

A NATION WITHOUT LAW

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Constitutional Morality and the Rise of Quasi-Law

By Bruce P. Frohnen and George W. Carey

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The Obama era has witnessed a resurgence in limited-government arguments, reaching an intensity not seen since the 1930s. On one level, the Tea Party movement has injected these arguments into the battleground of political campaigns. On another level, scholars have begun examining in depth the various consequences of unlimited government on our political, economic, and social systems. In *Constitutional Morality*, Bruce Frohnen and the late George Carey thoroughly explore how an abandonment of the framers' beliefs in limited government has undermined the rule of law.

Constitutional Morality is a welcome addition to the growing scholarly work examining the contemporary justifications for the framers' notions of limited government, as well as the destructive consequences of ignoring those notions. If nothing more, this book demon-

strates once again the sophisticated historical, constitutional, and political reasons for taking limited-government arguments seriously.

Frohnen and Carey's thesis begins with the Progressive era. Pushing for an expansive federal government, Progressives dismissed traditional notions of limited government. This expansion of the federal government greatly escalated during the New Deal, which then saw administrative agencies exercise their newly acquired power by enacting quasi-law, bypassing the constitutional law-making procedures. As these agencies have grown over the years, so has the body of quasi-law, which in turn has significantly eroded the rule of law in the United States. But perhaps the most novel and intriguing argument made by Frohnen and Carey involves how the erosion of the rule of law has flowed from an erosion of the constitutional morality prevailing at the time of the Founding.

According to the authors, constitutional morality encompasses all those civic habits and traits that support the essential features of our constitutional democracy.

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Constitutional morality arises out of “the body of institutions, customs, manners, conventions, and voluntary associations which may not even be mentioned in the formal constitution, but which nevertheless form the fabric of social reality and sustain the formal constitution” (8). It requires that political office holders act with a requisite set of virtues that support the written constitution, particularly those constitutional forms and procedures meant to check government power.

In the authors’ analyses, the Progressives played a key role in undermining the framers’ constitutional morality. To achieve government efficiency, Progressives tried to concentrate all power at the federal executive level. But this concentration drained autonomy from individuals, local governments, and all the voluntary associations that constitute society. It also contradicted the original nature of the Constitution, which relied on federalism and separation of powers to limit the power and scope of the federal government, but which also caused certain inefficiencies in government action.

In short, Progressivism and its progeny changed the political culture, undermining the constitutional morality, even though no change had occurred in the text or public meaning of the written Constitution. As Frohnen and Carey explain, Progressives dismissed the cultural and political habits appropriate for a constitution providing for a structure of limited government mediating among all the private social institutions. In place of that traditional constitutional morality, Progressives instituted habits more appropriate for a constitution envisioning the transformation of society by a powerful and nearly unconstrained federal government. Consequently, the problem with American government today is that its constitutional morality no longer fits its written constitution.

Constitutional Morality’s discussion of the rule of law is familiar but also comprehensive and instructive. When the executive branch enacts law outside the constitutional law-making procedures, as it has repeatedly done during the Obama presidency, for instance, the public loses any real certainty about what constitutes a law or how a law will be enacted. But people cannot adequately obey or support uncertain rules. This weakened obedience to law then undermines civic virtue.

Frohnen and Carey demonstrate that a key difference between the constitutional morality of the framers and the Progressives is that the latter see government as the primary if not exclusive vehicle for defining and shaping society. And because Progressives wanted government action to be unhindered, they pushed for an abandonment of procedural and structural checks on the exercise of executive power. Quasi-law was the result—law that was backed by the force of government but that had lost its constitutional foundations. The current morass of quasi-law, as the legacy of Progressivism, stems from a desire for a more swift-acting government and from the false belief that any inefficiencies in the lawmaking process are a sign of legal or political dysfunction.

The constitutional morality of the framers required seeing the Constitution as mandating government restraint, as establishing a frame of government intended to secure limited goals. The framers did not regard government efficiency as a top priority. Instead, they acknowledged that the machinery of checks and balances, meant to protect the separation of powers, was not flawed just because it produced gridlock. But over time, the framers’ constitutional morality, emphasizing procedure, caution, and restraint, has dissolved in the face of constantly increasing demands for more and quicker government action to achieve, unchecked, the perfect society.

The erosion of constitutional morality, however, has led to an institutionalization of the administrative state, and hence to the proliferation of quasi-law. This quasi-law not only lacks accountability but also contributes to political cronyism, as it is often geared to interest groups that are powerful enough to influence the administrative agencies charged with regulating them. Moreover, a vast national administrative bureaucracy, which supplants states, localities, and voluntary associations within civil society, requires that its agents possess vast discretionary power—and yet, such discretion violates the rule of law.

Despite Progressive promises, the increase in quasi-law has not brought about a smooth, efficient, and fair application of wise rules. Certainty about the law has disappeared. A vast realm of inchoate policy directives enforced by changing and conflicting government agendas now exists, the violation of which can bring retribution of unpredictable extent and severity. Without a functioning constitutional morality, the American legal system is a regime of profound uncertainty, in which one may find oneself on the wrong side of governmental orders emanating from a variety of sources, requiring an unpredictable variety of forms of action or inaction, facing penalties that depend on the popularity of one's activities and/or one's power to bargain effectively with government actors.

Not only does *Constitutional Morality* present an enlightening discussion of the rule of law and the development of quasi-law; it also makes a valuable contribution

to the continuing debate over the consequences of the Progressive legacy. The drive for a continually larger and more powerful federal government, while offering promises of short-term solutions to problems that can only be solved by individuals and society working together, ends up yielding long-term devastating effects, such as an erosion of the rule of law on which our entire constitutional democracy rests. Frohnen and Carey do a great service by unclocking the false promises of the relentless Progressive rush to enlarge more and more a federal government already outsized in both its reach and its power.

The Progressive mentality focuses only on the promised benefits of more and more government action, but Frohnen and Carey reveal how the ultimate power in society resides within those civic virtues and habits that make up America's constitutional morality. Therefore, the more exclusive the focus on the federal government, the more threatened becomes the foundation of the U.S. constitutional democracy—its constitutional morality.

The message of this book: the constitutional morality of the framers has upheld the rule of law; abandon it, and you undermine the rule of law. And the problem with abandoning political and cultural principles of limited government is that without them the written Constitution of the United States becomes nearly impossible to understand, much less apply in the manner it was intended. †