12-1-1991

Founding a Republic of Laws: The Rule of Law Ideal in Early American Constitutional Theory

Robert Moye

Follow this and additional works at: https://scholarsarchive.byu.edu/sigma

Recommended Citation

Available at: https://scholarsarchive.byu.edu/sigma/vol9/iss1/6

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Sigma: Journal of Political and International Studies by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen amatangelo@byu.edu.
Introduction

Although there is a wealth of scholarship available on the political and constitutional theories of the American Founders, many commentaries overlook or misunderstand one of the most important elements in the Framers' thought: their desire to implement the rule of law ideal into the new national government. Much of this confusion may be attributed to contemporary disagreement about what the rule of law actually implies, and the remainder to a mistaken belief of what the term meant for the Founders. In current parlance, the term suggests only a minimal equality—that no person should be "above the law"—but the concept meant a great deal more to the Founders.

During the nation's formative years, American statesmen had a clear conception of what the term "the rule of law" meant to classical thinkers, as well as the ideal's contemporary implications. Their constitutional experiment attempted, among other things, to minimize the tendency toward arbitrary government by incorporating the rule of law ideal in their governing institutions and procedures. While most scholars recognize the great care with which the Founders refashioned the nation's authoritative institutions, they often ignore important procedural aspects of constitutional theory; some even exacerbate this mistake by dismissing certain of the Constitutions' procedural innovations as unsophisticated.

Fortunately, some scholars avoid such errors. Noting the enormous difference between rule by established legal procedures and rule by an unpredictable human will, George and Scarlett Graham observe that:

Underlying each principle, institution, and practice explored by the Founders was one basic presupposition that was unchallenged by any theory of
experience brought to their deliberations: the government to be founded must be a government of law rather than of men. (1977, xiii)

In this paper, I will attempt to show that the American Founders' constitutional theories were influenced by their perceptions of the rule of law ideal and its procedural implications. I do not argue that the Founders were uninspired by other sources (i.e. classical economics, protestant religion, civic virtue, or their faith in "enlightened" reason), but rather that this type of explanation offers, at best, only an incomplete picture of the Founder's intentions. A truer picture of the Framers' motivations must also include their commitment to the rule of law ideal and its traditional emphasis on legal procedures.

To liberal statesmen living before and during the Founding era, there seemed to be a fairly obvious, necessary connection between the rule of law and the legitimacy of a government. Although they rarely employed the phrase "rule of law," they made frequent references to the ideal and its implications in a myriad of documented discussions on the subject. The Founders and their intellectual predecessors envisioned the legal processes of any legitimate political system as limited by certain procedural norms implied by the rule of law ideal: these included nulla poena sin lege (Usually translated as "no punishment in the absence of a crime"), due process, just compensation, trial by jury, the general and prospective nature of legal statutes, and the prohibition against ex post facto laws and bills of attainder.

Given the Founders' commitment to individual liberty, the line separating their legal conventions from liberal political theory often becomes tenuous, or even indiscernible. From the perspective of the Framers, the legal process itself reflected an informed political judgement on the value of procedure. In fact, the rule of law has been described as a political ideal which defines the nature of law itself and imposes limitations on government (Hayek 1960, 206). Some modern commentators dispute this claim; but, for the Founders, the notion of the rule of law was a legal ideal which informed the time-honored procedures ordering a free society.

The Origins and Development of an Ideal

The philosophers of ancient Greece and Rome were among the first to formulate the concrete implications of what later came to be called "the rule of law." In his 1960 work The Constitution of Liberty, Austrian economist F. A. Hayek challenged the prevailing assumption that ancient political philosophy rejected an individualistic conception of personal liberty. He insisted that, for many Greeks, government by legal procedures (which he calls isonomia), as distinguished from human will or caprice, entailed certain conditions. Those standards, as described by the lawgiver Solon, were that 1) all citizens, regardless of class, would share the same laws, and 2) that the government would abide by known and certain rules (Hayek 1960, 165). Hayek further argued that many Greeks even preferred government by isonomia over demokratia, or equal participation, because established legal procedures protected their freedom (165). For the Greeks then, a free government was a government of law, since legal procedures, by definition, placed limitations on the exercise of power in any government that claimed legal sanction.

Spurred by the ancient Greeks, most liberal thinkers recognized that a law, as opposed to a command or some other direc-
tive, implied a certain generality of purpose and prospectivity of scope (Wormuth 1949, 10). The equal, general, public, and prospective nature of human law suggested that legal procedures, by definition, could serve as an effective curb on sovereign caprice. Equally important, while ill-suited to advance certain policy goals, the municipal law could function as a facilitator for the actions of an individual. In governments which claimed to serve the people, the rule of law ideal encouraged the rulers to restrain their actions and protect the liberty of their subjects. Even Plato, whom many commentators paint as a totalitarian, intimated that "a primary function of government was to protect and maintain the law of [and for] the people" (Reynolds 1987, 83).

The influence of the classical rule of law ideal was not wholly a Greek phenomena. In ancient Rome, Cicero noted that freedom should never be confused with lawlessness; liberty actually hinged on the certainty supplied by general rules. Such rules, or leges legum, served as both a guide for the citizen and a restraint on the state (Hayek 1960, 167). Such a notion of liberty implied a relationship, analogous to a contract, between the people and their rulers (Reynolds 1987, 84). Indeed, the law functioned as an equally accessible protector of the people's prerogatives (Hayek 1960, 166). Although this ideal did not reflect later Imperial practices, the "recognized ultimate basis" for all laws in ancient Rome was professedly the will or consent of the people themselves (Reynolds 1987, 84).

The ancient rule of law ideal received a warm reception in sixteenth-century England. The terminology gradually changed from the anglicized "isonomy" to "equality before the law," or "a government of laws," and finally to "the rule of law," but the concept of isonomia remained the same (Hayek 1960, 164). In fact, legal equality implied more in the traditional, British context than an individual's formal standing before a court. Hayek notes that the struggle between Parliament and the monarchy further defined the rule of law to include a prohibition on the exercise of arbitrary power: not simply power exercised by an unauthorized source, but rather a usage in violation of general, fundamental rules (169). The rule of law principle of generality implied equality under the law, and prospectivity required that legal judgments be based on the results of individual choices, not on human caprice (Wormuth 1949, 212).

Francis D. Wormuth has observed that in classic constitutional theory, the doctrine of separation of powers is a vehicle for safeguarding the generality of rules: keeping the legislature from enforcing its own laws, and the executive from judging its own case (1949, 8). During the English Civil Wars, John Lilburne, a leader of the radical Leveler party, advocated separating power among the distinct arms of the British government organization as a way of confining the legislature to enacting only "general and prospective rules" (Hickman 1983, 369). Although Parliament could not be persuaded, nearly every American thinker of the Founding era eventually accepted Montesquieu's separation of powers as an essential part of constitutional theory (369).

During the English Civil Wars this "Enlightenment" conception of political institutions managed to win the near-universal acceptance of ideas like common consent, the separation of powers, an independent judiciary, and written constitutions. Significantly, each of these ideas is based on the notion of the rule of law. Although in Great Britain, especially just prior to the Colonial rebellion, the classical concepts were often subordinated to policy goals,
they have remained an integral part of modern conceptions about legitimate government.

The Rule of Law in America

To a large degree, the American statesman inherited their conceptions of the rule of law ideal from their English forebears. However, they made important contributions of their own, especially in relation to the importance of established legal procedures. One commentator, in fact, has observed that many substantive rights enjoyed under Anglo-American legal systems depended on traditional, procedural guarantees (Reid 1988, 69). Historical documents yield an abundant supply of subtle references to the rule of law and its procedural implications, but I discuss here only a few of the more interesting.

First, in his 1765 Commentaries, William Blackstone made reference to certain fundamental legal principles of any legitimate government. When discussing the sanctity of private property, he remarked that

"The great charter has declared that no freeman shall be disseised, or divested of his freehold, or of his liberties, or free customs, but by the judgement of his peers, or by the law of the land" (Kurland and Lerner 1987, 586)

Though he was a firm believer in the Lockean version of natural law, Blackstone defined concepts like due process and the trial by jury as legal stipulations, not immutable principles. The example cited above illustrates that, for him, the Magna Carta was an agreement on legal procedures between sovereign and subjects, not simply a power-sharing arrangement between nobility and monarchy.

Blackstone further remarks that the legal relationship between individual property rights and the governing authority is, and should be, controlled by traditional practices and procedures, such as that of "full indemnification" for seized property (586). The seizure of property was not absolutely prohibited; rather, it was constrained by social conventions which reduced the prospects of its use. This idea later found its way into the U.S. Constitution in the requirement of "just compensation" for the exercise of the government's eminent domain (see Amendment V.).

Second, in a 1771 speech, preparatory to a Boston election, Protestant minister John Tucker touched on many aspects of the nature and purposes of government. His remarks, interwoven with familiar religious rhetoric, imply not only that his audience needed no lengthy justifications or explanations of his political assertions, but also that his listeners shared with him a commitment to certain fundamental principles. One of his observations was that "all laws and rules of government [must] be as plain as possible" (Hyneman and Lutz 1983, 164).

For Tucker, this seemed like a basic requirement in any society that expected its laws to be obeyed. Citing John Locke, he mentions that readily understandable laws preclude the exercise of tyrannical authority in the guise of complicated legal procedures; indeed, the very definition of tyranny is the exercise of the state's coercive power without the sanction of legality (164). While Tucker was not the first, or the last, of the Founding era to define the boundaries of political legitimacy in this way, his arguments in an ostensibly religious discourse suggests that the principles of the rule of law had already become widely accepted in colonial America. Significantly, those
principles were also universally accepted by the American Founders.

Third, many of the Founders understood the limitations that the use of the law, as such, placed on a legislature’s methods. The rule of law demanded that, in addition to binding a government to obey its own rules (see Federalist #33), any particular law should be a known and stable rule (Federalist #62). James Wilson observed that “law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law” (West 1987, 153). In colonial America, this concept served to distinguish tyranny from political legitimacy; a government rules by dispassionate laws and a tyrant rules by pointed, prejudicial commands and the force of his will.

Fourth, by 1776 most American thinkers had accepted the postulate that all authority wishing the sanction of legality must conform to the principles stipulated by the people themselves, and additionally, must adhere to certain time-honored principles of conventional legal procedure. When George Mason of Virginia wrote the Virginia Declaration of Rights, one of the models for the Bill of Rights, he included a number of traditional, procedural guarantees, especially in the area of criminal law. Among them are prohibitions against excessive bail, cruel and unusual punishments, self-incrimination, and guarantees of search by warrant, trial by jury, criminal convictions by unanimous vote, the right to confront one’s accuser, and the ability to call witnesses in one’s behalf (Kurland and Lerner 1987, 6). Although many today see these provisions as a burden on society, to the Founders they represented a nearly insurmountable procedural barrier to those who would exercise arbitrary or tyrannical power.

Fifth, when the colonists made their break with Great Britain, the Declaration of Independence contained the straightforward charge that Parliament and the Crown had disregarded the legal methods incumbent upon any government. The document’s arguments are based primarily on a violation of traditional legal practices, not on moral or philosophical considerations. Thomas Jefferson, the principal author, carefully defended the colonists’ separation with England on legal grounds, and the eloquence of the preamble should not obscure the conscious attempt to do so (Reynolds 1987, 89).

Note the substance of a few of the colonists’ complaints against the Crown: subordinating an independent judiciary; abolishing charters and laws; convening the legislatures in inconvenient locations; obstructing naturalization laws; depriving citizens of the right to trial by a jury; and in general, “abolishing the free system of English laws.” In short, although the Founders did believe in natural laws and principles, they sought conventional, legal justifications for their actions. For the colonists, the demands of natural law and traditional legal procedure were coextensive (Wood 1969, 10).

Gordon Wood concludes that the Founding Fathers "revolted not against the English constitution but on behalf of it" (1969, 10). Though they selectively borrowed ideas from radical writers most favorable to the American experience, they truly believed that they were protecting their rights as Englishmen (13). The American statesmen were astonished that the British government, previously regarded as a defender of liberty, could disregard its own traditions and claim that Parliament superseded the law (Reid 1988, 57). For them, the violation of established procedures, with no expectation of
redress or change, justified a revolution. Their defense was that the English Crown had threatened their liberty by abandoning the universally accepted principles of the rule of law, and they expected to be vindicated in the eyes of all who took legitimate government seriously.

Sixth and finally, John Adams recognized that the basis for any government that espoused republican principles would be the rule of law ideal. He used a variation of the modern term in his 1776 *Thoughts on Government*, claiming that a republican form of government was "an empire of laws, not of men" (Kurland and Lerner 1987, 108). In his 1787 *Defence of the Government of the United States*, he further insisted that free governments must depend on the laws for their legitimacy, and that legal processes for addressing grievances must be available to every citizen.

> Every citizen must look up to the laws, as his master, his guardian, and his friend; and whenever any of his fellow-citizens, whether magistrates or subjects, attempt to deprive him of his right, he must appeal to the laws... (346)

Although I have cited only a few out of innumerable possible examples, they reveal that by 1787, the concept and terminology of the rule of law ideal had permeated almost every level of American political discourse. As in the classical civilizations, the rule of law, instead of human capriciousness, was seen as the protector of individual freedom. The Founding of the United States of America entailed an ambitious attempt to implement the rule of law ideal into the constitution of the nation’s new government. Though it does not exhaust the concept’s definition or implications, constitutionalism is based upon the rule of law ideal.

**The Rule of Law and the Constitution**

F. A. Hayek has noted that, for the Founders, a constitution signified a commitment to the rule of law, as well as a safeguard against the exercise of arbitrary power--by the legislature and by the people themselves (1960, 178). Since conventional legal procedures were not to be sacrificed to short-term policy goals, constitutionalism also entailed a commitment to abide by long-term principles instead of short-term interests (179). Though a written constitution could not preclude or ultimately frustrate the will of the people, it could limit the means by which a temporary majority can pursue its objectives (180).

In short, constitutional arrangements were agreements to abide by fundamental procedural norms. Lawrence Friedman believes that:

> American statesmen tended to look upon a written constitution as a kind of social compact--a basic agreement among citizens, and between citizens and state, setting out mutual rights and duties, in a permanent form (1983, 115).

Among Americans, a constitution embodied a society-wide agreement. The state and federal constitutions actually created certain rights and duties additional to those the people naturally enjoyed. They also grounded the authority and the formal limitations on government in the express or implied consent of the people (115).

The whole point behind constitutionalism, and indeed behind the rule of law, was to protect liberty. Prior to the Revolution, Americans commonly believed that the antithesis of liberty was arbitrary authority (Reid 1988, 59). Traditionally, Americans believed that the law’s whole purpose and reason for existence was to restrain or thwart the exercise of such arbitrary power...
For some liberty-minded Americans, "there was no accusation against an official more serious than that he sought to impose arbitrary rule" (55). Eighteenth-century Britons believed that the king was most likely to exercise arbitrary power and the colonists saw the danger stemming from Parliament; but both agreed that liberty became vulnerable when the state began to govern by subjective prerogative (79).

John Phillip Reid believes that the colonists thought their liberty depended on two things: 1) that the laws of a society must be based on the consent of the governed; and 2) that all laws must be subject to the traditional requirements of legal due process, not administered by discretionary authority (80). Echoing Cicero, he observes that law was the "central pillar" of the Americans' traditional liberty; it owed its existence to legally defined boundaries and without them could not exist (60). According to eighteenth-century thinkers, the law essentially balanced the natural inequalities of individuals (62), creating the security necessary to enjoy private property rights. The fictional "exchange" of a portion of one's personal liberty for protection was widely endorsed as a useful idea (68-71). Therefore the rules and conventions of a well-established legal process protected the people in the enjoyment of their property (and other) rights.

Although nearly all the Founders believed that substantive rights emerged from nature, they recognized that one could only enjoy such rights as a member of a civil society. In his most interesting argument, Reid contends that the rights the Americans enjoyed were actually simple legal stipulations; in certain cases, rights well-founded in tradition received the appellation of "natural" as well (64). In other words, many basic rights were legal instead of natural. Procedures like due process, compensation for seizure of property, jury trials, and the need for a warrant authorizing a search, all helped reduce the likelihood that the state could use coercion arbitrarily. Such conventions tended to preserve the ability to freely pursue one's individual initiatives within the boundaries prescribed by law. Ex post facto laws and bills of attainder are specifically prohibited by the American constitution (and others) because they frustrate efforts to use the law as a guide for individual initiative.

In this context, liberty for the American Founders meant living under a constitutional government and, in its eighteenth-century formulation, constitutionalism was the notion of rule by law in a civil society (74). Significantly, the procedural safeguards which served as a protection against the tendency towards arbitrary government formed the crux of the Americans' constitutional liberties (77). The notion of freedom that later came to be associated with America's most democratic principles was wholly a new idea (77). "American Whigs," Reid notes, "continued to associate 'true liberty' with 'legitimate government,' and to define liberty as government under the rule of law" (84). For the Americans, the rule of law was, in fact, constituted by customary legal procedures (85).

The Difficulties in Modern Discourse

While many critics have explored the Framers' emphasis on the rule of law, most modern commentators tend to disregard the procedural aspect of constitutionalism and attempt to explain the phenomena in other terms. Few have recognized any underlying significance for the Founders' constitutional theories. Charles Hyneman, for example, cogently observes that since the Founders
established the new national government by legal enactment, the actions of the government were to be limited by laws (1977, 7). Yet he then denies that the Founders hoped to cement the rule of law ideal into a preferred position in the federal system. In his modern view, the stability guaranteed by legal procedures is necessarily subordinate to public policies designed to advance the people's collective well-being (11). Echoing Hyneman's sentiments, Donald Lutz presents the rule of law as only one of several competing political theories among the Founders, and not as one with any particular significance (1977, 62).

Hyneman and Lutz, at least, try to account for the rule of law's procedural aspect. Many commentators oversimplify the rule of law ideal and its implications, concentrating instead on other assumptions or facets of constitutionalism. Many careful thinkers even dismiss the rule of law ideal as simplistic. The most facile, yet frequently heard, objection to the idea of the rule of law is that any government framed and administered by fallible men cannot really be a government of law, since it must ultimately rest on subjective political judgments.

Of course that statement begs the question by ignoring the enormous difference between an essentially arbitrary system based on human will and bounded by caprice, and one that is constituted, albeit imperfectly, by traditional, procedural conventions. Most of the more fruitful, contemporary discussions on the Founders' constitutional theories attempt to draw out normative implications from the rule of law ideal, yet even these often ignore the efficacy of established procedures as a constitutional curb on arbitrariness.

George and Scarlett Graham, for example, note that the Founders simply assumed that 1) the government would be bound by the same rules as the citizens, and 2) that there would be certain permanent restraints on government powers; otherwise their efforts to write and ratify a constitution become "nonsense" (1977, xiii). They even conclude that the Constitution was based upon the rule of law (xiii). Yet they miss a prime opportunity to explore the reasons why the Framers would prefer the rule of law over any of their other possibilities.

In yet another case, although he recognizes that the Founders were profoundly influenced by the classical notions of the rule of law, Francis D. Wormuth criticizes their views as naive. He asserts that, regardless of the generality or prospectivity of a given rule, its content makes the real difference; immoral laws can be administered impartially to everyone's detriment (1949, 214). While this is, of course, true, the point that Wormuth misses is that such a risk is present in any legal system. Yet a commitment to an impartial administration of the laws, which purports to bind the rulers as well as the citizens, does have the tendency to minimize the likelihood that any government will enact oppressive laws. For the Founders, the impartial administration of any rules was preferable to an existence wholly dependent on a government's whim and pleasure.

More recently, Thomas G. West has offered a considered account of constitutionalism by attempting to ground its assumptions in classical teleology. Taking his arguments from the Federalist, he indicates that for the Founders all governments shared the divine charge to advance the welfare of their subjects (1987, 150). With this in mind, he locates the Federalist's treatment of the rule of law ideal in an interesting combination of end-oriented human reason and popular consent. He
mentions the concept's classical definition by observing that laws, as such, should apply to large classes of people, not to individuals, and that they should be public and reasonably stable (153).

A written constitution, he continues, should by definition bind the officials who administer the government; it is alterable only by the people, and not by legislative enactment (156). For West

The rule of law, in sum, is a governmental practice designed to make as likely as possible the coincidence of the two requirements of just government: that it be by the consent of the people, and that it secure the safety and happiness of society. The law aims to embody the public's reason by requiring...reasoned discussion and a rule of universal application (153-54).

In at least one sense, West hints at the argument offered in this paper. Requiring the public's reasoned discussion on a given decision seems analogous to my emphasis on procedural norms; and his Kantian rules of "universal application" do suggest the kinds of general, prospective, and equal standards discussed earlier. However, West hopes that the rule of law can secure not only the "safety" of stability and order, but the happiness of the people as well—which may or may not admit the kind of restrictions to which they would readily consent. Balancing the two demands, consent and human felicity, may actually make unreasonable demands on fallible human reason. His argument has Aristotelian overtones in that it considers that the proper place of law is to serve as the embodiment of human reason, instead of an admittedly imperfect substitute. In this sense, then, West seems to be more optimistic about human nature and passions than were the authors of the Federalist, who were clearly influenced by the philosophy of David Hume (White 1987, 198). In his hopes that legal methods can successfully direct society towards virtuous aims, West runs into the precise problems of human nature addressed by the Founders.

The Framers were aware of the inner contradiction of popular government: though the people are sovereign they are often inclined to choose badly, at least in the short run. If a people lost their capacity for virtue they would become incapable of self-government. West points out that the Founders were sure that a virtueless society could not long remain free (see Federalist #63 and #55); but the Founders realized that virtue could only be encouraged by judiciously arranged institutions, not orchestrated by constitutional fiat. West seems to hold out the hope that unaided human reason can protect liberty. Sadly, it cannot.

Another approach used to justify the rule of law ideal implicit in the Constitution stems from the assumptions of the Enlightenment: that a society arranged around certain models tends to control the worst excesses of human nature. This is probably the most popular explanation offered by contemporary commentators. David F. Epstein defends this approach, taking as his starting point James Madison's contention in Federalist #57 that the object of any state's constitution should be to recruit the wisest and most virtuous men as the rulers, and then to structure the government institutions in a way that will encourage the exercise of their virtue while they hold temporary office. Citing the example of the U.S. Senate, he observes that the "constitution thus not only grants powers, but also arranges offices so as to encourage those powers to be used well" (1990, 93).

He avoids the difficulties lurking in a teleological scheme by contending that the Founders were primarily concerned with avoiding the evils of society, not with en-
couraging the rational pursuit of aims ad-
judged socially worthy. Since rulers are
fallible mortals, they are likely to err, or
disagree, in their conceptions of the good.
Therefore the Founders believed that future
rulers only needed to know how to avoid the
dangers of arbitrary government (Epstein
1990, 94). Frequent elections, which would
rotate the people’s representatives in and out
of office, would guarantee that the rulers’
efforts always reflected the aspirations of the
people, and not their own personal ambi-
tions (97). Thus "the Founders," he claims,
"looked not to a self-abnegating virtue to
guarantee public-spirited intentions but to a
self-aggrandizing spirit that would provoke
public-benefiting actions" (97).

Epstein correctly asserts that consti-
tutionalism, as a way of structuring gov-
ernment, places both written and unwritten
restrictions on the ruling institutions (1990,
107). A written constitution cannot forbid
everything that the state might illegitimately
attempt, nor can it define every right en-
joyed by the people or the degrees to which
power may be abused; the people reserve
certain unwritten limitations on the govern-
ment’s powers (107). These unwritten
norms or standards are contained in, and
part of, the rule of law ideal. Epstein de-
fines the rule of law as that which compels
the governors to control the exercise of their
own power. Finally, he notes that, con-
cretely, the rule of law requires prospective
laws and a separation of powers.

However, Epstein believes that the rule
of law ideal is an incomplete constitutional
foundation for the following three reasons.
First, not all government activities are part
of the legal process; for example, the presi-
dent has nearly unfettered power to conduct
war. Secondly, enforcing rules that are
themselves unvirtuous does not promote
virtue among the populace. And third, even
carefully separated powers can be usurped
and taken over by an ambitious branch or
individual (1990, 108). He sees the Found-
ers’ solution to these weaknesses in the
establishment of checks and balances which
distribute powers among different branches,
making each branches less dependent on the
good will of the others. The presidential
veto, a bicameral Congress, and the process
of judicial review tend to compensate politi-
cally for any defect in the legal process
(110).

Epstein’s description of the failures of
the rule of law falls into several common
errors. Initially, he doesn’t see that the
delegation of all constitutional powers,
including the president’s war-making power,
is itself subject to the legal process and is
actually constrained (albeit loosely) by legal
and procedural barriers. His criticisms of
the ideal seems
seems
seems
to be based on the mistaken
view that incorporating the rule of law into
a system will lead to the best result in each
situation. No system can guarantee that.
The rule of law only tends to protect the
freedom of individuals because its procedur-
al requirements discourage the abuse of
power. Finally, there is nothing in the
system of checks and balances that mends
the defects of the legal process, unless he
limits his definition of that process to Con-
gressional legislation. But that was not the
Founders’ approach. Since it is a founda-
tion, the rule of law is compatible with the
political conventions which shape our sys-
tem.

A final way of fitting the rule of law into
American constitutionalism involves the
moral requirements of a just society. Ellis
Sandoz takes this approach and for him the
rule of law is synonymous with a free gov-
ernment (1990, 117). A government dedi-
cated to preserving liberty and pursuing the
good of its citizens (instead of the good of
its rulers), is one that is built upon a moral framework adequate to the task (117-18). He further notes that in Revolutionary speeches, the call for justice is used interchangeably with the call for the rule of (or by) law (201). Interestingly, he recognizes that for those of the Founding era laws universally entailed the people’s common consent, publicity, and equality under the law (118-19). He then grounds the requirements of the rule of law in the dictates of morality, not in tradition or conventional procedures (120).

He views the Founders’ efforts as "skillfully calculated" to encourage the rule of divine reason in the affairs of men. Since the Founders were aware that the occasional ugliness of human nature could destroy even the best social arrangements, the separation of powers and a system of checks and balances neutralizes the problem of human ambition (41-42).

The 'government of laws and not of men'... is precisely an insistence that the tyranny of the passions (including those of the majority as well as those of the single tyrant) be averted by having 'God and reason alone rule' (39).

Sandoz sees the political theories of the Founders as profoundly influenced by their religious convictions. Indeed they were. But his idea of a cultural consensus—a subtle blend of classical political theory and protestant theology—misses the mark. The Founders firmly believed in traditional religious values, but they did not all share the convictions of John Adams—which Sandoz often equates with those of the entire group. The Founders' constitutional achievement was an ambitious attempt to reduce arbitrariness by establishing procedural norms that would guarantee the stability, predictability, and responsibility of the new government.

The moral reasoning Sandoz emphasizes is certainly not incompatible with the Framers' procedural standards, such reasoning is actually an effective support for the rule of law. But constitutional conventions, as such, do not depend upon morality for their strength nor are they grounded in moral demands. Moral reasoning would be hard-pressed to justify the necessity of such entities as due process, the jury trial, the writ of habeas corpus, and the separation of powers.

Additionally, although constitutionalism's assumptions about individual liberty are supported by traditional moral and religious values, the fact that the U.S. Constitution (unlike the Declaration of Independence) contains no outward manifestation of religious faith should indicate something. At the very least, it suggests that the Founders did not wish to stipulate truths about government along partisan lines of argument. At most, it implies that embodying traditional or religious values in the very structures and functions of government is not quite what the Founders had in mind.

**The Limits of the Rule of Law**

Although the rule of law ideal formed the basis for many of their conceptions about political legitimacy and constitutional government, the colonists recognized that the rule of law ideal couldn't guarantee their freedom (Reid 1988, 81). An ideal is not self-enforcing. The Founders were convinced that if a people lacked the necessary respect for the laws or for their fellow citizens, then shielding individual freedom through a legal process amounts to a hollow, theoretical barrier (Wood 1969, 42). If, however, a nation shares certain fundamental beliefs about the purposes behind the
limitation of governmental authority, constitutionalism does tend to protect individual liberty because it places limits on the state’s use of law and coercion, (Hayek 1960, 183; Hickman 1983, 379). Many of the Founders, echoing Montesquieu, even linked the freedom of a society to the moral fiber of its people (Wood 1969, 35; Vetterli and Bryner 1987, 73). "A real community of shared virtue is, by the Founding Fathers’ analysis, ultimately essential if free government is to be supportable" (42).

The Founders’ views presupposed the existence of certain morals, traditions, and practices, in both individuals and groups, that would act as a restraint on any free association. If any society proved itself unable to exercise simple self-discipline, its citizens were obviously incapable of self-government and ripe for authoritarian domination. Laws, and even the rule of law, would reflect the character of a people. While the Framers believed that rights were in the abstract real, they also recognized that rights had no protection outside of a society’s norms and conventions. This fact led James Madison to the conclusion that “public opinion [ultimately] sets the bounds to every government, and is the real sovereign in every free one” (Kurland and Lerner 1987, 73).

Conclusions

As heirs of a rich heritage of political philosophy, the American Founders clearly understood the concepts which formed the basis for the rule of law ideal. Even before the Constitutional Convention, they were sure that the ancient concept should form the basis of their structural and procedural efforts. Although the Framers recognized the limitations of the rule of law, they attempted to institutionalize the notion in the U.S. Constitution. Because they understood that the rule of law entailed more than mere obedience to formal, procedural norms, they were convinced that it would serve as the most useful form of protection against the abuse of power by arbitrary government. While the rule of law could not itself guarantee society the benefits of individual liberty, they understood that certain procedural standards, implied by the rule of law ideal, could promote the conditions that made liberty possible.
WORKS CITED


