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NATURAL RIGHTS
AND THE FOUNDING FATHERS—THE VIRGINIANS

CHESTER JAMES ANTEAU*

The philosophy of natural rights was championed by such Founding Fathers as Richard Bland, Patrick Henry, Thomas Jefferson, Richard Henry Lee, James Madison, George Mason, Robert Carter Nicholas, Peyton Randolph, George Washington, and George Wythe. Indeed, it would be amazing if any Revolutionary leader of the Commonwealth could be found who did not subscribe to the doctrines of natural law and right. Moreover, the doctrine was not limited to the select few who directed Virginia's destinies, but was widely held and continually expressed by the popular assemblages throughout the Commonwealth during Revolutionary days.

As early as February 27, 1766, a number of prominent planters adopted at Leedstown articles of association asserting their "fundamental rights...founded on reason, law and compact." Two years later the Burgesses were indicating to Parliament that they intended to secure "full enjoyment of all our natural and constitutional rights and privileges." On July 18, 1774, a meeting attended by the substantial citizens of Fairfax County adopted the famous Fairfax Resolves wherein they indicated that their most precious rights belonged to them "by the laws of nature." This great resolution was the first assertion by a representative body in America that the colonists alone had the right to enact laws governing their affairs. The citizens of the County resolved "that the claim, lately assumed and exercised by the British Parliament, of making all such laws as they think fit, to govern the people of these colonies, and to extort from us our money without our consent, is not only diametrically contrary to the first principles of the Constitution, and the original compacts by which we are dependent upon the British Crown and government; but it is totally incompatible with the privileges of a free people and the natural rights of mankind, will render our own legislatures merely nominal and nugatory, and is calculated to reduce us from a state of freedom and happiness to slavery and misery." George Washington was in the

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13 Freeman, George Washington 154 (1948) [hereinafter cited as Freeman].

1Id. at 198-99.

2The resolves are set forth in 1 Rowland, Life of Mason 418 (1892) [hereinafter cited as Rowland].
chair on this occasion, and the Resolves were almost certainly drafted by George Mason. It was on the twenty-sixth of the same month that the freeholders of Albemarle County adopted similar resolutions to defend their "natural rights" and "the common rights of mankind." Evidence is strong that these resolutions came from the pen of Thomas Jefferson.4

On January seventeenth of the following year the Committee of Safety of Fairfax County organized the Fairfax Independent Company, and the resolutions of that day, probably authored by George Mason, indicated the propriety of defending our "natural rights" and "those inestimable rights which we inherit from our ancestors."5 In June, 1775, when the landing of armed forces in Virginia was threatened, the Independent Company wrote to the Williamsburg Volunteers:

"We are determined at all events, to act on that occasion as men of spirit ought to do in defence of their natural rights and country's cause."6

The same month the Prince Edward County Committee adopted resolves that they were ready to defend their "inherent, legal and just rights and privileges."7

On June 12, 1776, the Virginia Convention adopted the Declaration of Rights, which was to become one of the most influential documents in American history. It solemnly asserted "that all men... have certain inherent natural rights." This was the first deliberate adoption of the natural rights philosophy as the basis for political organization anywhere in the world.8 Throughout the period immediately preceding and overlapping the Revolution the dissentient religious bodies were vigorously claiming their natural right to be free from the established church.9

Although the doctrine of natural rights played a most important role in severing our ties with England, the philosophy was clearly much more than a handy weapon of utility and opportunism. After the Revolution had been won, the people and such leaders as Thomas Jefferson continued to assert its primary role in defining man's rela-

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4 The Papers of Thomas Jefferson 117 (Boyd ed. 1950) [hereinafter cited as Boyd].
5 Rowland 182.
6 Force, American Archives 872 (1843).
7 Id. at 1023.
8 This was the product of George Mason. See also Clark, Natural Rights, 16 Annals 212 (1900).
tion to his temporal government. When the Statute for Religious Freedom was adopted in 1785, it recognized that man “has a natural right” to religious freedom. It concluded with the statement “that the rights hereby asserted are of the natural rights of mankind and that if any act shall be hereafter passed to repeal the present or to narrow its operations, such act will be an infringement of natural right.”

Three years later there was much opposition in the Convention of June, 1788, called at Richmond to deliberate ratification of the United States Constitution, because it contained inadequate provision for the natural rights dear to Virginians. That October the Assembly adopted a resolution, the work of Patrick Henry, requesting Congress to call a national convention at once to put into the Constitution a bill of rights “to secure to ourselves and our latest posterity the great and inalienable rights of mankind.”

Just prior to the ending of the memorable century, in 1798, there was again much stress placed upon our natural rights in the Virginia Assembly by Messrs. Daniel, Mercer, Nicholas, and Taylor who argued, for the majority, that the federal alien and sedition laws were utterly invalid as violative of our natural rights of freedom and expression.

THE NATURAL RIGHTS

In their most generalized expressions the Founding Fathers spoke of their natural rights to life and liberty, adding at times, property, and on other occasions, the pursuit of happiness. To some contemporaries the alternative use of property and the pursuit of happiness may seem strange, but to many of the Fathers property meant the right to develop one’s properties, that is, his faculties. The particular natural rights on which there was the largest measure of agreement among the Virginians were (1) freedom of conscience, (2) freedom of communication, (3) the right to be free from arbitrary laws, (4) the rights of assembly and petition, (5) the property right, (6) the right of self-government, to which were frequently appended (a) the right of expatriation and (b) a right to change the form of government. Later parts of this paper will be concerned with the meaning of these rights.

__ REFERENCES __

1Compare the different wordings in 12 Hening's Statutes 84-86 (1925) [hereinafter cited as Hening]; Morison, The American Revolution, Sources and Documents 206 (1929) [hereinafter cited as Morison]; Padover, The Complete Jefferson 946-47 (1949) [hereinafter cited as Padover].

2Morison 397; Morgan, The True Patrick Henry 348 (1907); Tyler, Patrick Henry 326 (1887).

3Id. at 349-50.

4Howison, History of Virginia 352 (1847).
to the Founding Fathers, as well as their ideas on permissible limitations. Additionally, some Virginians included in their natural rights such concepts as trial by jury, freedom from ex post facto laws, the right to an impartial judge, and a right to defend their liberties by force, although to Jefferson and others these were more properly deemed "fences" to assure the enjoyment of the more basic rights indicated earlier.

Bases of the Natural Rights

The Virginia Founding Fathers were in substantial agreement that the ultimate source of our natural rights was our Creator. Men "are endowed by their Creator" with inherent and inalienable rights, said Thomas Jefferson in the memorable language of the Declaration of Independence.14 Earlier Jefferson had written in his Summary View that "the God who gave us life gave us liberty at the same time."15 We have natural rights of the intellect, he indicated, "because Almighty God hath created the mind free . . . ."16 Speaking of the natural right of expatriation, Jefferson said in the Summary View: "The evidence of this natural right, like that of our right to life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of reason, but is impressed on the sense of every man. We do not claim these under the charters of kings or legislators, but under the King of kings."17 In his Notes on Virginia, Jefferson wrote: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?"18 Speaking there of our natural rights, he concluded: "We are answerable for them to our God."19 It was in the Summary View in which Jefferson asserted that Parliament had no power to encroach "upon those rights which God and the laws have given equally and independently to all."20 Later in life Jefferson wrote that we must follow "those moral rules which the Author of our being has implanted in man as the law of his nature to govern him in his associated, as well as individual charac-

14 The Writings of Thomas Jefferson 29 (Mem. ed. 1905) [hereinafter cited as Memorial Edition]; 1 Boyd 915.
16 The Bill for Establishing Religious Freedom in Virginia; Morison 206.
17 12 Works of Thomas Jefferson 66 (Ford ed. 1904-05).
18 Answer to Query XVIII; 9 The Writings of Thomas Jefferson 266-67 (Ford ed. 1892-99) [hereinafter cited as Ford].
20 Boyd 121.
That the natural rights of man came from God, in Jefferson's belief, was beyond doubt.

His fellow Virginians were ready to join in asserting that our rights came from "the great Author of nature," which assertion was simply sharing in such a view held by practically all of our Revolutionary leaders. Typically, John Adams wrote in his Dissertation on the Canon and Feudal Law, "I say RIGHTS, for such they have, undoubtedly, antecedent to all earthly government,—Rights that cannot be repealed or restrained by human laws—Rights, derived from the great Legislator of the universe." A later Virginian, John Randolph Tucker, outstanding authority on constitutional rights, nicely emphasized how our Founding Fathers understood that our natural rights and liberties come from God. Tucker wrote: "Liberty, which means this exclusive right of each man to self-use—that is, the exclusive use of the Divine gifts to him, under trust and responsibility to God, does not come, therefore, through any social compact of men, or as a gift from society or from government. It is the gift of God! It is a liberty of self-use, inalienable by himself, because that would be breach of duty and surrender of the trust Divinely vested; and inalienably by any and all others, because of sacrilegious robbery of that with which he is Divinely invested." And this, holds Tucker, is the philosophy adopted in the Declaration of Independence.

Thomas Jefferson and many of his contemporaries understood that the natural rights of man depended upon teleological considerations. So viewed, and accepting the premise that man's goal is being with his Creator for eternity, man has the duty to abide by His will and directions, because they are necessary to satisfy man's duties. Jefferson wrote that "the true office is to declare and enforce our natural rights and duties." The existence of natural duties and the relationship of rights to duties were quite apparent to Jefferson, and anyone who has studied the man should realize that the only natural duties Jefferson acknowledged were not to temporal kings, but to the Creator.

James Madison was even more explicit that the source of rights exists in man's duty to his Creator. Writing of the unalienable right

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21Letter to the North Carolina General Assembly (1808); N. Y. Times, Nov. 23, 1939, p. 32, col. 2-5.
22Preface to Williamsburg edition of Dickinson's Letters to a Farmer in Pennsylvania (1768); 2 Life and Writings of John Dickinson 290 (Ford ed. 1895).
23Published in Boston Gazette in August, 1765; Umbreit, Founding Fathers 114 (1941).
24Letter to Francis W. Gilmer, June 7, 1816; 10 Ford 32.
of religion in his Memorial and Remonstrance, he stated that the right is unalienable

"because what is here a right towards men, is a duty towards the creator. It is the duty of every man to render to the Creator such homeage, and such only, as he believes to be acceptable to Him. His duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign."

Another leading Virginian, George Mason, was equally clear in asserting that the obligation of man to his Maker was the source of natural rights. In 1772 he wrote:

"Now all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God: A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict His laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice."

The imperative necessity of understanding ends and duties in order to delineate natural rights was appreciated not only by Messrs. Jefferson, Madison, and Mason, but also by Virginians generally in our formative period. The members of the Virginia convention that ratified the United States Constitution saw and stated that the natural rights of conscience and religion are predicated upon an obligation to God. They contended that it was because of "the duty which we owe to our Creator," that "all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience."

There is ample evidence that the Founding Fathers were aware of the ontological basis of our natural rights. It is because we are rational, intellectual, social, spiritual, and political beings that we naturally have rights to develop our intellect, to hear appeals made

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[27] Elliot's Debates 307, 659 (1861 ed.)
to reason that can make clearer the proper means to our ordained end, rights to assemble with our fellow men to discuss more effective socio-political groupings better suited for the development of our faculties and the protection of our basic rights, as well as freedom of conscience and religion.\(^{28}\) When later in life Thomas Jefferson was explaining why he and the other Fathers believed in natural rights, he wrote: "We believed, with them, that man was a rational animal, endowed by nature with rights, and with an innate sense of justice...."\(^{29}\) We have natural rights of the intellect, according to Jefferson, because "Almighty God hath created the mind free."\(^{30}\) Jefferson saw with the scholastics that natural law was the participation of rational men in God's divine law; natural law and rights can be discovered, he wrote, by "the head and heart of every rational and honest man. It is there nature has written her moral laws, and where every man may read them for himself."\(^{31}\) "Questions of natural right," he added, "are triable by their conformity with the moral sense and reason of man."\(^{32}\)

It has been aptly noted that Jefferson considered moral sense and natural rights as necessary allies.\(^{33}\) When other Founding Fathers posited our natural rights upon nature, it was in the sense that they referred to the nature of man as above defined. To George Mason the natural rights were "the sacred rights of human nature,"\(^{34}\) and to Richard Henry Lee they were "the just and proper rights of human nature."\(^{35}\) Patrick Henry came by his awareness of natural rights not from the record of Anglo-Saxon history or the perusal of either colonial charters or a "state of nature;" according to Jefferson, Henry "drew all natural rights from a purer source—the feelings of his own heart."\(^{36}\)

\(^{28}\)See Lucey, Natural Law and American Legal Realism, 30 Geo. L.J. 493 (1942).
\(^{29}\)Letter to Judge William Johnson, June 12, 1823; 15 Memorial Edition 441.
\(^{30}\)The Bill for Establishing Religious Freedom in Virginia; Morison 206.
\(^{31}\)Letter of Aug. 28, 1789; 3 Memorial Edition 228.
\(^{32}\)Opinion rendered, April 28, 1793, "On the Question Whether the United States have a Right to Renounce their Treaties with France;" Basic Writings of Thomas Jefferson 316.
\(^{34}\)Letter to his son John, May 20, 1790; Hill, George Mason, Constituonalist 249 (1938).
\(^{35}\)Letter to John Dickinson, July 25, 1768. See also Letters to Landon Carter, Feb. 24, 1766; to Samuel Adams, May 8, 1774; and to George Washington, Nov. 13, 1775. Letters of Thomas Jefferson 14, 29, 110, 156 (Ballagh ed. 1911) [hereinafter cited as Ballagh].
\(^{36}\)12 Works, op. cit. supra note 17, at 39; Miller, Origins of the American Revolution 175 (1943).
The Fathers rather frequently indicated that our rights were founded on the law of nature. Richard Henry Lee rather typically spoke of "our just and legal possession of property and freedom, founded in the law of nature."37 Richard Bland often recurred to "the Law of Nature, and those Rights of Mankind which flow from it."38 In his Summary View in 1774 Thomas Jefferson said that the colonists were "claiming their rights derived from the laws of nature."39 Similarly, in the Declaration of Independence he stated that our rights were derived "from the laws of nature and of nature's God."40 The Virginians were obviously not alone in sensing a relationship between natural rights and the law of nature. The assembled colonists at the First Continental Congress agreed to found their rights "upon the laws of nature, the principles of the English Constitution, the charters and compacts."41 The order is highly significant, and as revolution began the last two sources virtually disappeared from American thinking.

At times the Founding Fathers spoke of natural rights as being the gift of nature, but in practically every instance it was meant the gift of God which clothed us with a distinctive nature, as aforesaid. For instance, James Madison, who clearly acknowledged the Deistic source of right, wrote: "The equal right of every citizen to the free exercise of his religion according to the dictates of conscience is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature...."42 "The laws of nature are the laws of God; whose authority can be superseded by no power on earth," wrote George Mason.43 And George Washington admonished us that as a nation we should forever respect "the eternal rules of order and right which Heaven itself has ordained."44 Carl Becker, outstanding scholar on Jefferson and the American Revolution, has concluded that

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37Preface to Williamsburg edition of Dickinson's Letter to a Farmer in Pennsylvania (1768); 2 Life and Writings of John Dickinson, op. cit. supra note 22, at 290.
38Bland, An Inquiry into the Rights of the British Colonies 26 (Swem ed. 1766).
39Boyd 134.
40Id. at 315.
41Burnett, The Continental Congress 41 (1941). A few representatives from other states, particularly Duane and Galloway, were reluctant to posit colonial rights upon the law of nature, but there is not the slightest suggestion that any Virginian denied the law of nature and the doctrine of natural rights as the worthiest foundation for American rights. Indeed, the decision of the Congress to place reliance upon the laws of nature was largely the work of Richard Henry Lee. Mapp, The Virginia Experiment 371 (1957).
42Brant, James Madison, Virginia Revolutionary 249, 254 (1941).
44Farewell Address; Commanger, Documents of American History 169-75 (1938).
to the Founding Fathers "the natural rights philosophy was essentially at one with the Christian faith."45

Clearly to our ancestors the basis of right was moral and metaphysical. Occasionally Jefferson supported his arguments for natural rights with references to rights long possessed by the Anglo-Saxons, but his basis for right was solely metaphysical. Even Cornelia LeBoutillier, who cannot be accused of bias or even sympathy for such a foundation, has written: "Of all the Founding Fathers, Thomas Jefferson, perhaps, most lays himself open to suspicion of the metaphysical approach. There is no question but that he has this preoccupation, as he refers to the rights of man."46

The identification of natural rights to common law rights by early Americans has been greatly exaggerated,47 and the Fathers knew that the common law hardly provided guarantees for the kind of freedom of religion and freedom of communication that they had in mind. Only rarely would one of the leaders of Revolutionary America suggest that his natural rights were those possessed by savages in an imagined "state of nature." Burlamaqui was, of course, known to many of the Fathers, but hedonism obviously was scarcely the basis for men who recognized their natural rights as concomitants to natural duties owed to the Almighty. It is impossible to conclude that the utilitarianism of Bentham or of Hume had the slightest significance as the source of right to the Founding Fathers. Nor was John Locke of any great inspiration to the Virginians. Gilbert Chinard has written that "it is very doubtful if [Jefferson] was greatly influenced by [Locke]."48 The same is surely true of his fellow Virginians; these men had been well nurtured in the jurisprudence of Hooker, Bellarmine, Grotius, Thomas Aquinas, and Vattel, and the influence is omnipresent.49

Accepted Limitations Upon the Exercise of Natural Rights

With veritable unanimity the Founding Fathers from Virginia understood that ordinarily there could be socio-political limitations upon the exercise of the natural rights. The exception is generally limited to the natural right known as freedom of conscience. Here, Thomas Jefferson was quite typical of his colleagues in stating, "Our

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46LeBoutillier, American Democracy and Natural Law 110 (1950).
49See, e.g., Brant, op. cit. supra note 42, at 249, 254, for the influence of Robert Bellarmine and Thomas Aquinas.
rulers have authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."50 Moreover, at times some of the Virginians spoke as though other natural rights might be beyond restraint by the state. Thus, Richard Bland, referring to the natural right to retire from society, wrote: "This natural Right remains with every Man, and he cannot justly be deprived of it by any civil authority."51 There are, indeed, statements by Jefferson which, taken alone, might indicate that he accepted no legislative diminution of our natural rights. He once wrote: "The true office is to declare and enforce only our natural rights and duties, and to take none of them from us....52 On another occasion he stated rather broadly that "our liberty depends on the freedom of the press, and that cannot be limited without being lost."53

Jefferson and his contemporaries generally understood that the natural rights were subject in their exercise to the limitations imposed by the natural law. "All natural rights," said Jefferson, "may be abridged or modified... by the law," meaning, obviously, the natural law.54 In accepting the proposition that natural rights were subject in their exercise to the limitations contained in natural law principles, the Founders of our country had before them the very clear statement of Blackstone who especially influenced the lawyers of the time. Blackstone had written in his famous Commentaries:

"This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature...."55

Natural law limitations upon the exercise of natural rights embrace in principle (1) consideration for the common good, (2) respect for the equal rights of others, and (3) realization that when the basis of the right is absent, the exercise of the claimed right can properly be denied. All these were understood by the Founding Fathers. In discussing natural rights and their exercise, Jefferson observed, "The law of the majority is the natural law of every society of men."56 By this he gave no blessing to arbitrariness of a legislative majority, but meant

50A263; Wright, op. cit. supra note 19, at 158.
51Bland, op. cit. supra note 38, at 10.
52Letter to Francis W. Gilmer, June 7, 1816; 10 Ford 32.
53Letter To Dr. James Currie, Jan. 18, 1786; 4 Ford 132.
55Blackstone, Commentaries 40 (12th ed. 1793).
56Writings of Thomas Jefferson 496 (Washington ed. 1857) [hereinafter cited as Washington].
rather that respect for the good of the majority is an ever present limitation upon the exercise of individual rights. "A man has no natural right in opposition to his social duties," Jefferson added. When the exercise of natural rights, other than freedom of conscience, imperiled the common good, the exercise could be restrained by the group. According to George Mason, even freedom of religion could be limited when "any man disturb the peace, the happiness, or safety of society." Very similarly, James Madison indicated that no man should be "subjected to any penalties or disabilities unless under color of religion, any man disturb the peace, the happiness, or safety of society."

Patrick Henry might have subscribed to the same limitations. If he drafted the sixteenth article of the Virginia Declaration of Rights, as has been suggested at times, there is reason to believe he did not deem freedom of religion an absolute right, for the article qualifies the right in these words: "unless under the color of religion any man disturb the peace." However, his record as an attorney before the Revolution indicates that he was both willing and effective in defending the Baptists in their demands for freedom of religion and speech when they were charged with disturbing the peace. Jefferson, too, undoubtedly accepted limits upon the natural right of religious practice. He wrote: "Whatsoever is prejudicial to the commonwealth in their ordinary uses and therefore prohibited by the laws, ought not to be permitted to churches in their sacred rights. For instance, it is unlawful in the ordinary course of things or in a private house to murder a child. It should not be permitted any sect then to sacrifice children." George Washington also recognized limitations upon freedom of religion. He wrote that every man, "being accountable to God alone for his religious opinion, ought to be protected in worshipping the Deity according to the dictates of his own conscience," so long as he conducted "himself as a good citizen." In writing to the Quakers, President Washington indicated that our laws should treat the conscientious scruples of all men "with great delicacy and tenderness," insofar "as a due regard to the protection and essential interests of the nation may justify and permit."

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57 Letter to Danbury Baptist Association; Bates, Religious Liberty 384 (1946).
58 Brant, op. cit. supra note 42, at 241.
59 Id. at 245.
60 Morgan, op. cit. supra note 11, at 266-67.
61 Id. at 125.
62 Boyd 547-48.
63 The Writings of George Washington 321 n.83 (Fitzpatrick ed. 1939).
64 The Writings of Washington 168-69 (Sparks ed. 1846).
well that the task of delimiting natural rights would not be easy. "It is at all times difficult," he said, "to draw with precision the line between those rights which must be surrendered and those which may be reserved."63

Not only could freedom of religion be limited according to the Fathers, but so too could freedom of expression and other natural rights when they broke out into acts injurious to others. "The legitimate powers of government," wrote Jefferson, "extend to such acts only as are not injurious to others."66 when the equal rights of others were being violated by activity, natural rights could be restrained, at least by the democratically elected representatives of the people whose natural rights were being limited. Jefferson said: "This, like all other natural rights, may be abridged or modified in its exercise by their own consent, or by the law of those who depute them, if they meet in the right of others."67

It is of the utmost importance to perceive that the Founding Fathers, in consenting to limitations upon the natural rights, taught us that these rights could not be restrained by the state nor denied unless it was imperatively necessary to safeguard the common good against immediate danger. In stating that the evidence of natural law and natural rights can be seen by the mind and heart of every rational man, Jefferson observed: "It is there nature has written her moral laws, and where every man may read them for himself. He will never read there the permission to annul his obligations for a time, or forever, whenever they become dangerous, useless or disagreeable. . . . And though he may, under certain degrees of danger, yet the danger must be imminent, and the degree great."68 This insistence that natural rights prevailed unless there was a clear and present danger to a vital interest of society was made by others. For instance, Madison stated that "all men are entitled to the free exercise of religion, according to the dictates of conscience, unpunished, and unrestrained by the magistrate, unless the preservation of equal liberty and the existence of the state are manifestly endangered."69

For government to deny a natural right because of some supposed tendency to harm sometime in the future was unthinkable to Jefferson. In his Bill for Establishing Religious Freedom in Virginia he wrote: "That to suffer the civil magistrate to intrude his powers into

66Ford 263.
67Washington 496.
68Memorial Edition 228.
69Brant, op. cit. supra note 42, at 246.
the field of opinion and to restrain the profession of principles on
supposition of their ill tendency is a dangerous fallacy, which at once
destroys religious liberty." It is time enough," Jefferson added, "for
the rightful purposes of civil government for its officers to interfere
when principles break out into overt acts against peace and good
order." Even the influential Blackstone, whose ideas of personal
freedom were inadequately developed, stated in his Commentaries:
"Political or civil liberty, which is that of a member of society, is no
other than natural liberty, so far restrained by human laws (and no
further) as is necessary and expedient for the general advantage of
the public." If Blackstone was unwilling to condone inroads upon
natural rights that were not "necessary and expedient" to protect the
common weal, it can be assumed safely that the Virginia readers, more
enthusiastic and understanding exponents of the doctrine, would have
countenanced no greater limitations by the state.

As has been suggested, the Founding Fathers from Virginia knew
well that the equal rights of others must be considered in ascertaining
the permissible limits upon the exercise of natural rights. The natural
law accepted by these men stood not only for the proposition that man
is social by his nature, but also that his existence in society necessarily
imposes limitations upon the enjoyment of his natural rights. The
common good obviously is not advanced by allowing a single religious
zealot to play a phonograph loudly upon the steps of a church making
impossible the worship within of some five hundred others. It was
Jefferson who said, "No man has a natural right to commit aggression
on the equal rights of another." He added that "this is all from which
the law ought to restrain him." On another occasion he stated:
"Rightful liberty is unobstructed action according to our will within
limits drawn around us by the equal rights of
others." Well known
to most of these early Americans was the definition of justice from
Justinian, preserved and repeated by the jurists of the middle ages:
"Justitia est constans et perpetua voluntas jus suum cuique tri-
buendi." "Every denomination of Christians," said Richard Henry
Lee, "has a right to pursue its own religious modes, interfering not
with others."
Since the natural right sometimes referred to as freedom of communication was designed to enable us to help ourselves and others to our ordained end and to make temporal society a more effective institution for accommodating our temporal needs, the peddling of untruths is never embraced within such a natural right. This was well comprehended by the Fathers. As much as Jefferson loved freedom of the press, he held it subject to these natural law limitations. It ought to be restrained, he urged, "within the legal and wholesome limits of truth."\textsuperscript{77} In his Draught of a Fundamental Constitution for the Commonwealth of Virginia in 1783, he suggested a clause: "Printing presses shall be subject to no other restraint than liableness to legal prosecution for false facts printed and published."\textsuperscript{78} Clearly, to Jefferson untruths had no right to enter the market place of thought. Nevertheless, although there is no natural right to utter or publish defamatory untruths, it does not follow that the criminal sanctions of the state should be used to incarcerate such individuals who pervert freedom of communication. There is much to be said for the social policy contained in the Draft for the Virginia Constitution of 1776, which read: "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."\textsuperscript{79} One can believe that Jefferson felt much this way; when a clergyman allegedly libelled him he had the prosecution dismissed.\textsuperscript{80}

Because of the lack of appeal to rational ends when force and violence take over, most of the Founding Fathers qualified the natural right to assemble by phrasing this as a "right of the people to assemble peaceably."\textsuperscript{81} Perhaps the Fathers knew better than our generation that when printing is used for peddling for profit pornographies and obscenities it is no longer a natural right. As devoted a believer in natural rights and freedom of expression as Patrick Henry stated: "I acknowledge that licentiousness is dangerous, and that it ought to be provided against."\textsuperscript{82} There is evidence to conclude that even Thomas Jefferson was willing to have the state prosecute those who degenerated in expression to licentiousness clearly endangering community morals.\textsuperscript{83}

\textsuperscript{77}Miller, Crisis in Freedom 231 (1951).
\textsuperscript{78}Peden 220.
\textsuperscript{79}Boyd 363.
\textsuperscript{80}Letter to Wilson Cary Nicholas, June 13, 1809; Ford 253.
\textsuperscript{81}Richard Henry Lee, Draft for Declaration of Rights (Prepared Oct 2, 1787); 2 Ballagh, op. cit. supra note 76, at 442. See Monaghan, op. cit. supra note 65, at 58.
\textsuperscript{82}Morison 323.
\textsuperscript{83}Letter to Thomas McKean, Feb. 19, 1809; Ford 218; 3 Memorial Edition 228; Mott, Jefferson and the Press 7 (1943).
Practically all of the Founding Fathers from Virginia who espoused the doctrine of natural rights included among their rights the freedoms of conscience and religion. When it was referred to as the right of conscience, it at times meant an absolute right to believe and, at other times, a right to practice one's faith openly. "The rights of conscience," according to Jefferson, could never be submitted to temporal legislators. On another occasion he wrote: "All persons shall have a full and free liberty of religious opinion." Moreover, in his Bill for Religious Freedom which eventually passed in 1785, Jefferson stated that "no man shall... suffer on account of his religious opinions of beliefs...." James Madison agreed that liberty of conscience was one of the "choicest liberties of the people." "The rights of conscience," he added, were "not included in the surrender implied by the social state." This right of conscience was clearly fundamental to Patrick Henry, who so stated in the debates in the Virginia Convention on the ratification of the United States Constitution. Similarly, George Washington, a great believer in the natural rights philosophy, wrote that all Americans are entitled to enjoy "the exercise of their inherent natural rights," the foremost being "liberty of conscience."

To most of the Virginians the present natural right was something more than a right of belief, of conscience, and something more than the toleration of Locke. It was a natural right to worship their God openly. The Virginia Declaration of Rights, authored largely by George Mason, and adopted unanimously by the Virginia Convention, read in Article Sixteen:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other."

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84Peden 159.
85Draft of a Constitution for Virginia (1776); 1 Boyd 334, 365.
86Hening 84.
879 Works, op. cit. supra note 17, at 485.
88Morgan, op. cit. supra note 11, at 348; Morison 322.
89Letter to Hebrew Congregation of Newport, R.I., Aug. 7, 1790; Monaghan, op. cit. supra note 65, at 44.
It was here that Mason wrote: "All men have an equal, natural and unalienable right to the free exercise of religion, according to the dicta
tes of conscience . . . ."90 In the later words of Jefferson: "The con
vention of May 1776, in their declaration of rights, declared it to be a
truth, and a natural right, that the exercise of religion should be
free."91 Richard Henry Lee fully agreed that "every denomination
of Christians has a right to pursue its own religious modes."92

The men of the Presbytery of Hanover on May 19, 1785, adopted
a memorial in opposition to a pending bill providing funds for teach-
ers of the Christian religion. The document stated: "Religion is al-
together personal, and the right of exercising it unalienable; and it
is not, cannot, and ought not to be, resigned to the will of the society
at large; and much less to the Legislature, which derives its authority
wholly from the consent of the people, and is limited by the original
intention of civil associations."93 In December of that year Jefferson's
Bill for Religious Freedom was finally passed, providing that man
would not only have a right to religious opinion, "but that all men
shall be free to profess, and by argument to maintain, their opinion
in matters of religion." This, it was added, was "of the natural right
of mankind."94

To Jefferson freedom of religion certainly meant the right to
preach what one desired. In his Notes on Virginia he wrote: "The
legitimate powers of government extend to such acts only as are in-
jurious to others. But it does me no injury for my neighbor to say
there are twenty gods, or no god."95 The Virginia Convention that
ratified the Constitution accompanied its ratification with a list of
proposed amendments and a bill of rights. Number twenty shows the
importance of free exercise of religious liberty to that body. It reads:

"That religion, or the duty which we owe to our Creator, and
the manner of discharging it can be directed only by reason
and conviction, not by force or violence, and therefore all men
have an equal, natural and unalienable right to the free exer-
cise of religion according to the dictates of conscience."96

Even freedom to worship or to exercise publicly one's religion was
considered veritably an absolute right by some of the Fathers. James

90Id. at 57-58.
91Peden 158.
93Humphrey, op. cit. supra note 25, at 400-01.
9412 Hening 84-86; Morison 206; Padover 946-47.
95Peden 159.
96Elliot's Debates, op. cit. supra note 27, at 376, 659.
Madison, in his Memorial and Remonstrance against Religious Assessments wrote:

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to Him. This duty is precedent, both in order of time and in degree of obligation to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain, therefore, that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that religion is wholly exempt from its cognizance."

Again, in a resolution of the Virginia House of Burgesses drafted in 1776 by Jefferson, it was announced that any act would be invalid "which renders criminal the maintaining any opinions in matters of religion, forbearing to repair the church, or the exercising any mode of worship whatever or as prescribes punishments for the same...." And, in 1783 in his draft of a proposed Constitution for Virginia, Jefferson wrote: "The general assembly shall not have power... ot restrain [any person] from professing and supporting his religious beliefs."

Primarily, to the Founding Fathers from Virginia freedom of religion as a natural right meant that a man was not to suffer civil disabilities because of his religious beliefs. This was emphasized by Jefferson in his Bill for Establishing Religious Freedom, wherein he stated that man "has a natural right" to freedom of religion in the sense that he was to be deprived of no civil right or office because of his religious convictions. He wrote:

"Almighty God hath created the mind free... our civil rights have no dependence on our religious opinions... that therefore

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Humphrey, op. cit. supra note 25, at 395.
Boyd 550.
Padover 113.
the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right."

In his draft of a Constitution for Virginia in 1789 Jefferson added that "the general assembly shall not have power...to abridge the civil rights of any person on account of his religious beliefs...." To Jefferson the deprivation of political right and office to dissenters from the Established Church was a matter of grave injustice and a denial of natural right. "We have no right to prejudice another because he is of another church," he wrote.

Similarly, this natural right meant to the Virginians that no religious denomination should be assigned to inferior status by the law. George Mason in his Virginia Declaration of Rights adopted by the Virginia Convention of June 12, 1776, stated: "All men have an equal natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and... no particular religious sect or society of Christians ought to be favored or established by law, in preference to others." On October 24, 1776, the Presbytery of Hanover asserted "their natural rights" to religious liberty and indicated that this especially meant to them that they were not to be relegated to an inferior citizenship because of their faith.

To Jefferson religious liberty further meant freedom from a legal requirement compelling attendance at the Established Church. In his draft of a Constitution for Virginia of June, 1776, he added to his basic freedom of religion clause: "Nor shall any person be compelled to frequent or maintain any religious service or institution." Clearly, to Jefferson it was a violation of natural right to force a man to contribute to a church whose doctrines he could not accept. "No man," he wrote, "shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods...." "The rights hereby asserted," he concluded, "are of the natural rights of mankind."

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100Hening 84-86; Morison 206; Padover 945-47.
101Id. at 113.
102Notes for argument on Virginia legislation disestablishing the church (1776); 1 Boyd 546.
103Monaghan, op. cit. supra note 65, at 57-58.
104Commanger, op. cit supra note 44, at 124.
1051 Boyd 344, 363.
106Bill for Establishing Religious Freedom; 12 Hening 84-86.
Again, in his Draught for a Fundamental Constitution in 1783 he wrote: "The general assembly shall not have power... to restrain [one] from professing and supporting that belief, or to compel him to contrib- 

utions, other than those he shall have personally stipulated."107 James Madison was equally of the belief that freedom of religion embraced a freedom from assessments imposed by the state for a church to which the individual did not subscribe.108

The Founding Fathers from Virginia were not in agreement as to whether freedom of religion would permit an individual to be compelled by law to support the church of his own choice. George Washington saw no harm in a proposed bill to tax for support of teachers of the Christian Religion in Virginia. He wrote: "Although no man's sentiments are more opposed to any kind of restraint upon religious principles than mine, yet I confess, I am not among the number of those who are so alarmed at making men pay toward the support of that which they profess."109 Richard Henry Lee was of a like mind; in a letter to James Madison he wrote: "The experience of all times shows Religion to be the guardian of morals—And he must be a very inattentive observer in our Country, who does not see that avarice is accomplishing the destruction of religion, for want of a legal obligation to contribute something to its support. The Declaration of Rights, it seems to me, rather contends against forcing modes of faith and forms of worship, than against compelling contribution for the support of religion in general."110 Patrick Henry, Edmund Randolph, John Page, and John Marshall were in substantial agreement with this position. However, Thomas Jefferson, James Madison, George Mason, Colonel George Nicholas, and Robert Carter were opposed to the bill, and it was never passed.111 Jefferson's views are expressed in the preamble to his Bill for Religious Freedom, wherein he stated:

"That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pat-

107Padover 113.
108Memorial and Remonstrance again Religious Assessments (1785); Humphrey, op. cit. supra note 25, at 395.
109 Letter to George Mason (1785); id. at 401.
110Nov. 26, 1784; 2 Ballagh 504.
1112 Rowland go; Nevins, The American States During and After the Revolution 434 (1927).
tern, and whose powers he feels most persuasive to righteousness..."112

When it came to the public exercise of religious worship, most of the Revolutionary Virginians were in general agreement that the common good might at times require some limitations upon the natural right. As James Madison indicated, no man should be subjected to penalties or disabilities unless "under color of religion," he "disturb the peace, the happiness, or safety of Society."113 Very similarly, George Mason stated that the "fullest toleration in the exercise of religion" should be enjoyed by all men, "unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or the safety of society."114 Although before the Revolution Patrick Henry enthusiastically defended the Baptists in their demands for freedom of religion, even when they were charged with disturbing the peace, there is the suggestion that he was willing to accept limitations upon the natural right when the safety of the community might be endangered.115 Moreover, Richard Henry Lee wrote that it is "perfectly consonant... with our Revolution principles professed throughout all the states, that every denomination of Christians has a right to pursue its own religious modes, interfering not with others."116 Recall, too, that Jefferson accepted that "whatsoever is prejudicial to the commonwealth in their ordinary uses and therefore prohibited by the laws, ought not to be permitted to churches in their sacred rights."117

Although the natural right of religion might be limited at times, it was not enough to Jefferson that there might be some "ill tendency" from the practice of one's faith. He stated that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty."118 As indicated at greater length in the earlier paragraphs concerned with limitations upon natural rights, the natural right to worship God could be denied or limited, according to these Founding Fathers, only when it definitely and immediately imperiled the common good.

112 Hening 84-86.
113 Brant, op. cit. supra note 42, at 245.
114 Virginia Declaration of Rights, § 14; id. at 241.
115 Morgan, op. cit. supra note 11, at 266-67.
117 Notes for argument on Virginia legislation disestablishing the church (1776); 1 Boyd 547-48.
118 Hening 84-86.
Life, Liberty, and the Pursuit of Happiness

To all of the Founding Fathers from Virginia, life and liberty were natural rights. Illustratively, Richard Henry Lee stated in the First Continental Congress: "Life and liberty, which is necessary for the security of life, cannot be given up when we enter society." Additionally, a natural right to seek happiness was often recognized. As early as 1766 Richard Bland spoke of man's "natural right to promote happiness." And the Virginia Declaration of Rights, drafted by George Mason and adopted at a general convention of delegates from throughout the Commonwealth on June 12, 1776, declared that "all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness."

Locke's emphasis upon the property right was disregarded, and Burlamaqui's preference for happiness was substituted by Thomas Jefferson in the Declaration of Independence of July 4th of the same year, wherein it was solemnly stated "that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

The "pursuit of happiness" had not been referred to in the Declarations and Resolves of the First Continental Congress on October 14, 1774, which asserted: "That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following rights: 1. That they are entitled to life, liberty and property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent." Both property and the pursuit of happiness were often added to life and liberty as basic natural rights. For example, George Mason, in drafting a proposed declaration of rights for the United States Constitution, suggested that "all freemen have certain essential inherent rights... among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."

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119 English Historical Documents 805 (1953).
120 Bland, op. cit. supra note 38, at 10.
121 Morison 149; 12 Hening 110.
122 Boyd 429.
123 Morison 118.
124 Rowland 445.
Although all of the Founding Fathers recognized liberty as a natural right, they have not left clear evidence of what they meant by the term. Undoubtedly, however, it meant something more than freedom from arbitrary physical restraint. Carl Becker has said that to Jefferson liberty as a natural right meant freedom of opinion, freedom of occupation and enterprise, and freedom from arbitrary political authority; and his conclusion seems sound. Jefferson surely recognized freedom of religion and freedom of expression as basic natural rights, as is fully developed elsewhere in this paper. Liberty to Jefferson further included the right to labor and to enjoy the products of one's labor.

The right to develop one's faculties was generally recognized as a natural right of the individual. As early as 1764 Richard Bland had indicated that freedom from arbitrary laws was one of the natural rights of man. Two years later he explained that if Parliament should abandon the colonies to a foreign tyrant the colonists "have a natural Right to defend their liberties by open force." Bland was undoubtedly one of the first of the Fathers to assert that the colonists had a natural right of resistance against tyrannical or arbitrary rule. Thomas Jefferson was in complete agreement that we have the natural right to self-defense against those who would arbitrarily deprive us of our life or liberty. To Jefferson, too, the natural right to liberty was violated by slavery. Referring to the slavery wrought by the English king, Jefferson said: "He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him."

The natural right of liberty embraced man's freedom to retire from any particular political state and to emigrate elsewhere. This right of expatriation was early appreciated as a natural right. In 1766, in "An Inquiry into the Rights of the British Colonies," Richard Bland said: "This natural Right remains with every Man, and he cannot justly be deprived of it by any civil authority." When men enter society,
Bland observed, "they retain so much of their natural freedom as to have a right to retire from the Society, to renounce the Benefits of it, to enter into another Society, and to settle in another Country; for their Engagements to the Society, and their Submission to the publick Authority of the State, do not oblige them to continue in it longer than they find it will conduce to their Happiness, which they have a natural Right to promote." Bland concluded that all men have "a natural right to quit the society of which they are members and to retire into another country." Similarly, Thomas Jefferson in his "Summary View" reminded the Crown that our people "possessed a right, which nature has given to all men, of departing from the country in which chance, not choice, has placed them...." It is worth noting that in 1868 the United States Congress formally announced our national policy to be in accord with the views of these Founding Fathers from Virginia—that it is the "natural and inherent right of all people" to divest themselves of allegiance to any state.

The Property Right

When Thomas Jefferson omitted from the Declaration of Independence the third in the triumvirate of Locke's natural rights—life, liberty, and property—and substituted, as would have Burlamaqui, "life, liberty and the pursuit of happiness," he rather clearly indicated that to him property was not a highly significant natural right. On another occasion Jefferson wrote to a friend, "No individual has, of natural right, a separate property in an acre of land." In correspondence with Madison he indicated that specific property claims were civil and not natural rights. Jefferson wrote: "No man can by natural right oblige the lands he occupied." On another occasion he stated: "Whenever there is in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right." We may safely conclude that Jefferson believed in a natural right to occupy and work uncultivated lands and that he recognized that man would naturally have a property right in the fruits of his labors from the soil.

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133 Bland, op. cit. supra note 38, at 10, 14.
134 Boyd 121.
152 Letter to Isaac McPherson, Aug. 13, 1813; Dumbauld, op. cit supra note 74, at 56.
153 Letter to James Madison, Sept. 6, 1789; 5 Ford 116.
154 Koch, op. cit. supra note 127, at 65; 7 Ford 35-36.
155 Koch, op. cit. supra note 127, at 78.
The term "property" as a natural right had many diverse meanings to the Founding Fathers. At times it meant that the individual had a property right in the sense that he had a natural right to develop his properties, i.e., his natural faculties and talents. Probably the most acceptable definition went beyond the bundle of rights in realty and personality and comprehended development of the individual personality. James Madison has given us much insight into the way in which the word was used by the Fathers who spoke of it as a natural right. He states that the term "embraces everything to which a man may attach a value and have a right; and which leaves to every one else the like advantage. ... A man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has a property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights."

On other occasions some of the Founding Fathers from Virginia used the term "property" in this context as connoting more narrowly the common law rights in realty and chattels. George Mason, for example, in drafting the Virginia Declaration of Rights, adopted by the Convention of June 12, 1776, declared that among the natural rights are "the acquiring and possessing property." Later he spoke of the inherent right to "the means of acquiring, possessing, and protecting property." Similarly, Richard Henry Lee in his preface to the Williamsburg edition of Dickinson's Letters of a Farmer in Pennsylvania in 1768 wrote that "the great Author of nature" has given man his natural rights including "liberty, the virtuous enjoyment and free possession of property honestly gained." Seemingly the term is being used here in its narrow, legalistic sense. The natural right to property included not only its acquisition and enjoyment, but also its disposition as well. Richard Henry Lee announced "that the disposal of their own Property is the inherent Right of Freemen." Moreover,

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146 The Writings of James Madison 101 (Hunt ed. 1906) [hereinafter cited as Hunt]. It was in this sense that Locke and Jefferson used the word. Koch, op. cit. supra note 127, at 79.
147Monaghan, op. cit. supra note 65, at 57-58.
149Life and Writings of John Dickinson, op. cit. supra note 22, at 290.
150Resolves for the Virginia Assembly, June, 1774; 1 Ballagh 115.
the property right embraced a natural right to defend one’s property. Richard Bland, deeply devoted to the theory of natural rights, wrote: “If a man invades my property, he becomes an aggressor, and puts himself into a state of war with me; I have a right to oppose this invader.” Thomas Jefferson agreed and suggested that every man has a natural right to recapture his property wrongfully taken.

To the Founding Fathers property as a natural right meant, for the time being, primarily that Parliament could not tax the colonists and thus indirectly take from them their property. On May 29, 1765, Patrick Henry had introduced resolutions into the Virginia House of Burgesses, four of which were adopted, by which that body indicated that it had the exclusive right to tax the property of Virginians. Three years later the same body was demanding the “full enjoyment of all our natural and constitutional rights and privileges,” adding: “No power on earth has a right to impose taxes upon the people or to take the smallest portion of their property without their consent, given by their representatives in Parliament.”

Of all the Founding Fathers from Virginia, James Madison has given us the clearest understanding of what property meant as a natural right. In his essay on “Property” that appeared in the National Gazette on March 29, 1792, Madison stated that arbitrary limitations and restrictions upon the acquisition of property were violative of right. There was no doubt in his mind that the right to possess property sprang from the law of nature. Madison was equally willing to add that the natural right included protection by the government of the owner’s realty and chattels. He wrote: “Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government which impartially secures to every man, whatever is his own.” To Madison arbitrary limitations and controls upon the use of property were contrary to natural right, and to his fellow Virginians arbitrary controls were wrong. Like all other natural rights,
however, the property right was subject to reasonable regulation to protect other members of the community in their legitimate rights. Governmentally condoned monopolies were to Madison a denial of the property rights of others. Furthermore, the natural right to property was clearly infringed by both arbitrary taxes and unequal taxation. Lastly, by indirection Madison made the point that the property right would be violated if the state took property from the individual without just compensation or for purposes not public.

There is abundant evidence from the Virginians that arbitrary taxation was generally deemed violative of the natural right to property. This is developed in the following section.

The Right to Govern and Tax Themselves

Undoubtedly one of the most important natural rights to the Virginia Founding Fathers was the right of self-government. Thomas Jefferson's writings are replete with recognitions of this right. He stated:

"Every man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will; collections of men by that of their majority; for the law of the majority is the natural law of every society of men. When a certain description of men are to transact together a particular business, the times and places of their meeting and separating, depend on their own will; they make a part of the natural right of self-government. This, like all other natural rights, may be abridged or modified in its exercise by their own consent, or by the law of those who depute them, if they meet in the right of others; but as far as it is not abridged or modified, they retain it as a natural right, and may exercise them in what form they please, either exclusively by themselves, or in association with others, or by others altogether, as they shall agree."

On the 26th of July 1774, the freeholders of Albemarle County adopted Resolutions, almost surely from the pen of Jefferson, to the effect that no legislature had power over them except their own "duly constituted and appointed with their own consent" and that they held these rights "as common rights of mankind."

\[^{235}\text{Hunt 103.}\]
\[^{236}\text{Ibid.}\]
\[^{237}\text{Ibid.}\]
\[^{238}\text{Washington 496; Caldwell, The Jurisprudence of Thomas Jefferson, 18 Ind. L.J. 198 (1949).}\]
\[^{239}\text{Boyd 117.}\]
Eight days earlier the freemen of Fairfax County meeting in Alexandria had passed several resolves, including what was in all probability the first assertion of the natural right to self-government by an American representative body. These men declared and resolved:

"That the claim, lately assumed and exercised by the British Parliament, of making all such laws as they think fit, to govern the people of these colonies, and to extort from us our money without our consent, is not only diametrically contrary to the first principles of the Constitution, and the original compacts by which we are dependent upon the British Crown and government; but it is totally incompatible with the privileges of a free people and the natural rights of mankind, will render our own legislatures merely nominal and nugatory, and is calculated to reduce us from a state of freedom and happiness to slavery and misery."

George Washington was in the chair on this occasion, and the resolves were undoubtedly from the pen of George Mason. Soon thereafter they were carried by Washington to Williamsburg and presented to the Burgesses. All of the Virginians in the First Continental Congress were in full agreement with that conclave's Declaration of Rights, which included "a right in the people to participate in their legislative council," at least as to matters of "taxation and internal polity."

Before most of the Founding Fathers considered revolution and independence, they had accepted a natural right of freedom from taxation by governmental bodies in which the taxpayers were not represented. Later, of course, this was absorbed into the natural right of self-government. As early as 1763 Richard Bland in "The Colonel Dismounted" had stated that "any tax respecting our INTERNAL polity, which may hereafter be imposed on us by Act of Parliament, is arbitrary, as depriving us of our Rights, and may be opposed." Three years later Bland averred the natural right of the Virginians to be subjected to laws only when passed by a legislature in which they were represented, and the natural right to be taxed only under the same circumstances. He wrote: "I have proved irrefragably that the Colonies are not represented in Parliament, and consequently upon your own Position, that no new Law can bind them that is made without the concurrence of their Representatives; and if so, then

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\(^{157}\) Rowland 418.

\(^{158}\) Id. at 421.

\(^{159}\) Declaration and Resolves of Oct. 14, 1774; Documents Illustrative of the Formation of the Union of the American States 1 (Tansill ed. 1927).

\(^{160}\) Meade, op. cit. supra note 145, at 198.
every Act of Parliament that imposes internal Taxes upon the Colonies is an Act of Power, and not of Right."\textsuperscript{161}

On February 27, 1766, a group of prominent planters met at Leedstown and drew up articles of association, in which they asserted that they were entitled to rights "founded on reason, law and compact" and that among them was the right that man "cannot be taxed, but by the consent of a Parliament in which he is represented by persons chosen by the people, and who themselves pay a part of the tax they impose on others." This, proclaimed these early Virginians, was "a fundamental right."\textsuperscript{162} Two years later the Virginia House of Burgesses drafted a memorial to the House of Lords and a remonstrance to the House of Commons, in which they set forth that "no power on earth has a right to impose taxes upon the people or to take the smallest portion of their property without their consent, given by their representatives in Parliament." The Burgesses served notice that they wanted "full enjoyment of all our natural and constitutional rights and privileges."\textsuperscript{163} The famous Fairfax Resolves, mentioned earlier, joined in the assertion that taxation by a Parliament in which the taxpayers were unrepresented was a denial of natural right.\textsuperscript{164} George Washington is also on record as indicating that to him Parliament's imposition of taxes upon the colonists was contrary to natural law.\textsuperscript{165} Everywhere throughout the Colonies the voice was the same, as witnessed by the Resolution of the Stamp Act Congress asserting the natural right of Americans "that no taxes be imposed on them but with their own consent, given personally or by their representatives."\textsuperscript{166}

Suggestions that the doctrine of natural rights was enforced by the Founding Fathers solely to provide an intellectual base for revolution are unsound. As late as 1790 Thomas Jefferson was writing of the instant natural rights: "Every man, and every body of men on earth possesses the right of self-government. They receive it with their being from the hand of nature."\textsuperscript{167} Caleb Patterson is indeed correct when he concludes that "self-government must be placed high among the blessings which Jefferson claimed as a natural right of man."\textsuperscript{168}

Many of the Founding Fathers from Virginia recognized a natu-
eral right in the people to alter or abolish their form of government. George Mason, draftsman of the Virginia Declaration of Rights adopted by the Virginia Convention of June 12, 1776, wrote: “Whenever any government shall be found inadequate, or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, and establish another, or abolish it.” Later, when suggesting amendments to the United States Constitution for the Virginia convention concerned with its ratification, Mason spoke of the right to “alter, or abolish it and to establish another in such manner as shall be judged most conducive to the public weal.” Patrick Henry also recognized “an indubitable, inalienable and indefeasible right to reform, alter or abolish” the governmental form of the moment. Moreover, James Madison originally wished to amend the United States Constitution by prefixing a declaration that “the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.”

Thomas Jefferson probably even more than his contemporaries believed that “whenever any form of government becomes destructive of these ends”—man’s “inherent and inalienable rights”—“it is the right of the people to alter or abolish it.” Through Gilmer, Jefferson was the disciple of St. Robert Bellarmine, who had written that “if there be legitimate cause,” the people may change the kind of government in which they find themselves. There is additional evidence that Virginians of the time rather widely subscribed to a natural right to alter the government. John Leland, a highly respected Baptist minister, asserted in 1791 in his well-received essay on the “Rights of Conscience” that “whenever government is found inadequate to preserve the liberty and property of the people they have an indubitable right to alter it so as to answer their purposes.”

**Freedom of Communication**

There are some indications that the Founding Fathers from Virginia considered certain aspects of what we call freedom of communication to be within the concept of natural rights. Thomas Jefferson, for instance, deemed freedom of communication between the

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169 Monaghan, op. cit. supra note 65, at 57-58.
170 Rowland 283.
171 Wirt, Patrick Henry 277 (1817).
172 Speech in Congress, June 8, 1789; 5 Hunt 376.
174 Bellarmine, De Laicis 27 (Murphy transl. 1928).
people and their representatives to be a natural right. The members of the First Continental Congress in their Declarations and Resolves asserted on October 14, 1774, that the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts "have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." George Mason similarly concluded that by nature men have "a right peaceably to assemble together to consult for their common good, or to instruct their representatives." His Virginia Declaration of Rights, adopted by the General Convention on July 12, 1776, follows the assertion of man's inherent rights with the later statement that "the Freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments." There were those who not only opposed the Alien and Sedition laws, but who, like James Madison and John Taylor, believed these limitations upon the press to be inimical to natural rights. Of course, Patrick Henry considered freedom of the press as a basic right. And Richard Henry Lee assuredly believed that freedom of the press was to be included in declarations of right, but it cannot be said that he considered it a natural right.

Thomas Jefferson did not deem free presses to be a matter of basic natural rights; rather, he considered this freedom as a "fence" to protect the people in the enjoyment of their more basic rights. This is not to say that freedom of the press was unimportant to Jefferson. He clearly believed that expressions of opinion were not to be punished by the state because of some ill tendency. The Sedition Act to him was patently unconstitutional. Most of his contemporaries from Virginia deemed the Alien and Sedition laws, in their punishment of newspaper editors for their opinions, to be the very worst form of violating freedom of the press. Once Jefferson somewhat

\[\text{175 Letter to James Monroe, Sept. 7, 1797; 8 Works, op. cit. supra note 17, at 359.}\]
\[\text{176 Burnett, op. cit. supra note 41, at 58; Morison 119-20.}\]
\[\text{177 Rowland 447.}\]
\[\text{178 Howison, op. cit. supra note 13, at 352.}\]
\[\text{179 Morgan, op. cit. supra note 11, at 348.}\]
\[\text{180 Ballagh 442.}\]
\[\text{181 Letter to Noah Webster, 1790; 8 Memorial Edition 112-13.}\]
\[\text{182 See Jefferson's Bill for Establishing Religious Freedom in Virginia; Morison 206.}\]
\[\text{183 Ford 141; 8 Ford 56.}\]
\[\text{184 Howison, op. cit. supra note 13, at 352.}\]
loosely remarked that "our liberty depends on the freedom of the press, and that cannot be limited without being lost."185 There is good reason to believe that some limitations upon the press were acceptable to Jefferson. In his draft for a constitution for Virginia in 1776 he wrote: "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."186 Libel and slander were beyond the pale to Jefferson, and their punishment he would have admitted, at least by actions brought by those individuals injured.187 Freedom of the press, said Jefferson, ought to be restrained "within the legal and wholesome limits of the truth."188 Nevertheless, when he was allegedly libelled by a clergyman, Jefferson was willing to order the dismissal of the prosecution.189

Like Jefferson, James Madison considered freedom of the press as one of the "choicest liberties of the people." He was instantly willing to join Jefferson in denouncing the Alien and Sedition Acts as unwarranted denials of freedom of communication. The Virginia Resolutions of 1798 were written by Madison, with encouragement from Jefferson, who had shortly before drafted the Kentucky Resolutions. Both stressed the theory of natural and essential rights and condemned the federal legislation as unjustified. When Madison was questioned if the federal government had the power to punish for libellous attacks against itself, he forcefully responded in the negative.190 To Madison freedom of communication included "the right of freely examining public characters and measures" which he explained as "the only effectual guardian of every other right."191 When speech or the press concerned matters of government and the temporary custodians of power, Madison was absolutely unwilling to attempt any distinction between freedom and "licentiousness" of the press. Throughout his life he fought those who through love of power "resorted to a distinction between the freedom and licentiousness of the press" to stifle freedom of communication when its exercise was injuring neither the equal rights of others nor the common good. By such a reckless jurisprudence of appellation Madison saw that "the judge as to what is licentious may escape through any constitutional

185Letter to Dr. James Currie, Jan. 18, 1786; 4 Ford 132.
1861 Boyd 363.
187Mott, op. cit. supra note 83, at 7.
188Miller, op. cit. supra note 77, at 231.
190Hunt 389-92; Koch, op. cit. supra note 127, at 58; Burns, op. cit. supra note 149, at 82.
191Letters and Other Writings of James Madison 540 (Congress ed. 1865).
restriction." He concluded: "A supposed freedom which admits of exceptions, alleged to be licentious, is not freedom at all. Under it men of a particular religious opinion might be excluded from office, because such exclusion would not amount to an establishment of religion, and because it might be said that their opinions are licentious. And under it Congress might denominate a religion to be heretical and licentious, and proceed to its suppression."\textsuperscript{192}

Madison's healthy antipathy to labels should not tempt the reader to conclude that he deemed the natural rights, even freedom of religion, to be absolutes. It can be stated quite categorically that he was willing for society to limit the exercise of natural rights when such overt action constituted a clear and present danger to the natural rights of others or the security of society. Recall that he wrote: "All men are entitled to the free exercise of religion, according to the dictates of conscience, unpunished, and unrestrained by the magistrate, unless the preservation of equal liberty and the existence of the state are manifestly endangered."\textsuperscript{193} James Madison seemingly would not have imposed upon the state any obligation to provide teaching posts for erratic thinkers. In passing upon professors for the contemplated University of Virginia, he advised that they had better be "orthodox" as well as "able" and that they were expected to safeguard the community against "heretical intrusions into the School of Politics."\textsuperscript{194}

It is a great disservice to the memory of both Jefferson and Madison to cite them in defense of absolute, libertarian notions. Freedom of printing and speaking was no more an absolute right, devoid of social control, to them than it was to their contemporary Founding Fathers. Not only did the communicative right end when it deviated from the truth, but when it failed to respect the legitimate concerns of others it was equally subject to restraint. No Virginian of the time was more concerned for freedom of speech and press than Patrick Henry, and yet he stated in the debates of the Virginia Ratifying Convention of June, 1788: "I acknowledge that licentiousness is dangerous, and that it ought to be provided against."\textsuperscript{195} Nor was the irrational rule of the mob any more acceptable than the recourse to untruths. To those who added to their rights freedom of assembly, it was uniformly "freedom to assemble peaceably."\textsuperscript{196}

\textsuperscript{192}Padover 295; Burns, op. cit. supra note 149. at 82.  
\textsuperscript{193}Brant, op. cit. supra note 42. at 246.  
\textsuperscript{194}Hunt 220.  
\textsuperscript{195}Morison 323.  
\textsuperscript{196}Ballagh, op. cit. supra note 76. at 442; 2 Rowland 447; Morison 119-20.
SOME OTHER OCCASIONALLY SUGGESTED NATURAL RIGHTS

There are some writers, e.g., Umbreit, who have remarked that the natural rights of the Founding Fathers were simply the common law rights. These writers almost uniformly urge that their thesis is proved because the Fathers termed the right of trial by jury to be a natural right. The writings of the Revolutionary Americans simply do not show that they overwhelmingly or even generally asserted that the right of trial by jury was a natural right. The record is clear that Thomas Jefferson did not deem this a natural right, but only a "fence" to protect the people in their natural rights. Moreover, it is suggested that most Virginians, as well as colonists generally, would have agreed. This is, of course, not to suggest that the Virginians did not treasure such a right, but it was ordinarily referred to not as a natural right but as, in the words of Madison, "one of the choicest liberties of the people," or "a fundamental right," or "the most valuable Birthright of every freeman," as Robert Carter Nicholas wrote.

Claims that the Founding Fathers from Virginia alleged trial by jury to be a natural right find support almost solely in a remark of Richard Henry Lee and in the arguments of Patrick Henry in the debates of the Virginia convention concerned with adopting the Constitution of the United States. Henry is reported to have said: "If you will in the language of freemen stipulate that there are rights which no man under heaven can take from you, you shall have me going along with you—not otherwise." Concededly, he might well have had in mind trial by jury at the time of these remarks. Yet, as a lawyer he should have understood that there were considerable areas of litigation, such as suits in equity and even the petty offenses in criminal law, in which trial by jury was not given by Americans to themselves in either colonial governments or the contemporary state constitutions.

In procedural matters there was further insistence upon the right to an impartial judge. Thomas Jefferson, for instance, asserted that no man had "a natural right to be the judge between himself and an-
other." Richard Henry Lee wanted to insert in his declaration of rights that "the right administration of justice should be secured by the freedom and independency of the Judges," but he stopped short of suggesting that there was a natural right to a free, independent, or impartial judge. Lee added: "There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property and persons." The language might possibly mean that he considered these to be natural rights, but more likely that he deemed them more akin to Jefferson's "fences" to protect the more basic natural rights. There is no considerable belief that there was a natural right to be free from ex post facto laws. Yet Thomas Jefferson once wrote: "The sentiment that ex post facto laws are against natural right is so strong in the United States that few, if any of the State constitutions have failed to proscribe them."

CONCLUSION

There were additional natural rights suggested by some of the Founding Fathers from Virginia. Freedom from perpetual obligation, for instance, was deemed a natural right by Jefferson. But the natural rights on which there was the largest agreement and the greatest significance were those discussed previously: freedom of conscience and religion, life, liberty and the pursuit of happiness, property, the right to govern and tax themselves, and freedom of communication.

Practically without exception these Founding Fathers stressed the equality of natural right. Thomas Jefferson spoke of "the equal right of every citizen, in his person and property." On another occasion he wrote, "Rightful liberty is unobstructed action according to our will within limitations drawn around us by the equal rights of others." "No man," he added, "has a natural right to commit aggression on the equal rights of another, and this is all and from

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201 Letter to Francis W. Gilmer, June 7, 1816; 10 Ford 32.
202 Ballagh, op. cit. supra note 76, at 442.
203 Letters of a Federal Farmer in 1787; Ford, op. cit. supra note 202, at 315.
204 Letter to Isaac McPherson, Aug. 13, 1813; Dumbauld, op. cit. supra note 74, at 56; 13 Memorial Edition 326.
205 Letter to Albert Gallatin, Nov. 26, 1805; 10 Works, op. cit. supra note 17, at 185.
207 Letter to Isaac H. Tiffany, April 4, 1819; Dumbauld, op. cit. supra note 74, at 55.
which the laws ought to restrain him."\textsuperscript{211} It was in his Summary View that Jefferson stated that Parliament had no power to encroach "upon those rights which God and the laws have given equally and independently to all."\textsuperscript{212}

Richard Bland had similarly stressed at an earlier date the equality of natural right.\textsuperscript{213} George Mason also wrote that "all men have an equal natural and unalienable right to the free exercise of religion...."\textsuperscript{214} Because there had been the preferred church in Virginia with discriminations against the so-called dissenters, it was equality of the natural right to religion that was most frequently asserted. Madison opposed the 1785 Bill for Religious Assessments "because, the bill violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If 'all men are by nature equally free and independent' (the Virginia Declaration of Rights, article one) all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of conscience' (the Declaration of Rights, article sixteen)."\textsuperscript{215}

Undoubtedly a number of the Founding Fathers from Virginia knew of John Locke's ideas on natural law and natural right and were influenced by him. At a relatively early date in this period Bland was endorsing his ideas.\textsuperscript{216} Jefferson read a good deal of Locke,\textsuperscript{217} but it is noteworthy that he repudiated Locke's triumvirate of natural rights language in favor of Burlamaqui's in the Declaration of Independence,\textsuperscript{218} as did George Mason.\textsuperscript{219} Malone has noted that Jefferson did not bother to copy Locke's ideas into his notebooks,\textsuperscript{220} and Chinard concludes that it is very doubtful if Jefferson was greatly influenced by Locke.\textsuperscript{221} According to James Madison, the delegates read much

\begin{footnotes}
\footnote{Letter to Francis W. Gilmer, June 7, 1816; 10 Ford 32.}
\footnote{Boyd 121.}
\footnote{Bland, op. cit. supra note 38, at 25.}
\footnote{Virginia Declaration of Rights; Monaghan, op. cit. supra note 65, at 58.}
\footnote{Padover 301.}
\footnote{Locke was cited by Bland in An Inquiry into the Rights of the British Colonies, op. cit. supra note 48. See also Rossiter, op. cit. supra note 130, at 267.}
\footnote{Becker, Declaration of Independence 27 (1922); 1 Thorpe, Constitutional History of the United States 155 (1901).}
\footnote{Boyd 315.}
\footnote{Hill, op. cit. supra note 34, at 140.}
\footnote{Malone, Jefferson the Virginian 175 (1948).}
\footnote{Chinard, op. cit. supra note 48, at 54.}
\end{footnotes}
of Locke at the First Continental Congress,\textsuperscript{222} and his works were undoubtedly read quite widely by the Virginians.\textsuperscript{222} It is suggested, nevertheless, that his influence upon the Founding Fathers was much less than has been popularly supposed. A biographer of Patrick Henry asserts that Henry was “unlearned in the philosophy of Locke”\textsuperscript{224} and that the influence upon many of the other Virginians was undoubtedly no greater.

Burlamaqui exerted a substantial influence upon some of Virginia’s Founding Fathers.\textsuperscript{225} The same may be said of Montesquieu;\textsuperscript{226} his \textit{Spirit of the Laws} was Jefferson’s bible, according to one author.\textsuperscript{227} Yet another biographer claims that Lord Kames was the principal source of Jefferson’s ideas.\textsuperscript{228} Vattel\textsuperscript{229} and Grotius\textsuperscript{230} were read by many of the Fathers, and their influence was probably considerable. The now sanctified Robert Bellarmine clearly impressed Madison, who was willing to recommend him to Jefferson.\textsuperscript{231} His influence upon Jefferson has been noted by others,\textsuperscript{232} and, through Filmer, who made Bellarmine’s ideas widely available to English and Colonial readers, Bellarmine was persuasive not only to Madison and Jefferson, but also to George Mason and others.\textsuperscript{233} It should be noted too that Thomas Aquinas had so much to offer James Madison that he was willing to suggest to Jefferson that Aquinas was well worth perusing.\textsuperscript{234}

The writings of the Founding Fathers from Virginia give evidence that they found ideas and inspiration also in Pufendorf,\textsuperscript{235} Wolf,\textsuperscript{236}
Priestly, Filmer, Sydney, Domat, and Wollaston. Even such a list should not be deemed exhaustive, since many of the leaders of this day read widely over the whole range of English, Continental, and Roman jurists. They were simply the contemporary exponents of a philosophy of natural rights and natural law that had been aged over the centuries.

271 Thorpe, op. cit. supra note 217, at 155.
272 Id. at 27; Bellarmine, op. cit. supra note 174; Hunt, op. cit. supra note 223, at 276.
274 Rossiter, op. cit. supra note 139, at 267.
275 Bland, op. cit. supra note 38; Rossiter, op. cit. supra note 130.
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