consider the following annihilation schedule:

ANNIHILATION SCHEDULE

	1300:	Cannon
	1440:	Printing Press
	1500:	Rifle
	1776:	Submarine
	1835:	Revolver
	1863:	TNT
	1896:	Radio-Telegraph
	1903:	Airplane
	1905:	Einstein proposes theory for transformation of matter into energy: $E = mc^2$
	1926:	Liquid Fuel Rocket
	1928:	Mechanical Computer
	1933:	Harold Urey isolates heavy hydrogen
	1939:	Fission in uranium discovered
	1942:	First nuclear chain reaction in the Chicago pile
	1945:	First test of A-bomb at Alamorgorda, New Mexico
August 6,	1945:	First obscene use of A-bomb at Hiroshima
	1946:	Electronic numerical integrator and calculator (ENIAC), first all-electronic computer
	1952:	H-bomb tested at Eniwetok
	1954:	H-bomb exploded producing twice anticipated destructive effect. John Foster Dulles propounds strategy of massive retaliation.
October 4,	1957:	Sputnik I

	1960:	Era of nuclear plenty (more than 1000 nuclear weapons available). Atlas Missile has CEP (circular error probable indicating the radius of the circle within which 50% of missiles will land) of several miles.
December,	1960:	SIOP (single integrated operational plan) requires all-cities strategy with estimated death toll of 360-450 million people in communist sphere.
June,	1962:	SIOP II adopts more flexible nuclear strategy of escalation of destruction.
July 8,	1962:	1.4 Megaton H-bomb 248 miles over Johnson Island generates EMP (electromagnetic pulse) of peak 6 megawatts/sq. meter.
October,	1962:	Cuban Missile Crisis
	1969:	NIE (CIA's National Intelligence Estimate of Soviet Nuclear strike capability) assumes parity. Russian SS-9s (armed with 3 warheads each with 7-10 megaton force) are aimed at U.S. LCCs (launch control centers) in the Midwest.
	1970:	U.S. develops MIRVs (multiple independently targetable re-entry vehicles).
	1974:	NSDM 242 (National Security decision memorandum) propounds Schlesinger doctrine of limited nuclear war.
	1975:	NIE assumes nuclear parity not attained by Russians until mid-1980s. U.S. Minuteman III Missile with Mark 12A warhead (350 kiloton force) has CEP of one tenth of a nautical mile.
	1977:	Russia develops MIRVs with low CEP. Window of vulnerability develops.

July, 1980: PD 59 (presidential directive) sets forth nuclear war strategies.

1982: Russian SS-19s acquire new front end with 90% PK (probability of kill) on minuteman missile silos. Opens wider window of vulnerability.

November 22, 1982: MX dense pack strategy adopted.

The inventiveness of *homo faciens* has produced better and better means of assuring our destruction. But while technological exosomatic evolution has occurred, the human nature of *homo sapiens* has remained unchanged—and in his natural state we know that "the life of man [is] solitary, poore, nasty, brutish, and short."[11] The combination of MIRVs with a low CEP and high PK produced a situation that compelled Carter to issue PD 59, rejecting a MAD strategy in favor of a policy requiring the U.S. military "to be able to undertake precise, limited nuclear strikes against military facilities in the Soviet Union, including missile bases and troop concentration, [and] to develop the capacity to threaten Soviet political leaders in their underground shelters in time of war."[12]

OL: But that sounds as though fighting a nuclear war *is* considered a reasonable option? I would have thought no sane person would even consider that. Do you really believe the leader of a State would initiate a nuclear war and thereby risk destruction of our civilization?

JP: Well, Harry Truman [who authorized Hiroshima's destruction] was sane and he, at the time of the Korean War, contemplated a nuclear attack, although he had removed General MacArthur for urging all-out war. Truman wrote in a January 27, 1952, memorandum:

> It seems to me that the proper approach now would be an ultimatum with a 10-day expiration limit, informing Moscow that we intend to blockade the China coast from the Korean border to Indochina, and that we intend to destroy every military base in

11. T. HOBBES, LEVIATHON OR THE MATTER, FORME & POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVILL *62.

12. N.Y. Times, Aug. 6, 1980, at 1, col. 1.

> Manchuria by means now in our control—and if there is further interference we shall eliminate any ports or cities necessary to accomplish our purposes.
>
> This means all-out war. It means that Moscow, St. Petersburg, Mukden, Vladivostok, Peking, Shanghai, Port Arthur, Darien, Odessa, Stalingrad and every manufacturing plant in China and the Soviet Union will be eliminated.[13]

There were, of course, other times when we came close—with Eisenhower in 1953 (Korean War), Kennedy in 1962 (Cuban Missile Crisis), Kissinger in 1973 (Arab-Israeli October War), and Carter in 1979 (Iran Crisis). The fact is that we could end up with a war because of computer error. Tom Wicker recently reported that there were "151 computer false alarms in an 18 month period" and that one false alarm "had American forces on alert for a full six minutes before the error was discovered."[14] Add more powerful missiles and more countries with nuclear weapons and the outcome is bleak at best.[15]

OL: But our civilization would not survive—at least not in any form identifiable by us.

JP: Edward Teller doesn't think a nuclear war would be all that bad. He suggests that we certainly could survive—as long as we acted rationally—including wiping the fallout ash from our skin.[16]

OL: But what about the effects of the EMP?

JP: I suppose all data encoded on microchips would disappear. Given the extent to which our society relies on an information network using microchips, that could be somewhat disastrous.[17] Of course, the mili-

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13. N.Y. Times, Sunday, Aug. 3, 1980, at 22, col. 1.

14. N.Y. Times, Sunday, Nov. 21, 1982, at EY21, col. 1. Defense experts suggest that the Russian detection systems are even more prone to error. Whew!

15. For an apocalypt's view see H. LINDSEY, THE 1980's: COUNTDOWN TO ARMAGEDDON (1980).

16. "Skin contact with fallout is not necessarily fatal—depending on the intensity of the radiation and the precautions taken. Injuries can be reduced simply by washing off the ash." Teller, *Dangerous Myths About Nuclear Arms,* READERS DIGEST, Nov. 1982, at 139, 141.

17. Daniel Bell reports that by 1980, 51.3 percent of our experienced civilian

tary has taken measures to protect the C^3 of C^3I (command, control, communication, and intelligence) from EMP. I think Thomas Powers' assessment is more accurate than that of Teller:

> Strategic planners hesitate to say what the world would be like after a nuclear war. There are too many variables. But they agree—for planning purposes, at any rate—that both sides would "recover," and that the most probable result of a general nuclear war would be a race to prepare for a second general nuclear war. As a practical matter, then, a general nuclear war would not end the threat of nuclear war. That threat, in fact would be one of the very few things the pre-war and post-war worlds would have in common.[18]

OL: It seems almost inevitable that given our organization for nuclear war, that it will surely occur. There are several haunting stanzas in the Rubaiyat of Omar Khayyam that I can't help but recall:

> We are no other than a moving row
> of magic shadow-shapes that come and go
> Round with the sun-illmin'd lantern held
> In midnight by the master of the show;
>
> But helpless pieces of the game he plays
> Upon this checquer-board of nights and days;
> Hither and thither moves and checks and slays,
> and one by one back in the closet lays.[19]

Do you believe that the probability of nuclear war would be reduced if the Supreme Court persuasively propounded a doctrine that there is a

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workforce was involved in the information business. Further, that the "axial principles of the post-industrial society, however, is the centrality of theoretical knowledge and its new role, when codified, as the director of social change." Bell, *The Social Framework of the Information Society,* in THE MICROELECTRONICS REVOLUTION 500 (T. Forester ed. 1980).

18. Powers, *Choosing a Strategy for World War III,* 250 THE ATLANTIC, No. 5, Nov. 1982, at 82, 110.

19. THE RUBAIYAT OF OMAR KHAYYAM (E. Fitzgerald trans. 1859).

constitutional duty to avoid a nuclear war?

JP: Well, that question is almost too speculative for me to answer. First, what constitutional provision would impose such a duty? I can agree that a natural law proponent could contend that there is a duty to seek survival. One of the clearest statements appears in the Summa Theologica, where St. Thomas states that "the natural law contains all that makes for the preservation of human life, and all that is opposed to its dissolution."[20] But even for the Thomistic natural law proponent,

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20. T. AQUINAS, *Summa Theologica,* in AQUINAS: SELECTED POLITICAL WRITINGS 123 (A. D'Entreves ed. 1959). Note: Interestingly, the *Summa Theologica* was incorporated into Catholic doctrine by an encyclical of Pope Leo XIII. *See* C. MORRIS, THE GREAT LEGAL PHILOSOPHERS 57 (1959). Catholics are thus bound, at least in theory, to St. Thomas' call for an active opposition to "dissolution." Catholics do appear to support opposition to nuclear weapons more frequently than Non-Catholics. A recent Gallup Poll indicates the following:

Unilateral Nuclear Freeze

"Do you favor or oppose a freeze on the production of nuclear weapons whether or not the Soviet Union agrees to do the same?"

	Favor	Oppose
National	45	55
Catholics	47	53
Non-Catholics	45	55

Dilateral Nuclear Freeze

"Do you favor or oppose an agreement between the United States and the Soviet Union not to build any more nuclear weapons in the future?"

	Favor	Oppose	No Opinion
National	77	17	6
Catholics	82	13	5
Non-Catholics	76	18	6

Reduce Nuclear Arsenals

"Would you approve or disapprove if President Reagan made a proposal to the Soviet Union that both countries reduce their present stock of nuclear weapons by 50 per cent?"

	Favor	Oppose	No Opinion
National	76	19	5
Catholics	81	16	3
Non-Catholics	73	21	6

there would be many troubling issues before exercising a duty to resist positive law supporting nuclear strike capability.[21] Aquinas' theory of resistance requires only that where positive law is contrary to the common good, it is not to be obeyed *unless* the disobedience is more onerous than the evil occasioned by obedience to an unjust law. Of course, if the Divine law is violated then one must resist—and perhaps survival of God's creation is mandated by the Divine Law requiring man to be "fruitful and multiply."[22] But *which* nuclear weapon strategy will deter a war is a subject of considerable debate. Agreeing to do good and avoid evil is far easier than determining what particular acts will further this primary precept. The same is true for survival.

OL: But what about a constitutional duty? Do you see any realistic argument for establishing such a duty?

JP: There are a number of difficulties. First, what provision in the Constitution is available for serving as a basis for such a duty? Recall that the Court in the *Rodriguez* case stated that only rights explicitly or implicitly guaranteed by the Constitution are to be considered fundamental enough to impose the strict scrutiny standard of review.[23]

OL: If interstate travel, privacy, procreation, voting, and education are fundamental rights implicit in the constitution, then why not a right of

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Destroy Present Weapons

"Would you favor or oppose an agreement between the U.S. and the Soviet Union to destroy all nuclear weapons that have already been built?"

	Favor	Oppose	No Opinion
National	47	44	9
Catholics	50	42	8
Non-Catholics	46	44	10

Catholics back stand on Missiles, Miami Herald, Sunday, Nov. 21, 1982, at A32, col. 1.

21. Concerning the ambiguities and difficulties inherent in a natural law approach see Kelsen, *Plato and the Natural Law*, 14 VAND. L. REV. 23 (1960); Neilsen, *An Examination of the Thomistic Theory of Natural Moral Law*, 4 NATURAL L.F. 44 (1959). *See infra* note 38.

22. *Genesis* 2:28 (King James).

23. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

survival?

JP: You are forgetting that the threat to survival is not a personal right, but one shared by everyone. The Court probably would deny standing to even raise the issue—whether in the context of failure to comply with the "law" on the part of the executive or legislative branch or infringement on the assumed [*arguendo*] right of survival. Recall the recent statement by the Court:

> [The] requirements of standing are not satisfied by "the abstract injury in nonobservance of the Constitution asserted by . . . citizens." *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. at 223, n. 13, 94 S. Ct., at 2933, n. 13 (1974). This Court repeatedly has rejected claims of standing predicated on " 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' *Fairchild v. Hughes,* 258 U.S. 126, 129 [42 S. Ct. 274, 275, 66 L. Ed. 499] [1922]." *Baker v. Carr,* 369 U.S. 186, 208, 82 S. Ct. 691, 705 L. Ed. 2d 663 (1962). See *Schlesinger v. Reservists Committee to Stop the War, supra,* 418 U.S. at 216-222, 94 S. Ct. at 2929-2932; *Laird v. Tatum,* 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972); *Ex parte Levitt,* 302 U.S. 633, 58 S. Ct. 1, 82 L. Ed. 493 (1937). Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Flast v. Cohen,* 392 U.S., at 106, 88 S. Ct., at 1956.[24]

If standing was found, then the Court still might refuse to reach the merits finding that the issue is a political question because such a case would present either, in the Court's words—

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24. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., ___ U.S. ___, 102 S. Ct. 752, 764 (1982). Another variation on the standing theme relates to the requirement that the judicial resolution of the constitutional issue will produce the relief desired by the plaintiff. *See* Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973). Imposing a duty on *our* government to eliminate the threat of nuclear war would not eliminate the threat from other countries, and indeed, some would contend, would only heighten the likelihood of the apocalypse. One can hear Chairman Andropov paraphrasing President Jackson: "The Court has made its decision. Let it enforce it."

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for questioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[25]

Or, given the complexity of the issue and expertise required to appreciate the nuances involved, the Court could invoke some variation of the abstention doctrine. After all, in *Horowitz,* the Court admitted "courts are particularly ill-equipped to evaluate academic performance."[26] *A fortiori*—nuclear weapons strategy! The Court has frequently manifested deference to the Executive Branch in matters of national security.[27]

OL: But assuming, *arguendo,* that the Court would hear the case, why wouldn't the Justices agree that there is a constitutional duty based on the fundamental right of survival.

JP: Frankly, I don't think the predicate exists for establishing such a right. Consider the length of time and number of incremental steps involved in the evolution of constitutional rights of privacy[28] and inter-

25. Baker v. Carr, 369 U.S. 186, 217 (1962). *See also* United States v. Nixon, 418 U.S. 683, 704-05 (1974). The Court would probably apply the same doctrine to arguments of invalid delegation of legislative power to the executive in the area of foreign affairs and national security. Given the temporal proximity to United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) of Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), it appears the Court has assumed that even if the delegation doctrine was applicable in other contexts, it would not apply in the area of foreign affairs. Of course, more recently the Court has upheld extremely broad delegations of legislative authority. *See, e.g.,* Lichter v. United States, 334 U.S. 742 (1948).

26. Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978).

27. *See, e.g.,* United States v. Nixon, 418 U.S. 683, 706-07 (1974); United States v. Reynolds, 345 U.S. 1, 11 (1953).

28. For discussion see Warren & Brandeis, *The Right to Privacy,* 4 HARV.

state travel.[29] And the right of procreation you mentioned is considered as "among the rights of personal privacy protected under the Constitution."[30] By the way, the right to vote in state elections is not a fundamental right. The Court on numerous occasions has indicated that the federal Constitution "does not confer the right of suffrage upon any one."[31] Of course, where the state does grant the right to vote, it must do so on an equal basis.[32] The Court applies a strict scrutiny test in such circumstances because it views the franchise once granted, as "preservative of all [other] rights."[33]

OL: But I recall that the Court actually stated in *Yick Wo* that the political franchise of voting is "a fundamental right because preservative of all rights" and in 1964 in *Reynolds v. Sims,* the Court reaffirmed the same idea, stating:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise

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L. REV. 193 (1890); Note, *The Right to Privacy Today,* 43 HARV. L. REV. 297 (1929); Bohlen, *Fifty Years of Torts,* 50 HARV. L. REV. 725 (1937); Nizer, *The Right of Privacy—A Half Century's Developments,* 39 MICH. L. REV. 526 (1941); Feinberg, *Recent Development in the Law of Privacy,* 48 COLUM. L. REV. 713 (1948). The Court's discussion of judicial antecedents appears in the various opinions in Griswold v. Connecticut, 381 U.S. 479 (1965). A similar incremental sequence occurred in the development of the fundamental right to marry. *See* Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978). Concerning the development of the fundamental right of personal choice in matters of family life, see Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

29. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941); Shapiro v. Thompson, 394 U.S. 618 (1969).

30. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 35 n.76 (1973).

31. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875), *quoted with approval in* Rodriguez v. Popular Democratic Party, ___ U.S. ___, 102 S. Ct. 2194, 2199 (1982). In *Rodriguez,* the Court observed that "the right to vote, *per se,* is not a constitutionally protected right." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973).

32. Of course the same is true of the right to an appeal. *See* Douglas v. California, 372 U.S. 353 (1963). In situations abridging rights which *where* granted are subject to heightened analysis, the Court often requires that the right be absolutely denied to justify relief. *See* Ross v. Moffitt, 417 U.S. 600 (1974); Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382 (1982).

33. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

> the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[34]

Isn't this true of the right to survive? After all, if we cease to exist, no rights—voting, expression, etc.—are preserved. And given this, why not an implied constitutional duty to eliminate the threat to survival now—since it is absurd to wait until our extinction is certain to occur.[35]

JP: Your analysis might apply in cases where the state grants a right not naturally held by its citizens and where there is a nexus between that right and exercise of other constitutional rights. The Court recently has gone one step further, holding that deprivation of access to a basic education (also not a fundamental right) in certain contexts, is subject to a heightened level of scrutiny.[36] But there, as in the case of voting, a substantive nexus was found between the right granted and other explicit rights in the Constitution—e.g., freedom of expression guaranteed by the First Amendment. There simply is no substantive connection between your proposed right of survival and any existing constitutional rights. Further, your existence is not granted by the State, but is acquired through natural processes beyond the control of the State.[37] Aren't we back to a natural law argument?[38]

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34. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). *See also* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966).

35. In another context, less fraught with an imminent threat to national security, the Court adopted the gravity of the evil test, which *mutatis mutandis,* appears applicable here. *See* Dennis v. United States, 341 U.S. 494, 510 (1951). This test was most recently used by Justice Burger in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 562 (1976).

36. Where children of aliens unlawfully present in the United States were absolutely denied access to public education, the Court in Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382 (1982) appears to apply the middle level review utilized in gender discrimination, Craig v. Boren, 429 U.S. 190 (1976); Mississippi Univ. for Women v. Hogan, ___ U.S. ___, 102 S.Ct. 3331 (1982), and illegitimacy-legitimacy classifications. Mills v. Habluetzel, ___ U.S. ___, 102 S. Ct. 1549 (1982).

37. *But see* Roe v. Wade, 410 U.S. 113 (1973).

38. Of course, in earlier times incorporation of natural law into our jurisprudence was not unusual. *See generally* Corwin, *The "Higher Law" Back-*

OL: I suggest that there is a clear nexus to the explicit guarantee of a right to life, which cannot be taken without affording due process of law. Further, life cannot be taken in a manner that violates the Eighth Amendment's proscription of cruel and unusual punishments. The Court has held invalid imposition of capital punishment on a robber, even when he is present at a robbery where a murder is committed, since robbery is not a crime "so grievous an affront to humanity that the only response may be the penalty of death."[39] We have not even committed a crime. Where is our due process? Isn't imposition of extinction cruel and unusual? Isn't the psychological torment of a nuclear sword of Damocles itself a cruel and unusual punishment?

JP: The short of it is that the state is not imposing any punishment on anyone. All the provisions you cite were not designed to protect survival of the species. The Court's resolution of the arguments you raise is adumbrated in its opinion in the student paddling (beating) case holding the Eighth Amendment not applicable.

> The prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer,* 408 U.S. 471 (1972).[40]

I think you can see the difference. It's like the black citizen subjected to the existence of a racially segregated park (unconstitutional),[41] as

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ground of American Constitutional Law, 42 HARV. L. REV. 149 (1928), 42 HARV. L. REV. 365 (1929). This is no longer fashionable. Today "no one wants to be called a natural lawyer. Natural law insists that what the law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong." Dworkin, *"Natural" Law Revisited,* 34 U. FLA. L. REV. 165 (1982).

39. Enmund v. Florida, ___ U.S. ___, 102 S. Ct. 3368, 3377 (1982) (quoting from Gregg v. Georgia, 428 U.S. 153, 184 (1976)). *See also* Coker v. Georgia, 433 U.S. 584 (1977).

40. Ingraham v. Wright, 430 U.S. 651, 669 (1977).

41. Evans v. Newton, 382 U.S. 296 (1966).

opposed to having no park at all (constitutional).[42] But even if I were to agree that there was a fundamental right somehow involved, and a concomitant duty to eliminate a threat to our individual and collective existence, that would at best only impose a standard of strict scrutiny. This is not an absolute and automatic test invalidating government action or inaction. And in every instance where the state considers its very existence in peril, the Court has found a sufficiently compelling governmental interest to justify subordination of any right proposed—whether under the First Amendment,[43] privacy[44] or even the right not to be subjected to invidious racial classifications subsumed within the due process clause of the Fifth Amendment.[45] As a noted constitutional scholar has concluded: "The Court has never ruled against the state in any matter of consequence."[46]

And so, my friend, our conclusion is that the Court will not involve

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42. Evans v. Abney, 396 U.S. 435 (1970).

43. *See, e.g.,* Barenblatt v. United States, 360 U.S. 109 (1959). A national security interest can justify even a prior restraint. Near v. Minnesota, 283 U.S. 697, 716 (1931). *See also* New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring).

44. Roe v. Wade, 410 U.S. 113 (1973). It is interesting that the Court in *Roe* cited favorably *Jacobson* and *Bell:*

> [I]t is not clear to us that the claim asserted . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11, 49 L. Ed. 643, 255 S. Ct. 358 (1905) (vaccination); Buck v. Bell, 274 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927) (sterilization).

410 U.S. at 154.

45. The due process clause of the Fifth Amendment prohibits invidious discrimination. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Accordingly, strict scrutiny is applied where racial classifications are employed—a doctrine that also was developed only incrementally over a considerable period of time. *See* Powell, *Carolene Products Revisited,* 81 COLUM. L. REV. 1087 (1982); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). Even so, the Court justified severe restrictions on the rights of citizens of Japanese ancestry during World War II based on "pressing public necessity" and "the military urgency of the situation." Korematsu v. United States, 323 U.S. 214, 216, 223 (1944).

46. A. MILLER, DEMOCRATIC DICTATORSHIP 194 (1981).

itself in this dispute. This choice is really ours to make. The bottom line is eloquently expressed by Jonathan Schell:

> One day—and it is hard to believe that it will not be soon—we will make our choice. Either we will sink into the final coma and end it all or, as I trust and believe, we will awaken to the truth of our peril, a truth as great as life itself, and, like a person who has swallowed a lethal poison but shakes off his stupor at the last moment and vomits the poison up, we will break through the layers of our denials, put aside our fainthearted excuses, and rise up to cleanse the earth of nuclear weapons.[47]

47. J. SCHELL, THE FATE OF THE EARTH 231 (1982).