

# WTN U. Class Notes

## Lesson 3 9/26/11

America's Foundations — the Rule of Law

Review: Declaration of Independence refers to the “law of nature and nature's God”

Natural law: belief that there is a moral law that has been woven into the natural order of things, the created order of things, that man AND government's ignore to their peril. Provided a “limitation on the king” meaning that there are some things that the king should not do, EVEN IF UNDER THE ESTABLISHED RULES, THE KING CAN'T DO THEM.

Two important follow-up thoughts:

1. Existence of this “natural law” was “self-evident” to them. Eg. William Blackstone - 17<sup>th</sup> Century legal scholar and wrote the famous Commentaries on the Laws of England that was the major source of legal education in the colonies.

Blackstone's logic was this: everywhere we look, we see in nature things governed by laws they have to follow. Since man is a part of this nature, it only follows that he too is subject to laws of his conduct and behavior that he needs to follow or he won't function right either.

Only difference between other thing and man is man's free will. Because of that free will, some mistakenly assume there are no rules that really does bind us

2. Natural law gave meaning to the “rule of law.” Can't have a rule of law without a Creator who has established a moral or natural law. All you can have is what I'd call a rule

of process. Today only under the “rule of law” in the sense that we have an agreed upon process by which civil laws are enacted.

Fact that we don't conclude that a law is right and just simply because Congress or the legislature followed the proper legal process for enacting the law means we are pointing to some nonhuman, nonlegislative law by which we say properly enacted law is “bad.”

Martin Luther King, Jr. said same kind of thing in his Letter from a Birmingham Jail

“How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law.”

Eg. of only rule of process is ACLU Representative having no answer to why it would be morally wrong for me to use constitutional amendment process to eliminate her right to abortion higher law than man's law. She really does believe there is a law higher than man's law by which man's law can be judged because that is the unwritten law by which she is determining that her “rights” are being violated.

Query: who is to say that the process we do have shouldn't be different?

CONSTITUTION:

Federalist Papers: originally 85 newspaper essays written under the pen name Publius. Actual authors were John Jay, who was the first Chief Justice on the US Supreme Court; Alexander Hamilton, Secretary of the Treasury under George Washington; and James Madison, who eventually became our fourth President.

First compiled and published together under the name The Federalist in the spring of 1788.

Key principal in Federalist Paper 51:

But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary

Founders didn't believe today's "perfectibility of man" nonsense - we're evolving into a more "human" person.

Perfectibility of man is belief that if we change the environment and in the right environment, man will naturally be good and do good.

Have to decide: when left alone and to our own devices, is our natural bent toward evil or toward good? Answer shapes what you do.

Question: If people are bent toward evil, how do you control people? Flip side: if people are bent toward evil, then how do you control the people that are trying to control the people?

Same questions in Federalist Paper 51 - here's the dilemma:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

And they said:

A dependence on the people is, no doubt, the primary control on the government [in other words, elections]; but experience has taught mankind the necessity of auxiliary precautions.

So let's look at those auxiliary precautions.

First consideration was the general frame of the government. Only a limited number of options.

1. Monarchy — rule by one person
2. Democracy — direct rule by everyone — where, as they said in Federalist paper 14, “the people meet and exercise the government in person.”
3. Republic — which we’ll describe a bit later.

First concern related to this dilemma of how to control the government and government control the people was what they called “faction.” Federalist Paper 10.

Founders said “factions” it was said were “sown in the nature of man.”

“Faction” meant:

“a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest adverse to the rights of other citizens, or to the permanent and aggregate interest of the community.”

Development of groups of people who get together and through their coalition do something good for group but not citizens and the community as a whole.

Why concerned about minority factions when majority vote is required?

“It does not take a majority to prevail . . . but rather an irate, tireless minority, keen on setting brushfires of freedom in the minds of men.” (See “Samuel Adams — A Life” by Ira Stoll)

Though reflected in our TN Constitution's amendment process — simple majority of the votes is not enough to amend our constitution. Have to have a minimum number of votes as well.

Because the majority can become apathetic, complacent!!!

Are today's politicians concerned more with next election or the "permanent interests" of the nation?

Democracy was rejected because inherently it had no answer to the elimination or control of factions. Federalist paper said, "From this view (this view of man we've been talking about) it may be concluded that a pure democracy . . . can admit of no cure for the mischief's of faction."

Democracies, they said, "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."

As we move more toward democracy and away from republic will we wind up with violence in streets like taking place in London lately?