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

The Rise of the Administrative State and Decline of Constitutional Morality

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Keep a highlighter and pen handy. I don't recall the last time I used the former so frequently or made so many comments in a book's margins.[1] Each draft of this review has had a different emphasis. The conclusion I reached was this: the reader will have an incredible number of issues to mull over, and this review simply cannot discuss every worthwhile topic. Thus, while not a casual read, this volume certainly is a rewarding one.

The book commences with a basic political insight: 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. This book demonstrates the many reasons why that is so, and more particularly, how current legislative and executive practices have undermined the framers' understanding of the rule of law. In sum, our nation's governance has become increasingly arbitrary under a system the authors aptly describe as "quasi-law."

George W. Carey is perhaps the better-known author. Until his death in 2013 he was for nearly fifty years Professor of Government at Georgetown University and a major academic influence among conservatives. Bruce P. Frohnen, who is the Ella and Ernest Fisher Professor of Law at the Ohio Northern University College of Law, also has strong conserva-

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[1] Bruce P. Frohnen and George W. Carey, *Constitutional Morality and the Rise of Quasi-Law* (Cambridge and London: Harvard University Press, 2016). Page numbers from this book are hereinafter cited within parentheses in the text.

tive credentials. The author of two previous books and editor of several others including the 1998 book *Community and Tradition*, co-edited with Carey, Frohnen completed the present co-authored volume after Carey's death.

In a sweeping introduction, the authors summarize their concern: "America's written and unwritten constitutions no longer fit one another. As a result, the written Constitution no longer means what it says to the people it is supposed to govern and our regime no longer acts according to the rule of law" (2). The authors proceed to steep readers in the history of the republican governmental form, in which voters are the ultimate determiners of public policy. They then survey the impact of well-intentioned twentieth-century reformers on our existing institutional structures, which those reformers found inadequate to meet the exigent circumstances of their day. Since the end of World War II, academicians and politicians have increasingly sought greater governmental efficiency, and their choice of means has eroded the framers' focus on legislative predominance and instead emphasized an administratively centered design that is more dependent on executive power.

Seems like a simple enough tale. It is not. Early on in consuming the book I was rudely made aware of how long it had been since I had given serious consideration to the issues raised by the authors: What is meant by 'the rule of law,' and why is it of value? The authors diligently and exhaustively explore this question. They define the rule of law as "governance according to settled norms; it is valuable because it establishes predictable order, allowing for the pursuit of higher political ends as well as basic human flourishing" (19). They then point out that integral to the rule of law is a recognition of the need for "voluntary self-restraint" (21), a subject rarely mentioned today in the legal literature. That failure, from both the right and left, has taken its toll on our tradition of self-government.[2] It is remarkable, for example, that after the Revolution was won and each sovereign state organized its governance as it wished, every state nevertheless uniformly retained its English heritage. Why?[3] After all, revolutions are a regular occurrence, and the historical record, ancient and modern, is not pretty. Yet the subject is

[2] Some fifty years ago George W. Carey, along with Willmoore Kendall, initiated the conversation. See Willmoore Kendall and George W. Carey, *The Basic Symbols of the American Political Tradition* (Washington, DC: The Catholic University of America Press, 1970), vii.

[3] For details of the continued state use of English common law before and after the American Revolution see, for example, *The Adoption of the Common Law by the American Colonies*, *The American Register* (September 1882), 553.

rarely given serious attention today. The authors, however, provide a serious exposition on topics such as, what features must a law have to be considered moral?[4] Their analysis is intricate, enlightening, and well-reasoned. Such attributes are also typical of other topics discussed in the book, including "civic republicanism" (communitarianism) and the nature of law (acknowledging that natural law has often been dismissed because of its association with "religion, and Christianity in particular.") (36).

Discussions that follow are equally complex, addressing, for example, what exactly *is* a law, how is it distinguishable from other inferior acts, and--perhaps even more intriguing--what kind of law is a constitution? (50). Having been immersed for several decades in more concrete public-policy disputes, I had not contemplated these fundamental issues for some time. My numerous handwritten margin notes indicate that at least for me the answers were more elusive than I had first imagined.[5] The authors also discuss various perspectives before making an important distinction, identifying two types of constitutions. The first type is *commanding* ones that "by their nature are political programs intended to shape the conduct of individuals, groups, and political actors to produce a society that has a specific character, whether it be deemed free, fair, or even oppressive" (52). The other type, "rooted in historical practice . . . , *mediates* among more primary social groups and institutions." Our constitution, the authors observe, is of the mediating variety because the framers designed it that way. They saw it not as a fundamental guiding force for the society but rather "as a suit of clothes made to fit a society that is already there, the integrity of which must be respected" (52). The authors add: "A mediating constitution accepts the preexisting orders of society, in their broad outlines, and builds its structures upon this order. This does not mean that constitutional structures will not . . . bring out the inherent injustice and constitutional incompatibilities of evil practices such as slavery" (55-56).

Reviewing the structures of the American Constitution, they explain why the included features were compatible with "the character of the

[4] In the authors' extensive treatment of the morality of law they draw upon H. L. A. Hart's classic articulation (23), including his "separation between law and morality" (29). They also explore the perspective of John Rawls (30).

[5] Philip Hamburger reminds us of the uncertainty congressional "determinations" had under the Articles of Confederation. It remained uncertain whether those determinations and especially treaties were considered part of the law of the land or had the force of law. See Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008), 587-596.

American people and of their preexisting governments" (80). The chapter draws heavily on George W. Carey's scholarship, and, not surprisingly, the discussions are once again thorough and enlightening.[6] They probe the interrelationships among the republican principle (reliance on the approval of the populace), antifederalists' concerns (including their perspectives on adequate representation), and James Madison's desire to put policy-making power ultimately in the hands of the relatively indifferent (85). Readers are reacquainted with the initial Virginia Plan (I did say they were thorough), which they use to demonstrate the self-restraint traditionally integral to our politics. As the reader no doubt recalls, although the Virginia Plan was initially approved by a majority of states, convention participants continued their dialogue, spending additional time and effort to acquire broader support for the new constitution.

The authors then probe the American idea of limited government, emphasizing how crucial it is to a mediating type of constitution. So too, recounted here and elsewhere in the volume is the tug of war between federal and state authority. Finally, and particularly important for those not already familiar with it, is a discussion of the framers' purpose of the separation of powers, including Carey's insightful analysis of the framers' distinction between governmental and majority tyranny, a distinction so misunderstood for so long that it marks a turning point in our nation's constitutional habits. Understood by the framers as a means to minimize governmental capriciousness and to acquire wider consensuses on public-policy choices, by the turn of the twentieth century, as the authors carefully recount, the separation of powers was perceived as responsible for governmental inertia. This helps to explain why so many academicians today approve the rise of executive and judicial power, that is, to obtain "good policies."[7]

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[6] The authors conclude the chapter with an "outline of the nonmechanical means necessary for the constitutional structure to work, namely, constitutional morality" (81). One might contrast the seriousness of this discussion with a typical college text that professes decidedly modern democratic assumptions.

[7] Space does not permit the recounting of other informative discussions on topics such as the Tenth Amendment (92), factions (93), the Council of Revision (98), and, perhaps most notable, the unwillingness and failure of contemporary legislators to defend their turf (103). The authors also review the framers' expectations for an independent judiciary. A contrast between the framers' perspective and that of modern advocates of judicial power may be found in William Gangi, *Saving the Constitution from the Courts* (Norman, OK: University of Oklahoma Press, 1995), 194-249. The authors, however, omit Publius' emphasis (he refers to it four times) on the power of Congress to control the Supreme Court's appellate jurisdiction "both as to law and fact, with such exceptions, and under

Space limitations prohibit explication of other worthy topics. For example, intimately related to the authors' discussion of constitutional morality is the idea of obligation, that is, the responsibility of individual citizens as well as "we the people" to uphold the constitution.[8] The discussion provides yet another example of how important self-discipline is to our tradition, and consequently, the authors put the oath of office (113) in its appropriate context.[9] Such considerations again are rarely, if ever, mentioned in today's literature.[10] Their discussion is reminiscent of Henri Bergson's suggestion that the sense of obligation among humans parallels the function of instinct among social animals.[11] Good citizens instill habits of honesty in their progeny.[12] Such habits are not instinctual in humans, but over time, when well cultivated, they may become manifest even in mundane situations, such as automatically correcting a cashier who mistakenly returns too much change. Like all such habits they become more automatic with more practice. So too, argue the authors, with habits of constitutional morality (110-112).

The authors make this observation: "Constitutional morality is a secondary, derivative morality. Only if the Constitution is seen as somehow good can upholding it be deemed good. Only if there is an internal morality to the Constitution's law can constitutional morality make sense" (113). But where had the appropriate and necessary virtuous habits come from? Not from the Constitution itself, the authors observe, because it was of the *mediating* type, that is, although creating structures consistent

such regulations, as Congress shall make." *U.S. Const., Art. 3, sec. 2.2.*

[8] Publius makes abundantly clear that "[u]ntil the people have by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act." James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* No. 78 (hereafter cited as *Federalist*).

[9] The authors add: "One key support for the constitutional morality was a culture in which the desire for honor was deeply rooted," citing the example of George Washington, who served his country's military and government, and in both instances voluntarily left once he considered "his duty [was] done" (112).. In this respect, I am increasingly appreciative of Hamburger's phrase of "judicial duty" rather than the contemporary use of judicial power. Generally, see Hamburger, *Law and Judicial Duty*, 587-596.

[10] "Constitutional morality required seeing the Constitution as a limited but necessary fundamental law, requiring restraint and judgment for its continued survival" (113).

[11] Henri Bergson, *Two Sources of Morality and Religion* (South Bend: University of Notre Dame Press, 1977).

[12] Habits are not always pleasantly reinforced. I recall my father bringing me to a local candy store, insisting I apologize to the owner and pay for some candy I had surreptitiously pilfered.

with pre-existing institutions, it was not equipped to instill (*command*) such habits (aside from those associated with allegiance to the created structures). Rather, "the people would have to be brought up in their families, churches, and local associations, to recognize and value the rule of law (especially as embodied in the Constitution) and the character traits necessary to maintain it" (112). And that is still true—deep down, beyond the academic machinations promulgated by our most respected scholars—the people obey judicial decisions because of the habits described by the authors. The people simply believe (why should they not?) that the Constitution requires what the judges tell them it does. They trust the justices—because the justices took an oath.

The authors then provide a refresher course in American intellectual history: "Our goal . . . is to show how the framers' constitutional morality was undermined by a newer vision of the purpose of constitutional government."[13] And they do an admirable job reviewing post-Civil War history while establishing that reformers of that era not only misunderstood the framers' design but also assumed the framers' motives had been pecuniary or anti-democratic ones. It was in the context of those misunderstandings that the belief grew that "the administrative state . . . [was] both inevitable and laudable given the requirements of a modern industrial and postindustrial society committed to an egalitarian distribution of life chances" (116). Obviously, this change was also spurred by powerful social and economic forces. Laissez-faire economic assumptions dominated the era's intelligentsia, including members of our state and federal judiciaries. Those economic assumptions, changing demographics, and labor dislocation and unrest soon frightened insecure voters and shifted intellectual tides, influencing thinkers such as Dwight Waldo, John Stuart Mill, Woodrow Wilson, Walter Bagehot, and Herbert Croly, to mention only a few of the intellectuals of the day whose views are reviewed by the authors (129-138).[14]

Their point is this: the administrative state is the by-product of many thinkers during a period of considerable economic and social stresses. The authors cogently review each of these thinkers while contrasting their views with those at the heart of the framers' constitutional design, explaining how these changing perspectives undermined the pre-existing constitutional morality. So, for example, the authors recount Croly's

[13] Ibid., 115.

[14] Some of the authors' most thought-provoking comments occur during their discussion of John Stuart Mill's contributions to the rise of the administrative state, including his influence on other thinkers, including Woodrow Wilson.

perception of administrative "experts as public spirited" and "capable of discerning social complexities" and therefore having no need to "submit . . . well-designed programs to the legislature for its approval"—as required by the framers' design (146). A subsequent authority, Pendleton Herring, contended that one of the integral components of the framers' design (the separation of powers) posed obstacles to the greater efficiency required in a more modern and efficient administrative state (151).

The authors recount early Progressive efforts to reconcile our legislative-dominant government with the rapid changes that were occurring: "an expansive bureaucracy exercising broad discretionary powers with democratic governance" (152). Initially these reformers thought the impetus for change should somehow come from "the people" since even for them the legislature remained the controlling institution. However, eventually thinkers such as Woodrow Wilson characterized "legislatures as subservient to special interests, riven by political division, and characterized by rank incompetence" (152). Soon, reformers turned to the presidency because of its inherently greater efficiency (decision-making was in a single hand versus the many legislative hands), thereby moving away from the framers' legislative-centered design. The authors view Woodrow Wilson as a pivotal figure in the transition from the framers' design to today's perception of the president as having an equal if not superior claim to Congress because he or she embodies the "popular will." For Wilson, it constituted an abrupt about-face from the position he had expressed in his 1885 work, *Congressional Government*.[15] In sum, since Wilson's time various processes "have served to alter the character of our constitutional morality and operational constitution without altering the Constitution's formal structure" (154). In the authors' view Congress has been complicit in the growth of the administrative state because it by-and-large abandoned its oversight responsibilities, often ceding its responsibilities to the executive branch. Additionally, in the authors' view, the framers' expectation that the judiciary would keep both branches within their respective constitutional boundaries not only

[15] Ignored here is the authors' discussion of Woodrow Wilson's transitional work, *Constitutional Government* (1908), wherein he abandoned his earlier emphasis on legislative power, eventually concluding that "the president [is] . . . the only authentic voice of the people" (cited in Frohnen and Carey, 153). The authors, however, reject the Progressives' mistaken assumptions regarding the role of the separation of powers as well as their accusation that the framers lacked faith in democratic government or the people, and that the framers' motives had been primarily pecuniary instead of patriotic. These accusations are analyzed more thoroughly in William Gangi, "A Scholar's Journey on the Dark Side," 11 Chap. L. Rev. 1, 45-51 (2007-2008).

failed, but the judiciary has contributed to the transition to the administrative state by repeatedly usurping the legislative power. The authors offer a comprehensive if at times exhausting and occasionally repetitious analysis. Briefly put, the framers' vision had been the "maintenance of ordered, limited government and the rule of law" while "[t]he Progressives . . . reject[ed] . . . formalism and restraint, instead emphasizing the need for efficiency in pursuit of a substantive common good" (160).

Two important topics remain. In the first the authors contrast contemporary characteristics of the modern quasi-law administrative state with the framers' constitutional design.[16] They recount today's frequent imposition of regulations on Americans by independent agencies. Each regulation has the force of law although not imposed by the people's elected representatives in the legislature. These regulations also are often not uniformly applied to all those regulated, a practice contrary to the authors' understanding of what is required by a viable constitutional morality. For example, the authors describe examples of Congressional exclusions from portions of legislation, most notably from the Affordable Care Act.[17] Other devices the authors find troublesome include Congressional delegation of broad administrative discretion accompanied by inadequate oversight (including a failure to impeach). So, too, the authors recount inadequate legislative diligence (pointing to a failure of many legislators to read provisions of the ACA before voting for it) (187). The authors find particularly vexing, and rightfully so, the presidential practice of raising constitutional objections to proposed legislation, only to sign the bill in question while announcing a presidential intent not to enforce particular provisions. The authors contend, and I concur, that while the framers authorized presidents to veto legislation for any reason, including constitutional ones, once they sign a measure into law, they must enforce every part of the law until it is otherwise adjudicated.

The authors thus trace the rise of the administrative state in parallel with the growth of executive power. In addition to the growing body of regulations issued by a variety of independent agencies such as the

[16] By "quasi-law we mean rules that have the impact of law—they alter the rights of people in our society—yet lack essential elements of law, such as general enforceability," which the authors describe as analogous to "indigenous laws in many countries because they [also] do not apply to everyone in all circumstances" (Frohnen and Carey, 185-86).

[17] More egregious, perhaps, is to learn that the House of Representatives is *considering* requiring sexual harassment workshops for members of Congress when it has been mandatory for some years in the private sector. Also, references have been made in the press to a congressional fund financed with taxpayer money to settle sexual-harassment claims made against congressional members.

Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA), a number of devices have rendered law applications more capricious: presidential waivers (exempting some parties from full application of the law), consent decrees, and other presidential practices such as "executive orders, proclamations, memoranda, or even signing statements" which "assume . . . the force of law, creating and imposing specific, legally enforceable burdens on citizens" (204).[18] None of these devices, the authors observe, requires Congressional approval.[19] While many particulars will undoubtedly resonate more strongly with conservatives, there are issues here that people of all political persuasions must confront on their merits.

The final issue is this: Can anything be done? In answering that question the authors are brutally pessimistic. They review, analyze, and reject suggested "'Practical' Reforms," such as returning to the "original dispensation" (by which I interpret them to mean the framers' understanding of constitutional morality), or expecting Congress to reestablish its hegemony and authority by directing "the actions of administrators with genuinely limited discretion and, more importantly, writ[ing] laws binding down those administrators through clear statutory language" (223).[20] The authors make this final observation:

> It may be the case that radical reforms become necessary to reconstitute proper political authority and the rule of law in the United States. It may be that no nation of over three hundred million people can be governed so as to maintain ordered liberty. If this is true, then the "nation" must become some form of loose confederation eschewing attempts to regularize, let alone standardize, incomes or ways of life, or it must split into several nations, or lose its freedom (240-241).

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[18] The authors rely on Philip Hamburger's conclusion "that adjudication—actual treatment of persons and entities operating under these regulations—lacks essentials of due process" (Frohnen and Carey, 191, citing Philip Hamburger, *Is Administrative Law Unlawful?* [Chicago, IL: University of Chicago Press, 2014], 130). The authors also observe that regulations often are so complex that different inspectors know only parts of the code, hence, the code is arbitrarily and inconsistently applied (195). With respect to sexual harassment made on University campuses see "AAUP-Title IX," a response of the American Association of University Professors to the 2011 Dear Colleague Letter, https://www.aaup.org/report/history-uses-and-abuses-title-ix. Other examples of laws often inconsistently applied, or where executive waivers are issued, include the "No Child Left Behind" program under the Bush administration.

[19] The authors review the Supreme Court's rejection of the one house veto—perhaps again usurping Congress's ability for self-supervision. The authors are even-handed in the sense that they also reject the adoption of a European-style parliamentary system as inconsistent with the American system (Frohnen and Carey, 230).

[20] The framers were certainly aware of the difficulties surrounding interpretation. See *Federalist* No. 37.

Conclusion

One omission, from my perspective, is a systematic exploration of how the framers' perception of human nature impacted their design and understanding of constitutional morality. Did Progressive reformers also have a unified view of human nature, and if so, how did it contrast with that of the framers? Alternately, was the Progressive intellectual legacy rooted in the perspective that all social ills were attributable to defective institutions rather than man's nature?[21] Such a perspective would permit Progressives to view a constitution differently than the framers: that is, as nothing more than a device to command citizen behavior.

While I also thoroughly enjoyed and profited from the authors' explication of why the administrative state grew as it did, it is difficult to understand how it could have gone any other way, dependent as it was on the perspectives of leading academicians. It is a valuable lesson we should keep in mind. In many respects, the post-Civil War period presented extraordinary challenges for Americans and their government, not the least being the appearance of radically new economic perspectives, including those of Karl Marx. The authors cover the ground well, picking and choosing among leading thinkers, and do an excellent job of clarifying their conceptual differences. But what was the average voter to do? They (and their representatives) relied on academic experts. After some fifty years I am more aware than ever of John Jay's observation that there are "tides" that affect scholarship as well as the affairs of men.[22] Similarly, we also must keep in mind Leo Strauss's observation that all good governments must be prepared to deal with the "inventiveness of wickedness," because if they cannot do so, in "extraordinary" times even the most democratic regime may be forced to act in a totalitarian fashion.[23] As much as I share the world of academia I have learned that more frequently than not its insights, even scientific ones, dissipate with time.

The administrative state grew in the context of its times and was perceived as good and necessary by our leading academicians. Today, as demonstrated by this volume, we have become more aware of unanticipated adverse consequences. Scholars, however, must allow for the fairness, insights, and common sense of present and future American citizens. Certainly, the framers did this, and that faith was also part

[21] See Gerhardt Niemeyer, *Between Nothingness and Paradise* (South Bend, IN: St. Augustine's Press, 1971).

[22] *Federalist* No. 64.

[23] Leo Strauss, *Natural Right and History* (Chicago, IL: University of Chicago Press, 1952), 157-162.

of their design. While the authors certainly do not ignore context (the Gilded Age, the Great Depression), their focus remains (as expected) on the impact of the Progressive reformers on the framers' constitutional morality, namely, that "voters and, increasingly, their representatives came to accept the idea that the federal government would provide substantive goods rather than focus on maintaining the rule of law and balance among mediating groups to which the people might look for material assistance. Thus, the shift in constitutional morality already experienced by elite American thinkers became electorally important, bringing changes in the operations of American government inconsistent with the framers' Constitution" (162). Although the authors include the context in which the judiciary negated *both* federal and state attempts to address various exigent circumstances—some sound, some not—the authors provide few concrete examples of how such matters may have been addressed correctly, from their perspective (164).

The authors' final assessment (240-241), undoubtedly written prior to the 2016 presidential election, expresses their honest analysis and fears. They cannot be faulted for that. But I don't share the extent of their pessimism. Elsewhere, I have suggested that the 2016 presidential election disturbed Progressive expectations of inevitable progress, prompting a resistance which will divide Americans for years to come.[24] But, if the authors' substantive analysis is sound—that ours is a mediating type of constitution—and if Madison was correct (and I certainly think he was) that the relatively indifferent should have the determining say in public-policy decisions, then I have faith that Americans will find solutions that presently elude us.

[24] William Gangi, *Scholars and Our Craft*, 70 S.C.L.R. 347, 366 (2018).