The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped. By Stuart Banner. New York: Oxford University Press, 2021. Pp 264. Hardcover, $55.00.

In this thought-provoking study of natural law's relationship to American legal thinking and practice, Stuart Banner provides valuable insight into how natural law—once a preeminent legal authority—was excised from the American legal tradition. Drawing on a vast array of courtroom and classroom records, Banner's narrative expands upon what R. H. Helmholz and Andrew Forsyth have identified as natural law's centrality to early legal thinking and practice in the United States. As such, Banner's text is indispensable for the historian interested in how American lawyers and judges have come to understand their respective professional tasks—once as finders of law, now as its makers.

Banner's overarching thesis is that early American legal thinking was premised on a belief that law was found, not made, prompting lawyers to make philosophical claims based on natural law. By the end of the nineteenth century, however, Banner asserts that the legal profession came to a new understanding that law was made by judges, not found through philosophical argumentation. Put simply, Banner posits that "[l]awyers once believed that some of the rules of our legal system were not created by humans … [t]hey now believe that all the rules of the legal system are created by humans." (1)

Before describing how natural law fell from its once-preeminent status, Banner offers two explanations for why early American lawyers and judges frequently invoked natural law. First, he demonstrates that natural law was used to "fill gaps left unregulated by the positive law" (27). Considering the fact that relatively few positive laws were enacted in early America, Banner argues that lawyers turned to natural law to demonstrate what the law, by nature, ought to be. In addition to filling these gaps, he highlights how natural law was once understood to regulate the common law—the other primary source of legal authority during this period. Indeed, because the common law was viewed as the accumulation of historical practice, natural law—which purportedly governs the course of history—appeared to be incorporated into the American legal tradition through the common law. Therefore, the common law (or 'historical practice') was merely a testament to a higher law already proscribed by the Creator. Crucially, this was a law that judges found, not made.

In the second part of his monograph, Banner offers four explanations for why natural law was abandoned in American courtrooms and law school classrooms: the adoption of written constitutions, the separation of law and religion, the explosion in law publishing, and the two-sidedness of natural law. Though each explanation has an important part in Banner's broader argument about the long-term decline of natural law, his assertion about the separation of law and religion is noticeably less convincing than the others.

Banner's claim that the separation of law and religion encouraged natural law's decline hedges on the changing status of Christianity in the Anglo-American common-law tradition. Indeed, he proposes that lawyers understood Christianity and American law to be "closely intertwined" during the late-eighteenth century. By the end of the nineteenth century though, Banner asserts that Americans "began to think of religion as an area of life separate from the of law and government." (96) Despite conceding the sociological evidence that American religiosity did not decline during this later period, Banner nevertheless concludes that law and religion began to separate because American lawyers questioned whether Christian doctrine was cognizable at common law.

While the traditional view that Christianity was part of the common law was repudiated by Thomas Jefferson, Banner suggests that the Jeffersonian conception of law and religion did not become conventional until the earthly twentieth century. (110) Between Jefferson and the twentieth century, Banner identifies important changes in American law—such as the disestablishment of state churches—to gesture toward the changing status of religious establishment and liberty claims in the nineteenth century. (111) It is, however, unclear how these changes necessitated natural law's expulsion from the American lawyer's vocabulary.

Banner's law and religion argument is predicated on a syllogism: Christianity was once understood as a part of the common law, so when Christianity was no longer understood as a part of the common law, the natural law also lost its common-law status. This argument is not entirely convincing in light of Banner's failure to challenge the classic philosophical view that natural law does not require religious presuppositions. Consequently, even if "the proposition that the American legal system incorporates religious doctrines" did disappear by the twentieth century, Banner does not show that the American conception of natural law was reliant on a religious foundation. (118) In fact, *The Decline of Natural Law*'s early chapters show just the opposite: the vast majority of American lawyers understood natural law to be accessible to all through the exercise of pure reason. Ironically, this belief that natural law could be discerned through the use of human reason (and not religious argumentation) caused it to suffer from inherent 'two-sidedness,' the last of Banner's four explanations for natural law's decline. Because individuals of any religious disposition could make natural law arguments, Banner suggests that the "pervasive disagreement" engendered by the use of natural law claims prompted lawyers to become disillusioned with its use. (161)

Setting aside Banner's less-than-convincing law and religion argument, *The Decline of Natural Law* is a substantial addition to the field. It would, however, be better framed as a history of natural law in the United States from the founding to the early twentieth century. Despite the fact that Banner does offer helpful applications of once-popular natural-law arguments to contemporary circumstances (e.g., recent Supreme Court cases), he all-too-quickly passes over the attempted revival of natural law that began in the 1920s and 1930s, became increasingly prominent during the Second World War, and reached its heyday immediately thereafter. In the broad scheme of his book, this period receives relatively little treatment compared to its historical significance, much of which Banner just begins to discuss in general terms in *The Decline of Natural Law*'s two concluding chapters. For example, influential invocations of natural law in postwar international human rights discourse and American Catholic legal scholars' widespread appealing to natural law around mid-century is mentioned in passing, while—as Banner even suggests—both of these developments continue to impact American legal thought.

Considering ongoing normative debates in American jurisprudence about natural law (vis-á-vis "Common Good Constitutionalism" in particular), twentieth-century legal historians would do well to examine anew how natural law, in the course of its "decline" from everyday courtroom use, may have begun to implicitly and explicitly shape other aspects of jurisprudential debate in the United States.

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