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## Corwin: The "Higher Law" Background of American Constitutional Law

Charles M. Whelan S.J.  
*Woodstock College and Seminary*

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## RECENT BOOKS

THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW. By Edward S. Corwin. Ithaca, N.Y.: Great Seal Books (Cornell University Press). 1955. Pp. xiv, 89. 95 cents.

When Professor Corwin's essay first appeared, the natural law revival had already progressed so far that Charles G. Haines was able to devote an entire volume to it less than two years later.<sup>1</sup> Unlike much of the other writing of the period, Corwin's study is not polemical—one reason, perhaps, for its lasting interest and validity. But there are other and more important reasons: the soundness of Corwin's scholarship, the intrinsic appeal of the subject matter, and the ever growing recognition of the need for reinvigorating what Walter Lippmann has called the "public philosophy." If the basic tenets of the Declaration of Independence and the political philosophy underlying the Constitution are to be defended, they must first be understood; and to be understood correctly, they must be seen in historical perspective. Scholars young and old have Professor Corwin to thank for a short, bold, and essentially accurate outline of the tradition behind American "higher law." Hitherto somewhat hidden in professional works, it now reappears in a paper-back edition which deserves widespread dissemination.

With that deft and mature analysis which characterizes his work, Corwin bares the essential elements of the problem. What is the source and content of this higher law, who is its final interpreter, and how is it legally enforced? The telling difference between the English answers to these questions and those proposed by classical and medieval Continental jurisprudence lies in a paradox. For Aristotle, Cicero, and the medieval Scholastics, higher law came first in the order of thought, and positive law must be harmonized with it; but before English higher law was recognized as such, "it was positive law in the strictest sense of the term, a law regularly administered in the ordinary courts in the settlement of controversies between private individuals."<sup>2</sup>

Thus, the real issue is not how higher law became positive, but how positive law became higher. Put more concretely, how and with what success did the common law courts attempt to subject the king and Parliament to their judicial power? The two questions are really one, because the outstanding characteristics of common law jurisprudence was the use of "reason" to form the basic rules of national law. By shifting the *recta ratio* of classical antiquity and medieval Scholasticism from the common reason of mankind to the expert legal science of the judges, the English courts were able to identify the fundamental principles of the common law with the higher law which limited

<sup>1</sup> HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930). Professor Corwin's essay was first published in 42 HARV. L. REV. 149, 365 (1928, 1929); it was reprinted in 1 SELECTED ESSAYS IN CONSTITUTIONAL LAW 1 (1938). See also note 10 *infra*.

<sup>2</sup> CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 24 (1955).

king and Parliament alike. The identification, of course, did not go unchallenged. Corwin draws a lively and vivid sketch of the struggles between the champions of divine right, parliamentary supremacy, and judicial power to nullify acts of the king and Parliament. The jurisprudence of Bracton and Fortescue, the legal status of *Magna Carta*, St. Germain's *Doctor and Student*, Coke's conflict with James I, the famous dictum in *Bonham's Case*, and many other less important details in English constitutional history are described. An account of Locke's political philosophy, spangled with the names of less brilliant lights of the same period, closes the discussion and opens the way for a study of political theory in pre-Revolutionary America.

Colonial political thought, finds Professor Corwin, was greatly influenced by Coke in the seventeenth century; in the first half of the eighteenth, thanks in good part to political indoctrination by the New England clergy, the dominant figure was Locke. The first generation of American lawyers restored Coke to a position of eminence—notably Otis, in the *Writs of Assistance Case*. Meantime, Colonial legislatures were using the arguments of both Coke and Locke to bolster their claim for local autonomy. But when the break with the mother country finally came and the colonies were faced with the problem of constructing their own governments, a new figure had entered the scene: Blackstone. His doctrine of parliamentary supremacy fell on sympathetic ears; the local legislatures had been the chief governmental champions of American liberty, and it was natural to entrust them with the sovereign power of the state in order to preserve that liberty in the future. That the “unalienable Rights” of our citizens were not soon submerged in the single right to be represented by a legislative majority, Corwin rightly attributes to the statutory form of the state and federal constitutions and to the institution of judicial review. The Declaration of Independence and the Virginia Constitution of 1776 mark the terminal points of Corwin's historical research in the present essay. The great political debates which filled the following years and led to the adoption of the Federal Constitution and the Bill of Rights may be found chronicled elsewhere.

In reflecting on Professor Corwin's essay, two considerations suggest themselves: how adequate is his survey of the doctrinal sources of our “higher law” tradition, and how valid and significant is his emphasis on the philosophy of Locke in the political thought of pre-Revolutionary America? The first consideration arises naturally from the professed object of the essay: to trace the origin of the “higher law” concept, to follow its transformations in history insofar as they are of special interest to the Constitution, and to set out the agencies and causes which made it a part of the American political structure. Compression of the answers to questions of such magnitude within less than a hundred pages was impossible without elimination of much relevant material; for example, the whole of medieval Continental thought is summarized in five pages. Such brevity can be justified,

no doubt, on the basis of the author's preoccupation with the institutional equipment which made the higher law an effective legal weapon against political injustice. Nevertheless, it highlights the methodological difficulty inherent in any such study as the present. Between the Declaration of Independence and the political philosophy of ancient Greece stretches a river of doctrine more than two thousand years long. The great variety of its tributaries and the tortuousness of its course renders any survey of this stream extremely difficult; philosophy, religion, politics, literature, and positive law have all contributed abundantly to its waters. The question inevitably arises, to which sources should a historian of American political thought during the pre-Revolutionary period give his attention? To those quoted by contemporary writers, or to those who in fact first formulated the propositions then accepted or discussed?

The distinction is real and important. The fact that the Church Fathers and medieval Scholastics were not often quoted or even read by the Founding Fathers does not mean that their contribution to the American tradition of higher law was small. Along with the writers of classical antiquity, they were the direct sources of much of the thought which immediately influenced the principal figures in our formative period. The anti-Papism of the age succeeded in temporarily obliterating popular memory of the true originators of many political ideals; but it did not succeed in preventing popular reception and adoption of those ideals. Moreover, it should not be forgotten that many Colonial spokesmen who used classical authors to bolster their arguments quoted them in an unconsciously Christian, and therefore anachronistic, sense. The god, the law, and the nature of Aristotle or Cicero are significantly different, even in the realm of political philosophy, from the God, the law, and the nature of Aquinas, Calvin or Locke. It has been fashionable to speak of the "secularization" of the natural law in the pre-Revolutionary period, but this is simply to ignore the fact that for the mass of the population the "God of Nature" meant the Christian God and not the Unmoved Mover of all things. The reality of the natural law was guaranteed by theological certainties, not merely by philosophical speculation.

In an age when the natural law is no longer a common conviction, international crises have made the rational justification of our political institutions and beliefs a matter of the utmost importance. In searching for such justification, it is natural to turn to the sources of our political philosophy. And it is for this reason that the question of the true sources of that philosophy is far from academic. It makes a great deal of difference whether Locke is the philosopher of the Constitution or not. His system of thought, as distinguished from certain propositions included in it but neither original nor inextricably connected, has been discredited for what it is: ambiguous, unrealistic, and inconsistent. If the principles of the Declaration of Independence and the Constitution depend, as a matter of history, for their justification on Locke, it is clear that a new source of justification must be found, under pain of continued adherence becoming irrational.

Fortunately, there is no such intimate connection between Locke's philosophy and American political theory. The complexity of Colonial thought found unity in political principles, not in the justification of those principles. Men with the most diverse philosophies joined in the common practical task of achieving freedom and self-government. Today, when liberty has become such a habit that security seems to many to possess the greater value, the public philosophy is indeed in danger. But the root of the peril does not lie in the fact that Americans do not share a common theoretical justification of their way of life; it lies in their doubt of the transcendental value of the principles upon which that way of life is based. It is for this reason that essays like Professors Corwin's are so important for the formation of our young men and women. They must be made aware of the heritage of natural law which is both their birthright and their trust.

Although Corwin does not say so explicitly, it is clear from an analysis of his work that for the most part he has chosen the writings of professional jurists to mark the broad outlines of the course of natural law thought. Such a selection is admirably suited to tracing the changing relationships between natural and positive law. But it also tends to veil the identity of the true originators of the political thought which the lawyers appropriated and implemented with effective legal institutions. Since it is too much to hope that the mass of students in our colleges (and even our law schools) may be persuaded to read Gierke<sup>3</sup> or the Carlyles,<sup>4</sup> it might be well when recommending the present essay to their study to advise supplementing it with a short study like that of de'Entrèves<sup>5</sup> or appropriate readings from more general histories like those of McIlwain<sup>6</sup> or Sabine.<sup>7</sup>

Similarly, in view of the extensive research since the original publication of this essay into the Colonial period of our history, it is regrettable that a short bibliography of more recent works was not included in the present reprint. Apart from the immense periodical literature and numerous studies of the political thought of individual Founding Fathers, there are many more general works which supplement Corwin's essay in an important and even necessary way.<sup>8</sup> It was, of course, both impossible

<sup>3</sup> GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE*, Maitland transl., (1913); GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY*, Barker transl., (1934, 1950).

<sup>4</sup> CARLYLE, R. W. and A. J., *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST*, 6 vols., (1903-1936); and see CARLYLE, A. J., *POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES* (1941).

<sup>5</sup> D'ENTREVES, *THE MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT* (1939).

<sup>6</sup> MCLILWAIN, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST* (1932).

<sup>7</sup> SABINE, *A HISTORY OF POLITICAL THEORY*, rev. ed. (1950).

<sup>8</sup> A few of the more noteworthy contributions: MILLER, *THE NEW ENGLAND MIND* (1939); MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION* (1933); PERRY, *PURITANISM AND DEMOCRACY* (1944); POOKE, *FOUNTAIN-SOURCES OF AMERICAN POLITICAL THEORY* (1930); ROSSITER, *SEEDTIME OF THE REPUBLIC* (1953); SAVELLE, *SEEDS OF LIBERTY: THE GENESIS OF THE AMERICAN MIND* (1948); STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* (1948); WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* (1931).

and irrelevant to his purpose for Corwin to make any detailed study of the contemporary literature of the pre-Revolutionary period to determine which authors were actually quoted, and in what proportions. But Clinton Rossiter has recently given us such a study, and it compels significant modifications of many of our traditional but uncritical opinions.<sup>9</sup>

In spite of its serious limitations as a history of the natural law doctrine and of the actual sources of that doctrine in the formative period of our republic, Corwin's study is invaluable on the precise point of the way in which higher law became part of American positive law. This is the real subject matter of the essay.<sup>10</sup> In measuring Corwin's achievement, we must not forget the complexity of his material and the limitations, self-imposed and involuntary, under which he worked. Summarizing an immense and infinitely rich period of history and doctrine of thought, he has succeeded in isolating some of the principal problems and some of their most significant attempts at solution. That the chain of historical or philosophical continuity should buckle here and there, that some influential figures should receive only a passing nod and others be apparently credited with a relative importance which they do not deserve, is not as significant as the clear statement of issues and the basic accuracy of the over-all picture. The insistence of the present review on the incompleteness of the essay is not a criticism of its learned author—to whom every student of constitutional theory is irreparably indebted—but a caution to the wide, non-professional audience for whose benefit the essay has been reprinted.

*Charles M. Whelan, S.J.*  
*Woodstock College and Seminary*

<sup>9</sup> ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* (1953) especially pp. 356-361. In view of Rossiter's work in this field, it is of especial significance that he should have written a highly laudatory preface for the reprint of Corwin's essay.

<sup>10</sup> In 1948 Professor Corwin published *LIBERTY AGAINST GOVERNMENT*, a study of the origin and development of judicial review as a device to limit governmental interference with freedom of choice and action. The present essay, substantially revised and rewritten, forms the second chapter of this book, and is appropriately entitled "Roman and English Origins."