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REMARKS

WHO OR WHAT KILLED THE PHILADELPHIA CONSTITUTION?*

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Let me explore at the outset what my title presumes; namely, that the document crafted by our Founding Fathers in Philadelphia over the course of the summer of 1788 is a dead letter.[1] Many, if not most, Americans—particularly

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1. Throughout I write of the Philadelphia Constitution; that is, the Constitution *sans* the first ten amendments. I do so because I want to avoid a controversy that would only cloud the basic issue with which I am dealing. As Ralph Rossum points out there is a distinct tendency today to view the original Constitution and the Bill of Rights as separate and even antagonistic documents. When, for instance, Constitutional Law texts, as they frequently do, accord separate treatment to the Bill of Rights and individual rights, they suggest, as Rossum puts it, "that the basis of individual rights is in not the Constitution itself [the Philadelphia Constitution] but the Bill of Rights and the Fourteenth Amendment." RALPH ROSSUM, "THE FEDERALIST'S UNDERSTANDING OF THE CONSTITUTION AS A BILL OF RIGHTS," SAVING THE REVOLUTION, 220 (Charles R. Kessler ed. 1987).

That the Federalists did not look upon the Bill of Rights as altering the basic constitutional design is evident from Madison's remarks in the first session of the House of Representative supporting the introduction of those provisions that later would form the corpus of the Bill of Rights. At the conclusion of his address outlining his version of rights, he assures the Federalist majority "that nothing is in contemplation, so far as I have mentioned, that can endanger the beauty of the Government in any one important feature, even in the eyes of its most sanguine admirers." While he maintains that the Constitution will enjoy greater support with the addition of rights, he is quick to add that this is done "without weakening its frame or abridging its usefulness in the judgment of those who are attached to it." *Annals*, 1st Congress, 1 session, 441. Madison had the difficult task of dealing, on one side, with the Antifederalists in Congress who wanted amendments that would weaken federal authority and, on the other, with the Federalists were ill-disposed towards any alterations of or

those who can recall their college or high school classes in civics or American government—might well be startled by this presumption. Certainly no such presumption seems to be shared by those elites (e.g., politicians, lawyers, media commentators, editorial writers) that are so influential in shaping our political understanding and discourse. Moreover, the institutions and processes established by the Philadelphia Convention are, for the most part, still very much a part of our political landscape. How, then, can it be said that the Philadelphia Constitution is no longer operative; that it no longer enjoys the status of "fundamental law" whose provisions could only be changed through the amendment process?[2]

DEATH OF THE PHILADELPHIA CONSTITUTION

I have concluded, for reasons that I will spell out in due course, that the Philadelphia Constitution is dead because, even though the institutions and processes it established are still there, its character—one might say its "essence"—has changed to such an extent that today it bears only a nominal connection to its 1789 version. I hasten to add that I am not alone in this assessment. Many close students of the political trends and developments of the Twentieth Century have commented on the drastic changes that have taken place with regard to one or more of the fundamental principles embodied in the Constitution.[3] Consider

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additions to the Constitution.

A basic Federalist argument, articulated by Hamilton in THE FEDERALIST, was that prohibiting the national government from the exercise of powers it did not possess could be used to argue that the powers of the national government were plenary, rather than limited to those delegated.

Clearly, the judicial application of the Bill of Rights to the States via the Fourteenth Amendment has changed the fundamental character of the Philadelphia Constitution. On this see text below.

2. The basic argument offered by Hamilton for judicial review in Federalist no. 78 was that the Constitution represented "fundamental law" that could not be altered by the institutions it created; i.e., the "constitutive" will of the people embodied in the Constitution can be altered by the "political" of the people operating through institutions by the constitutive will. "Until the people have by some solemn and authoritative act annulled or changed the established form, it is biding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act." *See* THE FEDERALIST NO. 78 at 405 (Alexander Hamilton) (George W. Carey & James McClellan eds. 1990). In Federalist No. 53, Madison put the matter this way: Americans, more than the people "in any other country," seem to understand the "important distinction... between a constitution established by the people, and unalterable by the government; and a law established by the government, and alterable by the government." *See* THE FEDERALIST NO. 53 at 227 (James Madison) (George W. Carey and James McClellan, eds. 1990).

It should be noted that essentially the same line of argument was used by Marshall in Marbury v. Madison, 5 U.S. 137, (1803) in justifying judicial review. In other words, "originalism," in the sense of preserving the "constitutive will" of the people, served as a fundamental starting point for justifying judicial review in the first place.

3. Examples of thoughtful works that indicate in detail the nature and effect of these changes would include: JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION (Henry Regnery Company, 1959); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (University of Oklahoma Press, 1989); and CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL (Atherton Press, 1963). None of the authors, it is true, explicitly subscribe to my position regarding the death of the Constitution. Each would seem to hold that restoration of the original design is possible through reform of one sort or another. But their works when taken together unmistakably show that the structural integrity of the Philadelphia Constitution has been damaged beyond repair. Burger points to the centralization which has culminated in a unitary, not a federal system; Hyneman to the emergence of an unrestrained judiciary that has usurped legislative functions; and Burnham to the alarming

Theodore Lowi's *The End of Liberalism*, certainly one of the most notable, comprehensive, and widely read books on the character of the American system. When this provocative work first appeared in 1969, shortly after Richard Nixon assumed the presidency, Lowi wrote with foreboding "that the ideologies and policies" that seemed to be driving American politics "were threatening to produce a deep and permanent change in the American constitution."[4] Consequently, he subtitled his book, "Ideology, Policy, and the Crisis of Authority." Ten years later, when drafting the second edition of this work, he was convinced that the challenges had not been met; that "a series of adjustments" had cumulatively produced "fundamental changes" in our constitutional structure to the extent that we were "operating under" a new, but "unwritten constitution."[5] Accordingly, he subtitled his second edition, "*The Second Republic of the United States.*"

Unlike many of his colleagues on the Left, Lowi did not look favorably upon this new constitutional order. By way of indicating the nature of his concerns and discontents, he offered up his version of this new, "unwritten constitution." In his account, the changes in the regime first introduced by Franklin Roosevelt's New Deal were adopted in the policies of John Kennedy and notably advanced by those of Lyndon Johnson, particularly his "Great Society" initiatives. These changes, in effect, were finally authenticated by the embrace of Richard Nixon, who lent them a bi-partisan character.

Character of New Constitution. It is instructive to examine what Lowi understands to be the character of this new, unwritten constitution because it so closely accords with the prevailing and accepted practices of our system today. Its "*PREAMBLE*," as he perceives it, declares that "There ought to be a national

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growth of presidential power and authority.

Perhaps Burnham might agree with my thesis. Writing in 1959 and stressing the indispensability of Congress for the preservation of liberty, he offers a pessimistic prognosis for both liberty and the Framers' Constitution. In his last chapter he concludes that the survival of Congress is "not probable," given the developments and trends of the preceding decades. By survival he means a Congress that is truly independent, with a will of its own, capable of controlling the bureaucracy and limiting the president. See *supra* note 13.

Albert Jay Nock certainly must be ranked among the first to perceive the collapse of the Philadelphia Constitution. Writing that the Congressional elections of 1934 established a new regime, he observes:

> This regime was established by a coup D'etat of a new and unusual kind, practicable only a rich country. It was effected, not by violence, like Louis-Napoleon's, or by terrorism, like Mussolini's, but by purchase.... Our national legislature was not suppressed by force of arms, like the French Assembly in 1852, but was bought out of its functions with public money... the consolidation of the coup D'etat was effected by the same means; the corresponding functions in the smaller units were reduced under the personal control of the Executive.

See ALBERT JAY NOCK, OUR ENEMY, THE STATE (Hallberg Publishing, 1994) (1935).

For more recent appraisals of our system in the Nockean vein, *see* ROBERT NISBET, TWILIGHT OF AUTHORITY (Oxford University Press, 1975), and ROBERT NISBET, THE PRESENT AGE (Harper and Row, 1988). On Nisbet's showing, the decline of the original system has been precipitous since the New Deal. He maintains that even under Reagan's presidency it continued virtually unabated.

4. THEODORE J. LOWI, THE END OF LIBERALISM, xi (W.W. Norton 2 ed. 1979).

5. *Id.*

presence in every aspect of the lives of American citizens. National power is no long a necessary evil, it is a positive virtue."[6] Article I, in keeping with this belief, provides that the "primary purpose" of the "national government" is "to provide domestic tranquility by reducing risk," either "fiscal" or "physical." Thus, the new constitution provides that the "national government" shall have "sufficient power to eliminate" environmental threats and "economic uncertainty."[7] Article II insures that the presidency shall be the most powerful branch, by authorizing it "to use any powers, real or imagined, to set our nation to rights by making any rules or regulations the president deems appropriate."[8] By way of pointing to one of his basic criticisms of this new order, Lowi also sees this article as authorizing the president to "sub-delegate this authority to any other official or agency."[9] In turn, the right to make "all such rules and regulations is based upon"[10] the morality implicit in this new constitution, namely, "that the office of the presidency embodies the will of the real majority of the American nation."[11] Article III, consonant with this presidential supremacy, pictures Congress as merely a "consensual body"[12] and, though possessed of "legislative authority,"[13] it "should limit itself to the delegation of broad grants of unstructured authority to the president." [14] Article IV of the new constitution enthrones the bureaucracy "whose right to govern is based upon ... the delegations of power flowing from Congress ... and the authority inherent in professional training and promotion through and administrative hierarchy."[15] The judicial branch, dealt with in Article V, is empowered to ride herd on the states through the vigorous enforcement of the Fourteenth Amendment, "but in no instance shall the courts review the constitutionality of Congress's grants of authority to the president or to the federal administrative agencies."[16] Article VI, as he would have it, holds that "The public interest shall be defined by the satisfaction of the voters in their constituencies. The test of the public interest is reelection."[17] Finally, by way of indicating the transformation of our ordinary political processes, Lowi points to the pervasiveness of "iron triangles,"[18] i.e., "actual policy-making will not come from voter preferences or congressional enactment but from a process of tripartite bargaining between the specialized administrators, relevant members of Congress, and the representatives of self-selected organized interests."[19]

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6. *Id.*
7. *Id.* at xi.
8. *Id.*
9. *Id.* at xii.
10. THEODORE J. LOWI, THE END OF LIBERALISM, xii (W.W. Norton 2 ed.,1979).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. THEODORE J. LOWI, THE END OF LIBERALISM, xii (W.W. Norton 2 ed.,1979).
17. *Id.*
18. *Id.*
19. *Id.*

Other observers, though far from sharing Lowi's political orientation, would agree with much of what he has to say about the altered nature of our political landscape. Christopher DeMuth, president of the American Enterprise Institute, sees the emergence of "the new Executive State" in the United States; a regime in which the federal bureaucracy, through the broad authority delegated to it by Congress, intimidates and burdens individuals, small businesses, corporations, interests of various descriptions, as well as state and local governments, with a plethora of stifling and burdensome regulations. On his showing, the delegation of broad, often undefined, authority has drastically transformed the distribution of powers specified in the Constitution and undermined republican government. The Environmental Protection Agency, for instance, by simply mandating marginal improvements in the quality of air places enormous financial burdens on the states, localities, and private sector; burdens which many of these entities are simply unable to meet. Worse still, in these and like cases, those sectors most adversely affected by such mandates often seek "waivers" to delay compliance or otherwise soften the impact of the new regulations, thereby placing themselves permanently and more firmly under the control of the bureaucracy. Or the bureaucracy may actually legislate by setting down unauthorized or unwarranted rules and regulations. Under Title IX of the Education Act, DeMuth points out, the bureaucracy has issued rules that mandate colleges and universities to "equalize" men's and women's sports programs, both in terms of participation and financial commitment—a policy that has forced some institutions to drop certain men's sports. Yet, no such goal was expressly set by Congress, nor, perhaps, could it have been because of the opposition it would have aroused. Often, though, the bureaucracy is not so forthcoming about its activities. For example, the FCC, with the authorization of Congress, imposes a tax on long distance service that yields 5 billion dollars annually to provide computers and internet access for the public schools. At the same time, however, the FCC has cautioned telephone companies against itemizing this tax on bills to their consumers so that it might remain hidden. DeMuth observes that the government has even resorted to intimidation and extortion to augment its revenues and increase its regulatory control over perfectly legal enterprises. Such, at least, is the case with the gun manufacturers and tobacco industry.[20]

The conservative columnist George Will commenting on DeMuth's speech echoes certain salient aspects of Lowi's lament:

> We are not just now losing limited government as the Founders conceived it and as Americans debated it from the founding until the second half of the 20th century. That conception and that debate are history. Several presidencies, particularly those of FDR and LBJ, and compliant Supreme Courts long ago interred the ideas that the federal government is limited by the Constitution's enumeration of its powers; that significant spheres of life are fenced off from the federal government; that there

20. Christopher C. DeMuth, After the Ascent: Politics and Government in the Super-Affluent Society, Francis Boyer Lecture at American Enterprise Institute (Washington, D.C. February 15, 2000).

are some human wants and grievances that are not properly public business.[21]

The Undermining of Original Principles. Extrapolating from the commentary of Lowi, DeMuth, and others, it is plain that the Philadelphia Constitution has been undermined by two developments: a derangement in the functions of its major institutions, legislative, executive, and judicial; and an enormous centralization of powers.[22] At the risk of dwelling on what is already common knowledge to the most casual student of the American system, let me briefly examine these two developments.

Perhaps the best way to illustrate the extent of the derangement of the legislative, executive, and judicial functions is to recall what Madison writes in *The Federalist* about the role of and potential dangers posed by legislatures in republican regimes at that point when he is discussing the nature of our system of separated powers. He remarks in Federalist No. 51 that "In republican government, the legislative authority, necessarily, predominates."[23] In previous essays, most notably No. 48, he spells out in no uncertain terms the need to bear in mind that the legislature is the center of power in republics. The executive "in a representative republic," he informs us, "is carefully limited both in the extent and the duration of his power," whereas "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."[24] The legislature he cautions "is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursing the objects of its passions, by means which reason prescribes."[25] He concludes this warning with a stern admonition: "it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions."[26]

Madison did not think the task of keeping the legislature in check would be easy. "Its constitutional powers being at once more extensive and less susceptible of precise limits," he remarks, means that "it can with the greater facility, mask

21. George F. Will, *Federal Swelling*, WASHINGTON POST, February 24, 2000, A24.

22. This is quite understandable in light of the fact that over the years—at least since 1879 when Woodrow Wilson wrote of the virtues of English cabinet government—Progressive reformers have been intent on overcoming the centripetal forces of the separation of powers and centralizing power in the federal government. For an excellent anthology of various reform proposals *see* REFORMING AMERICAN GOVERNMENT, (Donald L. Robinson, ed. 1985). This anthology contains an excellent bibliography of works dealing with the changes in the constitutional order, as well as the presumed need for even further consolidation of powers.

Given the goals of Progressivism, it is hardly surprising that the modern judiciary attracts scarcely any attention in their reform programs. From another perspective, however, this lack of attention casts doubts on the integrity of their movement. They would reform the electoral processes, the Congress, the presidency, and the political parties in order to achieve greater electoral accountability. Yet, they seem unconcerned about the accountability of judiciary that now exercises vast powers, well beyond those ever contemplated by the Founders.

23. *See* THE FEDERALIST NO. 51 at 67 (James Madison) (George W. Carey and James McClellan, eds. 1990).

24. *See* THE FEDERALIST NO. 48 at 256 (James Madison) (George W. Carey and James McClellan, eds. 1990).

25. *Id.*

26. *Id.*

under complicated and indirect measures, the encroachments which it makes on the coordinate departments."[27] By contrast, the executive power is "restrained within a narrower compass" and is "more simple in nature."[28] The judiciary, he goes on to observe, is "described by landmarks, still less uncertain" than those that mark out executive powers. For these reasons, he concludes that "projects of usurpation by either of these departments, would immediately betray and defeat themselves."[29]

To this we can add that reading the Philadelphia Constitution with an innocent eye clearly reveals that the Congress was intended to be the primary and most powerful branch. We find that it is treated with in Article I, not article II or III. We see that virtually all the powers of the proposed national government are delegated to it. We learn that Congress possesses the power, provided the requisite majorities can be had, to police the other departments through the impeachment process.[30] These are among the most prominent reasons why the Framers, in order to maintain the separation between branches—a separation they regarded as essential to prevent tyranny—followed a policy of strengthening the weaker branches by giving a qualified veto to the president and life tenure for good behavior to the judges, while weakening the stronger branch, the legislature, by dividing it into two branches.

As Lowi observes, increasingly over the course of the Twentieth Century the presidency has come to be viewed as the one office that represents all of the American people,[31] whereas Congress is normally pictured as parochial, as often

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27. *Id.*
28. *Id.*
29. *Id.*
30. As Gary Wills puts this:

> Congress is given what might be called, 'shoot-out' power, the weapons for final showdown with both other branches. Suppose a President refuses to execute the laws passed by Congress. Congress has a resort: It can impeach the President. The President, unlike even limited or constitutional monarchs, cannot dissolve his parliament. He can veto; but if the Congress overrides, he has no further resort.

"The Supreme Court," he continues, "is in the same situation." While it can declare a law unconstitutional, Congress "can amend the Constitution on the contested point." More: "Congress has a variety of weapons" to deal with the Court —"it can impeach the justices; it can refuse to levy funds for enforcing the Court's decision; it can pass constitutional laws on related matters that make the Court's original declaration of unconstitutionality nugatory; it can change the makeup of the Court; it can amend the Constitution to deny judicial review." *See* GARY WILLS, EXPLAINING AMERICAN: THE FEDERALIST, 128 (New York: Doubleday, 1981). To the point that the Framers intended that Congress be the principal department government, *see also* his more recent work: GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (Simon & Schuster, 1999).

What Wills says is clearly the case if we use the Philadelphia Constitution as our referent. But political considerations and deep seated public attitudes regarding what is politically "legitimate" have enormously undermined the original powers of Congress. For Congress to exercise the some of the major constitutional prerogatives cited by Wills seems as likely as the British monarch vetoing an act of Parliament. And that is a measure of how far we have departed from the original constitutional understanding.

31. Woodrow Wilson was among the first to exalt the Presidency in terms that have become commonplace today. Writing in 1908, he draws the following picture of the president:

> [h]e is... the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has not other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the

standing in the way of "reform" and "progress."[32] What is hardly disputed nowadays is that the president has emerged over the decades as the "chief legislator," as the one who sets down the legislative agenda to a far greater extent than the Congressional leadership. In the area of foreign affairs he stands almost alone with what now seems an authority to commit American armed forces at his sole discretion.[33] The courts for their part have to an increasing extent in recent times embraced an "activism" that provides ample room for them to legislate, so

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country, and no other signal force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest.

See WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, (Columbia University Press, 1964) (1908).

Clinton Rossiter, writing nearly fifty years later speaks in similarly glowing terms about the representative character of the president and his powers. *See* CLINTON ROSSITER, AMERICAN PRESIDENCY, 18-21 (Harcourt, Brace, and Company, 1956). "The President," he writes, "is the American people's one authentic trumpet, and he has no higher duty than to give a clear and certain sound." At another point he remarks: "Throughout our history there have been moments of triumph or dedication or frustration or even shame when the will of the people—the General Will, I suppose we could call it—demanded to be heard clearly and unmistakably." He laments that "It took the line of Presidents some time to grasp the meaning of this function," though modern presidents he assures us do. Rossiter holds that, as a matter of constitutional duty, the president is "Chief of State, Chief Executive, Chief Diplomat, Commander in Chief," as well as "Chief Legislator." To this he adds the distinctly non-constitutional functions, among them, "Chief of Party" and "Chief of Prosperity," which taken together with the official duties, render the office "greater than and different from the sum of its parts." In other words, if we are to judge by Rossiter's account, Wilson's vision of the presidency had come to be a reality by the middle of the Twentieth Century.

32. *See* WOODROW WILSON, *supra* note 31. Woodrow Wilson seems to have set the tone for the modern criticism of Congress. In 1884, he wrote: "Though honest and diligent, it is meddlesome and inefficient" exhibiting the same "clumsiness" and "distemper" that characterized the "first parliaments of William and Mary." He quotes extensively from Walter Bagehot's ENGLISH CONSTITUTION to convey the character of the "distemper" displayed by the "Lower House" of parliament: "'jealous'," "'fickle'," and "'factious'." And Wilson, again quoting from Bagehot, ascribes the causes for this distemper to the absence of "recognized leaders" to provide "guidance," the lack of "adequate information," and the totally inadequate "organization out of which alone a definite policy can come." WOODROW WILSON, CONGRESSIONAL GOVERNMENT A STUDY IN AMERICAN POLITICS, 204-05 (Meridian Books, 1956) (1884).

In more recent decades, critics of Congress have emphasized "gridlock" or "deadlock," the product of the irresolution of Congress. Lloyd Cutler's comments are typical. Congress now represents "many diverse and highly organized interest groups," many of them "single interest" groups, that stand ready to "reward or punish" legislators. Thus, it is not difficult to see why it acts decisively only when "there is a large consensus induced by some crisis." "To form a Government." See REFORMING AMERICAN GOVERNMENT, 20 -1 (Donald L. Robison, ed. 1985). Perhaps the most important and comprehensive work since World War II in stressing the gridlock and advancing the case for "reform" that would eliminate the congressional stumbling blocks to enactment of Progressive policies is JAMES MCGREGOR BURNS'S, THE DEADLOCK OF DEMOCRACY, (Prentice-Hall, 1963).

Much of the criticism of Congress stems from the observation that, because it represents special interests, it speaks with "many tongues," whereas the president speaks with but one "authentic" voice. On the intriguing question of which institution, the president or Congress, best represents the views of the American people *see* WILLMOORE KENDALL, "THE TWO MAJORITIES" WILLMOORE KENDALL CONTRA MUNDUM, (Nellie Kendall, ed. 1971).

33. An excellent overview and analysis of the president's growing power in this area is ROBERT SCIGLIANO, "The New Understanding of the President's War Power," LIBERTY UNDER LAW: AMERICAN CONSTITUTIONALISM, YESTERDAY, TODAY, AND TOMORROW, 135 (Kenneth L Grasso and Cecilia Rodriguez Catillo, eds. 1998). Scigliano writes: "Whatever their precise number, the instances in which presidents prior to the Second World War made war independently of Congress were few. Moreover, except in the case of the Mexican War, they were not of the magnitude of the instances that have occurred since that time." *Id.*

much so that is no longer true, as Madison wrote, that the "legislative department alone has access to the pockets of the people."[34]

The second development, centralization, is related to the derangement of functions, but it is sufficiently distinctive to merit separate attention and analysis. Again, if we take *The Federalist* as our guide, we find that the Framers clearly intended that there should a division of powers between the state and national government. In Federalist no. 39, that paper devoted to discussing the federal character of the proposed union, Madison writes that the proposed government "cannot be deemed a *national* [unitary] one . . . since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[35] Hamilton, writing in Federalist No. 9, seemed to share much the same view. As he put it: "The proposed Constitution, so far from implying an abolition of the State Governments, makes them constituent parts of the national sovereignty by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power."[36]

The notion that the states possess "inviolable sovereignty" or "certain exclusive and very important portions of sovereign power" has long since vanished.[37] The last century witnessed the application of the Bill of Rights to the states through the Fourteenth Amendment, a process which render the federal courts a monitor of the most important state actions.[38] Indeed, with the rise of a

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34. See THE FEDERALIST NO. 48 at 256 (James Madison) (George W. Carey and James McClellan, eds. 1990). This, of course, is no longer the case. See Missouri v. Jenkins, 495 U.S. 33 (1990). It should also be noted that judicial remedies, whether for increased prison space or busing to achieve racial integration, have required increased expenditures by the states and national governments. In sum, with the acceptance of judicial activism, another manifestation of the breakdown of the Philadelphia Constitution, the traditional barriers to the judicial authority have disappeared.

35. *See* THE FEDERALIST NO. 39 at 1986 (James Madison) (George W. Carey and James McClellan, eds. 1990).

36. *See* THE FEDERALIST NO. 9 at 41(Alexander Hamilton) (George W. Carey and James McClellan, eds. 1990).

The best statement in THE FEDERALIST concerning the exact division of these powers if found in essay no. 45.

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberty and properties of the people; and the internal order, improvement, and prosperity of the State.

See THE FEDERALIST NO. 45 at 238 (James Madison) (George W. Carey and James McClellan, eds. 1990).

This formulation provides an excellent benchmark against which we can measure the degree to which powers are centralized today. In fact, for all intents and purposes, we are a unitary, not a federal system; there is no area mentioned among those "reserved to the several States" over which the national government does not exercise final control.

37. On the extent to which this formulation was accepted in the ratification debates and conventions, as well as by the leading figures in the Founding period *see* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (UNIVERSITY OF OKLAHOMA PRESS, 1987).

38. Charles Warren, the noted constitutional historian, warned shortly after the decision in *Gitlow v. New York*, 268 U.S. 652 (1925)—the first instance of incorporation— that once the process of

judicial activism the courts have legislated, in effect, dictating to the states what they must do to comply with mandates that presumably derived from the Constitution. The courts have even assumed control over prisons and taken on the responsibilities of school superintendents.[39]

While the role of the courts has attracted attention, the intrusion of Congress into what was once regarded the domain of the states through the use of its commerce power is not so widely recognized.[40] The columnist John Leo draws attention to the bizarre way this power is used by Congress. Commenting upon the Violence Against Women Act enacted in 1994, he writes: "In passing this legislation, Congress cited its all-purpose excuse of overriding or duplicating states' jurisdiction, the commerce clause of the Constitution. Congress said that violence against women has a significant effect on the economy... by impeding women's travel and employment." Leo goes on to note, "But if this is right, why couldn't Congress cite the cost of all violence directed at females (41 percent of the annual total) as well as the violence directed at males (59 percent)? Surely all violence, not just the 'gender based' variety, has an economic effect." He rightly concludes: "The commerce clause is an all-purpose pretext for dubious federal legislation." [41]

WHO OR WHAT IS RESPONSIBLE FOR THE DEMISE OF THE CONSTITUTION?

The foregoing only presents only the bare outline of the reasons for holding

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incorporation had been set in motion (something the Court up this point had resisted) there would be no logical stopping point. He saw that this process would eventually lead to the demise of federalism by allowing the federal courts to supervise and control the states in those areas traditionally thought to be among the states' reserved powers. *See* Charles Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

39. For an excellent critical discussion of the Court's activities in this area *see* chapter five, "Rule by Judges," in PAUL CRAIG ROBERTS & LARRY M. STRATTON, THE NEW COLOR LINE (Regnery Publishing, 1995).

40. In this regard the constitutional law courses in most political science departments would seem to be different from those in the law schools. The law school courses with which I am familiar do place an emphasis upon the commerce power, whereas those in the political science departments stress the Bill of Rights, the Fourteenth Amendment and civil liberties.

41. John Leo, *Dubious results from well-intentioned fixes*, WASHINGTON TIMES, February 1, 2000, at A19. It is true that in San Antonio School District v. Lopez, 514 U.S. 549 (1996), the Court for the first time in sixty years invalidated a congressional law based on the commerce power. But this decision is likely to be an aberration for at least two reasons. First, Congress did not attach a "finding" to legislation that was invalidated; that is, a finding showing the relationship between the legislation (School Gun Safety Zone Act) and interstate commerce. Second, the Court will come up against enormous obstacles in formulating rules or formulas that can be uniformly applied to distinguish between legitimate and illegitimate uses of the power; i.e., when the objective is regulation of interstate commerce versus when it is used as a "cover" to usurp state "police powers."

The federal government's successful effort to raise the drinking age to 21 illustrates the powers Congress has at its disposal to force the states to comply with its wishes. In this instance, the Congress threatened to withhold highway funds from recalcitrant states; a bullying tactic that is scarcely inconsequential given the number and scope of grant-in-aid programs. If this tactic had not worked, however, Congress was prepared to use its commerce power to cut off shipments of alcohol to those states refusing to raise the drinking age. Any of the Court's landmark decisions on the commerce power—e.g., *U.S. vs. Darby*, 312 U.S. 100 (1941)—would clearly have supported such congressional action, whereas under the Philadelphia Constitution a constitutional amendment would have been required.

that the Philadelphia Constitution has, so to speak, expired. The fact is that volumes could be written by way of elaborating on what has been said. For many observers the question is not whether the Philadelphia Constitution has survived, but rather who or what killed it. On this score at least three general answers are frequently offered.

Founders. An obvious one is that the Framers miscalculated; that they went too far in weakening the legislature relative to the other branches; that they could not see the obvious advantages that the chief executive would enjoy in the political struggles to come. Certainly, they could not have anticipated the development of political parties in a fashion that would allow presidents to claim, as Andrew Jackson did, that they represent the people every bit as much as the Congress. Nor could they have anticipated that the Supreme Court would play the role that it has come to play, particularly in the second half of the Twentieth Century after its decisions in the Desegregation cases.[42] Then, too, the Framers seemed to be genuinely concerned that the states would encroach on federal authority rather than *vice versa.* For this reason they did not perceive that the states would need protection against encroachments by the national government. In sum, it might be said that the Framers were not prescient enough; they could not anticipate changes in the political landscape.

Amendments. Many critics of our present centralized system offer still another explanation. They point to the amendments that have been added, placing great stress on the 17th Amendment that provided for the direct election of Senators.[43] In their view, this virtually removed the interests of the states from

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42. I refer here to Brown v. Board of Education 349 U.S. 294 (1954) and Bolling v. Sharpe, 347 U.S. 497 (1954). With these decisions, in the words of Richard E. Morgan, we "ushered into the modern era of constitutional law: Courts were now seen as a source of governmental power that could force unpopular changes that could be secured through representative institutions." "If judges," he points out, "could sidestep the electoral and legislative processes, by bypassing the very forms of the Constitution, in order to serve the higher good of ending Jim Crow, then judges could do many things about which the country was deeply divided." Richard E. Morgan, *Coming Clean about Brown*, 6 CITY JOURNAL 48-49 (Summer, 1996).

In these cases, quite unlike early substantive due processes cases—e.g., Lochner v. New York, 198 U.S. 45 (1905)—the Court went beyond invalidating law to actually mandating prescribed action. In this sense, the Court did assert an unprecedented power, not supported by the original justifications of judicial review set forth by Hamilton in Federalist no. 78 or Marshall's reasoning in Marbury v. Madison, 5 U.S. 137 (1803). On this point, see GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION, (Indianapolis: Liberty Press, 1995). Moreover, in Cooper v. Aaron, 358 U.S. 29 (1958) the Court went a step further. As Charles S. Hyneman put it:

> In the opinion accompanying this decision, the Supreme Court made a series of statements which were intended —I do not see how there can be any doubt about the intent—to force this conclusion: What this Court says the Constitution means is exactly what the Constitution does mean, and all other public officials and branches of government, national and state, shall respect this Court's statements of the Constitutions means, no matter what other interpretation may seem to them to be clearly implied by the words of that document.

See CHARLES S. HYNEMAN, THE SUPREME COURT ON TRIAL, 78 (Prentice–Hall Inc., 1963).

43. For a superb article that maintains the Seventeenth Amendment dealt a fatal blow to the Framers' design of federalism *see* Ralph Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671 (Summer, 1999). For an informative and insightful examination of the politics and ideology behind the move for direct election of Senators *see* C. H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT (Transaction Publishers, 1995).

effective participation in the legislative processes, thereby opening the way for the national government to aggrandize state powers. Yet, this is questionable in light of the fact that the 16th amendment, passed when many Senators were elected by state legislatures (enough at any rate to block the amendment had they so chosen), has perhaps done more than any other to increase the powers of the national government vis-à-vis the states. Armed with the progressive income tax, the best source of revenue, the national government has assumed a dominant financial position that allows it to dictate to the states. Of course, there is no gainsaying the significance of the Fourteenth Amendment and the incorporation process in accounting for the decline of the states and the death of the Framers' system. This scarcely needs recounting here.

Congressional Powers. Still another explanation, as indicated in the remarks above, is the Supreme Court's reinterpretation of the commerce power that came about in the middle 1930's, an interpretation that cleared the way for Roosevelt II's New Deal and the emergence of the modern welfare state. Likewise, an expanded conception of the "general welfare," inherent in the New Deal goals, has also led to the national government assuming a far great role in controlling and directing the activities of states, primarily through literally hundreds of grant-in-aid programs. In this regard, Albert J. Nock's observations, written during the first term of Roosevelt II, are both appropriate and revealing:

> When the Johnstown flood occurred, social power [the private sector] was immediately mobilized and applied with intelligence and vigor. Its abundance, measured by money alone, was so great that when everything was finally put in order, something like a million dollars remained. If such a catastrophe happened now, not only is social power perhaps too depleted for the like exercise, but the general instinct would be to let the State [national government] see to it.[44]

And so it is today that one of the generally acknowledged responsibilities is to provide disaster relief to the states and localities, underscoring once again the primacy of the national government.[45]

THE BASIC CAUSE: PROGRESSIVISM

These and like explanations, however, including those proffered by Lowi, focus primarily on symptoms. Put otherwise, the Philadelphia Constitution and the principles it embodies have been "done in," so to speak, by an underlying

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44. *See* NOCK, *supra* note 3.

45. This generally accepted view of what constitutes the "general welfare" and the responsibilities of the national government have served to shrink and weaken the capacity of private subsidiary groups to provide needed social functions and relief. This comes about largely through a change of attitude, as much as from a reallocation of resources. On this score, Nock writes:

> If the State has bade such matters its business, and has confiscated the social power necessary to deal with them, why let it deal with them. We can get some kind of rough measure of this general atrophy by our own disposition when approached by a beggar. Two years ago we might have been moved to give him something; today we are moved to refer him to a State's relief-agency.... our instinct is to say that the State has already confiscated our quarter for his benefit, and he should go to the State about it.

Id. at 24.

ideological sea change. More specifically, the last century witnessed the growth and, finally, the dominance of Progressivism whose main outlines were set forth by Herbert Croly with the publication in 1911 of his major work, *The Promise of American Life.*[46] While Croly's original blue print has been modified over the decades, the core beliefs, assumptions, and objectives have remained the same.

Croly believed that "The American system stands for the highest hope of an excellent worldly life that mankind has yet ventured,—the hope than men can be improved without being fettered, that they can be saved without even vicariously being nailed to the cross."[47] But, as he writes in his opening chapter, this hope is gradually fading from sight, largely due to "prodigious concentration of wealth, and of the power exercised by wealth, in the hands of a few men."[48] His program to overcome these conditions and to realize the American potential involved, *inter alia*, "the complete emancipation of the individual"[49] which, in turn, meant transforming man's nature from acquisitiveness to disinterestedness so that individuals would willingly place the higher collective purpose and good above that of their self-interest. This required, as Croly put it, a drastic reform of the capitalist system, particularly its materialism and incentives. Individuals could never be fully emancipated so long as "mercenary motives" or "selfish acquisitive motives in the economic field"[50] prevailed over disinterested motives. "The only way in which work can be made entirely disinterested," he wrote, "is to adjust its compensation to the needs of a normal and wholesome human life."[51]

While it is beyond our purpose here to detail Croly's ambitious program, certain of its key characteristics should be noted.

Secular Humanism. Croly's thought bears a close relationship to what Vernon Parrington would later call the "French Romantic School" of thought in the American tradition; the school of thought that presumably dominated at the time of the Declaration of Independence.[52] For our purposes it is sufficient to note that Croly subscribed to certain basic tenets that are associated with the

46. HERBERT CROLY, PROMISE OF AMERICAN LIFE (Macmillan Company, 1909).
47. *Id.* at 13.
48. *Id.* at 23.
49. *Id.* at 417.
50. *Id.* at 415.
51. *Id.* at 417.
52. VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT, 275-76 (Harcourt, Brace and World, 1927). Parrington writes of the French romantic philosophy that it sought "a juster, more wholesome social order"; that it held "reason and not interests should determine social institutions" and "that the ultimate ends to be sought were universal liberty, equality, and fraternity."

Whereas he pictured the French philosophical approach as "humanitarian" and "appealing to reason and seeking social justice," he drew a dark picture of the opposing school of thought, "English liberalism." He regarded it as "self-centered, founded on the right of exploitation, and looking toward capitalism." *Id.*

Parrington fleshed out Progressive historicism that pictured the Constitution as a reactionary and undemocratic document designed to protect and advance the interests of the rich and well born. This version of history draws a sharp line between the values and ideals expressed in the Declaration of Independence and those found in the Constitution. While originally greeted with great skepticism, the Progressive account of our Founding period could be found in a large majority of college American history texts by middle of the Twentieth Century. *See* Douglass Adair, *The Tenth Federalist Revisited,* FAME AND THE FOUNDING FATHERS, (Trevor Colbourn, ed. 1974).

Enlightenment thinking that fueled the French Revolution.[53] One of the more important of these is secular humanism, a doctrine that is apparent in Croly's understanding of the "hope" which the American nation holds out, namely, an "excellent worldly life." This secular humanism is evident in other important dimensions of his thought. We should not, he maintains, simply "accept human nature as it is, but move it in the direction of improvement."[54] Not only does he maintain that human nature is capable of improvement, he goes on to quote approvingly from John Jay Chapman to the effect that "Democracy assumes perfection in human nature."[55] What is perhaps most telling is that Croly, in elaborating on his educational program to undo the acquisitive nature of man, sees no role for religion. Nor does he take into account the Christian understanding of the nature of man; that understanding which points to the limitations of worldly powers to transform human nature, particularly in the directions Croly desired, without the use of oppressive force.

Egalitarianism. A second major characteristic of progressive thought as set forth by Croly is egalitarianism. His egalitarianism goes far beyond "one person, one vote," equality before the law, or equal privileges and immunities. At the outset of his work, Croly indicates the dimensions of the equality. He agrees with John B. Crozier who had written some years earlier that the American nation was marked by a "broad equality of material and social conditions" such as "equal material opportunities, equal education, equal laws, equal opportunities, and equal opportunities to all positions of honor and trust."[56] Croly felt, however, that the subsequent concentration of wealth, which had led in due course to a concentration of power, had change all of this; that Crozier's picture of American society was rapidly disintegrating. In large measure, his concern was to restore the

53. Nicholas Capaldi's excellent analysis of the "liberal paradigm"—which corresponds to "Progressivism"—parallels our analysis. He differentiates between Enlightenments (e.g., Scottish, French) and identifies the philosophical sources of the elements of Enlightenment thought that are most prominent in American thought today. He also points to the same underlying tenets I have identified.

At the level of political tactics, Capaldi writes: "Until the later 1930s, the advocates of the liberal paradigm sought to introduce national reform by trying to capture, through democratic means, either the Presidency or the Congress. Failure to do so has led to an attempt to capture the Court, which is more insulated from the electorate. The Court is also more vulnerable to the influence of intellectual currents such as the current domination by the liberal paradigm of the Enlightenment Project. The movement from democracy to authoritarian expertise is part of the inner logic of the Enlightenment Project." Nicholas Capaldi, *The Liberal Paradigm in Affirmative Action Law*, 43 LOYOLA L. REV. 526 (1998).

For a fuller development of Capaldi's thesis, *see* NICHOLAS CAPALDI, THE ENLIGHTENMENT PROJECT IN THE ANALYTIC CONVERSATION (Kluwer Academic Press, 1998).

54. HERBERT CROLY, PROMISE OF AMERICAN LIFE, 413 (Northeastern University Press edition, 1998) (1909).

55. *Id.* at 418.

56. *Id.* at 15. In this connection he does note that there is mixed into this equality an appropriate and "sufficient inequality... to keep it sweet and human." This is important to his construct, particularly for achieving the national promise. Croly depended upon the better sort of individual, those who would stand "above" the generality of men in society, to provide the examples and leadership necessary for a higher type of associated life that would come with individual emancipation. His quest for equality was modified by his recognition of the need for a suitable hierarchy. Nevertheless, the realization of greater equality, social and economic, is a major theme in this work.

equalities that presumably had been lost and to place them on firmer foundations. Since economic inequality was at the root of the other inequalities, he persistently called for a redistribution of wealth. Indeed, he felt his vision could not be achieved unless the American society undertook "to regulate the distribution of wealth in the national interest."[57] In various ways, he condemned what he regarded as the "morally and socially undesirable distribution of wealth" that existed and the effects it had on blocking the realization of the national promise.[58]

Centralization. A third major element of Croly's thought was the imperative need for centralization of political authority at the national level. He acknowledged that his program called for "a radical transformation of the traditional national policy and democratic creed."[59] "The way to realize a purpose is," he writes, "not to leave it to chance, but to keep it loyally in mind, and adopt means proper to the importance and difficulty of the task." The shortcomings and problems he identifies, he insists throughout, are those of "American national democracy" and, as such, their "solution must be attempted chiefly by means of official national action."[60] Later, in dealing with specifics, he writes of "collective purpose," "collective responsibility," "collective power," and "collective organization."[61] Croly regarded the traditional federalism, one in which the states possessed important powers beyond the control of the national government, as anathema. In this respect, he severely chastises Jefferson, who he concedes possessed a finer vision of the good society than Hamilton, but who, unlike Hamilton, was seriously deficient in understanding the need for a strong central government as the means for the realization of his vision.

PROGRESSIVISM AND THE PHILADELPHIA CONSTITUTION: A MISFIT

Croly adopted a condescending attitude towards the Founding Fathers. He allowed that they did well for their time; that is, they pushed the cause of political centralism about as far as they could given the political circumstances of the time. Yet, save possibly for Hamilton, they did not see the full potential of the new government as a vehicle for collective action. Most certainly Jefferson and his fellow Republicans failed to perceive its potential in fulfilling the grander purposes embodied in the national promise. For his part, though, Croly did not explore the major areas of incompatibility between his progressive vision and the Philadelphia Constitution. These areas of incompatibility are deep and broad; they point to fundamental reasons why the Philadelphia Constitution could never serve as an instrument for the realization of Croly's national promise. Here we can only touch upon those where there seems to be an irreconcilable difference

57. *Id.* at 409.
58. *Id.* at 22.
59. *Id.* at 413.
60. HERBERT CROLY, PROMISE OF AMERICAN LIFE, 24 (Northeastern University Press, 1998) (1909).
61. *Id.* at 408-09.

between Croly's view—a view which had dominated since the days of the New Deal—and the belief and postulates underlying the Philadelphia Constitution

Nature of Republicanism. The Constitution is not an ends oriented document, whereas the achievement of given ends is central to Croly's state. This is to say, the Framers' objective was primarily to provide a means for making decisions, while simultaneously securing the rule of law. "The regulation of various and interfering interests," Madison informs us, was to be the "principal task" of Congress[62], whose members were to be selected through a competitive electoral process. Put another way, the principal mission of the new government was not "positive" in nature; its mission clearly was not, to use Lowi's terminology, that of "reducing risks," either financial or physical. If there were to be New Deals or Wars on Poverty under the forms of the Philadelphia Constitution, they would be conducted at the state or local levels. But more importantly, these and like ends were not conceived to be inherent to the concept of republicanism as Croly would have it. What was inherent in republicanism, from their vantage point, was that ultimate control over government would rest with the majority.[63]

Nature of Man and Religion. While there is great debate about the role that religious beliefs played in the framing of the Philadelphia Constitution, it is evident that the Framers accepted a view of man consonant with the mainstream religious beliefs, the most significant of which revolved around the Fall and original sin. This is illustrated perhaps most dramatically in the correspondence between Adams and Jefferson, two giants of the Founding period whose religious views were hardly "centrist." Neither held that man was perfectible. Both were concerned about the need to control government in order to prevent "tyranny"; both were aware of the darker side of man that rendered republicanism vulnerable to majority oppression. In fact, of all the leading figures of the formative period, Adams wrote more extensively than any other about the dangers of republican government attributable to the nature of man and how they might be prevented through the proper alignment of institutions. Hamilton may have put the matter most bluntly when he wrote that "men are ambitious, vindictive and rapacious" [64], but Madison was inclined, albeit in gentler terms, to this position. He recognized that oppressive majorities would pose problems for the republic and that the rulers might use their powers to tyrannize the society. He knew as well that

62. *See* THE FEDERALIST NO. 10 at 45 (James Madison) (George W. Carey and James McClellan, eds. 1990).

63. In this connection, Madison writes:

> If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow the name on, a government which derives all its powers directly or indirectly from the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

See THE FEDERALIST NO. 39 at 194 (James Madison) (George W. Carey and James McClellan, eds. 1990).

64. *See* THE FEDERALIST NO. 6 at 23 (Alexander Hamilton) (George W. Carey and James McClellan, eds. 1990).

"neither moral nor religious motives" or "parchment"[65] barriers would serve as adequate barriers to oppression or tyranny.

In sum, whether due to religious influences or not, the Framers' view of human nature and its perfectibility is at odds with that held by Croly.

Acquisitiveness. At still another level, Madison's understanding of human nature differs in important particulars from Croly's. From Madison's vantage point, a "uniformity of interests" is impossible. There is, he writes, a "diversity in the faculties of men from which the rights of property originate." So long as this diversity exists (and Madison believes it is "the first object of government" to protect this diversity), he concludes that there will be "a division of the society into different interests and parties" based on "different degrees and kinds of property."[66] The unarticulated premise here, of course, is that man is an acquisitive being; that men will use their different and unequal capacities to acquire property, thereby setting off the processes leading to inequalities he describes. But unlike Croly, Madison does not condemn this acquisitive nature. He accepts it as a given, something that must be recognized and understood for a stable political and social order. Largely because they would run counter to the nature of man, he contends proposals for "an equal division of property"[67] would be factious, i.e., "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[68]

Did Madison believe this acquisitive nature could be overcome? Could Croly's vision of a "disinterested" individual seeking a higher form of associated life free from incentives of the capitalist system be realized? In his writings, we find that Madison believes that religious life and training from early youth, such as that provided by the Moravians, Harmonites and Shakers, would be necessary to overcome man's acquisitive proclivities.[69] In sum, from Madison's perspective at least, barring early indoctrination by some coercive force, Croly's national promise could never be achieved. And once achieved, such indoctrination would be required for each successive generation in order to avoid a return to an acquisitive way of life.

THE CONSEQUENCES OF INCOMPATIBILITY

To go no further, the fact is that the Philadelphia Constitution and what would appear to be the widely held assumptions of its drafters are at odds with

65. *See* THE FEDERALIST NO. 10 at 46 (James Madison) (George W. Carey and James McClellan, eds. 1990).

66. *Id.*

67. *Id.* at 48.

68. *Id.* at 44.

69. On this point, *see* JAMES MADISON, THE MIND OF THE FOUNDER, (Marvin Meyers, ed. 1981). Madison was highly skeptical of the feasibility of a scheme designed to emancipate the slaves that relied called upon individuals within a community to contribute voluntarily according to abilities, while being rewarded on the basis of need. One of the major problems he noted was that "each individual would feel that the fruit of his exertions would be shared by others whether equally or unequally making them; and that the exertion of others would equally avail him, notwithstanding a deficiency in his own." *Id.* at 330.

Progressivism. It simply is not based on a view of man or human nature compatible with Progressivism or, which comes to the same thing, Croly's quest for the fulfillment of the "national promise." The obvious upshot is that the Philadelphia Constitution is not appropriate or well suited vehicle for the achievement of progressive ends.

What this means, of course, is that Progressivism can only realize its goals by "refashioning" the Constitution, by making it seem as if the Constitution were a "living" document that had acquired new meaning with each passing generation.[70] And this is precisely what Progressives have done. They have argued that, for a variety of reasons, there is no point in trying to figure out what Founders or the ratifiers intended, that the task may be impossible or, more likely, inconclusive. The great debate over how best to interpret the Constitution, I would suggest, is attributable to the fact that Progressives did not want to appear to be scrapping the original design. Rather they wanted, as far as possible, to create ambiguity about the Philadelphia Constitution, an ambiguity that would make their ends seem less "revolutionary" than they are. What does seem abundantly clear is that the major and most controversial developments—i.e., those developments which have killed the Philadelphia Constitution—all bear a direct relationship to Progressivism because they have opened the way for the advance of progressive goals along the lines suggested by Croly. In this category certainly fall the limitless delegation of legislative power, judicial activism and legislation, centralization of power in the national government, and an expansive and outlandish definition of the commerce power.

This point can be put another way. The Progressives, knowing that amending the Constitution would not serve their purpose, had to work with what they had. And what they had, they knew, was not adequate for their purpose, so they were left with the alternative of "reinterpretation." At the same time, they could not make it appear as if they were abandoning the Framers' design for that might well be politically suicidal. Thus this reinterpretation had to take place under the cover of the ambiguity created about the Founders' original design.

I do not mean to suggest that this was a conspiracy, well thought out in advance. Not at all. It simply unfolded in this fashion. But once the enormity of the change was perceived there has been a concerted, though not necessarily coordinated, effort to "cover up" or to minimize what has taken place by offering various rationales.[71]

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70. We find a clear statement of this in the late Justice Brennan's famous Georgetown speech: "We current judges read the Constitution the only way that we can; as Twentieth-Century Americans.... What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time." THE CONSTITUTION OF THE UNITED STATES, INTERPRETING THE CONSTITUTION, (Jack N. Rakove, ed. 1990). Justice Brennan, quite clearly, was one of the foremost spokesman for Progressivism in the last half of the Twentieth Century.

71. This is particularly true in the law schools for at least two basic reasons. First, the Constitution, its meaning and uses, is a large part of legal study. But, second, Progressivism predominates on the faculties in all but a few law schools in the country. In short, law schools are the most appropriate source for efforts along these lines.

POTENTIAL DANGERS

The great French political philosopher Bertrand de Jouvenal argues persuasively that the modern democratic state may well be the most dangerous regime in human history. In his classic work *On Power*, he remarks,

> It must be noted that Power which is founded on the sovereignty of the people is in better shape than any other to fight and conquer. If sovereignty resides in a king or an aristocracy, so that it belongs to but one man or a few, it cannot markedly extend its scope without clashing with the interests of the majority.[72]

And this "clash," as he points out, can and has served as an effective restraint on monarchies and aristocracies of the past. Indeed, the powers at the disposal of the modern states—principally their powers to conscript and to tax—are those which the most absolute monarchs of the past could only dream of. Moreover, Jouvenal notes, there was a time when the Church and Christian natural law doctrines actually served to limit even the most absolutist kings. Fear of eternal damnation of the soul often served as a most effective restraint.

In sum, the chilling message of Jouvenal's work is that we lack restraints in the modern world; that, moreover, the modern world suffers from the "crisis of rationality" that has spawned relativism and even nihilism. Secularism and materialism have both served to undermine the natural law and with this the internal restraints on the exercise of power.

Walter Lippmann in his *Public Philosophy* makes much the same overall point, albeit in a slightly different way. The public philosophy for Lippmann emerged from the better part of the Western tradition, embodying the institutions, values, tenets, and practices that had proved solid and worthwhile over time. In his view, the public philosophy also provided transcendent standards for the society; standards against which the society could measure its institutions and policies. He believed that only upon the "premises of this philosophy," which itself was built on the natural law, was it possible "to reach intelligible and workable conceptions of popular election, majority rule, representative assemblies, free speech, loyalty, property, corporations and voluntary associations."[73] The public philosophy embraced constitutionalism, the rule of law, the notion that power ought to be restricted, checked, and held accountable. Above all its pointed to the dangers of arbitrary rule, unchecked power, and the lack of restraint on the part of individuals, majorities, or the rulers. Moreover, as Lippmann would have it, those responsible for the democratic institutions of the West, including our Founding Fathers, subscribed to the belief that a consensus on fundamental issues of governance—e.g.,, how decision making authority should be

72. BERTRAND DE JOUVENAL, ON POWER: THE NATURAL HISTORY OF ITS GROWTH, 333 (Liberty Fund, 1993) (1949). Jouvenal's point in this respect is similar to that made by Alexis de Tocqueville: "The very essence of democratic government consists in the absolute sovereignty of the majority; for there is nothing in democratic states which is capable of resisting it." DEMOCRACY IN AMERICAN, 244 2 vols. (New Rochelle, New York: Arlington House, n.d).

73. WALTER LIPPMANN, THE PUBLIC PHILOSOPHY, 79-80 (The New American Library, 1955).

distributed—could be achieved through deliberation and "honest reflection."[74]

The death of the Philadelphia Constitution must be cast against this background. The Progressives have, knowingly or not, ignored or circumvented the Constitution when it has suited their ends and purposes. Its restraints and divisions of power, all calculated to prevent tyranny and oppression, have been effectively discarded. The courts and the bureaucracy are now engaged in making law and inventing new "rights" and powers. Progressivism, above all, is directed to ends, to altering our social and economic environment. In this, as Lowi points out, it has shown scarcely any sensitivity towards the "rule of law" or, for that matter, "constitutionalism" (i.e., following the decision making paths marked out in the Philadelphia Constitution).

But the most serious indictment of Progressivism, to recur to Lippmann, is that it offers no coherent replacement for what it has destroyed. The Progressives now stand amid the ruins of the Philadelphia Constitution, but they present no new set of coherent rules for governing with an accompanying morality like that which the Founding Fathers offered in replacing the Articles of Confederation. As a consequence, we live under a system that lacks coherence, not to mention legitimacy. So much is clear from Professor Lowi's new, "unwritten" constitution that forms the foundation of the Second Republic. The new constitution presents us with no principled understanding of the limits of government or what constitute the legitimate processes for law making. The powers and functions of the branches of government seem to bear no correspondence to republican principles or to the manner in which authority has been traditionally allocated.

To put this in other terms, precisely when we would seem to be most in need of a Constitution —and this because of the dangers inherent in modern democratic states—we are without one. In killing the Philadelphia Constitution and not providing us with a coherent substitute, the Progressives have left present and future generations in a very precarious situation. Far more precarious, I think, than they seem to realize.

74. *Id.* at 103.