

"A Whiter Shade of Pale": Sense and Nonsense –
The Pursuit of Perfection in Law and Politics
The Federalist Society
University of Chicago Law School
April 20, 2000, Thursday
12:15 p.m.

Thank you. I want to thank Mr. Schlangen (fondly known as Charlie to my secretary) for extending the invitation and the Federalist Society both for giving me my first opportunity to visit the City of Chicago and for being, as Mr. Schlangen assured me in his letter of invitation, "a rare bastion (nay beacon) of conservative and libertarian thought." That latter notion made your invitation well-nigh irresistible. There are so few *true* conservatives left in America that we probably should be included on the endangered species list. That would serve two purposes: Demonstrating the great compassion of our government and relegating us to some remote wetlands habitat where – out of sight and out of mind – we will cease being a dissonance in collectivist concerto of the liberal body politic.

In truth, they need not banish us to the gulag. We are not much of a threat, lacking even a coherent language in which to state our premise. [I should pause here to explain the source of the title to this discussion. Unless you are a very old law student, you probably never heard of "A Whiter Shade of Pale."] "A Whiter Shade of Pale" is an old (circa 1967) Procol Harum song, full of

nonsensical lyrics, but powerfully evocative nonetheless. Here's a sample:

"We skipped the light fandango
turned cartwheels cross the floor
I was feeling kinda seasick
but the crowd called out for more
The room was humming harder
as the ceiling flew away
When we called out for another drink
the waiter brought a tray."

There is something about this that forcibly reminds me of our current political circus. The last verse is even better.

"If music be the food of love
then laughter is its queen
and likewise if behind is in front
then dirt in truth is clean. . . ."

Sound familiar? Of course Procol Harum had an excuse. These were the 60's after all, and the lyrics were probably drug induced. What's our excuse?

One response might be that we are living in a world where words have lost their meaning. This is certainly not a new phenomenon. It seems to be an inevitable artifact of cultural disintegration. Thucydides lamented the great changes in language and life that succeeded the Peloponnesian War; Clarendon and Burke expressed similar concerns about the political transformations of their own time. It is always a disorienting experience for a member of the old guard when the entire understanding of the old world is uprooted. As James Boyd White expresses it: "[I]n this world no one would see what he sees, respond

as he responds, speak as he speaks,"¹ and living in that world means surrender to the near certainty of central and fundamental changes within the self. "One cannot maintain forever one's language and judgment against the pressures of a world that works in different ways," for we are shaped by the world in which we live.²

This is a fascinating subject which we do not have time to explore more thoroughly. Suffice it to say that this phenomenon accounts for much of the near hysterical tone of current political discourse. Our problems, however, seem to go even deeper. It is not simply that the same words don't have the same meanings; in our lifetime, words are ceasing to have any meaning. The culture of the word is being extinguished by the culture of the camera. Politicians no longer have positions they have photo-ops. To be or not to be is no longer the question. The question is: how do you feel.

Writing 50 years ago, F.A. Hayek warned us that a centrally planned economy is "The Road to Serfdom."³ He was right, of course; but the intervening years have shown us that there are many other roads to serfdom. In fact, it now appears that human nature is so constituted that, as in the days of empire all roads led to Rome; in the heyday of liberal democracy, all roads lead to slavery. And we no longer find slavery abhorrent. We embrace it. We demand more. Big government is not just the opiate of the masses. It is *the* opiate. The drug of choice for multinational corporations

and single moms; for regulated industries and rugged Midwestern farmers and militant senior citizens.

It is my thesis today that the sheer tenacity of the collectivist impulse — whether you call it socialism or communism or altruism — has changed not only the meaning of our words, but the meaning of the Constitution, and the character of our people.

Government is the only enterprise in the world which expands in size when its failures increase. Aaron Wildavsky gives a credible account of this dynamic. Wildavsky notes that the Madisonian world has gone “topsy turvy” as factions, defined as groups “activated by some common interest adverse to the rights of other citizens or to the permanent and aggregate interests of the community,”⁴ have been transformed into sectors of public policy. “Indeed,” says Wildavsky, “government now pays citizens to organize, lawyers to sue, and politicians to run for office. Soon enough, if current trends continue, government will become self-contained, generating (apparently spontaneously) the forces to which it responds.”⁵ That explains how, but not why. And certainly not why we are so comfortable with that result.

America’s Constitution provided an 18th Century answer to the question of what to do about the status of the individual and the mode of government. Though the founders set out to establish good government “from reflection and choice,”⁶ they also acknowledged the “limits of reason as applied to constitutional design,”⁷ and wisely did not seek to invent the world anew on the

basis of abstract principle; instead, they chose to rely on habits, customs, and principles derived from human experience and authenticated by tradition.

"The Framers understood that the self-interest which in the private sphere contributes to welfare of society — both in the sense of material well-being and in the social unity engendered by commerce — makes man a knave in the public sphere, the sphere of politics and group action. It is self-interest that leads individuals to form factions to try to expropriate the wealth of others through government and that constantly threatens social harmony."⁸

Collectivism sought to answer a different question: how to achieve cosmic justice — sometimes referred to as social justice — a world of social and economic equality. Such an ambitious proposal sees no limit to man's capacity to reason. It presupposes a community can consciously design not only improved political, economic, and social systems but new and improved human beings as well.

The great innovation of this millennium was equality before the law. The greatest fiasco — the attempt to guarantee equal outcomes for all people. Tom Bethell notes that the security of property — a security our Constitution sought to ensure — had to be devalued in order for collectivism to come of age. The founders viewed private property as "the guardian of every other right."⁹ But, "by 1890 we find Alfred Marshall, the teacher of John Maynard Keynes making the astounding claim that the need for private

property reaches no deeper than the qualities of human nature."¹⁰ A hundred years later came Milton Friedman's laconic reply: " 'I would say that goes pretty deep.' "¹¹ In between, came the reign of socialism. "Starting with the formation of the Fabian Society and ending with the fall of the Berlin Wall, its ambitious project was the reformation of human nature. Intellectuals visualized a planned life without private property, mediated by the New Man."¹² He never arrived. As John McGinnis persuasively argues: "There is simply a mismatch between collectivism on any large and enduring scale and our evolved nature. As Edward O. Wilson, the world's foremost expert on ants, remarked about Marxism, 'Wonderful theory. Wrong species.' "¹³

Ayn Rand similarly attributes the collectivist impulse to what she calls the "tribal view of man."¹⁴ She notes, "[t]he American philosophy of the Rights of Man was never fully grasped by European intellectuals. Europe's predominant idea of emancipation consisted of changing the concept of man as a slave to the absolute state embodied by the king, to the concept of man as the slave of the absolute state as embodied by 'the people' — i.e., switching from slavery to a tribal chieftain into slavery to the tribe."¹⁵

Democracy and capitalism seem to have triumphed. But, appearances can be deceiving. Instead of celebrating capitalism's virtues, we offer it grudging acceptance, contemptuous tolerance but only for its capacity to feed the insatiable maw of socialism. We

do not conclude that socialism suffers from a fundamental and profound flaw. We conclude instead that its ends are worthy of any sacrifice – including our freedom. Revel notes that Marxism has been “shamed and ridiculed everywhere except American universities” but only after totalitarian systems “reached the limits of their wickedness.”¹⁶

“Socialism concentrated all the wealth in the hands of an oligarchy in the name of social justice, reduced peoples to misery in the name of shar[ed] resources, to ignorance in the name of science. It created the modern world's most inegalitarian societies in the name of equality, the most vast network of concentration camps ever built [for] the defense of liberty.”¹⁷

Revel warns: “The totalitarian mind can reappear in some new and unexpected and seemingly innocuous and indeed virtuous form. [¶] . . . [¶] . . . will [probably] put itself forward under the cover of a generous doctrine, humanitarian, inspired by a concern for giving the disadvantaged their fair share, against corruption, and pollution, and ‘exclusion.’ ”¹⁸

Of course, given the vision of the American Revolution just outlined, you might think none of that can happen here. I have news for you. It already has. The revolution is over. What started in the 1920's; became manifest in 1937; was consolidated in the 1960's; is now either building to a crescendo or getting ready to end with a whimper.

At this moment, it seems likely leviathan will continue to lumber along, picking up ballast and momentum, crushing everything in its

path. Some things are apparent. Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege; war in the streets; unapologetic expropriation of property; the precipitous decline of the rule of law; the rapid rise of corruption; the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

But what if anything does this have to do with law? Quite a lot, I think. In America, the national conversation will probably always include rhetoric about the rule of law. I have argued that *collectivism* was (and is) fundamentally incompatible with the vision that undergirded this country's founding. The New Deal, however, inoculated the federal Constitution with a kind of underground collectivist mentality. The Constitution itself was transmuted into a significantly different document. In his famous, all too famous, dissent in *Lochner*, Justice Holmes wrote that the "constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*."¹⁹ Yes, one of the greatest (certainly one of the most quotable) jurists this nation has ever produced; but in this case, he was simply wrong. That *Lochner* dissent has troubled me – has annoyed me – for a long time and finally I understand why. It's because the framers did draft the Constitution with a surrounding sense of a particular polity in mind, one based on a definite

conception of humanity. In fact, as Professor Richard Epstein has said, Holmes's contention is "not true of our [] [Constitution], which was organized upon very explicit principles of political theory."²⁰ It could be characterized as a plan for humanity "after the fall."

There is nothing new, of course, in the idea that the framers did not buy into the notion of human perfectibility. And the document they drafted and the nation adopted in 1789 is shot through with provisions that can only be understood against the supposition that humanity's capacity for evil and tyranny is quite as real and quite as great as its capacity for reason and altruism. Indeed, as noted earlier, in politics, the framers may have envisioned the former tendency as the stronger, especially in the wake of the country's experience under the Articles of Confederation. The fear of "factions," of an "encroaching tyranny"; the need for ambition to counter ambition"; all of these concerns identified in the Federalist Papers have stratagems designed to defend against them in the Constitution itself. We needed them, the framers were convinced, because "angels do not govern"; men do.

It was a quite opposite notion of humanity, of its fundamental nature and capacities, that animated the great concurrent event in the West in 1789 – the revolution in France. Out of that revolutionary holocaust – intellectually an improbable melding of Rousseau with Descartes – the powerful notion of abstract human rights was born. At the risk of being skewered by historians of ideas, I want to suggest that the belief in and the impulse toward human perfection, at least

in the political life of a nation, is an idea whose arc can be traced from the Enlightenment, through the Terror, to Marx and Engels, to the Revolutions of 1917 and 1937. The latter date marks the triumph of our own socialist revolution. All of these events were manifestations of a particularly skewed view of human nature and the nature of human reason. To the extent the Enlightenment sought to substitute the paradigm of reason for faith, custom or tradition, it failed to provide rational explanation of the significance of human life. It thus led, in a sort of ultimate irony, to the repudiation of reason and to a full-fledged flight from truth – what Revel describes as “an almost pathological indifference to the truth.”²¹

There were obviously urgent economic and social reasons driving not only the political culture but the constitutional culture in the mid-1930's – though it was actually the mistakes of governments (closed borders, high tariffs, and other protectionist measures) that transformed a “momentary breakdown into an international cataclysm.”²² The climate of opinion favoring collectivist social and political solutions had a worldwide dimension.

Politically, the belief in human perfectibility is another way of asserting that differences between the few and the many can, over time, be erased. That creed is a critical philosophical proposition underlying the New Deal. What is extraordinary is the way that thesis infiltrated and effected American constitutionalism over the next

three-quarters of a century. Its effect was not simply to repudiate, both philosophically and in legal doctrine, the framers' conception of humanity, but to cut away the very ground on which the Constitution rests. Because the only way to come to terms with an enduring Constitution is to believe that the human condition is itself enduring.

For complex reasons, attempts to impose a collectivist political solution in the United States failed. But, the political failure was of little practical concern. In a way that is oddly unappreciated, that same impulse succeeded within the judiciary, especially in the federal high court. The idea of abstract rights, government entitlements as the most significant form of property, is well suited to conditions of economic distress and the emergence of a propertyless class. But the economic convulsions of the late 1920's and early 1930's passed away; the doctrinal underpinnings of *West Coast Hotel* and the "switch in time" did not. Indeed, over the next half century it consumed much of the classical conception of the Constitution.

So secure were the intellectual underpinnings of the constitutional revolution, so self-evident the ambient cultural values of the policy elite who administered it, that the object of the high court's jurisprudence was largely devoted to the construction of a system for ranking the constitutional weight to be given contending social interests.

In the New Deal/Great Society era, a rule that was the polar opposite of the classical era of American law reigned. A judicial subjectivity whose very purpose was to do away with objective gauges of constitutionality, with universal principles, the better to give the judicial priesthood a free hand to remake the Constitution. After a handful of gross divisions reflecting the hierarchy of the elite's political values had been drawn (personal vs. economic rights, for example), the task was to construct a theoretical system, not of social or cultural norms, but of abstract constitutional weight a given interest merits – strict or rational basis scrutiny. The rest, the identification of underlying, extraconstitutional values, consisted of judicial tropes and a fortified rhetoric.

Protection of property was a major casualty of the Revolution of 1937. The paradigmatic case, written by that premiere constitutional operative, William O. Douglas, is *Williamson v. Lee Optical*.²³ The court drew a line between personal rights and property rights or economic interests, and applied two different constitutional tests. Rights were reordered and property acquired a second class status.²⁴ If the right asserted was economic, the court held the Legislature could do anything it pleased. Judicial review for alleged constitutional infirmities under the due process clause was virtually nonexistent. On the other hand, if the right was personal and “fundamental,” review was intolerably strict. “From the Progressive era to the New Deal, [] property was by degrees ostracized from the company of rights.²⁵ Something new, called

economic rights, began to supplant the old property rights. This change, which occurred with remarkably little fanfare, was staggeringly significant. With the advent of "economic rights," the original meaning of rights was effectively destroyed. These new "rights" imposed obligations, not limits, on the state.

It thus became government's job not to protect property but, rather, to regulate and redistribute it. And, the epic proportions of the disaster which has befallen millions of people during the ensuing decades has not altered our fervent commitment to statism. The words of Judge Alex Kozinski, written in 1991, are not very encouraging. " 'What we have learned from the experience of Eastern Europe and the Soviet Union . . . is that you need capitalism to make socialism work.' In other words, capitalism must produce what socialism is to distribute."²⁶ Are the signs and portents any better at the beginning of a new century?

Has the constitutional *zeitgeist* that has reigned in the United States since the beginning of the Progressive Era come to its conclusion? And if it has, what will replace it? I wish I knew the answer to these questions. It is true – in the words of another old song: "There's something happening here. What it is ain't exactly clear."²⁷

The oracles point in all directions at once. Political polls suggest voters no longer desire tax cuts. But, taxpayers who pay the largest proportion of taxes are now a minority of all voters. On the other hand, until last term the Supreme Court held out the promising

possibility of a revival of what might be called *Lochnerism-lite* in a trio of cases – *Nollan*, *Dolan*, and *Lucas*. Those cases offered a principled but pragmatic means-end standard of scrutiny under the takings clause.

But there are even deeper movements afoot. Tectonic plates are shifting and the resulting cataclysm may make 1937 look tame.

Lionel Tiger, in a provocative new book called *The Decline of Males*, posits a brilliant and disturbing new paradigm. He notes we used to think of a family as a man, a woman, and a child. Now, a remarkable new family pattern has emerged which he labels "bureaugamy." A new trinity: a woman, a child, and a bureaucrat."²⁸ Professor Tiger contends that most, if not all, of the gender gap that elected Bill Clinton to a second term in 1996 is explained by this phenomenon. According to Tiger, women moved in overwhelming numbers to the Democratic party as the party most likely to implement policies and programs which will support these new reproductive strategies.

Professor Tiger is not critical of these strategies. He views this trend as the triumph of reproduction over production; the triumph of Darwinism over Marxism; and he advocates broad political changes to accommodate it.

Others do not see these changes as quite so benign or culturally neutral. Jacques Barzan finds the Central Western notion of emancipation has been devalued. It has now come to mean that "nothing stands in the way of every wish."²⁹ The result is a

decadent age – an era in which “there are no clear lines of advance”; “when people accept futility and the absurd as normal[,] the culture is decadent.”³⁰

Stanley Rosen defines “our present crisis as a fatigue induced by

... accumulated decisions of so many revolutions.”³¹ He finds us, in the spirit of Pascal, knowing “too much to be ignorant and too little to be wise.”³²

I will close with a story I like a lot. It's a true story. It happened on June 10, 1990. A British Airways jet bound for Malaga, Spain, took off from Birmingham, England. It was expected to be a routine flight. As the jet climbed through the 23,000-foot level, there was a loud bang; the cockpit windshield directly in front of the captain blew out. The sudden decompression sucked Captain Lancaster out of his seatbelt and into the hole left by the windscreen. A steward who happened to be in the cockpit managed to snag the captain's feet as he hurtled past. Another steward rushed onto the flight deck, strapped himself into the captain's chair and, helped by other members of the crew, clung with all his strength to the captain. The slipstream was so fierce, they were unable to drag the pilot back into the plane. His clothing was ripped from his body. With Lancaster plastered against the nose of the jet, the co-pilot donned an oxygen mask and flew the plane to Southampton – approximately 15 minutes away – and landed safely. The captain

had a fractured elbow, wrist and thumb; a mild case of frostbite, but was otherwise unharmed.

We find ourselves, like the captain, in a situation that is hopeless but not yet desperate. The arcs of history, culture, philosophy, and science all seem to be converging on this temporal instant. Familiar arrangements are coming apart; valuable things are torn from our hands, snatched away by the decompression of our fragile ark of culture. But, it is too soon to despair. The collapse of the old system may be the crucible of a new vision. We must get a grip on what we can and hold on. Hold on with all the energy and imagination and ferocity we possess. Hold on even while we accept the darkness. We know not what miracles may happen; what heroic possibilities exist. We may be only moments away from a new dawn.

¹ James Boyd White, *When Words Lose Their Meaning* (Univ. of Chicago Press 1984) p.

4.

² *Ibid.*

³ F. A. Hayek, *The Road to Serfdom* (Univ. of Chicago Press 1994).

⁴ Golembiewski & Wildavsky, *The Cost of Federalism* (1984) *Bare Bones: Putting Flesh on the Skeleton of American Federalism* 67, 73.

⁵ *Ibid.*

⁶ Hamilton, *The Federalist Papers* No. 1 (Rossiter ed. 1961) p. 33.

⁷ Michael W. Spicer, *Public Administration and the Constitution: A Conflict in World Views* (March 1, 1994) 24 *American R. of Public Adm.* 85 [1994 WL 2806423 at *10].

⁸ John O. McGinnis, *The Original Constitution and Our Origins* (1996) 19 *Harv. J.L. & Pub. Policy* 251, 253.

⁹ Tom Bethell, *Property Rights, Prosperity and 1,000 Years of Lessons*, *The Wall Street J.* (Dec. 27, 1999) p. A19.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

- 13 John O. McGinnis, *The Original Constitution and Our Origins*, *supra*, 19 Harv. J.
L. & Pub. Policy at p. 258.
- 14 Ayn Rand, *Capitalism the Unknown Ideal* (New American Lib. 1966) pp. 4-5.
15 *Ibid.*
- 16 Jean Francois Revel, *Democracy Against Itself* (The Free Press 1993) pp. 250-
251.
- 17 *Id.* at p. 251.
- 18 *Id.* at pp. 250-251.
19 (198 U.S. at p. 75.)
- 20 Clint Bolick, *Unfinished Business* (1990) p. 25, quoting *Crisis in the Courts*
(1982) *The Manhattan Report on Economic Policy*, Vol. V, No. 2, p. 4.
- 21 Jean Francois Revel, *The Flight From Truth* (Random House N.Y. 1991) p. xvi.
22 *Id.* at p. xxxvii.
- 23 348 U.S. 483.
- 24 Tom Bethell, *The Noblest Triumph* (St. Martin's Griffin, N.Y. 1998) p. 175.
25 *Id.* at p. 176.
- 26 Alex Kozinski, *The Dark Lesson of Utopia* (1991) 58 U.Chi. L.R. 575, 576.
- 27 Buffalo Springfield, *For What It's Worth* (1966).
- 28 Lionel Tiger, *The Decline of Males* (Golden Books, N.Y. 1999) pp. 21, 27.
- 29 Edward Rothstein, *N.Y. Times* (April 15, 2000) p. A17.
30 *Ibid.*
- 31 Stanley Rosen, *Rethinking the Enlightenment* (1997) 7 Common Knowledge, p.
104.
32 *Ibid.*