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

Legal Conservatism and the Progressive Blame Game

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In a recent essay in *The Independent Review*, I praised Bruce Frohnen and George Carey's *Constitutional Morality*[1] as "one of the best, if not the best, constitutional law books of the last decade."[2] As I explained in that review essay, *Constitutional Morality* is distinct from many other excellent pieces of constitutional law scholarship in both its ideological breadth and analytical depth.

By "ideological breadth," I am referring to how, as compared to other works in constitutional law and theory, *Constitutional Morality* resists partisan tropes and examines how both conservatives and liberals alike have derogated their constitutional duties. The book thereby exposes the deficiencies of the bipartisan consensus supporting our constitutional order. *Constitutional Morality*'s publication in 2016 is thus particularly apt, as the presidential election that year represents a reconsideration of the commitments and coalitions underlying our national political parties and institutions.

By "analytical depth," I am referring to how *Constitutional Morality* probes beyond the formal veneer of case law to reveal the underlying social maladies driving our constitutional problems. For Frohnen and Carey, a much more important question than which precedents the Su-

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

[2] Jesse R. Merriam, "Book Review: 'Constitutional Morality and the Rise of Quasi-law' by Bruce P. Frohnen and George W. Carey," *The Independent Review* 24, no. 3 (Winter 2019/20): 444-448.

preme Court should overrule, or even which interpretive methodology the Supreme Court should apply, is what kind of legal and social culture is necessary to support our constitutional republic. This query reframes the conversation surrounding our constitutional disorder, so that the discussion is less about judicial politics and more about the various cultural dysfunctions besetting twenty-first century America.

Nevertheless, *Constitutional Morality* follows the general thrust of right-leaning constitutional scholarship in tracing the demise of American constitutionalism to the Progressive Era. Given the novelty of *Constitutional Morality*'s approach on other issues, the book's unwillingness to probe further and consider whether the root cause of our dysfunctional culture goes beyond the Progressive Era, both temporally and conceptually, is disappointing—not only because this adherence to the "blame the Progressives" narrative stifles the creativity of an otherwise novel piece of scholarship but also because it leads to a disappointing prognosis as to how we can restore our constitutional morality.

This symposium essay will focus on *Constitutional Morality*'s adherence to the "blame the Progressives" narrative. The first half of the essay will situate *Constitutional Morality* within contemporary constitutional law scholarship; this section will therefore focus on how other right-leaning theorists have conceived of the Progressive Era and its role in dismantling our constitutional order. The second half of the essay will discuss how Frohnen and Carey depart from the conventional right-leaning approach to the Progressive Era. The essay will close with consideration of how future research should engage the framework adopted in *Constitutional Morality*.

I. The Standard Conservative Narrative About the Progressive Era

Twenty-first-century legal conservatives generally agree that courts have gone awry in how they interpret and enforce the Constitution. But an important shift is masked within this consensus.

Throughout the 1970s and '80s, the standard conservative account, led by Judge Robert Bork and Harvard Law Professor Raoul Berger, was that the Warren Court had created this problem through its activism in various areas of constitutional law—most notably, criminal procedure, civil liberties, and federal power.[3] In the 1990s, however, the focus

[3] See Ken Kersch, *Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism* (Cambridge, U.K.: Cambridge University Press, 2019), 92-93 (discussing how Berger's *Government by Judiciary* attacked the Warren Court and won "plaudits in the conservative press, which treated *Government by Judiciary* as a landmark

among conservative legal scholars began shifting away from the Warren Court's activism and toward the Progressive Era's pragmatism.[4] According to this new understanding, our constitutional dysfunction began over two generations before the Warren Court, with the late-nineteenth-century advent of legal realism and the attendant justifications for judicial restraint, living constitutionalism, and a narrow Fourteenth Amendment jurisprudence.

A prominent scholar endorsing the "blame the Progressives" narrative is Georgetown Law's Randy Barnett, whose most direct engagement of this narrative appears in *Our Republican Constitution* (2016), published the same year as *Constitutional Morality*.[5] Below, I will discuss *Our Republican Constitution* to illustrate how Frohnen and Carey adhere to, but in important ways depart from, the conventional narrative concerning how the Progressives undermined our constitutional order.

How the Progressive Era Created Judicial Restraint

In *Our Republican Constitution*, Barnett argues that the Supreme Court developed the doctrine of judicial restraint as an instrument for advancing Progressive politics. More specifically, Barnett argues that late-nineteenth- and early-twentieth-century Progressives favored judicial restraint (and its permissiveness toward both Jim Crow laws and labor protections) because "the Democratic political coalition combined southern racists" and "northern progressives ardently committed to the cause of labor unions, whose membership was usually all white and male."[6] As a result, "[a] constitutional commitment to deference to majoritarian state legislatures conveniently facilitated the agenda of both of these key Democratic constituencies."[7] Over the last several decades, the Democratic coalition has changed, so that Southern whites no longer constitute a significant part of the coalition, and various ethnic and cultural interests now form the coalition's core. As the un-

manifesto").

[4] This transition away from the Warren Court and toward the Progressive Era can be traced to Bernard Siegan's work in the 1970s and '80s on property rights, including his defense of judicial activism and the Supreme Court's highly controversial *Lochner v. New York* (1905) decision, but these did not become mainstream positions among legal conservatives until they were grounded within originalism, a transition that began in the 1990s with the rise of New Originalism. See ibid., 195, n. 241.

[5] Randy Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (New York: Broadside Books, 2016).

[6] Ibid., 137.

[7] Ibid..

derlying political coalitions have changed, the Progressive conception of constitutional law has also shifted. Indeed, Progressives have transitioned from favoring judicial restraint to favoring judicial activism—at least on cultural issues, such as church-state relations, civil rights, and sexual autonomy.

Nevertheless, Barnett insists, despite these changes in how Progressives conceive of judicial power, the underlying Progressive conception of constitutional law has remained the same. That is to say, Progressives have continued to view constitutional law as a mere instrument of political power. Whether that instrumentalist view of constitutional law has been deployed to advance judicial restraint for union interests (as was the case in the early twentieth century) or to advance judicial activism for various ethnic groups and cultural causes (as has been the case over the past 75 years), Progressive constitutional law has prioritized political power over constitutional protections for individual liberties, thereby undermining the various protections afforded by the U.S. Constitution. In Barnett's view, our constitutional order can be restored only by dismantling the instrumentalist view of constitutional law wrought by the Progressive Era.

In my research on the history of conservative legal thought, I have referred to this shift within the conservative legal community as a "libertarian turn."[8] I have characterized it as such, because before libertarian-oriented thinkers like Barnett played a central role in framing the agenda for legal conservatism, most conservative scholars and judges embraced the doctrine of judicial restraint, as a rejection of the Warren Court's perceived judicial activism. Over the past 25 years, however, as libertarians have assumed a larger role within the Federalist Society and related legal networks, there has been a shift away from the judicial restraint of the old legal right and toward what some scholars have called "judicial engagement"—i.e., an active judicial enforcement of the Constitution's original public meaning.[9]

That brings us to the second part of the narrative: how the Progressive Era dismantled our constitutional order through the advent of living constitutionalism.

[8] See Jesse Merriam, "Originalism's Legal Turn as a Libertarian Turn," *Law and Liberty*, May 8, 2018.

[9] Ibid.

How the Progressives Created Living Constitutionalism

According to the conventional "blame the Progressives" narrative, for the first hundred years of the nation's history, constitutional thinkers and judges generally interpreted the Constitution according to its original meaning. But that practice took a sharp turn when the Progressives politicized the judiciary. So, the narrative goes, the pragmatism and instrumentalism associated with Justices Oliver Wendell Holmes and Louis Brandeis generated an entirely new way of doing constitutional interpretation, one that viewed the Constitution as constantly evolving in accord with new social understandings and values.

Employing this narrative, libertarian scholars such as Barnett have argued that, to dismantle the Progressive regime, courts must actively enforce the Constitution's *original public meaning*. And under a libertarian understanding of the original public meaning, this means that courts must guarantee individual liberty—against the will of the majority—at the federal, state, and local levels of government.

Just as Barnett's work on judicial power initiated a shift within the legal right, so has his work on originalism. In the 1970s and '80s, the originalism favored by legal conservatives was grounded in the *intent* of the Constitution's Framers. But, beginning in the 1990s, Barnett led a movement to reconceptualize originalist methodology to focus not on the subjective intent of particular Framers but on the objective meaning captured in the text itself. This has been characterized as "New Originalism," because this shift from intent to meaning brought with it a new interpretive nomenclature, such as the distinction between *interpretation* of original public meaning (i.e., meaning commanded by the text itself) and *construction* of original public meaning (i.e., meaning created through judicial action).[10]

New Originalism also brought with it a new politics. Because New Originalism permits constitutional meaning to evolve according to new understandings of the social facts underlying a legal command (as opposed to how Old Originalists argued in favor of judges' being constrained by the factual expectations of the constitutional framers and ratifiers), New Originalism has facilitated a transformation of how legal scholars view many of the Constitution's most amorphous guarantees. This is perhaps best illustrated by the ways in which some scholars have

[10] See Larry Solum, "Legal Theory Lexicon: The New Originalism," Legal Theory Blog, October 4, 2018 (explaining the differences between Old Originalism and New Originalism and how "[t]he phrase 'New Originalism' was first used [by] Evan Nadel in 1996, but the phrase was popularized by Randy Barnett and Keith Whittington a few years later").

employed New Originalist techniques to argue that states are obligated to recognize same-sex marriage under the Fourteenth Amendment because of new understandings of homosexuality and its relationship to the equal protection of the law.[11]

This brings us to the third and perhaps most significant feature of the conventional "blame the Progressives" narrative: how the Progressives, through their judicial restraint and living constitutionalism, eviscerated the Fourteenth Amendment.

How the Progressives Eviscerated the Fourteenth Amendment

The old legal right, led by people like Judge Bork, Professor Berger, and Justice Scalia, condemned broad interpretations of the Fourteenth Amendment as examples of legal liberalism gone awry. But after the libertarian turn in the 1990s, right-leaning legal scholars began condemning *narrow* interpretations of the Fourteenth Amendment as a vestige from the Progressive conception of law.

This is most evident in the pivot with regard to the Supreme Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Whereas the old legal right defended *Slaughter-House* as a conservative decision, due to its defense of state sovereignty and preservation of the original constitutional design, the new libertarian legal right has charged the decision not only with being wrong as an originalist matter but also with being motivated by the racist elements that animated the Progressive political coalition.[12]

In concert with this shift on the Fourteenth Amendment, a new understanding has arisen within the legal right as to what constitutes a canonical and anti-canonical decision under Supreme Court precedent. Most notably, in accord with the libertarian turn, legal conservatives increasingly adopt the following positions that had been explicitly re-

[11] See Steven G. Calabresi and Hannah M. Begley, "Originalism and Same-Sex Marriage," 70 U. Miami L. Rev. 648 (2016).

[12] See Barnett, 115-117. In a Federalist Society debate with Judge Bork, Roger Pilon (the Vice President for Legal Affairs for the Cato Institute) explained the conservative-libertarian division on constitutional law in the following terms: "We come thus to a major divide between conservatives and libertarians—between those at one end who believe the Fourteenth Amendment wrought few changes in our federalism; and those at the other end who believe it incorporated against the states, ab initio, not only most of the Bill of Rights but our common law and natural rights as well. The infamous Slaughterhouse Court of 1873 reflected that divide; it continues today, in many variations." Federalist Society, "Forum on Judge Bork's Article: 'Individual Liberty and the Constitution,'" July 9, 2008, available at https://fedsoc.org/commentary/publications/forum-on-judge-bork-s-article-individual-liberty-and-the-constitution.

jected by the old stalwarts of legal conservatism: (1) that *Lochner v. New York* (1905) correctly found a right to economic liberty in the Fourteenth Amendment's Due Process Clause,[13] (2) that the Fourteenth Amendment incorporates the Bill of Rights to apply to the states,[14] and (3) that a vast array of unenumerated bodily and dignitary rights, extending to such controversial issues as abortion and same-sex marriage, inhere in the Constitution, either through the Ninth Amendment or the Fourteenth Amendment.[15]

That is where Frohnen and Carey's *Constitutional Morality* comes into the picture, stridently against the general current of legal conservatism, but still operating within the framework of tracing our constitutional crisis to the Progressive Era.

II. The Frohnen and Carey Charge Against the Progressive Era

Frohnen and Carey agree that much of our constitutional dysfunction is traceable to the Progressive Era, but they offer a distinct narrative as to: (1) what constitutes our constitutional dysfunction, (2) how the Progressive Era caused the dysfunction, and (3) how to restore our constitutional order.

The Demise of Our Unwritten Constitution

As mentioned above, the conventional narrative is that the Progressives embraced an instrumentalist view of courts and law, and this instrumentalism, in turn, created the doctrine of judicial restraint, the theory of living constitutionalism, and a narrow understanding of the Fourteenth Amendment. Frohnen and Carey, however, offer a strikingly different account of what is wrong with American law in the twenty-first century.

An important dividing point is that, although Frohnen and Carey (like most legal conservatives) favor the resuscitation of a more textually tethered constitutional jurisprudence, Frohnen and Carey (*unlike* most

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[13] See David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago: University of Chicago Press, 2011).

[14] See Kurt Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* (New York: Cambridge University Press, 2014) ; also see Luke C. Sheahan, "The Chartered Rights of Americans: A Kirkian Case for the Incorporation of First Amendment Rights," *Humanitas*, Nos. 1 and 2 (2019): 14-36.

[15] See Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004); Steven G. Calabresi and Hannah M. Begley, "Originalism and Same-Sex Marriage," 70 U. Miami L. Rev. 648 (2016).

legal conservatives) accept that an unwritten constitution underlies our constitutional order. Indeed, Frohnen and Carey accept that unwritten constitutional norms are part of our "constitutional morality" (a term that they use in referring to the fixed legal norms that political agents are duty-bound to honor). But Frohnen and Carey object to the *particular type* of unwritten constitution favored by Progressives—that is, an unwritten constitution that seeks to transform longstanding social conventions to achieve undefined and evolving egalitarian ends. Frohnen and Carey object to this evolving understanding of an unwritten constitution, because its fluidity erodes the conventions and institutions that give our constitutional morality structure and efficacy.

In the introduction to the book, Frohnen and Carey cite Yale Law School's Akhil Amar, a self-described "liberal originalist," as embodying the position they are attacking. In many ways, the singling out of Amar is entirely sensible, given Amar's outspoken commitment to the view that the Fourteenth Amendment "fundamentally altered American public law" by giving the federal government the "sweeping authority to hold state governments to the highest contemporary standards of democratic inclusiveness."[16] Amar's constitutionalism—one that empowers the federal government to re-shape the citizenry to comply with continuously evolving understandings of justice and equality—is precisely the type of unmoored constitutionalism that conflicts with Frohnen and Carey's conception of constitutional morality.

But it would have been more interesting, and more revealing, had Frohnen and Carey identified a broader adversary: nearly the entire elite legal establishment, including most academics and judges affiliated with the legal right. Indeed, as discussed above, it is increasingly the case that *both* legal liberals and legal conservatives (living constitutionalists and originalists alike) see the Fourteenth Amendment as warranting the federal judiciary to define and enforce evolving norms of liberty and equality. *This* is what Frohnen and Carey are undertaking in the book—a challenge to the elite legal consensus that sees the Constitution as a basis for judicially imposed transformation.

So what are Frohnen and Carey proposing as an alternative to this consensus? In their words, "an older, more deeply rooted understanding of the unwritten constitution."[17] Put differently, Frohnen and Carey endorse an unwritten constitution that values preservation and convention as opposed to transformation and aspiration. Quoting Russell Kirk (who

[16] Frohnen and Carey, 5.

[17] Ibid., 8.

in many ways was the intellectual architect of postwar American conservatism), Frohnen and Carey describe this unwritten constitution as consisting of the following features: "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."[18]

But *what* is included in these "institutions, customs, manners, conventions, and voluntary associations" that constitute our unwritten constitution? Frohnen and Carey are not as clear on this point as many readers might like. Presumably, this unwritten constitution would consist of a society in which the following sub-constitutional features are pervasive: traditional family units, involving a husband and wife raising children within a single home; religious institutions in which worship is communal, regular, and faithful; local organizations, including school boards and professional associations, where participation is robust and disaggregated; property ownership, distributed widely among different economic classes and professional occupations.

An important corollary to the argument in *Constitutional Morality* is that, even if the U.S. Constitution remains exactly the same in how courts interpret and enforce it, we will have a different constitutional order without these traditional features of family life, religious worship, communal association, and property ownership undergirding our social relations.

Note how, in this view of constitutional morality, originalism is largely epiphenomenal. This is a significant point, because originalism has become the *idée fixe* of legal conservatism. Indeed, as many political scientists have noted, the legal conservative movement, particularly through the Federalist Society, has united its various factions under the umbrella of originalism.[19] So it is quite significant for Frohnen and Carey to suggest, as they do in *Constitutional Morality*, that originalism is not sufficient, and perhaps not even necessary, to sustaining our constitutional order.

Given the significance of this point, for both jurisprudential and political purposes, the book would have benefitted from addressing this point head-on, something that Frohnen recently did in a *Law and Liberty* essay, arguing that "originalism is beside the point."[20]

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[18] Ibid.

[19] See Amanda Hollis-Brusky, *Ideas With Consequences: The Federalist Society and the Conservative Counter-Revolution* (New York: Oxford University Press, 2015).

[20] Bruce P. Frohnen, "Originalism Is Beside the Point," *Law and Liberty*, October 29, 2019.

But if not originalism, what is the point? That is, what is really driving our constitutional disorder?

The real problem, for Frohnen and Carey, is that the "institutions, customs, manners, conventions, and voluntary associations" that have been central to the American experience are deteriorating. This means that urbanization, de-industrialization, and secularization are as much, if not more, the cause of our constitutional crisis as any Supreme Court decision that interpreted the Constitution inconsistently with the original public meaning.

Frohnen and Carey thus depart from the standard Progressive Era narrative among legal conservatives in that Frohnen and Carey do not base their critique on a particular mode of constitutional interpretation or a particular Supreme Court decision. In fact, they spend very little time in *Constitutional Morality* exploring how the Constitution *should* be interpreted. Nor do they mention more than a few Supreme Court decisions. This is, again, in stark contrast with how most conservative constitutional scholars focus on interpretive matters, objecting to the Progressive Era for its repudiation of an originalist framework.

That brings us to the second question critical to how *Constitutional Morality* differs from other works in the field: How did the Progressive Era create this problem?

The Progressive Consolidation of Governmental Power

Given that Frohnen and Carey are addressing a different problem than the one addressed in other works, it is not surprising that they provide a strikingly different account of *how* the Progressive Era created the problem. As discussed above, many scholars on the legal right have focused on how the Progressives deployed constitutional interpretation for political ends, specifically to weaken individual liberty protections afforded to commercial transactions and ethnic minorities. Frohnen and Carey, by contrast, focus on how the Progressives dismantled the Constitution's *structural* guarantees—specifically the Constitution's vertical disaggregation of power through federalism and its horizontal disaggregation through the three distinct branches of government.

The Progressives accomplished this, Frohnen and Carey argue, by transitioning from the traditional model of constitutionalism (whereby the Constitution acts as a *mediator* between the government and preexisting institutions, such as families, communities, and churches) to a new model of constitutionalism (whereby the Constitution acts as a *commander* of individuals). Under the new, commanding model of con-

stitutionalism, society consists of a "collection of individuals" whose autonomy can be fulfilled only through the centralized government's command over the private associations that restrict individual liberty.[21] Under this Progressive view, then, the federal government's obligation is not to preserve but to dismantle the bonds of family, faith, and community.

Here, it is important to understand that constitutional structures, as opposed to individual liberties, are critical to the Frohnen and Carey conception of constitutional morality. This is because constitutional structures, such as federalism and separation of powers, enable the mediating institutions of our unwritten constitution to flourish, whereas individual liberties often undermine these mediating institutions.

Consider, for example, how Christianity has weakened as a moral and political force in America, partly as a result of the Supreme Court's creating a nearly impregnable barrier between church and state. State sovereignty and voluntary associations have weakened as a result of various civil rights decisions. And family structures have weakened as well, largely due to a new, more consent-based understanding of marriage. All of these changes have transformed our unwritten constitution.

Notice, too, that all of these changes happened through judicial enforcement of evolving liberty and equality guarantees in the Fourteenth Amendment. Recall that the libertarian view, discussed above, is that the Progressives weakened individual liberty protections under the Fourteenth Amendment; for this reason, the libertarian solution to Progressivism is to empower the federal judiciary's constitutional authority to subjugate state and local governments to the Fourteenth Amendment's commands. In other words, the libertarian *solution* to Progressivism is the Progressive *problem* identified by Frohnen and Carey.

That two camps within the legal right view our constitutional crisis in such divergent terms is striking. Even more striking is that, notwithstanding these differences, these two camps somehow agree the Progressives are to blame.

This tension within the legal right is apparent throughout *Constitutional Morality*. But perhaps it reaches its height when Frohnen and Carey discuss Woodrow Wilson and his contributions to Progressive constitutionalism. Frohnen and Carey mention how, in his book *Congressional Government*, Wilson celebrated that the Civil War "finally and decisively disarranged the balance between state and national powers," and how the Union victory marked "the triumph of the principle of national

[21] Frohnen and Carey, 227.

sovereignty."[22]

This discussion of Wilson highlights the tension alluded to above—namely that libertarians attribute our current constitutional order to how the Progressives narrowed the Civil War Amendments by undermining equality protections and individual liberties. For Frohnen and Carey, however, the real problem is that the Progressives dismantled our constitutional structures by interpreting the Fourteenth Amendment too broadly, not by infringing on individual liberties through an overly narrow interpretation of the Fourteenth Amendment.

That brings us to the third, and most important, question addressed in *Constitutional Morality*: How do we restore our order?

A Cultural Solution

Given the problem identified in *Constitutional Morality*—namely, the Progressive consolidation of power and the attendant rise of quasi-law under the administrative state—one might expect the solution to be a legal one: Restore the limitations on federal power articulated in Articles I, II, and III of the Constitution, and cut back on the judicial interpretations of the individual liberty and equality guarantees restricting the states under the Fourteenth Amendment. As a result, progressivism will be eliminated, and mediating institutions will be resuscitated, effectively restoring our constitutional order.

But Frohnen and Carey concede, at least implicitly, that the situation is much more complex than this. Instead of proposing a new method of interpreting the Constitution, or urging that the Supreme Court overrule a particular decision, Frohnen and Carey seek "a renewal of culture and renewed recognition, among those in and out of government alike, of the duties of officeholders."[23]

Here, Frohnen and Carey look to a non-legal thinker, Robert Nisbet, for guidance, in that Frohnen and Carey argue that a renewed sense of communal belonging is essential to restoring our constitutional morality. This is, in many ways, a more ambitious undertaking than the efforts to restore the original meaning of the Constitution. One reason is that this Nisbetian approach contravenes the agendas of both political parties; as Frohnen and Carey concede, observing that the American "left and right share a vision of the central government as shapers of other institutions in service to individual autonomy."[24]

[22] Ibid., 154.
[23] Ibid., 236.
[24] Ibid., 228.

While I applaud Frohnen and Carey for challenging the bipartisan consensus, it should be noted that even this indictment is an understatement. Both parties do not simply share this vision; both parties vigorously oppose anything that conflicts with this vision. This is because Democrats perceive communitarian localism as a threat to their various egalitarian causes. Republicans oppose communitarian localism as a threat to economic efficiency and prosperity. The political task before Frohnen and Carey is therefore much greater than they seem to acknowledge.

Conclusion

Given that *Constitutional Morality* is as much a work in political theory as it is in constitutional theory, it would have been helpful if Frohnen and Carey had addressed why we have a political consensus in favor of the constitutional disorder they identify. Why do our political parties disagree on so much, but not on the principal issue that Frohnen and Carey identify as responsible for so many of our maladies?

Moreover, Frohnen and Carey elide the extent to which our broader social culture contravenes their vision. Here, it would have been helpful had Frohnen and Carey considered some of the startling statistics over the last 50 years on marriage, child-rearing, and church attendance. While Frohnen and Carey cannot be reasonably faulted for failing to include sociological data in a piece of constitutional law scholarship, it is nevertheless a shortcoming of the book that it prescribes a cultural solution without considering the nature of the problem they are addressing. When national illegitimacy rates are approaching 50 percent, and church attendance is in precipitous decline, it is difficult to see how to restore the mediating institutions of family and faith that are necessary to sustain their conception of constitutional morality. To be sure, Frohnen and Carey *do* acknowledge that this will require "the work of decades."[25] But they do not tell us what this work will look like over these decades. This ambiguity is particularly problematic for a book that follows the general "blame the Progressives" narrative but then offers a different critique of how the Progressive Era created our problems. While the standard libertarian story has an appealingly simple solution to the problems they associate with the Progressive Era (enforce the Fourteenth Amendment to the fullest extent and the republic will be saved), Frohnen and Carey do not seem to think that reversing the problems they associate with the

[25] Ibid., 236.

Progressive Era (namely, the consolidation of governmental power) will save the republic.

Because the problems identified in *Constitutional Morality* are so much bigger and the solutions prescribed are so much more complex than what is commonly found in other works tracing our constitutional demise to the Progressive Era, the curious reader is left wondering whether the problems identified by Frohnen and Carey actually began with the Progressives.

Maybe the real grievance in the book should not be with the Progressive Era but with the Founding Era. After all, the unraveling of federalism and the separation of powers began with the Marshall Court, just a few decades after the Constitution's ratification.

Or perhaps the grievance should be with the original Constitution itself. That Constitution failed to specify adequate limitations on federal power, and it failed to provide the sort of communal identity necessary for the constitutional morality that Frohnen and Carey identify as essential to a sustainable constitutionalism. Indeed, even if the Establishment Clause was not designed as a "wall of separation," as the Supreme Court held in 1947, it was clearly designed to confine religion to the private realm.[26] And it can be argued that it should not have been unforeseeable that the animus toward Christianity we are witnessing today would grow out of such an experiment.

These are all questions that those persuaded by the underlying thesis of *Constitutional Morality* should pursue. Frohnen and Carey have done us a tremendous service by getting this important conversation started. But if we are to begin resolving our crisis, we will need to know much more about what has caused our problems and what exactly can be done to address them. Professor Carey unfortunately passed before he could address these questions. I look forward to seeing Professor Frohnen take on this challenge.

[26] In *Everson v. Board of Education* (1947), the Supreme Court invoked Thomas Jefferson's "wall of separation" language (which Jefferson used in an 1802 letter to the Danbury Baptist Association) as a basis for understanding the purpose of the Establishment Clause. The Supreme Court later used the "wall of separation" language as the basis for finding that the Establishment Clause was designed to create separate spheres for governmental and religious authority, leaving little room for governmental interaction with religious organizations and beliefs.