IN DEFENSE OF THE CONSTITUTION

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George W. Carey

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January 1995

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Note to the Reader

Throughout this book all references to *The Federalist* are to the student edition edited by George W. Carey and James McClellan (Dubuque: Kendall/Hunt, 1990). The parenthetical citations in the text refer to essay number and page except when the essay number is evident from the discussion.

The following abbreviations have been used in the parenthetical citations in the text of chapter 1, "Publius—A Split Personality?" SP refers to Alpheus T. Mason's article, "The Federalist—A Split Personality," *American Historical Review* 57 (1952); TF, to Gottfried Dietze's *The Federalist: A Classic on Federalism and Free Government* (Baltimore: Johns Hopkins Press, 1960); and DP, to Douglass Adair's article, "The Authorship of the Disputed Federalist Papers," reprinted in *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn (New York: W. W. Norton, 1974).

IN DEFENSE OF THE CONSTITUTION

Introduction

While the essays that follow are addressed to different aspects of our constitutional order and operations, there is an underlying unity to them. The principal source of this unity takes the form of a reaction to a revisionist school of thought, now dominant in academia, that has sought in various ways to disparage our Founding Fathers and their handiwork. Because so much of what I say in the following selections presupposes an understanding of the development and major tenets of this school of thought, I will examine it and the consequences that have flowed from its ''teachings'' at the outset.

For several decades now, since the early 1900s to be exact, the Constitution has come under increasingly severe and sustained attack for what is alleged to be its ''undemocratic'' character. The initial attacks were ''shocking'' in the sense that they challenged the prevailing orthodoxy that served to place the Founders and the Constitution above reproach. Today, by contrast, the gist of these early attacks constitutes commonplace observations—advanced normally in the guise of undisputed facts—found in many colleges and high school government and history texts concerning the motives and purposes of our Founding Fathers and the nature of the system they bequeathed to us.

While, as we shall see, there are differences between the early revisionists and their modern counterparts, the most notable being a belated but welcome acceptance of a strong national government, there is at least one common theme that weaves through their critiques: namely, the Constitution is an ''undemocratic'' document. In this respect, the critiques are, so to speak, double-edged; that is, not only is the Constitution found wanting from the perspective of the majority rule principle, it is viewed as an instrumentality that thwarts the realization of ''democratic'' ends such as those presumably embodied in the second paragraph of the Declaration of Independence. Thus, the revisionists' democracy is of two kinds: one concerned with the means or methods of decision making, the other with goals or ends.

Now what is often overlooked is that these two conceptions of democracy are not entirely compatible. For instance, a majority may vote for policies that contravene the presumed democratic ends. To some extent, the liberal revisionists have been able to avoid facing the theoretical difficulties posed by this incompatibility by assuming, sometimes tacitly, that majorities do cherish these democratic ends,

but that our institutions and processes either thwart or distort their will. Accordingly, they have long held that, once the Constitution has been democratized, majorities will actively pursue and ultimately realize these democratic ends. For the New Left, neo-Marxists, and other social dissidents, of course, to reach this coincidence of ends and means requires a good deal more than mere institutional "reform," since institutions are only the reflection of dominant social and economic forces. For them the problem is overcoming the hurdles—social, economic, educational, and the like—that prevent majorities from perceiving their true interests, an undertaking that would necessarily involve comprehensive social engineering.

What seems increasingly clear in recent decades is that the revisionists, off at the end, have given primacy to ends over means; that is, their commitment to majority rule is secondary to their commitment to democratic ends which, to a great extent, come down to egalitarianism mixed with virtually unbridled liberty. Indeed, their commitment to majority rule seems to be contingent on whether they like what the majority wills. One reason for this, we may surmise, is that it is now painfully obvious to most revisionists that majorities can (that is, from the revisionists' point of view) be a "beast," that they are not as "enlightened" as some of the earlier revisionists seemed to assume.

Without going into the whys and wherefores—for this is a matter I will take up in due course—what has emerged from these revisionists' reservations concerning republicanism and their quest for the realization of democratic ends is what can appropriately be termed a new "constitutional morality"; that is, they advocate and justify a way of looking at the proper operations and relationships of our constitutional institutions and processes that is inimical to the older morality wrought by the Framers and articulated in *The Federalist.* This new morality, it should be noted, is truly revolutionary because it represents, as the following essays will endeavor to show, a repudiation of the basic principles upon which our constitutional system was founded. In this connection, we should also observe that this new morality, though revolutionary, is often not perceived for what it is, primarily because of the evasive tactics of revisionists that I will spell out later.

My conclusions, I believe, are borne out by looking at the enormous power the courts have assumed within our system, an assumption of power that, according to one constitutional authority, rests on a conviction "almost universal among academics . . . that the American people are not to be trusted with self-government and are much in need of restraint by their moral and intellectual betters." Such a view, he quite rightly holds, "is an insult to our national heritage."[1] But even this depiction of the Court's new role is understated. As the late Charles S. Hyneman was one of the first to perceive,[2] the Court by the mid-1950s had already reached

[1]Lino Graglia, "Was the Constitution a Good Idea?" *Human Life Review* 10 (Fall 1984), 88–89.

[2]*The Supreme Court on Trial* (New York: Atherton Press, 1963). This is a much neglected work that was the first, to my knowledge, to point out the full implications of the Court's desegregation decisions.

a new plateau of power well beyond that attained by the Court of the mid-1930s that had prompted Roosevelt's Court packing plan. The 1930s Court had merely ''vetoed'' certain of Roosevelt's New Deal programs, whereas the modern Court has actually concocted ''constitutionally'' mandated remedies for perceived social ills.

Hyneman wondered aloud whether the Court would be so bold as to take upon itself the task of correcting the presumed ''political failures'' of the elective branches. The answer was soon forthcoming in a series of reapportionment decisions in the 1960s based on the formula, ''one man, one vote''—a ''standard'' of republicanism that, in the words of Philip Kurland, ''never existed in the past . . . was clearly rejected by the framers of the national constitution for the national government and . . . remains a standard unjustified by the Court itself.''[3] Instances of equally blatant judicial behavior and reasoning abound. No serious student of the Court today, no matter what his ideological or political persuasion, denies that the Court in many instances simply legislates. What is more, many controversial pieces of such ''legislation'' are based upon constitutional interpretation that places them ''above'' ordinary laws passed by Congress. All of this, I daresay, is something relatively new under our constitutional sun—a state of affairs alien to the abiding principles of the Constitution as it emerged from Philadelphia.

That the Court provides perhaps the most visible example that can be offered to illustrate the altered character of our regime should not blind us to other, equally significant, departures from the constitutional morality of the Framers that inhere in this state of affairs. For instance, for the Court to legislate in the fashion it does without being called to account indicates that we have either forgotten or discarded the Framers' concern about maintaining the separation of powers. Moreover, implicit in the expanded conception of judicial power and authority is a distrust, not only of the Founders' ''solution'' to the problem of curbing unjust majorities, but of our representative institutions as well. Beyond this, we are led to speculate why it is that the Court—not, say, the Congress—seems to be the centerpiece of this new morality. This can be taken as further evidence that beneath this morality resides a primary concern, not with guaranteeing republican government understood as rule by the people, but with securing ''rights'' and substantive ends that conform with preconceived patterns of ''justice''—rights and ends that might not be recognized as such by the more politically accountable branches. In sum, the exalted position of the Court, though noteworthy in its own right, is the outgrowth of fundamental changes in position and attitude toward basic principles—e.g., republicanism, the separation of powers—woven into our constitutional fabric.

This much said by way of general introduction, two observations are called for that will serve to refine and sharpen the theoretical concerns that prompted the following essays. First, my assessment and that of many others, if

[3] ''Government by Judiciary,'' *Modern Age* 20 (Fall 1976), 366.

correct, would mean that we are in a constitutional crisis of sorts. This crisis can be pictured in terms of a new and antagonistic morality encroaching upon the old, an encroachment that has caused, and will continue to cause, bitter divisions in the nation. These divisions do and will revolve not only around the substance of given decisions but around the legitimacy of the manner or processes by which they are made. Such is the case because the new morality, if nothing else, involves a significant reshuffling of decision-making authority among the branches of government.

I am well aware that there are legitimate rejoinders to this position. A very persuasive one is simply that there is nothing really unique about our present constitutional differences: that, in fact, our system has never really been free from controversy over what must be regarded as constitutional questions of the first order. In the very first decade of its operation, for instance, disputes arose over the relative authority of the state and national governments, the extent of Congressional power vis-à-vis the executive authority, and, *inter alia*, the role of the Supreme Court.

One answer to this rejoinder that, I believe, helps us to comprehend the nature of our present difficulties can be put as follows: these early controversies, as well as those of similar nature we have experienced throughout our history, normally involved disagreements about the proper applications or operations of a given constitutional principle, not the principle itself. In this respect, evidence abounds that the Founders fully anticipated such disputes arising once the system was set in motion. However, rather than trying to provide any hard and fast answers to forestall such disputes—an impossibility on the face of it—they left their resolution to be worked out under the forms and processes provided in the Constitution. For example, and very much to this point, Madison, in writing about the separation of powers fused into the Constitution, does not even attempt to delineate with precision the relative boundaries of the three branches. Rather, he relies upon the operations of the system itself, wherein "those who administer each department [are given] the necessary constitutional means and personal motives to resist the encroachment of the others," (51:26)[4] to secure these ends. In other words, the Framers seemed to feel that the Constitution, once set in motion, would be a self-adjusting or self-correcting mechanism. In these terms, our present predicament is of a different order: it involves, not an adjustment *through* the system in the fashion described by Madison, but a fundamental change in the system itself.

The distinction that I draw here is far from being simply academic. Certainly no one would deny that we confronted a constitutional crisis at the time of our Civil War. To be sure, at its center was an irreconcilable difference over what is the most fundamental of all constitutional concerns—the nature of the union

[4] *The Federalist*, ed. George W. Carey and James McClellan (Dubuque: Kendall/Hunt, 1990). All subsequent parenthetical citations to *The Federalist* in the text are to this edition. When the essay number is not evident from the discussion, it will be placed before the page number.

established by the Constitution. Nevertheless, its character was not unlike that which we confront in the disputes over our constitutional order today. In both cases, we see differences over constitutional principles, the resolution of which cannot help but have a ''ripple effect'' on the fundamental character of the regime. Suppose, to illustrate this point dramatically, the view of the union as a contract or compact between the states had prevailed at some point in our history prior to the Civil War. Clearly, the entire character of our union—the relative powers of national and state governments, to say nothing of the role and function of the Supreme Court—would be drastically different from what it is today. Indeed, it might well be that the states would not be politically unified to any significant degree.

My second point relates to the nature of the new morality. To this juncture I have been using the expression ''new constitutional morality'' in a manner to suggest that it constitutes a body of principles as reasoned, coherent, and complementary as the older morality. But this is not quite the case. On certain matters relating to both means and ends, this morality is clear enough. We know, for instance, that its scope is far ranging; that it would call for the abandonment or drastic reformulation of principles long associated with our constitutional tradition. But save for heroic, though unsuccessful, efforts to reconcile judicial supremacy with republicanism, the proponents of the new morality have not to any great extent systematically explored the questions and problems that logically flow from its principles.[5] Not the least of these, trivial though it may seem at first glance, relates to the tacit assumption that a legal education equips the judges to exercise their newly acquired authority wisely.

Of course, there are concerns of a more strategic nature. One of the most important of these in my estimation is this: given the fact that the new morality is ill at ease, so to speak, under the existing and presumably antiquated constitutional forms and principles, why is it that its proponents do not seek constitutional changes that would serve to reconcile theory and practice? One obvious answer, in my opinion, is that the proponents of the new morality know very well that they could not secure the necessary changes that, in fact, would probably necessitate an entirely new constitution. Outside the groves of academe, that is, the American people still very much revere the Philadelphia Constitution, and they certainly would not look kindly upon any proposal whose declared purpose is to dismantle it. From the Machiavellian point of view, then, these proponents can be viewed as having adopted a strategy that will allow them to achieve their ends, or many of them at any rate, through the path of least resistance.

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[5]In my view, the most ambitious of these has been John Hart Ely's *Democracy and Distrust* (Cambridge: Harvard University Press, 1980). For an excellent analysis of Ely's position and why Ely does not reconcile republicanism with his particular form of judicial oversight, see Stanley C. Brubaker, ''Fear of Judging: Ely's Theory of Judicial Review,'' *Political Science Reviewer* 12 (1982).

Clearly, however, this strategy can be successful only as long as it is not widely perceived for what it is—a fact that, I believe, goes a long way towards accounting for the character of our contemporary ''debate'' on this matter. This is to say, as most opponents of the new morality would no doubt argue, the strategy has not been widely perceived in its proper context so that the real issue at stake—i.e., should we overhaul the Constitution or not—remains ''hidden'' from the people.[6] Be that as it may, it can be said that, whether by design or not, the reasoning and lines of argument advanced in its defense go a long way towards insuring that the issue remains hidden. In this regard, for example, we find aspects of the older tradition co-opted and employed on behalf of the new. Thus, somewhat ironically, we find arguments on behalf of an independent judiciary, which do make sense in the context of the older morality, transposed to support the notion of judicial supremacy. At another level, we are told that ours is a ''living'' and ''flexible'' Constitution and that the Framers would surely want us to adapt it to the changing circumstances of the modern world, which, of course, seems reasonable enough but leaves us with a host of questions regarding what particular provisions of the Constitution should or should not be treated as ''living'' and ''flexible.'' Or we may be told, depending on the particular circumstances, that it is difficult, if not impossible, to determine the Framers' intent so that the Courts are obliged to use their best lights to interpret the Constitution in keeping with its ''spirit'' or, if not that, within the bounds of ''contemporaneous consensus.'' In other words, the justifications are linked, however tenuously, to the older constitutional morality in such a way as to direct our attention and critical thinking away from the central issue and over to matters that, by their very nature, are incapable of definitive resolution. I cannot help but note, for example, that the findings of Raoul Berger's monumental study[7] of the intended scope of the Fourteenth Amendment, no small matter given the key role of this amendment in reshaping the American political landscape by judicial fiat, can so easily be dismissed by new morality advocates on various grounds—e.g., the Courts of the modern era are interpreting the Fourteenth Amendment in the ''spirit'' intended by its drafters—which are, by their nature, virtually impossible to come to grips with.

These observations lead to questions of a different order whose answers are, at least in part, to be found in the sustained attacks on the Constitution that have encouraged the development of this new morality. That is to say, the new morality did not achieve its present status and acceptance overnight, particularly among academics. What are its attractions? How can it be justified? What are its objectives?

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[6]For an interesting discussion ''around'' this point see Joseph Sobran, ''A Naive View,'' *Human Life Review* 9 (Winter 1983). Writes Sobran: ''Even conservative members of the Court, including preeminently the most serious of them, William Rehnquist, have not raised the fundamental question whether we have fundamentally corrupted the original system'' (14).

[7]*Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge: Harvard University Press, 1977).

We can, I believe, trace its origins back to shortly after the turn of the century with the publication of James Allen Smith's *The Spirit of American Government.*[8] Smith's work was revolutionary primarily because it challenged the then prevailing belief that the Constitution embodied democratic principles. For this reason, it is generally recognized as the first of the ''revisionist'' works that have proven so instrumental in providing the foundations for the new morality.

Smith contended that ''ordinary text books'' and ''popular works'' that dealt with the Constitution did not deal sufficiently with the ''political philosophy upon which it rests'' so that ''the American people,'' he felt, were ill-informed about the ''fundamental nature of their system of government.''[9] ''Democracy—government by the people, or directly responsible to them—was not,'' he argued, ''the object which the framers of the American Constitution had in view, but the very thing which they sought to avoid.''[10] He found it ''difficult'' to believe that anyone at all familiar with the proceedings of the Philadelphia Convention or the character and background of the Framers could think otherwise. For his part, he found the ''evidence . . . overwhelming'' that the Framers placed ''no faith in the wisdom or political capacity of the people.'' Rather, in his words, they sought to entrench the ''wealthy and conservative classes.''[11]

Smith provided still another perspective for looking at the Constitution and the purposes of the Founders, namely, that the Constitution was a reactionary document designed to reverse the democratic impulses unleashed during the Revolution. In this vein, he wrote, ''our form of government after the Declaration of Independence''—i.e., the Articles—was clearly democratic in character because the ''English system of checks and balances was discarded'' and ''all important powers of government were vested in the legislature.''[12] All this, he took pains to emphasize, was undone with the adoption of the Philadelphia Constitution.

Certain of Smith's views have been extensively modified or even abandoned over the decades. Revisionist thought, for example, eventually came to reject the value of political decentralization that Smith, true to Jeffersonian principles, regarded as essential for truly popular rule. And history has proved him wrong in his conviction that the Supreme Court would constitute a permanent barrier for majorities intent upon securing economic ''justice.'' In recent decades, for reasons that will become apparent in due course, the Court has come to be viewed from a perspective that simultaneously renders it central to the new morality and compatible with the overarching values associated with revisionism. Nevertheless, two major elements of Smith's thought are very much with us today. The

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[8] *The Spirit of American Government* (New York: The Macmillan Company, 1907). This work has been reprinted by the Harvard University Press (1965) with an excellent critical ''Introduction'' by Cushing Strout. All citations are to the Harvard edition.

[9] *The Spirit of American Government*, 30.

[10] Ibid., 29–30.

[11] Ibid., 32.

[12] Ibid., 27.

first of these is that the Constitution is basically an undemocratic document designed by men who feared the levelling tendencies of popular majorities. The second, which to a great extent flows from the first, holds that the Constitution represents a betrayal of the values associated with the Declaration of Independence or, if not that precisely, those associated with "social justice."

Both these themes were refined and developed some twenty years later in Vernon Parrington's widely heralded two-volume work, *Main Currents in American Thought*,[13] which he dedicated to his former teacher James Allen Smith. Parrington pictured the theoretical climate prior to the Constitution against the backdrop of "French radicalism" and "English liberalism." "The root of French radicalism," according to Parrington, "was anarchistic, and its idea was an agrarian society of freeholders. It would sweep away the long accumulated mass of prescriptive rights, the dead hand of the past, and encourage free men to create a new society that should have as its sole end and justification, the common well-being."[14] He regarded Rousseau as the chief spokesman for the "passionate social idealism" that characterized "French romantic philosophy" whose main elements were, in Parrington's words, "that a juster, more wholesome social order should take the place of the existing obsolete system; that reason and not interests should determine social institutions; that the ultimate ends to be sought were universal liberty, equality, and fraternity." For Parrington, "English liberalism," originally set forth by Harrington and subsequently refined by Locke and Adam Smith, embraced principles essentially alien to these. Moreover, he believed, the freedom and liberty it sought was of a markedly different kind: its "great concern," in his view, was that government "should . . . assist and not hamper industry and trade" and that "political policies should follow and serve commercial interests."[15]

Parrington did not disguise his feelings towards these two schools of thought. While he noted that both were "characterized" by a "pronounced individualism," he went on to remark that the French individualism "was humanitarian, appealing to reason and seeking social justice," whereas the English "was self-seeking, founded on the right of exploitation, and looking toward capitalism." But, he continued, "the French humanitarian conceptions of equality and fraternity found little response in [the] middle-class, competitive world" of the era.[16] Thus, the main question at the time of founding, as Parrington viewed it, came down to whether the confederation under the Articles ought to be replaced by a stronger, more "coercive" national government. And he was outspoken in his belief that the adoption of the Constitution was brought about "by a skillful minority in face of a hostile majority." Outside the South, he contended, this minority represented the "large property interest" or "powerful money groups"

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[13] *Main Currents in American Thought*, 2 vols. (New York: Harcourt, Brace, and Company, 1927).
[14] *Main Currents*, 1, *The Colonial Mind*: 1620–1800, 276.
[15] Ibid., 275–76.
[16] Ibid., 277.

that had since ''pre-Revolutionary days . . . greatly increased'' both their ''resources and . . . prestige as a result of war financing and speculation in currency and lands.'' This monied group, in Parrington's scenario, found a willing ally for a stronger national government among the ''planter aristocracy'' of the South.[17]

In Parrington's account, as we might expect, the real loser in all of this maneuvering turned out to be the ''small property holders'' who lacked ''disciplined cohesion.'' As he would have it, ''astute politicians'' like Alexander Hamilton blamed the post-war depression on ''too much agrarianism'' which, in turn, they attributed to ''too much democracy.'' Their argument that ''prosperity'' was not possible until such time that ''a competent national government was set up on a substantial basis'' was, in Parrington's estimation, ''a sharp setback'' for the ''ideal of popular democratic rule.'' Indeed, he contended, the ''aristocratic prejudices of the colonial mind'' were exploited by ''skillful propaganda'': ''Democracy was pictured as no other than mob rule, and its ultimate purpose the denial of all property rights. Populistic measures were fiercely denounced as the natural fruit of democratic control.''[18]

Parrington's views on the Constitution and the founding period are the most comprehensive we have of one wing of revisionist thought. To be sure, Charles A. Beard's *An Economic Interpretation of the Constitution of the United States*[19] had covered a good deal of the same general terrain some fifteen years earlier. And Beard's thirteen-count indictment of the Framers certainly raised more eyebrows than did Smith's charges, no doubt, in large part because Beard presumably had mustered the evidence to prove that the Framers were ''with but few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system.''[20] Moreover, Beard's work added a good deal of credibility to what can be termed the ''conspiracy theory'' of our founding. To this end, for example, he pointed out that there was no popular vote, either direct or indirect, ''on the proposition to call'' the Philadelphia Convention; that ''a large propertyless mass'' was ''excluded'' from any role in ''framing the Constitution''; and, *inter alia*, that because of apathy and suffrage qualifications, ''not more than one-sixth of the adult males'' voted to ratify the Constitution.[21] However, it was Parrington who wrapped Smith's concerns about the direction of our political tradition together with Beard's allegedly ''hard'' data concerning the Framers' economic motivations into a coherent whole.

No account of revisionist thinking that has contributed to the new morality would be satisfactory or complete without surveying the ''progressive'' thought

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[17]Ibid., 277–78.

[18]Ibid., 279.

[19]*An Economic Interpretation of the Constitution of the United States of America* (New York: The Macmillan Company, 1913).

[20]Ibid., 324.

[21]Ibid., 324–25.

of Herbert Croly, particularly that set forth in his *Promise of American Life*[22] which appeared only four years after Smith's initial assault on our constitutional heritage. Croly, like Smith, was aware that his view on the Constitution might well seem heretical. Indeed, for Croly, the existing ''strong, almost dominant tendency to regard the existing Constitution with superstitious awe, and to shrink with horror from modifying it even in the smallest detail'' served to hold the genuine ''American spirit'' in ''great bondage.''[23] Moreover, his vision of our ''national promise'' in many ways paralleled Parrington's conception of the ''French humanism'' that had been rejected in favor of ''English liberalism'' at the time of our founding. For instance, Croly was extremely critical of the ''traditional American confidence in individual freedom'' which he believed ''had resulted in a morally and socially undesirable distribution of wealth.'' The self-acquisitiveness that had produced this state of affairs, he argued, needed to be supplanted by a new morality calling ''for the subordination of the individual to the demands of a dominant and constructive national purpose.'' What Croly sought was ''a higher type of associated life'' in which ''desirable competition'' would be encouraged by minimizing the ''mercenary motive'' and placing a premium on ''excellence of work.''[24] Beyond this, he sought to attain or approach as nearly as possible the Rousseauistic ideal of ''individual disinterestedness'' wherein each citizen would be willing ''to sacrifice his recognized private interest to the welfare of his countrymen.''[25]

There are differences of varying degrees between the views of Croly and those of Smith and Parrington that, in the main, stem from Croly's realization that the achievement of the ''American national promise'' could only be brought about through a strong national government. For this reason, it would seem, Croly did not look upon the founding period in the same black-and-white terms as Smith. For instance, he viewed the adoption of the Constitution not as the result of any conspiracy or political chicanery but as the outcome of the ''conversion of public opinion'' through ''powerful and convincing arguments.'' It was achieved, in his words, ''chiefly by virtue of capable, energetic and patriotic leadership.'' What is more, he had kind words for Hamilton and the early Federalists for realizing the potential of the new government and for advancing the national welfare: ''A vigorous, positive, constructive national policy was outlined and carried substantially into effect—a policy that implied a faith in the powers of an efficient government to advance the national interest, and which justified the faith by actually meeting the critical problems of the time with a series of wise legislative measures.[26] Where Hamilton failed, in Croly's estimation, was ''in seeking to base the perpetuation of the Union upon the interested motives of a minority of well-to-do

[22] *The Promise of American Life* (New York: The Macmillan Company, 1911).
[23] Ibid., 278.
[24] Ibid., 415.
[25] Ibid., 418.
[26] Ibid., 38.

citizens'' rather than entrusting ''its welfare to the good-will of the whole people.'' And this Croly attributed to Hamilton's ''English conception of a nation state, based on domination of special privileged orders and interests.''[27]

As we might expect from his appraisal of Hamilton, Croly was highly critical of Jefferson, whose conception of democracy he describes as ''meager, narrow, and self-contradictory'' because of its ''extreme individualism.'' While Croly held that Jefferson ''understood his fellow countrymen better and trusted them more'' than Hamilton, his conception of democracy was flawed because it carried with it the implication ''that society and individuals could be made better without actually planning the improvement or building up an organization for the purpose.'' In sum, from Croly's point of view, Jeffersonian democracy called for a negative, ''hands off'' government, one ill-equipped to promote a ''higher type of associated life.''[28]

Croly's critique of the Constitution and what he took to be the Framers' motives is not totally dissimilar to that of Smith, Parrington, or Beard. But, again, he is not nearly so harsh. The Federalists, he acknowledged, ''demanded a government adequate to protect property rights,'' but, in his view, ''they were not seeking any exceptional privileges.''[29] The chief end of the Constitution, he held, was to secure ''liberty from any possible dangers,'' and, for this reason, he maintained, it ''was framed, not as the expression of a democratic creed, but partly as a legal fortress against the possible errors and failings of democracy.'' The ''system of checks and balances'' and the separation of powers were, in his judgment, ''calculated to thwart the popular will'' but only when that will threatened ''the essentials of a stable political and social order.''[30] In sum, he was not overly concerned about the ''undemocratic'' character of the Constitution. Indeed, he wrote that, for ''all its faults,'' it ''proved capable of becoming both the organ of an efficient national government and the fundamental law of a potentially democratic state.''[31] In this last analysis, from Croly's perspective, the basic flaw of the Constitution was that it lacked the power that ''every popular government should possess,'' that is, after due deliberation, the capacity to take ''any action, which, in the opinion of a decisive majority of the people, is demanded by the public welfare.''[32]

The views of Croly, Smith, Beard, and Parrington have been modified over the years. However, what we see in these modifications are principally variations on two basic themes. The first of these, which emerges most clearly in the writings of Smith, Beard, and Parrington, is that the Constitution is not a democratic document, and that it was drafted to protect the interests of economic and

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[27]Ibid., 41.
[28]Ibid., 43.
[29]Ibid., 32.
[30]Ibid., 33.
[31]Ibid., 34.
[32]Ibid., 35.

social minorities from the ravages of majority rule.[33] Modern political scientists who dwell on this theme are apt to put it somewhat differently. They would say that the constitutional rules—both the formal and the informal, which have developed over the years—are skewed to benefit certain interests at the expense of others in ways consonant with the general aims of the Framers.[34] That is, in their view, the more affluent and better organized interests in society enjoy a distinct advantage over groups less well organized and affluent: the rich and well-to-do, in other words, still run the show. This at least is the impression conveyed, expressly or implicitly, in the vast majority of American government college texts.

In this connection it is not surprising to note that by 1950 a majority of the leading college textbooks in American history had come to embrace the proposition that "the Fathers were intent on protecting the property of the few at the expense of the many." Moreover, the conception of the Constitution as a "reactionary" document, that is, as one rejecting the noble and progressive doctrines of the Declaration of Independence, had also gained widespread acceptance by this point in time.[35] As one close student put this: "The Declaration is portrayed as the ultimate expression of Revolutionary ideals, to wit, egalitarianism, popular majority rule, and human rights; the Constitution is cast in the role of a counter-revolutionary reaction in support of monied privilege, minority rule, and property rights."[36] In this respect, the revisionists' views seem to have won the day over those of the "traditionalists." Whereas Smith and Croly may have been fighting a lonely battle in their time, today the traditionalists' views are seldom heard, much less defended, in the academy.

The second basic theme relates to Croly's major concern, namely, the conception of democracy associated with and to some extent embodied in the Constitution leads to a protective, limited, and relatively inactive government. Now this is a far more complicated theme than the first because its expression has subsequently taken many forms. Croly, more activist-oriented and less wedded to Jeffersonian theory than either Smith or Parrington, provides us with a greater insight into the basic difficulty that seems to have prompted a good deal of revisionist thought in the first place: namely, the lack of an instrumentality to achieve the desired ends that, in recent decades, have come to be those derived from the second paragraph of the Declaration. To put this more accurately, Croly had no substantial complaint with the Constitution as an instrumentality; rather, as we have seen, he was distressed with the Jeffersonian theory that guided its use. For

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[33]Perhaps the best known of the modern statements to this effect is to be found in chapter one of Robert A. Dahl's *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

[34]James MacGregor Burns has popularized this view, which is widely held in the political science profession. See, for example, his *Uncommon Sense* (New York: W. W. Norton, 1974), 76.

[35]Douglass Adair, "The Tenth Federalist Revisited," in *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn (New York: W. W. Norton, 1974), 76.

[36]Richard F. Gibbs, "The Spirit of '89: Conservatism and Bicentenary," *The University Bookman* 14 (Spring 1974), 54.