Constitutional Corner – Progressives and the Law

There used to be respect for the law in the legal profession – all the law, that is.

In our nation's founding period, the lawyers of the day: James Otis, Thomas Jefferson, James Wilson, John Dickinson, Alexander Hamilton, and others,[1] knew that law had three components: civil law, common law and natural law.

Natural law had been around for millennia, having been theorized by no less than Aristotle (384-322 B.C.), Thomas Aquinas (1225-1277), Hugo Grotius (1583-1645), Sir Matthew Hale (1609-1676), Sir Edward Coke (1552-1634), Samuel Pufendorf (1632-1694), John Locke (1632-1705), and culminating (for the Founders at least) with Sir William Blackstone (1723-1780), and Emmerich Vattel (1714-1767). Until at least the mid-19th Century, American lawyers were trained in the particulars of all three aspects of law. It was no surprise to anyone of the time to see reference to "the Laws of Nature and of Nature's God" in Mr. Jefferson's Declaration. Everyone knew of which he wrote.

Blackstone, in his Commentaries on the Laws of England, wrote that *"the laws of nature," "having been dictated by God Himself, are superior to all other."* They are *"binding over all the globe, in all countries, and at all times, no human laws are of any validity, if contrary to this."* Wow, what an amazing statement: no civil law, created by man, is valid if it contradicts natural law.

The U.S. Constitution is civil law, the most supreme law of the land according to its own Article VI; yet, even a provision of the Constitution would be void if it contradicted natural law (or was interpreted in a way that it did).

The American legal system flourished in this environment. The Supreme Court based occasional decisions, such as Calder v. Bull (1798) and Chisholm v. Georgia (1793), on concepts pulled from natural law. Even as late as 1905, in Lochner v. New York, the Court defined a "liberty of contract" that appears to have come from natural law (it is also implied by the Obligation of Contracts clause in Article 1 of the Constitution).[2] The Court took great heat for "inventing" a supposed new right, and in doing so, bypassing the will of the duly-elected

[1] About 30% of the signers of the Constitution were lawyers, 20% of the signers had been trained just in the Middle Temple in London. Five Middle Templars signed the Declaration of Independence.

[2] This led, unfortunately, to the derogatory phrase: "Lochnerize," which means a judicial ruling that usurps democratic lawmaking authority and imposes the will of unelected judges instead, charging that the judges are "making up law from thin air." Had natural law not been "sent to the back of the bus" and the Lochner court taken the time to carefully explain the derivation of their "liberty of contract," the results would have been different. In this I side with Randy Barnett and Richard Epstein, among others.

legislature of New York. I think if the court had been honest and upfront about the source of this right; it would have been neither so controversial nor misunderstood. By 1905, unfortunately, the concept of natural rights and natural law had pretty much passed from the public consciousness. How did this happen?

In 1859, Charles Darwin published "On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life."

As David Whitney writes in "The Darwinization Of Law In America:"[3]

> "Darwin's notions might never have obtained wide-spread acceptance without the tireless proselytizing of his contemporary, Herbert Spencer. Spencer took what was a biological conjecture and applied it as if it were absolute truth in every field of study. While Darwin speculated in the field of biology, Spencer insisted evolution was truly a life philosophy, a world view, and the organizing principle in every academic discipline. This belief in social Darwinism had an even wider impact as Universities adopted this philosophy as their guiding light in every field of study."

Universities including Harvard, we might add. Nine years after Darwin's "Origin of Species" hit American shores, Harvard hired William Eliot as their new President. Eliot embraced Darwinism with a sloppy wet kiss:

> "If the universe, as science teaches, be an organism which has by slow degrees grown to its form of today on its way to its form of tomorrow, with slowly formed habits which we call laws, and a general health which we call harmony of nature, then, as science also teaches, the life-principle or soul of that organism for which science has no better name than God, pervades and informs it so absolutely that there is no separating God from nature."

To Eliot, who changed Harvard's motto from "Christo et Ecclesiae" (For Christ and Church) to "Veritas," ("Truth"), law became merely part of an evolving cosmos, with no source in the Biblical God.

Eliot needed someone, a "priest," to preach his message; that man was Christopher Columbus Langdell. Hired in 1870, Langdell brought to his new post as Dean of the Law School, a belief in Legal Positivism, another "British import."

> "Legal positivism is a theory about the nature of law, commonly thought to be characterized by two major tenets: first, that there is no necessary connection between law and morality; and second, that legal validity is determined

[3] http://www.theamericanview.com/wp-content/uploads/2013/05/The-Darwinization-Of-Law-In-America.pdf.

ultimately by reference to certain basic social facts, e.g., the command of the sovereign."[4]

We should note that the "sovereign" to a legal positivist consists of the people who form a social compact and decide to govern themselves. To someone steeped in natural law theory, however, the sovereign is God himself, who through the endowing of rights to his people, equips them with political sovereignty which they can, in turn, grant to the government they form. Thus a legal positivist replaces God with the "will of the majority."

Langdell's "preaching" of Legal Positivism, combined with an innovation of his own design, the Case Method of legal study,[5] quickly spread to most of the remaining law schools in America (the "holdouts" will be discussed shortly). With Langdell proselytizing the law schools and Oliver Wendell Holmes working to eradicate natural law and natural rights at the Supreme Court,[6] natural law stood little chance in the face of this "pincer-movement."[7]

Where has 140 years of Legal Positivism brought us? First, to a legal profession that knows next to nothing about natural law.

In an essay entitled: "On Teaching Natural Law,"[8] Professor David R. Forte of Cleveland State University describes the time, in his senior year at law school, he interviewed for a Federal clerkship. The judge was allowing his chief clerk to do the initial interviews; the clerk would then present the judge with the final candidates from which to choose. Forte was asked if he had some writing samples the judge could examine and Forte presented the clerk with a paper he had published in a law review entitled: "Natural Law and the Supreme Court." The clerk asked "What's natural law?"

Now, this clerk might have been an outlier, but consider that only 3-4 law schools in America still consider natural law a viable part of the "corpus legibus." Notre Dame, Loyola University, Regent University and Liberty University are the only ones I'm aware of (if anyone knows of others, I would love to learn of them). Some law schools have

[4] http://ccnmtl.columbia.edu/projects/mmt/udhr/preamble_section_1/discussion_5.html
[5] The Case Method utilizes the study of previous legal decisions to determine the law that should apply to a certain situation. In other words, in Case Method, one studies not the Constitution itself, including the arguments at the "Grand Convention," the Federalist Papers, or the ratification debates, but studies instead the previous decisions of judges as they "find the law."
[6] http://www.nlnrac.org/critics/oliver-wendell-holmes
[7] "Pincer-movement." A movement by two separate bodies of troops converging on the enemy.
[8] http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1021&context=fac_articles

survey courses on natural law, which have the student study this category of law as one would study the dinosaurs or 17th Century British Mercantilism.

Supreme Court nominee Elena Kagan was asked about natural law and natural rights in her nomination by Senator Tom Coburn. Her reply: *"Senator Coburn, to be honest with you, I don't have a view of what are natural rights independent of the Constitution."* Translation: the only "natural" rights we have are the positive rights "created" by the positive law of the Constitution. (Incidentally, contrary to popular opinion, the Constitution's Bill of Rights creates no rights, it only enjoins first the federal government and later the state governments from infringing on those pre-existing natural rights. Example: 2nd Amendment: "…the right to keep and bear arms shall not be infringed." Emphasis added).

And then there's the more recent debacle when Kim Davis, a Kentucky County Clerk, was imprisoned for refusing to sign marriage licenses for homosexuals in contravention of the state's constitutional provision that marriage is the union of a man a woman. In her trial, her lawyer began to make an argument based on natural law. Judge David Bunning's interrupted reply was: "*The idea of natural law superseding this court's authority would be a dangerous precedent indeed*."

Bunning got that right; it takes a great jurist, someone like Alabama Supreme Court Chief Justice Roy Moore, to admit that there is a superior wisdom to be found in one of God's creations: natural law.

There is no shortage of books lamenting the deplorable state of the legal profession today: "Betrayed by the Bench," "Judicial Tyranny," "Men in Black," "Courting Disaster," are just a few titles that reveal the anger some Americans feel at how law operates in America. Even some on the left have taken to complain, as Erwin Chemerinsky does in "The Case Against the Supreme Court."

We should not be surprised to find progressives shunning natural law; a firm, almost religious belief in historicism characterizes the true progressive. Historicism, invented by George Wilhelm Freidrich Hegel, the "Father of Progressivism," holds that all historic "truths" must be placed in a context and interpreted within that context. This doesn't sound too bad until you realize that this also results in a rejection of any notion of universal, fundamental or immutable "truths" from history.

Since Darwin "proved" we don't need God to explain the natural world, we can dismiss the idea of natural law as easily as we dismiss special creation.

While I've noted in the past that progressives are found on both sides of the political spectrum, consider this: Democrats outnumber Republicans on the Stanford Law School

faculty by 28-1,[9] they outnumber Republicans at Columbia Law 23 to 1, and Harvard has gone 30 years without hiring a single Republican faculty member. Law Professors donated approximately 10-20 times as much to Democrat presidential contenders as to those from the GOP.[10] What can explain this?

Perhaps Democrats are somehow better equipped to be lawyers. Perhaps membership in the Democrat party makes you intellectually more attuned to a career in law. Psshaw. Studies have shown that conservatives and liberals score similarly on intelligence tests,[11] so why aren't there more Republican lawyers? What else could account for this disparity?

When asked about the shortage of conservative viewpoints at University of Chicago Law School, one professor quipped that "Not all ideologies have merit." Ah, now we're getting somewhere. Conservatives need not apply to schools of law, their beliefs have no merit. Go to the back of the bus. Progressives "own" the legal education system.

Of course, this progressivization of lawyers affects how average Americans view the law as well. Fewer and fewer average Americans have heard of natural law; when they read the Declaration, Jefferson's words fly right past them without a thought. But consider the impact of this: if there is no natural law, no "laws of Nature and of Nature's God," then you have no natural rights. If you have no natural rights you have only positive rights granted by civil laws or Constitutions. Positive rights are only "positive" until the society has no further use for them, then they are gone as quickly as they were created.

As early 20th Century progressive Frank Goodnow, put it: *"the rights which [an individual] possesses are, it is believed, conferred upon him, not by his Creator, but rather by the society to which he belongs. What they are is to be determined by the legislative authority in view of the needs of that society. <u>Social expediency</u>, rather than natural right, is thus to determine the sphere of individual freedom of action."*[12](Emphasis added)

I suppose if you wish to live in a society that believes that, fine – I don't. I like my rights slow cooked and long lasting, unalienable even.

Next time you need to shop for a lawyer, ask candidates their view of natural law; flee if they reply: "What's natural law?"

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[9] http://www.professorbainbridge.com/professorbainbridgecom/2005/10/law-school-diversity-no-surprises.html
[10] Walter Olson, *Schools for Misrule: Legal Academia and an Overlawyered America*, p. 15.
[11] Ibid. citing a study by Northwestern University professor James Lindgren.
[12] http://www.nlnrac.org/critics/american-progressivism