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FUNDAMENTAL LAW
AND
THE AMERICAN REVOLUTION
1760-1776

BY
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PREFACE

THE historians of the American Revolution have taught us that the concept of a spontaneous political uprising of an oppressed people revolting against British tyranny is incorrect; they have taught us that the Revolution was a movement in which a variety of social and economic factors mingled with the political to bring on first verbal and then armed resistance to British policy; they have taught us also that for a fuller understanding of the Revolution we must set it against both the background of colonial institutional development and British imperial policy; and finally they have taught us to consider a number of other factors, international politics, religion, and political and constitutional theory. It is this last aspect that will be developed in the following pages.

Too often, perhaps, the Revolution has been viewed from the standpoint of action and as unworthy of consideration from that of theory. Without intending to detract from the social and economic interpretations, with which the writer essentially concurs, it may be suggested that the imperial and legal ideas of the Revolution are of no less interest than the political action. What men do and why they do it is undoubtedly of much importance, but it is not the whole story. Of great importance, also, is their explanation and justification of what they are doing, which accounts for their political theory. In the process of explaining and justifying their conduct the colonists formulated a great deal of imperial theory, but it should not be thought that they manufactured this entirely out of their own experience. The ideas that

were used to sustain theories of empire advanced by the American revolutionists were not original; the political classics of twenty centuries and more were called upon to justify them. Particularly was this true in the matter of a "higher law", the ultimate appeal of revolutionists.

Periods of political distress and crisis have at all times produced appeals to a fundamental law that is above and beyond all human positive law. This law has been hailed under various names, natural law or law of God being most common, although in England, from which the colonists of course drew most of their authorities, men frequently spoke of the law of reason and in some cases endowed the common law and the constitution with the qualities of natural law. The colonists, in protesting against what they believed to be an unwarranted disregard of their rights by the British government, followed then in a well beaten path when they called upon fundamental law in their own defense. Their claims were made as claims of right, not of expediency. Since these were erected on such a foundation, law played a leading role in establishing them, and the safest kind of law to use was fundamental law in some one of its manifestations.

In searching for prophets of this law the Americans ranged far and wide, and the result was indeed a strange collection of oracles, who furnished the intellectual ammunition whereby the colonists hoped to withstand British efforts to reduce their practical autonomy. Yet while this variety tended to produce a curious confusion of phraseology and even contradictions in the colonial protests, no colonist needed to apologize for the names which dotted his pages. Greek philosophers, Roman historians, medieval theologians, French *philosophes*, common lawyers, English revolutionists, all contributed to the justification of the American cause, and if but a few of the colonial pamphleteers had gone to the more esoteric authors, those authors may still be legitimately re-

garded as among the intellectual fathers of the American Revolution, along with such popular writers as Coke, Locke, and Blackstone.

This study had its genesis in a seminar on British imperial theories given by Professor Robert L. Schuyler in 1924-25. It is evident that it owes a great deal to Professor R. G. Adams's *Political Ideas of the American Revolution* and Professor C. H. McIlwain's *American Revolution*. It was largely completed before the publication of the recent works of Professor C. G. Haines and Professor B. F. Wright, Jr. on natural law, but has undergone considerable modification in the light of those books.

The primary purpose of this study is to analyze the idea of fundamental law as it was used by the American revolutionists. The first two chapters sketch the concepts of fundamental law held by those authors whom the leaders of colonial opinion quoted or referred to in their writings. No attempt had been made to write a history of fundamental law *per se* from its earliest appearance in Europe down to the eve of the American Revolution, although some revolutionary pamphleteers were acquainted with practically all of the exponents of the idea from Sophocles to Blackstone. It is not suggested that all or even very many colonial writers knew all the authors whose ideas are summarized in these first two chapters; there was only one John Adams, one John Dickinson, and one James Wilson. But no writer has been cited in these chapters who was not known to at least one colonial pamphleteer. Men like Bland, Drayton, and Jefferson read widely, and no part of their reading in law and politics could not be applied, when they wished to strengthen their arguments. Their writings dealt with some aspect of British policy: their reading supplied them with an ideology which elevated an *ad hoc* dispute to a struggle concerning the fundamental and abiding principles of politics.

In this connection it is of interest to note the preponderance of lawyers among the colonial pamphleteers, a factor which Burke in his speech on American taxation remarked as explaining the character of the opposition to British policy. "In no country perhaps in the world", he said, "is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the Deputies sent to the Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science. I have been told by an eminent Bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the Plantations. . . . This study renders men acute, inquisitive, dextrous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle."

The last three chapters contain an examination of the ideas current in the colonies with respect to fundamental law. It is hoped that no writer or writing that might have had influence has been overlooked, even though the point of view was not original. In general, fundamental law was used to justify fairly specific claims which can be readily classified. If this study of what the revolutionary pamphleteers read and the use they made of their reading gives some impulse to the consideration of the intellectual history of the great imperial controversy, the writer will be content.

Special thanks are due to Professor E. B. Greene for his critical reading of the manuscript, and to Professor R. L. Schuyler, who has guided the study from its inception. I would also acknowledge the courtesy of the editors of the *Canadian Historical Review*, *Economica*, the *Political Science*

PREFACE

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