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Educational materials for U.S. Supreme Court

INTRODUCTION TO THE U.S. SUPREME COURT AND NATURAL LAW

In this article, Paul Moreno explores the role of natural law in Supreme Court decisions. “Natural-law jurisprudence” encompasses an idea of natural law that is far broader than any of the natural law traditions included on the website, and involves a judge’s resort to any “higher law,” anterior and superior to the written constitution. He traces this broad idea of natural law from the Declaration of Independence’s claims about “self-evident truths” of human equality and the necessity of consent, to the Court’s recent 1992 assertion that at “the heart of liberty is the right to define one’s own concept of existence.” Many Supreme Court justices have based their decisions forthrightly on natural-law arguments, appealing to what they argue are well-known principles of reason and justice. Others have found a textual basis for natural-law arguments in the Constitution’s contract clause, the 5th Amendment’s “due process of law” clause, and the 14th Amendment’s reaffirmation that no state can deny “the equal protection of the law” to any person. Opponents of natural law jurisprudence argue that it imports into constitutional interpretation political and economic theories external to the Constitution’s text. Critics such as Justice Black also argue that decisions which appeal to universal principles are only based on subjective considerations of natural justice.

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GLOSSARY OF TERMS FOR SUPREME COURT

Blackstone, Sir William (1723–1780):

English jurist and writer on law whose ideas on natural law as expressed in his Commentaries on the Laws of England greatly influenced the drafting of the U.S. Constitution.[1]

civil libertarians:

advocates for the protection of civil rights and liberties in law. Civil liberties include free speech, the right to bear arms, the right to vote, the right to full and equal protection of the laws, and others.

common law:

unwritten law derived from the accumulated legal customs, practices, and judicial decisions of a country’s legal history. The United States has a tradition of common law that derives from the older English common law.[2]

***Dred Scott v. Sanford*:**

The 1857 decision of the Supreme Court in which Dred Scott, a man enslaved in Missouri, sued in federal court for his freedom. He based his suit on the fact that his master had brought him first into a state where slavery was forbidden, and then into a federally owned territory where slavery was forbidden. The Court decided against Scott. The Court first ruled that Scott could not sue in federal court because he was not a U.S. citizen under the definition of the Constitution. Secondly, the Court ruled that the federal government could not outlaw slavery in federal territory because the Constitution

acknowledged the right to property in a slave. (This ruling therefore voided the Missouri Compromise.) Tangentially, the Court said that Scott's residency in Illinois had no effect on his status as a slave, but that the laws of Missouri, the place of his enslavement, controlled that matter. Critics at the time said that the ruling effectively permitted slaves to be held in states that forbade slavery as long as the slaves were originally enslaved in states where slavery was legal. The controversy that followed is thought by many to have been one of the leading incitements to the Civil War.

***ex post facto* law**:

a law such that after its passage it affects not only activities that will happen in the future, but also events that have occurred in the past. For example, imagine that a law were to be passed that increased the fine for speeding while driving not only for future speeding offenders, but also for all those who were found guilty of speeding in the past. In other words, previous offenders would now have to pay additional money in order to make up the difference between the old fine and the new one. Such a law would be *ex post facto*. Such laws are forbidden in the United States by the federal Constitution. (*ex post facto* = Latin for "from the thing done afterward") (See Primary Document Calder v. Bull)

Federalist:

A supporter of the ratification of the Constitution and a member of the Federalist Party, an American political party that existed from 1789 until 1816. The Federalists were strong supporters of the federal Constitution and favored the idea of a strong centralized government for the United States.[3]

French Revolution:

(1789–1799) the political revolution in France that ended the long-established monarchy in that country, established the first French republic, and ended with the ascension of Napoleon Bonaparte to power.[4] The movement justified itself with the language of the universal "rights of man" to "liberty, equality, and brotherhood" borrowed from the ideas of the preceding French Enlightenment. The Revolution eventually devolved into a prolonged period of brutality called the Reign of Terror as the leaders of the Revolution, in the name of reason and human rights, went about executing their political enemies, particularly the French aristocracy and clergy. This aspect of the Revolution frightened many in England and the United States, and caused many Americans at the time to become more restrained in their use of the language of universal rights.

Lochner v. New York:

One of the most infamous of the "laissez-faire" decisions of the U.S. Supreme Court. In this case, the Court overturned a New York law that forbade bakers from working more than ten hours a day or sixty hours a week (in order to protect them from being overworked by employers, or to eliminate the competition of bakers who were willing to work longer hours). The Court based its decision on the alleged right to "liberty of contract," which, the Court said, was included in the "substantive due process" protected by the 14th Amendment. (*See* SUBSTANTIVE DUE PROCESS) So greatly did this case tarnish the doctrine of "substantive due process" in the eyes of progressive reformers and later Supreme Court justices that for a long time any justice who engaged in natural-law jurisprudence under the cover of "substantive due process" was accused of "Lochnerizing."

"positive enactments of state legislatures and courts":

Here "positive enactments" are those laws or rulings that have been enacted by persons holding the offices of government. They might also be called "positive law." Positive law is distinct from eternal law, of which natural law is theoretically a part. Positive law is that law which is manmade. Eternal law is the law that exists independently of human beings and which all human beings are obligated to follow whether or not their own laws acknowledge or follow it.

incorporation:

a Supreme Court doctrine, formed around 1890, which states that, because of the "due process" clause of the 14th Amendment, not just the federal government, but also state governments are restricted by the federal Constitution's Bill of Rights. In this way the states are said to be "incorporated" into one body under the Bill of Rights. Previously the states were at liberty not to respect the rights outlined in the Bill of Rights unless their individual constitutions stated otherwise.

jurisdiction:

the legal authority and power to decide how to apply or interpret the law, or the sphere of territory or activity over which one has authority to judge, legislate, or enforce the rule of law. Article III of the Constitution outlines the jurisdiction of the Supreme Court.

jurisprudence:

the philosophy of law. In the case of the Supreme Court, this term especially means the method by which the Court decides cases that it hears, or the collection of all of its written opinions (wherein its method is seen in action). "Natural-law jurisprudence" is the method of deciding court cases by following the unwritten laws of nature or some other standard not set by human beings.

jurist:

any judge, legal expert, or legal scholar.[5]

laissez-faire jurisprudence:

the judgment of court cases according to laissez-faire economic principles. This kind of argumentation was common in the late nineteenth and early twentieth centuries and is thought by scholars of the Supreme Court to be a kind of natural-law jurisprudence. Opponents of laissez-faire jurisprudence accused the Court of appealing to theories that were not found in the text of the Constitution.

Magna Carta:

the "great charter" that King John of England was forced by the English barons to grant at Runnymede, June 15, 1215, traditionally interpreted as guaranteeing certain civil and political liberties.[6] Some of these liberties are guaranteed by the U.S. Constitution and the Bill of Rights.

natural-law jurisprudence:

the name for the method or philosophy in which some Supreme Court justices decide cases that the Court hears by discerning allegedly universal, timeless, "fundamental" laws (that are not man-made or "positive" laws), and then by applying them to a given case. This jurisprudence is described as "natural-law" jurisprudence by scholars of the Supreme Court although such jurisprudence need not look explicitly to "nature" or to any systematic theory of natural law. Also called "natural law reasoning."

procedural due process:

the doctrine of Supreme Court jurisprudence that interprets the 5th and 14th Amendments to say that either federal or state governments may deprive persons of life, liberty, or property, as long as the correct procedure or "due process" of justice is followed. Here "due process" is interpreted to mean only the process of legislation, enforcement, and judicial trial by which the law is made, executed, and interpreted by the various branches of government operating in accord with the Constitution. To put the point more positively, under this understanding, the very mechanics and framework of government that

flow out of the Constitution protect human rights. If that framework is obeyed, human rights will on the whole be secured best. To give an example, this doctrine would say that in order for a murderer to be deprived of liberty (by being sent to jail), he need only be justly arrested, tried for the alleged crime, and found guilty. That arrest and trial operating in accord with the law and the Constitution are what constitute "due process," and they protect both the rights of society (whom the murderer has offended) and of the murderer (who despite his offense retains "unalienable rights"). This concept is usually opposed to "substantive due process." (*See* SUBSTANTIVE DUE PROCESS) Opponents of this understanding of due process say that it leaves too much freedom for the government to violate fundamental rights under the cover of legal process: injustices against African-Americans by means of slavery and later racial segregation are taken as an instance of such violations.

state police power:

the power of individual states of the United States (but not of the federal government) to regulate by law any matter of public health, safety, and morals.

substantive due process:

the doctrine of Supreme Court jurisprudence that interprets the 5th and 14th Amendments of the U.S. Constitution to say, contrary to those who hold the doctrine of procedural due process (*see* PROCEDURAL DUE PROCESS), that the "due process of law" by which federal or state governments may deprive persons of life, liberty, or property refers to more than simple adherence to legal and constitutional procedures. Rather, this doctrine says that "due process" also includes the practical dictates of universal reason or "rationality;" these dictates include the protection of certain universal, foundational rights that are not necessarily described in the law or the Constitution. Therefore any governmental action, even if it done according to constitutionally established procedures, may be overridden if it violates fundamental human rights without a "rational basis." This doctrine is especially meant to prevent the violation of rights that are not written into the text of the Constitution or its Amendments. Because these rights are unwritten, they need to be derived from some authority other than the text, which derivation inevitably requires some form of natural-law jurisprudence, as Professor Moreno states in his essay. (*See* NATURAL-LAW JURISPRUDENCE) The task of discerning the rights protected by substantive due process has generally been given to the federal courts. Opponents argue that this doctrine effectively makes the Supreme Court and not the people of the United States the ultimate rulers of the American government even though, they say, there is no reason to believe that Supreme Court justices specifically educated in human laws are on average any better at figuring out the timeless laws of right and wrong than are the people as a whole. In such a situation, they continue, democracy (rule by the people) is effectively replaced by oligarchy (rule by a few), and oligarchy still remains open to human rights abuses.

yellow-dog contracts:

labor contracts in which employees promised not to join labor unions. Union organizers claimed that such contracts were used to exploit workers during the late nineteenth and early twentieth centuries. During the era of its "laissez-faire jurisprudence," the Supreme Court kept the states from prohibiting such contracts.

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[1] "Blackstone, Sir William," *Webster's College Dictionary*, Fourth Edition. Agnes, Michael, Ed. (Foster City, Calif.: IDG Books Worldwide, Inc., 2001).

[2] "Common Law," *Webster's New World Collegiate Dictionary*.

[3] "Federalist," *Webster's New World Collegiate Dictionary*.

[4] "French Revolution," *Webster's New World Collegiate Dictionary*.

[5] "Jurist,"*Webster's College Dictionary*.

[6] "Magna Carta," *Webster's College Dictionary*.

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OUTLINE OF ESSAY ON SUPREME COURT

I. Introduction

A. The Court prefers to stick to interpreting the text of the Constitution rather than discerning unwritten laws on which the ideas expressed in the text are based.

B. "Natural-law jurisprudence" involves a judge's resort to a law higher than the written constitution. The ancient Athenians, Cicero, Aquinas, and English jurists have all maintained some kind of natural law theory.

II. Most direct sources of the natural law thinking that influenced the framers of the Constitution: Declaration of Independence; Blackstone's Commentaries; James Wilson's Law Lectures.

III. The Early Supreme Court: Forthright appeals to natural law.

A. Chisholm v. Georgia (Justice James Wilson)

B. Calder v. Bull (Justice Samuel Chase)

IV. Early Nineteenth Century: Retreat from natural law

A. Reasons for retreat:

1. reaction against the gruesome French Revolution's appeal to the "rights of man"

2. suspicion of natural law as a theory of elites

B. *Fletcher v. Peck* (Chief Justice John Marshall) used natural-law doctrines without calling them such. Claimed that they were implied in the Constitution's text.

C. *Terrett v. Taylor* (Justice Joseph Story) appealed to "common sense" and "maxims of eternal justice."

V. Pre–Civil War Era: Revival of natural-law jurisprudence

A. Reason for revival: Slavery raised fundamental issues of liberty and property; reaction to laws passed by state legislatures that courts deemed unjust.

B. Gave rise to the notion of "substantive due process": it was thought that "there were fundamental or natural rights that government could not violate regardless of the forms it followed"

VI. Reconstruction Era and the 14th Amendment: Growth of natural-law jurisprudence

A. Reason for growth: 14th Amendment enshrines rights to life, liberty, and property in the Constitution; provides a textual basis for using natural-law doctrines in jurisprudence (as John Marshall had done).

B. Chief Justice Salmon Chase (*Legal Tender Cases*): applies a Constitutional prohibition directed

at the states against the federal Congress.

VII. Late Nineteenth Century: increase in appeal to natural law through substantive due process

A. Slaughterhouse Cases (Justice Stephen Field) deny the existence of certain allegedly universal rights of workers.

B. Lochner v. New York uses the doctrine of "liberty of contract" under "substantive due process" in order to overturn state labor laws.

VIII. Early Twentieth Century: Reaction against Natural-Law jurisprudence

A. Justices Holmes, Pound, Brandeis called previous decisions "laissez-faire" economic jurisprudence; said those decisions were illegitimate because they used theories not in the text of the Constitution.
B. New Deal ends "economic due process," but leaves room for the protection of non-economic and minority-group rights under the "double standard" of the *Carolone Products* case.
C. Court leaves open the possibility that rights of minority groups may be protected by appeal to universal rights.

IX. Mid- to Late Twentieth Century: Return of Natural Law through "Incorporation"

A. Incorporation: The application of the Bill of Rights to state governments through the 14th Amendment.

B. Griswold v. Connecticut said that a "right to privacy" is implied in the Bill of Rights

1. Justice Black's dissent: "mysterious and uncertain natural law concept," depends on "subjective considerations."

C. The right to privacy and its origin in pre-Constitutional law is reaffirmed several times in decisions related to the legality of abortion.

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STUDY GUIDE FOR SUPREME COURT

Part I. Basic Interpretation

If you are interested in the history of the Supreme Court's uses of natural law-thinking after reading Moreno's essay, please go to the Primary Source Documents to read some of the essential passages that relate to the article. As you go back to the primary sources, keep in mind the following questions:

1. The principles resorted to by "natural-law jurisprudence" are not necessarily tied to the classical tradition of natural law found on this website.

a. Consider the Declaration of Independence, Justice Wilson's reasoning in Chisholm v. Georgia, and Justice Chase's in Calder v. Bull. Clearly identify the "natural-law" principles

to which each Justice appeals.

b. The "contract clause" in the Constitution, as well as the 5th and 14th Amendments, have often been interpreted to provide a textual basis for natural-law doctrines such as "vested rights." What does the contract clause say? What do the 5th and 14th Amendments say? In your own words, why are these parts of the constitution best suited to support natural-law jurisprudence?

2. Natural-law jurisprudence can also be viewed from a more negative perspective, such as when Moreno mentions the excesses of the French Revolution and its intense assertions of the "rights of man."

   a. Beginning in the 1900s, "laissez-faire natural-law jurisprudence" began to be attacked by progressive legal theorists. What were their arguments against it?

   b. In his dissent in Griswold v. Connecticut, Justice Black rejects judicial decisions based on natural law or any allegedly universal standards because he claims that they are based on "subjective considerations," or as Justice Goldberg put it, on "personal and private notions." Based on your reading of Black's opinion, what does he mean by "subjective considerations" and why does he think that they are bad as a basis of judicial decisions?

3. How important is the role that nature plays in the respective appeals to "fundamental principles" or "general principles" that various Supreme Court justices have made in their written opinions? Compare the "fundamental principles" used by James Wilson with those used by the Court in the Slaughterhouse Cases or in *Griswold v. Connecticut*.

4. What is an alternative to "natural-law" jurisprudence? Does this alternative need to deny natural law, or might it simply propose concrete, uniform ways of recognizing and applying this law?

5. Writing for the majority of the Court in *Griswold v. Connecticut*, Justice Douglas found a right to privacy implied in the Constitution. In Douglas's own words, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance," one of which penumbras is, according to Douglas, the right to privacy. Douglas gives several examples of cases where he believes that the Court similarly found penumbras formed by emanations from the rights explicitly protected in the Constitution. In your own words, what does Justice Douglas mean by "emanation" and "penumbra" as written in this decision?

6. Which branch or branches of government may engage in "natural-law reasoning" according to Justice Black's dissent in *Griswold*? Why? Why did he not think that the courts specifically could use natural-law reasoning in their decisions?

Part II. Connections to Other Thinkers

In order to understand the Supreme Court's usage of natural law-thinking, it is important to also consider the context. As you look deeper into some of the landmark cases of the Supreme Court and explore their relation to natural law and other influences, consider these questions in order to see how the theories underpinning these cases fit into the broader history of ideas:

1. When scholars discuss the Supreme Court's decisions (as Moreno does in this essay), any judgment that appeals to an unchanging, universal law above man-made laws or constitutions is

often described as "natural-law reasoning" or "natural-law jurisprudence." These scholars use the term "natural-law reasoning" whether or not a particular reasoning about universal law seeks that law in human nature. "Natural-law reasoning" here could also seek law in some other universal, unchanging source that is not man-made, but to which man is subject. Compare two of the Court's "natural-law arguments" with the idea of natural law articulated by Thomas Aquinas. For Aquinas, what is the source of natural law? Is it simply a law's reasonableness? What does Aquinas mean by reason? Which opinions of the Supreme Court are closest to a more Thomistic view of natural law?

2. The essay ends by considering "the most expansive appeal to extra-constitutional natural-law norms," when the Court in 1992 upheld the right to abortion as a liberty protected by the 14th Amendment. What is the general principle that the Court decides is "at the heart of liberty?"

    a. Which thinkers on this website have ideas similar to those of the Court about the nature of liberty? To begin, compare the Court's logic with Hobbes' theory of natural right.

    b. Is this supposed "natural-law argument" closer to some of the theories of the opponents of natural law theory as presented on this website?

3. In 1937-1938, when the Supreme Court overthrew almost all of its 1890-1937 precedents in matters of economic regulation, the rejection of "laissez-faire natural-law jurisprudence" seemed complete. Opponents of this type of jurisprudence claimed that it imported into constitutional interpretation economic theories external to the Constitution's text. Do any of the natural law traditions that influenced the Founding Fathers in their drafting of the Constitution include certain economic principles? Or do you agree with the opponents of "laissez-faire" natural-law jurisprudence that the natural law traditions underlying the Constitution do not assume one theory of economics over another? Consider in particular the influencing ideas of Locke and Montesquieu.

4. In *Fletcher v. Peck*, Chief Justice John Marshall called the Constitution's "contract clause" "a bill of rights for the people of each state." That clause reads as follows: "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts."

    a. Are any rights of citizens implied in this clause? If so, which are they? In answering the question, consider Justice Chase's statements about the social compact in *Calder v. Bull*.

    b. According to Justice Chase in *Calder v. Bull*, the "great first principles of the social compact" transcend any particular contract or agreement actually made to establish a government. Because "it is against all reason and justice" that a people would have entrusted the legislature with "unlawful" powers, "it cannot be presumed that they have done it." Would Hobbes and Locke agree? In their respective accounts of the social compact, does the compact create natural laws, or is the contract legitimate only if it expresses a natural law that already exists? Chase seems to be arguing the second, but if this is the case, should he be more respectful of the constitution that should simply be an expression of "the great first principles of the social compact?"

5. Presumably, a country should enact only laws that are known to be good for certain because those laws affect the real people's lives. A law that harmed people would be especially bad because of the suffering that it would cause:

    a. What is a good standard by which one could be certain about a law's goodness? The

findings of "science"? The collective judgment of all people who are to be affected by the law? A scientific inquiry into the collective judgment of the people (such as the Gallup Poll, which Justice Black cites)? Explain why a particular standard would be best.

b. What methods of discerning what counts as just or good do Thomas Aquinas, John Locke, and Montesquieu use? How "certain" are their methods? Could any of these methods serve as a guide for deciding a case before the Supreme Court?

Part III. Critical Interpretation

With a basic understanding of the natural law that motivated Supreme Court cases, let us examine these cases more critically. Are the arguments advanced persuasive? Can we expand on the thought of these Justices to determine what they would say about issues they did not directly address? Use the questions below as your guide:

1. When the Framers separated the powers of the American government, they hoped that this separation would help the government to discern and carry out the demands of justice. Do you think that the separation of powers helps or hinders the federal government's ability to act justly, and how? Does natural-law jurisprudence adequately respect the separation of powers? Why or why not?

2. In *Griswold v. Connecticut* (1965), the Court struck down a state anti-contraceptive law on the basis of the "right to privacy" that was not expressly stated in the Constitution. The concurring majority opinion of Justice Goldberg helps to shed light on the relation of this case to questions of natural-law jurisprudence:

    a. Goldberg suggests that one need not look even to the Bill of Rights in order to find the "right of marital privacy" because that right is included under the 14th Amendment's protection of liberty. How would you make the case that the right to privacy is included under the right to liberty? What other rights are protected under the right to liberty? What rights are not protected by the right to liberty? Why?

    b. Goldberg says that judges who go about "determining which rights are fundamental" can easily and wrongly "decide cases in light of their personal and private notions." He proposes that in order to prevent this, the standard for judging the content of the fundamental rights protected by the Constitution must be the "'traditions and [collective] conscience of our people.'" Where would one discern these traditions and conscience? Would the study of history be a good place to start (as suggested by Justice Harlan in another concurring opinion)? Is historical analysis itself always tainted by "personal and private notions," and if so, how would one correct for such notions?

    c. Could you name some of the rights that are fundamental to what Americans think is important? Does Goldberg's appeal to collective human judgment amount to moral relativism, deriving fundamental rights from man instead of from some other source such as nature or a law that is higher than man? Would moral relativism be good or bad? Or does Goldberg mean to say that, although there is a higher law of justice, it can never be known perfectly, and that the best alternative is to rely on the collective opinion of the people who together make up a society? Or might there be some other explanation for why he seeks recourse to America's collective tradition and conscience?

3. Goldberg appears to provide an exposition of the American tradition regarding the right to privacy where he cites at length Justice Brandeis's dissent in *Olmstead v. United States*:

    a. Is Brandeis's derivation of a right to privacy correct? Is he correct to say that "the right to be left alone [is] the most comprehensive of rights and the right most valued by civilized men"? From what part of the collective tradition of America might he have found that understanding of the importance of the right to privacy?

    b. Why does Goldberg think that Brandeis's opinion is correct? Is Brandeis's opinion itself independent of "personal and private notions"?

4. Although he finds the Connecticut law to disagree with the "traditions and collective conscience" of the American people, Goldberg allows that the law could be legitimate if Connecticut had a "compelling subordinating state interest" to enforce it. Connecticut claims to have such a reason, but Goldberg concludes that "[t]he rationality of this justification is dubious." Here, then, Goldberg does not refer to collective tradition, but to a presumably universal standard of rationality.

    a. What is his basis for this statement as nearly as you can tell? Is the relation of contraception to sexual promiscuity manifestly irrational? Many sane and highly intelligent people today and throughout history have thought otherwise, including Thomas Aquinas, the New Natural Law theorists, and others studied on this website.

    b. How would you defend Goldberg against the charge that here he is simply using his "personal and private notions," quite to the contrary of what he claims to be doing? Where does he answer Black's criticisms on this point? Is Goldberg's kind of reasoning effectively natural-law argumentation, or some other form of reasoning?

5. Some, like Justice Black, the main dissenter in *Griswold v. Connecticut*, would claim that *Griswold* is an example of the Court's engagement in natural-law reasoning. They might say that Douglas's word "emanation" means a logical relationship between the written right and its unwritten "penumbra" that is a natural outgrowth of the written right. In other words, they say, Justice Douglas is engaging in legal philosophy: he is deducing unwritten rights from the written rights of the Constitution. He is claiming that the Constitution necessarily protects these unwritten rights as a consequence of the nature of the written rights that the Constitution explicitly protects. Is this actually what Justice Douglas is doing? What are the penumbras and emanations if they are not logical consequences and relationships?

6. Justice Black claims that any invocation of natural law can only be based on "subjective considerations of natural justice":

    a. What does it mean for a judgment to be "subjective"? What does it mean for a judgment to be "objective" (the word to which "subjective" is usually opposed)? Is it possible for any human being (or "subject") to make a "purely objective" judgment about alleged universal standards of justice?

    b. When one considers how many different strands of natural law thought have existed throughout history (just look at all of the examples given on this website), one might empathize with Black's refusal to allow justices to opine on the natural law in their decisions. As Justice Iredell (whom Black quotes) noted in 1798, "the ablest and the purest men have differed upon the subject" of what counts as "natural justice." If those

whom society agrees to have been the greatest minds in the history of philosophy did not agree about the content or form of the natural law (or about whether or not such a law even exists), what would make the majority of the currently sitting Supreme Court Justices just as able as if not more able than those thinkers to discern any so-called natural law? Or do all great thinkers agree about the content of universal, non-manmade law? If we could discern any agreement among those thinkers about what counts as just, should the Supreme Court use that agreement in its decisions?

c. When an injustice brought to the Court's attention is clearly egregious (as in the case of racial oppression exemplified by the Court's famous decision in *Brown v. Board of Education*), is the Court obligated to step in and correct the injustice? Justice Goldberg seems to have precisely such cases in mind when he faults Black's reasoning because it would allow states to enact "totalitarian" laws with impunity. With such egregious cases in mind, could you make the case to Justice Black that judges should try to look to the natural law in making their decisions?

Part IV. Contemporary Connections

The decisions of the US Supreme Court have affected the laws, and by extension, the lives of the citizens of America. Let us now turn to some contemporary issues and see how the Justices studied in this article would respond to them:

1. Contemporary judicial debates often center upon whether a Supreme Court Justice is a "strict constructionist" or a "judicial activist". In your own words, what is the distinction between these two ways of approaching judicial rulings? In your opinion, is it the strict constructionists or the judicial activists who are more closely tied to the traditional Thomistic interpretation of natural law? The judicial activists seem much more likely to favor "natural-law jurisprudence," but if natural law is knowable to all men, as Aquinas argued, why must judges look beyond, and even disregard, the written laws of the Constitution and the Framers' original meaning?

2. Justice Iredell once said that the Court may override laws, but only "in a clear and urgent case." What counts as "a clear and urgent case" of legal injustice (that is, for Justice Iredell, a manmade law that violates universal standards of justice)? Can you think of any cases in the last century that might qualify as a "clear and urgent case?" How we do we know the universal standards of justice that these cases violate? In light of your examples, do you think that this provision that allows for overriding the laws is too dangerous, or a necessary evil? Would it jeopardize the separation of powers?

3. Although Justice Douglas acknowledges that his reasoning in *Griswold v. Connecticut* appears similar to that of Lochner v. New York (in which the Court inserted nonconstitutional principles into its decision through the 14th Amendment), he insists that this case is different. Here the Court is not acting as a "super-legislature" in the same way in which, he claims, it did in *Lochner*. What is the difference between these two cases, according to him? Why was *Lochner* decided incorrectly according to him?

4. The Court retreated from a natural-law based jurisprudence in the early nineteenth century, in part as a reaction to the excesses of the French revolution. Indeed, the Reign of Terror began under the auspices of the universal "rights of man," but it rejected the existence of a law higher than man to limit and direct his freedom. Do you see any signs today of a return to the logic of the French revolution? Consider in particular the Court's 1992 assertion that "at the heart of liberty is the right to define one's own concept of

existence, of the universe, and of the mystery of human life." Does even nature limit man's freedom at this point? For example, why ought we to care about the environment if freedom is the right to define one's own concept of existence?

5. Many people see the Courts as the central battle ground of today's "culture wars":

    a. Give one or two examples in order to illustrate what this might mean. Do you agree that the Court's role in deciding these cultural issues is crucial? If so, is this a good thing, or a misappropriation of power?

    b. Do you see any connection between the Court's extreme version of absolute individualism in its recent assertion that one has the right to define one's own existence, and the individualistic philosophies of some of America's founders? Or did the Founders, even if they acknowledged man's individualistic tendencies, have some idea of nature that transcends man's particular desires and binds his freedom?

    c. If the Courts continue to define freedom as "the right to define one's own concept of existence," what kind of restraint could possibly influence their decisions? Do you think that the Court can come to some type of agreement on these major cultural issues through a return to some version of natural law that we all ought to recognize, or do you think that this is impossible?