Constitutional Morality and the Rise of Quasi-Law:
A Symposium

A Response to Critics

Bruce Frohnen
Ohio Northern University College of Law

My thanks to the participants in this symposium. I know that my co-author, George Carey, would be as gratified as I am at the serious consideration given, here, to *Constitutional Morality and the Rise of Quasi-Law*.[1]

At first I was puzzled by William Gangi's summation of our book as one that addresses the adage that "a constitution originating in one country may not be transplanted to another country and be expected to work in the same manner as it had in the country of origin." The book includes some comparative analysis of constitutions to show their reliance on the underlying culture for their success and the importance of the fit between tradition and text. Still, it focuses on the American Constitution, not on the application of any country's constitution to other countries. Then again, as Gangi notes, in a more fundamental sense our book is about the interaction between the written constitution of the United States and the unwritten constitution of institutions, beliefs, and practices that shaped the American people, the American culture, and the constitutional morality that until fairly recently held officials to their public duties. This is a particular instance of the universal problem of "fit" between constitution and culture.

To a disappointing degree America has become a different country from that for which the original Constitution was written. Americans no longer are a predominantly religious people both grounded in and devoted to family, church, and local association. Self-government under God is no longer the *telos* or intrinsic goal of American society as

Bruce Frohnen is Professor of Law at Ohio Northern University College of Law.

[1] Bruce P. Frohnen and George W. Carey, *Constitutional Morality and the Rise of Quasi-Law* (Cambridge, MS: Harvard University Press, 2016).

a whole, though it remains the goal of something close to half of all Americans, depending on how such things are measured. The culture that shaped and maintained our constitutional order is not just under attack; it has been driven from all centers of cultural power—schools, universities, institutions of arts and entertainment, and even many if not most churches.

Carey, far less sanguine than I about the possibility of reform and recovery, would say that the disconnect between written and unwritten constitution is by nature fatal. For Carey, our tradition has been derailed and cannot simply be put back on track. My view is slightly more sanguine. I would argue that a concerted campaign of renewal within the culture might, with luck, make limited government under our traditional, constitutional order possible. Without such renewal our choice lies between more or less ordered descent into the more or less disordered social democracy consistent with our corrupted national character.

Thus, I appreciate in particular Gangi's emphasis on self-discipline as a central aspect of republican government. The concept of constitutional morality and, more generally, the possibility of self-government rest on the capacity of the people to hold their desires-of-the-moment in check, to rationally consider opposing conceptions of the common good, and to see honor in protecting a constitutional order bequeathed by tradition, rather than seeking to play lawgiver from bench or podium. No factor has tended more to the degradation of our constitutional tradition than the miseducation of our youth into the feeling that they are entitled to liberty, and also to various goods they believe will make them happy. Such goods can be "guaranteed" only by an unlimited and ultimately failed national government. As Alexis de Tocqueville remarked, "He who asks of freedom anything other than itself is born to be a slave."

It may seem churlish to quibble with Gangi's generous and erudite review. Nevertheless, in the interest of clarity I must point out a few discrepancies between his review and what Carey and I were attempting in our book. First, in discussing the morality of law, we "rely on" H.L.A. Hart and John Rawls only in a very limited sense. We bring to bear criticisms from Lon Fuller, Thomas Aquinas, and our own thinking to reject Hart's claim that law and morality are truly, fully separate and Rawls's twisting of the idea of a state of nature into an ideologically driven mischaracterization of human nature. Second, where Gangi states that Congress has "abandoned its oversight responsibilities," our point is that such oversight is no substitute for the actual writing of laws; to merely "keep an eye on" an unelected set of functionaries empowered

to write and re-write rules of action for the citizens in virtually every aspect of their lives is of little use to a free people. The job of a legislator is to make laws according to the rules and within the structural confines set by the higher law of the Constitution. Finally, on this, I would not want readers to be left with the impression that Carey and I believe the President is the prime force behind the loss of constitutional morality, separation of powers, and meaningful rule of law. As Gangi points out, most of the federal government's once limited, separated powers have ended up in the executive branch. But they were put there through a combination of congressional abdication and judicial overreach that demands administrative actions and oversight to implement its expansive, not to say abstract, dictates of "fairness" and ever-shifting definitions of new rights.

Gangi has two points of criticism I would embrace. First, it seems clear that the book could have profited from more extensive and in-depth analysis of the role assumptions about human nature played in the drafting of our Constitution and the Constitution's reliance on constitutional morality. Second, it also would have been helpful to discuss at greater length how Progressives' rejection of these assumptions motivated and shaped their campaign to alter the American Constitution and people. The natural response to this criticism is that the book already was long by contemporary standards and that it seeks to make a predominantly constitutional rather than philosophical argument. It remains the case, though, that such an argument—or perhaps such a companion volume—would further and deepen the analysis. Some of this argument appears throughout the book and especially in discussions of the role of separated powers and checks and balances as precautions intended to aid in the filtering of public and legislative opinion, but more would be better.

A collaboration between a Catholic and a non-theist who nevertheless recognized the pattern of existence central to natural law, *Constitutional Morality* does not fully address cultural, let alone religious, issues. Although Carey and I discussed the implications of various assumptions related to human nature and theology on numerous occasions before his untimely death, we thought a book focusing on the "facts" of constitutional culture would be worthwhile were it to leave such deeper concerns for other work. That said, I think this much comes through in our book: the framers' common-sense school understanding of man's limited, self-interested nature (the inescapable role of sin), as well as man's capacity for virtue, underlay the Constitution's historically grounded

machinery of federalism and checks and balances, which buttresses separated and limited, enumerated powers. Progressives' faith in the power of elites to reshape and even perfect human nature drove their program of gathering power to the political center.

This much seems inescapably true and leads to Gangi's further question: "what was the average voter to do" when events, forces, and people began undermining our constitutional order? The problem with such questions is that they put the analyst in the position of seer and, more troubling, advocate. Neither Carey nor I have ever espoused the myth of utter neutrality among analysts. Still, "what-ifs" can easily twist analysis into myth-making and even dishonest narrative building. Moreover, while it is true that a people more determined to protect its rights of self-government might have resisted the calls of government-sponsored comfort, it is equally true that the "laissez-faire" Supreme Court of the late nineteenth century, in the name of freedom and individual rights, began in earnest the undermining of our constitutional order. Had this Court been less enamored of social Darwinism (itself a Progressive conceit) and less confident of its right to construct a "national market" on the corpse of local self-government it would have better obeyed the call of constitutional morality and so avoided undermining our constitutional order. Sin, or if one prefers, the pull of ideology, is always with us, requiring a virtuous and vigilant people if self-government is to survive, let alone flourish.

Kevin Lee's review also begins on a surprising note. Why analyze a book on constitutionalism in the context of artificial intelligence? But the concerns Lee highlights in his thought-provoking essay go directly to those of unwritten constitutions and their relationship to the rule of law. He notes in particular intellectual and software engineering developments brought on by crucial twentieth-century advances in mathematics. The roots go deeper, of course. As Thomas Spragens pointed out several decades ago in *The Irony of Liberal Reason*, the drive to reduce human experience to data predates and may be said to have spawned both a determination to reshape human nature and an incapacity to understand that nature's intrinsic interconnectedness.

The persistent liberal practice of breaking down information into its smallest component parts has undermined our ability to think clearly about human relationships and institutions. Our increasing focus on "facts" that we may marshal to our own ends has made the teleological thinking at the heart of Western civilization and, from there, American constitutionalism, difficult to sustain. Moreover, such reductionism has

led to increasing manipulation of information by those in positions of authority to serve their own ends. Lee shows that the patterns of action and thought captured by students and practitioners of artificial intelligence show two important things: first, that there are natural patterns to our interaction (supporting most people's instinctive understanding of a natural order to existence) and, second, that a pattern may be altered or even imposed on such thoughts and actions, at least for a time and in appearance. The manipulation of algorithms by Google and other organizations to further their own narratives and nudge users toward preferred content and opinions show the totalitarian possibilities of data integration.

Data have patterns because existence is patterned. But there are many patterns that can be found, or even imposed. Sadly, those who rule AI may well follow their search-engine progenitors and manipulate data for their own, no doubt "enlightened," ends. This is why, for all its flaws, H. L. A. Hart's supposedly value-neutral understanding of the rule of law is so important. As Lee points out, law's essential good is order, which rests on predictability. The order established by consistent judicial decisions is undermined by juridical democracy (rule by judges), with its myriad prejudices favoring individual autonomy, now in ever-greater conflict with the demands of "diversity" defined in terms of group identity. Our book emphasizes Lon Fuller's critique of Hart's own reductionist view of legal order as mere predictability because, as Fuller points out, law's order is naturally intertwined with human purpose. Law furthers purposive action by conforming to man's social nature and purposes—in accord with the nature of our being.

Legal order is being redefined as overtly political order, which is to say it is becoming a tool of power rather than an outgrowth of human interaction. Law cannot survive as law—as predictable rules of action—under such circumstances. This renders highly dangerous the kind of predictive software Lee notes is in development, and which could be used to bully judges into adhering to a skewed reading of precedents as manipulated by the terms in which the program is written. That such methods already have made their way into some sentencing guidelines and even discussions of the implementation of regulations is, frankly, frightening. This is so, not because it is impossible to use mathematical modeling to improve law making and adjudication, but because we are using such tools without understanding the modelers' assumptions.

Clearly, those who write predictive software programs have no right to prescribe outcomes. But there is ample precedent for such illegitimate

conduct. The "scientific" study of politics, with its emphasis on polling and political messaging, has been used as a tool of public manipulation from its beginning. The phrasing of polling questions and news headlines, the placing of stories on the front page or in the back; these are only the most obvious tactics for using supposedly neutral informational tools to advance an agenda. The massive increase in the power of these tools, combined with the ability to hide their manipulation from the public, makes it imperative to address their use. We must find some way to expose and subject to serious debate the assumptions guiding our access to information. In a nation as riven by fundamental disagreements as ours has become, this will not be easy. Clearly the place to begin is with antitrust law and other structural reforms rooted in our law and our cultural attachment to open competition. Through these we may undermine the power of a small, technocratic elite to shape public discourse.

More generally, it is essential for those few conservatives left among academics and "public intellectuals" to make clear that the technocratic, individualistic, and anti-traditional assumptions of our cosmopolitan elites are not the only ones available. We must choose between law that follows culture, within a constitutional order seeking to mediate among competing natural, local associations, and law that pushes culture in the name of "progress" toward the cosmopolitan goals of a commanding constitution. Unfortunately, the assumptions and traditions underlying this choice are almost universally placed above discussion, or rather camouflaged by liberal pieties and self-serving virtue signaling among elites, apparatchiks, and their hangers-on.

Multicultural ideology and the progressive drive to dominate are hostile to law and cannot be bound by law. This is especially true of the individualistic forms of law espoused by liberals and libertarians at the expense of constitutional form and cultural content. Whether law is undermined by ideologically motivated judicial discretion or ideologically motivated algorithms, the results will be the same: the rise of quasi-law and the degradation of law, liberty, and any decent culture.

Many today seem genuinely surprised that some of us refuse to accept the tools of data collection and modeling as "neutral" forms of "science." But then this is a central problem of our era: the essentially religious belief that we can find a God in the data that will produce the kind of society and even human character we desire. Instead, as any student of natural law would have predicted, such tools merely bring us back to a more fundamental question, namely, given the intrinsic patterns of

conduct embedded in our nature and in the nature of human relationships, how can we bring order to the chaos of mass society in times of disaffection without assigning our wills to those who rule the machines?

Patricia Lines's essay is less surprising than those of either Gangi or Lee. It is, in fact, the kind of argument for judicial supremacy that has been made consistently for many decades. According to Lines, there is a "right to privacy [that] protects individual self-determination and control over one's major life decisions, so long as they harm no other person and have" an insufficient impact on the public welfare to justify an invasion of that right. This "right," spelled out most famously in J. S. Mill's *On Liberty*, is not written down in the Constitution but may be divined by judges who find it to be partially covered or at least implicated by various rights specifically mentioned, especially in one or more of those provisions making up the Bill of Rights. On this view, we should overlook the fact that the first eight amendments were aimed directly at preventing federal, not state, action and that the Ninth and Tenth Amendments clearly emphasize the priority of state over federal authority wherever the federal government has not been granted specific, enumerated powers by the Constitution. Why? Because the Fourteenth Amendment's guarantee of due process of law in fact protects the substantive rights of all citizens against state as well as federal actions. To reject this argument is to accept a whole series of deplorable state laws and decisions such as those forcing families to send their children to English-only schools and those prohibiting the distribution of contraceptives. To reject a "right to privacy," then, is to cooperate with the evil of governmental oppression.

Some of the details and offerings of evidence change. In addition to finding relevant quotations showing the concern of constitutional and Fourteenth Amendment framers to protect individual rights, Lines emphasizes what she sees as a kind of "judicial duty" exercised by judges in their development of the doctrine of substantive due process. But substantive due process, a doctrine responsible for a massive increase in judicial power, is not limited by the constitutional common law promulgated by its practitioners. The various prudential rules of review, not to mention the court-created "levels of scrutiny" by which properly promulgated laws are subjected to judicial manipulation and possible nullification, are nothing more than court-created tools of power; they direct but do not set justiciable limits to judicial discretion. Indeed, Lines's own formulation of the right to privacy itself is a rejection of traditional rights thinking. It substitutes for traditional natural law understandings of, for

example, the difference between free speech and libel, a judge-applied calculus of harm (decisions that "harm no other person and have no serious impact on the public welfare"). All rights have limits. But the tradition of rights undergirding our constitutional order sees such limits in the nature of the act and its *telos*, not in judges' determinations of harmful effects.

As to Lines's historical argument, it has been answered definitively several times. I reference as preeminent examples Raoul Berger's *Government by Judiciary*[2] on the intentions of the framers of the Fourteenth Amendment and the nature of "Privileges or Immunities" and Philip Hamburger's "Natural Rights, Natural Law and American Constitutions"[3] on the nature of rights, their limited incorporation into our Constitution, and the import of the Ninth Amendment. Further discussion has long since lost its utility and interest on this point. Why? For the simple reason that, as Jesse Merriam points out in his contribution to this symposium, proponents of a "living constitution" continue to shift ground whenever necessary to provide some modicum of scholarly legitimacy for their fundamentally political determination to protect "fundamental rights" of their own creation at the expense of constitutional form and process.

Judicial supremacy has no doubt eliminated many bad things, but it has committed them as well. It is ironic that Lines includes in her parade of horribles an Oklahoma statute requiring sterilization for certain habitual criminals without mentioning the "progressive" decision in *Buck v. Bell*.[4] In that case every Supreme Court Justice, with the exception of the one Catholic then on the Court (Pierce Butler), approved the sterilization of Carrie Buck, a "feeble minded" ward of the state who had given birth to an illegitimate child conceived when she was raped. The Court, its members as enamored of eugenics as most progressives of the era, agreed that "three generations of imbeciles is enough."

Arrogant, bad actors and bad opinions populate all sectors of all societies. The question is not whether we can trust some set of experts to keep us safe from tyranny; we cannot, be they in robes, suits, or the latest hipster-wear favored in Silicon Valley. The framers of our Constitution understood that the forms of constitutionalism—separation of powers, checks and balances, and federalism chief among them—must serve as precautions auxiliary to human virtue and republicanism to lessen the

[2] (Cambridge: Harvard University Press, 1977).

[3] 102 Yale L. J. 907 (1993).

[4] 274 U.S. 200 (1927).

risk of tyranny. The concentration of power in the courts undermines their system, indeed is in the process of destroying it.

We also should not forget that a constitution is something more than a frame of government and set of rules for making rules. A Constitution is a kind of contract and covenant. Americans have been a covenanting people. They were conceived in large measure on the ship *Mayflower*, when the Pilgrim heads of households declared that "[we] do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience."[5] That is, in entering into our society, the Pilgrims consented to the laws that would be passed to serve the general good, defined in terms of a Godly community.

Within our tradition, Americans brought up under or lawfully choosing to become bound by our Constitution agree that they will support that Constitution, including its provisions for change—that is, through the amending process, rather than through unconstitutional means, be they military coups or judicial overreach. The "deal" of being part of a constitutional republic is that the rules are set, intended to be predictable and continuing until and unless they are specifically changed through the constitutional amendment process. To give over this power to unelected judges is to transform the constitutional republic into a dictatorship of judges. There is, of course, a law higher even than the Constitution—the natural law. But that law, with its moral principles, is only liable to adjudication, to being applied to life and law in court, when and to the extent it is explicitly incorporated into law by appropriate means, not by judicial fiat in the name of abstract principles like "privacy."

Under the guise of preventing "more dangerous branches" from imposing rules they do not like, all too many judges have helped create a kind of constitutional common law, rooted in their own notions of fairness and prudence. And so we have seen our culture reshaped by a line of cases from *Dredd Scott*, the progenitor of substantive due process, through various "good" cases recognizing penumbral rights such as that to contraceptives, first within the family, then without, to abortion, again, first within the family, then without, to the redefinition of family itself as a union of two (or perhaps more?) people who currently wish to have their relationship receive official approval and, not coinciden-

[5] Mayflower Compact (1620), https://avalon.law.yale.edu/17th_century/mayflower.asp.

tally, receive various government and government-mandated benefits. Whatever one thinks of such results, or of numerous decisions striking down state laws and private practices deemed discriminatory (many of them comporting in their results with my own policy preferences and/or deeply held moral convictions) the vast majority have been brought about by courts acting in ignorance and/or contempt of our Constitution and the constitutional morality on which it relies.

People are free in our country to create rights in addition to those provided in the Constitution. They may do so either through their legislatures or, should they desire greater protections, through constitutional amendment. The issue is not of rights, but of who shall rule. Will it be the people through their representatives, or the courts? Will Americans rule themselves under God, constitution, and law? Or will we seek the comforts of subjugation to judicial elites?

I have saved my response to Jesse Merriam for last because his essay calls for the greatest amount of consideration regarding further research. In a review that is as insightful as it is irenic, Merriam distinguishes the arguments laid out in our book from those that constitute what he calls the "libertarian turn" in the academic study of American constitutional law. Agreeing with his arguments in all their detail I would observe only that this "turn" is more the result of survival than of change among students of constitutional law. A small minority of those on the loosely defined political right have always sought to foster an aggressive form of "classical liberal" individualism through expansive readings of the constitutional text and narrow, not to say shallow, readings of America's unwritten constitution.[6] In recent decades, however, as traditional conservatives have been essentially eliminated from the legal academy (one could count on one's fingers the number of traditionalist constitutional scholars still alive and writing)[7], libertarians have, if not flourished, then survived and even increased their numbers within a narrow range of law

[6] It is worth noting that not all classical liberals are guilty of such maneuvers. See, for example, Peter Augustine Lawler and Richard M. Reinsch II, *A Constitution in Full: Recovering the Unwritten Foundation of American Liberty* (Lawrence, KS: University Press of Kansas, 2019).

[7] It is indicative of this situation that only six law professors were willing to publicly support the presidential candidacy of Donald Trump. Not all were traditional conservatives, and some traditional conservatives did not sign on, but the number indicates how low the numbers are and how concerned those in this tiny group are about ideological exposure and job security. https://editions.lib.umn.edu/constitutionalcommentary/article/stephen-pressers-love-letter-to-the-law-in-five-parts/. On the ideological leanings of law school teachers more generally, see for example https://abaforlawstudents.com/2017/01/12/political-disequilibrium-law-school-campuses/.

schools.[8]

This change in academic representation helps explain the paucity of arguments regarding specific court decisions Merriam notes in our book. Unfortunately, libertarian radicalism is as divorced from the American tradition as are leftist academics' various forms of social activism in the guise of legal interpretation. As a result, a deep dive into precedents seemed counterproductive to Carey and me. The bulk of contemporary precedents are rooted in reasoning more or less hostile to the unwritten constitution on which the written Constitution is based. In addition, precedent for many decades has been accorded far too much deference, resulting in a constitutional common law increasingly divorced from the text. The Constitution is not simply what the Supreme Court says it is. Members of each branch have a duty to read it in itself and in the context of our constitutional tradition and apply it within their own spheres. This is the difference between constitutional morality and the overreaching judicial review so often touted as the essence of democratic governance.

Constitutional morality is undermined by the machinations of interpretive practices that are engaged in to achieve ideological goals such as "progress" and individualism. Our point, as Merriam notes, is not to "get the precedents right." It is to resuscitate the cultural understandings that undergird the document itself. Only if we sweep away both bad precedents and court-imposed doctrines that obscure the constitutional text can we again use our reason, shaped by the same traditions that shaped the Constitution itself, to understand it and use it to shape and constrain government.

Given our concern with traditions of understanding, it is not surprising that Merriam should criticize our book for failing to go beyond a critique of progressivism to the deeper roots of the decline in American constitutional morality. Guilty as charged. Merriam correctly notes that the problems with contemporary American constitutionalism cannot be attributed solely to progressivism. Carey and I would agree. But we also would contend that progressivism was the mechanism as well as the ideological medium through which most of the corruptions of our constitutional order were introduced. This certainly was our operating assumption as we sought to explain the unraveling of the American constitutional tradition.

[8] Not surprisingly, the practicing bar and the judges who come from it have followed suit. There simply is no one to teach the vast majority of lawyers the respect for judicial restraint and tradition conservative scholars once supported.

Federalism and the separation of powers have been undone by the demand for national solutions to the eternal problems of financial insecurity, competition for wealth and status, and the abuse of power. As we explain, in the late nineteenth century, progressivism began undermining our constitutional order in the name of fairness, efficiency, and democracy. According to progressives, the people as a whole should rule by giving experts general goals, which they would use the machinery of government to reach. First aimed at bringing powerful corporate interests to heel, the progressive trend hit its stride during the New Deal when economic disaster brought into power a regime promising to take care of the people—something new in American public life—through legislative and administrative means.

The new, commanding view of the national government undermined the American division of sovereignty. Once the people demanded a government that provided prosperity and security, members of Congress in particular were moved to abandon their traditional constitutional morality. Members signed over their duty to make laws to various executive agencies, even as the federal government as a whole arrogated to itself the right to rule in the fullest sense a formerly independent people.

Without rehearsing too much of our book's argument I would note that this institutional watershed is at the heart of the various forms of radical change wrought through legal as well as political institutions in America. Religion was privatized. Education was nationalized. The family was deconstructed in the name of individual autonomy. Local associations were stripped of their reasons to exist, even as they were subjected to detailed oversight from the political center. All these changes were made possible by the progressive state. From mediating among more natural, fundamental associations, the progressive state seized the initiative in commanding that society be changed to make it more friendly toward individual wants and desires, as determined and provided for by national elites and their followers.

This is not to say that much more work should not be done in tracing the roots and effects of progressivism on constitutionalism and culture. Obviously, progressivism did not come from nowhere. Its roots go deep into the American culture. Intellectually, it owes much to the American transcendentalists and, more generally, to the increasing influence of a perfectionist strain of Christianity set loose from its historical and theological moorings. Legally and politically, progressivism has roots in the doctrine of substantive due process. That doctrine was first promulgated in the infamous *Dredd Scott* decision as a means of implanting slavery

in the common law—a place it never had been before and which could not accommodate the "peculiar institution" without damage to our understanding of natural as well as statutory and customary law. The influence of this doctrine was multiplied manyfold by the laissez faire court before being further developed, to different ends, by progressives.[9] Why did Carey and I not explore these roots? Principally because a book, especially a joint venture between two very different people, must stop somewhere. We sought to capture the crucial, defining concepts of law, constitutionalism, and the specifically American constitutional tradition, then show how it was undermined by an increasing demand for state-supported "progress."

It does seem worthwhile mentioning one central era of potential disagreement with Merriam. He asks whether we should not have looked to the founding era itself as a, if not the, source of our contemporary dilemma. Both Carey and I would disagree if by that Merriam means that the Constitution, including as interpreted during the early republic, was fatally flawed. Carey and I differed in some ways. Carey was a proponent of Hamilton's more nationalist reading of the Constitution, which he insisted was central to our tradition, distinctly limited in its original conception and reach, and undermined first by Lincoln, then by progressives and others. I see founding era debates over the proper reach of the federal government as necessary parts of a healthy polity negotiating the details of divided sovereignty. In debates between Hamilton and Jefferson, as between Federalists and Antifederalists, both sides were wrong, both sides were right, and the conflict itself was healthy for and perhaps essential to divided sovereignty and ordered liberty.

Carey and I agreed that the question was not whether our or any other constitution was perfect. Divided sovereignty is a difficult, delicate, and ultimately imperfect constitutional form requiring a disciplined, virtuous people for perpetuation. Without going into detail, I would note that Federalists and Antifederalists willingly compromised on a number of constitutional provisions (perhaps most importantly the Ninth and Tenth Amendments) relevant to this issue.

The Federalist/Antifederalist debate took place within a broad consensus regarding the culture and the necessity of divided sovereignty that was a solid basis for constitutional republicanism. Was Marshall too aggressive in his use of the Commerce Clause? Did the Constitution

[9] These arguments can be found in other works by both Carey and me. For example, McAllister and Frohnen, *Coming Home: Reclaiming America's Conservative Soul* (New York: Encounter Books, 2010) provides a short introduction to many related themes.

itself grant too much elasticity to the federal government? Perhaps, but then again, too little federal power might have resulted in an earlier and even more catastrophic civil war, or other forms of corruption rooted in local radicalism. It is impossible to know. And the real degradation only set in with progressivism. Moreover, I would emphatically disagree with Merriam's contention that the Religion Clause intentionally relegated religion to some private sphere. Even the deist Thomas Jefferson as President made a point of attending religious services in the Capitol. Ours was and in important ways remains a constitutional tradition rooted in Biblical and natural law as well as English charter traditions.[10]

The most important corruptions of our system are cultural. As Merriam points out, our book is less concerned with interpretive theory than with the grounds of constitutionalism. As such, its central point is that we have become a people too corrupt to govern itself. If Carey and I were insufficiently precise in our description of the kind of society upon which the American constitutional republic was founded and which is necessary for its restoration, Gangi clearly made out its character and Merriam himself has done an admirable job of piecing together the precise elements of America's former, free and virtuous culture.

We did not delve more deeply into the nature and possible remedies for this situation because there was a lack of agreement on some of these issues between Carey and me. Carey held little hope of restoration and did not share my own focus on the natural family and specifically religious practices as crucial to any full realization of a good life. That said, I have written on such topics elsewhere (and continue to do so). As important, my good friend George Carey, without benefit of religious faith, was determined to argue for what he saw as the commonsense bases of ordered liberty in constitutional government, limited by a system of divided sovereignty. I shall always be grateful for his partnership in thinking through these issues and writing *Constitutional Morality and the Rise of Quasi-Law*.

[10] See, e.g., Joseph Baldacchino, "The Unraveling of American Constitutionalism: From Customary Law to Permanent Innovation," *Humanitas*, Vol. XVIII, Nos. 1 and 2 (2005).