
Law, Constitution, and Culture

Lawless America: What Happened to the Rule of Law

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Though it has been obvious to discerning observers for a considerable period that the United States is moving at an accelerating pace from constitutionalism toward arbitrary power, the vast majority of Americans have been slow to recognize that a crisis of governance exists. Much of the reason, I think, is that entire structures of understanding are crumbling. We suffer, not from a frontal attack by clear enemies to constitutional government, but from an internal decay of understanding.

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Sadly, in many ways lawyers, whose job it should be to defend the legal and governmental structures of our society, are the least likely to recognize such a crisis. Lawyers have an unfortunate tendency to see such issues in narrow terms, or more likely to miss them altogether. Why? Because they see law as by nature concerned solely with technical issues of legal definition and application. Issues of justice and morality may be important, on this view, but they are not specifically legal and so not the particular concern of law and/or lawyers.¹

I want to argue that law, as law, is in fact important to our understanding of the contemporary crisis of governance. I

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¹ See, for example, H. L. A. Hart's review of Lon Fuller, *The Morality of Law*, 78 *Harvard Law Review* 1281-96 (1965), especially 1285-86.

would not claim that the crisis is solely or even primarily a crisis of law. At its root it is a crisis of reason and morals. We have chosen to forget the order of being and our obligation to maintain its coherence. But I do think we can better understand the nature and extent of our predicament by examining its impact on the rule of law.

What, then, is the rule of law? At its most basic level, the term 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. The laws themselves may be unequal; they may single out one group for favorable or harsh treatment.² 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.

Today, of course, the model "law" that is supposed to "rule" is a statute. A statute is enacted by a specific body of rulers according to pre-established rules and clearly states what it demands. And all this makes for consistent rules. Or so we are told.

Rule of law does not necessarily establish justice.

I will argue that this view overestimates the power of statutory language. But the problem this formulation highlights is that the rule of law does not necessarily establish justice, or the rule of *good* law. This is the point driven home by legal positivists, for many decades the dominant force in American law and even today bearers of the dominant view of the nature of law. According to positivists it is silly to pretend that the directives of rulers are always just. And they believe it is just as silly to claim that unjust directives are not "law" in the sense that we will be punished for disobeying them, and even ought to be punished for disobeying them because disobedience undermines the civil order.

But if this is the case, then what good is the rule of law? Why should we value a principle that justifies unjust, perhaps even evil, actions? A fair question, I think, and one that points up a problem, or confusion, at the heart of contemporary legal

² See, for example, Antonin Scalia's discussion of the necessity of a Nineteenth Amendment to establish women's voting rights in *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), 47.

discourse. On the one hand we want order. As Russell Kirk often pointed out, order is the first need of all; without order there can be no peace, no justice, and no society at all.³ And order requires obedience to rules. On the other hand, those in power are liable to use that power to impose unjust laws on the people. Such unjust laws can come in many forms, including race-based disabilities or laws reducing marriage to a contract revocable at the whim of either party. And such unjust laws may be perpetuated by the claim that the rule of law demands obedience to them.

The positivist response to this dilemma is not simply “tough luck. You may not like a law—for example, taking land from some disfavored group and giving it to people the government likes better—but it is still a law, period. So get used to it.” On the contrary, positivists often deny even the *prima facie* claim of law to our obedience.⁴ But the upshot of their argument is that the law simply has no answer to the problem of a particular law’s injustice. Law, argued H. L. A. Hart, the last century’s leading positivist, is a fact; it is a rule that achieves its status by the mere fact that it is followed. Thus, in evaluating its moral quality one must engage in moral analysis, a non-legal form of inquiry.⁵

The problem with either form of this response is that it seems to turn a natural good—the rule of law—into an evil, or at least a powerful justification and support for people who wish to use the instrument of law for bad ends. For positivists, if you have an unjust law, you have two choices: accept it because justice is irrelevant to law, or oppose it on moral grounds. In the second instance you may work for a new regime or legal structure, but unless you are a judge you must work outside the law in order to replace it. And what legal positivists cannot provide, because they do not believe it exists, is any *legal* basis for criticism or reform. Why? Because for positivists law is a mere instrument and morals may dictate but do not encompass legal reasoning.

Some progressives claim to find in the job of judges the

³ See Russell Kirk, *The Roots of American Order* (Wilmington, DE: ISI Books, 2003).

⁴ See, for example, Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 239-49.

⁵ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994), 116.

duty of imposing a kind of legal morality through interpretation. Ronald Dworkin, for example, puts forward the curious argument that the Constitution lays down abstract principles of political morality, which judges are to discern and apply through their own assumptions regarding the “semantic intentions” of the drafters. The touchstone, for him, is what the legislature taken as a whole is presumed to have intended the words to mean—there being, for Dworkin, no intrinsic, plain meaning to texts.⁶ To take one example, Dworkin argues that the Eighth Amendment’s prohibition of cruel and unusual punishment should be taken as laying down a principle forbidding punishment “widely regarded as cruel and unusual at the date of this enactment” instead of what the framers clearly stated—“no cruel and unusual punishment,” in a context clearly taking capital punishment as a given. Why is such a convoluted and self-serving “interpretation” to be taken as somehow the intention of the drafters? Because the plain meaning of the words would be “confusing” to one who shares Dworkin’s particular prejudices regarding capital punishment and the need for the Constitution to be open ended in its meanings.⁷ Thus Dworkin’s work shows the essential nominalism of legal positivism, calling on judges to infuse a particular morality into laws he accords little intrinsic meaning.

Despite centuries of practice to the contrary, legal positivists claim that law is not rooted in culture and history.

Despite centuries of concrete practice to the contrary, legal positivists (including reluctant ones, like Dworkin) claim that law is not rooted in culture and history, and through them moral reason and experience. For Scalia consistent rules can only come from specific, statutory language. For Dworkin even these rules have no sensible meaning until it is imposed by heroic judges through the use of their own moralistic ideology. Thus judges in particular are in the position of imposing their own morals on the law—unless, of course, they confine themselves to strict application of written rules, eschewing moral judgment altogether.

The classic response to legal positivism has been neo-Thomistic. It has been the claim that, because every law is

⁶ Scalia, *A Matter of Interpretation*, 119.

⁷ *Ibid.*, 120.

shaped to the common good, an unjust law is no law at all.⁸ This is all well and good. And I am certain that opponents of many unjust laws are happy to hear that they need not fear that these laws should bind their conscience. But the statement that “law is no law at all” really doesn’t help very much, does it? Disobedience still brings punishment and disapprobation—often general disapprobation. Perhaps most important, we instinctively understand that there is a kind of presumptive moral legitimacy to all law because it is, in fact, necessary to establish order, the first need of all. In fact, an unjust law is neither simply a law like any other nor “no law at all.” It is, as Aquinas following Augustine at one point acknowledges, “a sort of crooked law.”⁹ An unjust law is a perversion; it fails in its most elemental, natural purpose of furthering justice. But that does not mean that it is not law, that we do not have to consider its status as a rule in deciding how to treat with it.

All law has a kind of presumptive moral legitimacy because necessary to establish order.

This is why people’s responses quite rightly vary in addressing laws that are unwise, foolish, unjust, and downright evil. We put up with many irritating laws, seek to use the political process to repeal harmful laws, resort, if necessary, to forms of civil disobedience to unjust ones and, yes, in certain circumstances, fight against makers of evil laws. Think about your response to, say, speed limits that are too low, intrusive government regulations, hot-button issues like abortion, and the sadly numerous atrocities governments have committed under the guise of law throughout history.

Injustice, like most things, tends (note my language, please, *tends*) to exist on a continuum. So a simple “that’s not a law, so I need not obey” is only slightly more useful than “it’s the law, so obey” in helping us order our public life. Our responses require more calibration than is allowed for by either extreme.

A more nuanced understanding of good vs. crooked law is also beneficial in that it helps us understand that even bad laws often must be tolerated simply because of the place they hold in our larger legal and social fabric. Revolutionary change is seldom a perfectly good thing, even in correcting wrongs. For example, most politically aware observers would say, I think, that they are happy that Soviet communism has come to

Revolutionary change seldom an unmixed blessing.

⁸ Thomas Aquinas, *Summa Theologiae* 1a2ae.90.2

⁹ *Ibid.*, 92.4.

an end. But we should not be surprised that the death of that system did not bring instant, orderly economic freedom, but rather a combination of speculation, predatory behavior, and governmental gangsterism. Even if it is imperative that you tear something down, that act will leave sadly much room for corruption and confusion in its wake. So, other things being not equal, but at least non-catastrophic—and certainly well short of Soviet communism—a stable rule of law is a good thing. It provides the necessary grounds, at least, for the establishment of justice.¹⁰

The connection between law and justice is made clear, I think, in the traditional, common-law definition of justice, in a purely legal sense, as vindication of the rational expectations of the parties.¹¹ In any legal dispute, the job of the legal system is to uphold the rule a decent, rational person would have thought already applied. If one of the parties violated a previously known law—say, “drive on the right side of the road”—obviously that person should be held accountable for damage caused in a resulting collision. If the law seems unclear in the given circumstances, the judge’s job is to find within it the most rational rule. And by that I here mean the rule most in line with pre-existing customs and understandings and so most likely to come to the mind of a reasonable person.

To take one pedestrian example, if a law says “no motor vehicles in the park” and the city tries to use the law to prevent construction of a monument that includes a non-functioning automobile, the proper legal answer seems clearly to be that the city loses. Why? Because, when a rational American thinks of a motor vehicle he thinks of something that moves, or at least could move without the help of construction equipment.

Law tends to rule, and justice to be done, when culturally rooted, rational expectations are upheld. Conversely, injustice tends to be done, and law tends to be undermined, by violations of customary expectations. Unjust expectations certainly

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¹⁰ This I take to be the real justification for, and inherent limitation on, the application of the judicial rule of *stare decisis*, according to which a judgment that would be found incorrect today may nonetheless be upheld, if its harm is not too great, in the name of consistency and continuity—in short, maintenance of rational expectations.

¹¹ Scalia, *A Matter of Interpretation* at 5 criticizes this definition of justice as a mere prop for judicial hubris. Obviously, I disagree.

exist. But laws generally cannot change them because they meet too much resistance. And this means the would-be bringer of progress must rely on more cultural responses, changing hearts and minds, or else on massive force aimed at coercing compliance with anti-customary rules. Such force may or may not be clothed in law. But it will of necessity be harsh, will very often prove ineffectual or counterproductive, and by nature will undermine the habits of government behavior and citizen confidence necessary for the rule of law to flourish. Thus we have the perpetual problem of “benign dictatorship” accompanying armies of occupation—including ones that see themselves as liberators.

As Lon Fuller recognized, law has an internal morality. And really, truly unjust laws tend (again note the limits of my claim, *tend*) not to be law-like. This tendency has both analytic and systemic, political aspects. Politically, regimes that are evil tend to be unlaw-like. The Soviet constitution promised paradise—the right to work, to leisure, to free speech, and so on—but delivered none of these, instead producing tyranny and mass murder. Many in Hitler’s regime claimed to act through law, believe it or not. But those laws were so often retroactive or simple decrees that, in addition to being evil, the regime clearly was unlawful.¹²

Regimes that are evil tend to be unlaw-like.

More analytically, it is difficult for a law that is truly evil, that violates our most basic precepts of natural justice rooted in the order of existence, to be law-like. You can, of course, have a law that simply says “all Jews” or “all white people” (take your pick) “are to leave the country, their property being hereby confiscated by the state.” But what then?

Well, to begin with, you probably won’t want to be so obvious in your theft. You have to worry, after all, about economic and political consequences. Let’s take, for example, Robert Mugabe’s Zimbabwe. When this dictator decided it was time to confiscate property held by white farmers, he first changed the constitution—which already had provided for some land transfers, with compensation—to allow his government to take the land, then tell the farmers to get compensation from

¹² See Fuller’s discussion of the Nazi regime in *The Morality of Law* (New Haven: Yale University Press, 1969), 40-41 and 54-55.

the *British* government.¹³ And after that? There was written into law a land-reform program providing for rules regarding which landless peasants would be eligible for land, how compensation would be carried out, and so on.¹⁴

Of course these provisions were ignored and the courts were bullied into rubber stamping whatever the government decided to do with the land it had seized.¹⁵ It is after all in the nature of theft that the booty will be divided up among the powerful, not those best able to make use of it. My point is this: few regimes want to look as arbitrary as Mugabe's actually is, so they use the language of law, and then violate it. That's not good. But the reason for the hypocrisy is important: cultural legitimacy.

Hatred of white settlers (the very real bad acts responsible for much of this animus is not directly relevant in this context) and the very real need for land reform made the unjust confiscatory law palatable in Zimbabwe. But the actual result—Mugabe's cronies getting the land—well, a law written that way would be obvious in its evil. You can do evil through law, of course. But it is going to be pretty obvious because laws are, by their nature, straightforward and obvious. So an evil law will endanger the ruler's legitimacy, his ability to rule.

A regime is most likely to do evil through quasi-law. Its dictates will be called law but will be written in a manner to hide their bad intentions. And the result will be inconsistent with the rule of law. The same, by the way, goes for regimes that seek to do too much, too formally. They will call their dictates law, but they will be only quasi-law, failing to embody or sustain the rule of law.

Fuller lists eight ways in which a regime can fail to establish or maintain a rule of law.¹⁶ Let me briefly summarize his central points:

Most obviously, a regime fails to live by the rule of law if it does not have rules—if everything has to be decided on an ad

¹³ Constitution of Zimbabwe S. 16 A(1) (c) ii, viewed online at: <http://www.parlzim.gov.zw/inside.aspx?mpgid=25&spid=68>.

¹⁴ Land Acquisition Act, Chapter 20:10, viewed online at: http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=002131&database=FAOLEX&search_type=link&table=result&lang=eng&format_name=@ERALL

¹⁵ John McClung Nading, *Comment: Property under Siege: The Legality of Land Reform in Zimbabwe* 16 *Emory Int'l L. Rev.* 737 (2002).

¹⁶ Fuller, *Morality of Law*, 39.

hoc basis. We see this in many of our own Supreme Court's decisions regarding, for example, the Constitution's religious establishment clause. The "interior decorating decisions" regarding crosses in public squares and the like may be seen by their authors as applying rules. But it is rather clear that the question of how many Santa Clauses can make a nativity scene "constitutional" is not based on a principle or rule. Proof of this is provided by the fumbling, niggling distinctions and inconsistent decisions themselves.¹⁷

Second, a regime may fail to publicize, or at least make available to the affected parties, the rules they are expected to observe. Parties are expected to follow an unknown law, which is not possible, save by mere chance. Secret laws are not law, as even Hobbes noted.¹⁸

Secret laws are not law.

Third, a regime abusing retroactive legislation destroys the rule of law by negating the proper immunizing effect of enacted law. There is actually some ground for debate as to how bad retroactive legislation is and when. But this much seems generally acknowledged: If a few people are using a hyper-technical reading of, say, a tax code provision to get a massive tax break that was not intended, the government can rewrite the legislation and apply it retroactively, and still be acting in a law-like manner. The state in effect is saying "do you remember that tax break? You don't get it, including for the year you claimed it, because you should have known it wasn't what was intended." But it is not law-like, for example, for the government to pass a law that would imprison people for criticizing government ministers, and then apply it to people who made such criticisms before the law was passed.¹⁹

Fourth, laws that are not understandable, whether the Internal Revenue Code or increasingly arcane regulations applied to small businesses—are not law-like because they do not effectively tell people what is required of them. And

Laws that are not understandable are not law-like.

¹⁷ *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

¹⁸ Thomas Hobbes, *Leviathan*, Chapter XXIV: "Of the Civil Laws."

¹⁹ Our Constitution specifically forbids ex post facto laws, of course. Moreover, I personally would have a problem with the first form of retroactive legislation. The power of retroactive legislation seems just too liable to abuse, though the correction of erroneous judicial decisions (such as those awarding a tax break not intended) resides within the legislature's appropriate powers.

it is no solution to say that everyone should have a lawyer to explain the law to them. “Rational lawyers’ expectations,” however widely spread (and lawyers are too expensive for it to be widely enough spread), simply are not the same as people’s rational expectations.

Fifth, contradictory rules and, sixth, rules that require conduct beyond people’s natural capacities in effect make it impossible to follow the law. Seventh, rules that change too often fail to guide us in determining what conduct is required. Think, for example, of the number of times you have been berated by a security guard at the airport who is upset that you have failed to divine the latest requirement added to your search before boarding an airplane. Finally, when the rules as announced are not the rules enforced—our Soviet constitution and Zimbabwe land reform examples—you do not have law.

If a regime fails too much on any or any combination of these aspects, there is no rule of law. Why not? Because the regime fails to provide settled, enforceable rules, known by the people, which allow them to plan their lives according to those rules.

At its root, the rule of law recognizes reciprocity between rulers and ruled. In exchange for obeying the rules, the people are told, in effect, that those are the rules. What they are told to do and not to do defines the boundaries of licit and illicit conduct. So, if the regime fails to make the rules known, or changes them too often, etc., it is failing in its basic, inherent legal duty to the ruled, and cannot possibly rule in any legitimate fashion, let alone establish justice in any meaningful sense.²⁰

In exchange for obeying rules, the people are owed clear boundaries between licit and illicit conduct.

This brings us to our current situation. Today we live under an increasingly unlaw-like regime. Our centralized state concentrates ever more power in itself in the name of protecting us from want, from harm, from effective moral censure, and from the consequences of our own actions.²¹ In so doing it necessarily fills in the spaces once left for individual and local community initiative, replacing culture with law—or, rather, with quasi-law.

Even as our prophylactic state expands the realm of what it

²⁰ Fuller, *Morality of Law*, 40.

²¹ See my *The New Communitarians and the Crisis of Modern Liberalism* (Lawrence, KS: University Press of Kansas, 1996), especially 23-27.

calls law, it also increasingly must act in an arbitrary manner. It seeks to maximize our autonomy by protecting us from all harm. But it cannot achieve its ends within our constitutional structure, or, indeed, through the rule of law. Law requires too much precision, predictability, foresight, and so on, to be useful to a prophylactic state. As for the Constitution, it is too focused on specific, limited grants of power, formal rules, and reservations of rights to the states and the people to serve the prophylactic state.

Relatively few lawyers even recognize our traditional constitutional structure. Today, for lawyers, the Constitution begins with the Fourteenth Amendment. And today that Amendment is read as establishing a regime in which the central government protects individuals from communities,²² indeed, in which there is a constitutional duty to construct a prophylactic state. But even lawyers are beginning to recognize a specifically legal problem with the prophylactic state: it finds it increasingly difficult to act through law.

The real fight over law took place during the nineteenth century, with lawyers participating on both sides of the battle. Law lost, of course. Specifically, the common law—or the system of law rooted in custom, precedent, and the rational expectations of the parties—was undermined in most of Europe and parts of America over the course of the nineteenth century. The instrument used was the legal code. The early positivists, followers of the early positivist John Austin but also of the great code maker Napoleon, believed that law is by nature simply a rule, set down by whoever happens to be the lawgiver. These people were convinced that they would be great lawgivers, and so could be trusted with unquestioned power, but that really is beside the point. The point is the positivists' belief that the perfect legal system could be put together by wise lawgivers, and could in turn mold a perfect commonwealth. When they attained power, they sought to make their beliefs into reality.

The common law—rooted in custom, precedent, and rational expectations—was undermined by legal positivists.

People's accustomed ways of life had to be rooted out to make room for the mechanism of systematic statutes. But that was considered a good thing, custom and tradition being seen

²² This is the theme of Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 2000).

as by nature harmful. Some backward thinkers resisted and had to be punished or killed, but this was seen as a fair price to pay for progress.²³

The great reformers discovered something troubling as they turned custom into directives from the legislature. They discovered that the structures of law they built were limited in their ability to mold society. Their laws even were limited in their ability to regulate all that the reformers wished to regulate.

Statutes are rules set down by legislatures in specific language. They can be rather effective at achieving specific, narrow ends. “No smoking in restaurants” is the latest example sweeping the nation. And you can, whether you should or not, ban smoking in restaurants. It is a simple matter to write a clear, simple rule to that effect.

But how do you set up rules beforehand for regulating an entire industry, or running a health care system? How does the government direct the thousands of decisions and actions necessary to fund, guide, and oversee the thousands of tasks involved in, let us say, healthcare, through pre-existing, set, clear rules?

It can't.

Prophylactic state can rule, but not through law.

And that is the key legal problem with our prophylactic state. It can rule, but it cannot rule through law. It must empower administrators to make decisions through “enabling” legislation. Enabling legislation basically says, “Here is the problem”—say, unmet healthcare needs—“and here is the money, and here is what the administrative structure will look like that will enable administrators to solve the problem.” It then says to those empowered, “here are some goals, and some things we want to make sure you do not do; beyond that, follow the employee manual whenever it gets written.”

And that is not a law. It is a grant of power. It is a kind of constitution for, say, the Republic of Healthcare. It is a lot of things. But it is not a law.

In making this argument I invite at least two responses. The first would be, “how is this not a law?” It is not a law because it leaves administrators to make the rules that actually affect, rule,

²³ See, for example, Erik Ritter von Kuehnelt-Leddihn, *Leftism, From de Sade and Marx to Hitler and Marcuse* (New Rochelle, NY: Arlington House 1974).

and mold people's behavior. Even if the enabling legislation sets down rules for rulemaking, which it generally does, the makers of rules remain the administrators. And their work is far too detail- and results-oriented to be legal in the strong sense.

Administrators' decisions will be ad hoc, will not be generally known, will change frequently, and will violate other legal norms noted by Fuller. This is especially true when congressional oversight bodies and executive agencies all but inevitably fight over various interpretations and implementations of the enabling legislation. Potentially, these quasi-laws will encompass multiple or even all the failures of rule of law described by Fuller.

Rules made by administrators not laws but quasi-laws.

And, no small point, these quasi-laws also are violations of the higher law of the American Constitution. For the Constitution—our source of basic rules for lawmaking—says that one branch, the legislature, gets to make law while another, the executive, is to execute the laws. The Constitution's provisions are the rules of the game by which rulers must abide if they are to maintain the fundamental reciprocity on which the rule of law and governmental legitimacy rely.

Quasi-laws violate American Constitution.

The second, more troubling question is, "who cares?" That is, "who cares if it is not a law if it is allowing us to do good?" This is a question often raised by lawyers themselves, who have come to consider it rude and reactionary to suggest that good things done by lawyers and the state should have to meet some preconceived, "formalist" notion of lawfulness.²⁴ No longer recognizing the rule of law's essential character, many lawyers no longer are in a position really to care about it. Obedience to the directives of the state, yes. The power of the term "law," yes. Honest, clean government, okay. But the rule of law seen as obedience to formal rules? No, not anymore.

Instead the concern is to have rules drawn up by administrators who engage in lots of consultation to make certain that all sides have "had their say." And this is taken for the rule of law. That is, law is seen as the product of the process, whether

²⁴ Oliver Wendell Holmes, Jr., famously led a revolt against the perceived "formalism" of his time, opposing excessive reliance on mechanical logic with a call for reliance on "experience." For a telling critique of this movement see Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2002).

that product is predictable, non-ad hoc, and so on, or not. Of course, enabling legislation is none of these things; it is less law-like than it is constitution-like. That is, it sets out structural distinctions and powers, along with some basic guidelines for those who make law.²⁵ This is fine for a constitution (higher, or meta-law) but it is not law; it is what I would call quasi-law. And it now pervades our government.

We expect, or once expected, our legislators—those accountable to the people and empowered by the Constitution to make law—actually to make the law. But today everyone except the legislators is bent on making law. And the result is that members of all three branches of government make quasi-law and, generally speaking, nobody makes law.

This problem begins with a misunderstanding of the nature of law itself. Most lawyers casually assume that everyone in our constitutional structure always has, does, and should make law. We are all equal in this, though the courts are more equal than others. This mistake in turn comes from the erroneous assertion that judges, because their interpretation and application of law tends to rule, must be makers of law. After all, how can there be a pre-existing rule if the judges make the rule whenever they hand down a decision? If judges make law, rather than find the extension of the law that best fits people's rational expectations, then there is no rule of pre-existing, known law that can bind people in conscience. And this leaves us with law as either the will of the judge or a statute's language, mechanically followed by the judge, period.

This is not just some left-wing ideological position. In a now-classic work, Supreme Court Justice Antonin Scalia—often termed a conservative—insists that common law judges make, and always have made, law whenever adding anything to precedent in covering new facts without specific statutory language. Indeed, the entire concept of seeking the rule best meeting rational expectations of the parties escapes Scalia because his positivism blinds him to the common law's sta-

²⁵ Scalia seems at one point to recognize this distinction between constitutions and laws (e.g., *Matter of Interpretation*, 37, where he refers to the Constitution's generality), yet he in other places seems confused as to the distinction between constitutions, which are and must be general assignments of responsibility within a framework of goals and prohibitions, and more specific directives of laws. See especially *ibid.*, 38.

tus as law. Referring to common law reasoning as “playing king,” Scalia misconstrues one of the classic cases in which judges once found this rule.²⁶ The case, *Hadley v. Baxendale*,²⁷ concerned a lawsuit over damages from a carrier’s failure to deliver a package on time. The carrier was told of the need for speed and that failure would mean significant damage to the customer. But when the carrier failed to deliver in a timely fashion and the customer sued for lost profits (his mill was forced to stay shut down for several days, waiting for a part), the court found for the carrier. Scalia criticizes the court, and the common law generally, for making new law by holding that the consequential damages were not reasonably foreseeable, even arguing that the damages were in fact foreseen because the carrier was told why speed was needed and the cost to the customer of failure.²⁸ According to Scalia, this case shows the arbitrary nature of common law reasoning because the case came out wrong, but is looked to as the source of the legal principle, still applied, that consequential damages are not reasonably foreseeable. But Scalia misconstrues both the case and common law reasoning. Consequential damages are not “reasonably foreseeable” for the simple reason that neither party in a shipping transaction would reasonably believe that the price paid includes insurance to protect against bad events happening outside that transaction—whether caused by failure of timely delivery or not. When one pays to ship something, one reasonably expects it to be delivered and to be recompensed the value of the object should it be lost. But—and this is where Scalia’s rejection of the fact of common law’s roots in tradition is crucial²⁹—one has not in our culture ever reasonably expected that the carrier should, without a separate agreement and extra compensation, take responsibility for consequential damages. We may never use the negligent carrier again, but it is simply not reasonable to expect that the few dollars we pay for shipment buys us potentially thousands (or millions) of dollars in compensation for lost profits, or a deal that falls through. This is why we have insurance, and why

Genuine common law reasoning not arbitrary, nor does it make law.

²⁶ Scalia, *Matter of Interpretation*, 7.

²⁷ 9 Ex. 341, 156 Eng. Rep. 145 (1854).

²⁸ *Matter of Interpretation*, 6.

²⁹ *Ibid.*, 4.

the just rule is that carriers are not responsible for damages beyond the cost of the item shipped.

The implication of Scalia's mischaracterization of common law reasoning is that the monument in the park with the non-functioning car to which I alluded earlier should be forbidden. Scalia sees judges who make distinctions such as that between a functioning and non-functioning car as playing king, violating our democratic principles.³⁰ Properly suspicious of today's judges and their interpretive methodologies, Scalia indicts the common law itself for supposedly fostering a mind-set that asks, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"³¹ Only statutory texts, and judicial adherence to them, can protect us from judges who would be kings.

Again, Scalia's suspicions regarding judges' moral reasoning are well founded. This is made clear, for example, by the philosophical gymnastics of Ronald Dworkin, a hero of "progressive" judges, who claims to advocate interpreting texts while promoting their replacement by the prejudices of ("progressive") judges and other interpreters. Thus Dworkin terms it "near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary moral language, would have used 'cruel' as shorthand for 'what we now think cruel'" in the Eighth Amendment's prohibition against cruel and unusual punishment. On Dworkin's reading it is "bizarre" to think that the framers of the Constitution would believe, as they clearly did, that they knew what was cruel and unusual, and that these terms stand for something real rather than relative, permanent rather than transitory, part of the fabric of existence rather than part of an evolution toward ever better, more liberal understandings.³² Thus, for Dworkin, whether to ban the death penalty (or that monument in the park) is an issue of interpretation, reading what good, progressive people happen to think into the text's supposedly abstract principles, then applying it to make the law what a good liberal thinks it ought to be.

Thus, where Scalia rejects common law reasoning because

³⁰ *Ibid.*, 9.

³¹ *Ibid.*, 13.

³² *Ibid.*, 121.

he mistakenly believes it is inherently arbitrary, Dworkin applies an arbitrary misreading of common law reasoning to texts that are clear in their meaning and so not open to common law reasoning of any kind. What both reject, then, is a cultural, historical understanding of the nature of law and justice, rooted in traditions that are real and discernible rather than the products of arbitrary—even “enlightened”—personal opinions of judges. They share with lawyers in general today a rejection of the inherent purpose of the common law as the achievement of justice as the vindication of the rational expectations of the parties, where reason is understood as neither the will of the judge nor the “best” or most progressive thought taught in elite law schools, but the culturally rooted traditions of the people.

Seeing their professional choice as solely between statutory language and will, without the option of actual legal reasoning rooted in rational expectations, courts do, in fact, make law all the time in contemporary America. The results are unfortunate. They include misinterpretations and misapplications of law and a more general failure to uphold the very basic principles of law and the constitutional morality on which the rule of law depends in our system of government.

All three branches routinely violate Constitution by making quasi-laws.

But it is important to note that the other two branches of our government are not innocent in this undermining of the rule of law. The executive undermines the rule of law by making law (or quasi-law) when it should not. And the legislative undermines the rule of law by not making law (or only making quasi-law) when its job is actually to make law.

First, the President makes law, or quasi-law, even though he should not. To begin, of course, the President presides over administrative agencies that make quasi-law on a regular basis. But in addition the President issues Executive Orders that take the place of, or act like, law.

To select one recent example, our new health-care system received congressional approval, more or less, in part because the President promised one member of Congress that, if he voted for the law, he need not fear the use of federal funds for abortions in most instances.³³ Why not? Would there be an

³³ Mimi Hall, “Both Sides of Abortion Issue Quick to Dismiss Order,” www.usatoday.com/news/washington/2010-03-24-abortion_N.htm.

amendment to the law? Well no, but there would be an Executive Order declaring that federal money could not be used to fund most abortions.

One would think this would be a legislative issue. But apparently the concern that a law allows for and even requires the use of federal funds for certain abortions is now something that can be overruled by Presidential fiat. A rule becomes a different rule because the President says so. Again, this is not law—it violates the Constitution, to begin with, for the President to issue a decree, and then demand it be obeyed despite its contradicting a statute. But the Executive Order claims the force of a law, obligates administrators and citizens, and will be treated by the courts as if it were a law. It is quasi-law.

The Executive Order is not new. The Emancipation Proclamation was an Executive Order. Sadly, this fact has led many to suppose that the instrument, having been used to announce the liberation of slaves, must be legitimate.

The Supreme Court knew (somewhat) better at one point. For example, it struck down Harry Truman's Executive Order nationalizing the steel mills in the name of national security. Why? Because the Court rightly held that order to be an attempt by the President to usurp the role of the legislature.³⁴ But Presidents rarely act with Truman's lack of finesse. Today's Executive Orders are less confrontational and almost certain to go unchallenged.

Executive Orders are supposed to be uncontroversial, the equivalent of a memo from the home office to employees, merely clarifying executive branch policy in accordance with legislation. But the healthcare deal shows that these orders now can contradict or substitute for clear statutory language. The reason the deal on abortion was needed was that Congress has understood ever since *Roe v. Wade* declared a right to abortion that healthcare funds are assumed to be available for abortions unless specifically prohibited by Congress. This is why every year Congress has passed the "Hyde Amendment" specifically forbidding the expenditure of Medicaid funds for abortion.³⁵

³⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³⁵ "Obama White House abortion Executive Order and Statement on Healthcare Bill," *Los Angeles Times*, March 31, 2010: <http://latimesblogs.latimes.com>.

The healthcare bill did not include that ban, so the proper reading of the statute is that it leaves public money available for abortions. But the President has “come to the rescue,” stating that it is his will that the funds only be used for a narrow category of abortions. Of course, we have been saved by a President overruling legislation that he himself signed into law. And the President could undo his act by simply replacing this Executive Order with another one authorizing public funding of abortions. But such details seem to get lost in the shuffle these days.

And it gets worse. Presidents now claim to be “saving” the Constitution from bad laws by signing those laws, then declaring their intention to ignore parts of them with which they disagree. Like Executive Orders, these presidential signing statements also are not new. But historically they 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.

Signing statements began to change during the Reagan Administration. They changed more radically during the Clinton years. Clinton actually used a signing statement—a mere signed assertion of his own opinion and authority that happened to go along with his signature on a bill—to create a new federal agency. The National Nuclear Security Administration was created, not by law or even Executive Order, but by a signing statement. No Congressional legislation, no debate among our elected legislators, not even a formal Executive Order, but a mere “statement” created an agency of government.³⁶ But the agency was uncontroversial, so few people even heard about this bold stroke to the heart of the rule of law.

More people have heard of George W. Bush’s signing statements. In part this is due to their sheer number. But the attention also flows from their audacity. Clinton portrayed himself as filling the interstices of legislation. Sometimes he would say, in effect, “The courts will find this provision unconstitu-

com/washington/2010/03/obama-abortion-statement-stupak.html?utm_source=twitterfeed&utm_medium=twitter

³⁶ *Presidential Signing Statements: Constitutional and Institutional Implications* (Washington, DC: Congressional Research Service, 2007), 7-8.

tional, so I won't seek to apply it."³⁷ And he clearly said in one instance that the legislation really required a new agency for its proper implementation, then provided that agency. And that is all quite unlaw-like. Clinton was usurping the legislative role, furthering the tendency to shape our government into one in which the rules of the game—the Constitution—mean essentially nothing. And that means people have no way of knowing where the law will come from, what form it will take, or how to fight or even consistently abide by it.

Bush II signing statements intentionally undermined constitutional morality.

Bush II went further. His signing statements aim directly at undermining what George Carey has called our constitutional morality.³⁸ The formalities of a constitution—such as the one requiring that each house of Congress pass a bill in the identical form, then present it to the President for signature or veto—have a purpose. These formalities protect institutional interests and the primacy of Congress. They also reinforce constitutional morality: the recognition by the various persons within each branch that there are real limits to their own power and that they have a duty to see that they and those in the other branches do not exceed their powers. These formalities lie in disrepute. The healthcare bill made a mockery of them by ignoring the need even for both houses of Congress to pass the same legislation.³⁹ But there remains some vestigial opposition to unchecked presidential power, and the Bush II signing statements seemed specifically designed to eliminate it.

I can do no better, here, than to provide an extensive quotation from the Congressional Research Service's report. That report notes that "the large bulk" of the 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. . . . The often vague nature of these

³⁷ Ibid., 6-8.

³⁸ See for example George W. Carey, *The Federalist: Design for a Constitutional Republic* (Urbana: University of Illinois Press, 1989), 154-75.

³⁹ For one critique of the "procedure" see Michael W. McConnell, "The Health Care Vote and the Constitution," *The Wall Street Journal*, <http://online.wsj.com/article/SB10001424052748704416904575121532877077328.html>.

constitutional challenges coupled with the pervasive manner in which they have been raised . . . could thus be interpreted as an attempt by the administration 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.⁴⁰

Let me very briefly unpack this statement. The Bush II signing statements do not make specific claims, à la Clinton, that particular provisions of a bill would be struck down by the courts and so will not be enforced by the executive branch. Instead a large number of them simply state that the law will be read in accordance with the broad powers they claim reside with the President. That is, the President is claiming the power to apply or not apply laws as he sees fit, in accordance with his own view of his powers, without going to the trouble of vetoing the legislation. This makes sense in a way. Vetoes can be overridden, whereas executive branch actions counter to signed legislation are quite difficult to correct. But this is not a constitutional kind of sense, for it undermines the formalities of the legislative process and the effectiveness of constitutional morality. Indeed, it undermines the legitimacy, and even awareness, of a system of delegated powers with checks and balances imposing limits on the ability of the President to act unilaterally.

Thus, for example, Bush II signing statements have asserted control over the executive branch rule-making process. They have defended the idea and practice of a “unitary executive” in foreign affairs. And they have asserted the President’s power to classify and even re-classify documents related to national security.⁴¹ They have helped make the President, increasingly, a law unto himself.

The President increasingly a law unto himself.

Despite all I have said, however, I would not want to be seen as laying the blame for the growth of our imperial presidency on the presidency itself. The source of the problem is not even the Supreme Court. The real though passive villain in this story is Congress.

⁴⁰ *Presidential Signing Statements*, 11.

⁴¹ *Ibid.*

*Congress
derelict in its
legislative
duty.*

It is Congress that refuses to do its job—legislate—while continuing to play at serving its constituents. Forty-seven of the Bush II signing statements rejected provisions for legislative vetoes that Congress passed, knowing they were unconstitutional.⁴² These provisions constitute attempts by Congress to maintain control over executive agencies without going to the trouble of writing legislation that binds them to specific rules. Congress for decades has sought credit for solving all our problems, big and small, through legislation. But Congress long ago gave up on the impossible task of writing detailed legislation spelling out precisely what needs to be done by whom and in what way in order to “fix” our problems.⁴³ The result is the enabling legislation I have deemed quasi-law.

Added to this is the oversight imperative. Congress seeks credit for protecting people from the very administrators it has granted lawmaking powers. Thus Congress holds public hearings, runs constituent services, and otherwise poses as a cop on the beat, making sure the agencies stay in line with the perceived demands of the public.

We have seen the results of the oversight imperative on television. Bank meltdown? We have a hearing for that. Auto-maker bankruptcy? We have a hearing for that as well. So Congress plays the executive role in our system, seeing that administrative regulations are applied so as to solve our problems.

Except that it does not work out that way.

What we have, in actuality, are mock show trials. Bankers get spanked in public, while retaining their government subsidies so that they can keep that art collection at their mansion in the Hamptons. Auto executives get sent home empty handed when they fly their corporate jets to the hearing. But when they come back in alternative fuel vehicles they are rewarded with massive payouts.

Responsible lawmaking this is not, though the result—a direct subsidy—may itself be a law. The real problem is that so few of us recognize this circus for what it is. Indeed, our understanding of the process of making and executing law has

⁴² *Ibid.*, 9.

⁴³ The constitutional problems with the delegation of legislative power are spelled out in the long-ignored *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

become so confused that for decades we have had textbooks on “shared powers” as the essence of our system, in which public conflict and private bargaining are presented as the essence of government.⁴⁴ The Constitution as a set of formal mechanisms maintaining a separation of limited, delegated powers through checks and balances is treated as a dead letter, or worse, a myth. The result is a loss of constitutional culture and the rule of law.

It would be easy to say at this point that the answer is to “throw the bums out” or otherwise foment some kind of revolutionary reform of the state. But that simply isn’t going to happen. There is in fact no solution to the decay of constitutional morality. All we can do is work to rebuild some kind of respect for ordered liberty, for personal and local responsibility, for deep rooted traditions and ways of life, and for government that shows a decent respect for the rational expectations of the people affected by any given law. And for that, the people and the governors must have expectations that are rational.

No political solution to decay of constitutional morality.

Few people today have rational expectations, especially when it comes to the power of law to change behavior, solve problems, or even provide order. The positivist program of using laws to reform society has failed utterly in its set task of designing a competent prophylactic state and banishing the need for virtue. But it has succeeded in winning over to its irrational worldview not just a few lawyers but the vast bulk of the people.

Respect for the rule of law did not fade overnight. It is the victim of a culture of irresponsibility, of endless appetites, and of moral and intellectual laziness. Only through a renewed culture, in which we expect to care for ourselves as members of families and communities, in which we understand both the need for order and the limits of the state and of law, will we also expect the state to abide by the Constitution and the rule of law. And until we demand this of the state, and of the law itself, we will not have any chance of receiving it.

Only renewed culture can revive the rule of law.

⁴⁴ The classic example is Louis Fisher, *The Constitution Between Friends: Congress, the President, and the Law* (New York: Palgrave MacMillan, 1978).

