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ORIGINALISM AND NATURAL LAW

*Brian T. Fitzpatrick**

I am grateful to Judge O’Scannlain for his thoughtful discussion on the role that natural law has played in American legal history. I share Judge O’Scannlain’s understanding that those who wrote and ratified the U.S. Constitution were believers in natural law—by that, I mean they were believers in a body of rules that could be derived by reason, that existed outside the rules enacted by a sovereign government.¹ But it is also true that the belief in natural law has waned considerably over time. In my mind, this raises an interesting question for those who embrace the “originalist” method of constitutional interpretation: what is the originalist view of federal judicial power in light of the fact that the very conception of what the law is has changed significantly since the founding?

At the time of the founding, both private and public law were understood to embody natural law and judges were expected to consult it in the cases before them. As Justice Scalia has noted, “the prevailing image of the common law was that of a preexisting body of rules, uniform throughout the nation . . . that judges merely ‘discovered’ rather than created.”² As Justice Holmes put it more derisively, common law was thought of as “a brooding omnipresence in the sky.”³ Even in constitutional cases judges were expected to consult natural law.⁴ Indeed, many people believe that the reason the original Constitution did not contain a Bill of Rights was that it was thought to be redundant: judges were expected to rely on natural law to protect individual liberties even in the absence of constitutional commands.⁵ This view did not become obsolete once the Bill of Rights was adopted. The Ninth Amendment to the U.S. Constitution—the one that says that “[t]he enumeration in the Constitution of certain rights, shall not

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1. See James W. Ely, *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1048 (2000) (“Under natural law theory, certain rights were deemed so basic as to be beyond the reach of governmental authority.”).

2. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1998).

3. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

4. See, e.g., Ely, *supra* note 1, at 1048–55.

5. See, e.g., Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 667 (2009) (noting that “the Federalists had expressly argued that the entire Bill of Rights was redundant” because “natural and customary rights [existed] independent of any textual enumeration”).

be construed to deny or disparage others retained by the people”⁶—presupposes a body of natural rights that existed outside of positive law.⁷ Other provisions of the Constitution are so vague and open-ended that they, too, may have presupposed a body of natural law that judges could invoke to fill out the broad principles.

Most people no longer see the law in this way. The Legal Positivist and Legal Realist movements that Justice Holmes helped shape one hundred years ago fundamentally reoriented things. Today, many of us believe, as Justice Holmes did, that law is not “a brooding omnipresence in the sky, but the articulate[d] voice of some sovereign.”⁸ That is, many of us believe that law is a choice to be made by distilling our values and experiences, not a set of preexisting rules to be discovered by reason.

But as the conception of law has changed, so has it created a tension with the original expectation of the federal judicial power. When it was thought that judges could consult a preexisting body of rules when deciding cases, the original judicial role was less threatening to both democratic values and the constitutional design of separation of powers. But now that most of us believe that there is no preexisting body of rules and that ambiguities in legal texts require judges to make choices as to what should or should not be the law, the role originally expected of federal judges encroaches democratic values in general and separation of powers in particular. As Justice Scalia has noted, “[o]nce we have taken this realistic view of what common-law courts do, the uncomfortable relationship of common-law lawmaking to democracy (if not to the technical doctrine of the separation of powers) becomes apparent.”⁹

How can originalists resolve this tension? What is the originalist view of the federal judicial power in an age when consulting natural law is understood to create law rather than merely discover it? How can the founding-era expectation of natural law judging, on the one hand, be squared with the founding-era embrace of the principles of democratic lawmaking and separation of powers?

It strikes me that originalists might confront this tension in any number of ways, and scholars more expert on this subject than I am have set forth a number of possibilities. For our purposes here, however, I would like to briefly discuss three of the more obvious options.

The first option is to favor the original expectation of the judicial role to the detriment of the original embrace of principles of democratic lawmaking and separation of powers. That is, the first option is to let judges continue in their role as expositors of natural law despite the fact that we now understand this to mean that unelected judges will be “making” rather than “discovering” that law. This option gives judges a license to distill their own values and experiences—willfully—into rules that will

6. U.S. CONST. amend IX.

7. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

8. *S. Pac. Co.*, 244 U.S. at 222 (Holmes, J., dissenting).

9. SCALIA, *supra* note 2, at 10.

govern the rest of us. Needless to say, this option will be just as unsatisfying to many originalists as it is to Judge O'Scannlain. After all, perhaps the most dominant functional justification for originalism is that it minimizes the policymaking role of federal judges. The first option fails badly at furthering this objective.

The second option is at the other extreme: to favor the original embrace of the principles of democratic lawmaking and separation of powers to the detriment of the original expectation of the judicial role. That is, the second option is to require federal judges to defer to the democratic process as much as possible. This is the course we have largely taken when it comes to private law cases,¹⁰ but it may not be as satisfying in public law cases because it could broadly limit the federal judiciary's role in reviewing the constitutionality of legislation. Although judicial review was not embraced at the founding like it is today,¹¹ the support for it now is so wide and so deep that the second option may not be appealing to very many people, including originalists.

Hence the third option, the middle course, the course embraced by Judge O'Scannlain. This option asks federal judges to discern what the framers believed the natural law encompassed circa 1787, and then incorporate those tenets into public and private law today. This middle course has the merit of preserving judicial review, but it is less clear how well it minimizes the policymaking role of the federal judiciary. Trying to figure out what most people in the framing generation thought the natural law encompassed is fraught with ambiguity, and, as they do when confronted with ambiguities in other legal sources, judges may turn, consciously or unconsciously, to their own policy preferences.

Indeed, a good example of the difficulties with this historical inquiry can be found in the very Supreme Court case relied upon by Judge O'Scannlain in his defense of the middle course: *District of Columbia v. Heller*.¹² Judge O'Scannlain relies on *Heller* as an example of the Supreme Court properly discerning one tenet of the natural law circa 1787 and using it to fill out the ambiguous text of the Second Amendment. But the historical inquiry into what the natural law encompassed in 1787 appeared to be just as ambiguous as is the text of the Second Amendment itself. The vote in *Heller* was 5-4 and the principal dissenting opinion, I think it is fair to say, was just as steeped in historicism as was Justice Scalia's majority opinion.¹³ Despite the historicism in the *Heller* opinions, the Court split along perfectly ideological lines: the five more conservative justices interpreted the history consistently with the conservative policy outcome against gun control, and the four more liberal justices interpreted it consistently with the liberal policy outcome in favor of gun control. This

10. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

11. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

12. 128 S. Ct. 2783 (2008).

13. See Jeffrey M. Shaman, *The End of Originalism*, 47 *SAN DIEGO L. REV.* 83, 101 (2010).

may have been a mere coincidence, but it also may be that judges tend to resolve historical ambiguities like other legal ambiguities: consistent with their own experiences and world views. To the extent the third option routinely presents judges with such historical ambiguities, judges practicing the third option may end up deciding cases in accordance with their own values and experiences quite often. Although drawing upon such considerations might not be willful (as it would be under the first option), as a matter of case outcomes, there may be less difference between the third and first options than initially meets the eye.¹⁴

In short, I think Justice Scalia was quite right when he said that the original expectation of the federal judicial role sits “uncomfortabl[y]” today with the original embrace of the principles of democratic lawmaking and separation of powers.¹⁵ How to resolve this tension will continue to interest originalists for years to come.

14. See Richard H. Fallon, *Are Originalist Constitutional Theories Principled, Or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5 (2010).

15. SCALIA, *supra* note 2, at 10.