

The
“Higher Law”
Background
of American
Constitutional
Law



Edward S. Corwin

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Prefatory Note

The hard core of the American tradition is a belief in constitutional government. When the American pledges his allegiance to democracy, as he so often must in this age that mingles triumph and frustration, he means *constitutional* democracy, a system of government in which political power is diffused by a written constitution and the wielders of power are held in check by the rule of law. In his opinion, there is no inherent conflict between democracy and constitutionalism. The latter is simply a guarantee that the former will be carried on through safe, sober, predictable methods. Since men, even the thrice-blessed Americans, can always be led into temptation and thence into corruption by the taste and touch of power, they must agree to govern themselves under self-imposed restraints or lose their freedom. And since democracy is based on common agreement to proceed slowly through discussion and compromise and to avoid bold steps that cannot be retraced, they must recognize that the complex of ideas and procedures known as “constitutionalism” strengthens rather than frustrates the democratic process.

The American, like men of other nations and cultures, expresses his most precious beliefs with the help of symbols. The symbol of his constitutionalism, and its instrument as well, is the Constitution of 1787, an ingenious catalogue of grants and limitations that is not just casually admired but diligently honored. His high regard for the Constitution, amounting often to idolatry, is explained on numerous grounds. One explanation, of course, is its source: in law the sovereign people, in fact “an assembly of demi-gods” some of whose names were Washington, Madison, Hamilton, and Franklin. Another is its age, hardly so impressive as that of Magna Carta or the Decalogue, yet greater now than that of any other charter of government anywhere in the world. Still another is its success, whether as splendid sign of freedom and unity or as tutor in the trials and blessings of ordered liberty. Yet the

most compelling explanation is the American's deep-seated conviction that the Constitution is an expression of the Higher Law, that it is in fact imperfect man's most perfect rendering of what Blackstone saluted as "the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions." This conviction has been a dominant influence in American constitutional law almost from the day the Constitution was put into commission.

Professor Corwin's notable essay, reprinted here for the first time in almost twenty years, is an eloquent introduction to the idea of the Constitution as Higher Law. From the time it first appeared in the *Harvard Law Review* in 1928–1929,¹ this exploration of the remote sources of the American Constitution has been one of the most universally admired and heavily used essays in constitutional law and American political thought. The reasons for the continued respect in which it is held are visible on its face. It is learned: Consider the footnotes, so characteristic of Professor Corwin's scholarly offerings and so useful to the teacher and scholar. It is eloquent: Consider the magisterial handling of the celebrated Blackstone—"Nor is Blackstone's appeal to men of all parties difficult to understand. Eloquent, suave, undismayed in the presence of the palpable contradictions in his pages, adept in insinuating new points of view without unnecessarily disturbing old ones, he is the very exemplar and model of legalistic and judicial obscurantism." Above all, it is humbling: No one can come away from reading it without realizing how much we in America are a part of Western civilization. The men we meet in the pages of this essay—Demosthenes, Sophocles, Aristotle, Cicero, Seneca, Ulpian, Gaius, John of Salisbury, Isidore of Seville, St. Thomas Aquinas, Bracton, Fortescue, Coke, Grotius, Newton, Hooker, Pufendorf, Locke, Blackstone—all insisted that the laws by which men live can and should be the "embodiment of essential and unchanging justice," and we may salute them respectfully as founding fathers of our experiment in ordered liberty. It should do us good to remember at the height of our power

1. *Harvard Law Review*, XLII (1928–1929), 149, 365; reprinted in *Selected Essays in Constitutional Law* (Chicago, 1938), I, 1–67.

and self-esteem that our political tradition and constitutional law are late blooms on a sturdy growth more than two thousand years old and still vigorous.

The rest of these few words are more likely to be tribute than introduction. It would be ungracious in a student and teacher of American political and constitutional thought to present an example of Professor Corwin's work without bespeaking the considerable debt that all of us owe this remarkable scholar. The list of his published works is sufficient evidence of the debt: I count a full twenty titles in the card catalogue of the Cornell University Library, and at least a dozen of these studies were timely and remain definitive in the best sense of those overworked adjectives. I would hardly hazard a guess as to the total number of his articles in the learned journals.

A teacher to the teachers, he has also been a scholar for the scholars, quarrying from the deep recesses of intellectual and constitutional history and laying out neatly for our confident use a mass of invaluable materials that few of us would have the time or talent to dig up for ourselves. And he has done all this with thoroughness and fidelity unsurpassed in the scholarship of American political science. Suspecting, like that prince of scholars, Otto von Gierke, that "it is not probable that for some time to come anyone will tread exactly the same road that I have trod in long years of fatiguing toil," he has seen to it that those who retrace his steps will find the way straight and secure.

This choice essay, "The 'Higher Law' Background of American Constitutional Law," is a model of Professor Corwin's scholarship. It is presented once again to students of constitutional law and political theory for instruction and inspiration in the sources of a great American tradition.

Clinton Rossiter

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