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March 2, 2011

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Bruce P Frohnen, Ohio Northern University
George W. Carey, Georgetown University

Available at: https://works.bepress.com/bruce_frohnen/2/
Constitutional Morality and the Rule of Law

Bruce P. Frohnen∗

George W. Carey†

Our thesis, simply put, is that the American constitutional order no longer operates in accordance with the rule of law. As we will endeavor to show, the Framers of the Philadelphia Constitution took pains to insure that the new order would operate in accordance with the rule of law, but both the structures and processes they devised to secure this end no longer operate as intended. As a result, we are governed by what can rightly be termed “quasi-laws”; that is, governmental orders, treated as laws by the state, that fail to embody the characteristics that would render them settled, known, or otherwise capable of being complied with.

To be sure, various reasons – social, economic, and political – can be cited to account for this state of affairs. But we believe the most fundamental reason for our loss of the rule of law has been abandonment of the “constitutional morality” necessary for the system to operate as intended.¹ By this term we do not mean any system of individual, let alone religious, self-abnegation, but rather a felt-commitment on the part of office holders to the institutional duties and requirements necessary to maintain the central facets of the constitutional order, including the separation of powers and especially the prerogatives of each branch of government.

We begin by explaining the nature of constitutional morality and its relationship to the rule of law, particularly in the American context. We next look more specifically at the

∗ Associate Professor of Law, Ohio Northern University College of Law. I gratefully acknowledge the generous, continuing support of Dean David Crago at Ohio Northern University’s Pettit College of Law and the outstanding research assistance of Acacia McCallum.
† Professor of Government, Georgetown University.
¹ Constitutional morality is discussed, among other places, in the introduction of GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC xi-xxxiii (1994).
separation of powers, its necessity in our system for the rule of law, and its reliance on constitutional morality for its maintenance. After briefly reviewing the turn against constitutional morality in American constitutional thought, we review its impact on the rule of law, particularly as played out in the replacement of law with quasi-law. We look specifically at Presidential Executive Orders and Signing Statements, along with Congressional enabling legislation. We then examine the bases, practice, and impact of judicial legislation on the rule of law. Finally, we argue for measures aimed at re-establishing a consistent rule of law within our fundamentally altered constitutionalism through formulation of a new constitutional morality.

Constitutional Morality and the Rule of Law

Why do we speak of constitutional morality in relation to the rule of law? To begin with, it seems obvious that changes in our system of law are not essentially defined by changes in formal constitutional structure. The Constitution as it emerged from the Philadelphia Convention is, in its important particulars—its framework, institutions, and powers—very much the same Constitution we live under today. Yet no one to our knowledge would contend that the constitutional system operates today in the same way it did in, say, 1790 or even 1920. As American Government textbooks are wont to inform us, there have been both formal and informal changes in our constitutional structure and processes.² But the reasons they cite—Amendments, political parties, technological advances, and the like—scarcely account for the enormous transformation of our constitutional order that has taken place, primarily over the

course of the last century. Thus the source of changes in our legal structure must lie in changes
to our “constitutional morality.”

Constitutional moralities (there are many possible such) can be understood as anticipated
norms of behavior or even duties primarily on the part of individuals within our constitutional
institutions. We use the term morality and refer to constitutional morality with regard to these
norms or duties principally because of the purpose they serve; they can be viewed as imposing an
obligation on individuals and institutions to insure that the constitutional system operates in a
coherent way, consistent with its basic principles and objectives. That the successful operation
of the Philadelphia Constitution would require such obligations or duties was well understood by
those who drafted the document. Yet, the nature of these duties and obligations precluded their
articulation in the text of the Constitution—a frame of government not being the place for a
primer on obligation.

In this regard, we should note in passing that one of the major contributions of The
Federalist is its articulation of the more significant of these moralities. And this is true even if it
was done only to convince its readers that the proposed constitutional system would work
without any insurmountable glitches. In sum, while unwritten, nowhere to be found in the
Constitution, and largely ignored in constitutional commentary, constitutional moralities help us
to comprehend more fully the written constitutional provisions, as well as to reveal some of the
realistic, albeit unarticulated, ideals of those who framed the Constitution.

Constitutional moralities play a unique and highly critical role with respect to written
constitutions that are based on the consent of the people. In the American case the belief that

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3 This can be seen most clearly in Federalist essays nos. 63, 71, and 73 where Publius views the Senate and president
as having a moral responsibility to block factious or ill-conceived measures, even those that have majority backing.
The Federalist No. 63 (James Madison or Alexander Hamilton); Nos. 71, 73 (Hamilton).
governments should rest on the consent of the governed—a principle that was fully put into practice following on the Declaration of Independence—imposes an obligation on those who assume power; those in power have a duty to not abrogate or abridge the terms of the written constitution. The written constitution, to put this somewhat otherwise, can be viewed as akin to a contract which binds those exercising authority to the terms of the contract. A violation of the constitution or contract would not mean its revocation. Rather such violations would be viewed as null and void, beyond the legitimate authority of government. In the American context, this obligation of the rulers to operate within the bounds of the Constitution reflected the fact that, as James Wilson, one of its chief architects, put it, government should be regarded as the handmaiden of society. Written constitutions stood as testimony that government was not only limited, but accountable to the people. As James Varnum of Rhode Island put this matter in 1786: “The powers of legislation, in every possible instance, are derived from the people at large, are altogether fiduciary and subordinate to the association by which they are formed.” From this, he reasoned, “Were there no bounds to limit and circumscribe the legislature; were they to be actuated by their own will, independent of the fundamental rules of the community, the government would be a government of men and not of laws.”

A year later, James Iredell, who was to serve on the first Supreme Court, remarked on the status of the North Carolina legislature, stating that he had no doubt, but that the power of the Assembly is limited and defined by the Constitution.

It is a creature of the Constitution. . . . The people have chosen to be governed under

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4 See chapter seven, “Of Man, as a Member of Society,” of his Lectures on Law. James Wilson, Lectures on Law, in 1 COLLECTED WORKS OF JAMES WILSON 621-44 (Kermit L. Hall & Mark David Hall, eds., 2007). See also PHILIP HAMMBERGER, LAW AND JUDICIAL DUTY 435-461 (discussing Trevett v. Weeden and Bayard v. Singleton).
6 Id.
such and such principles. They have not chosen to be governed, nor promised to submit upon any other.\textsuperscript{7}

This historical understanding reflects a deeper reality. At its root, the rule of law recognizes reciprocity between rulers and ruled. The people agree to obey the rules, and the rulers agree to establish rules which the people can recognize as such, and which are consistently and logically enforced. And among the rules to be consistently and logically enforced are those governing the promulgation of rules. Otherwise, the people will not know which commands are genuinely rules, demanding their obedience, and which may be the illegitimate decrees of a potentially rebellious official. Moreover, if the regime violates the lawmaking procedure agreed upon at its inception then it is eschewing rules for mere commands (backed by force) and cannot possibly rule in any legitimate fashion, let alone establish justice in any meaningful sense.\textsuperscript{8} At its most basic level, the term “rule of law” refers to a public order in which general, settled rules are applied consistently. That is, in which laws are applied according to their own terms rather than more or less severely, more or less often, according to the status of those to whom they are to be applied. Alas, the laws themselves may be unequal—they may single out one group for favorable, harsh and/or unjust treatment.\textsuperscript{9} But if law rules then the treatment must be what the law says and applied to whom the law directs. Power will not be arbitrary, but bound by the rule laid down in law. And if the foundational agreement concerning how laws will be made is ignored, then the rulers themselves are ignoring their obligation.

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\textsuperscript{7} Id. at 115.
\textsuperscript{8} LON L. FULLER, THE MORALITY OF LAW 40 (Yale 1969).
\textsuperscript{9} See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (Amy Gutmann ed., 1997) (discussing the necessity of a Nineteenth Amendment to establish women’s voting rights).
\end{flushright}
There is more than the seemingly abstract commitment to the rules of the game involved in constitutional morality and its relationship to the rule of law. The particular formalities built into the United States Constitution themselves, if followed, constrain the rulers to making law, rather than quasi-law. Here we may begin with the question “If the Constitution is to limit government, to keep government within the bounds agreed to by the people, then how is this limitation to be enforced?” For Varnum and Iredale the answer was the courts. And this is the only answer we would expect them to give. As Philip Hamburger makes clear, it was well understood that the judiciary in America had a “duty” inherited from the long standing tradition of the English common law courts, albeit in a different constitutional context; that duty was to uphold the “law of the land.”

Moreover, both Iredale and Varnum were aware of the rule or morality that was integral to the exercise of this duty, namely, the courts were confined to nullifying only those laws or actions that were “manifestly contrary” to the “law of the land.”

Central to Varnum’s and Iredale’s position is an element of constitutional theory Publius articulates in Federalist 53: “The important distinction, so well understood in America, between a constitution established by the people, and unalterable by the government; and a law established by government, and alterable by government.” This understanding simply means that the will of a people that finds expression in the constitution cannot be changed or abrogated by ordinary legislation, even if such legislation is backed by popular majorities. Constitutions, thus, were looked upon as “fundamental law,” assuming a status corresponding to “the law of

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10 HAMBURGER, supra note 4, at 101.
11 HAINES, supra note 5, at 106, 115 (quoting JAMES M. VARNUM, THE CASE OF TREVETT AGAINST WEEDEN iv (Providence 1787); GRIFFITH JOHN MCREE, 2 THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 145-46 (1857)).
12 THE FEDERALIST No. 53, at 277 (Madison or Hamilton) (George W. Carey & James McClellan eds., 2000). All subsequent citations to THE FEDERALIST are to this edition.
land” in England that the common law courts found themselves obliged to uphold. From this it follows that, unless formally amended through the prescribed processes, the will of the people expressed in the Constitution is completely binding upon subsequent generations.

A clear understanding of judicial duty and the conditions for its use can be seen in The Federalist. In Federalist 78 Publius turns his attention to the role of the courts in preserving the Constitution from legislative encroachments. Here also he confronts potential dangers from the courts. Perhaps the most important of these concerns the question of what is to prevent the courts “on the pretense of a repugnancy” from substituting “their own pleasure to the constitutional intentions of the legislature”? What if the courts, that is, exercise “will,” the province of the legislature, instead of “judgment”? To this Publius simply responds: “if they (the courts) should be disposed to exercise WILL instead of JUDGMENT, the consequence would be the substitution of their pleasure to that of the legislative body.” Such a substitution, of course, would be viewed as a usurpation of power and violation of the rule of law. If the courts were to do this—substitute will for judgment—they would themselves be acting unconstitutionally.

Consonant with both his understanding of judicial duty and the principles of constitutional republicanism, Publius insisted that the courts are confined to the exercise of judgment, leaving the exercise of will to the legislature—save, of course, as that legislative will contravenes the Constitution. Only later, after declaring that “the supposed danger of judiciary encroachments on the legislative authority ... is, in reality, a phantom,” does he maintain that the mere existence

13 HAMBURGER, supra note 4, at 101.
14 Id. at 405.
15 Id.
of the legislative power to impeach and remove the judges “from their stations” is sufficient to eliminate “all apprehensions” in this regard.\footnote{The Federalist No. 53, at 420.}

There is good reason why Publius regarded judicial usurpation of legislative authority to be a “phantom,”\footnote{The Federalist No. 81, at 420 (Hamilton).} quite aside from the fear of impeachment, namely, the prevailing and firmly held commitment to judicial duty, not only within the legal community, but among the people as well. Publius takes pains to articulate what this judicial duty amounts to under the proposed Constitution: The courts, for instance, are bound to uphold the “specified exceptions to the legislative authority; such for instance that it shall pass no bill of attainder, no ex post facto law, and the like.”\footnote{The Federalist No. 78, at 403 (Hamilton).} As we might expect, he also pointed out that there had to be an “irreconcilable variance” between an act of the legislature and the Constitution before the court could legitimately void a legislative act.\footnote{Id. at 404.} This, of course, imposes a very stringent and demanding obligation on judges, the equivalent of the traditional “manifest contradiction” rule.

To this point, as James B. Thayer shows in his classic article on the American doctrine of constitutional law, judges at both the state and national levels in the early decades of the Republic—largely in deference to the role of legislatures in constitutional republics—accepted and even built upon the “irreconcilable variance” rule. As Thayer observes, given what they conceived to be their proper judicial duty, judges could “only disregard ... [an] act when those who have the right to make laws have not merely made a mistake, but have made a very clear
one, – so clear that it is not open to rational question.” ²⁰ He illustrates the stringency of this test by referring to a remark of Judge Thomas Cooley
to the effect that one who is a member of a legislature may vote against a measure as
being, in his judgment, unconstitutional; and, being subsequently placed on the bench,
when this measure, having been passed by the legislature in spite of his opposition,
comes before him judicially, may there find it his duty, although he has in no degree
changed his opinion, to declare it constitutional. ²¹

The reason for this is that the judge was obliged to understand that the “constitution often
admits of different interpretations,” which accords the legislature some latitude. And so long as
legislatures operate within that latitude, the courts have no legitimate basis to nullify their acts. ²²
Hamburger has shown the development of this rule from the Middle Ages on and its vigor during
the era of constitutional founding in the United States. ²³ In sum, Publius, given the morality and
sense of duty prevailing in the legal community at the time of the founding—particularly with
respect to the proper function of the courts—was not concerned that the courts would act outside
their constitutional bounds. This morality and sense of duty, that is, were by themselves
sufficient to guard against overreaching by the judiciary.

The Separation of Powers

²⁰ James B. Thayer, The Origins and Scope of the American Doctrine of Constitutional Law, in TAKING THE
CONSTITUTION SERIOUSLY: ESSAYS ON THE CONSTITUTION AND CONSTITUTIONAL LAW 57 (Gary L. McDowell ed.,
²¹ Id.
²² Id.
²³ HAMBURGER, supra note 4, at 309-16.
Our argument thus far points to a more general concern with the separation of powers. The belief that a concentration of powers—legislative, executive, and judicial—constituted tyranny was widely accepted across the political spectrum at the time of founding.\(^\text{24}\) Indeed, Publius maintains that the very definition of tyranny is the concentration of these powers in the same hands and, therefore, feels an obligation to show that critics of the proposed Constitution who contend that there is too much blending of powers are simply wrong.\(^\text{25}\)

A belief prevailed at the time of founding that to have a stable republican government with ordered liberty required adherence to the rule of law.\(^\text{26}\) That the separation of powers was necessary for this purpose seems to be implicit, and occasionally explicit, in the deliberations of the Philadelphia Convention.\(^\text{27}\) But early in *The Federalist*, Publius puts to rest any doubts on this score. In discussing the history of republicanism, he begins by pointing to the short lived petty republics of the past that continually vibrated between extremes of anarchy and tyranny.

\(^{24}\) See C.J. FRIEDRICH AND ROBERT G. MCCLOSKEY, FROM THE DECLARATION OF INDEPENDENCE TO THE CONSTITUTION xvi-liv (Liberal Arts Press 1954). The basic disagreements surrounding the separation of power involved the specific form it should take. As Madison notes in *Federalist* no. 47, the Anti-Federalists felt the proposed Constitution was not true to this principle because it allowed for too much blending of powers between the branches. See THE FEDERALIST No. 47 (Madison).

\(^{25}\) Madison employs Montesquieu’s writing on the separation of powers to refute the Anti-Federalist claim. See THE FEDERALIST No. 47.

\(^{26}\) During what is commonly known as the “critical period” of American history—roughly that period between the Declaration of Independence and the adoption of the Constitution—most states witnessed internal turmoil. As Madison put it, “our government are too unstable ... measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an overbearing majority.” THE FEDERALIST No. 10, at 42 (Madison). See also 9 JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES, IN THE WRITINGS OF JAMES MADISON 319-28 (Gaillard Hunt, ed., G.P. Putnam’s Sons 1900-1910); JOHN FISKE, THE CRITICAL PERIOD (Houghton Mifflin 1916).

\(^{27}\) This concern is most evident in the deliberations over the mode of electing the president. On July 17\textsuperscript{th} Madison points out that election by Congress would, in effect, rule out re-eligibility of a president for another term. “The Executive could not be independent of the Legislature, if dependent on the pleasure of that body for a reappointment. Why was it determined that the Judges should not hold their places by such measure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in tyrannical manner.” JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 311 (Adrienne Koch, ed., W. W. Norton 1987).

Since a majority of the delegates saw genuine merit in re-eligibility, they eventually embraced election through the Electoral College.
“From the disorders that disfigure the annals of” these petty republics, he goes on to write, “advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty.” 28 Yet, he continues, these enemies of republican government have accurately portrayed the sordid history of past republics. And he is led to conclude that “If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends of liberty would have been obliged to abandon the cause of that species of government as indefensible.” 29 In other words, if no remedy could be found for the defects long associated with republican government, then it would be best to turn to some other form where civil liberty would be possible.

What saves the day and renders republicanism compatible with liberty are developments in the science of politics. Publius points to principles, unknown or imperfectly known to the ancients. And we cannot help but note the degree to which most of these principles relate directly to the separation of powers. He cites “The regular distribution of power into distinct departments,” bicameralism which provides for “legislative checks and balances,” as well as a separate judiciary whose members hold “offices during good behavior.” 30 Along with “the representation of the people in the legislature. ...[these] are ... powerful means,” he holds, “by which the excellencies of republican government may be retained, and its imperfections lessened or avoided.” 31

How would the separation of powers serve this end? To begin with it would guard against arbitrary and capricious government, violating the rule of law, and for this reason would

28 THE FEDERALIST No. 9, at 38 (Hamilton).
29 Id.
30 Id.
31 Id.
promote liberty. Publius quotes at some length from Montesquieu: “When the legislative and executive powers are united in the same person or body ... there can be no liberty because apprehension may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” If “the power of judging” were “joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.” For Montesquieu and for Publius, political liberty embraced “a tranquillity of mind arising from the opinion each person has of his safety.” In order to have this liberty, according to Montesquieu, “it is requisite the government be so constituted as one man need not be afraid of another.” This means that the mere concentration of all powers or, for that matter, of any two powers—no matter how the powers may be used, whether for good or ill—was incompatible with liberty. Those living under a constitutional order with such a concentration of power could never enjoy that “tranquility of mind” essential for liberty; they would live under a constant apprehension of being subject to arbitrary and oppressive laws; and there would be no rule of law because the rulers would be able to violate their own laws with impunity.

An effective separation of powers also helped to insure that the legislators would not be exempted from the laws which they passed. This, by itself, is a potent barrier against oppressive or otherwise objectionable laws. Because the laws would be applied to the legislators, their family, friends, and political supporters by an independent executive and judiciary, legislators

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32 THE FEDERALIST No. 47, at 251.
33 Id at 251-52.
35 Id.
understandably would not be inclined to pass oppressive laws. When, as demanded by the rule of law, the laws are applied equally to all, those who make the laws will not be able to exempt themselves or their friends from their application, enhancing the probability that the laws themselves will not be oppressive. As Publius warns, if the people come “to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.”\textsuperscript{36}

In the course of answering the critical question of how the constitutional separation of powers is to be maintained, Publius sets forth certain propositions that take the form of constitutional moralities. A people intent upon preserving their liberties, he cautions, must focus their attention on the locus of power which, he points out, is no longer King George III, but Congress.\textsuperscript{37} He warns as well that formal constitutional change should only be undertaken when absolutely necessary: frequent amendments would not only undermine public confidence in the Constitution by implying “some defect in the government”, but also would arouse the passions, endangering “public tranquillity.” Moreover, he maintains, such alterations are of “too ticklish a nature to be unnecessarily multiplied.”\textsuperscript{38} This would appear to be a morality which we have, in the main, followed.

But of even greater importance is the solution Publius offers for maintaining the separation of powers by means of a duty that corresponds with the interests of the office holders. From his account, the strategy adopted by the convention to maintain separation was to weaken the strong, that is Congress, and strengthen the weak, that is the executive and the courts. In keeping with this strategy Congress is divided in two, necessitating the concurrence of two

\textsuperscript{36} \textsc{The Federalist} No. 57, at 297 (Hamilton or Madison).
\textsuperscript{37} \textsc{The Federalist} No. 48, at 257 (Madison).
\textsuperscript{38} \textsc{The Federalist} No. 49, at 262 (Hamilton or Madison).
bodies in order to act.\textsuperscript{39} The executive is strengthened with a qualified veto, the primary function of which he makes clear later is to protect against encroachments by Congress on the executive’s constitutional domain.\textsuperscript{40} The courts, in turn, are strengthened by tenure “during good behavior” which insulates them from control by either the executive or Congress. These, he maintains, are the constitutional means necessary to prevent a tyrannical concentration.\textsuperscript{41}

Publius realizes that the efficacy of the means provided in the Constitution depends upon their use. For this he relies, not upon reason, but rather on the “interest of the man” being joined with the “constitutional rights of the place”; or, to quote perhaps the most famous line of \textit{The Federalist}, “Ambition must be made to counteract ambition.”\textsuperscript{42} To put this in the vernacular: He wanted the office holders to defend their turf, and assumed this would happen naturally, as a matter of course. In defending their turf, office holders are, to be sure, protecting their institutional and individual interests—what we might term selfish interests—yet, at the same time, and more significantly, they are serving a higher cause, namely, that of preserving the constitutional separation which is essential for liberty and the rule of law. To this point, Publius—seemingly aware of an apparent moral ambiguity—writes, “This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.”\textsuperscript{43}

Thus constitutional morality is no monkish demand for individual self immolation. Rather, it is a form of self interest properly understood, linking concern for self with concern for one’s institution and, ultimately, the common good. This is not to say that virtue was

\begin{enumerate}
\item \textsc{The Federalist} No. 51, at 269 (Hamilton or Madison).
\item \textit{Id.}
\item \textit{Id.} at 268.
\item \textit{Id.}
\item \textit{Id.} at 269.
\end{enumerate}
unimportant, according to Publius. In *Federalist* 10, Publius maintains that in the extended republic, Americans can expect representatives of a high order: that in all likelihood our representatives would constitute a “chosen body of citizens” who will “refine and enlarge the public views”; “whose wisdom may best discern the true interests of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations.” That this condition will obtain rests upon unarticulated assumptions, an obvious one being that “fit characters”—those best capable of refining and enlarging the public views—will present themselves to the people for election. But there is an unmistakable obligation placed upon the voters to vote for the fittest candidate, that is the candidate most capable of discerning “the true interest[s]” of the nation and even elevating the public views. In turn, of course, the representatives selected by the people bear the responsibility or duty of looking past “temporary and partial considerations” to the more permanent and long term interests of the country. This moral virtue, then, is structural in nature, tied to the person’s institutional place and its institutional extent and limitation.

The Turn against Structure and Constitutional Morality

In a strategic sense, the Founders sought to provide for the rule of law through adherence to the Constitution and protection against arbitrary and capricious government with the separation of powers. The success of their effort, as we hope to have shown, rested primarily upon constitutional moralities: The judges would uphold the Constitution by declaring laws

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44 *The Federalist* No. 10, at 46.
45 *Id.*
46 *Id.*
irreconcilably at variance with the Constitution null and void; the members of each of the departments of government would resist encroachment upon its power by another.

What seems clear, however, is that, principally over the course of the last century, these constitutional moralities have virtually disappeared. New understandings concerning the role and powers of the branches, as well as their relationship to one another, all of them at odds with the constitutional morality undergirding the Philadelphia Constitution, have gained currency. For instance, the older morality regarding the courts’ role in upholding the Constitution—a morality that served to define or restrain its scope of constitutional authority with regard to the legislative branch—is no longer operative. As one critic of the Supreme Court writes, clearly with Publius’ injunctions in mind, “every fundamental change in domestic social policy has been brought about not by the decentralized ... [republican] process contemplated by the Constitution, but simply by the Court’s decree.”47 However much one may support the political norms they embody, when we consider the Court’s decisions on abortion, issues of public morality—e.g., pornography, obscenity, nudity—state or federal aid to religion, reapportionment of the state legislatures, libel and slander, to name but a few, this view of the Court’s role in relatively recent time certainly cannot be summarily dismissed.

At another level, it should be noted that modern formulations involving the legitimate and proper functions of the Court have no place for any constitutional morality, much less that of the Framers. It has long been fashionable among more prominent theorists and commentators to downplay the importance of adherence to constitutional formalities on grounds that the rules of the game have their proper grounding, not in any formal contract or higher order agreement such as the Constitution, but only in practice. Thus H.L.A. Hart argues that the “rule of recognition”

whereby rules are recognized as such is a matter of pure custom, rather than morality, legitimacy, or other related concerns; the rules of rulemaking are the rules simply because they are followed as the rules.48

Ronald Dworkin sees adherence to any formal rule of constitutional interpretation for its own sake as foolish and unnecessary. In a now classic formulation Dworkin asserts that a “semantic interpretation” of the Constitution is necessary in order to find the “right” answer to constitutional questions, and entails translating constitutional provisions into abstract concepts, taking what the legislature is presumed to have meant by its words, then applying them according to moral principles rooted in the philosophy of the interpreter.49 Dworkin insists that the primacy of the philosopher’s moral precepts as the master rule for determining law renders constitutional rules regarding who should make, execute, and interpret law meaningless if not harmful; there is always one right answer in questions of law, and it is the philosopher judge who knows how to find it.50 As Hamburger points out, more temperate forms of judicial activism rest on the conviction that the Court’s power of judicial review itself is in significant measure a usurpation and, lacking procedural legitimacy, should be reserved for one or another cause—such as the protection of individual rights or the reinforcement of representation—deemed especially important on the basis of some moral, political or other non-judicial criteria.51

49 SCALIA, supra note 9, at 119.
51 HAMBURGER, supra note 4, at 13, (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (concerning individual rights); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (concerning representation)).
Over the course of the last century, there have been corresponding changes in understandings of the executive’s role and responsibilities within the constitutional order. But, again, none of these can be squared with the Framers’ understanding of the need for the separation of powers and how it might be preserved. Progressives, for instance, saw the potentialities of the presidential office in overcoming the hurdles posed to the realization of their policies by the separation of powers. Woodrow Wilson, perhaps more than any other individual, sought to legitimize this role in the context of advancing the vision of a more active and democratic political order. To this end, he maintained that the president is not only the “unifying force in our complex system,” he is also “the leader of both his party and of the nation.” He repeatedly emphasized that the president, not Congress, represents “the people as a whole” and that the nation “has no other political spokesman.” Given this, Wilson held that the president alone could satisfy the country’s “instinct . . . for unified action . . .” and “a single leader.” Once he has gained “the admiration and confidence of the country,” Wilson held, “no other single force can withstand him, no combination of forces will easily overpower him.”

Few would dispute that over the course of the Twentieth Century and into the Twenty First, Wilson’s vision of the presidency has been realized; that the potentialities of the office he emphasized have, for the most part at least, been fulfilled. At the same time, with the presidency now having replaced Congress as the predominant branch in our political system, and with the courts, no longer bound by judicial duty, assuming a new and active role, it is also evident that the Philadelphia Constitution is no longer operative. To put this somewhat otherwise, while our

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53 Id. at 68.
54 Id.
55 Id.
constitutonal forms and principles are outwardly the same as they were at the time of ratification – i.e., we still have a separation of powers and Congress still possesses on paper the vast bulk of powers – the operations of our system are markedly different from those anticipated or desired by the Framers.

The New Dispensation and the Rule of Law

The abandonment of the Framers’ constitutional morality and the changes it has wrought bear significantly on the realization and maintenance of the rule of law. Concerns on this score become more acute with the awareness that, while we have abandoned the Framers’ teachings, we have not provided any corresponding constitutional morality for this new constitutional order that might serve to preserve or advance the rule of law. This failure, in our view, has produced an instability and incoherence in our present political order resulting in the emergence of what we term “quasi-laws”; that is, laws that do not conform to the acknowledged and fundamental tenets of the rule of law.

To begin with, Hart’s rule of recognition may not depend on adherence to formal structures, but it depends, at the least, upon some kind of consistent practice. This consistency no longer exists in our system of lawmaking, which means that this system does not exhibit merely a deviation from some utopian vision of the rule of law—with perfect and perfectly clear rules always being perfectly obeyed by the people. Rather, the American government increasingly fails to maintain the most fundamental elements necessary for what is called a law to in fact be a law—that is, a rule capable of being followed by those required to follow it. The worse a regime is at achieving minimal consistency, clarity and predictability in its rules, the closer it is to falling into simple lawlessness, in which abiding by the law becomes both pointless
and impracticable.\textsuperscript{56} We do not claim that such a point has been reached in the United States today, but do argue that the American government has moved perilously far in that direction.

As a first example we offer President Obama’s Executive Order in regard to abortion funding under the structures established by the 2010 healthcare legislation.\textsuperscript{57} Whatever one’s opinion regarding this hot-button issue (the substance of the law), it seems clear that the Executive Order is a critical instance in which the form or rule of law is undermined. The Executive Order was the result of bargaining between the President and Congressman Bart Stupak, who expressed fear that the legislation would allow federal funding for most abortions, a policy with which he said he disagreed. Rather than convincing Congress to amend the bill, however, the President promised that after signing it he also would issue (as he did issue) an Executive Order barring the use of federal funds for most abortions.\textsuperscript{58}

The deal on abortion was needed because Congress has understood ever since \textit{Roe v. Wade} declared a right to abortion that federal healthcare funds are assumed to be available for abortions unless specifically prohibited by Congress.\textsuperscript{59} This is why every year Congress has passed the “Hyde Amendment” specifically forbidding the expenditure of Medicare funds for abortions.\textsuperscript{60} The healthcare bill did not include that ban, so the proper reading of the statute is that it leaves public money available for abortions.

\textsuperscript{56} \textit{FULLER}, \textit{supra} note 8, at 39.

\textsuperscript{57} Patient Protection and Affordable Care Act’s Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion, Exec. Order No. 13535, 75 Fed. Reg. 15599 (Mar. 29, 2010).


\textsuperscript{60} \textit{Id.}
Again, the issue here is not the underlying policy’s wisdom or virtue, but the deviance of the lawmaking methodology from that required by the rule of law. Customary interpretation of statutory law dictates that the healthcare legislation be read as allowing federal funding for abortion, until and unless a more general statutory policy or more specific statutory amendment is enacted. But the President signed this legislation and then simply and clearly contradicted it through an Executive Order—a decree, in essence, issuing from his office, under his authority alone. And the President could undo this act by simply replacing this Executive Order with another one authorizing public funding of abortions. So the President signed one law, issued a law contradicting a portion of that law, and potentially could undo his contradiction—all on his own.

The upshot of this series of acts for the rule of law is devastating. A law passed according to the standard rules of the game has been specifically contradicted by a Presidential decree. The result can be looked at in two ways: either the law passed by Congress is in mere contradiction with the law decreed by the President, meaning that we have inconsistent laws, or we have a clear inconsistency between the law as passed and the law as it will be applied. In either case the government has failed to make law because it has declared rules inconsistent with one another and/or a rule that is in practice different from the rule as published. It has rendered the law difficult to find, understand, and follow, undermining the ability of those to whom it is applied to recognize it as law, let alone follow it.

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61 We note, here, that even the passage of the act is highly suspect in terms of constitutional morality, because both houses of congress did not pass the same legislation; rather one house passed the legislation and the other passed an earlier version, then a resolution adopting amendments thereto. Ewen MacAskill, *Barack Obama’s healthcare bill passed by Congress*, GUARDIAN.CO.UK, Mar. 22, 2010, http://www.guardian.co.uk/world/2010/mar/22/us-healthcare-bill-passes-congress.

62 We have, in effect, instances 5 inconsistency, and 8 rules as practiced vs. as published, from FULLER, supra note 8, at 39.
Presidential signing statements over the last decade arguably have gone even further than Executive Orders in undermining the rule of law. Historically, signing statements were mere statements of the President’s reasons for signing legislation, embodying no attempt to affect the status of that legislation or any of its provisions. But the use of signing statements has changed radically; President Clinton used a signing statement to create, on his own, a new federal agency—the National Nuclear Security Administration. More often, however, Clinton signing statements purported to fill the interstices of legislation, refusing to enforce provisions the President deemed likely to be declared unconstitutional by the courts. Such intersticial line-item vetoes have been accepted over time; they have their roots at least as far back as Reagan Administration statements ordering agency heads to enforce laws in accordance with Constitutional interpretations included in those statements. But they violate the rules of the game and the rule of law by enabling a President to pick and choose what provisions to enforce of a law he or she signed, in effect making contradictory law.

President George W. Bush went far beyond his predecessors in the use of signing statements. An example showing the extent to which Bush II signing statements contradicted the laws they accompanied (which the President himself signed into law) is provided by the McCain Amendment, or Detainee Treatment Act of 2005. The McCain Amendment included an explicit directive that detainees not be subject to cruel, inhuman, or degrading treatment. On

64 PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 7-8 (Congressional Research Service 2007) 7-8.
65 Id. at 6-8.
66 McManus, supra note 63, at 760.
68 Id.
signing the relevant legislation into law, Bush issued a signing statement declaring that the executive branch would construe it “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power[.].”\(^{69}\) Thus Bush II indicated his intention to see that the McCain Amendment was applied only when and to the extent that it comported with his own views regarding the “unitary executive” and the lack of room for judicial review thereof. Not only would the law not be enforced as written, but there would be no published law informing people of the rules to be applied, and indeed no set law of any kind in this area; actions taken in this area would comport with whatever the executive branch deemed fitting in accordance with its own reading of its own powers; there would be no law, only actions dictated by Presidential will.\(^{70}\)

The signing statement for the McCain Amendment was no aberration. According to the Congressional Research Service, “the large bulk” of Bush II signing statements do not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law. Instead, the statements make broad and largely hortatory assertions of executive authority that make it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of an act.\(^{71}\)

\(^{69}\) *Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricane in the Gulf of Mexico, and Pandemic Influenza Act of 2006*, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 20, 2005) (quoted in McManus, *supra* note 63, at 762).

\(^{70}\) See FULLE , *supra* note 8, at 39 (stating that unpublished rules and ad hoc governmental actions are not law).

\(^{71}\) *Presidential Signing Statements*, *supra* note 64, at 11.
The lack of law indicated in these statements is intended to support a particular doctrine—that of a “unitary executive” exercising “inherent powers” in important areas, especially regarding foreign relations.\textsuperscript{72} The Congressional Research Service noted in its study of the Bush II signing statements a pattern intended to systematically object to any perceived congressional encroachment, however slight, with the aim of inuring the other branches of government and the public to the validity of such objections and the attendant conception of presidential authority that will presumably follow from sustained exposure and acquiescence to such claims of power.\textsuperscript{73}

In our terms, the Bush II signing statements’ intent was to eliminate any vestigial remnant of constitutional morality hostile toward unchecked presidential power. But it would be wrong to ascribe this intent solely to the Bush II signing statements. Some attempts to put the inherent powers doctrine into action were not embodied in signing statements; this was the case with the controversial “torture memos” of John Yoo advising the executive branch to ignore congressional limitations on interrogation techniques if they encroached on the Commander in Chief powers of the President.\textsuperscript{74} Bush II was not the only President to issue this kind of signing statement. One more recent example: President Obama’s signing statement regarding legislation directing the Secretary of the Treasury to adopt specific positions in dealing with the International Monetary Fund. Obama’s signing statement declared “I will not treat these


\textsuperscript{74}Ku, \textit{supra} note 72, at 619-20.
provisions as limiting my ability to engage in foreign diplomacy or negotiations.” That is, Obama declared his intention to treat provisions specifically directing the taking of certain positions in negotiations as not limiting his ability to take whatever positions he thought proper in those negotiations. He was stating his intention to disregard specific statutory provisions on account of their encroaching on his “inherent” powers. He was placing himself above a statute he had signed into law.

Congress as Enabler

We would not want to give the impression that the Presidency is the main source of acts undermining the rule of law; that dubious honor belongs to Congress. Congress, intended by the Framers to be the locus of federal lawmaking power, has enabled the other branches to seize that power both through acquiescence in their actions (not, for example, moving to impeach Presidents who ignore laws they have signed) and, even more, by passing statutes that fail to embody the essential characteristics of law. Central to this practice has been “enabling” legislation establishing administrative agencies of various sorts and otherwise delegating power to executive branch officers.

The Supreme Court clearly has accepted the notion that power may be delegated by Congress to executive agencies; while its decision in Schechter Poultry holding that Congress may not delegate its lawmaking powers to the executive branch has not formally been overturned, the Court has ignored it, allowing it to become a dead letter. Again, one need take no position as to the substance or the goals of legislation (e.g. regulation of railroads, as was

75 Id. at 620 (quoting President Obama’s Signing Statement).
done with the seminal executive agency in this area, the Interstate Commerce Commission\textsuperscript{77}) in order to take issue with the manner in which Congress increasingly has chosen to regulate: through quasi-laws granting broad discretionary power.

It has been argued that the wide discretion left to administrators in enabling legislation is necessary to maintain our administrative state.\textsuperscript{78} Yet, as Theodore J. Lowi has pointed out, such claims rest on the mistaken view that complexity itself requires the abandonment of clear legal standards; in fact the problem is not complexity, but abstraction.\textsuperscript{79} Lowi does not argue that all laws must explicitly state every single rule and how it is to be applied; such a definition would rule out the common law itself. Rather, what is required is a set of standards, along with pre-statutory development and statutory language sufficiently “freighted with meaning” to provide objective rules to be applied, and objective rules of application.\textsuperscript{80} For illustration one need look no further than the original language of the Interstate Commerce Act, which applied to a specific industry (railroads, defined in section 1) and forbade specific practices (rebates, short charges and the like, defined and enumerated in section 2). Lowi refers to the ICC legislation as “good law” “because standards concerned with goals, clientele, and methods of implementation were clear.”\textsuperscript{81}

Compare the original ICC standards with those encompassed in the original legislation for the Federal Trade Commission, which forbade “unfair methods of competition. . . and unfair

\textsuperscript{78} Kenneth Culp Davis, \textit{A New Approach to Delegation}, 36 U. CHI. L. REV. (1969) 713, 719 (arguing that the “objective of requiring every delegation to be accompanied by meaningful statutory standards had to fail, should have failed, and did fail.”).
\textsuperscript{80} \textit{Id.} at 96; Interstate Commerce Act of 1887, 49 U.S.C.A. § 1 et seq. (1887).
\textsuperscript{81} Lowi, \textit{supra} note 79, at 124.
or deceptive acts or practices.”

The original ICC legislation provided for enforcement of specific rules against specific persons. The FTC legislation in effect gave power to administrators to determine what practices were unfair, meaning that those regulated (a group defined as those operating in interstate commerce, thus capturing many citizens unawares) would not know what standard would be applied to them until after being informed of their violation of the “rule.” Thus in the early days of delegation the Supreme Court repeatedly struck down regulations based on this quasi-law for being overly vague.

Already by the early twentieth century Congress was neglecting its duty to provide standards in its enabling legislation. Indeed, the change came about in the ICC itself with the 1920 amendment giving the Commission the right to raise minimum rates on the basis of its determination of what was “just and reasonable.” Lowi traces development in regulatory law from the concrete, specific, rule-bound, and proscriptive legislation establishing the ICC to enabling legislation establishing agencies like the Occupational Safety and Health Administration (OSHA) which had as its purpose “to assure so far as is possible every working man and woman in the nation safe and healthful working conditions and to preserve human resources.” A noble goal, to be sure, but how was it to be accomplished? Through the establishment of standards deemed by the agency (or Secretary of Labor) appropriate to provide such safe and healthful working conditions. And from where would such standards come? By what statutorily defined methods would executive officers formulate the rules by which people

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83 Id. at 97 (citing LOUIS JAFFE, ADMINISTRATIVE LAW: CASES AND MATERIALS 60-61 (1959)). It is true that section 1 of the ICC legislation made the vague demand that prices be “reasonable and just” but at least these terms were defined through the listing of forbidden charges provided in section 2.
84 Id. at 102.
85 Id. at 117 (quoting 49 U.S.C.A. § 2B).
would live? Either by an in-house advisory committee or, more often, through adoption of a “national consensus standard,” defined as any standard already adopted by a “nationally recognized standards-producing organization under procedures where it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption.” That is, so long as those deemed interested have been given the opportunity to participate in the formulation of the standard, the standard is deemed appropriate.

One might see the OSHA rulemaking formula as a demand for law-like rules in the formation of regulations. But this delegation of power is a recipe for lawmaking by interest group. It includes little or no genuine representation of the interests of the general public (including the general working public) who have neither the time nor the wherewithal to become involved in setting “consensus standards” because they do not control powerful organizations. The result has been highly favorable to the regulated industries; e.g. the FTC made its lists of unfair practices in consultation with the regulated industries and their own lists of “best practices.” And this is not actual law making; it is rather the making of quasi-law—of vague and mutable standards that may, or may not, be enforced. The culmination of this methodology in regulation has been the “consent decree”—the name given to bargained agreements between the regulatory agency and the regulated company. Consent decrees have become increasingly common, including as a tool for making public policy through lawsuits. Of course, with a

87 Lowi, supra note 79, at 118 (quoting 49 U.S.C.A. § 3(9)).
88 Id. at 111.
consent decree the regulated company avoids prosecution under terms bargained out with the agency.\textsuperscript{90} In effect, Congress does not regulate, it enables agencies to make deals with the regulated industries on a case by case basis. Such case by case, or ad hoc power is intrinsically unlawful.\textsuperscript{91} And this rejection of law in application has spread even into the realm of criminal law, where plea bargaining has become standard operating practice, with the percent of guilty pleas rising from under 65 percent in 1908 to over 95 percent in 2002.\textsuperscript{92} Just between 1980 and 2002, the federal criminal trial rate dropped from 23 percent to less than 5 percent.\textsuperscript{93}

Whether termed a consent decree or plea bargain the central concept is bargaining; and it is not a term of law. Rather, it is a process whereby parties assess the strength of one another’s positions. The clarity of the evidence and severity of the accusation are, of course, relevant, but so are the reputation of the lawyers and the amount of influence the regulated entity and/or defendant has with the higher ups in government. Influence and personality become key factors in the outcome, as befits a process of bargaining rather than law; a process that relies on who one is, and who one knows, rather than what one has done; a process that constitutes the rule of men, not of laws.

Beyond the rather clear problem of reducing law to an object of bargaining is the problem of the sheer size and complexity of law today. “The laws,” Madison observed, may “be so voluminous that they cannot be read, or so incoherent that they cannot be understood.” And they may “undergo such incessant changes,” he continued, “that no man who knows what the law is

\textsuperscript{90} Lowi, supra note 79, at 111.
\textsuperscript{91} Fuller, supra note 8, at 39-40.
today, can guess what it will be tomorrow.”\textsuperscript{94} Such fears hardly seem overwrought at a time when we have a tax code that has been amended more than 3,000 times in the last decade, and the CCH Standard Federal Tax reporter has 71,684 pages.\textsuperscript{95}

Madison noted the injustice of this mutability. “Every new regulation concerning commerce or revenue” or “affecting the value of property,” he maintained, “presents a harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens.”\textsuperscript{96} Not only did he contend that this state of affairs lent weight to the contention “that laws are made for the \textit{few}, not for the \textit{many},” he pointed to the “unreasonable advantage” this accorded “the sagacious, the enterprising, and the monied few, over the industrious and uninformed mass of the people.”\textsuperscript{97} At least as important, however, would be the effects of this loss of predictability on commerce, for who would move forward with any long term project knowing he might fall “victim to an inconstant government?”\textsuperscript{98} No one, we would venture, but those powerful enough to be in on the bargaining over what that inconstant government would decide next and, as important, have the wherewithal to bargain over potential prosecutions under the resulting quasi-laws.

Madison’s concerns are highly relevant today because the national government has assumed vast responsibilities in fields such as education, health, civil rights and the environment; areas where Congress has set down broad goals, leaving the promulgation of regulations that have the force and effect of law to the bureaucracy. The history of OSHA best illustrates the

\textsuperscript{94} \textsc{The Federalist} No. 62, at 323-24 (Hamilton or Madison).
\textsuperscript{95} \textit{Federal Tax Law Keeps Piling Up}, http://dontmesswithtaxes.typepad.com/CCH_WBOT_TaxLawPileUp_2010.pdf; Nina E. Olson, \textit{We Still Need a Simpler Tax Code}, \textsc{Wall St. J.}, Apr. 10, 2009, at A13 (reporting in 2009 that more than 3,250 changes have been made to the tax code since 2001).
\textsuperscript{96} \textsc{The Federalist} No. 62, at 324.
\textsuperscript{97} \textit{Id}.
\textsuperscript{98} \textit{Id}.
difficulties that have arisen with the emergence of the modern welfare state. By 1994 OSHA already had issued over 4,000 regulations in an effort to fulfill its broad, congressionally mandated mission. OSHA regulations range over a wide variety of concerns and conditions—e.g., where to store rags, the composition and structure of ladders, what substances are toxic (there are over 60,000 listed, including sand), and the height of railings—and they are so numerous it is unlikely that even the OSHA inspectors know them all, much less the managers in the workplaces. Thus those who must take responsibility for “regulatory compliance” may regard each OSHA inspection as “a kind of negative lottery: ‘Every inspector knows different rules,’ and will always find a violation,” even when the company being inspected has sought to maintain compliance for decades with the same agency’s rules. Clearly, the number of regulations and their arbitrary application, coupled with the fact that these regulations have the force and effect of law—their violation carrying with them enforceable penalties—constitute a breach of the rule of law, i.e., the uniform, equal, and predictable application of set, known rules. Moreover, it seems equally clear, this state of affairs is precisely what Madison inveighed against.

The situation with respect to OSHA is scarcely unique. The Consumer Product Safety Act of 1972 provides an equally broad mandate for the Consumer Product Safety Commission, namely, “to protect the public against unreasonable risks of injury associated with consumer

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100 Id. at 37.
101 Id. at 12.
102 Id. at 14.
products.” The responsibility of the Environmental Protection Agency set forth in the Clean
Air Act (1970) is also quite broad, “to protect and enhance the quality of the Nation’s air
resources so as to promote the public health and welfare and the productive capacity of its
population.” Examples of similar congressional delegations of broad authority to
commissions, agencies, and departments could be multiplied many times over; one indication of
the extent of their rules making is The Federal Register; this compilation of the rules issued by
these authorities ran to 75 volumes and over 80,000 pages in 2010.

With so many rules determined on-the-spot or even after-the-fact by people within a
faceless bureaucracy, one is reminded of the opening scene from The Hitchhiker’s Guide to the
Galaxy. When spaceships arrive to destroy Earth to make room for a hyperspace bypass, the
head of the construction crew hears the cries of anguish from doomed Earthlings. He calmly
notes that the plans were available for viewing at the agency offices on Alpha Centauri. If
people can’t be bothered to find out about such things, he has no sympathy for them whatsoever.

Courts and the Perversion of Common Law

The courts are not free from the difficulties we have noted. And we would not want to be
seen as charging them solely with excessive activism. In part the courts are responsible for our
current predicament on account of their failure to act—in particular their failure to enforce the
non-delegation doctrine. But the principal reason for the lack of judicial conformance with the
principles of the rule of law stems, as we have remarked above, from the abandonment of
judicial duty, the morality that prevailed at the time of founding. As Hamburger notes, this

morality was “so clearly evident” at this time that “it could be left implicit”; that is, it needed no formal constitutional grounding. But he also notes with concern that judicial duty—along with its prescriptions regarding the functions of the courts and the strict limitations on their power to invalidate legislation—“have almost been lost to view.” What has transpired over the decades is that modern historians and legal academics have misunderstood the exercise of judicial duty in the early American states to be the origins of “judicial review” that, in turn, has developed into a far more malleable understanding of judicial power than that embodied in judicial duty. Moreover, as we might expect, this “judicial review” is taken to be largely an American “invention” and, therefore, like many other developments of the founding period, a matter that has engendered considerable speculation concerning it origins, scope, and intended uses.

With the emergence of “judicial review,” a problem involving the basic underlying principles of the rule of law emerges, namely, what is the extent of judicial power? To put this another way, as Hamburger notes, at various time in the English experience there were those who urged the abandonment of the restrictions posed by judicial duty; some have sought to turn the intrinsically limited practice of equitable interpretation into a power to fully control legislation. That is, they sought to abandon their duty to look to the intent of the legislature, only filling in interstices where the language is unclear and incomplete, and only endeavoring to fulfill the legislature’s perceived intent in accordance with the law of the land and the customary

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106 HAMBURGER, supra note 4, at 618.
107 Id. at 615.
108 Unaware of “judicial duty,” and believing its exercise in nullifying legislation to be “judicial review,” legal scholars look in vain for the constitutional grounding of judicial review. As Hamburger puts the matter, this search is “quixotic:” “It is difficult to discern express authority for what the Constitution largely took for granted, and the task become decidedly quixotic when modern scholars seek the Constitution’s authorization not for judicial duty, but for ‘judicial review.’” Id. at 616.
109 Id. at 339-40.
assumptions regarding what is fair and reasonable embodied therein. Instead they sought to subordinate the law of the land to their own “rational” conception of the dictates of justice they ascribed to an abstract reading of natural law and individual conscience. Hamburger emphasizes the basic disagreement that has perennially surrounded the source and content of any higher source for judging human law. Common law judges came to recognize that, if an abstract understanding of natural law were used as a measure for the legitimacy of the law of the land, there would be no uniformity in the adjudication of the laws; thus the growth of precedent and known principles of adjudication at the very heart of the rule of law would be undermined. Indeed, once free of the limitations of judicial duty, judicial power is theoretically limitless.

This particular problem becomes very real and acute in the United States as judicial review has been interpreted to embrace the notion that the Constitution embodies rights whose realization and enforcement fall to the courts. Perhaps the decision in Missouri v. Jenkins best illustrates the degree to which the courts go to secure these rights; specifically, they may compel the local governments to tax at a rate in excess of state statutory limits in order to force secure compliance with judicially determined constitutional obligations. The Court’s decision in Roe v. Wade (1973), however and whatever one’s views on the underlying policy issue, best illustrates the range of difficulties with this conception of judicial authority. In Roe, to begin with, we find a pattern of circular reasoning common to virtually all decisions which embrace “substantive due process.” Lacking in the decision is the articulation of a theoretical foundation

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110 Id.
111 HAMBURGER, supra note 4, at 19-30.
113 Id. at 56-57.
or framework for determining why the right to an abortion is “fundamental” or why, it would seem to follow, other recognized rights may be less than fundamental. In other words, we are left to speculate how we are to determine the relative status of rights that comprise generally understood limitations on the scope of governmental authority.\footnote{To speak of a “fundamental” right suggests that rights may vary in their importance and brings to mind the Court’s use of “strict scrutiny” and “heightened scrutiny” of legislation involving, inter alia, race and gender. This practice, which accords a different judicial treatment to individuals based on their attributes, is justified on existing social conditions and attitudes, distinctly non-judicial considerations that would seem best taken into account by the legislative branch.}

The decision in Roe closely resembles the infamous Lochner decision in which “liberty of contract” was arbitrarily read into the “due process” clause as a right beyond the legitimate control of the legislature.\footnote{\textit{Lochner v. New York}, 198 U.S. 45, 117 (1905).} Certainly, the Roe decision partakes of this same arbitrary character by relying on the “right of privacy”—a right of its own invention, not specifically enumerated in the Constitution—to find abortion a “fundamental” right protected by the “due process” clause of the Fourteenth Amendment.\footnote{\textit{Roe v. Wade}, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).} The constitutional grounding of rights not mentioned in the Constitution and upon which a “fundamental” right rests would, in the absence of theoretical framework along the lines we have suggested above, clearly seem to indicate that subjective values determined the outcome. It suggests that future Courts would be free to look beyond the Constitution’s express provisions to “discover” new rights that should be shielded from legislative control.

The Court’s arbitrariness, both real and potential, undermines and weakens the basic framework necessary for the rule of law. If the law as enacted by the legislature is not the law as applied by the courts, the citizenry will not be able to predict what the law will be as applied to them; their success or failure in arguing that they have not violated the law will depend, not on
their ability and willingness to abide by the law, but rather on their ability to appeal to the moral and political convictions of the judge. Some may find naïve Blackstone’s admonition that judgments are the sentence of the law, merely pronounced by the court, but that formulation marks the distinction between the rule of law and the rule of those entrusted to apply the law.118

Another related and equally serious problem comes down to whether in this and like cases involving rights the Court has not usurped a legislative function. Certainly the Roe Court took a bold step in invalidating legislation, particularly on the grounds that it did. Beyond this, however, the Court set down rules regarding what legislatures may or may not do during the “trimesters” of pregnancy and certain of these rules certainly have some attributes of law. For instance, the stipulation that in the first trimester “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician,”119 although it takes the form of a judicial command, is legislative in that it is a generally applicable rule of action, albeit only quasi-legal in nature, given its non-legislative source and arbitrary rationale. What is more, the trimester rules and related regulations over the decades are themselves, much like Congress’ delegations, susceptible to varied interpretations. Subsequent to its decision, for instance, the Court had to resolve key issues such as what constitutes the “health of the mother,” which it acknowledged as legitimate grounds for state regulation in the third trimester.120 Many of the Court’s decisions following upon Roe also take the form of laws in marking out whether a state “interest” is sufficiently “compelling” to justify regulation of abortion.121 And some degree

118 See HAMBURGER, supra note 4, at 321-22 (citing the quotation of Blackstone by “the young law student William Plumer” in New Hampshire during the founding era).
119 Roe, 410 U.S. at 164.
120 Id. at 137.
121 See, e.g., Stenberg v. Carhart, 530 U.S. 914 (2000) (striking down Nebraska’s “partial birth abortion” ban on the grounds that a woman has a fundamental right to choose the safest means of abortion medically available).
of uncertainty still exists at the state level over what constitutes legitimate regulation in the eyes of the Court.\footnote{122 See generally David D. Meyer, \textit{Gonzales v. Carhart and the Hazards of Muddled Scrutiny}, 17 J.L. \& POL’Y 57 (2008).}

Much of the controversy surrounding Roe and subsequent decisions stems from the American constitutional understanding that legislatures would be better forums than the courts to accommodate and balance the claims and interests of the contending parties. This would suggest that prudential considerations should come into play in determining which branch is best capable of handling contentious issues. While concern with observing the rule of law does not necessarily exclude such considerations, it does point to the need for establishing criteria to determine when the judiciary can legitimately take it upon itself to remove an issue from the political arena. What kinds of issues, for instance, should be handled in this manner and why? Are all “rights claims” to be handled exclusively by the judiciary? Is it possible to formulate any relatively precise rules or standards for determining the legitimacy of rights claims? These are, as we indicated above, issues that arise once Judicial Duty is abandoned and replaced with a broad and amorphous conception of “judicial review.” Yet, these issues remain unresolved. So long as this is the case, the capacity of our institutions to act in accordance with the rule of law remains uncertain.

Conclusion

We ask, by way of concluding, how might our constitutional system be altered or amended to restore the rule of law? If, as we have endeavored to show, the institutions and procedures designed by the Framers to secure the rule of law no longer serve this purpose, then
what can be done to render them again suitable for this end? The loss of the constitutional morality anticipated by the Founders to realize the rule of law, while understandable in light of political and economic developments, in no way suggests that the rule of law is not essential for a stable and legitimate political order.

Critical questions in this regard relate to how extensive the institutional or procedural changes or reforms in the existing system must be to meet the requirements and standards essential for the rule of law, as well as to the possibilities of their realization. Over the years various ideas, usually taking the form of proposed legislation, have been advanced to redress one or another of the most glaring shortcomings. Because the War Powers Resolution (1973) has not served to curb presidential war making powers or to restore Congress’s constitutional authority, for instance, numerous proposals to strengthen Congress’s role in decisions involving the deployment of military forces into potentially hostile environments have been advanced.  

One widely discussed reform is that set forth by John Hart Ely, the “Combat Authorization Act,” which would shorten the current 60 day period before any congressional termination of a presidential commitment of troops can be potentially terminated to just 20 days.  

More significantly, the Ely proposal would allow the courts to hear suits brought by members of Congress and go so far as to allow the judiciary to determine whether or not armed

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forces were being deployed into areas where hostilities were “imminent.” If the courts were to find hostilities imminent and Congress failed to authorize intervention, funding would automatically terminate. An even more stringent proposal that would limit presidential discretion is the Constitutional War Powers Amendments introduced in 2007 by Representative Walter Jones.\footnote{See Constitutional War Powers Amendments, H.J. Res. 53, 110th Cong. (2007).} Under its provisions the president’s use of military forces would be limited to attacks on the United States and the evacuation or protection of American citizens. And, like Ely’s proposal, it would give members of Congress standing to use the courts to force the president to adhere to the legislatively prescribed timetables. Again, failure of Congress to act within the prescribed time limit would automatically terminate funding.

These scarcely exhaust the reforms suggested to re-establish congressional control over war making powers, but they are we believe sufficient to show the seemingly insurmountable obstacles facing even piecemeal reforms. As Gene Healy points out, these and like measures wrongly presuppose “a Congress eager to be held accountable for its decisions, a judiciary with a stomach for interbranch struggles, and a voting public that rewards political actors who fight to put the presidency in its place.”\footnote{GENE HEALY, THE CULT OF THE PRESIDENCY: AMERICA’S DANGEROUS DEVOTION TO EXECUTIVE POWER 273 (Cato Institute 2008).} Nor, as he points out, would a president part with his prerogatives without a fight; and this resistance would necessitate supermajorities in both chambers to bring about change. Moreover, there are ways around reforms that bring into play congressional delegation of authority to the president. Perhaps the best illustration of this is section 2 of the Gulf of Tonkin Resolution (1964):

The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the
Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.\footnote{Gulf of Tonkin Resolution, H.J. Res. 1145, 88th Cong. (1964), available at http://www.hbci.com/~tgort/tonkin.htm (emphasis added).}

A close second would clearly be section 3 (a) of the Iraq War Resolution that authorized the president “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”\footnote{Id. (emphasis added). To be sure, this grant was conditioned, but its net effect was to give the president a free hand to invade Iraq.}

The delegation of war powers to the president is, in effect, part of the broader problem of legislative delegation upon which we already have remarked. Proposals to ameliorate this problem since 1983 have had to work around the Supreme Court’s decision in \textit{INS v. Chadha} that struck down the legislative veto as a constitutional means of policing the regulatory processes. One such effort is the “Congressional Responsibility Act of 2003” intended to provide congressional oversight of regulations.\footnote{See H.R. 110, 108th Cong. (1st Sess. 2003) available at http://www.constitution.org/legis/03hr0110.htm.} This act, very similar to other measures with the same purpose introduced over the years, sought to provide that “Federal regulations will not take effect unless passed by a majority of the members of the Senate and House of Representatives and signed by the President, or that the members of the Senate and House of Representatives override
the President’s veto.”\textsuperscript{130} That such a measure and those like it have failed to make headway would seem to be due in large part to the burden they would place upon Congress, both in terms of carefully drafting legislation to minimize conflict with regulatory agencies in order to make their task manageable, and accepting accountability, or a significant portion of it, for rule making and the manner in which the laws are applied.

What seems clear from even this limited survey is that Congress resists taking even patchwork measures that would help to restore its intended role in the constitutional order; a restoration which, for reasons set forth, is essential for the rule of law. Each of the major departments of government seems to find itself in a “comfort zone,” content with the procedures and institutional behavior that simply do not conform with the rule of the law. This fact, plus the uncertainties associated with such reforms, even if somehow they were enacted (i.e., would such reforms prove too burdensome? would they be permanent? could they be readily circumvented?) strongly suggest that the only effective alternative is to replace the present constitutional system or change its character through well designed constitutional amendments that would significantly alter institutional relationships. There can be no doubt that abandonment of the present system or its make over through amendment would meet with widespread resistance. Nevertheless, it still appears to be the only way to bring about the necessary convergence of republican self-government with the requirements of the rule of law.

The crucial concern, of course, is what institutional design best achieves this convergence. For this we have no ready answer, although many who have over the decades

\textsuperscript{130} For example, this act is almost identical to “The Congressional Responsibility Act of 1995.” H.R. 2727, 104th Cong. (1st Sess. 1995), \textit{available at} http://www.constitution.org/legis/95hr2727.htm. Ron Paul’s “Congressional Responsibility and Accountability Act” would provide congressional approval of all regulations that would impose significant costs on individuals or businesses. See H.R. 3396, 111th Cong. (1st Sess. 2009), \textit{available at} http://www.opencongress.org/bill/111-h3396/show.
called for constitutional change or overhaul offer some promising suggestions. To take one example: By the middle of the 20th century, political reformers developing the earlier ideas of Woodrow Wilson had come to realize that disciplined political parties, along the lines they imagined existed in the British system, would go a long way in overcoming the separation of powers.\footnote{For a comprehensive account of this development see \textit{Austin Ranney, The doctrine of Responsible Party Government, It’s Origin and Present State} (University of Illinois Press 1954). The extent to which the doctrine of responsible parties had come to be accepted by political scientists is evident in the report of the Committee on Political Parties of the American Political Science Association. \textit{American Political Science Association, Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties}, 274 Annals of the American Academy 1 (Supplement 1950).} To be sure, their concern to effectively do away with the Framers’ system of separation of powers was not motivated by any concern about the rule of law, but rather with efficiency, democracy, and a stronger, more active national government. Illustrative of this is the statement adopted by the Committee on the Constitutional System, consisting of over forty prominent political leaders, political scientists, and law professors, to the effect that not only has the separation of powers frustrated “democratic leaders,” it has “led repeatedly, in the twentieth century, to governmental stalemate and deadlock, to indecision and inaction in the face of urgent problems.\footnote{\textit{Reforming American Government} 69 (Donald L. Robinson, ed., Westview Press 1985) (quoting James Sundquist, \textit{A Statement of the Problem}, \textit{Committee on the Constitutional System}).}

In one respect at least, the abandonment of the separation of powers implicit in these proposals is not as drastic as it might seem since the Founders’ constitutional morality, which served to render it essential for the prevention of tyranny, no longer prevails. What is more, the proposal recognizes the importance of political parties, the major reason for the collapse of the Framers’ design and a factor that comprehensive proposals for reform of the system must recognize if they are to stand any chance of restoring the rule of law. Finally, the bridging of the legislative and executive branches, integral to these proposals, offers the prospects of resolving
the problems surrounding legislative delegation of authority, as well as providing tighter control
over rule making processes.

Yet, as promising as party reform seems, there remain fundamental concerns. In
what ways ought the judicial power be understood in this revamped system? Given the
greater union of the legislative and executive department, should the primary role of the
judiciary be that of protecting society against the abuses of the rulers? How could this be
accomplished? Could a second legislative chamber prove useful? If so, in what ways?
Or, among others, Should the internal structure and operations of the political parties be
changed in light of their centrality?

Clearly, as even this widely advanced reform shows, any comprehensive changes
designed to embrace adherence to the rule of law with republican government are going to
involve immense complexities. The fact alone poses an enormous obstacle to their ever
being given serious consideration in the political arena. Yet, if we are to avoid the evils
that flow from the absence of a rule of law, we must, soon or late, confront the need for
some form of comprehensive change.