



Gorsuch and natural law: He's not another SCOTUS faux-philosopher

BY ALLEN MENDENHALL, OPINION CONTRIBUTOR - 02/07/17 03:00 PM EST

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Much has been made of the fact that Donald Trump's nominee to the Supreme Court, Neil Gorsuch, studied at Oxford with Australian legal philosopher [John Finnis](#), a prominent proponent of natural law theory. Gorsuch's essay "[Intention and the Allocation of Risk](#)" opens with a touching tribute to Finnis, who directed his dissertation.

What might it mean if a member of the High Court adhered, like Finnis, to the natural law? How does natural law theory square with constitutionalism, which binds judges to the terms of a written document?

We've heard these questions, or some permutation of them, before. When George H. W. Bush nominated Clarence Thomas to fill the Supreme Court vacancy left after the retirement of William Brennan, natural law became an improbable focus of the confirmation hearings.

Professor Lawrence Tribe, writing in The New York Times in 1991, [stated](#) that Clarence Thomas was "the first Supreme Court nominee in 50 years to maintain that natural law should be readily consulted in constitutional interpretation."

Joe Biden, then a senator and the chairman of the Senate Judiciary Committee, [told](#) Thomas that "there are signs in your writing and speeches ... that you would apply natural law to effect changes ... to replace our freedom to make personal and family choices without government imposing their moral code, and to thrust the Court into economic and regulatory disputes that it now stays out of."

How might Gorsuch instantiate his own jurisprudence in opinions for the Court?



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The answer depends upon a basic understanding of natural law, which is sometimes defined negatively against positive law, or the rules and normative orders promulgated by humans. Although there are many schools and teachings of natural law — some religious and others secular, some complex and others straightforward — the key standard underpinning them all is that certain moral principles precede human commands and institutions.

A higher law, in other words, that is antecedent to human codes governs human relations.

Gorsuch has never ruled directly on a case implicating *Roe v. Wade* or its progeny. How natural law might find expression in his future opinions regarding “life issues” isn’t clear. His book [“The Future of Assisted Suicide and Euthanasia”](#) claims, among other things, that all human life is intrinsically valuable and worthwhile in itself — that it is a fundamental, non-instrumental good.

From this premise one can deduce how Gorsuch might reason about abortion or end-of-life controversies, but the precise contours of his logic — and the constitutional analysis that must frame it — remain to be seen.

Having reviewed hundreds of pages from Gorsuch's judicial opinions, I have yet to find a "smoking gun." The phrase "natural law" does not appear in them.

Gorsuch has been on Trump's list of potential nominees since September 2016; surely by now Democrats would have released opposition research that included any disqualifying information on him. Unless something comes out during his confirmation hearings, Gorsuch will be confirmed notwithstanding his chosen mode of jurisprudence.



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His opinions suggest he's meticulous and restrained in his rulings. So far as I can tell, he considers only the arguments presented by parties to the case. He'll dispose of cases on technical grounds before tackling big issues with a sweeping impact on settled law. He's concerned about whether issues are properly preserved for appellate review. And his holdings are narrowly tailored to achieve the limited purpose of resolving the particular issues before him.

Of course, a Supreme Court Justice enjoys wider latitude than lower court judges to enact broad changes in the law. But nothing indicates that Gorsuch will be a Zeus-like figure hurling judicial lightning bolts from his throne on Olympus.

To predict how Gorsuch might rule as a justice, one could look to Thomas, who didn't disclaim his belief in natural law. To his critics during the confirmation process, Thomas [rejoined](#), "I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory." Gorsuch may parrot this response in the coming weeks.

Thomas has remained a faithful devotee of originalism and textualism, which Gorsuch, too, embraces.

Originalism in its more sophisticated form maintains that judges should stick to the original public meaning of constitutional provisions. Textualism, a distant cousin of the New Criticism in literary theory, confines interpretations to the plain or ordinary meaning of statutory texts, rejecting explorations of authorial or legislative intent.

By method and design, originalism and textualism constrain judges from capacious theorizing about natural law or natural rights. They are in this sense in tension with natural law theory, except to the extent that the constitution or statutes incorporate natural law principles. Thus, it's difficult to predict how students of the natural law will handle cases as judges and justices, especially when only routine or mundane matters of practice and procedure are involved.

We should expect Gorsuch to operate like Thomas. As a workaday justice, he will privilege the text of both the constitution and legislation over abstract conjecture about natural law or natural rights. But terms like "[practical reason](#)" and the "[incommensurability of goods](#)" may find their way into his opinions.

Supreme Court justices are often glorified as philosophers; it's time we actually placed a philosopher on the Court.

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