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LS 190 – Natural Law and Constitutional Interpretation
Spring 2022
Tues-Thursday, 3:30 – 5 pm
Social Science Bldg, Rm. 104

This course will examine whether Natural Law is still relevant today. The Natural Law tradition stretching back to antiquity was at the center of Anglo-American and European law at the time modern constitutional democracy took shape. For more than a century Natural Law reasoning has been supplanted by numerous modern foundational rivals. Is Natural Law legal reasoning therefore wholly obsolete? What might remain operative from this tradition? Can it inform judicial review of constitutional controversies in any substantial way? This seminar will review the Natural Law tradition and its principal challengers; the two forms of modern Natural Law thought (Aristotelian/Thomistic, based on teleology, and the Kantian Natural Law theory based on synthetic rationalism), and the relation of Natural Law to the common law and positive law.

There are no required books to purchase. Readings will be compiled in a reading packet and posted to bCourses in PDF format.

There will be several recommended optional background books and law review articles posted on bCourses, including Edward Corwin's *Higher Law Background to American Constitutional Law*. Especially recommended is Stuart Banner's brand new book, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped*.

Week 1 (Jan. 18 & 20) Introduction

Federalist #31
Martin Luther King Jr, *Letter from the Birmingham Jail* (excerpt)
German Basic Law of 1955 (excerpt)

Week 2 (Jan. 25 & 27): Begin at the Beginning: The Origins of the Idea of Natural Law (1)

Sophocles, *Antigone*
 Plato, *Crito*
 The Code of Hammurabi
 The Ten Commandments

Week 3 (Feb 1 & 3): The Origins of the Idea of Natural Law (2)

Aristotle, *Nicomachean Ethics* (Excerpts)
 Excerpts from Cicero, *Republic*
 Leo Strauss, "On Natural Law"

Week 4 (Feb. 8 & 10) From Classical to Medieval to Modern Natural Law

Cicero, *De Officiis* ("On Duties"), (excerpts).
 Thomas Aquinas, *Treatise on Law (Summa Theologica)*
 Hugo Grotius, *The Law of War and Peace*
 Samuel Pufendorf, *On the Law of Nature and Nations*

Week 5 (Feb. 15 & 17) Natural Law and Common Law

Sir Edward Coke, *Dr. Bonham's Case*
 Blackstone, *Commentaries on the Common Law* (excerpts)
 Thomas Reid, "Of Reasoning"

Week 6 (Feb. 22 & 24) Natural Law and the American Founders

Declaration of Independence
Federalist 43, 78, 84 (excerpts)
 Madison's Notes on the Federal Convention, "Ex post facto clause"
 James Wilson, "On the Law of Nature"
 James Madison, "On Property"

Week 7 (Mar. 1 & 3): Natural Law in the Early Republic & Marshall Court

Joseph Story, *Commentaries on the Constitution* (excerpts)

Rutgers v. Waddington (<https://archive.org/details/caseofelizabethr00rutg/page/n59>)
Calder v. Bull, 3 US 386 (1798)
Chisholm v. Georgia, 2 US 419 (1793)
Fletcher v. Peck, 10 US 87 (1810)
Van Horne's Lessee v. Dorrance, 2 U.S. 304 (1795)

Weeks 8 & 9 (Mar. 8, 10, 15 & 17) Modern Natural Law & Its Challenges

Kant, *The Science of Right*
 H.L.A. Hart, *The Concept of Law* (excerpts)
 Lon Fuller, *The Morality of Law* (excerpts)
 Oliver Wendell Holmes, "Natural Law"
 Berns, "The Illegitimacy of Appeals to Natural Law"

[Week 10: Spring Break. Week of March 20]

Weeks 11 - 12 (Mar. 29 & 31, Apr. 5 & 7) Modern Applications and Challenges to Natural Law (1)

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)
Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)
Ogden v. Saunders, 25 U.S. 12 Wheat. 213 (1827)
Corfield v. Coryell, 6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. (1823)
Swift v. Tyson, 41 U.S. 1 (1842)
Dred Scott v. Sandford, 60 U.S. 393 (1856)
Buckner v. Street, 4 F. Cas. 578 (E.D. Arkansas, 1871)

* Term paper draft due.

Weeks 13 - 14 (Apr. 12, 14, 19 & 21) Modern Applications and Challenges to Natural Law (2)

Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873)
Munn v. Illinois, 94 U.S. 113 (1876)
Yick Wo v. Hopkins, 118 U.S. 356 (1886)
Lochner v. New York, 198 U.S. 45 (1905)
Twining v. New Jersey, 211 U.S. 78 (1908)
Buck v. Bell, 274 U.S. 200 (1927)
Nebbia v. New York, 291 U.S. 502 (1934)
Erie Railroad v. Tompkins 304 U.S. 64, 58 S.Ct. 817 (1938)

Adamson v. California, 332 U.S. 46 (1947)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Roe v. Wade, 410 U.S. 113 (1973)
Adarand Constructors v. Peña, 515 U.S. 200 (1995)
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)
Alden v. Maine, 527 U.S. 706 (1999)
Stogner v. California, 539 U.S. 607 (2003)
DC v. Heller, 554 U.S. 570 (2008)

Week 15 (April 26 & 28) Restatement, Summary and Conclusion & Loose Ends

Final term papers due, Friday, April 29