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# Founding Fathers and the Natural Law: A Study of the Source of our Legal Institutions, The

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# The Founding Fathers and the Natural Law:

## A Study of the Source of Our Legal Institutions

by Clarence Manion • Dean of the University of Notre Dame College of Law

■ Where did the Founding Fathers get the principles upon which they established our government? What was the source of their faith? The bedrock of their convictions? What was the political evolution of our Constitution? The legal philosophy of our Bill of Rights? The discussion of these questions by Dean Manion is timely for it is necessary now to make soundings and take bearings if the Ship of State is to continue on its true course. Whereas the Revolution of 1688 brought the doctrine of parliamentary sovereignty to England, the American colonists resisted that doctrine and adhered to the true natural law doctrine of constitutionalism which had come down from the Middle Ages through the writings of Bracton, Fortescue and Coke. Dean Manion shows that the principles on which Otis, Jefferson, Adams, Hamilton, Mason, Madison and Wilson relied are still the basic need of our day.

■ The term "natural law" has always had a great variety of meanings.<sup>1</sup> In one or more of its many senses it is acknowledged by everybody. The procession of daylight and darkness through the four seasons of every year promulgates one kind of natural law, while the instinct of self-preservation in all living things tells of another kind. The most violent opponents of the natural law concept entertain, nevertheless, a healthy respect for the natural law of gravity and admit that for all practical purposes it is universal.

There is no serious controversy about natural law until discussion reaches the point where the natural law becomes *supernatural*, the point, in other words, where natural law is described as the will of God perceived by His rational creatures. At this crucial point the fat of disagreement is definitely in the fire of unquartered argument.

It must be admitted therefore, that in one sense or another, all of the Founding Fathers of the American Republic believed in natural law. Did this belief stop with the "laws of nature" merely, or did it extend to an acknowledgment that natural law is a projection of the Eternal Law of God Himself? What was the natural law philosophy of the Founding Fathers, and to what extent did they write this philosophy into our American constitutional system?

Predominantly the Founding Fathers were lawyers, trained in and devoted to the common law. "So steeped were the eighteenth century colonial lawyers in Coke's teachings . . . that the controversial literature of the era of the [American] Revolution, if it is to be understood, must be read or interpreted by a common law lawyer. Indeed he must be a common law lawyer of the nineteenth century type brought up to read and

reread Coke and Blackstone until he got the whole feeling and atmosphere of those who led resistance to the home government".<sup>2</sup> In the same article Dean Pound reminds us that the common law was "a tradition and not a code". In other words Coke's *Institutes and Reports* consist of particulars processed reasonably from basic generalities taken from medieval cases and customs. Familiar to all American lawyers of the Revolutionary period was Coke's report of *Calvin's Case* which goes directly to the point where the "natural law" controversy is now most heated and contentious:

The Law of nature was before any judicial or municipal law [and] is immutable. The law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the eternal law, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world . . . God and nature is one to all and therefore the law of God and nature is one to all. . . . This law of nature which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two

1. Charles Grove Haines, *The Revival of Natural Law Concepts* (1930) Part I.

2. Roscoe Pound, "The Development of Constitutional Guarantees of Liberty", 20 *Notre Dame Lawyer* 183 (1945).

thousand years before any laws written and before any judicial or municipal laws. And certain it is that before judicial or municipal laws were made, kings did decide cases according to natural equity and were not tied to any rule or formality of law.<sup>3</sup>

This is a fair digest of the theistic principle upon which all of our pre-Revolutionary legal education was based. The principle was even more compactly summarized by Coke himself when he quoted Bracton to buttress his historic argument with James I, "The King is under God and the Law". Human government, in other words, is limited by the law of God. Coke properly regarded that maxim as controlling in his day just as Bracton had interpreted it to be controlling in the Middle Ages. This principle was the mainspring of what Coke welded into the common law of England. A learned and talented English lawyer has recently traced the fate of the principle as follows:

In the constitutional struggles of the seventeenth century the books and arguments of Bracton and Fortescue were in the hands and on the lips of Sir Edward Coke and John Selden and all those who defended the old ideas of constitutional liberty against the new notion of divine right. But when after the Revolution of 1688, the divine right of Kings gave way to the divine right of Parliament, it was common lawyers again like Chief Justice Holt and Sir William Blackstone who ventured to doubt the new orthodoxy.<sup>4</sup>

It was common lawyers, too, on this side of the ocean who did not doubt the new orthodoxy merely, but categorically challenged it on the authority of *Calvin's Case*. To this end they used Blackstone to good effect and particularly the following:

When the Supreme Being formed the universe and created matter out of nothing, he impressed certain principles upon that matter from which it can never depart and without which it would cease to be. . . . Man considered as a creature must necessarily be subject to the laws of his Creator. . . . It is necessary that he should in all points conform to his Maker's will. . . . This will of his Maker is called the law of Nature. . . . This law of Nature being coeval with mankind and dictated by God Himself, is superior in obligation to any other; no human laws are of any validity if contrary to

this; and such of them as are valid derive all their force and all of their authority from this origin. . . . Hence it follows that the first and primary end of human laws is to maintain these absolute [God-given] rights of individuals.<sup>5</sup>

But in spite of all this Blackstone admitted that "if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the Constitution that is vested with the authority to control it".<sup>6</sup>

The juridical issue of the American Revolution could not be more compactly stated. In *Bonham's Case*, Coke had said:

And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an action to be void.<sup>7</sup>

#### Early American Lawyers Believed in Natural Law

This was in 1610. Coke died in 1634. In his exposition of the natural law-common law relationship, Blackstone appears to agree with his illustrious predecessor in all things except the "power" of Parliament effectively to override both natural law and common law. Blackstone unquestionably agreed that Parliament had no "right" to pass such a law. Something of the utmost importance to English law had obviously happened between the commentaries of Coke and Blackstone respectively. That occurrence was the English Revolution of 1688. Dean Pound says that "the Revolution of 1688 made a profound change in the English Constitution. The seventeenth century polity as set forth in Coke's doctrine, was the one we accepted at our Revolution and put into our constitutions. When these instruments declare themselves the 'supreme law of the land' they use the language of Magna Charta as interpreted by Coke, namely, that statutes could be scrutinized to look into the basis of their authority and if in conflict with fundamental law they must be disregarded. This doctrine was as much a matter of course

to the American lawyer of the early Revolution as the doctrine of the absolute binding force of an act of Parliament is to the English lawyer of today. American lawyers were taught to believe in a fundamental law which, after the [American] Revolution they found declared in written constitutions. After 1688 there was no fundamental law superior to Parliament."<sup>8</sup>

It is most unfortunate that the romantic and psychological sidelights of the American Revolution have lured historians away from the logical and legal aspects of that epochal struggle. Taxes, parliamentary representation and finally the very independence of the United States itself were all incidental to the main and controlling legal issue, namely, the enforcement and implementation of a law "superior in obligation to any other . . . coeval with mankind and dictated by God Himself." This controlling issue was made crystal clear by the Declaration of Independence but for some reason modern historians seem reluctant to take the great Declaration at its word. There is a subtle but unmistakable effort to edit this document out of our jurisprudential system and to regard its categorical postulates as eccentric extravagances transposed on the spot from a variety of foreign philosophical dreamers in order to make a rallying cry for a rather desperate American cause. The fact is that the Declaration is the best possible condensation of the natural law-common law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution. By pushing and pursuing the principle of parliamentary absolutism it was England and not America who abandoned the ancient traditions of English liberty. In 1776 the British Government was insisting that "the law of the land" and "the

3. *Calvin's Case*, 7 Co. 12 (a), 77 Eng. Rep. 392 (1608).

4. An Anonymous King's Counsel, *The Common Law of England* (1948).

5. 1 *Bl. Comm.* 21, 31, 108 (Lewis' ed. 1897).

6. *Ibid.* 79.

7. 8 Co. 118 (a) (1610).

8. Pound, *supra* note 2.

immemorial rights of English subjects" were exclusively and precisely what the British Parliament from time to time declared them to be. This claim for parliamentary absolutism was at variance with all the great traditions of the natural law and common law as recorded through the centuries from Bracton to Blackstone. By abandoning their ingrained concepts of the natural law, the colonists undoubtedly could have made a comfortable settlement of their tax and navigation difficulties with England, but they chose the alternatives so well and so logically described in the Declaration of Independence.

#### Founding Fathers Did Not Invent New Theory of Law

The inference that the principles of the Declaration were extravagant improvisations is refuted by the testimony of the times. Nearly half a century after the Declaration was adopted, one Timothy Pickering wrote to John Adams calling attention to the commonplace character of pronouncements contained in the great document and manifesting surprise at the acclaim and reverence accorded to it. Adams replied on August 6, 1822. He said:

As you justly observe, there is not an idea in it but what had been hackneyed in Congress for two years before. Indeed the essence of it is contained in a pamphlet voted and printed by the Town of Boston before the first Congress met, composed by James Otis.

Pickering made Adams' letter the subject of a speech delivered on the Fourth of July in the following year (1823) and Jefferson in turn paid his respects to Pickering in a letter to Madison dated August 30, 1823. After a preliminary correction of Mr. Adams' recollection in certain particulars, Jefferson wrote:

... Pickering's observations and Mr. Adams' in addition, that it [the Declaration] contained no new ideas, that it is a commonplace compilation, its sentiments hackneyed in Congress for two years before, and its essence contained in Otis' pamphlet may all be true. Of that I am not to be the judge. Richard Henry Lee charged it as

copied from Locke's treatise on government. Otis' pamphlet I never saw, and whether I had gathered my ideas from reading or reflection I do not know. I know only that I turned to neither book nor pamphlet while writing it. *I did not consider it as any part of my charge to invent new ideas altogether, and to offer no sentiment which had ever been expressed before...*

... Timothy [Pickering] thinks... that the Declaration, as being a libel on the government of England, composed in times of passion, should now be buried in utter oblivion, to spare the feeling of our English friends and angloman fellow citizens. But it is not to wound them that we wish to keep it in mind: but to cherish the principles of the instrument in the bosoms of our own citizens. . . . In opposition, however, to Mr. Pickering, I pray God that these principles may be eternal. . . . [Italics supplied.]<sup>9</sup>

Far from attempting to invent new theories and express them in the Declaration, it was Jefferson's purpose, as he later wrote to Henry Lee, Jr.:

Not to find out new principles or new arguments never before thought of, not merely to say things which had never been said before; but to place before mankind the common sense of the subject in terms so plain and firm as to command their assent and to justify ourselves in the independent stand we were compelled to take. Neither aiming at originality of principle or sentiment nor yet copied from any particular previous writing, it was intended to be an *expression of the American mind*. All its authority rests upon the harmonizing sentiments of the day.<sup>10</sup>

The authorship of the Declaration was in Jefferson's own estimation the first of the three highest achievements of his remarkable life. He was chosen for that high honor because of what Adams called Jefferson's "felicity of expression". To the best of his unusual ability he was expected to mirror the prevailing American point of view, and, as we have seen, in Jefferson's own judgment he did just that. In a very important sense it is misleading to attribute the philosophy of the Declaration to the writings of John Locke. The latter frequently confuses a point that is vital to the American legal system; a point which all of the influential American Revolutionary writers



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made with full clarity and force. For instance, Locke says:

When any number of men have consented to make one community or government they are thereby presently incorporated and make one body politic wherein the majority have the right to conclude the rest.<sup>11</sup>

#### Locke's Philosophy Inconsistent with Declaration of Independence

Locke thus implies that once government is installed by the consent of the governed the rights of individuals and minorities are completely and absolutely subject to its directions. This doctrine is inconsistent with the natural law and natural rights philosophy of the Declaration of Independence. It is at variance with the essays, pamphlets and correspondence that circulated so freely in American Revolutionary times and thereafter. This theory was certainly not that of Thomas Jefferson. For instance on June 7, 1816, Jefferson wrote to Francis Gilmer that:

Our legislators are not sufficiently apprised of the rightful limits of their power; that their true office is to declare and enforce only our natural

9. Jefferson, 15 *Writings* 462.

10. 10 *id.* at 343.

11. Locke, 2 *Two Treatises of Government*, §§ 95-101.

rights and duties and to take none of them from us. No man has a natural right to commit aggression on the equal rights of another and this is all from which the laws ought to restrain him. . . . When the laws have declared and enforced all this, they have fulfilled their functions and the idea is quite unfounded that on entering into society we give up any natural right.<sup>12</sup> And again in his notes on Virginia he declared:

An elective despotism is not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided between the bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by others.<sup>13</sup>

John Adams said that: "Rulers are no more than attorneys, agents, and trustees for the people", and he added that if these betray their trust "the people have to revoke their authority" and substitute other agents, attorneys and trustees.<sup>14</sup>

The effective limitation of sovereignty and government by *division, judicial review* and *democratic forces*, was thus held to be a necessary corollary to the doctrine of unalienable natural rights. This was indeed, *the significant contribution* that the American Revolution made to the doctrine of natural law. The views expressed in so many different ways by so many of the Founding Fathers during that critical period had all been expressed and explored by others from time immemorial. It was the Founding Fathers of the American Republic however, who first *did* something about it. Their experience with the voice of Coke and Blackstone on the one side and the hands of Parliament on the other, convinced them that Tom Paine was right when he urged that:

Society is produced by our wants and governments by our wickedness; [that] society in every state is a blessing but government in its best state is but a necessary evil; in its worst state an intolerable one; [that] government like dress, is the badge of lost innocence—a mode rendered necessary by the inability of moral virtue to govern the world.<sup>15</sup>

Revolutionary America believed that such an evil institution as government would certainly get out of

hand unless closely checked from every side. Just as firmly as they believed in natural law and natural rights, therefore, they believed in practical as well as theoretical checks upon the possibility of government violation of those rights. It was not enough, in the opinion of the Founding Fathers, to belabor sovereignty with sound philosophy. Sovereignty had to be split and checked and degraded to the point where it was obviously a servant of the people's God-given rights. The constitutional system put together by the Founding Fathers, was devised to keep this governmental servant in its place, and on the job, and its job was "to secure these rights" of man.

There was little or no dissonance in the many widely publicized American views on this point in the latter half of the eighteenth century. While there was some difference of opinion about the *timing* of the Declaration of Independence, there was no expressed dissent from the principles which it so clearly and unmistakably announced. We have Jefferson's own word that the document was previously and privately approved by John Adams and Benjamin Franklin. When it was submitted to the entire Congress it was furiously and thoroughly debated. Large sections of Jefferson's specifications against the King were lifted out bodily and two significant additions were added upon motion from the floor. These additions are very much in point. At the opening of the second to the last paragraph the Congress inserted the phrase "appealing to the Supreme Judge of the world for the rectitude of our intentions" and in the last sentence of the same paragraph the Congress inserted the words "with a firm reliance on the protection of Divine Providence".

It is thus obvious that the important document was carefully reviewed line by line by each of the signers, all of whom accepted "the laws of nature and of nature's God" together with the significant "self-evident" truths in their entirety and without the slightest question.

There were many who are certainly

in the category of Founding Fathers who were not present in, or members of the Continental Congress when the Declaration was adopted or signed. Washington was occupied with the defense of New York City but we know from innumerable sources that he was enthusiastic about the fact accomplished as well as the philosophy pronounced in the Declaration. Young Alexander Hamilton was also in uniform, but as an undergraduate of King's College, later Columbia, he had already replied to "Westchester Farmers'" criticism of the legality of the Continental Congress:

Granting your supposition were true, it would be a matter of no real importance. When the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded. Men may then betake themselves to the *law of nature*; and if they but conform their actions to that standard, all cavils against them betray either ignorance or dishonesty. There are some events in society to which human laws cannot extend, but when applied to them lose all their force and efficacy. [Italics supplied.]

Hamilton's refutation incidentally reflects the religious and philosophical nature of American college education in those days. The currency of deeply religious and philosophical approaches to political and legal questions by the college trained leaders of the Revolution, is explained by the fact that from their very beginning all American colleges in existence at the time of the Revolution were closely related to the churches, and every one of them featured courses in theology and moral philosophy.

#### First Virginia Constitution Based on Natural Law

At the time the Declaration was adopted two distinguished Americans were at work in Virginia drafting the first constitution of that state. This constitution began with its famous declaration of rights—from that

(Continued on page 529)

12. 15 *op. cit. supra* note 9 at 24.

13. 2 *op. cit. supra* note 9 at 224.

14. 3 *Works* 456, 457.

15. *Common Sense*, page 1.