Does Originalism Have a Natural Law Problem?

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Most originalists are legal positivists, not natural lawyers. By contrast, the founders, by and large, were natural lawyers, not legal positivists. A non-trivial problem thus appears built into the nature of originalism, at least as it is conceived by many scholars and judges. At bottom, originalism rests on a series of ontological and jurisprudential assumptions at odds with the belief systems of early Americans—the people who actually framed and ratified the Constitution. Positivism shapes our modern understanding of law so thoroughly that we hardly notice the paradigm shift. But the founders inhabited a different intellectual world than ours, in which terms like "law," "liberty," and "constitution" itself had different connotations than our lexical counterparts do.[1] When originalists stampede toward the original public meaning of the constitutional text, therefore, they not only miss the forest for the trees; they are exploring the wrong conceptual landscape. Or so Jonathan Gienapp argues in his provocative new essay on originalism.[2]

Gienapp's critical move is to shift our attention from semantics to ontology. What *is* the Constitution? How was it conceived to exist in 1787, and how has that conception changed over time? These questions must be squarely addressed, he insists, before asking what the Constitution

1. See, for example, Gordon S. Wood, *The Creation of the American Republic* (originally published 1969; New York: W.W. Norton, 1972); Gerald Stourzh, "Constitution: Changing Meanings of the Term from the Early Seventeenth to the Late Eighteenth Century," in *Conceptual Change and the Constitution*, ed. Terence Ball and J.G.A. Pocock (Lawrence: University Press of Kansas, 1988); Mary Sarah Bilder, "The Emerging Genre of the Constitution: Kent Newmyer and the Heroic Age," *Connecticut Law Review* 52 (2021): 1263–1279.

2. See, in this volume, Jonathan Gienapp, "Written Constitutionalism, Past and Present," *Law and History Review* 39 (2021): 321–360.

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means. Instead, originalists typically reach for old dictionaries, linguistic corpora, snippets of ratification history and the like, all the while simply taking for granted that the bearer of original meaning they seek to parse is a written document that can be carried around in one's pocket and exhaustively recited, if need be. By now, the stale discourse that assumption often yields is depressingly familiar: "As Madison said in *Federalist 45* and Johnson's *Dictionary* confirms. . . ." This seems like no way to run a railroad, let alone govern a diverse modern nation of 330 million people. Yet because of deeply entrenched features of American law, these practices persist, with historians frequently joining the fray in the form of Op-Eds, *amicus* briefs, and open letters that for all practical purposes often seem indistinguishable from those written by sophisticated originalists.[3] There are some differences, of course, but they arguably don't amount to much. In these contexts, at least, the dividing line between "law office history" and its alternative seems increasingly elusive.

Does this whole text-focused enterprise rest on a mistake? Drawing on a wealth of primary sources and modern scholarship, Gienapp makes a strong and interesting case that it does. Boiled down, his main argument is that the founders were predominantly natural lawyers, and thus conceived of law quite differently than most originalists typically do. As I have observed in other contexts, a useful heuristic for considering the founding-era ideas of natural jurisprudence to which he refers is the comparison between rules of justice and rules of grammar, an analogy that was surprisingly popular during this period, albeit in different ways.[4] On the most salient version of this classic Enlightenment idea, just as the mind's tacit rules of grammar structure language, thought, and perception, so, too, do intuitive principles of justice. Beyond this abstract gloss, however, there are many concrete cases that illustrate Gienapp's point, in addition to the ample evidence he cites. When Gideon Henfield demanded to

3. See, for example, Saul Cornell, "What Today's Second Amendment Activists Forget: The Right to Not Bear Arms," *Washington Post*, January 18, 2021; Marcia Coyle, "2 Amicus Briefs Played Big Roles in Latest 'Emoluments' Ruling Against Trump," *National Law Journal*, May 1, 2019; Noah Wilend, "Hundreds of Historians Speak Out on Impeachment," *New York Times*, December 16, 2019.

4. See, for example, Adam Ferguson, *An Essay on the History of Civil Society* (1767); Matthew Hale, Preface to *Rolle's Abridgment* (1668); David Hume, *A Treatise of Human Nature* (1739–40); Samuel Pufendorf, *On the Duty of Man and Citizen* (1673); Thomas Reid, *Essays on the Intellectual Powers of Man* (1785); and Adam Smith, *The Theory of Moral Sentiments* (1759). See generally John Mikhail, *Elements of Moral Cognition: Rawls' Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (New York: Cambridge University Press, 2011); John Mikhail, "'Plucking the Mask of Mystery from Its Face': Jurisprudence and H.L.A. Hart," *Georgetown Law Journal* 95 (2007): 733–79.

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know what law he had broken in the most notorious prosecution arising out of the Neutrality Controversy, for instance, James Wilson pointed first to an unwritten body of law, the law of nations, "that was in existence long before Gideon Henfield existed."[5] Nor was this an isolated case: As Maeva Marcus and other historians have documented, virtually every Supreme Court Justice between 1789 and 1800 endorsed or at least flirted with federal jurisdiction over the law of nations, common law crimes, natural rights, or cases in equity arising under the Constitution.[6]

Positivism eventually transformed this landscape, no doubt hastened by the potential threats to slavery that unwritten federal law entailed. But those were later developments; and Gienapp rightly demands to know what entitles originalists to graft them back onto the original Constitution. From this perspective, I am inclined to agree with him that originalism has a natural law problem—one that predates Robert Bork and Antonin Scalia.[7] Yet I also have lingering questions about some aspects of his engaging narrative. Without purporting to do justice to his rich and detailed analysis, let me briefly mention a few concerns.

To begin with, it seems worth considering whether the distinction between natural law and legal positivism is itself somewhat tricky and hard to pin down. Were Locke and Blackstone natural lawyers or legal positivists? The answer, of course, depends on what exactly one means by those terms. "The state of nature has a law of nature to govern it"[8] certainly sounds like the claim of a natural lawyer. So do similar passages in Blackstone's *Commentaries*.[9] Yet Locke rejected the conception of innate moral knowledge that formed the basis of natural law as most seventeenth and eighteenth century writers conceived of it.[10] And Blackstone's definition of law as "that rule of action, which is prescribed by some superior,

5. Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson* (Indianapolis: Liberty Fund, 2007) 1:368.

6. See generally Maeva Marcus, ed., *The Documentary History of the Supreme Court* (New York: Columbia University Press, 1985–2007) (hereafter "DHSC"); see also William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995).

7. See, for example, *Griswold v. Connecticut*, 381 U.S. 479, 502–27 (1965) (Black, J., dissenting).

8. John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (Indianapolis: Hackett, 1980), 9.

9. See William Blackstone, *Commentaries on the Laws of England*, ed. Wilfrid Prest (originally 1765; Oxford: Oxford University Press, 2016), 1:33–47.

10. See John Locke, *Essays on the Law of Nature*, ed. W. Von Leyden (originally 1660; Oxford: Oxford University Press, 1954), 137–45; John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (originally 1689; Oxford: Clarendon Press, 1975), 65–84.

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and which the inferior is bound to obey"[11] descended straight from Hobbes and anticipated modern positivism.

As Robert Cover suggested over four decades ago, perhaps the best understanding of the founders is that they were *both* natural lawyers and constitutional positivists.[12] On this view, an important issue concerns what Cover calls the "most telling aspect of the American variant of constitutional positivism"—its "enthusiasm for written constitutions."[13] Gienapp challenges the received wisdom on this topic, focusing in particular on individual rights, judicial review, and delegated powers. While many of his historical arguments are brilliant and incisive, others seem less convincing.

Consider, for example, Gienapp's observation that the declarations of rights in the first state constitutions were understood to declare rather than create fundamental rights. That only about half the states had such declarations confirms that they were unnecessary, he suggests, for otherwise "[c]itizens of New Jersey or South Carolina would have been shocked to learn that they lacked the fundamental rights that had been codified in Virginia or Delaware."[14] This claim seems plausible at first glance—until one pauses to consider slavery. The Fifth Virginia Convention spent several days wrangling over the precise language of the free and equal clause contained in the Virginia Declaration of Rights before deciding that its antislavery implications could be curtailed by a peculiar piece of positivist-sounding verbiage: "That all men are by nature equally free and independent, and have certain rights, of which, *when they enter a state of society*, they cannot by any compact deprive or divest their posterity. . .."[15] With Vermont, Pennsylvania, and Massachusetts leading the way, several northern jurisdictions soon began to abolish slavery at least partly on the basis of free and equal clauses in their own constitutions that did not contain the same qualification. By contrast, none of the states that patterned their bill of rights on Virginia's Declaration without including a free and equal clause (Delaware, North Carolina, and Maryland) or that avoided adding a bill of rights to their new constitutions altogether (New Jersey, Georgia, New York, and South Carolina) successfully moved against slavery before 1787. Furthermore, it seems likely that slavery was a primary reason

11. Blackstone, *Commentaries*, 1:38.

12. See Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 25–30.

13. Ibid., 27.

14. Gienapp, "Written Constitutionalism," 343.

15. Virginia Declaration of Rights, Art. 1 (emphasis added). For background on this episode, see John David Mays, *Edmund Pendleton 1721–1803: A Biography* (Cambridge: Harvard University Press, 1952), 2:121–22.

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why a bill of rights was not added to the original federal Constitution—a conclusion reinforced by the fact that Madison's own amendments carefully omitted a free and equal clause.[16] In short, far from confirming that formal recognition of fundamental rights did not depend on the precise character of a written constitution, this pattern suggests that it sometimes made a significant difference.[17]

Gienapp also highlights the fact that during the debate over prohibiting *ex post facto* laws, Wilson and Oliver Ellsworth balked at making this ban explicit. His suggestion that they did so on purely jurisprudential grounds is tempting, but there are reasons to doubt this interpretation. Initially, one should recall that the Constitution contains, not one *ex post facto* clause, but two. If *ex post facto* laws were deemed "*already* prohibited no matter what the Constitution said, because such laws violated general principles of law,"[18] then one would expect these clauses to elicit consistent reactions. Yet that did not happen. At the Convention, the Virginia and Maryland delegations voted for a prohibition on federal *ex post facto* laws, but against the same ban on the states. Conversely, the Pennsylvania and New Jersey delegations voted against a prohibition on federal *ex post facto* laws, but for the same ban on the states.[19] Furthermore, Wilson helped draft an almost identical *ex post facto* clause in the 1790 Pennsylvania Constitution. Evidently, he did not think doing so would appear ignorant or embarrassing, as Madison's Notes might lead one to assume. What explains these anomalies? I have my own hypotheses, which turn mainly on conflicts over land, slavery, abolition, and federalism.[20] Wherever the truth lies, it does not seem likely to depend on exclusively theoretical factors.

This leads to my final point, which also involves the 1790 Pennsylvania Constitution. At several points in his essay, Gienapp implies that John

16. See Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1913), 2:137; William Pierce to St. George Tucker, September 28, 1787, *American Historical Review* 3 (1898): 313–317; see also Charles F. Hobson and Robert A. Rutland, eds., *The Papers of James Madison* (Charlottesville: University Press of Virginia, 1979), 12:200, 203–06.

17. The origin and fate of women's suffrage in New Jersey arguably points in a similar direction. See generally Rosemarie Zagarri, *Revolutionary Backlash: Women and Politics in the Early American Republic* (Philadelphia: University of Pennsylvania Press, 2007); Campbell Curry-Ledbetter, "Women's Suffrage in New Jersey 1776–1807: A Political Weapon," *Georgetown Journal of Gender & the Law* 21(2020): 705–23.

18. Gienapp, "Written Constitutionalism," 344.

19. *Records*, note 16, at 2:369, 376, 435–36, 440.

20. See John Mikhail, "James Wilson, Early American Land Companies, and the Original Meaning of 'Ex Post Facto Law,'" *Georgetown Journal of Law & Public Policy* 17 (2019): 79–146.

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Marshall may have been spinning a tale when he underscored the significance of written constitutionalism in *Marbury*.[21] Many commentators have made this argument, and Gienapp seems drawn to it as well. Yet Marshall was hardly alone in celebrating the novelty of America's written constitutions and their connection to judicial review. "It is difficult to say what the constitution of *England* is," William Paterson explained in *Vanhorne's Lessee v. Dorrance*, "because not being reduced to written certainty and precision, it lies entirely at the mercy of Parliament." Paterson added: "Besides, in *England* there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain, by which a statute can be tested. In *America*, the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision."[22]

That Marshall was inventing a myth about judicial review in *Marbury* seems doubtful in light of statements like these and others like them during the founding era. Paterson's interpretation of the 1790 Pennsylvania Constitution in *Dorrance* attracted widespread attention and was issued as a pamphlet in 1796. In his last known publication, a 1797 land company memorial, Wilson quoted these passages from *Dorrance*, endorsing and amplifying Paterson's remarks. Wilson likewise grounded judicial review in the constitutional text in his 1787 ratification speeches and 1791–92 law lectures, pointing to the same clauses that Marshall later highlighted in *Marbury*. Other founders did so as well. Arguably, then, Marshall was merely amplifying well-established views about the significance of written constitutionalism in *Marbury*.[23]

In 1828, Timothy Pickering reported that Wilson once told him that "after the Constitution had been finally settled, it was committed to him to be critically examined respecting its style; in order that the instrument might appear with the most perfect precision & accuracy of language."[24] Pickering's letter invites us to reflect again on the fact that the two principal drafters of the Constitution, Wilson and Gouverneur Morris, were ardent nationalists, whose ideas are often anathema to prominent originalists. Many of the clauses for which they were directly or indirectly responsible—the Preamble, the General Welfare Clause, the Sweeping Clause, the Supremacy Clause, the Ninth Amendment, and others—are among those parts of the Constitution that Bork, Scalia, and their followers have

21. Gienapp, "Written Constitutionalism," 332, 345.

22. *Vanhorne's Lessee v. Dorrance*, 2 Dallas 304, 308 (1795).

23. DHSC, note 6, at 8:162; *Collected Works of James Wilson*, note 5, at 1:245–46, 737–743; Mikhail, note 20, at 131–39.

24. From Timothy Pickering, March 10, 1828, in Charles F. Hobson, ed., *The Papers of John Marshall* (Chapel Hill: University of North Carolina Press, 2002), 11:72.

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long tried to curtail or render inoperative. The text itself refers to "other" powers and rights beyond those enumerated, for example, yet many originalists often ignore or minimize this fact.[25] All this makes me wonder whether Gienapp's target might be somewhat misplaced. Perhaps the bigger problem with contemporary originalism is not that it takes the written Constitution too seriously, but that it doesn't take the entire instrument seriously enough. If not fully persuaded by Gienapp's excellent essay, I am nonetheless grateful to him for making me think in new ways about natural law, positivism, originalism, and the written Constitution. His fresh insights raise important issues that all historians and originalists would do well to ponder.

25. See U.S. Const. art. I, §8, cl. 18; amend. IX.

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