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COMMENTS ON CLINTON: RECONSIDERING THE ROLE OF NATURAL LAW IN JOHN MARSHALL'S JURISPRUDENCE

JAMES W. ELY, JR.*

In his paper, Robert Clinton continues his exploration of the place of natural law in the constitutional order of the early republic.¹ He offers a challenging account of the Marshall Court's principles of constitutional interpretation. I concur with his view that an understanding of Marshall's constitutional decision-making benefits from careful historical inquiry. I also share his unhappiness with the effort of Progressive-era scholars to recast constitutional history in terms of class conflict.

Still, there is room to question whether Clinton has provided a convincing assessment of Marshall's jurisprudence. I fear that he is inviting us on a journey to a fanciful past. Specifically, I wish to suggest four caveats to Clinton's analysis:

1) He posits that Marshall was heir to a natural law tradition which found expression in English common law and William Blackstone. This tradition, we are told, represented a consensus. But the natural law tradition was more complex and disjointed than Clinton makes it appear.² Not only did Sir Edward Coke and Blackstone write more than a century apart and under very different political circumstances, but Blackstone was more a synthesizer of different views than a champion of natural law. Further, at least two prominent American constitutionalists, Thomas Jefferson³ and James Wilson,⁴ emphatically rejected

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1. See generally ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989); ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM* (1997).

2. See generally KNUD HAAKONSSON, *NATURAL LAW AND MORAL PHILOSOPHY FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT* (1996) (surveying the array of different natural law theories); see also *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT* 561-652 (J.H. Burns ed. 1991).

3. DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON*, 10-11, 47-51 (1994); Julian S. Waterman, *Jefferson and Blackstone's Commentaries*, 27 *ILL. L. REV.* 629, 629-659 (1933).

4. 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 15-20 (James DeWitt Andrews ed. 1896).

Blackstone's views as unsuitable for the foundation of a republican government. In short, the notion that there was a single natural law tradition that everyone accepted is more asserted than demonstrated. It would be remarkable indeed if there was ever any universally accepted understanding of either natural law or of the basis for constitutional interpretation. English courts, moreover, do not exercise judicial review over legislation or interpret a written constitution. Therefore, Blackstone's conception of the judicial function was an imperfect model for newly independent America.

It follows that the leading decisions of the Marshall Court cannot be understood solely as a quest to discover some pre-existing norms derived from common law. Marshall was always alert to the political realities of his day and to the instrumental dimension of judicial decision making. There is an air of unreality about Clinton's suggestion that Marshall was deciding cases in a sort of political vacuum.

2) As argued by Clinton, the appropriate use of natural law by courts rests on a fine distinction. The Marshall Court, he insists, regarded natural law principles as embodied in the written Constitution. Thus, it was thought suitable that the Constitution should be interpreted with reference to natural law. Clinton is quick to assert that the Marshall Court never relied solely on natural law in deciding cases, but rather limited itself to applying natural law principles as they were incorporated in the text of the Constitution. This strikes me as a thin distinction that does not amount to much of a real difference. I would suggest that Marshall and his colleagues simply did not draw a sharp line between the constitutional text and non-textual natural law precepts. If the Constitution was fully consonant with natural law, why should we be surprised that some Marshall Court decisions relied on natural law concepts, regardless of their express incorporation into the text?⁵

Not only was the Marshall Court prepared to invoke extra-textual norms drawn from natural law, but state courts in the antebellum era began to move in a parallel direction. They developed the notion that due process placed substantive restraints on the exercise of legislative power. The emerging doctrine of substantive due process to safeguard liberty and property interests was similar to Marshall's recognition of unenumerated rights.⁶

5. See generally Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127-1177 (1987).

6. See generally James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARIES 315, 327-342 (1999); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171-222 (1992).

3) I confess that I am mystified as to how a centuries-old consensus understanding about the use of natural law, supposedly accepted by judges and the public alike, could be so easily hijacked in the post-Civil War era to serve the goal of economic liberty. Clinton attributes this development to a cabal of laissez-fairest attorneys, judges, and politicians. But his explanation leaves much to be desired. Ironically, Clinton on this point appears to follow in the path of the very Progressive historians he criticizes. One doubts that there could have been a meaningful consensus about the proper role of natural law if its usage could be so suddenly and inappropriately enlarged. Is a better explanation that judges in the late nineteenth century built upon the Marshall Court's use of natural law, and infused natural law principles into the Due Process Clause? Indeed, arguably there was considerable continuity between the jurisprudence of the Marshall Court and the constitutional doctrines promulgated by courts in the late nineteenth century. Jennifer Nedelsky has cogently observed:

But the notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth-century advocates of laissez-faire. And the idea that property and contract could define the legitimate scope of governmental power was a basic component of constitutionalism from 1787 to 1937.⁷

In this connection, I am dubious that Social Darwinism had the impact that Clinton assigns. It has become an article of faith for some scholars that the Supreme Court in the late nineteenth century was influenced by the tenets of Social Darwinism.⁸ Yet there is little evidence to sustain this thesis.⁹ Indeed, as Herbert Hovenkamp concluded: "The degree to which Darwinism and Social Darwinism *failed* to permeate the thinking of the Supreme Court in any way is most amazing."¹⁰ In any event, Social Darwinism has been out of favor for decades and hardly explains the continued rejection of what Clinton describes as a one-time accepted convention of constitutional interpretation.

4) Lastly, I would question the rather passive image of the Marshall Court fashioned by Clinton in this paper and elsewhere. In fact, Marshall was quite an activist in effectuating the property-conscious values of the framers, which were enshrined in the Constitution.¹¹ These rulings were bolstered by an instrumental

7. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 228 (1990).

8. See, e.g., ROBERT GREEN MCCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE*, 82 (1951).

9. JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910* 75-77 (1995).

10. HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937* 99-100 (1991).

11. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 42-58, 63-68 (2nd ed. 1998).

understanding of the desirability of protecting property and national markets as vehicles for economic growth. Charles F. Hobson, for example, has pointed out that Marshall's dedication to property rights was based on his conviction "that strong constitutional protection for property and investment capital would promote national prosperity."¹² One must not lose sight of the practical dimensions of Marshall's jurisprudence.

These reservations aside, Clinton should be applauded for tackling a difficult and important topic. He asks a number of compelling questions about the work of the Marshall Court, and his thought-provoking treatment will inform and challenge scholars.

See also Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1135-1158 (1980).

12. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 75 (1996).