Natural Law for Modern Lawyers
A Conversation with Judge Paul Matey
Interview Conducted and Transcribed by Maclain Conlin
(All errors are my own.)

Maclain Conlin: Good morning, and welcome to Originalist Angles. My name is Maclain Conlin. Today, we are joined by a very special guest, Judge Paul Matey. Judge Paul Matey was appointed to the United States Court of Appeals for the Third Circuit in 2019 by President Trump. Before his judicial service, Judge Matey was a partner at Lowenstein Sandler in New Jersey where he practiced complex commercial litigation and criminal defense. Earlier, Judge Matey was the Senior Vice President, General Counsel and Secretary for University Hospital Newark, an academic medical center and teaching hospital. He also served as the Deputy Chief Counsel to Governor Chris Christie, and as an Assistant United States Attorney in the District of New Jersey, where he was awarded the Justice Department's Director's Award for Superior Performance.

He also practiced at the Washington D.C. firm of Kellogg, Hansen, Todd, Figel & Frederick, and served as a law clerk to judges on the United States Court of Appeals for the Third Circuit and the United States District Court for the District of New Jersey.

He earned his bachelor's degree from the University of Scranton, a Jesuit University, in 1993, and his J.D., summa cum laude, from Seton Hall University School of Law in 2001, where he served as Editor-in-Chief of the Seton Hall Law Review. In 2019, Judge Matey was elected to membership in the American Law Institute and, since 2020, has lectured on administrative law and American legal history at Seton Hall.

This past year, outside of his judicial duties, Judge Matey has written several essays on the role of natural law in American jurisprudence, and has emerged as a leading defender of the relevance of Sir William Blackstone. He joins us today to discuss these essays, as well as his own legal education. Judge Matey, thank you very much for your time.

Paul Matey: Good morning, Maclain. Thank you so much for having me. It is a pleasure to be here.

MC: Thank you! Before we move into the content of your essays, I would like to start with a broader question. In reading your articles, I was shocked by the sheer variety of classical sources that you cite, from Aristotle to Blackstone to Dorothy Sayers to Wendell Berry. When did you acquire this broad familiarity with the classics and the Western tradition, and why did you choose to do so?

PM: I credit, as I do most things in life, the providence of God in leading me towards these insights, but I have to give particular thanks to my patron saint, Ignatius of Loyola, for being so darn persistent in his passion for education. It was my Jesuit education at the University of Scranton that began to open my eyes to broad (what we used to call liberal) education, or foundational learning. There, I was exposed to the Great Books and great

thinkers as a mandatory requirement for freshmen. It led me to this gnawing sense that I really didn't know much. I didn't have a strong understanding of the things that seemed so foundational, not just to the American project but to the civilizations that inspired the Founders of our Republic. It led me to a lifelong interest in asking first-order questions. Where did this come from? Why are we doing this certain thing? Perhaps how we could do things better, but more, "What was the thinking that grounded the decisions that we are making today?"

MC: I can certainly appreciate that. As a homeschooler, my family has always placed a very strong emphasis on a liberal arts education. My family owns the 54-volume Great Books of the Western World set, and I have learned incredible lessons about life and human nature from those dusty volumes.

PM: You make a great point. We should engage these works wherever our studies take us. Large universities, home and hearth-it doesn't really matter. Younger thinkers who are beginning their education should give more thought to what you are studying than where you are studying it. These ideas are more available now than in the past through technology. We should take advantage of those advances and inspire people to engage with these subjects and focus less on where they will learn them.

MC: Have you incorporated classical legal sources into your "American Legal Tradition" course at Seton Hall, and would you also mind telling our readers a little more about this program?

PM: This past semester, I started to study how things changed from the American proposition that Lincoln challenged us to recognize—the idea that law is an evolving standard which needed to be constantly worked out like a mathematical equation or philosophical proposition—to the kind of thin and often shrill discourse that we now see in the public square. What, in other words, had gone wrong? I wanted to explore that in a more organized way, and created a legal seminar that I called "The American Legal Tradition" to probe this question with a group of fellow explorers. We read widely, from Psalm 119 to Father John Courtney Murray to Blackstone, Paine, Rousseau, and Burlamaqui. We revisited *The Federalist* and early cases that were decided by the Supreme Court. The idea, at each step, was to try to build the story of the American legal tradition into a more coherent exploration of working out problems. That is probably where I will land on most of these things. I think that the law in America is, as Lincoln said, the working out of a proposition. It is a concept that must constantly be proved against external standards. The challenge of the judge and the responsibility of the lawyer is to identify the relevant standards necessary to the working out of that equation. It has been a pleasure to encounter these works again in the classroom and to read some new ones along the way. I

would add that as a corollary to my earlier comments. Part of reading the Great Books is amplifying what you have read with new scholarship that's re-engaging these works and exploring new ideas that may have been missed the first couple hundred times around.

MC: I appreciate that, sir. I would also like to read aloud a passage from your recent paper in the Harvard Journal of Law and Public Policy which touches on this topic: "Justice Scalia and Judge Bork were, for much of their lives, scholars. Their only job, their comfortable center, was the future of ideas. Most members of the bench are simply lawyers who, through a combination of timing and connections, wound up serving as judges. Be careful how you view us, mindful of what you ask the generalist judge to do."[1] On the one hand, the Founding generation believed that judges cannot perform their jobs well unless they had a strong grasp of where law comes from and what its ultimate purpose is. However, in your essays, you point out some of the dangers of having judges engage in high-level theorizing. Is there a tension between these two facts, and how do you believe that young people interested in the law should approach the generalist v. specialist distinction?

PM: I side with Wendell Berry on the importance of avoiding expertise and embracing generalism and that the role of the expert has been overstated in modern American culture. But, I do believe (and think Berry would agree) that anything worth doing is worth doing well. The generalist cannot succumb to a kind of rank amateurism and ankle-deep immersion in anything that happens to catch his fancy. My fear that I tried to explain in that essay is that judges, because of their appointment, think that they have an intellectual station equal to that of the professional scholar. I pointed to Justice Scalia and Judge Bork as examples of how we shouldn't think of ourselves. Justice Scalia was a law professor for many years and wrote endlessly on questions of constitutional theory and administrative law. Judge Bork was a scholar of American policy and a pioneering professor of law and economics. Both taught at major universities. They brought their scholarly instincts and training to the federal bench.

Most of us did not follow that path, as I write. We were not professors for several decades before we stepped into this role. Most of us were lawyers, so we understand the craft of the law and the trade of the practice, but we are not primarily architects of ideas.

So what should we do? We should try to do our job well with the understanding that there are others for the development of ideas in the academy. One can be an excellent carpenter without also being the craftsman that designs the chair. My fear is that we're trying to do both, and we're not doing either particularly well.

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[1] Hon. Paul Matey, *"Indispensably Obligatory": Natural Law and the American Legal Tradition,* 46 HARV. J.L. & PUB. POL'Y 967, 969 (2023).

MC: On this point about being a craftsman, your political theory seems to oppose dogmatism, or the development of entirely new ways of looking at the law which do not build upon the achievements of the past. Out of curiosity, how did Sir William Blackstone avoid this mistake while still making unique contributions to legal philosophy?

PM: Great legal scholars remind me of archaeologists. They sift through the ideas and organize them in a coherent way. Here, I'm thinking less of the scholar of theory than the scholar who collects the ideas that have been around for a very long time. Those kinds of resources are incredibly useful to the practitioner and to the judge.

I think a leading example of that is the work of Sir William Blackstone. Blackstone, as your readers may be interested to know, was an extraordinary figure because he was an extraordinary failure in so many ways. He couldn't find success at the bar when he first started practicing. He had only a handful of cases in his first five years. He tried to become a tenured professor and was turned down. Later in life, he would serve as a judge, and his rulings were reportedly reversed at a higher rate than anyone else in London. This is not the sort of mark that most people want to make with their life. But he did have one spectacularly good idea, and that was to ask why are places like Oxford and Cambridge teaching law students only the civil law of Rome? There's a good deal of law out in the English countryside, and that's what people are using in everyday life. He asked why professors were teaching these theories instead of the actual law of the realm.

He went through the hard effort of collecting all these common English standards into four volumes, organizing them around themes and making them digestible, and then presenting them to students at a series of lectures. This, to me, is remarkable. On the one hand, this is a very simple way of thinking about the law, but on the other, it had not been done particularly well since Sir Edward Coke. Blackstone is a particularly helpful theorist to look towards. His idea was less to come up with a new idea than to say, let us take what has already been put together and see if we can organize it in a way that will be useful to our society.

MC: Is it almost like Cardinal John Henry Newman's view of the development of Catholic doctrine, where the ideas themselves do not change but they are unfolding and being organized in new and different ways? Is that an appropriate way to look at the law?

PM: Yes, and that there is an idea that's behind the organization is most important. I think Newman is a terrific example. I'll also go back to Ignatius. His *Spiritual Exercises* did not replace God. Rather, they were a series of practices to know God and His will more clearly. We often say that the judge should turn to his toolbox that contains all the tools of ordinary interpretation familiar to legal practitioners. My sense is that Blackstone was an early

advocate of that same principle. He taught us that deciding legal questions requires the right tools. It's not enough to say, "I wish to apply the law, so I turn to the tools." Well, what are those tools? I don't think finding that answer is the role of the judge. The judge must decide the cases and controversies that are before him. Scholars assist the judge by doing the work of identifying the tools that have been traditionally understood as necessary for the exploration and determination of the law going back centuries. Scholars present those tools to the judge for him to embrace in his work. The judge should welcome that assistance, remaining a student of the law rather than aspiring to academic expertise.

MC: Does that relate to the classical view that courts and the law serve an intrinsic good rather than acting as instruments for an external ideology?

PM: Yes, and Sayers makes this point. You also see it in the writings of Saint Josemaria Escriva too. The work that we do, and here I would turn back to my point regarding expertise versus amateurism, doing what we are called to do well and vigorously honors our mirrored image from the Creator. We need not become an expert on everything to do one thing particularly well. I think Blackstone did one thing particularly well and we see the law more clearly from his labor.

MC: When did you decide to enter the law, and what was your reason for doing so? What gave you this passion for knowing what the law is?

PM: I wish that I could claim the heritage that you and your listeners do, which is this clear sense of having a vocation for the law at an early age. My name was well-chosen. I think my family knew that I would be more of a Saul than a Paul for a long time, and as a result, I think I wandered a great deal. I saw myself as a writer, as a philosopher, as an entrepreneur, and so on. Law was something in the background. I really saw it as just one way in which I could explore my appetite for ideas. But what turned me, I think, was my encounter with the Neo-Positivism of Hart. This idea that there were definite rules spoke to me and cleared away the muddle that had dominated my early thinking. Law became my grounding force. It also taught me the value of labor. Industry is the one thing we should be inspiring in the next generation, and law does allow you a deep and satisfying engagement with work that is often missed in modern culture. Being a lawyer, as a tradesman, has given me great satisfaction, and met well my need to ground my intellectual curiosity in something practical.

MC: Toward the end of your essay in a footnote, you give a couple of examples from opinions that you have written which exemplify, or attempt to exemplify, the classical legal tradition in practice. I'm curious about this point. I can picture a judge who considers himself a positivist (one can argue about whether this is actually possible in practice) who would

probably say that when a case comes before them, they look first to the text, and if they cannot find a clear answer there using dictionaries from the time of enactment, they would open a landmark treatise such as the one drafted by Justice Scalia and Professor Garner and look to the longstanding presumptions of statutory interpretation. Would you agree with that method?

PM: I can't point to any opinions that perfectly demonstrate the classical legal tradition. I will go with your alternative characterization that these opinions *attempt* to exemplify the classical legal tradition, because I think that's the best that we as judges can aspire to. To the extent that it really exists, the purely positivist reasoning is simply an application of the first step of Blackstone's hierarchy of interpretation, that the intent of the lawmaker is best understood by the words of the lawmaker in their normal signification. That resolves, let's call it 95%, of cases that will come before federal judges. I will speak only to the federal practice given my role. When we try to interpret positive law, whether it be the Constitution, an Act of Congress, or an administrative regulation, most of the time looking to prior precedent or how those words would have normally been understood by a reasonably competent speaker of the English language will do the trick. In these scenarios, you needn't look much farther than Webster's Second or, as you said, Scalia and Garner.

The question that, I think, you're interestingly posing, is what happens if that isn't sufficient. What if you have done your due diligence and are still left with sufficiently capacious meaning that you can't reach a determinate answer? What is there to do? Well, I think what judges have always done is look to the broader context in which that law was enacted. So, to finally get to the question of how one goes about a case then, I think the answer is that lawyers and judges need to start at the beginning, looking at the state of the law before the enactment of the law which is now the subject of the controversy. That helps us answer the fundamental question, which is what was the mission of the enacted law and the problem it was seeking to remedy.

In the cases that you mention, the opinions give a bit of a lens into that. One of them was a case involving a dispute in a commercial setting regarding the joinder of necessary parties. When do you have to bring somebody into a lawsuit to make sure that everyone gets what is due and you don't have multiplying lawsuits? That's a very easy concept to understand, but working it out from the few words from the Federal Rule winds up being a little tricky. So what we did in that case was go back and look to see where Federal Rule 19 came from. There was law before it, and obviously there were cases before it. How did we think about the joinder of absent parties before there was a rule? And it turns out that there was a very rich equitable practice going back to the English common law, and there were specific ideas for complete justice that judges were thinking about when they ordered the joinder of an absent party. And it turns out that the drafters of Rule 19 knew that practice and were

baking those concepts right into the language. Studying that history gave me great confidence in applying the rule. We are not engaging in a technical recitation of a formula to decide when someone should be brought in or left out. We are resorting to the principles of equity and the common law. That made, I thought, the decision easier to follow for parties and sounder for us to ground our thinking upon. Could one have done that with just the purely positivist tool of reading the words? I don't think so, and I try to explain that in this particular opinion. You could read those words in more than one way and still be left with a kind of indeterminacy that doesn't satisfyingly lead to a resolution. Going back to the pre-enactment history and building the story that led to the positive prescription not only reinforces the predictability that the law should strive for but also reflects the lawmaker's will, which, going back to Blackstone, really is the nature of the judicial function.

MC: That's very interesting, and on this topic, I would also like to turn our readers to another essay that you wrote in a legal journal called *The New Digest*. There, you assert that many judges profess that they are positivists by night, but during the day, they recognize that the text of positive law itself cannot truly be the only tool in the interpretive toolbox. I recently watched a video of an interview that Justice Scalia gave to the Hoover Institution at Stanford University, and one member of the audience asked whether natural law should play a role in interpreting the Constitution. He swiftly said, "No."[2] However, in a separate article that he drafted in the 1980s, Justice Scalia wrote that judges should seek to conform their decisions to the reason of the law.[3] I'm a little curious about this point, because it seems that Justice Scalia rejected the use of natural law *per se*, but also believed in a Blackstonian model of adjudication. I would be greatly intrigued to hear your thoughts on this possible combination.

PM: My admiration for Justice Scalia is second to none. One of the great tragedies of my legal life is that I will not see where he would have taken his important ideas. He wrote so richly on so many topics and never stopped thinking through tough questions. It would be remarkable to see where his life in the twenty-first century would have brought him. What can we then do? We have to try to reconcile some of these points that he made along the way. He famously remarked that he was a fainthearted originalist and was skeptical of taking some positivist ideas to their ultimate expression. That hesitancy is a reminder for us all to not get caught up in dogmatic thinking, this idea that theories somehow displace

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[2] Hon. Antonin Scalia, *Uncommon Knowledge with Antonin Scalia,* Hoover Institution, October 31, 2012, https://www.bing.com/videos/riverview/relatedvideo?q=justice+scalia+uncommon+knowledge+interview&mid=0E9955F940FBB46ADBD30E9955F940FBB46ADBD3&FORM=VIRE, retrieved June 10, 2024.

[3] Hon. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L. J. 511, 515 (1989) (arguing that judicial decisions should be "compatible with the reason or purpose of the statute").

the law. Theories are merely a lens into the law. Ours is the search for the law itself. I do argue that in many cases, if not at least some, purely positive prescriptions have to give way to a richer understanding of the law. I am comfortable reaching that conclusion because the great judges and Justices of the republic seem to have been doing so since the Founding. Marshall routinely reached for these kinds of tools in his decisions. Those are the decisions that we insist first-year law-year students begin their studies with, and I am comfortable saying that they can ground our jurisprudence today. While I see some tension in Justice Scalia's writings, I think they are nothing more than evidence of the search that we are trying to work out for the proper balance between the enacted law and the assumed law. I have grown confident that the answer in that balance is to understand that the enacted law always works in the foreground with the background being the natural law. We write these positive prescriptions against the understandings that were always thought essential to human nature, and I am comfortable reaching that conclusion because I see that argument being made again and again by members of the Founding generation, and this is what I tried to draw out in that article.

MC: Thank you very much for sharing your thoughts, sir. I have found this to be fascinating. Before we wrap up, I would also like to ask if there are any books or sources that you would suggest to our readers if they would like to gain a better understanding of our legal heritage.

PM: There are three that I think would be particularly helpful. Hadley Arkes is a dear friend and has been working on these issues for many years, and I know that you and the rest of the leadership at OA are familiar with his work. He has a new book called *Mere Natural Law*, and it's an excellent synthesis of his earlier thoughts. It's also essential to grapple with the work of Professor Adrian Vermeule at Harvard Law School. His recent book *Common Good Constitutionalism* which helps to flesh out the link between the Anglo-American legal tradition and the Roman legal tradition, and the enormous influence classical thinking has on our understanding of the law. Finally, Stuart Banner's book *The Decline of Natural Law* helpfully charts the answer to the question which may intrigue many of your readers, which is, What happened to all this? If natural law was the lexicon of the Founding generation, where did it go? Why did it become so controversial and so unfamiliar to the modern lawyer's ear? Banner does a great job of saying here's what happened. Some of it follows from the rise of positivists like Holmes and the massive influence that they exerted. Some of it was the rise of the social sciences and the search for empirical answers to everything in the nineteenth century. Some of it was just happenstance and commercialism. The growth of legal publications and the reliance of lawyers on written words as evidence to win their cases. That's a great place to start because it answers the question of what we were doing beforehand. When you encounter it in that historical context, I think it becomes far more knowable and far less mysterious.

MC: Thank you very much for those recommendations, sir! I hope that many of our readers will soon add these works to their summer reading lists. Thank you again for taking time out of your busy schedule to speak with our publication, and I hope you have a wonderful week.

PM: Of course! Thank you for having me.