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Question: Higher Law and the American Constitution

In the debate of whether or not a constitution is considered ‘sacred’ and thus should not be violated, a very important question arises: is one a follower of evolutionary hypothesis, or does one agree to the theory of natural law. Although one could surely follow both in somewhat of a synergetic combination, one would definitely start here. If someone fully subscribes to the wholly evolutionary hypothesis (as in all things were the product of evolution), then there would be no fruit in debating the merit of whether a constitution could reflect higher law, as laws are merely progressive, subjective, and change to the needs of society. As humanity evolves, so does its need and it’s perceived morality, and what may be considered right or wrong in the past can evolve. Man progresses through evolutionary change; intellectually, physically, and morally. However, if one follows the theory of natural law, then the question does not become whether or not natural law exists, but whether it is reflected in the written constitution of a nation. If so, then it is of no disagreement that this constitution must be revered, protected, and upheld. What exactly is this natural law? It “is defined as right reason; and is described as at once a law of, and a law to, God,” (Corwin 55). With this divisionary observation established, and now presuming the latter truly does exist, this paper will analyze the supposed higher law background of the U.S. Constitution, followed by an analysis into why individuals ‘revere’ this document, and conclude with a personal observation on why preservation of a higher law document is in order.

In discovering the importance of Higher law, it is of immense value to discover important judicial thinkers whom inspired the U.S. tradition. Perhaps rising above most is that of Edward Coke. It is in him we find both actions and words used to describe Higher Law, and most importantly it's sanctimonious character. In defining the law of nature, Coke clarified that it is "that which God at the time of Creation of nature of man infused into his heart, for his preservation and direction; and this is *Lex aeterna*, the moral law, called also the law of nature," (43). Coke continued with a clarification to express that this law was, written upon the hearts of man (Hebrews 8:10), directed man before the time of the written law given by Moses.¹ Here we find a body of judicial law, as to be follows, by the ultimate Judge in God himself. Man was designed to follow the law of man, and in the reference to "common right and reason," Coke speaks of the law of God written across our hearts. This law, higher law, takes precedence. In the American system, we see a characteristic not so much of God's law (although it is no exaggeration to argue that the law of Moses and the Western tradition influenced law in the states), but this division of law. We call it judicial review, whereas the Constitution itself stands as the Higher law, and that lesser law (i.e. legislation), must stand in accordance to its nature. "And it appears, in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be 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 controul it and adjudge such act to be void." (41-42). Within this statement from Coke, we find an early strand of Judicial Review. In striking down the act of Parliament, on the grounds that it conflicted with 'common law', some higher body of law is seen as an authoritative body.

¹ "This is the covenant I will make with the house of Israel after that time, declares the Lord. I will put my laws in their minds and write them on their hearts." (Hebrews 8:10)

It is no mistake to observe the American system, and find Judicial review in its current form, where laws by congress may be deemed unconstitutional if they go against the body of higher law. For this similarity in reason, it is not far-fetch, given Coke's immense importance in law studies within the United States, to assume that this law of Cokeian judicial thinking brought about an impression upon Chief Justice Marshall and the like. " 'Common right and reason' is, in short, something fundamental, something permanent; it is higher law," and higher law in the American system is Constitutional law (44). "His dictum in *Bonham's Case*... treated apart from his other ideas, as it was destined to be by a series of judges, commentators, and attorneys, became the most important single source of the notion of judicial review," (54).

In addition to Coke, other individuals set the stage for the Founder's conception of Constitutionalism. An example would be Grotius, who revived the Ciceronian conception of Natural Law (which removed the theological implications from Medieval and Papal thinking). In addition to Grotius' influence of de-papalized concept of natural law, as being God's law or God's reason, Newton's scientific discoveries altered the understanding. With laws of nature found, such as those as gravity, the universe could be perceived to contain laws of nature which also lead to influence the notion of 'law of nature', and the concept of Deism that was also then widespread. This combination of "Ciceronian conception of natural law, extended and deepened by Newtonian science," provided the background in perhaps the greatest influence of American theory and constitutionalism emerged: John Locke. Locke's *Second Treatise on Civil Government* provided an immense influence on American Constitutionalism and the Founders, via Locke's usage and clarification of natural law. Working from the protestant notion of the priesthood of individualism, and its importance, Locke spoke of the natural law of individual rights; "the rights of 'life, liberty, and estate,'" (Corwin 28). As Coke gave the gift of language

that, once construed, influenced the idea of Judicial Review, Locke gave the American system the important concept of legislative limitation, and property right (64-65). In the legislature's purpose of protecting the rights of individuals, Locke argued that this legislature "cannot assume to itself a power to rule by extemporary, arbitrary decrees," but is instead designed to preserve the earlier mentioned individual rights (Corwin 65).

One other realm of influence from Locke is on the generality of law. "Nor may it vary the law in particular cases...law must be general; it must afford equal protection to all," (65). This generality of law, as found in the Equal Protection clause within the 14th Amendment, is another influence from Lockean thinking. Two more important contributions to American Constitutionalism were the idea that "legislative power cannot be delegated," (non delegation doctrine, Article 1 Section 1 of the Constitution)², and that "legislative power is not the ultimate power of the commonwealth," (Corwin 65).³ It is the latter point, regarding legislative power as not being ultimate to the power of the commonwealth (as found in the rights of individuals), that laid a hefty impression on American Constitutionalism, separation of powers, and this idea of Higher Laws. Locke had found a right to property and the ownership of man's labor, under the pretense that man had inherited the earth and the ownership of his labor from God. Here then, property and the individual are considered Higher Law, and this privileged importance found within the constitution is overt.

Having viewed this definition of natural law, and having seen, through such thinkers as Coke and Locke, the notion of higher law came into fruition via the written constitution of the United States, we must ask the following question: why is there a great reverence for the

² "without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment to the U.S. Constitution)

³ "All legislative Powers herein granted shall be vested in a Congress of the United States," (Constitution Article 1 Section 1)

Constitution? To first answer this, we must turn to peculiarity of the document itself. The written Constitution was a new invention of political man, something that has become somewhat of a standard, and has its roots with the founding fathers. Although borrowing with a deep and diverse constitutional tradition, the Founding Fathers had taken the ideas of Ciceronian Law of Nature, as well as the above mentioned ideas of Coke and Locke, as well as practical experience and religious conviction, to draw forth ideas of laws codified within a physical document. Given the earlier puritan experience, and the sovereignty of Scripture, it would come to no surprise that the binding documents and covenants of founding fathers and earlier puritans found the extension of natural laws as written normal. With this background, and a general reverence of scripture given the *sola scriptura* protestant characteristic, the American people were used to a reverence of binding textual agreements. It would then come as no surprise to find the people granting this reverence not only to their guiding moral documents (scripture), but their guiding political document (the Constitution). In addition to this background, a general reverence for the Constitution is established in the constitution itself. Within its very context it affirms its high law nature, speaking of itself as “shall be the supreme Law of the Land,” (Constitution Article VI Section 2).⁴

This combination of a protestant national background, as well as the affirmation of the Constitution as supreme itself, are perhaps two good reasons as to the source of this ‘constitutional reverence’. However, perhaps a third adds to the mix: the reverence for the Founding Fathers themselves. It is of no surprise that a certain degree of mystification occurs regarding patriotic and founding figures with national heroes. The same can be said of the founding fathers. Given their prestigious position within history, to assume they were not of a

⁴ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;” (Constitution Article VI Section 2)

superb degree is to put into question their workmanship (the constitution itself). As such, a reference regarding the founding fathers, usually depicted as great intellectual men of history, would naturally lead to a reverence of their work, the constitution.

In the debate of whether or not our constitution reflects a kind of “higher law” that makes it sacred and inviolable, another important question must be asked: does higher law even exist? Before we can handle the question, we must handle the presupposition: is there an existence of natural law, or higher law, or the existence of anything sacred? If we assume something sacred and inviolable may exist, then we could proceed to the judgment of sacred. The realm of natural law is an interesting thing. As Locke deals with it, the assumption of God is made. Natural law then, to the Christian or the Theist, is the reflection of God’s perfect reason; the law God has established on earth. Within Christianity, this is furthered by saying the law is expressed with Christ himself, and that this law is written upon the hearts of man not only to govern his world, and the nature in which he lives (gravity, chemistry, biology, etc), but also to govern him morally. It is interesting that in the early Jewish kings, God hand’s to man a form of written constitutionalism. During this time, Egyptians and others used a form of governmental model whereas the leader was considered supreme, and where they themselves were above their law (regardless of their claims to be divinely inspired). It is first with the Israelites that we find, after God giving Moses the commandments that a system of constitutionalism is in place. The Israelite kings are not above levitical and Mosaic law. Rather, the rulers and the Israelite people are beneath the law, and the law itself, not the leadership and government, are supreme. It is the Israelite leadership ignoring the Higher Law of the Old Testament Canon that is eventually blamed for the demise and diaspora of the Jews. The relevance in all this is as follows: as Locke and others must assume a God who has established natural law in order to argue with reason the

existence of natural law in civic law, the presumption must be made. This paper in no ways means to argue for or against the existence, and that itself would be the heftiest of topics, whoever we assume a legislature or a lawmaker when we assume a law, and the same principle can be applied to Constitutionalism. The question then becomes, does the Constitution reflect this Higher Law? If by higher law we mean principles of Christian or Jewish morality, then it becomes quite muddled. Although political theory and the study of politics have their roots in ethics and the 'best' way to organize society, it is not within the domain of the Constitution to produce more ethical and moral being, but to preserve liberties that are written within God's law. I would argue, given the special historical time of the Founders, and their various influences, the Constitution, in its consciousness, best reflects principles established in God's law: liberty, freedom, and the ownership of one's labor. This is more theological, however I am working from the presumption that by Higher Law we mean God's law. Then we must ask what the worth of adhering to this law is? Perhaps the best example would be found in the above mentioned Israelites: if there is a God who can create a Higher Law, and he has created this Higher Law for a reason, then there is no reason, if a Constitution reflects these laws of reason and nature, to abandon its principles. Although political language changes with political times, and democratic majorities shift, natural law remains eternal. The job of the democratic public and their representatives is not then to apply subjective interpretations to Constitutional provisions to their betterment, but to best preserve these isolated and eternal laws.

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