

## THE NATURAL LAW PHILOSOPHY OF FOUNDING FATHERS

**I**N the early summer of 1933 the Seventy-Third Congress of the United States, in special session, passed what it officially entitled the National Industrial Recovery Act. In both House and Senate majorities favoring the measure were overwhelming. Pursuant to the provisions and directions of this extremely comprehensive statute, industrial processes and procedures throughout the United States were fundamentally readjusted at each and every level of commercial activity. Jobbers, shippers, wholesalers, and retailers vied with each other in their eagerness to come under the broad wings of the Blue Eagle, the adopted symbol of the new industrial order. Under the aegis of the ensuing National Recovery Administration a country-wide organization of speakers brought the virtues of the new legislation directly to the people of every American community. In a remarkably short time practically everybody in the United States was talking in terms of the N.I.R.A., and there was an all but universal popular acceptance of its expressed aims and purposes.

On the 26th day of July, 1934, the five Schecter brothers, all citizens of New York, were indicted for conspiring to violate certain provisions of the new statute. They were subsequently convicted and in 1935 their appeal from this conviction was carried to the Supreme Court of the United States. On April 1, 1935 the Supreme Court

unanimously reversed the conviction and held the involved section of the N.I.R.A. to be in violation of the Constitution of the United States, and, for that reason, invalid.

This decision hit the Blue Eagle in a vital cross section and death followed almost immediately. To the general public the casualty was shocking and to some extent at least, slightly mortifying. For two years we had heralded and supported an institution that in legal contemplation had never existed. In attempting to create and implement the National Recovery Administration two of the six separated and distinct divisions of American Government had exceeded their proper constitutional authority and the legally enforceable result of such excession was exactly nothing. By the formal assertion of their innate and reserved rights as individual persons, five men had nullified an act of Congress together with innumerable acts pursuant thereto by the President of the United States. A great popular desire for N.R.A. was thus thwarted. The same thing had happened many, many times before in the history of the United States, but this time it occurred in a most spectacular manner: an American citizen had successfully asserted an inherent substantive right against his own Government. Having proved their point to its satisfaction, the court, as a matter of course, rebuffed the Government, of which the court itself was an integral part, and directed that the five Schecter brothers go free. The result of this and similar decisions of American courts of last report points up the practical importance of natural law to the citizen of the United

States. Nowhere else in the world of 1935 could individual citizens of any state challenge and set aside an official act of their Government on the theory that such act violated the citizens' reserved personal rights. This is the important distinction upon which the whole body of American legal and political science turns away from the time-honored and so-called orthodox conception of sovereignty. It is the distinction which is constantly missed or mangled by most foreign commentators on American jurisprudence, for the simple reason that this feature of our system is unique and quite definitely homegrown.

At Runnymede the English barons were seeking to limit the tyrannical power of a recreant king who was out of their control and quite beyond their reach. To bridle such a menacing autocratic creature with the terms of the Great Charter made very good sense, but we are now constantly reminded by the realists that times have changed. We are told that "Democracy" in the very nature of things must be an *absolute* democracy and that consequently constitutional limitations imposing checks upon democratic officials are self-contradictory. The realists thus conclude that a constitutional democracy is a contradiction in terms.

Nevertheless, the Schecters, and countless Americans before them, have personally profited by the availability of these same checks on American officialdom. The question therefore arises: Are these available checks—the Constitutions, the Bill of Rights, the separation of governments and the division of their powers—are these ends in themselves or are they merely *means* to ends? Have the

Schecters, and others merely escaped into an ancient petrified forest of antiquated forms and procedures of law, or were the forms and procedures precisely made that way for the purpose of holding and preserving some vital and necessary substance? If our system of constitutional limitations is an end in itself, it is defensible only as a tradition, and the sands of purely traditional values are rapidly running out today. On the contrary, if the letter of these limitations is merely insulation for a well defined concept of man's inherent and imperishable nature, then a knowledge and evaluation of this concept is and must be required of every American judge and all American lawyers whose terrible and continuing responsibility it is to uphold and defend our presently besieged system of American law.

We can answer these significant questions only by a recourse to that unusual generation of men which gave us the words and phrases of the American constitutional system. Many of the men to be consulted were renowned and successful lawyers long before the American constitutional system was formally devised. These men were trained and educated in the common law of England, but most of them were products of the American frontier where the administration of justice, like other things, was largely homemade. For instance, Dean Roscoe Pound tells us that "an English lawyer who came to Boston about 1637 wrote, in 1642, that the colonial tribunals ignored English common law and sought to administer Mosaic law." The Dean goes on to say that:

"Lawyers played a chief part in the contest with the

Stuarts. They found their weapons in the doctrines which had been worked out by the experience of the common law courts in trying official actions by the provisions of the Great Charter. Coke made the cases under the Plantagenets the material for a commentary on Magna Carta, which made (this) treaty between the paramount landlord and his tenants in chief, a legal document defining limitations in the relation of ruler and ruled. What the medieval cases and traditions were to Coke, Coke's Second Institute (Coke's Reports) and the decisions of the common law courts he discusses or that followed him, were to the American lawyers before the Revolution. \* \* \* So steeped were the Eighteenth Century colonial lawyers in Coke's teachings, for Coke's Institutes were the most authoritative law books available to them, and they were dealing with a tradition and not a code, that the controversial literature of the era of the Revolution, if it is to be understood, must be read or interpreted by a common law lawyer. Indeed he must be a common law lawyer of the Nineteenth Century type, brought up to read and reread Coke and Blackstone until he got the whole feeling and atmosphere of those who led resistance to the home government.<sup>1</sup>

As Dean Pound points out, Coke's Common Law was an uncoded tradition. It was an immemorial but an inexact process of reasoning from the general to the particular. Coke himself was seldom if ever satisfied to rest on Magna Carta as the bedrock foundation of the institution of English common law. "Common right and rea-

<sup>1</sup> *The Development of Constitutional Guarantees of Liberty*, Roscoe Pound 20 N. D. LAWYER 347, 348 (1945).

son” were invariably used to bolster the Great Charter in important cases. Magna Carta was not *ipso facto* binding but was evidentiary of concepts universally acknowledged and observed both before and since 1215. Coke’s Commentaries and Decisions are replete with his explanations of what these universally acknowledged concepts were. The following quotation from Coke’s notes in Calvin’s case is typical:

“The Law of nature was before any judicial or municipal law (and) is immutable. The law of nature is that which God at the time of creation of the nature of man infused into his heart for his preservation and direction; and this is the eternal law, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed before the law was written by Moses, who was the first reporter or writer of law in the world. \* \* \* God and nature is one to all and therefore the law of God and nature is one to all. \* \* \* This law of nature which indeed is the eternal law of the creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written and before any judicial or municipal laws. And certain it is that before judicial or municipal laws were made, kings did decide cases according to natural equity and were not tied to any rule or formality of law.”<sup>2</sup>

This is a fair digest of the fundamental principle upon which all our pre-Revolutionary legal education was based. The theistic element of this fundamental law was

<sup>2</sup> Calvin’s Case, 7 Coke’s Rep. 12(a), 77 Eng. Rep. 392.

certain to be enthusiastically received and developed in and through the American Colonies, because religion of one kind or another had been the motivation for the establishment of each and every one of these colonies. Theology was the subject which the colonists discussed most passionately and it would have been very difficult for the Seventeenth or Eighteenth Century American mind to comprehend a strictly secular system of duties and obligations. The natural law expounded by Coke in the Seventeenth Century, and by Blackstone in the Eighteenth, met colonial specifications perfectly. Blackstone's Commentaries were for the most part a restatement of Coke's principles in less archaic language and immediately after their first publication in 1765 they achieved a wide circulation throughout the American colonies. A special American edition of Blackstone was printed in Philadelphia in 1771. Here are some pertinent excerpts therefrom with which the founding fathers were obviously familiar:

"When the Supreme Being formed the universe and created matter out of nothing, he impressed certain principles upon that matter from which it can never depart and without which it would cease to be. \* \* \* This then, is the general significance of law; a rule of action dictated by some superior being; and in those creatures that have neither the power to think nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws in their more confined sense and in which it is our present business to consider them, denote the rules, not of action in general, but of human action or conduct, that is the

precepts by which man \* \* \* endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.

Man considered as a creature, must necessarily be subject to the laws of his creator for he is entirely a dependent being. A state of dependence will inevitably oblige the inferior to take the will of him on whom he depends as the rule of his conduct \* \* \* in all those points wherein his dependence consists. \* \* \* Consequently, since man depends absolutely upon his maker for everything, it is necessary that he should in all points conform to his maker's will. *This will of his maker is called the law of nature.* For as God, when he created matter and endowed it with a principle of mobility, established certain rules for the perpetual direction of that motion, \* \* \* so, when he created man, and endowed him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of *reason* to discover the purport of those laws. \* \* \* The Creator is a being not only of infinite power and wisdom but also of infinite goodness, therefore, he has been pleased so to contrive the constitution and form of humanity that we should want no other prompter to inquire after and pursue the rule of right but only our own self love, that universal principle of action. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual that (happiness) cannot be attained but by observing the former; and if the former be punctually obeyed it cannot but induce (happiness). In consequence of



which mutual connection of justice and human felicity (God) has not perplexed the law of nature with a multitude of abstracted rules and precepts \* \* \* but has graciously reduced the rule of obedience to this one paternal precept *that man shall pursue his own true and substantial happiness*. This is the foundation of what we call ethics or natural law: for the several articles into which it is branched in our systems amount to no more than demonstrating that this or that action tends to man's happiness and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness and therefore that the law of nature forbids it."<sup>3</sup>

Observe and remember the great commentator's conclusions with reference to the *pursuit of happiness*. That phrase is due to make an official reappearance at the climax of the colonial contest with the mother country. It is significant likewise that Blackstone speaks of the natural law as "branched" into what he calls the English "systems." This could mean nothing except that the natural law was accepted as the inspiration of the common law of England. In another place he says:

"This law of nature being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all of their force and all of

<sup>3</sup> Blackstone's Commentaries (Lewis' Edition) Vol. I, pp. 27-31.

their authority mediately or immediately from this origin.”<sup>4</sup>

It is not difficult to imagine the avidity with which this reasoning was seized upon by the men who were then protesting against what they called illegal and unwarranted encroachments of such Parliamentary measures as the Stamp Act. But Blackstone contained still more comfort for those Americans who were at that time still manfully contending for their ‘immemorial rights’ as English subjects. In one of the chapters of the Commentaries we find that

“natural persons are such as the God of Nature formed us; artificial persons are such as are created by human laws for the purposes of society and government, which are called corporations or bodies politic. \* \* \* By the absolute rights of individuals, we mean those which are shown in their primary and strictest sense, such as would belong to their persons merely in a state of nature and which every man is entitled to enjoy, whether out of society or in it. \* \* \* Hence it follows that the first and primary end of human laws is to maintain (and regulate) these absolute rights of individuals. \* \* \* The absolute rights of man considered as a free agent endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general explanation and denominated the natural liberties of mankind. 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*, being a right inherent in us by birth and one

<sup>4</sup> Ibid., p. 31.

of the gifts of God to man at his creation when he endowed him with the faculty of free will.”<sup>5</sup>

Such was the summation of the natural law-common law fusion brought down to the very date of the Stamp Act. It would be difficult to find a better brief for the conclusions of the Declaration of Independence than is contained in these and other materials from the great English commentator himself. But while Blackstone’s version of the natural law-common law relationship was comforting to the Americans, it did not surprise them. It was merely a modern and timely restatement of what they had always understood.

Two years before Blackstone was published young John Adams wrote:

“It has been my amusement for many years past, as far as I have had leisure to examine the systems of all the legislators, ancient and modern, \* \* \* and the result \* \* \* is a settled opinion that liberty, the unalienable, indefeasible rights of man, the honor and dignity of human nature, the grandeur and glory of the public and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England.”<sup>6</sup>

But the beautiful idol had acquired a clay foot. Blackstone gives us a peep at it when he says:

“Acts of Parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifest-

<sup>5</sup> Ibid., pp. 108, 109.

<sup>6</sup> Adams’ *Life and Works* (1851), p. 440.

ly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions: I know it is generally laid down more largely, that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the Constitution that is vested with the authority to control it.”<sup>7</sup>

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

“And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an action to be void.”<sup>8</sup>

This was in 1610. Coke died in 1634. In his exposition of the natural law-common law relationship, Blackstone appears to agree with his illustrious predecessor in all things except the “power” of Parliament effectively to override both natural law and common law. Blackstone unquestionably agreed that Parliament had no “right” to pass such a law. Something of the utmost importance to English law had obviously happened between the commentaries of Coke and Blackstone respectively. That occurrence was the English Revolution of 1688. Dean Pound says that

<sup>7</sup> Blackstone, *op. cit. supra* Note 3, Vol. V, p. 79.

<sup>8</sup> 8 Coke’s Rep. 118(a).

“the Revolution of 1688 made a profound change in the English Constitution. The Seventeenth Century polity as set forth in Coke’s doctrine, was the one we accepted at our Revolution and put into our constitutions. When these instruments declare themselves the ‘supreme law of the land’ they use the language of Magna Carta as interpreted by Coke, namely, that statutes could be scrutinized to look into the basis of their authority and if in conflict with fundamental law they must be disregarded. This doctrine was as much a matter of course to the American lawyer of the early Revolution as the doctrine of the absolute binding force of an act of parliament is to the English lawyer of today. American lawyers were taught to believe in a fundamental law which, after the (American) Revolution they found declared in written constitutions. After 1688 there was no fundamental law superior to Parliament.”<sup>9</sup>

It is most unfortunate that the romantic and psychological sidelights of the American Revolution have lured historians away from the logical and legal aspects of that epochal struggle. Taxes, parliamentary representation and finally the very independence of the United States itself were all incidental to the main and controlling legal issue, namely the enforcement and implementation of a law “superior in obligation to any other \* \* \* coeval with mankind and dictated by God himself.” This controlling issue was made crystal clear by the Declaration of Independence but for some reason modern historians seem reluctant to take the great Declaration at its word. There is a subtle but unmistakable effort to edit this document

<sup>9</sup> Pound, *op. cit. supra* Note 1, p. 367.

out of our jurisprudential system and to regard its categorical postulates as eccentric extravagances transposed on the spot from a variety of foreign philosophical dreamers in order to make a rallying cry for a rather desperate American cause. The fact is that the Declaration is the best possible condensation of the natural law-common law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution. By pushing and pursuing the principle of parliamentary absolutism it was England and not America who abandoned the ancient traditions of English liberty. In 1776 the British Government was insisting that "the law of the land" and "the immemorial rights of English subjects" were exclusively and precisely what the British Parliament from time to time declared them to be. This claim for parliamentary absolutism was at variance with all the great traditions of the natural law and common law as recorded through the centuries from Bracton to Blackstone. By abandoning their ingrained concepts of the natural law, the colonists undoubtedly could have made a comfortable settlement of their tax and navigation difficulties with England, but they chose the alternatives so well and so logically declared in the Declaration of Independence.

The inference that the principles of the Declaration were extravagant improvisations is refuted by the testimony of the times. Nearly half a century after the Declaration was adopted one Timothy Pickering wrote to John Adams calling attention to the commonplace character of pronouncements contained in the great document and

manifesting surprise at the acclaim and reverence accorded to it. Adams replied on August 6, 1822. He said:

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

Pickering made Adams' letter the subject of a speech delivered on the 4th of July in the following year (1823) and Jefferson in turn paid his respects to Pickering in a letter to Madison dated August 30, 1823. After a preliminary correction of Mr. Adams' recollection in certain particulars, Jefferson wrote:

“I drew it (the Declaration) but before I reported it to the Committee (Benjamin Franklin, Roger Sherman, William Livingston, John Adams, Thomas Jefferson), I communicated it separately to Dr. Franklin and Mr. Adams, requesting their corrections, because they were the two members on whose judgments and amendments I wished most to have the benefit before presenting it to the committee: and you have seen the original paper now in my hands with the corrections of Dr. Franklin and Mr. Adams interlined in their own handwritings. Their alterations were two or three only and merely verbal. I then wrote a fair copy, reported it to the committee, and from them unaltered to Congress. This personal communication and consultation with Mr. Adams, he has misremembered into the actions of a subcommittee. Pickering's observations and Mr. Adams' in addition 'that it contained no new ideas, that it is a commonplace compilation, its sentiments hackneyed

in Congress for two or three years before, and its essence contained in Otis' Pamphlet' may all be true. Of that I am not to be the judge. Richard Henry Lee judged it a copy from Locke's Treatise on Government. Otis' Pamphlet I never saw, and whether I had gathered any ideas from reading or reflection I do not know. I know only that I turned to neither book nor pamphlet while writing it. *I did not consider it as any part of my charge to invent new ideas altogether, and to offer no sentiment which had ever been expressed before.* Timothy (Pickering) thinks \* \* \* that the Declaration, as being a libel on the Government of England, composed in times of passion, should now be buried in utter oblivion to spare the feeling of our English friends and Anglo-men fellow citizens. But it is not to wound them that we wish to keep it in mind: but to cherish the *principles* of the instrument in the bosoms of our own citizens; and it is a heavenly comfort to see that these principles are yet so strongly felt as to render a circumstance so trifling as this little lapse of memory of Mr. Adams worthy of being solemnly announced and supported at an anniversary assemblage of the nation on its birthday. In opposition, however, to Mr. Pickering I pray God that these principles may be eternal."<sup>10</sup> (Italics supplied.)

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

"Not to find out new principles or new arguments never before thought of, not merely to say things which had never been said before; but to place before mankind *the common sense of the subject* in

<sup>10</sup> Writings XV, p. 462.



terms so plain and firm as to command their assent and to justify ourselves in the independent stand we were compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular previous writing, it was intended to be *an expression of the American mind*. All its authority rests upon the harmonizing sentiments of the day.”<sup>11</sup> (Italics supplied.)

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

“When any number of men have *consented* to make one community or government they are thereby presently incorporated and make one body politic wherein the majority have the right to conclude the rest.”<sup>12</sup>

Locke thus implies that once government is installed by the consent of the governed the rights of individuals and minorities are completely and absolutely subject to its

<sup>11</sup> Writings V, p. 343.

<sup>12</sup> Locke, *Two Treatises on Government*, Bk. II, Secs. 95-101.

directions. This doctrine is inconsistent with the natural law and natural rights philosophy of the Declaration of Independence. It is at variance with the essays, pamphlets and correspondence that circulated so freely in American Revolutionary times and thereafter. This theory was certainly not that of Thomas Jefferson. For instance on June 7, 1816, Jefferson wrote to Francis Gilmer that:

“Our legislators are not sufficiently apprised of the rightful limits of their power; that their true office is to declare and enforce only our natural rights and duties and to take none of them from us. No man has a natural right to commit aggression on the equal rights of another and this is all from which the laws ought to restrain him. \* \* \* When the laws have declared and enforced all this, they have fulfilled their functions and the idea is quite unfounded that on entering into society we give up any natural right.”<sup>13</sup>

And again in his notes on Virginia he declared:

“An elective despotism is not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government should be so divided between the bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by others.”<sup>14</sup>

John Adams said that:

“Rulers are no more than attorneys, agents, and trustees for the people,” and he added that if these

<sup>13</sup> Writings, XV, p. 24.

<sup>14</sup> Ibid., II, p. 224.

betray their trust "the people have to revoke their authority" and substitute other agents, attorneys and trustees.<sup>15</sup>

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

"Society is produced by our wants and government by our wickedness; (that) society in every state is a blessing but government in its best state is but a necessary evil; in its worst state an intolerable one; (that) government like dress, is the badge of lost innocence—a mode rendered necessary by the inability of moral virtue to govern the world."<sup>16</sup>

Revolutionary America believed that such an evil institution as government would certainly get out of hand unless closely checked from every side. Just as firmly as they believed in natural law and natural rights, therefore, they believe in practical as well as theoretical checks upon

<sup>15</sup> Works, Vol. III, pp. 456, 457.

<sup>16</sup> Common Sense, p. 1.

the possibility of governmental violation of those rights. It was not enough, in the opinion of the Founding Fathers, to belabor sovereignty with sound philosophy. Sovereignty had to be split and checked and degraded to the point where it was obviously a servant of the people's God-given rights. Their constitutional system put together by the Founding Fathers, was devised to keep this governmental servant in its place, and on the job, and its job was "to secure these rights" of man.

There was little or no dissonance in the many widely publicized American views on this point in the last half of the 18th Century. While there was some difference of opinion about the *timing* of the Declaration of Independence, there was no expressed dissent from the principles which it so clearly and unmistakably announced. We have Jefferson's own word that the document was previously and privately approved by John Adams and Benjamin Franklin. When it was submitted to the entire Congress it was furiously and thoroughly debated. Large sections of Jefferson's specifications against the King were lifted out bodily and two significant additions were added upon motion from the floor. These additions are very much in point. At the opening of the second to the last paragraph the Congress inserted the phrase "appealing to the Supreme Judge of the world for the rectitude of our intentions" and in the last sentence of the same paragraph the Congress inserted the words "with a firm reliance on the protection of Divine Providence."

It is thus obvious that the important document was carefully reviewed line by line by each of the signers, all

of whom accepted the laws of Nature and of Nature's God together with the significant "self-evident" truths in their entirety and without the slightest question.

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

"Granting your supposition were true, it would be a matter of no real importance. When the first principles of civil society are violated, and the rights of a whole people are invaded, the common forms of municipal law are not to be regarded. Men may then betake themselves to the *law of nature*; and if they but conform their actions to that standard, all cavils against them betray either ignorance or dishonesty. There are some events in society to which human laws cannot extend, but when applied to them lose all their force and efficacy. In short when human laws contradict or discountenance the means which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws and so become null and void. \* \* \* *The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written as with a sunbeam, in the whole volume of human na-*

*ture, by the hand of Divinity itself and can never be erased or obscured by mortal power.”* (Emphasis supplied.)

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

At the time the Declaration was adopted two distinguished Americans were at work in Virginia drafting the first Constitution of that State. This Constitution began with its famous declaration of rights—from that day to this, a model for all similar sections in the constitutions of every state of the Union. The author of this document was George Mason, but James Madison, later to become known as the “Father of the Constitution of the United States” was responsible for the phraseology of that provision which declared freedom of conscience to be a *natural right* and not merely an object of toleration. The Virginia declaration states that “all men are by nature equally 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 and safety.” In his long and dis-

tinguished career Madison was never to lose his respect for these natural law principles. George Mason's devotion to the natural law doctrine was well known.

While arguing the case of *Robin v. Hardaway*<sup>17</sup> before the Virginia General Court in 1772 Mason declared:

"Now all acts of legislation apparently contrary to natural rights 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, whose authority can be superseded by no power on earth.* 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 adjudication of our courts." (Italics supplied.)

Mason cited both Coke's Report of Bonham's Case and Calvin's Case in support of his argument.

One who looks for the spirit behind the letter of the American Constitutional system will find it embodied clearly in Mason's argument. Knowing at once the source of rights as well as the dangers which threatened them, Mason was well qualified to write a model bill for their protection. It will also be observed from this case that American Colonial courts in pre-revolutionary days were constantly hearing arguments and deciding cases on the natural rights theory projected by Coke as a basic principle of the common law.

Time and space limitations force us to forego reviewing the natural law declarations of such staunch and learned revolutionary patriots as Patrick Henry, Samuel Adams,

<sup>17</sup> 1 Jefferson's Va. Rep., 109.

John Dickinson, the Carrolls, the Pinckneys and many others. Of James Otis who sparked the Revolutionary struggle at its very outset by his courage and eloquence, at least this must be lifted from his pamphlet on the "Rights of the British Colonies":

"To those who lay the foundation of government in force and mere brutal power, it is objected, that their system destroys all distinction between right and wrong; that it overturns all *morality* \* \* \* leads directly to *scepticism* and ends in *atheism*. When a man's will and pleasure is his only rule and guide what safety can there be either *for* him or *against* him, but in the point of a sword?

That the common good of the people is the Supreme law is of the law of nature, and part of that grand charter given to the human race (though too many of them are afraid to assert it) by the only monarch in the Universe Who alone has a clear and indisputable right to absolute power because He is the only one who is omniscient as well as omnipotent."

Finally, there is the great James Wilson of Pennsylvania. Wilson was one of only six men who signed both the Declaration of Independence and the Constitution of the United States. In addition to this distinction he was one of the first group of justices appointed by President Washington to the United States Supreme Court. Because of this unusual continuity of service in the development of American constitutionalism, Wilson's views should provide a good concluding summary of the political philosophy which flowed from the Declaration of Independence into the "Supreme Law of the Land." Wilson was educated in the Universities of Scotland, and



after coming to this country at the age of 23 he read law in the office of John Dickinson in Philadelphia. He was active in the politics of Pennsylvania from the very beginning of his residence there and by the time of his service in the Constitutional Convention he had attained undisputed leadership in the legal profession of America. Wilson's writings and lectures are voluminous.

All of these reveal a consistent devotion to the principles of the "Law of Nature" as it had been understood and developed in the American tradition. In his lecture upon this subject he says

"that our Creator has a supreme right to prescribe a law for our conduct, and that we are under the most perfect obligation to obey that law, are truths established on the clearest and most solid principles. \* \* \* (God) being infinitely and eternally happy in Himself, His goodness alone could move Him to create us, and give us the means of happiness. The same principle that moved His creating moves His governing power. The rule of His government we shall find to be reduced to this one paternal command: let man pursue his own perfection and happiness. What an enrapturing view of the moral government of the universe! Over all, goodness infinite reigns, guided by unerring wisdom and supported by Almighty power. \* \* \* What is the efficient cause of moral obligation—of the eminent distinction between right and wrong? \* \* \* I give it (the question) this answer, the will of God. This is the Supreme Law. \* \* \*"

In compassion to the imperfection of our internal powers our all-gracious Creator, Preserver and Ruler has been pleased to discover and enforce his laws by

a revelation given to us immediately and directly from himself. This revelation is contained in Holy Scriptures. The moral precepts delivered in the sacred oracles form a part of the law of nature, are of the same origin, and of the same obligation operating universally and perpetually. On some important subjects, those in particular which relate to the Deity, to Providence and to a future state, our natural knowledge is greatly improved, refined and exalted by that which is revealed. On these subjects one who has had the advantage of a common education in a Christian country, knows more and with more certainty than was known by the wisest of the ancient philosophers. \* \* \* *The law of nature is universal.* For it is true, not only that all men are equally subject to the command of their Maker, but it is true also that the law of Nature having its foundation in the constitution and state of man, has an essential fitness for all mankind and binds them without distinction. \* \* \* We may infer that the law of nature though immutable in its principles will be progressive in its *operations* and *effects*. In every period of his existence the law, which the divine wisdom has approved for man will not only be fitted to the contemporary degree but will be calculated to produce in future a still higher degree of perfection."<sup>18</sup>

As a Supreme Court Justice it was to be expected that one with such a philosophy would see the constitutional limitations of American government not as ends in themselves, but as a means merely for the preservation of man's natural God-given integrity. Questions involving "Reasonable Exercises of the Police Power" and substantive

<sup>18</sup> Wilson, Works, Vol. V, p. 95 *et seq.*

"Due Process of Law" would carry sharp challenges to a man like James Wilson, just as his brilliant and moving lecture on the Law of Nature from which the foregoing quotations are taken, should carry a sharp challenge to every American lawyer today. Fortunately for America, Wilson's generation was able to distinguish the hedonistic demands for human delights and comforts from the God-given right to pursue one's "true and substantial happiness." These are thoroughly reasonable distinctions it is true, but as Wilson acknowledged, for full clarity and consistency in these confusing cases reason needs the assistance of a firm faith in the Divine order of things. The codes of constitutions which proceeded with such orderly precision and logic from the American Revolution was but the crystallization of a creed. From Massachusetts to Georgia and from the Atlantic to the Alleghenies it was the will of God in all places that underlay the supreme law of the land. Unless one understands its vitalizing religious principles our unique form of government laboring with its separations, divisions, checks, balances, vetoes, and judicial reviews seems ever ready to collapse under the onerous weight of its own retarded processes. It is a far cry from the Stamp Act to the Schecter case and it is understandable that the Founding Fathers are having increasing difficulty in making themselves heard today. Meanwhile, and ever more and more precariously, we continue to be the one remaining country on earth where the individual may protect his God-given rights against his own government and everybody else.

*Dean Clarence E. Manion*