

The University Bookman

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Our Real Constitution—And What Happened to It

Constitutional Morality and the Rise of Quasi-Law

By Bruce P. Frohnen and George W. Carey.
Harvard University Press, 2016.
Hardcover, 293 pages, \$45.



ALLEN MENDENHALL

Conservatism lost a giant when George W. Carey passed away in 2013. Thanks to Bruce Frohnen, his longtime friend, we're able to hear anew Carey's prudent admonitions in these strange and interesting times.

Before his death, Carey completed drafts of chapters on progressivism and progressive constitutional reform that later became substantial portions of two chapters in *Constitutional Morality and the Rise of Quasi-Law*, the book that Frohnen has now completed. The final product is an impressively collaborative effort that substantiates the idea of constitutional morality, which Carey spent years developing.

The two men had planned to split the chapters in half. Having few disagreements between them, they reserved the right to approve and edit each other's contributions. Carey's untimely passing changed these plans. To honor his friend, Frohnen consulted Carey's work carefully, downplaying his own more "antifederalist" positions to accommodate Carey's more federalist leanings. If Jefferson and Hamilton would have agreed that the size and scope of the American government has become dangerous and unmanageable, then it's no surprise that Frohnen and Carey found common ground.

Constitutional morality denotes "the felt duty of government officials ... to abide by the restrictions and imperatives imposed on them by a constitution." It contemplates the "unwritten constitution," a concept central to Frohnen and Carey's argument that's drawn from Russell Kirk and Orestes Brownson, both of whom Frohnen in particular has

Imagination rules the world.

Russell Kirk

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N E W S

★ The *University Bookman* is joining Fordham University in hosting the award-winning poet and critic **A. M. Juster** on **Monday, February 6, 2017** at 6:00pm on Fordham's Lincoln Center campus (McMahon Hall, Rm. 109; use the entrance on West 60th Street and Columbus Avenue in Manhattan). Juster will speak on "**Riddles, Elegies, and Satires: Adventures in Translation.**" The event is free and open to the public and registration is not required. We are also planning a second event in May on the humanities. Watch this space for more details. (27 Dec 2016)

interpreted thoughtfully and skilfully. Kirk defined the unwritten constitution as “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.” To maintain their authority and gain general acceptance in a community, written constitutions and positive laws must reflect the norms and values of the people they bind. Frohnen and Carey’s narrative is about how quasi-law in the form of executive decree and the administrative state have become divorced from the people they govern.

The narrative runs something like this. Rule by executive command and administrative agencies has resulted in a decline of the rule of law in the United States. Odd, extratextual interpretations of the United States Constitution have dislocated its content from the common understandings of reasonably prudent Americans. The Progressive Era facilitated a shift in our approach to law that was qualitatively different from the teachings of checks-and-balances, decentralization, separation-of-powers, and other such doctrines alive in the minds of our Founders, even those like Hamilton and the young Madison (as against the later Madison) who favored a strong national government. Consequently, we have found ourselves in a crisis of constitutional morality, there being little institutional and systemic accountability to curb the broad powers of bureaucracy, reckless and unelected federal judges, a delegating congress beholden to lobbyists and corporations, and the expansion of executive privilege, prerogative, and patronage.

Political rhetoric of limited government, common among Republican leaders, does not square with the manifest reality of the ever-growing managerial state. Heated discourse alone won’t suffice to roll back federal programs and agencies. “What is required,” say Frohnen and Carey, “is a retrenchment of the federal government into a much smaller but more detailed and legalistic form that allows more actions to be taken by other institutions, be they states, localities, or associations within civil society.” In short, these men call for devolution and subsidiarity. They make the case for localized control based on clear rules that are consistent with common norms and expressed in a shared idiom.

Championing the rule of law involves the recognition that, although morality does or should underpin laws, “we cannot use the tool of law to achieve perfect virtue, or freedom, or any other moral good.” Without denying the importance or reality of natural law, which is antecedent to human promulgation, Frohnen and Carey approach it cautiously, stating that it “is not a rigid code demanding that human law force all human beings into a straightjacket of specific individual conduct.” Seemingly skeptical of grand schemes for

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- ☞ The Imaginative Conservative
- ☞ Arts & Letters Daily
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- ☞ The New Atlantis
- ☞ The New Criterion (and blog)
- ☞ Intercollegiate Studies Institute
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- ☞ The Acton Institute
- ☞ The New Inquiry
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- ☞ Good Letters Blog
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- ☞ Front Porch Republic
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- ☞ The City (from HBU)
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- ☞ G. K. Chesterton Institute
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- ☞ What’s Wrong with the World?
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- ☞ The Tocqueville Forum
- ☞ National Humanities Institute
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- ☞ The Distributist Review
- ☞ Journal of Catholic Legal Studies
- ☞ The Library of Law and Liberty
- ☞ Huron County Extract
- ☞ The Academy of Philosophy and Letters
- ☞ Southern Literary Review
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the magnificent systematization and organization of natural-law principles, they humbly submit that humans “can only do our best to develop practical lawmaking and interpreting virtues such that the laws we make will be efficacious in spelling out and enforcing duties in such a way as perhaps to encourage people to pursue virtue.” This nomocratic mode of thinking recalls Hume, Burke, Oakeshott, Kirk, and Hayek with its awareness of the limitations of human knowledge and its attention to the historical, institutional, and cultural embeddedness of standards and values.

If there is one take-home point from this book, it’s that government is not the instrument through which to facilitate the good, the true, or the beautiful. We should avoid the “new dispensation” that consists in “a government ruled not by formal structures and procedures but by the pursuit of putatively good policy through broad statements of programmatic goals and the exercise of broad discretionary power.” Disempowering the central government may be the obvious counter to this new dispensation, but we’ve been advocating that for decades. In fact, Frohnen and Carey believe that “there can be no simple return to the original dispensation,” which involved “the Framers’ constitutional morality, emphasizing procedure, caution, and restrained defense of one’s institutional prerogatives.”

With no quick and easy remedy at the ready, Frohnen and Carey encourage something less magnificent and extraordinary: civic participation in local associations and mediating institutions such as “families, unions, clubs, schools, and religious groups,” the kinds of little platoons that struck Alexis de Tocqueville, during his tour of America, as bulwarks against tyranny. “More important than any particular policy,” Frohnen and Carey aver, “is the attitude toward law and policy making that must be recaptured.” Although they suggest that some form of separation or secession may become inevitable, the corrective they envision is rhetorical and discursive. We must, in their view, shape the political discourse through private associations, which, in the aggregate, engender the bottom-up processes of rulemaking that reflect the normative orders of local communities rather than the top-down commands of a faraway, massive, impersonal sovereign. 🚩

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