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Liberty Against Government: The Rise, Flowering and Decline of a Famous Juridical Concept, by By Edward S. Corwin

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LIBERTY AGAINST GOVERNMENT. The Rise, Flowering and Decline of a Famous Juridical Concept. By Edward S. Corwin.* Baton Rouge: Louisiana State University Press, 1948. Pp. xiii, 210. \$3.00.

As Professor Corwin's book makes very clear, legal systems may differ but natural law crops up whenever lawyers of any age or tradition are hard pressed to find a tool to persuade courts that laws should not be enforced. The natural law conception will not easily be downed, and we find it recurrent in our own constitutional history, most recently under the guise of "due process of law."

Even today when old conceptions of due process appear to be strangled by a judiciary in revolt, we find the same familiar notions arising again and again. Professor Corwin finds origins of modern due process in Cicero's conception of "right reason," and shows that from Cicero's day to our own, right reason or its modern manifestation, due process, is invoked by everyone with a grievance against law-making majorities. Cicero of course was a businessman's lawyer, and our own history of due process is largely a commercial chronicle. However, today labor unions claim the right to

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carry on their business free of control under the banner once borne by Justices Brewer and Peckham,¹ and minority politicians invoke right reason as their champion when state power seeks to restrict freedom of expression.² The Government of Puerto Rico, in an effort to free its people from a mercantile serfdom, has recently gone beyond even the forms of constitutionalism to challenge congressional legislation confining one of their basic industries as unconstitutional "without reference to specific clauses in the Constitution . . . a gross violation of the very spirit of free government . . . [in conflict with] the glorious tradition of our system of law."³

Briefly stated, from earliest to most recent times, lawyers have found natural law a marvelously amorphous substitute for chapter and verse as a tool of opposition against popular rule. They have, by various invocations of "right reason," "God's will," "common right and reason," or "due process of law," deduced that what the state seeks to do to their clients cannot be allowed.⁴

This book by Professor Corwin is an account of the struggle of lawyers from Cicero to Coke and from Coke through the counsel for the Jehovah's Witnesses today to prove first, that judges are entitled to say that the law which is wrong is unenforceable, and second, to define

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1. See, for example, the argument of the Musicians Union in *United States v. Petrillo*, 332 U. S. 1 (1947).
 2. The leading case on the applicability of due process as a protection of free speech is *Gitlow v. New York*, 268 U. S. 652 (1925).
 3. Brief of Government of Puerto Rico, pp. 78, 79, in *Central Roig Refining v. Secretary of Agriculture*, pending as No. 9769 in the United States Court of Appeals for the District of Columbia. The issue in the case is whether Congress has or can restrict the amount of sugar to be refined in Puerto Rico to approximately one-eighth of the amount produced there.
 4. To his appraisal of his clients' needs, the lawyer adds facile scholarship—scholarship essentially historical—to veneer the "right reason." Anyone could have the insight which the lawyer gathers principally by osmosis from clients' needs. But it is judges who are to be persuaded, and for them lawyers have a near monopoly on the production of the acceptable type of scholarship. At this we lawyers are frequently very good. As Thurman Arnold observed of the process by which procedural due process in the Fifth Amendment was metamorphosed into reasons why railroad workers could not have pensions and corporations were turned into individuals, "only a short time ago nobody saw anything strange or out of the way in the change. Scholars in law schools proved that it was not a change at all, and were generally believed." ARNOLD, *THE FOLKLORE OF CAPITALISM* 34 (1937).

"wrong" in terms of the needs of the client or class represented. As always Corwin's prose is felicitous, and he describes with acquainted hand the consistent drive for a bulwark against executive or legislative action. Three chapters comprising the bulk of his book relate that topic: the rise, decline, and fall of natural law in Roman and English experience; the efforts by attorneys to utilize natural law for the protection of property rights before the Civil War; and the successful culmination of this movement after the Civil War when the Fourteenth Amendment became the great protecting aegis for private property.⁵ The writer also tells of the transition in recent years from due process as a protector of property to due process as a protector of civil rights.

This is essentially an historical work, and its greatest value as a scholarly contribution is in the pages dealing with events most removed from our own time. It is because controversies over natural law are a constantly recurring emergence in our own constitutional system that Corwin's book will have lasting value. These essays, largely republication and revision of older works, come at a time when revolt against the earlier excesses of due process still rages. Thus Corwin's work has relevance in dealing with problems which lie beyond the horizon of the present volume. Though he offers a few predictions, his readers may perhaps best assess the prospective outcome of the present reconsideration of due process of law by studying its origins.

Corwin's recording of the periodic impressions of the natural law conception on the history of government holds discernible implications. It may be read as indicating that the problem of controlling the judiciary is not likely to disappear no matter how the phrase "due process of law" may be restricted by interpretation. The reason for the present aversion to the interpretation of due process which existed during the first third of this century is that this interpreta-

5. The account of Liberty into Property Before the Civil War in Corwin's third chapter can most profitably be read in conjunction with Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L. J. 371, 48 YALE L. J. 171 (1938). Corwin's chapter on Due Process After the Civil War may be studied in conjunction with Hamilton, *The Path of Due Process of Law in THE CONSTITUTION RECONSIDERED* 167 (Read ed. 1938); and in an excellent work by one of Corwin's students, TWISS, *LAWYERS AND THE CONSTITUTION* cc. IV-VII (1942).

tion in many cases gave the judges a sort of roving commission against evil without, in the federal judiciary at least, subjecting them to the check of elections. In a democracy there is a proper reluctance to leave unrestricted policy making to life-time appointees. But we must recognize also that this roving commission, this extreme judicial prerogative, exists not only in the Fifth and Fourteenth Amendments but in somewhat similar fashion whenever the terms of the Constitution permit an almost unlimited range of "interpretation." It is inherent in any equation in which judicial review is a factor. For as Corwin points out, John Marshall, using as his tool the contract clause, started toward the same goals at which another century arrived with due process of law. The basic Corwin thesis is that Cicero's "right reason" was bound to crop out in our Constitution as an inevitable response of minority attorneys to popular government. Given the inventiveness of the legal profession, the choice of the particular clause scarcely mattered.

These essays remind that due process or its equivalent can be everybody's friend as well as everybody's enemy. The reminder is significant because the reaction against the grotesque excesses indulged in to insulate property against community responsibility in the first thirty-six years of this century could result in the destruction of substantive due process of law as a device for judicial control of legislation. Without considering whether such destruction would be desirable, if it comes at all it should be based upon thoughtful appraisal of all of the consequences; and Corwin's essays give breadth to the range of those consequences. He shows that a majority of the present Court has given Justice Holmes' doctrine of due process a clear victory over that of Justice Sutherland, and fairly well ended judicial suzerainty over economic legislative action. But today's majority has reshaped, without abandoning, the power Sutherland used and Corwin recounts the theories by which due process has been moved as an obstacle to legislation from the economic to the civil liberties zone of the law.

Corwin has not taken as his province the most vigorously disputed of the current judicial debates concerning the reach of the due process clause. But one use for this kind of historical study is as an aid in analyzing problems

outside its specific scope and the major current issue may be subjected to brief appraisal.

As has been noted, the revolt against older notions of due process has generally relaxed the control of the Supreme Court over regulatory legislation. But four Justices of the present Court, Justices Black, Douglas, Murphy and Rutledge, would carry the revolt still further. These dissenters, in capsule, say that there never should have been any substantive due process in the conventional sense. They say that the Fourteenth Amendment was meant to be a shield for civil rights and that the Court has departed from the plain historical truth. They would reinstate what they conceive to be that truth, that the Fourteenth Amendment was intended to establish the Bill of Rights as a limitation upon the states.⁶

This is a minority conception, but four man dissents have a way of becoming law. One may be convinced by the historical soundness of this minority interpretation of the Fourteenth Amendment, and still reject it as impracticable. Consider, for example, the clauses of the Fifth and Seventh Amendments requiring grand jury indictments and civil jury trials. Perhaps the states could have been bound by these provisions if they had accepted them in 1868; but there can be vested error and the proposed change comes too late. We are eighty years and one hundred million people away from the adoption of the Fourteenth Amendment. With respect to such comparatively trivial things our ways have jelled, and it is hard to imagine any good reason for pressing the grand jury on states that do not want it⁷ or cluttering small claims courts with twelve good men and true.

6. These minority views are stated in *Adamson v. California*, 332 U. S. 46, 68 (1947).

7. If four Justices say that the Fourteenth Amendment requires the application of the entire Bill of Rights to the States, then the states may well look to see what their own problems will be if the addition of a fifth vote turns dissent into law. The Federal Bill of Rights include some twenty-one different rights, of which twenty are already guaranteed, in the Constitution at least, by the State of Indiana. (Of course differences in phraseology occur. Thus the Indiana equivalent of "due process of law" is "due course of law." IND. CONST. Art. I § 12). The major impact in Indiana of bringing the Bill of Rights in toto into the Fourteenth Amendment would be in the grand jury requirement. The Indiana Constitution provides that the General Assembly may modify or abolish the grand jury system, Art. VII, § 17. This privilege has been exercised by providing that all public offenses except treason and murder may be prosecuted by affidavit. IND. STAT. ANN. (Burns 1933) § 9-908.

The only seriously hard fought federal civil right not now imposed upon the states by the interpretation of the Fourteenth Amendment is the right to counsel in criminal cases.⁸ The four dissenters would of course require counsel whenever an accused desires, and it is almost incomprehensible that a majority of five can continue to say that civilized notions of justice—the majority's conception of due process—do not require an attorney for every defendant who wants one, regardless of the state of his purse.⁹ This majority view of due process makes criminal justice like a theatrical production. You must pay to get in, and without the fee, you don't see the performance. The controversy over whether all the Bill of Rights is a limitation on the states would be well compromised were identical limitations against lawyerless trials imposed on the states and the Federal Government as a part of due process.¹⁰

8. The text observation assumes that freedom from forced confessions and from cruel and unusual punishments are equally federal and state civil rights under the Bill of Rights and due process. For possible evidence to the contrary see the discussions in *Ashcraft v. Tennessee*, 322 U. S. 143, 157, 158 (1944) (dissenting opinion); and *Louisiana v. Resweber*, 329 U. S. 459, 466 (1947) (concurring opinion).
9. In Indiana we have long since integrated the fullest notion of the right to counsel into our own "natural law," and one of the most powerful judicial expressions of this view has come from our Supreme Court, which stated in 1854: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public." *Webb v. Baird*, 6 Ind. 13, 18 (1854). See also *State v. Hilgemann*, 218 Ind. 572, 576, 34 N. E.2d 129, 131 (1941); *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 497-8, 29 N. E.2d 405, 407 (1940).
10. While the four dissenters agree that the Fourteenth Amendment means the Bill of Rights to be a limitation upon the states, at times they appear to divide on a related question, namely whether this is the entirety of the meaning of the Fourteenth Amendment. In *Adamson v. California*, 332 U. S. 46 (1947), Justices Black and Douglas seem to accept the view that the Fourteenth Amendment means the Bill of Rights, no more no less; while Justices Murphy and Rutledge seem to believe that the Fourteenth Amendment equals the Bill of Rights but reserve the possibility of adding to it. However all four Justices uphold one right which is not specifically referred to in the Bill of Rights. That is the right not to be punished by vague and indefinite laws, so unintelligibly drafted as to be incomprehensible. *Winters v. New York*, 333 U. S. 507 (1948), well annotated in Note, 23 IND. L. J. 272 (1948). Yet the right to be governed by laws which are not utterly unintelligible is one not mentioned in the Bill of Rights. We must

But this is aside from the main point. More important is the appraisal of the underlying philosophy of the four Justices which leads them to the conclusion that substantive due process ("natural law") should be extirpated from the Constitution. This philosophy stems fundamentally from a basic belief in Democracy, from a conviction that the will of the people is morally entitled to be the law of the land except insofar as the Constitution pretty clearly restricts that popular will. These Justices believe that due process, as interpreted since 1890, is clearly too loose and too broad a formula of restriction on the majority. To eliminate what appears to them to be the excessive judicial discretion involved in this conception of due process, they would interpret the Fourteenth Amendment in accordance with its historical purpose—an incorporation of the Bill of Rights as a limit on the states. And this irrespective of the fact that the inclusion of some minor parts of the Bill of Rights would be extremely burdensome on the states.¹¹

Corwin's book will leave his readers with the gravest doubt as to whether the dissenting Justices can possibly suc-

conclude that the four Justices are not completely at odds; they seem to agree that the Bill of Rights does not represent *all* of one's civil rights in every circumstance.

11. Mr. Justice Rutledge has expressed his reasons for insistence upon inclusion of the entire Bill of Rights as a limitation upon the states as follows:

I do not think it can be demonstrated that state systems, freed of the Bill of Rights' "inconveniences," have been more fair, just, or efficient than the federal system of administering criminal justice, which has never been clear of their restraints.

Notwithstanding *Betts v. Brady*, 316 U. S. 455, and its progeny, I cannot imagine that state denial of the right to counsel beyond that permissible in the federal courts or indeed of any other guaranty of the Sixth Amendment could bring an improvement in the administration of justice.

The guaranties seemingly considered most obstructive to that process are those of the Fifth Amendment requiring presentment or indictment of a grand jury and securing the privilege against self-incrimination; the rights to jury trial and to the assistance of counsel secured by the Sixth Amendment; and the requirements relating to suits at common law of the Seventh Amendment. Whatever inconveniences these or any of them may be thought to involve are far outweighed by the aggregate of security to the individual afforded by the Bill of Rights. That aggregate cannot be secured, indeed it may be largely defeated, so long as the states are left free to make broadly selective application of its protections.

In re Oliver, 68 S. Ct. 499, 511, n.9 (1948).

ceed in their underlying effort. His study dictates the conclusion that even though the dissenters should be successful in respect to the Bill of Rights, it is probable their victory would be only for the day. True, Corwin's history shows that natural law conceptions may be successfully rejected, and the complete supremacy of the legislature upheld; for as his study demonstrates, the English have substantially done this. But the English have no practice of judicial review at all. The appeal of the unwritten truth has been consistently strong in our history. Corwin's study will confirm for his readers the firm belief that while it may be regrettable, natural law will keep bobbing up in some corner of the American constitutional system no matter how it may be treated at any given moment. Lawyers are too firmly ingrained with a faith that they can determine eternal verities to make it likely that they will stop trying in the face of setbacks.

John P. Frank†

STATE CONTROL OF BUSINESS THROUGH CERTIFICATES OF CONVENIENCE AND NECESSITY. By Ford P. Hall.* Bloomington: Bureau of Government Research, Department of Government, Indiana University, 1948. Pp. 154.

This little monograph brings up to date an article Professor Hall wrote on *Certificates of Convenience and Necessity* almost twenty years ago in the MICHIGAN LAW REVIEW.¹ Like its predecessor, the present study collects and discusses the statutes, court cases and commission decisions bearing on the major aspects of state control of business by means of the certificate of convenience and necessity, an instrument which is used today for regulating business in every state but Delaware. A certificate can be roughly defined as a legislative grant of quasi-monopolistic power to a particular kind of business. The theory is that public regulation has been substituted for the competitive forces of the market place either at the instance of the public or the business itself. The theory further is that in return for this grant of

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1. 28 MICH. L. R. 107, 276 (1929) (in two parts).