

BOOK REVIEW: *JUDICIAL REVIEW IN AN OBJECTIVE
LEGAL SYSTEM*

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Tara Smith: *Judicial Review in an Objective Legal System*. Cambridge: Cambridge University Press, 2015. ISBN: 978-1107114494.

THE UNITED STATES, we are often told, is subject to the rule of law, a phrase deployed endlessly by scholars, pundits, politicians, and average Americans to indicate an ideal of dispassionate jurisprudence and rational government. The rule of law has attained something of the status of a national motto, so often does one hear it invoked as one of the guiding principles of our political experiment. However, it is far from clear what “the rule of law” actually means. Theories abound, but consensus is rare. Lawyers get paid to disagree over what the law *says*, but even the best legal thinkers, far removed from the sweaty wrangling over statutory interpretation at the county courthouse, get flummoxed when asked to explain what the law *does*.

This is what makes reading the legal treatises of the Objectivists so refreshing. Few secular legal thinkers have such a clear, systematic understanding of how laws’ form and function are to be matched. With the Objectivists, one knows exactly where they stand on even the most daunting legal conundrums. In a new book-length treatment, Tara Smith, who has written extensively on the intersections of Objectivist philosophy and law,

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explains how judicial review, a feature of non-Objectivist jurisprudence, should function in a truly Objectivist legal system.

Divided into two halves, *Judicial Review in an Objective Legal System* first sets forth what Objectivism is and how Objectivists understand law. Of particular importance in this regard, Smith stresses, is the written constitution, which Smith, following the logical premises of Objectivism, calls “bedrock legal authority.” This is a key concept, and one to which I will return later in this review. In the second half of the book, Smith moves to narrower considerations of judicial review proper. Smith’s first task in those sections is to critique the “failures” of “the reigning accounts” to understand judicial review. After dispensing with the various mistaken versions of judicial review as she sees them, Smith defines Objectivist judicial review (ch. 7) before providing a handful of examples of how such a process might work in “contemporary conditions” (ch. 8).

This is an ambitious book, but one so carefully and cogently argued that it never seems as though the author is reaching beyond her grasp. There can be no doubt what Smith means by “Objectivist law,” how it is to function, and how it applies to previous attempts to make theoretical sense of one of the most ancient human institutions.

For Smith and other Objectivists, rights are the heart of the law. The most helpful primer on Objectivist law was, in fact, written by Tara Smith herself: “Objective Law,” in *A Companion to Ayn Rand*, edited by Allan Gotthelf and Gregory Salmieri. There, Smith, following Rand, declares that “law is not an end in itself, but the means through which government fulfills its function” (*Companion*, 212). For Rand and Smith, that function is the same for both government and law: “the protection of individual rights” (*Companion*, 212, citing both Ayn Rand, *The Virtue of Selfishness: A New Concept of Egoism* [New York: Signet, 1965], 128, 131, and Ayn Rand, *Capitalism: The Unknown Ideal* [New York: American Library, 1966], 381, 384).

Rights, in turn, are what insulate individuals from the possible predations of their fellow humans. Smith again, following Rand:

A right... is a sanction of man’s moral title to act by his own judgment... The particular evil that rights protect the individual against is others’ initiation of physical force... The concept of a “right” pertains only... to freedom of action. It means freedom from physical compulsion, coercion or interference by other men... Reason is man’s means of survival[, but] force nullifies a man’s mind[,] thus wast[ing] his ability to use his rational faculty (*Companion*, 212, citing *The Virtue of Selfishness*, 110, and *Capitalism*, 369).

It is thus on the grounds of reason, and the enmity between reason and coercive force, that Objectivists argue that a monopoly on force must reside in a body—namely, a duly constituted government—fully restrained by law in order to prevent force from infringing on the full exercise of reason and right:

Government is “the agent of restraining and combating the use of force” and so must hold a “monopoly on the legal use of force”. Given the tremendous power that it wields, it is imperative that its actions “be rigidly defined, delimited and circumscribed... If a society is to be free, its government has to be controlled”. The objectivity of a legal system is our means of both constraining government and enabling it to accomplish its mission. (*Companion*, 212, citing *The Virtue of Selfishness*, 128-29, and *Capitalism*, 381-82)

This is the vital confluence for the Objectivist: right, reason, law, and force, all working together to ensure full latitude to citizens within the high-liberal matrix of abutting freedoms. Accordingly, it is here that one properly directs questions of whether Objectivist law really stands on its own merits. This is especially germane to the aspect of law that Smith has taken up in her new book: judicial review. Do pure rights square with lived jurisprudential experience? Can Objectivist judicial review accommodate the intricacies of even the hardest cases? Let us take an example Smith has chosen to test just this set of questions: *Hosanna-Tabor*.

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, et al., eventually argued before the Supreme Court in 2012, pitted the prerogative of a religious organization to appoint to ministerial functions anyone of its choosing and to rescind such appointments at will, against the right of an appointee to contest such rescindments on substantive grounds. Concretely, the Hosanna-Tabor school assembly voted to change a teacher’s status from “lay” to “called” minister, but later revoked the status change when the teacher, who had developed narcolepsy, was long absent from her teaching position. The teacher sued the school on Americans with Disabilities Act grounds. The school claimed it was exercising a longstanding First Amendment-based right to “ministerial exception,” which prevents government from interfering in churches’ internal appointments.

The Supreme Court found in favor of the Lutheran organization, holding, in part (1[c]), that

since the passage of Title VII of the Civil Rights Act of 1964 and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a “ministerial exception”, grounded in the First Amendment, that precludes application of

such legislation to claims concerning the employment relationship between a religious institution and its ministers. The Court agrees that there is such a ministerial exception. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

At first, it may seem that we have here—as Smith and many other American observers have believed—a classic conflict of rights (256-258).¹ If so, then Smith is correct in asserting that Objectivism quite handily runs the calculus, in finding the plaintiff (i.e., Hosanna-Tabor) in *Hosanna-Tabor* to be in violation of others' rights, and in giving her blessing to deploying the full weight of the government's monopoly on force to do away with Hosanna-Tabor's obstructions to the free exercise of rights.

Indeed, for Smith, the solution is to relegate religious practice to operating solely within the bounds of Lockean rights:

The interpretation of religious freedom as a religious *exemption* is profoundly mistaken. In a legal system dedicated to the proposition that each person has a right to lead his life however he likes as long as he respects the like rights of others, it makes perfect sense to recognize religious practices as among those protected activities. It makes no sense, however, to grant religious people special permission to violate law that the government deems vital to the protection of individual rights. That is, in a proper system, the premise behind every law must be that that law is a necessary means of fulfilling the government's function. No extraneous agendas may contaminate the system or deter it from that singular task. (256-57; italics in original)

Clearly, the Objectivist scheme is a methodological monad. Activity not allowed by the rights scheme is dangerous to the system—"extraneous agendas" that might "contaminate" it—and so must be limited by the plenary power of the government.

¹ See also Smith, *Moral Rights and Political Freedom* (1995), cited in *Judicial Review*, 258.

But let us take a step back and frame the issue in a different way. At the level of rights, we see only black and white. Either someone is infringing on someone else's rights, or they are not. If they are not, case closed. If they are, then the government must make them stop. It is a binary equation, with elements clearly falling on one side or the other. To be sure, Smith does allow that cases can be extraordinarily complex and difficult to adjudicate. But this is never a liability to the rights-based system itself. When rights are the framework, Objectivism as a legal philosophy holds together perfectly.

However, the larger question—the essential question—is whether this understanding comports with the subjects of Objectivism and of every other legal system and interpretation: namely, human beings *as we find them*. Smith presents human rights as an almost congenital feature of human beings—almost as though examining any human's mitochondrial DNA under a microscope would reveal it to be inscribed with the complete works of Rousseau, Jefferson, and Locke. Smith judges both past and present—and, presumably, East and West—from the vantage point of rights' timeless moral force. But does the rights schematic match the blueprint of humanity as it exists all around us, and as it has always existed in the past?

Let us remember that Smith's conception of human rights, although commonplace in the West today, is itself an innovation of very recent vintage. It is also a distinctly Western understanding of the human person, rooted in the rich Judeo-Christian heritage of Europe and the Americas and inexorably bound up with the secularization of Christendom under the Kantianism and Hegelianism of the late Enlightenment. Rights themselves are not prepolitical and prehistorical. They are historical artifacts that emerged out of very particular times and places, and that did not appear until very late in the West before being exported, often by brute force, to Asia and Africa.

These rights are now exported back in time as well. For most of human history, human beings had a very different conception of ourselves from the rights-bearing agents Smith holds up as our true anthropological forbearers. Rights theorists often point to ignorance or bigotry in accounting for common law cases decided contrary to twenty-first-century understanding of what rights should be. Perhaps, but there is also the vast weight of tradition. Our jurisprudential past is laden with influences not often visible to the naked eye. Smith wants rights, and she wants everyone in history to want them too. Fair enough, but until a few hundred years ago, no one wanted rights, because no one had ever heard of them.

Consider, for example, Smith's reading of "miscegenation and antisodomy laws" as "institutionalized discrimination that violated individual rights" (128). From the Objectivist perspective, everything will, of course,

appear to be a question of rights. But in the past, it was considerations of social stability, and not abstract rights, that guided the quest for justice. In a hierarchical society in which families and other nonstate institutions were the main vehicles for human flourishing and survival, it was unthinkable that direct challenges to those institutions—whether at a sexual or racial level—be allowed to upset entire social edifices willy-nilly. In other words, people once saw it as dangerous to allow full license to individuals if doing so might mean the collapse of social stability and grave harm for everyone in a given polity. Surely we can all join Smith in condemning the requirement that one obtain “a government censor’s permission” before being allowed to publish one’s ideas (128). But in the past, such laws, repugnant though we now find them, served different purposes, which did not include preserving human rights. Rights were not always the trump card. In the past, humans played with decks stacked very differently than today.

Beyond this historically selective thinking, the deeper problem is that Smith does not explain where rights come from or where their authority lies. Time and again, she grounds Objectivist law’s authority in two places at once. On the one hand, Smith sees the moral authority of a legal system as “an outgrowth of its reason for being” (92-93), which is to say, protecting freedom. Elsewhere, Smith holds that “rational action is the wellspring of all the objective values that human beings create” (106). But this comes to resemble a circular argument, as when Smith argues that “freedom is the sine qua non of a rational society—a society that it is rational for men to enter into because it allows them to flourish” (107). In other words, once men have entered a rational society, they enjoy freedom. And they desire freedom because they are rational, and are rational because they desire freedom.

All of this may be true, but it does not, in the end, tell us what gives moral weight—authority—to rights-based, freedom-protecting law. Solving this Anavastha dilemma by means of positing a constitution as the unmoved mover of the law does, in fact, work in a practical sense. But it does not solve the fundamental problem: what is law?

These problems are quite nicely resolved by examining the American Constitution itself, the “bedrock legal authority” in Smith’s Objectivist legal philosophy. Problematically for Objectivism, however, what we find in the US Constitution is that it is not bedrock legal authority at all, and was never intended to be understood as such. The US Constitution, by the Founders’ conscious design, is a succinct expression of the workings of *natural law*. Our rights come from our humanity, and that humanity the Founders understood to be fully compatible with the long history of the natural-law discovery process eventually called “the common law.”

What really exists in the United States is a hybrid system of constitutionalism in which a written constitution has been placed atop millennia of traditionally-decided individual cases. Those cases, in one way or another, were decided using human reason attuned to higher principles of justice. In other words, the US Constitution rests atop a much older unwritten constitution, itself a bit-by-bit manifestation of the natural law. The genius of the American founding is that it almost seamlessly mapped the maturing rights-based anthropology of Western Europe onto the much older common law anthropology that typifies much of the world's pre-Enlightenment jurisprudence both Western and Eastern.

Smith, who explicitly rejects the natural law, understands the dual-hearted nature of the US Constitution differently.² For example, she writes:

As they actually developed, common law and constitutional law arose largely as means of dealing with different domains, private law and public law, thus they do not pose perfectly symmetrical alternatives. And the two are rarely pitted as rivals, only one of which might be adopted to govern. The US legal system, in fact, seems to benefit from both... Yet common law is frequently invoked as carrying equal, if not greater, weight than the Constitution. (114)

This understanding is closely tied up with Smith's trifold reading of the common law as "a historical system of governance that has been used in specific times and places; a method of reasoning used to resolve legal controversies; or the substantive legal doctrine that results from the use of that method" (115). However, Smith rejects the common law as unstable (122), too nebulous (124), and too obscure (127). Mostly, though, Smith

² As Smith explains, "If a legal system's authority can extend no farther [*sic*] than its moral authority, one might suspect that this entails the embrace of Natural Law or endorsement of the thesis that an unjust law is not truly a law. It does not. Essentially, that supposition would confuse the conditions necessary to enjoy the Rule of Law, which is an ideal, with the question of whether a legal system exists in a given area, which is a simpler, non-normative matter of fact. Bear in mind that my concern throughout the book is to understand a legal system that *should* be respected, that is objectively proper. Thus, my contention that a proper legal system requires moral authority does not stake a claim in the distinct dispute between Positivists and Natural Lawyers over what constitutes law. I should note, though, that my account of an objective legal system does disavow some important features found in many versions of Natural Law, particularly metaphysical moral realism and claims to the self-evidence of certain prescriptive legal truths." (89, fn 2)

rejects the common law as lacking in proper legal authority (132), which is, again, to delineate rights and entrust their enforcement to a properly constituted governing body. She does not see the common law as a working out of the natural law, but, rather, as a poor substitute for the protection-of-rights scheme that only constitutional authority can provide.

Smith's critiques of the common law are perfectly reasonable from an Objectivist standpoint. I find missing from Smith's consideration, however, a treatment of the larger fact that the common law conceives of humankind in a way radically different than do the Objectivists. Indeed, it is difficult even to say whether common lawyers conceive of "humankind" in the abstract at all. Instead, those who practiced the common law over the long centuries of its accretive unfolding have, by and large, taken people as they have presented themselves, one by one, before the bar. Humankind, in the common law, is not a collective noun. Each man, each woman has a name, and each case differs from other cases, regardless of how much one case might resemble another. There is no species *Homo sapiens* in the common law. There is no composite jurisprudential portrait of the race. There are only keyhole views of individuals' existence, whatever may be gleaned from the facts presented before judges and juries and witnesses in a courtroom. The common law never sought to protect human rights; its function was to render justice to particular people in particular, fundamentally unrepeatable ways.

Smith finds the piecemeal common law approach intolerable. That the common law did not protect what Smith sees as the grand prerogative of each individual to hold his or her overarching set of human rights—to copulate, marry, abort, and hire at will, to give just a few examples—Smith sees as incompatible with the rock-ribbed array of rights and monopoly on force that together form the Objectivist vision of law. Taking as some of her touchstones *Loving v. Virginia* (1967) and *Lawrence v. Texas* (2003), Smith sees the common law as "undermin[ing]" the "objectivity of a legal system" (122). "When the common law commands final legal authority," Smith warns, "individual rights become precarious" (125).

But it is only gradually that the written American Constitution—the 1789 one, the one now appealed to as "bedrock legal authority"—has come to stand alone in our jurisprudential reasoning. It is this historical process of elevating the Constitution above the natural law that eventually allowed Objectivists to declare the Constitution to be "bedrock legal authority." But this apparent triumph of rights contains within it the seeds of its own undoing. To put it bluntly, the natural law, which the Founders understood to be the true bedrock legal authority, has been bleached out of the text.

The irony is that it is only the exponential, explosive growth of state power that has allowed Objectivism to make claims about government protecting human rights. In fact, the natural law predates not just Objectivism and rights but the state. It is the much surer ground for a truly human jurisprudence that takes as its lodestone, not the demarcation of boundaries of individual rights, but, much more capaciously, the dignity of each human being. The tradeoff, as Smith correctly points out, is that judges in a common law, natural law order have much more discretion to use their reason in order to decide individual cases. The upshot is that one need not invoke the brute force of Leviathan to act as inflexible referee. Human nature demands that a legal system give a little somewhere or other. Much better, as the common lawyers and natural lawyers have long known, that it give at the bottom, case by case, thus keeping the state edifice small, than that it be forced to give at the top, which will always lead to larger state apparatuses in order to contain the contradictions inherent in humanity and inevitably arising in legal practice.

Objectivist legal philosophy tells us clearly what law does and how it should do it, and also tells us—shows us, in fact, with ample evidence from Soviet horrors and beyond—what happens when law does not work as it should. And yet, for all this, the evidence remains circumstantial as to what law actually *is*. Objectivism posits that people have rights and that government exists to protect those rights. But this anthropology is too shallow to stabilize an edifice of jurisprudence built upon it. Human beings are complicated, and individual cases are often much harder to decide than a rights-based understanding of men allows. To know what law is, we must know what people are. Objectivism does not really tell us, although in its very limitations it points to the natural law, which undergirds all moral legal systems, past and present.

Returning to the *Hosanna-Tabor* case, it should give the reader pause that a Randian could decide in favor of a gargantuan, immoral, venal megastate over a tiny group of religious believers. Imagine, by way of illustration, Ayn Rand coming down in favor of the Soviet behemoth in its drive to bend the citizens of Hungary or Czechoslovakia to its inflexible will. The comparison is not perfect, of course, for the Soviet government did not even pretend to care about human rights. But is the current US disposition any different? The Soviet state was a bloated beast, and Rand was a brave and true friend to the millions whom that state oppressed. Arguably, Washington, DC, circa 2015 (the year Smith's book was published), was far, far worse than Moscow circa 1965. In a post-Snowden era, can we ever again argue that the federal government is capable of acting for moral ends? Libertarians of whatever religious persuasion, or none at all, may dislike the Lutheran

school's practices. But better that there be 10,000 Hosanna-Tabor than one Leviathan capable of forcing people to behave as it thinks they ought.

In her long section pointing out the many failures of originalism as a standard for judicial review, Smith needles the late Supreme Court justice Antonin Scalia (who of course was still alive and active when Smith's book was published) for breezily dismissing tough cases such as abortion and the death penalty as easy for the well-trained originalist to decide (161n35). But one cannot help but feel that Smith, in considering *Hosanna-Tabor*, does much the same thing. By Objectivism's lights, Smith declares, the plaintiffs in *Hosanna-Tabor* have no compelling argument. Having violated the fundamental tenets of Objectivism in infringing human rights, the *Hosanna-Tabor* plaintiffs have forfeited any redress of their other grievances. We can also find a tinge of originalism in the Objectivists' understanding of rights. The originalists froze language in amber at a certain time and place. The Objectivists do the same thing with human nature. But surely neither words nor people are as easy to pin down as that.

On closer examination, we can see ambiguity beneath the glass-bottomed boat of the Objectivists' rights-based interpretations. The Christians in *Hosanna-Tabor* perhaps did not act out of animus toward a scheme of rights. Instead, they likely adhered to a vision of humanity that precedes Smith's and that I believe to be infinitely more convincing and robust. For the Christians, human beings are not clad with the armor of rights. They are endued with dignity as creatures of God. A world of difference lies between these two approaches, and the liberal state remains unable to determine how to adjudicate between them.

It is therefore an entirely different anthropology, not mere bigotry or ignorance, that is driving the showdowns we see throughout the liberal West. From ministerial appointments to the baking of cakes, we often understand these events as conflicts of rights. But they are much, much more than that. Rights leave us speaking of procedures, whereas the natural law lets us go deep into human nature—akin to the difference between a tour in a glass-bottomed boat and a scuba dive. To understand the rule of law and the ways it is variously conceived, one must take into account, not only the ways men and women are viewed in the present, but also the ways they have been viewed in the past and still are viewed in vast areas of the globe beyond the reach of the European Enlightenment. Objectivism is a powerful lens for seeing the post-Enlightenment side of a story. Other lenses, though, capture radically different scenes.

The snap judgments of both originalists and Objectivists on some of the most difficult cases hint that Objectivism and originalism are both

inelastic. It is judicial review—the age-old test of theory against lived reality—that works yet again to lay bare the shortcomings of all ideology. Imperfect though it may be, judicial review is not an adjunct to any kind of legal philosophy. It is a brake on all of them. To my mind, the greatest danger posed to the free person today is not judicial review or the common law, or, a fortiori, the natural law, but the fact that people recruit a deeply immoral bureaucratic state—namely, Washington, DC—even for the most laudable ends, such as those Smith longs for in her program for securing human freedom in an age largely inimical to it. The natural law, pieced together one case at a time, will stand against any tyrannical state—see, for example, Thomas More—but Objectivism, at best, can claim only to tame the state-beast, not, in the end, to defeat it.

Judicial Review in an Objective Legal System is a tour de force of erudition and eloquence. Smith is among the most formidable legal thinkers working in English today, and anyone even remotely interested in legal philosophy or current constitutional debates could find few titles, past or present, to rival Smith's for its clarion exposition of a landmark legal idea. Reading her work is in itself an education in legal philosophy well beyond Objectivism. I recommend the book unreservedly, although I invite Smith's readers to join me in wondering: Is this all there is to law? To humans?