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RIGHTS AND THE POLITICS OF THE COMMON GOOD:
A STUDY OF THE USE OF RIGHTS AT THE AMERICAN FOUNDING

by

ROLAND MARDEN

A dissertation submitted to the Graduate Faculty in Political Science in partial
fulfillment of the requirements for the degree of Doctor of Philosophy, The City
University of New York

2001

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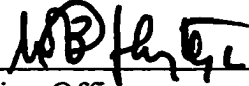
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Abstract

RIGHTS AND THE POLITICS OF THE COMMON GOOD:
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by

Roland Marden

Adviser: Professor Burton Zweibach

This dissertation examines the use of rights at the American founding in the light of the contemporary critique of rights as a vehicle of moral claims. Beginning with an analysis of the seventeenth century natural law tradition, I highlight the importance of an ethically-imbued current that ascribed natural law a positive moral content.

Elaborated by Samuel Pufendorf and later reworked by John Locke, Jean-Jacques Burlamaqui, Emerich de Vattel and Francis Hutcheson, among others, this current offered an alternative to the more minimalist version of natural law elaborated by Thomas Hobbes. Critically, the Pufendorfian version balanced the permissive nature of rights- the right to act as one wished- with a sense of moral restraint- that one should use these individual freedoms to further the moral order intended by God. I then go on to consider the form in which natural law and natural rights were appropriated in

America prior to the Revolution. Examining the appearance of this language in theology in the mid eighteenth century, I argue that the particular religious climate precipitated by the Great Awakening made Americans receptive to the Pufendorfian current. Reviewing religious writings and college curricula, I trace how this version of natural law became increasingly evident in the colonies. Moving onto the Revolutionary and founding period, I trace how this language of rights appeared in political writings. Finally, I argue that the heterogeneous historical tradition of rights demonstrates the narrowness of the contemporary critique of rights. The problem with rights is not the concept per se, I contend, but rather what rights have become in the modern world.

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Introduction

The idea that political morality should be based on some account of the rights of the human individual has long been a familiar theme in Western politics. Since the American and French Revolutions of the late eighteenth century the language of rights has been a prominent leitmotif within political discourse. But the importance of rights as a political idiom has been significantly amplified in the wake of the Second World War. Spurred by the scale of Nazi atrocities, the appeal to the protection of basic rights assumed a new urgency in the aftermath of the war. The revived dedication to rights was apparent in the formal mandate of the newly formed United Nations “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person,” and the codification of this commitment in the Universal Declaration of Human Rights of 1948. These initiatives signaled the onset of the contemporary era in which respect for rights has become widely accepted as the principal criterion of political legitimacy. A government that respects its citizens’ rights is a good government and deserves support; a government that violates human rights should be denied aid from abroad and shunned in the international community.¹

¹ For more on the postwar resurgence of rights talk in international politics, see, Louis Henkin, The Age of Rights New York. Columbia University Press. 1990. On the enduring persistence of rights more generally, see, Thomas L. Haskell, “The Curious Persistence of Rights Talk in the ‘Age of Interpretation,’” in David Thelen, ed., The Constitution and American Life Ithaca. Cornell University Press. 1987.

Yet despite its renewed popularity as a touchstone of political evaluation, the concept of rights has been far from uncontroversial. Recent decades have witnessed growing dissatisfaction with the adequacy of rights theory as a vehicle of moral claims. Rights are criticized for positing an individualistic ontology that sets up an antagonistic and egoistic relationship between the individual and the political community. This atomistic conception of the individual, these critics claim, denies the robust and essentially social nature of human moral existence.

Presenting this critique from a Hegelian perspective of humanity embodying a historically conditioned being, Michael Sandel argues that the atomistic self presented by rights theory fails to capture the socially-constituted moral being of the individual. The communal attachments associated with the ties of birth and community membership impart a personal identity to the individual that is eviscerated by rights theory. The insistence of rights theory that “the self is prior to the ends which are affirmed by it” presents an implausible and hollowed-out conception of the moral identity of the individual. By positing an “unencumbered” individual in this way, this language denies the fact that the shared pursuit of goals by individuals is “not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.” The particular visions of the good life that we assume as individuals are in fact “inseparable” from these communal attachments, Sandel insists, and without them we lack a sense of “character” and “moral depth.”²

² Michael Sandel, Liberalism and the Limits of Justice Cambridge. Cambridge University Press. 1982, pp.19, 150, 179 See also, Sandel, “The Procedural Republic and the Unencumbered Self,” Political Theory 12,

Offering a neo-Aristotelian slant to this communitarian critique, Charles Taylor, Alasdair MacIntyre and Ronald Beiner have focused on the alleged ethical inadequacies of rights talk. Adopting an Aristotelian concern for an objective good life or *eudaimonia* and its social requisites, these critics denounce the moral voluntarism of rights theory. The emphasis on individual moral volition that characterizes rights, they argue, entails a moral voluntarism that flies in the face of the fact that there are objective and readily identifiable interests that are requisite to meaningful human existence. Accordingly, the free exercise of an individual's will becomes identified with moral dignity regardless of the costs incurred to others or the community at large. With this identity of rights-claims with the "autonomous moral agent," MacIntyre writes, "it follows that others ought not to interfere with my attempts to do or have whatever it is, whether it is for my own good or not." The conceptual structure of rights, he concludes, makes "the would-be moral utterances" of the "autonomous agent" bereft of "any authoritative content."³

This character of rights, these critics argue, leads to the proliferation of querulous claims devoid of moral content. The production of a right becomes a trump, or, as Beiner puts it, "definitive, like a voucher that entitles one to claim final victory" against the political community. It becomes perfectly legitimate for entirely selfish claims to be couched in this language. Prohibitions on retail shopping on Sundays, as Beiner notes, for example, are objected to on the grounds that they deny

(1984). For a similar Hegelian critique, see, Roberto Mangebeira Unger, Knowledge and Politics New York. Free Press. 1975.

³ Alisdair MacIntyre, After Virtue: A Study in Moral Theory Notre Dame. University of Notre Dame Press. 1981, pp.67-8. See also, MacIntyre, "Rights, Practices and Marxism," Analyse and Kritik 7 (1985).

a fundamental *right*. The denial of this liberty is taken to be a violation of an individual's moral autonomy, defined in terms of living by a self-elected purpose.⁴ By virtue of this moral voluntarism, it is argued, any moral content that enters into political discussion has to do so from outside the language of rights. Illustrating this point, Taylor writes; "If I have a right to do what I want with my property, then any disposition I choose is equally justifiable from the point of view of this principle." Any criticisms of my particular disposition, Taylor continues, "arise from other moral standards, quite independent from the view that we have a right to do what we want with our own."⁵

From these different perspectives then, these critics agree that rights theory fails to provide a sufficiently robust moral theory. By ignoring the larger scope of moral being, these critics charge, rights theory amounts to a 'hyperindividualism' that encourages a society in which individuals are preoccupied with staking claims against others. The solution to this predicament is to substitute a more substantial theory of human moral existence for the allegedly inadequate language of rights. As

⁴ Ronald Beiner, What's the Matter With Liberalism? Berkeley. University of California Press. 1992, pp.88, 81.

⁵ Charles Taylor, "Atomism," in Alkis Kontos, ed., Powers, Possessions, and Freedom: Essays in Honour of C.B. Macpherson Toronto. University of Toronto Press. 1979, p.48. See also, Sandel, Liberalism, p.33. Making a similar indictment, Mary Anne Glendon alleges that "its exaggerated absoluteness, its hyperindividuality, its insularity, its silence with respect to personal, civic and collective responsibilities..." renders 'rights talk' unable to "perform the important function of facilitating public discussion of the right ordering of our lives together." Glendon, Rights Talk: The Impoverishment of Political Discourse New York. Free Press. 1991, p.xi.

Sandel puts it, we should give up the “politics of rights” for a “politics of the common good.”⁶

How credible then, is this charge that rights theory is incapable of accommodating the type of ‘social’ dimension that these critics consider essential for an adequate theory of political morality? Is it indeed accurate to conclude that rights are so inherently individualistic that they preclude an appreciation of a common good that transcends the discrete individual? At the heart of this matter is whether rights theory is necessarily tied to an individualistic ontology. To pose the question another way, does rooting moral claims in the individual necessarily entail individualistic ends? Or alternatively, can rights, despite their being exercised by individuals, be related to ends that transcend the discrete being of their possessor?

The merit of the “new communitarian” critique and the ontological issues it raises has of course received widespread attention and been subjected to considerable scrutiny. Much of this scholarly attention has considered the merit of this critique from an analytical perspective.⁷ While these studies have undoubtedly yielded

⁶ Michael Sandel, “Morality and the Liberal Ideal,” The New Republic, May 7, 1984, p.16. Other examples of the “new communitarian” critique of rights include, Michael Walzer, Spheres of Justice New York. Basic Books. 1983, and Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism Oxford. Clarendon Press. 1990.

⁷ See for example, Will Kymlicka, Liberalism, Community, and Culture Oxford. Clarendon Press. 1989, George Kateb, “Democratic Individuality and the Meaning of Rights” in Nancy L. Rosenblum, ed., Liberalism and the Moral Life Cambridge. Harvard University Press. 1989, Bernard Yack, “Liberalism and its Communitarian Critics” in Charles H. Reynolds and Ralph V. Norman, eds., Community in America Berkely. University of California Press. 1988, Allen E. Buchanan, “Assessing the Communitarian Critique of Liberalism,” Ethics (July 1989), and Amy Gutmann, “Communitarian Critics of Liberalism,” Philosophy and Public Affairs 14, 3 (1985).

important insights, I contend that it is productive to consider this matter from a different perspective. What I am particularly interested in here are the insights gained from considering the historical usage of rights. In contrast to studies that consider the conceptual implications of rights from an analytical perspective, a historical perspective can illuminate formulations that are novel to contemporary ways of thinking. Furthermore, to the extent that historical study reveals the *actual* usage as opposed to simply offering logical evidence that a concept might be used in a certain way, this approach yields unique insights into the scope of rights.⁸

Examining the use of rights at one of its definitive historical moments in the modern era, the founding of the American republic, I argue, sheds important light on this contemporary theoretical debate. Most importantly, it reveals how this familiar conceptual language can embody precisely those ‘social’ ends which contemporary critics claim it precludes. Close study of the form in which this language was appropriated in eighteenth century America and taken up as a political idiom in the revolutionary and founding era, suggests that rights was conceived as part of a morally-imbued framework that linked the individual to a larger common good. Rights, rather than being atomistic properties that supported adversarial claims against others, were more seen as joint entitlements that contributed to a moral community. Examining how rights incorporated this moral dimension allows us to evaluate the contention made by the contemporary critique that the individual agency central to rights necessarily entails a license to absolute moral autonomy. Critically,

⁸ For more on the advantages of the study of concepts in historical context, see, Quentin Skinner, “The idea of negative liberty: philosophical and historical perspectives” in Charles Taylor, ed., Philosophy in History Cambridge. Cambridge University Press. 1984, pp.198-202.

the eighteenth century use demonstrates how the individual agency associated with rights could be coherently linked to a morally restrained understanding of the concept. By illuminating this aspect of the modern rights tradition we are reminded that it is not its characteristic conceptual structure that leads to hyper-individualism but rather the particular meaning that this ethical individualism has come to embody. The fact that the language of rights has incorporated this moral dimension cautions against the type of undifferentiated critique that has been characteristic of recent communitarianism and suggests the need for a more chastened consideration of the problems associated with rights.

As an introduction to this historical study, it is worth briefly considering the locus classicus of rights talk at this juncture, the Declaration of Independence. Among the myriad of statements that invoked rights to provide meaning to political events, the Declaration stands out as a definitive example of this emerging political idiom. It is widely taken to be a representative statement of the conception of rights that informed this period. As Walter Berns puts it, the Constitution “is related to the Declaration of Independence as effect is related to cause, and the Declaration of Independence, the cause, is a political statement of a philosophical teaching concerning the nature of man, Providence, and nature itself.”⁹ Jefferson’s own thoughts on the Declaration give further credence to the currency of the principles it articulated. His comments indicate that the document was aimed at articulating

⁹ Walter Berns, “Equally Endowed With Rights,” in Frank S. Lucash, ed., Justice and Equality Here and Now Ithaca. Cornell University Press. 1986, p.151.

uncontroversial principles that Jefferson considered to be widely accepted. He wrote that the document was written, “Neither aiming at originality of principles or sentiments...it was intended to be an expression of the American mind.” “All its authority,” Jefferson insisted, “rests on the harmonizing sentiments of the day...”¹⁰ Contemporaries of Jefferson seem to have agreed with his evaluation of the currency of the principles espoused in the Declaration. Noting the lack of original thinking in the Declaration, John Adams, wrote that, “There is not an idea in it, but what had been hackneyed in Congress for two years before.”¹¹

Yet in examining the document’s treatment of rights one does not find a conception that is wholly consistent with the ‘hyperindividualism’ alleged to be endemic to rights theory. Jefferson’s use of rights to justify the severing of political ties with Great Britain reveals a complexity that belies what we would be led to expect from the contemporary critique. Most telling in this respect is Jefferson’s account of resistance to despotism. Jefferson does not describe resistance as an

¹⁰ “Letter to Henry Lee, Jr. May 8, 1825” in The Writings of Thomas Jefferson New York. Heritage Press. 1967. VII, p.407.

¹¹ John Adams to Timothy Pickering, 1822, quoted in Carl L. Becker, The Declaration of Independence New York. Vintage Books. 1922. Becker writes that “the strength of the Declaration was precisely that it said what everyone was thinking....Not all Americans, it is true, would have accepted the philosophy of the Declaration, just as Jefferson phrased it, without qualification, as the “common sense of the subject”; but one may say that the premises of this philosophy, the underlying preconceptions from which it is derived, were commonly taken for granted.” pp.24, 26. Pauline Maier similarly writes, the Declaration “restated what virtually all Americans- patriot and Loyalist alike- thought and said in other words in other places...As a statement of political philosophy, the Declaration was therefore purposely unexceptional in 1776.” Maier, American Scripture: Making the Declaration of Independence New York. Vintage Books. 1997, p. xvii

optional right, that can be exercised or not at the discretion of the individual. Instead, resistance to despotism is presented as a “right” *and* a “duty”; in other words, an act that the individual is obliged to perform.

But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

Though he does not elaborate on this point, Jefferson’s coupling of “right” with “duty” would seem to suggest that certain objective moral ends are indeed linked to human existence. Individuals cannot choose to tolerate the denial of liberty that stems from despotism because, it would seem, that would preclude the conditions deemed necessary for human flourishing. Implicitly Jefferson seems to be endorsing the idea of a broad moral good independent of the will of the individual.

Unfortunately most scholarly commentary on the Declaration of Independence provides little insight into the ambiguity that Jefferson leaves us with on this issue. Assessments of the use of rights in the Declaration typically overlook Jefferson’s coupling of right and duty and simply conclude that his understanding implies a sense of individual moral autonomy. Thus, Ronald Hamowy, for example, claims that Jefferson’s reference to an inalienable right to the pursuit of happiness implies a permissive moral power to define and pursue one’s own ends. When Jefferson spoke of this right, Hamowy writes,

he meant that men may act as they choose in their search for ease, comfort, felicity, and grace, either by owning property or not, by accumulating wealth or distributing it, by opting for material success or ascetism, in a word, by determining the path to their own earthly and heavenly salvation as they alone see fit.¹²

Arguing along similar lines, Michael Zuckert concludes that “all the natural rights enumerated in the American Declaration of Independence...” are rights “that each individual can claim as his or her own- possessions to be deployed, options to be exercised at the choice of the rights-holder, rights in a permissive sense.” “They are not,” Zuckert insists, “expressions of a desirable (a “right”) condition or state of affairs.”¹³ In this vein, Zuckert elsewhere concludes that the “rights philosophy” endorsed in the Declaration condones an individualistic moral pluralism whereby “political life” is “open to the potentially varied and variable goals of its citizens”

¹² Ronald Hamowy, “Jefferson and the Scottish Enlightenment,” William and Mary Quarterly 3rd. ser., 31 (1979), p.519. See also Hamowy’s claim that the Declaration did not impose on government an obligation to maximize the people’s happiness, but only to see that their rights are respected and so “to provide the framework in which each person may pursue his own happiness as he individually sees fit.” “Declaration of Independence,” in Jack P. Greene, ed., Encyclopedia of American History I New York. Harper & Row. 1984, p.459.

¹³ Michael P. Zuckert, Natural Rights and the New Republicanism Princeton, Princeton University Press. 1994, p.11. See also, pp.245-6.

and human beings are “left free to ‘pursue’ their own happiness, to follow their own bent.”¹⁴

But to draw such conclusions about this use of rights and its attendant moral philosophy without addressing Jefferson’s use of “duty” alongside “right” may be premature. The Declaration’s sense of rights may in fact be more complex than the self-defined moral autonomy identified by Zuckert and Hamowy. The anomaly raised by Jefferson’s conceptualization seems all the more worthy of attention given the intended paradigmatic status of the Declaration. Moreover, this treatment of resistance to despotism was no mere addendum to the argument Jefferson laid out in the document; it was in fact the key justification for the act of political separation, and to that extent, Jefferson is likely to have considered his wording carefully.

Given the relevance of this anomaly to the contemporary debate it seems worthwhile to consider the matter further. How in fact were “rights” conceived as a vehicle of moral claims at the American founding? To answer this question with any certainty we need to expand our scope beyond examination of foundational documents such as the Declaration of Independence. Useful though these documents are, their ‘declaratory’ nature and brevity make them no more than suggestive on the underlying meaning of the concept of rights. As Jefferson makes clear in his stated intention to use the Declaration to “place before mankind the common sense of the subject, in terms so plain and firm as to command their assent,” the express purpose of these documents precluded an extensive treatment of concepts addressed.

¹⁴ Michael P. Zuckert, The Natural Rights Republic Notre Dame. University of Notre Dame Press. 1996, pp.26-27.

Without the type of discussion that would clarify what authors had in mind when they invoked concepts, these documents are necessarily of limited value.

A more promising way of approaching this topic is to adopt a broad analytical focus on the use of rights as a theoretical language. If rights talk was a more or less coherent political idiom that rested on certain underlying premises, we can gain insight into this concept by examining its broader philosophical context. An examination of the theory of natural law is particularly illuminating in this respect. Natural law provided the conceptual framework for the seventeenth and eighteenth century rights tradition, and as such served as a backdrop to the use of rights at the American founding. By examining the form of this conceptual framework as it was appropriated in the eighteenth century America, we are thus able to shed light on the ambiguities apparent in the use of rights in the less theoretically-delineated political discourse. In this way, we are able to elucidate tacit assumptions about “rights” that, without this background knowledge, would be imperceptible to the modern observer.

I adopt this approach in the following study. Before examining the American case, I begin with an overview of the state of the rights tradition immediately prior to these events. This pays particular attention to the ethical currents that developed within sixteenth century natural law. Examining the framework developed by Hugo Grotius and the subsequent work by Thomas Hobbes, John Selden and Samuel Pufendorf, I examine how the early modern rights tradition consisted of two distinct ethical traditions. I then proceed to examine in detail how natural law was appropriated in mid-eighteenth century America. Paying particular attention to the historical circumstances of this appropriation, I examine how, under the particular

circumstances precipitated by the Great Awakening, Americans gravitated to the more robust of these ethical currents within early modern natural law. I then trace how curriculum changes in the colleges reflected and elaborated these changes in the adoption of a systematic program of moral philosophy. Having established the philosophical context of this language, I turn to an examination of the use of rights in political discourse at the founding. I do this in two ways. First, by examining the explicit treatment of rights in political writings. And second, by examining conceptual discussions that bear some relevance to rights theory and thus illuminate the type of moral theory that is likely to have informed this political thinking. Examining the full breadth of the use of rights in this way, I believe, provides ample material to consider the theoretical scope of rights as it was applied in the eighteenth century.

PART 1: The Natural Rights Background

Early modern natural law: a heterogeneous tradition

Before we examine how natural law and rights were appropriated in eighteenth century America it is worth considering how the rights tradition had previously taken shape in early modern Europe. It is particularly important to note that the modern rights tradition, despite its characteristic moral realism,¹ did not necessarily preclude the embodiment of a significant moral dimension. Notwithstanding the moral parsimony that distinguished seventeenth century rights theory from its predecessors, the new rights theory was not monolithic in its conception of the moral scope of natural law. In this respect rights theory was a heterogeneous tradition and it is important to gain a sense of this complexity to appreciate how rights were appropriated in America.

One of the distinguishing features of the early modern natural rights tradition, and in large measure the reason for its success as a theory, was its ability to reconcile a notion of universal morality with a moral realism. Departing from the robust moralism characteristic of the Thomist tradition, the “new” natural law pared down

¹ I use the term ‘moral realism’ here and elsewhere in this chapter to convey a cautious approach regarding the presence and extent of universal morality. I thus use this term purely in the conventional sense and do not imply the philosophical doctrine of the same name.

the moral scope of rights to an essential core. Stripped down in this way, natural law became sufficiently realist to counter skeptical criticism while at the same time maintaining an objective and sufficiently substantial moral content to offer a basis for a civil society. Yet while there was agreement on the need to reduce the moral scope of natural law there arose different ideas as to exactly how minimal this universal morality should be. These differences were manifested in the emergence of two distinguishable approaches to this issue within modern natural law; an absolute minimalism that reduced the moral strictures imposed on man by natural law to self-preservation, and a more substantial conception that assigned man a slightly broader moral purpose. Each of these approaches built upon distinct elements of the framework provided by Grotius. The former tradition, developed by John Selden and Thomas Hobbes, elaborated Grotius's ontological individualism; the latter tradition, developed by Samuel Pufendorf in the latter decades of the century, built upon Grotius's intimation of a more morally-imbued natural law. Pufendorf's formulation was subsequently adopted by John Locke and Jean Barbeyrac and endured through most the eighteenth century in the work of a number of theorists, including Jean-Jacques Burlamaqui, Emerich de Vattel, and various figures of the Scottish Enlightenment, including Francis Hutcheson and Thomas Rutherford.² Working on Grotius's legacy in this way, these theorists transformed

² Among the key texts were, John Locke, *Two Treatises of Government*, 1690, Jean Barbeyrac, ed., Pufendorf, *Les devoirs de l'homme et du citoyen*, 1706, and Barbeyrac, ed., *Le droit de la nature et des gens*, 1707, Jean-Jacques Burlamaqui, *Principes du droit naturel*, 1748, Emerich de Vattel, *The Law of Nations, or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns*, 1758, Francis Hutcheson, *A Short Introduction to Moral Philosophy in Three Books, containing the Elements of Ethics and the Law of Nature*, 1747, Hutcheson, *A System of*

the distinct impulses within Grotius's work into two separate ethical traditions within early modern natural law.

Each of these approaches entailed a distinct conception of the moral injunctions imposed upon the individual by natural law. The minimalist tradition developed by Selden and Hobbes imposed limits only insofar as they were necessary to preserve peaceful interaction between discrete individuals. Natural law in this sense was directed towards protecting the absolute necessities of civil life; prohibiting breaches of justice such as the taking of property, not keeping one's word, and not punishing a violator of rights. The more robust Pufendorfian tradition, on the other hand, entailed an additional dimension of moral obligation. Natural law, according to this perspective, enjoined man not only to maintain society, but also to contribute to its improved existence. This injunction Pufendorf described as the law of humanity or charity and entailed acts such as generosity and compassion. In this sense the scope of social relations enjoined by natural law referred not merely to the avoidance of mutual harm but also to the provision of mutual "benefits." Pufendorf captured the thrust of this conception in his summary of the general duties of humanity. "It is not enough," he wrote,

not to have hurt another, or not to have deprived him of the esteem he is owed: These only remove the just cause for hatred. Something good must also be conferred on the other...Someone who has not driven me away from himself by some hostile or ungrateful deed has not discharged the debt of

Moral Philosophy, 1755, and Thomas Rutherforth, *Institutes of Natural Law*, 1754.

sociality; rather, he should furnish something beneficial so that I am glad that others who share my nature also live upon this earth.³

The addition of this 'social' dimension of moral obligation was not, however, as exacting as it might appear. For though these morally-imbued duties were enjoined by law, they were not obligatory in the sense that the duties concerned with justice were. While it was assumed that man, at least on occasion, would fulfill these duties, their performance in any specific instance was left to the discretion of the individual. However praiseworthy the performance of such an act was, it was not something that was enforceable. In this sense the addition of this other-regarding dimension to the moral repertoire of natural law did not add a burdensome requirement to the obligations imposed on man. Moderate though this addition was it nonetheless introduced a moral dimension into early modern natural law that was not countenanced by the model offered by Selden and Hobbes.

In sum then, the natural law that took shape through the seventeenth century exhibited a degree of latitude consistent with its characteristic moral realism. Within the parameters of the reduced moral scope that distinguished the new natural law from its antecedents there arose distinct conceptions of the extent of obligations imposed on man by God. The heterogeneity that arose on this issue encompassed both a bare-bones minimalism and a less extreme minimalism that incorporated a moral dimension beyond the discrete being of the individual.

³ Samuel Pufendorf, *On the Law of Nature and Nations*, 1672, in Craig L. Carr, ed., trans. Michael J. Seidler, The Political Writings of Samuel Pufendorf New York. Oxford University Press. 1994, pp.164-65.

Grotius and the beginnings of modern natural rights

As I have already suggested, Grotius's contribution to the development of the natural law tradition is usefully understood within the historical context of skepticism. Jean Barbeyrac aptly described Grotius's breakthrough in his early eighteenth century review of the historical development of moral philosophy. In the piece, Barbeyrac wrote that Grotius "broke the ice" and rescued the study of morality from the "confusion" and "error" perpetuated by Scholastic philosophy. By establishing a systematic and scientific basis for ethics, Grotius brought sufficient light to the study of morality to "dissipate those thick Clouds of Darkness" which had for so long obscured the subject. Grotius effectively countered the skeptical objections that had previously posed an insurmountable obstacle to ethical theory, Barbeyrac contended, by looking to readily identifiable and tenable premises as the basis for ethical principles.⁴

Barbeyrac's account accurately captures the key to Grotius's success. Prior to Grotius ethical theory had floundered in the face of the Renaissance skepticism

⁴ Jean Barbeyrac *An Historical and Critical Account of the Science of Morality*, 1709, in Barbeyrac, ed. Pufendorf, *On the Law of Nature and Nations*, trans. Basil Kenett, 1749, pp.66-67. For a detailed account of how modern natural law was formulated in response to skepticism, see, Richard Tuck, "The 'modern' theory of natural law," in Anthony Pagden, ed., The Languages of Political Theory in Early-Modern Europe Cambridge. Cambridge University Press. 1987.

expounded by Michel de Montaigne and his follower, Pierre Charron.⁵ Scholastic natural law, as represented by Francisco Suarez, for example, was criticized for presupposing a robust and universal morality in the natural world. The idea that there existed a morality that transcended time and place was implausible, these critics charged, given the diversity of values among different religions and cultures.⁶ Trying to posit a moral order onto the flux of the real world, Montaigne pointed out, was like trying to clutch water. “There cannot be first principles for men unless the divinity has revealed them,” Montaigne concluded, “all the rest- beginning, middle and end- is nothing but dreams and smoke.”⁷

The epistemological and relativist challenges posed by the *nouveau pyrrhonisme* of Montaigne thus provided the context for any attempt to revitalize ethical theory in the late sixteenth and early seventeenth century. Grotius was acutely sensitive to these pressures in his early seventeenth century effort to reformulate natural law. He acknowledged that any theory of ethics had to confront the diversity of beliefs and practices in different societies and across time. This fact made the tradition of natural law established by Thomas Aquinas and revived by the

⁵ Montaigne’s most influential essay was *Apologie de Raimond Sebond*, 1580. Charron disseminated Montaigne’s ideas in the widely read *De la sagesse*, 1601.

⁶ See, Jill Kraye, “Moral Philosophy,” in C. B. Schmitt, Q. Skinner, and E. Kessler, eds., *The Cambridge History of Renaissance Philosophy* Cambridge. Cambridge University Press. 1988, Knud Haakonssen, *Natural law and moral philosophy* Cambridge. Cambridge University Press. 1996, ch. 1, and Tuck, 1987, pp.109-110.

⁷ Quoted in R. Popkin, “Problems of knowledge and action,” in Schmitt, Skinner, and Kessler, 1988, p.683.

Spanish Dominicans in the sixteenth century untenable for Grotius.⁸ The robust and all-encompassing moral structure posited by Thomistic theory was too easily undermined by this observable fact.

But this did not make ethics *per se* untenable, Grotius insisted. To say that there was great diversity in morals was not to say that there were no universal values at all. The great skeptic, Carneades, had been in error, Grotius claimed, when he argued that the diversity of laws among men made “that which is called NATURAL RIGHT...a mere Chimera.”⁹ Rather, Grotius argued, there existed a minimal core of universal values that even the skeptics could recognize. These values were premised, Grotius explained, on the principle of self-preservation. This argument was most clearly expressed in his early work, *De iure praedae* (1607), where he argued that,

since God fashioned creation and willed its existence, every individual part thereof has received from Him certain natural properties whereby that existence may be preserved and each part guided for its own good, in conformity, one might say, with the fundamental law inherent in its origin. From this fact the old poets and philosophers have rightly deduced that love, whose primary force and action are directed to self-interest, is the first

⁸ For more on the Thomist tradition of rights, see, Richard Tuck, Natural Rights Theories: the origin and their development Cambridge. Cambridge University Press. 1979, cht. 2.

⁹ Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (The Rights of War and Peace), 1625. trans. Francis W. Kelsey. Indianapolis. Bobbs-Merrill. 1925, I, p.14.

principle of the whole order.¹⁰

Thus the two primary laws of nature, he asserted, were “It shall be permissible to defend one’s own life and to shun that which threatens to prove injurious” and “It shall be permissible to acquire for oneself and to retain those things which are useful for life.” “On this point,” Grotius added, “the Stoics, Epicureans and Peripatetics are in complete agreement, and apparently even the Academics [i.e., the Academic skeptics, headed in the second century B.C. by Carneades] have entertained no doubt.”¹¹

By paring down the moral scope of rights to an essential core Grotius attempted to meet the challenge posed by the skeptics while retaining a positive moral content. The moral stricture of self-preservation was so minimal it seemed irrefutable and yet it was also sufficient to provide a basis for a moral order. Driven by this natural impulse individuals would enter into agreements with each other to ensure harmony between conflicting claims, thereby creating a civil society. As Grotius put it,

for the author of nature willed that as individuals we should be weak, and should lack many things needed in order to live properly, to the end that we might be the more constrained to cultivate the social life. *But expediency afforded an opportunity also for municipal law, since that kind of*

¹⁰ Hugo Grotius, *De iure praedae commentarius*, (Commentary on the Law of Prize and Booty), 1607, trans. G.L. Williams. Oxford. Oxford University Press. 1950, I, p.9.

*association of which we have spoken, and subjection to authority, have their roots in expediency.*¹²

Grotius's emphasis on self-preservation and expediency as the basis for society clearly pointed toward the strongly individualistic ontology of his theory. The moral compass of the individual, according to Grotius, was limited to his own discrete being; he was entirely guided by selfish considerations in his interaction with others and did not exhibit any 'social' moral identity for its own sake. While this strong individualism remained a central theme throughout his work, Grotius broadened the moral content of his theory somewhat in his later work *De Jure Belli* (1625). Alongside the familiar argument that "the principles of nature" are those by which "every animal from the moment of its birth has regard for itself and is impelled to preserve itself, to have zealous consideration for its own condition and for those things which tend to preserve it,"¹³ he added that it was misguided to limit morality to self-interest alone.

What is said...in accordance with the view not only of Carneades but also of others, that *Expediency is, as it were, the mother of what is just and fair*, is not true, if we wish to speak accurately. For the very nature of man, which even if we had no lack of anything would lead us into the mutual

¹¹ Grotius, 1607, pp.10-11.

¹² Grotius, 1625, II, Prolegomena, §16, p.15.

¹³ Grotius, 1625, I, II, p.51.

relations of society, is the mother of the law of nature.¹⁴

The addition of this natural impulse toward “sociality” to Grotius’s framework rested awkwardly alongside his well-developed individualistic ontology. For Grotius “sociality” was a spontaneous impulse in much the same way that the impulse of self-preservation was. Such an amalgam of conflicting impulses proved difficult to manage conceptually and Grotius’s overall framework remained weighted toward an individualist foundation. The general thrust of Grotius’s account is clearly directed toward delineating the limited nature of moral obligations imposed on man. For example, “Right reason,” he writes, suggests to man that this law of nature does “not prohibit all use of force, but only that use of force which is in conflict with society which attempts to take away the rights of another: For society has in view this object, that through community of resources and effort each individual be safeguarded in the possession of what belongs to him.”¹⁵ Similarly, in adjudicating between conflicting rights Grotius gives clear precedence to the individual over the community. Only in exceptional circumstances did Grotius consider it appropriate for ‘social’ concerns to be allowed to trump the private interests of individuals. In situations of extreme need only, for example, did the basic rights of the needy defeat the rights of others to private property. Similarly, when property remained unused--as was the case with Spain’s claim to vast tracts of land and good in foreign parts, which Dutch trading companies were poised to exploit-- Grotius argued that claims

¹⁴ Grotius, 1625, Prolegomena, §16, p.15.

¹⁵ Grotius, 1625, I, II, p.53.

to property were rendered void. But aside from these few exceptions, Grotius generally strongly favored individual rights. His endorsement of a person's right to sell him or herself into slavery is only the most striking example of this individualistic bent.

Despite the general tone of his account Grotius nonetheless made important steps toward establishing a conceptual framework that articulated the broadened moral scope he now attributed man. Accordingly, in *De iure belli* he sketched out the moral powers associated with man's interaction with others and created a systematic framework of rights. As Dugald Stewart later described this system of rights, Grotius used the "fiction" of perfect and imperfect rights "to treat indirectly of all our various duties, by pointing out the rights which are supposed to be their correlates," thereby "contriv[ing] to exhibit, in the form of a system of rights, a connected view of the whole duty of man."¹⁶

Perfect rights were related to a moral sense by which the individual sought to secure his own preservation within a social environment. This moral sense ensued from two basic features of human nature; first, the natural drive for self-preservation described as the *prima naturæ*, and second, the rational judgment of what was *honestum*, or what made life with others possible. The exercise of a perfect right thus consisted in the coordination of these two basic aspects of human nature in one's actions. In doing so we are able to maintain our moral integrity or *suum* as human beings. Three basic moral powers or rights are derived from the maintenance

¹⁶ Dugald Stewart, *Dissertation exhibiting the Progress of Metaphysical, Ethical, and Political Philosophy since the Revival of Letters in Europe*, in William Hamilton, ed., *Collected Works of Dugald Stewart* Vol.1 Edinburgh. 1815, pp.176-7.

of this *suum*; a “power over oneself, which is called freedom, over others, as that of the father (*patria potestas*) and that of the master over slave, ownership, either absolute, or less than absolute, as usufruct and the right of pledge, and contractual rights, to which on the opposite side contractual obligations correspond.”¹⁷

Sketched out in this manner, perfect rights were compatible with any action that did not injure any other person’s *suum*. Natural law that corresponded to this type of rights was thus a negative injunction that enjoined the individual not to violate the *suum* of others. Grotius described this type of law as amounting to “expletive Justice, which is entitled to the name of justice properly or strictly so called,”¹⁸ and took it to represent the minimal level of morality necessary for social life.

The more robust morality that Grotius introduced in his discussion of ‘sociality’ was evident in his conception of imperfect rights. The moral powers associated with rights in this sense ensued from dispositional faculties or *aptitudines* by which persons judged what was good for society as a whole. Such imperfect rights were the subject of attributive or distributive justice, and they formed the theoretical basis for acts of compassion or generosity. Rights in this sense corresponded to what Grotius described as a law or rule of love. Thus, for example, Grotius explained that it was in accordance with “the law of a well-ordered love” that innocent persons should receive goods before guilty ones. Likewise this law of love would be fulfilled if a grain seller were to advise a prospective customer that a

¹⁷ Grotius, 1625, I, I, pp.35-6.

¹⁸ Grotius, 1625, I, I, p.14.

large shipment was about to arrive. Or, similarly, if a citizen of a besieged city were to sacrifice himself to the enemy in exchange for the siege to be lifted.¹⁹

In sum then, Grotius presented a theory of natural law that was rich in possibility. On the one hand it placed heavy emphasis on the limits of universal morality and on the efficacy of an individualistic ontology in accounting for this morality. The firm anchorage in the principle of self-preservation made Grotius's theory sufficiently realist to counter skeptical critics. On the other hand, Grotius kept the door open for the possibility that human morality was something more than simply self-interest. Though he failed to adequately reconcile this moral dimension with his strong ontological individualism, it remained an important element of his theory that proved attractive to his seventeenth century audience. Grotius's formulation of natural law thus steered a course for natural law that was not entirely uniform in its implications. While it was clear that his theory stayed well clear of the robust moralism of the Thomist tradition, it was less clear what it implied for the precise moral scope of rights. Was, for example, the 'sociality' principle an integral part of Grotius's theory? Or alternatively, was it simply an anomalous appendage to a theory rooted in an ontological individualism?

Grotius's attempt to revitalize ethical theory struck a chord with his seventeenth century audience. *De Jure Belli* received acclaim throughout Europe and led to the appearance of multiple editions and translations.²⁰ Commenting on the

¹⁹ Grotius, 1625, I, II, §vii, p.75, II, XII, §9, p.347.

²⁰ Five editions in the original Latin were published in Grotius's lifetime. On Grotius's contemporary fame Dunning writes, "For twenty-five years before [Hobbes] wrote, Protestant Europe and the most progressive thinkers of all nations had recognized Grotius as the exponent of ultimate truth in

work's impact, Friedrich Glafey later wrote in his history of natural jurisprudence that Grotius's magnum opus stimulated a period in which "students of natural law did nothing more than dispute about his *Law of War and Peace* [Rights of War and Peace], comment on it, turn it into compendia and diagrams, and finally translate it into other languages."²¹

As contemporary commentators considered the implications of this work they paid particular attention to the question of whether a natural rights theory required a strongly individualistic ethical theory.²² The ensuing efforts to build upon Grotius's framework sought to clarify one way or another the ambiguous foundation he had left them. Subsequent seventeenth century natural law theorists, accordingly, opted to work on either developing the ontological individualism that Grotius had intimated, or on more effectively integrating the "social" premise into a 'modern' theory of natural law. By the final quarter of the century these efforts had engendered a clear bifurcation within modern rights theory between a radical individualistic tradition that assigned rights only a minimal moral purpose and a more "socially" imbued tradition that gave rights a broader moral purpose.

political theory." William A. Dunning, A History of Political Theories from Luther to Montesquieu London. Macmillan & co. 1923, p.301.

²¹ Friedrich Glafey, Vollständige Geschichte des Rechts der Vernunft Leipzig, 1739, III, p.111.

²² See, Tuck, 1979, p.82.

Selden and Hobbes: the development of a radical individualistic tradition

Initial efforts to build upon Grotius's work were very much aimed at elaborating and giving clearer definition to the ontological individualism in his theory of rights. The major figures involved in this effort were John Selden and Thomas Hobbes. The work on natural rights written by these two Englishmen played a critical role in solidifying this radical individualism as a central current of modern natural law theory.

Selden was the first of these two to engage with the new theory of rights bequeathed by Grotius. He elaborated his ideas in the course of commissioned writings that attempted a defense of English claims to sovereignty over the North Sea and North Atlantic. Though an initial draft of this work was completed in response to a royal commission of 1618, this version was revised when Charles I and Archbishop Laud requested a paper regarding a similar maritime dispute in 1635. The final product of these efforts included references to Grotius's *De Jure Belli* of 1625 even though the work, entitled *Mare Clausum*, was ostensibly a reply to Grotius's *Mare Liberum*, published in 1609.²³

Even if Selden's position on the maritime dispute between England and Holland was quite at odds with that held by Grotius, the theory that he laid out in defending his argument was similar in important respects to that of his illustrious predecessor. Most significantly he enthusiastically embraced Grotius's premise that because of the diversity of human practice only a minimum universal morality could

²³ The account of Selden is largely taken from Tuck, 1979, ch. 4.

be sustained. But whereas Grotius had given some latitude to the scope of this morality, Selden was insistent that only a bare minimum was tenable. Moral obligation independent of egotistical motivation was unsustainable, claimed Selden.

When the school-men talk of *recta ratio* in morals, either they understand reason, as it is governed by a command from above; or else they say no more than a woman, when she says a thing is so, because it is so; that is, her reason perswades her it is so. The other reason has sense in it. As take a law of the land. I must not depopulate, my reason tells me so. Why? Because if I do, I incur the detriment.²⁴

With no reliable and self-evident means of evaluating bolder moral claims, Selden insists, we are left with self-interest as the only satisfactory standard for morality.²⁵

The desire to explore the outer limits of this individualistic ontology was also a characteristic feature of Hobbes's work. Such a focus is hardly surprising given Hobbes's closeness to the group of 'Seldenians' known as the Tew Circle.²⁶

²⁴ John Selden, *Mare Clausum*, 1636, quoted in Tuck, 1979, p.94.

²⁵ For more on Selden's theory of natural rights, see, M. Crowe, "An eccentric seventeenth-century witness of the natural law: John Selden (1584-1654)" *Natural Law Forum* 12 (1977), and J. P. Sommerville, "John Selden, the law of nature, and the origins of government," *Historical Journal* 27, 2 (June 1984).

²⁶ The group of intellectuals known as the Tew Circle who met regularly at Lord Falkland's house at Great Tew, Oxfordshire, included, Falkland, William Chillingworth, Dudley Digges, and Henry Hammond. The 'Circle' worked on and disseminated Selden's ideas in a number of works published in the early 1640s. See Tuck, 1979, ch. 5.

Moreover, Hobbes himself attests to his intellectual interest in and admiration for Selden on several occasions in his works and private letters.²⁷ But Hobbes, unlike his predecessor he so esteemed, was willing to go much further in this theoretical endeavor. For Hobbes the skepticism that motivated these theoretical efforts was at times so extreme that he was willing to go as far as abandoning any positive moral content whatsoever. In one of his early works, *Elements of Law* (1640), for example, Hobbes simply equated “right” with individual will.

Every man by nature hath right to all things, that is to say, to do whatsoever he listeth to whom he listeth, to possess, use, and enjoy all things he will and can. For seeing all things he willeth, must therefore be good unto him in his own judgement, because he willeth them; and may judge so... it followeth that all things may rightly also be done by him.²⁸

But in his later works, *De Cive* (1642) and *Leviathan* (1651), Hobbes retracts his earlier nominalism and adopts a minimal moralism reminiscent of Selden. Instead of defining “right” as *absolute* liberty, he presents a slightly more restricted

²⁷ Tuck notes that Selden’s *Titles of Honour* is one of the few books praised or even mentioned by name in *Leviathan*. While touring the continent in 1635 Hobbes wrote back to a friend asking for a copy of *Mare Clausum*, saying that he had “already a great opinion of it.” Quoted in Hobbes, *English Works* VII, ed. W. Molesworth. London, 1839-95, p.454. Hobbes and Selden did not actually meet until after the publication of *Leviathan*, when Hobbes sent Selden a complimentary copy. They apparently became quite close friends afterwards. Tuck, 1979, p.119.

²⁸ Hobbes, *Elements of Law*, 1640, Ferdinand Tonnies. Cambridge. Cambridge University Press. 1928. I.14.10, p.121.

notion that accepts an obligation of self-preservation. Man, no longer has a right “to do whatsoever he listeth to whom he listeth,” as stated in *Elements*; he has the right merely to do what contributed to his self-preservation, or what he judged to do so. In *De Cive*, Hobbes clarified this new conception of natural right by saying the following. A man “hath a right to make use of, and to do all whatsoever he shall judge requisite to his preservation...But if any man pretend somewhat to tend necessarily to his preservation, which yet he himself doth not confidently believe so, he may offend the laws of nature...”²⁹ Self-preservation is thus a *law* of nature that is binding on the individual.

From this basis, Hobbes presents an anthropology of human existence in which discrete individuals employing this atomistic logic are lead toward a civil society. Faced with the prospect of inevitable conflict if all men are unhindered in the pursuit of their wants, each man arrives at the conclusion that everyone should seek peace and live sociably. Following this observation men surmise a secondary “law of nature,” that a man be willing to “*lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.*”³⁰ This injunction to live sociably is not dependent upon any moral principle or law; these “laws” of nature are only obligatory to the extent that they serve the goal of self-preservation. If at any time this law-regulated behavior is found to not serve this end, the right to self-defense in the interest of preservation

²⁹ Hobbes, *De Cive*, 1642, in William Molesworth, ed., English Works of Thomas Hobbes London. J. Bolin. 1839, II, p.10.

³⁰ Hobbes, *Leviathan*, 1651, in C. B. Macpherson, ed. Harmondsworth. Penguin. 1968, p.104.

remains to be asserted by the individual. As such, these “laws” of nature are simply logical deductions as to how a society can be maintained. Hobbes himself confesses these laws are more accurately understood as “Conclusions” or “Theorems.” “These dictates of Reason,” Hobbes explains, “men use to call by the name of Laws; but improperly: for they are but Conclusions, or Theorems concerning what conduceth to the conservation and defence of themselves.”³¹ The various attributes included in these laws specify the kind of behavior, such as “*That men performe their Covenants made,*” that sustains the type of contractual relations between individuals that serve as the basis for civil society.

Civil society according to Hobbes is therefore premised on a kind of civic atomism. Each individual rationally concludes that his or her interests are best served if everyone lives peaceably and sociably. And, accordingly, individuals recognize the benefits of and therefore exhibit mutual forbearance in their dealings with others. Each individual restrains his own pursuit of wants to the extent that it infringes on the right of others to pursue their own. Although a harmonious society is the outcome, the driving logic of the transactions that create and sustain civil society is strictly an atomistic individualism. The Hobbesian individual has no moral scope beyond his own discrete being.

³¹ Hobbes, 1651, p.124.

Samuel Pufendorf: a return to moralism

The form in which the ‘new’ natural law was beginning to take shape in the hands of Selden and Hobbes was not always well received. Samuel Pufendorf, a German Protestant working largely in the courts of Northern Europe, was among those who were left dissatisfied with the developing Grotian tradition. An admirer of Grotius and Hobbes since his youth,³² Pufendorf began to see weaknesses in this tradition after several years of lecturing on Grotius’s *De Iure Belli* at Heidelberg. In his magnum opus on natural law, *De Iure Naturae* of 1672 and its shorter version, *De Officio Hominis et Civis* published in the following year, Pufendorf presented a theory of natural rights that attempted to address the problems that had become apparent to him.

While Pufendorf expressed his strong support for the attempt to create a modern moral science that characterized the ‘new’ natural law, he also expressed reservations about the direction in which Grotius and Hobbes had taken this

³² In his first work, *Elementa Jurisprudentiae Universalis*, (Elements of Universal Jurisprudence) 1660, Pufendorf praised Grotius and remarked of Hobbes that his “basic conception in his book, *De Cive*, although it savours somewhat of the profane, is nevertheless for the most part extremely acute and sound.” In W. O. Oldfather, ed.. Oxford. Oxford University Press. 1931, Vol. II, p.xxx.

endeavor.³³ One aspect of their work that troubled Pufendorf was its failure to adequately address a non-individualistic moral scope. Pufendorf welcomed both Hobbes and Grotius's insistence on individual self-preservation as an incontrovertible foundation, but felt that neither had adequately considered the existence of additional moral foundations. On this count, Hobbes and Selden, of course, had positively written off the possibility of there being morals independent of self-interest. And Grotius, though he had addressed this matter, had done so as almost an afterthought to his central emphasis on self-preservation. Commenting on Grotius's treatment, Pufendorf insisted that it was not enough for him to simply add sociability as an observed fact when everything else in his account suggested the efficacy of an individualistic ontology. Such treatment failed to adequately reconcile this moral dimension with the ethical individualism that characterized Grotius's theory.

Pufendorf thus set himself the difficult task of effectively integrating into a 'modern' rights framework the "social" premise that Grotius had introduced in *De Iure Belli*. Foremost among his objectives in this endeavor was to attempt to reconcile an ethical individualism with a non-individualistic ontology. In other words Pufendorf sought to retain the individualistic framework that was the hallmark

³³ The main source for this account of Pufendorf's views is the essay entitled *De origine et progressu disciplinae iuris naturalis* (Of the origin and development of the discipline of natural law), 1680, printed as the first chapter of his collected answers to his critics, *Eris Sandica* (Scandinavian polemics), 1686. The document was first published in the pamphlet *Spicilegium controversarium*. See, Hont's account of these comments, Istvan Hont, "The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the 'Four-Stages Theory,'" in Anthony Pagden, ed., *Languages of Political Theory* Cambridge. Cambridge University Press. 1987, pp.256-66 .

of the 'new' natural law; that individuals were the carriers of moral powers vis a vis others and that they arrived at a conception of these moral ends through an individualistic logic. But in addition to these staple features, Pufendorf sought to expand the moral ends adopted by individuals beyond the limited purview of their discrete selves. Man was to be understood as a moral agent who could step outside his discrete being and adopt an identity with the larger community.

Pufendorf acknowledged that his methodology in this endeavor owed much to Hobbes even if its end was quite different from the controversial Englishman's. Denouncing Hobbes's conclusions as "falsehoods," Pufendorf warmly praised Hobbes's methodology, saying that it

provide[s] a foothold by which moral and political science can be led to the highest peak. Thus, much of what helps to complete this study would never have entered anybody's mind if it were not in Hobbes' writings.³⁴

Following Hobbes's example in this way, Pufendorf used an examination of abstract human nature as a premise for his framework. Just as it had done for Hobbes, the analytical device of man in the 'state of nature' served as a parsimonious and incontrovertible basis for positing a logic by which man was purported to interact with the world. But unlike Hobbes, in Pufendorf's account, man's confrontation with the world as a solitary being would not confirm the stark minimalism of man's moral persona. Pufendorf's detailed anthropological account

³⁴ Pufendorf, 1680, p.168.

would suggest that such an existence would lead to the realization and adoption of a more substantial moral identity. Aptly capturing the distinction between his account of man's moral being and that of his English predecessor, Pufendorf insisted that his basic premise stood "in direct opposition to the theory of Hobbes." "For I come very close to the reasonable system of the stoics," he continued, "whereas Hobbes serves up a rechauffé of Epicurean theories."³⁵

Pufendorf began his account by examining how human beings were distinct from other species in their natural affinity for society. What distinguished man from animals, Pufendorf insisted, was the former's complete inability to satisfy its own needs. Man was a "mute and ignoble Animal, Master of no Powers or Capacities," that displayed nothing but "exceeding Weakness" and a "wonderful Impotency."³⁶ Furthermore, man was distinguished by the infiniteness and diversity of his needs across the species. In comparison to the finite and uniform needs of species of animals, Pufendorf asked, "do not Man float in a whole Tide of Affections and Desires, utterly unknown to Beasts?" The desires of man were not only insatiable but also infinitely varied. "There is," he said, "no more Diversity of living, than there is Opinions and ways of living: each of which is cry'd up, with wonderful Perversness, by the several Patrons of them."

The depth and diversity of human needs demonstrated for Pufendorf the absolute necessity for cooperation between men. Without society, man would be

³⁵ Pufendorf, 1686, quoted in James Tully "Introduction" in Tully, ed., Samuel Pufendorf: On the Duty of Man and Citizen according to Natural Law Cambridge. Cambridge University Press. 1991, pp.xxvii-xxviii.

³⁶ Pufendorf, *De jure naturae et gentium libri octo* (On the Law of Nature and of Nations), 1672, 2.1.4, p.115

devoid of the *cultura* that made possible the satisfaction of his needs as a human being, and thus deprive himself of an essential element of being human. To illustrate this point Pufendorf asked his readers what would happen “should we suppose a Number of such helpless Wretches thrown together by Nature on some uninhabited Soil”? In response, Pufendorf concluded that the uniqueness of human needs would prompt these “Wretches” to “arrive at some Method and Elegancy of Living.” “This will easily be acknowledge’d,” he continues, “by anyone that looks about on the numerous Improvements and Assistances which we make use of in our daily Actions, and at the same time considers how difficult it would be for any Man to invent all these of his own Head, if he were not put in the Way by previous Labour and Guidance of others...”³⁷ In “this sense,” Pufendorf concluded, “the Natural State is opposed to a Life cultivated by the Industry of Men.”³⁸

Having established the natural affinity between society and human nature, Pufendorf went on to lay out an anthropological account of how man came to realize this natural “sociality.” Man arrived at this outcome, ironically enough, via the impulse of self-preservation. Like speech, sociality arose naturally and spontaneously out of human development. Initially generated by the self-interested interaction between individuals, in time sociality would acquire a distinct force of its own. In this way sociality would transcend its initial character as mere ‘unsocial sociality,’ and become a non-instrumental virtue valued for its own sake. Man had

³⁷ Pufendorf, *De officio hominis et civis* (On the Duty of Man and Citizen), 1673, in James Tully, ed., Samuel Pufendorf: On the Duty of Man and Citizen according to Natural Law Cambridge. Cambridge University Press. 1991, 2.2.2, p.120.

³⁸ Pufendorf, 1673, 2.1.4, p.141.

thus created civil society on the basis of atomistic needs alone, but sustained it, at least in part, on the basis of an identity with the ‘social.’

Through this process of human development, accordingly, man would recognize this “law” and adopt it as part of his ‘natural’ being. The other-regarding disposition entailed in this sociability was not an innate or spontaneous quality as had been suggested by Grotius and presented by the Thomist natural law tradition; rather, it was an outcome that rational human beings were assumed to necessarily arrive at through reasoning. In this sense it was a “law of nature” in the same way that Hobbes’s “Conclusions” or “Theorems” were.

From this anthropology of human development, Pufendorf deduced that the moral injunctions imposed on man by natural law amounted to two fundamental principles, self-preservation and ‘sociality.’ Each of these principles were independent and could not be reduced to the other. This was the case even if ‘sociality’ was discovered through an individualistic logic. Sociability was, in other words, a natural trait inherent to human beings that could not be fully accounted for by self-interest.³⁹

After sketching out the basic nature of man’s being, Pufendorf delineates the type of social relations that ensue from this premise. The moral obligations between individuals include not only avoidance of mutual harm but also the provision of mutual services. Accordingly, Pufendorf identifies a primary law of nature by which

³⁹ For similar readings of Pufendorf’s account of ‘sociality’ and the impulse of self-interest, see T. J. Hochstrasser, Natural Law Theories in the early Enlightenment Cambridge. Cambridge University Press. 2000, pp.63-65, James Tully, “Introduction” in Tully, 1991, pp.xxiv-xxix, and Micheal Seidler, “Introduction” in Seidler, ed., Samuel Pufendorf’s On the Natural State of Men Lewiston. Edwin Mellen. 1990, pp.49-53.

the individual is obliged to preserve and cultivate humanity wherever it is encountered. This command entails the duty to cultivate one's own person in its physical and moral aspects and assist others in pursuing the same end. Pufendorf divides these tasks into two categories, duties to oneself and duties to others. Describing the former, Pufendorf writes that when considering the naturalness of man's concern for himself, "it seems superfluous to invent an obligation of self-love." "Yet from another point of view," he continues,

a man surely does have certain obligations to himself. For man is not born for himself alone; the end for which he has been endowed by his Creator with such excellent gifts is that he may celebrate His glory and be a fit member of human society. He is therefore bound so to conduct himself as not to permit the Creator's gifts to perish for lack of use, and to contribute what he can to human society.⁴⁰

Presented in this way, the ethic of self-preservation is not antithetical to the 'social' moral being that characterizes man. The preservation and nurturing of oneself is as much a part of man's obligation to cultivate humanity as is the performance of more other-regarding acts.

In his account of duties to others, Pufendorf describes an obligation to exhibit benevolence to fellow man. This principle he illustrates with the maxim, that "Any man must, inasmuch as he can, cultivate and maintain toward others a peaceable sociality that is consistent with the native character and end of humankind in

⁴⁰ Pufendorf, 1673, p.46.

general.” Such a sociality, contrasting his position from that of Hobbes and Selden, cannot be reduced to a self-interest whereby “any intention for joining oneself to another would do,” akin to “an association of thieves.” “Rather,” he continues, “we mean by it a kind of disposition whereby a man is understood to be joined to every other man by ties of benevolence, peace, and charity, and therefore by mutual obligation.”⁴¹

Pufendorf’s account of this moral being served as a foundation for his new conception of natural rights. It was mistaken, Pufendorf insisted, to equate a right with whatever power an individual exercises that is compatible with self-preservation. Only the

Power of doing a Thing, is properly a *Right*...as includes some moral Effect, with regard to others, who are Partners with me in the same Nature. Thus, for Instance, in the old Fable, the Horse and the Stag had both of them a natural Power of Privilege of feeding in the Meadow; but neither of them had a *Right*, which might restrain or take off the natural Power in the other. So Man, when he employs, in his Designs and Services, insensible or irrational Beings, barely exercises his natural Power, if without regard to other Men, we here precisely consider it in reference to the Things, or Animals, which he uses. But then, at length, it turns into a proper Right, when it creates this moral Effect in other Persons, that they shall not hinder him in the free Use of these Conveniences, and shall themselves forbear to

⁴¹ Pufendorf, 1672, p.152.

use them without his Consent.⁴²

According to Pufendorf, then, a Hobbesian ‘right’ was simply *not* a right, because it denied any moral purpose beyond the individual. Pufendorf’s insistence that a right entail “some moral Effect, with regard to others,” indicated the broader moral context that the individual was conceptualized within. The actions of an individual were seen within this larger context, and only where they were consistent with this *eudaimonia* could such acts be understood as ‘rights.’

With natural law imposing an obligation beyond merely self-preservation, rights assumed a more substantial moral content in Pufendorf’s formulation. The powers granted by rights furnished the individual with the liberty to conform to the moral order indicated by natural law. Pufendorf’s definition of *ius* or ‘right’ is instructive here because it illustrates how rights in his formulation connected the individual to the *positive* maintenance of the moral order. Defining *ius* as an “Authority to do something *granted* or left unaffected by the Laws,” Pufendorf indicates how rights can sanction the performance of positive duties as well as behavior that is within the bounds of a minimal morality.⁴³ For Pufendorf then, rights were attributed the negative dimension reminiscent of Hobbes and Selden, describing the permissive powers afforded an individual in society within the bounds of justice. In this sense an individual’s actions incurred a duty on others to yield. But departing from the legacy of his English predecessors, Pufendorf also gave rights a

⁴² Pufendorf, 1672, p.169.

⁴³ Pufendorf, 1673, p.120, italics added.

positive dimension where they were related to the performance of duties derived from natural law. Where natural law enjoined a certain positive action the individual had a moral power or a 'right' to act.

Despite its rejection of an ontological individualism Pufendorf's theory stayed well clear of a strict prescriptive moralism. The performance of benevolent acts towards others was not coerced by external sanction but rather was induced by an inner moral motive. As Pufendorf describes it;

obligation places a kind of bridle on our liberty, so that, though the will can in fact take different directions it yet finds itself imbued by it with an internal sense (so to speak), so that it is compelled to recognize that it has not acted rightly if the subsequent action does not conform to the prescribed rule ⁴⁴

The evaluation of moral claims is thus informed by an inner moral judgment that extends beyond an atomistic logic. A person judges the legitimacy of a claim not simply by its expediency but by its moral worth. Thus, as Pufendorf explains, an individual has a justified claim to be obeyed by another,

if he has conferred exceptional benefits on him; if it is evident that he wishes the other well and can look out for him better than he can for

⁴⁴ Pufendorf, 1673, p.27.

himself; if at the same time he actually claims direction of him; and, finally, if the other party has voluntarily submitted to him and accepted his direction.⁴⁵

Obligation is accordingly grounded not simply on the consent of the individual, but also on a shared sense of benevolence between individuals.

The temperate manner in which the individual is linked to an overarching moral order was most apparent in Pufendorf's discussion of perfect and imperfect rights. Borrowing the system that Grotius had developed, Pufendorf declares that the performance of imperfect rights, those obligations that contribute to the "well-being" of society, cannot be as strictly demanded as perfect rights, those obligations that are essential to the very "being of society." Imperfect rights, he claims, should be "left to each person's sense of decency and conscience." As such, "it would be inconsistent to extort them from another by force except when a grave necessity compels it." Exemplifying his general liberality on this issue, he renounces strict enforcement of imperfect obligations, saying it would be "foolish to prescribe a remedy that is far more elaborate and troublesome than the disease."⁴⁶

Tempered though this moral dimension undoubtedly was, man was still seen as endowed with a moral agency, which, when properly directed, gave rise to a 'social' being. Rights, accordingly, were the moral powers that enabled the individual to transcend his discrete self and thereby reconcile himself to this moral order. Going against the drift of new natural law as it had developed since Grotius,

⁴⁵ Pufendorf, 1673, p.28.

⁴⁶ Pufendorf, 1672, p.131.

Pufendorf's formulation attempted to contain the individualist logic of the new "science" of rights within a more morally-centered framework. Rights were still moral powers that inhered in the individual and exercised largely at the discretion of the individual, but they were no longer entirely subject to an atomistic logic.

Pufendorf's sophisticated attempt to reconcile an ethical moralism with the Grotian rights framework presented a coherent alternative to the tradition that had been elaborated by Selden and Hobbes. This dimension of Pufendorf's formulation attracted considerable interest across Europe and prompted a number of scholars to pursue the line of thinking he had opened up.⁴⁷ In Germany, Christian Thomasius followed Pufendorf's example in his natural law treatise, *Institutiones jurisprudentiae divinae* (1688) and his *Einleitung zur Sittenlehre* (1692).⁴⁸ In the French and English-speaking worlds, Jean Barbeyrac was particularly important in disseminating and expounding upon Pufendorf's initiative. Barbeyrac's annotated translations into French of Pufendorf's work offered a strong endorsement and gave this current a

⁴⁷ *On the Law of Nature and Nations* saw over forty editions and translations into the main European languages during the century following its appearance and *On the Duty of Man and Citizen* appeared in some one hundred and fifty editions before 1834. Describing Pufendorf as "arguably the most widely read natural law philosopher of the late seventeenth and early eighteenth centuries," Seidler writes, "No one attending a European university or secondary school could avoid being exposed to these works, particularly the latter, which was also widely read outside academic circles by nobility, merchants, industrialists, officials, and military men, not to mention monarchs like Peter the Great, Frederick the Great, and Joseph II, who promoted it in their realms." Michael Seidler, "Religion, Populism, and Patriarchy: Political Authority from Luther to Pufendorf," *Ethics* 103 (April 1993), pp.562-63.

⁴⁸ See, Hochstrasser, 2000, ch. 4.

major impetus.⁴⁹ In England, this current was taken up by John Locke, who read and recommended Pufendorf, and was himself used by Barbeyrac to improve on the latter.⁵⁰ By the turn of the century Pufendorf's morally imbued version of natural rights had developed into a fully-fledged paradigm that rivaled the conception of Selden and Hobbes.⁵¹

⁴⁹ Barbeyrac, 1706, and Barbeyrac, 1707. On the value of these texts, Francis Hutcheson wrote that Barbeyrac was "by the far the best commentator on Puffendorff, whose *notes* are of much more value than the *text*." Quoted in Stewart, 1815, p.178. For more on Barbeyrac's contribution, see. T. J. Hochstrasser, "'Conscience and reason' the natural law theory of Jean Barbeyrac," Historical Journal 36 (1993).

⁵⁰ See, Seidler, 1990, p.15. Peter Laslett comments that, among the writers consulted by Locke in writing the *Two Treatises*, "Samuel Pufendorf was perhaps the greatest use to him...He took advantage of Pufendorf's arguments, he reproduced his positions..." "Introduction," in Laslett, ed., John Locke Two Treatises of Government New York. Mentor. 1963. p.88. Locke recommended Pufendorf's *De jure naturae* "as the best book of that kind" for instruction in "the natural rights of men, and the original and foundations of society, and the duties resulting from thence." See, Locke, *Thoughts Concerning Reading and Study for a Gentleman*, [1703] in Locke: Political Essays, Mark Goldie, ed., New York. Cambridge University Press. 1997, p.349.

⁵¹ Knud Haakonssen describes this "system" as being "planted firmly at the center of Enlightenment moral thought, thanks to the enormous popularity of Pufendorf's treatises in all of Protestant Christianity (and beyond)." Haakonssen, "From natural law to the rights of man," in Haakonssen and Michael J. Lacey, eds., A Culture of Rights Cambridge. Cambridge University Press. 1991, p.28. Pufendorf was treated as a major figure in eighteenth-century histories of natural law. See, J.B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy Cambridge. Cambridge University Press. 1998, pp.118-19. For Pufendorf's influence, see, Sieglinde Othmer, Berlin und die Verbreitung des Naturrechts in Europa Berlin. De Gruyter. 1970, and Leonard Kreiger, The Politics of Discretion: Pufendorf and the acceptance of Natural Law Chicago. Chicago University Press. 1965, pp.255-66.

Locke's rendition was typical of these various efforts and given the frequency by which his work was invoked at the American founding it is appropriate that we briefly examine his work to get a sense of how the ethical tradition opened up by Pufendorf was followed up by his successors. Although Locke never wrote a comprehensive statement of his moral theory, a number of his writings demonstrate a consistent commitment to the idea that natural law imposed a moral obligation on man beyond merely self-preservation. This position remains central to Locke's thinking despite his preoccupation with the role that appetite or desire could play in determining the will. For example, Locke admitted that an individual's desires routinely determine the will and the objects that are identified as good. But the "present good" identified by the individual was not beyond revision or rational evaluation. Here reason enters into the picture and provides a natural guide to the "greater good." Locke writes, "before the will be determined to action, and the action (which follows the determination) done, we have opportunity to examine, view, and judge, of the good or evil of what we are going to do." Through reason the individual apprehends the "greater good" and is able to make it his conception of happiness so his "desire, raised proportionally to it, makes us uneasy in the want of it." Natural law thus leads man toward this "greater good" or eudiamonia.⁵² As Locke puts it, "Law, in its true notion, is not so much the limitation as the direction

⁵² On a similar note elsewhere, Locke writes that individuals have the ability to "*suspend*" the "prosecution" of the will, "till they have looked before them and informed themselves whether that particular thing which is then proposed or desired lies in the way to their main end, and make a real part of that which is their greatest good." John Locke, *An Essay Concerning Human Understanding*, 1690, Alexander Campbell Fraser, ed. New York. Dover. 1959. II, xxi, §52.

of a free and intelligent agent to his proper interests, and prescribes no farther than is for the general good of those under the law.”⁵³ Although Locke labored throughout his career to satisfactorily explain why men would choose the “greater good” over the “present good,” he remained committed to the idea that morality could not be reduced to individual utility.⁵⁴

We get a glimpse of the specific moral content of natural law in *The Second Treatise of Government* (1689). Here Locke makes it clear that the fundamental law of nature is to preserve humanity in others as well as in oneself. Echoing Pufendorf, he writes that, “Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business.” Focusing more closely on the content, he writes that “Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, *to preserve the rest of Mankind*...”⁵⁵

The clearest explication of Locke’s thinking on natural law, however, is in his series of lectures entitled *Essays on the Law of Nature* written in the early 1660s. Although the essays were not published in his lifetime and thus were limited in their historical influence, they are significant to the extent that they clarify some of the

⁵³ Locke, 1690, II, vi, §57, 12-16.

⁵⁴ See, John Dunn, The Political Thought of John Locke: an Historical Account of the Argument of the ‘Two Treatises of Government’ New York. Cambridge University Press. 1969, cht. 14, and James Tully, An approach to political philosophy: Locke in contexts New York. Cambridge University Press. 1993, cht. 9.

⁵⁵ John Locke, 1690, II, ii, § 6, 7.

themes that emerge in his later writings. In this sense the lectures provide a convenient substitute for Locke's failure to comprehensively lay out his theory of natural law in his later work. For our purposes the essays are revealing because of their detailed discussion of the moral obligations imposed by natural law. Locke pays particular attention to explaining the distinction between his own position and that associated with Selden and Hobbes. Beginning lecture VI, Locke rhetorically considers the validity of limiting the law of nature to the principle of self-preservation.

Since there are some who trace the whole law of nature back to each person's self-preservation and do not seek its foundation in anything greater than that love and instinct wherewith each single person cherishes himself and, as much as he can, looks to his own safety and welfare, and since everyone feels himself zealous and industrious enough in self-preservation, it seems worth our labour to inquire what and how great is the binding force of the law of nature.⁵⁶

Locke is clearly unimpressed with this argument. Reducing natural law in this way makes a mockery of the idea that God's design for mankind imposes duties on man, Locke insists. "For if the source and origin of all this law is the care and preservation of oneself, virtue would seem to be not so much man's duty as his convenience," and

⁵⁶ John Locke, *Essays on the Law of Nature*, 1664, in Goldie, ed. 1997, VI, p.116.

he adds, “the observance of this law would be not so much our duty and obligation, to which we are bound by nature, as a privilege and an advantage, to which we are led by expediency.”

Locke’s opposition to this moral minimalism becomes further apparent when in a later lecture he discusses the specific kind of duties that are enjoined by natural law. The law of nature, Locke writes, commands “the consolation of a distressed neighbour, the relief of one in trouble, the feeding the hungry.” But, as with Pufendorf, the occasion of the performance of these acts of benevolence is left to the discretion of the individual. Locke writes, “in these matters we are not under obligation continuously...we are not obliged to provide with shelter and to refresh with food any and every man, or at any time whatever, but only when a poor man’s misfortune calls for our alms and our property supplies means for charity.”⁵⁷ For Locke, as was the case for Pufendorf, natural law imposed a moral injunction on mankind that even if it was not overly burdensome stretched beyond the minimalist scope proposed by Selden and Hobbes.

This historical survey suggests, then, that immediately prior to the American appropriation of natural rights in the eighteenth century, an important feature of early modern natural law was this bifurcation into distinct ethical traditions. Evidence of the circulation of a range of representative works in the colonies suggests that eighteenth century Americans had both of these well-formed traditions at their disposal. Lundberg and May’s recent survey of the appearance of selected

⁵⁷ Locke, 1664, p.123.

philosophical and political works in libraries from 1700 to 1776 indicates the presence of the full breadth of the modern rights tradition. The ideas associated with these traditions also enjoyed wide circulation and dissemination in the colonies through learned periodicals and letter writing.⁵⁸ Yet for many commentators interested in the reception of rights in America the heterogeneity of early modern natural rights theory is overlooked. Walter Berns, for example, subsumes the whole of this rights theory under the Hobbesian tradition. Referring to “the doctrine of modern natural rights and natural law,” Berns describes the “laws of nature,” as being “all derivative from and, as it were, made necessary by, the rights of nature, or, man’s natural rights, the rights that all men possess equally.” These “natural rights,” Berns continues, entail

the right to self-preservation and the right to use whatever means are

⁵⁸ Although only a handful of specifically rights texts are included in Lundberg and May’s survey, incidence of rights texts in both the Pufendorfian and Hobbesian tradition are found. Indeed, texts in the former tradition register much more frequently than texts by Hobbes: Jean Jacques Burlamaqui’s *Principles of Natural and Political Law* is listed in 10% of libraries surveyed, Emerich de Vattel’s *Law of Nations* in 10%. Francis Hutcheson’s *A System of Moral Philosophy* in 15%, and Locke’s *Two Treatise* in 15%, compared to Hobbes’s *Leviathan* in 4% and a compilation *Works* in 3%. David Lundberg and Henry F. May, “The Enlightened Reader in America,” *American Quarterly* 28, 2 (Summer 1976). Excerpts from natural law texts and discussion of the ideas they presented were also available through widely circulated learned journals, dictionaries and encyclopedias. Specifically aimed at providing synopses and reviews of recent intellectual developments, these publications were likely to have been a particularly important source of this sort of information in America where access to books was sometimes difficult. See, Norman Fiering, “The Transatlantic Republic of Letters: A Note on the Circulation of Learned Periodicals to Early Eighteenth-Century America,” *William and Mary Quarterly* 3d ser., 33, 4 (Oct. 1976).

required, or are thought by each man to be required, to preserve himself. As Hobbes makes explicit, if his own preservation requires it, or is thought to require it, every man has a natural right not only to take from another but to kill the other. Locke, whom we are more inclined to acknowledge as a founder of our modern politics, taught the same lesson but less explicitly.⁵⁹

From this assumption about the ethical homogeneity of the modern natural law tradition, it is but a short step for Berns to conclude that it was this particular conception of rights that was embedded in the political and constitutional tradition established at the founding. It is this “doctrine of modern natural rights and natural law,” Berns writes, “from which...we derive our understanding of

⁵⁹ Walter Berns, “Judicial Review and the Rights and Laws of Nature,” The Supreme Court Review, 1982 Chicago, 1983, pp.58-59. See also, Berns, 1986, Berns, “The Constitution as Bill of Rights,” in Robert A. Goldwin and William A. Schambra, eds., How does the Constitution secure Rights Washington, D.C. American Enterprise Institute. 1985, Harvey C. Mansfield, Jr., “Hobbes and the Science of Indirect Government,” American Political Science Review 65 (1971), Frank M. Coleman, Hobbes and America: Exploring the Constitutional Foundations Toronto. 1977, Martin Diamond, “Democracy and *The Federalist*: A Reconsideration of the Framers’ Intent,” in William A. Schambra, ed., As Far as Republican Principles Will Admit Washington D. C.. AEI Press. 1992, pp.27-30. and Gary L. McDowell, “The Language of Law and the Foundations of American Constitutionalism,” William and Mary Quarterly 3rd. Ser. 9,3. July 1998. As Berns and many of these authors acknowledge, this interpretation of early modern natural law is indebted to Strauss’s study of the early 1950s, Leo Strauss, Natural Right and History Chicago. University of Chicago Press. 1953. Though less influential for interpretation of the American founding, C.B. Macpherson’s seminal study should also be acknowledged as making an important contribution to the general currency of this position. C. B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke London. Oxford University Press. 1962.

constituitionalism.⁶⁰ Yet, as we have seen, this conclusion may be in error. The complexity that a historical survey of seventeenth century natural law reveals compels us to reconsider precisely how natural law and natural rights were appropriated in America. To this end I begin by considering how the framework of natural law was adopted in the eighteenth century.

⁶⁰ Berns, 1983, p.58.

PART 2: Natural Law and Rights in the colonies

Chapter 2: Theological Revision: the shift to natural law and the effort to fortify the moral existence of man

To fully appreciate how natural rights were received in the mid-eighteenth century America we need to consider the historical context into which these ideas were appropriated. A close examination suggests that the form in which these ideas gained currency was closely related to the intellectual climate of the period. In particular, it appears that the appropriation of a language of natural rights was in large part a response to a pervasive crisis in natural ethics. A central factor in shaping the course of these events was a widely shared sense of uncertainty regarding the status of human judgment in moral questions. This moral uncertainty had been stirred by the antinomian “enthusiasm” of the Great Awakening. In its call for an emphasis on spiritual revelation for guidance as opposed to rational judgment, revivalism questioned traditional notions of the role of human faculties. A period of religious debate ensued that examined theological doctrine in the light of the revivalist critique. Fearing the implications of the subjectivism inherent in

evangelical doctrine, efforts were made to appropriate a natural ethics that could provide a more secure foundation for understanding moral life in the natural world.

Drawing on the theological rationalism of early eighteenth century English Latitudinarians American clergy began to incorporate a notion of the natural world as an orderly and purposive moral system in which man could participate. This providential design or “natural” law was understood as discernible in and through the attributes of the natural world. Using reason man could discern moral principles simply by examining the world around him. As Samuel Clarke, one of the most influential exponents of this doctrine, put it, upon examination of “different relations” between “different things” in the natural world, the “fitness or unfitness of the application of different things or different relations one to another” would be self-evident or “as plain, as that there is any such thing as proportion or disproportion in geometry and arithmetic.” From the observation of these “different relations,” Clarke explained, moral principles would be self-evident; “from the different relations of different persons one to another, there necessarily arises a fitness or unfitness of certain manners of behavior of some persons towards others.”¹ Although this rationalism was incorporated within different epistemologies, some attempting to retain the traditional Reform distinction between ‘true’ divine morality and natural morality and others abandoning this distinction altogether, this revised theology shared an anchored and relatively substantial vision of natural morality. Natural man

¹ Samuel Clarke, *A Discourse concerning the Unchangeable Obligations of Natural Religion, and the Truth and Certainty of the Christian Revelation*, 1706, in D.D Rapheal, ed., *British Moralism, 1650-1800* Oxford. Clarendon Press. 1969, Vol. 1, p.192.

was now seen as a competent moral agent who could in some way participate in God's divine will.

It is within the context of this theological revision that we need to understand the appropriation of natural rights. With the exception of the nominalist strain, most notably represented by Hobbes in *Elements*, the modern concept of natural law was closely related to the doctrine of theological rationalism or "natural religion" as it was often called. Natural law simply gave specific focus to the promulgation of this natural moral system. It examined how this system was intelligible to man, the content of the moral obligations it imposed and how these duties could be translated into a civil society. In effect it was a discipline that examined how this "natural religion" was applied to secular life. Samuel Pufendorf aptly captured the distinction but nonetheless close affinity between the disciplines of natural law and moral theology. Considering the distinction between these disciplines Pufendorf declared that

by far the greatest difference is that the scope of the discipline of natural law is confined within the orbit of this life, and so it forms man on the assumption that he is to lead this life in society with others. Moral theology, however, forms a Christian man, who, beyond his duty to pass this life in goodness, has an expectation of reward for piety in the life to come and who therefore has his citizenship [*politeuma*] in the heavens

while here he lives merely as a pilgrim or stranger.²

Given the manner in which natural law complimented theological rationalism we can see how this larger theological revision was likely to incorporate an implicit theory of rights. The adoption of a more ordered and substantial conception of natural ethics put forward a conception of the moral agency of natural man. This development, in turn, suggested that individuals could make moral claims on one another. The discipline of natural law simply picked up on the task of giving systematic definition and organization to the moral claims entailed by natural religion. Thus in this sense the course of theological revision indicated a general approach to rights. The emerging new theology pointed to a general conception of the type of moral obligations imposed on man and, consequently, the type of moral claims individuals could make on one another.

As we will see in greater detail then, faced with the profound uncertainty regarding Christian ethics and natural morality precipitated by the Great Awakening, American clergy turned to the moral certitude offered by theological rationalism. When Americans subsequently sought a theory of rights that could compliment the new approach to natural ethics they turned to the Pufendorbian version. Between the two traditions of new natural law we have examined, Pufendorbian rights theory was particularly well suited to the task at hand. While remaining respectful of the overall limits of man's moral capacities it offered a more stable foundation for a Christian

² Pufendorf, 1673, pp.7, 8-9. Pufendorf concludes on this point by insisting that despite their distinctive methods in acquiring knowledge, "it would be very ignorant to set these disciplines against each other or to imagine any contradiction between them."

ethics in the natural world. The insistence of Pufendorfian theory on a moral scope that transcended the discrete individual meshed well with the pervasive concern for a substantial morality in the natural world. In contrast, the alternative tradition presented by Selden and Hobbes (in *De Cive* and *Leviathan*) appeared to portend precisely the moral relativism that these efforts were seeking to avoid. Though this Hobbesian tradition did stay clear of nominalism, it still fell short of the kind of positive content that could sustain a Christian morality. Limiting the obligations of natural law to the self-interest of the individual remained too subjective a premise to satisfy the ethical concerns of Americans.

I begin my account of the appropriation of natural law and natural rights by examining this mid century theological revision. In the following chapter, I examine how the rights theory sketched out in religious discourse was given definition and elaborated in the teaching of moral philosophy in the colleges. In doing so, these academic endeavors provide an opportunity to examine the form in which rights were understood as they were assimilated into more general discourse and became a central political idiom.

The religious connection: the Great Awakening and the shift toward theological rationalism

The primary catalyst for this adoption of a theory of natural law was the theological challenge presented by the Great Awakening. The revival's call for a return to an

evangelical religion rooted in emotionalism raised serious theological concerns regarding an individual's relationship to God. In reaction against the nominalism and subjectivism of the "enthusiasm" associated with the revival, a major reformulation of theology was undertaken that saw both liberal and orthodox wings of the church embrace the more orderly and secure approach to religion offered by this rationalism.

The adoption of such a fully-fledged theological rationalism was unprecedented in Protestant theological tradition in the colonies. The influence of the Reform tradition, elaborated by Zwingli, Luther and Calvin in the sixteenth century and William Perkins and William Ames in the seventeenth century, held sway over much of religious life. The Congregationalist, Presbyterian, Dutch and German Reformed, and Lutheran denominations (representing almost two-thirds of the total number of churches) were formally aligned and a substantial proportion of Anglican ministers exhibited doctrinal allegiance.³ Furthermore, the Congregationalists, by far the largest denomination, were influential in cultivating fidelity to the tradition throughout the colonies.⁴ Through the circulation of writings by their own divines such as Cotton Mather and Solomon Stoddard as well the

³ For the incidence of the different churches in the seventeenth and eighteenth centuries, see Edwin S. Gaustad, Historical Atlas of Religion in America. New York. Harper & Row. 1976. For the doctrinal commitment to the Reform tradition among some Anglican clergy, see, John Frederick Woolverton, Colonial Anglicanism in North America Detroit, Michigan. Wayne State University. 1984.

⁴ On the influence of the Reform tradition on early American theology, see, Sydney E. Ahlstrom, "Theology in America: a historical survey," in James Ward Smith and A. Leland Jamison, eds., The Shaping of American Religion Princeton. Princeton University Press. 1961.

writings of theologians from Europe, the Congregationalists propagated the “New England way” and helped to reaffirm commitment to the Reform tradition.

In following this tradition, American Protestantism generally stayed well clear of rationalism. The basic position expounded by Reform theologians and reiterated by clergy in the colonies was that the natural faculties were extremely limited in their ability to supply knowledge of God. Man was confronted with an insurmountable gap between his own being and that of God's, such that it could only be bridged by supernatural assistance. Reason could be used to acquire knowledge of the earthly realm but these truths could never reach the heights of divine knowledge acquired through the action of the spirit. As Calvin put it, man's natural gifts are “corrupted by sin, and his supernatural gifts withdrawn,” as a result of the original sin.” “He is now an exile from the kingdom of God,” Calvin continued, “so that all things which pertain to the blessed life of the soul are extinguished in him until he recover them by the grace of regeneration.” “There are still some sparks which show that he is a rational animal, and differs from the brutes...and yet, that this light is so smothered by clouds of darkness, that it cannot shine forth to any good effect.”⁵ The pursuit of truth by human faculties, accordingly, is described as a fruitless quest. Calvin writes, “unable, from dulness, to pursue the right path of investigation,” the human mind “after various wanderings, stumbling every now and then like one groping in darkness, at length gets completely bewildered, so its whole procedure proves how unfit it is to search the truth and find it.” These natural

⁵ John Calvin, *Institutes of the Christian Religion*, 1559, trans. Henry Beveridge. Michigan. Eerdmans Publishing Company. 1966. II, ii, 12, p.233.

faculties thus overreach themselves when they are directed toward the “superior” objects of the heavenly realm. Reason and faith, accordingly, are assigned their separate domain, each with their own distinct object of knowledge; faith to “the knowledge of God and of his will, and the means of framing the life in accordance with them,” reason to “earthly things” which have “some connection with the present life.”⁶

The only modification of this strict separation between the domains of reason and faith came with the Puritan theologians of the seventeenth century. Led by William Perkins, this initiative introduced into the Reform tradition a rational soteriology that gave a greater role to reason in evaluating the process of salvation.⁷ Perkins elaborated his concept of conscience in his works *Treatise of Conscience* and *The whole treatise of cases of Conscience*. Rather than leaving the believer with no means of determining his fate, Perkins attempted to lay down an objective criterion of salvation. Conscience, Perkins argued, provided a reliable means of self-examination. Through the human conscience the judgment of God and man coincide in ‘a knowing together.’ “God knowes perfectly all the doings of man,” he writes, “though they be never so hid and concealed; and man by a gift given him of God, knowes together with God, the same things of himself: and this gift is called

⁶ Calvin, 1559, p.234.

⁷ See, Frederick C. Beiser, The Sovereignty of Reason Princeton. Princeton University Press. 1996, pp.155-157.

Conscience.”⁸ If then the believer wishes to know the judgment of God upon him, then he only has to listen to the voice of conscience within himself:

It [conscience] is (as it were) a little God sitting in the middle of mens hearts, arraigning them in this life as they shal be arraigned for their offences at the Tribunal seat of the everlasting God in the day of judgment. Wherefore the temporarie judgment that is given us by the conscience is nothing else but a beginning, a forerunner of the last judgment.⁹

Functioning in this way, conscience amounts to a natural faculty that has a close affinity with reason. Thus, Perkins describes conscience as “a part of the understanding in al reasonable creatures, determining of their particular actions either with them or against them.” The understanding is then described as that faculty of the soul “whereby we use reason,” which is “the more principall part serving to rule and order the whole man” placed within him “as the wagginer in the waggin.” Eliminating any need for supernatural grace in the deliberation of conscience, Perkins maintains that it is “a natural power, a faculty of created qualitie,” which has the capacity to determine its election by itself.¹⁰

⁸ William Perkins, 1612, in Thomas F. Merrill, ed., William Perkins; 1558-1602, English Puritan; his pioneer works on casuistry Nieuwkoop. B. De Graas. 1966, I, p.518.

⁹ Perkins, 1612, I, 519.

¹⁰ Perkins, 1612, I, 517.

Nonetheless, even with this concession to a rational soteriology reason continued to play a very limited role in Reform doctrine. The seventeenth century Reform theologians such as Perkins, William Ames, Thomas Cartwright and Richard Baxter all adhered to a conception in which strict limits were placed on the sovereignty of reason. This was no more apparent than in their continued pessimism regarding man's moral agency in the natural world. Following their predecessors these theologians argued that man was incapable of fully recognizing and conforming to God's will promulgated through natural law. Rendered impotent by the corruption of his will at the Fall, natural man was a hapless figure that only vaguely recognized moral law and was incapable of fulfilling its demands. Ames, for example, highlighted the diminished faculties of natural man. "Wholly buried by originall corruption, and almost totally overwhelmed by custome in sinning," knowledge of natural law within "the booke of the mind," is neither "fully and perfectly legible, nor can our understanding read anything therein, distinctly and plainly." Impaired in this way, conscience "only deepens man's self-conviction of sin" without providing clear guidance.¹¹

Faithful to the doctrine expounded by these distinguished theologians American clergy mirrored these positions in their writings. Samuel Willard, a prominent New England minister in the early eighteenth century, for example, echoed the sense of man's fundamental impotence. "Since the Fall, there are some remains of the Law on the Conscience of Men, enough to leave them without excuse,

¹¹ William Ames, *Conscience with the Powers and Cases thereof*...1639, in The Works of William Ames 1643. London. II, p.2.

yet not sufficient to direct them in the way of Holiness or Righteousness.”¹² As Charles Norton, another New England minister, put it, “The light of nature since the fall, compared with the light of the image of God, before the fall, hath not the proportion of star-light, to the bright sun-light at noon day. This indeed is but darkness.”¹³ Similarly, the scope of reason in these accounts reflected the limits imposed by Reform theology. Though reason could not serve as a substitute for divine illumination it could play a role in evaluating salvation and interpreting Scripture. Cotton Mather, for example, noted the role of reason in verifying the presence of the divine spirit after sanctification. “I know my Election by my Vocation, and my Concernment in that Covenant,” Mather declared, “by my being made willing to come under the Shadow of thy Wings in the Covenant of Grace.”¹⁴

Consistent with the limited moral purpose afforded man, this framework furnished only a limited role for individual rights. As man was incapable of acting on the dictates of natural law, rights only applied in regards to achieving *knowledge* of natural law; they did not encompass claims related to the performance of positive actions prescribed by natural law. Such a circumscribed notion of rights is reflected

¹² Samuel Willard, *A Compleat Body of Divinity*, 1726, p.577.

¹³ Quoted in. Perry Miller, *The New England Mind: From Colony to Province* Cambridge. Harvard University Press. 1953, p.52.

¹⁴ Samuel Mather, *The Life of the Very Reverend and Learned Cotton Mather...* Boston. 1729, p.87. Also affirming the use of objective standards to verify sanctification, William Hart, minister at Saybrook, wrote that “True Conversion, supposes that in consequence of this renovation of the tempers of our mind, there does follow, a thorou’ Reformation of our Lives, and a regular, habitual practise of all the Virtues of the Christian life...” Hart, *Discourse Concerning...Regeneration...*(New London, 1742), p.6, quoted in D. Harlan, *The Clergy and the Great Awakening in New England*, Ann Arbor. University of Michigan Press, 1979, p.86.

in religious writings of the period. Compared to later writings, reference to individual rights is relatively infrequent and where they are mentioned they usually embody this restricted meaning.¹⁵

The revival's call for an experiential religion that eschewed any emphasis on role of reason presented a radical challenge to the doctrinal status quo in the colonies. Some of the long-term ramifications of the Awakening were, however, far from what its protagonists had intended. For the Awakening precipitated not simply a questioning of the merit of the central claim of revivalism, that inspiration should be taken as the rule of faith. But more significantly the revival also prompted a reconsideration of religious doctrine more generally in regards to the limits imposed upon reason. Cast into doubt was the vast distance that separated the earthly realm from the heavenly realm in Reform doctrine and, in particular, the relegation of natural morality to an impoverished minimum that resulted from this. The specter of radical

¹⁵ The reference to rights in published sermons, for example, corroborate this finding. See, Alice M. Baldwin The New England Clergy and the American Revolution New York. Frederick Ungar. 1928. Though Baldwin claims continuity in use of natural law through the eighteenth century, her review of sermons suggests that prior to the mid-eighteenth century reference to individual rights was relatively unusual and restricted in this way. A notable exception to this understanding of rights in this early period was John Wise's *Vindication of the Government of New-England Churches* (1717). Paraphrasing Pufendorf's *On the Law of Nature and Nations*, Wise offers a full-blown theological rationalism in which man is attributed a full moral competence. Such a theory of natural law though was far from typical. As Wright explains, Wise's position in *Vindication* was "far removed from the first generation of New England ministers, and much more in the line of the later eighteenth-century rationalistic tendencies than the other clergy of his own time or of the next half-century or more." Benjamin Fletcher Wright, Jr. American Interpretations of Natural Law Cambridge. Harvard University Press. 1931. p.52.

antinomianism raised by the Awakening was sufficiently foreboding to cause both liberal and moderate evangelical clergy to reconsider the merit of the doctrine of *Deus absconditus* as it applied to natural man.

As a result, clerical leaders in both anti-revival and pro-revival camps, despite maintaining differences in other respects, began to take steps toward incorporating major elements of theological rationalism into their respective doctrine. Led by Jonathan Edwards on the evangelical side, and Jonathan Mayhew, Charles Chauncy, and Ebenezer Gay, on the liberal side, theological doctrine was reconfigured to accommodate a more secure sense of natural morality for the unregenerate. For guidance in this endeavor these clergy looked to the work of the English Latitudinarians, particularly Samuel Clarke.¹⁶ Clarke and his colleagues in the Latitudinarian movement offered a moral system for the natural world that spoke to precisely the concerns that preoccupied Americans. The theological rationalism they offered supported a traditional Christian morality but did not go so far as to challenge the idea that there was a distinction between natural morality and that of the heavenly realm. Using this framework orthodox clergy could thus acknowledge

¹⁶ Latitudinarianism was the successor to seventeenth century intellectual movement, Cambridge Platonism, associated with Benjamin Whichcote, Nathaniel Culverwell, Ralph Cudworth and Henry More. The former was expounded around the close of the seventeenth and the beginning of the eighteenth centuries in the work of John Tillotson, Samuel Clarke, John Harris and William Wollaston. The essential texts were, Tillotson, *Sermons Preach'd upon Several Occasions*, 1671, Clarke, 1706, Harris, *Sermon VII of Immorality and Pride the Great Causes of Atheism*, 1698, and Wollaston, *The Religion of Nature Delineated*, 1724. For more on Latitudinarianism, see, Gerald R. Cragg, *The Church and the Age of Reason, 1648-1789* Middlesex, England. Penguin Books. 1960, ch. 11.

the existence of an orderly moral system in which man could participate, while retaining the idea that true morality could only be acquired through supernatural means. As Edwards put it, natural faculties could acquire the attributes of outward religious life such as book knowledge and theological principles, but they could not acquire the affective attributes of inward religious life. Natural man was capable of a high degree of moral understanding, of comprehension of the truth of the basic propositions of ethics, and even assent to them up to a point. But true virtue, Edwards insisted, was not a matter of “assent,” but of “consent,” that is of dispositions, affections, and sense knowledge that can occur only when one has been touched by the Spirit. On the other hand, liberal clergy could use this framework to argue that the heavenly and earthly realms were not qualitatively distinct, and that consequently, natural morality was different in degree rather than in kind to divine morality. The appropriation of theological rationalism could thus take forms that were either consistent with or challenged traditional Reform tenets. Whatever the larger theological picture, however, these revisions entailed an acceptance of an ordered and relatively substantial conception of moral life in the natural world.

Scholarly interpretations of the Awakening have not given sufficient attention to the manner in which it engendered the emergence of rationalism within popular discourse. Recent assessments of its political impact have paid particular attention to the general cultural ramifications of revivalism. The Awakening’s call to believers to open themselves to the spiritual workings of God, it is argued, gave rise to an egalitarian or democratic consciousness. Harry Stout, a leading exponent of this interpretation, illustrates well the argument presented. He argues that the revival’s appeal to a sense of the capacity of individuals to experience regeneration

irrespective of social status unleashed “an egalitarian impulse” that subsequently contributed to the Revolution. Explaining further, Stout writes,

The most conspicuous and revolutionary product of the revivals was not to be found in doctrine, in the creation of new ecclesiastical or academic institutions, or even in resistance to the tyranny of established religion or monarchy. Evangelicalism’s enduring legacy was a new rhetoric, a new mode of persuasion that would redefine the norms of social order.¹⁷

This perspective may, however, be unduly narrow. Important though this egalitarian rhetoric and its accompanying ethos probably was to the later movement for independence, the heavy focus on this aspect of revivalism may blind analysis to the broader implications of this phenomenon. This is especially true when this focus is coupled, as it is for Stout, with an apparent willingness to downplay the

¹⁷ Harry S. Stout, “Religion, Communications, and the Ideological Origins of the American Revolution,” William and Mary Quarterly 3d ser., 34, 4 (Oct. 1977), p.525. For other examples of this interpretation, see, Nathan O Hatch, The Democratization of American Christianity New Haven. Yale University Press. 1989, William G McLoughlin, “‘Enthusiasm for Liberty’: The Great Awakening as the Key to the Revolution,” in Jack P. Greene and William G. McLoughlin, eds., Preachers and Politicians: Two Essays on the Origins on the American Revolution Worcester, Mass., 1977, and Gordon S Wood, “Religion and the American Revolution,” in Harry S. Stout, ed., New Directions in American Religious History New York. Oxford University Press. 1997. For an important earlier effort to make this argument, see, Alan Heimert, Religion and the American Mind: From the Great Awakening to the Revolution Cambridge. Harvard University Press. 1966.

ideological consequences of the revival.¹⁸ An important, though frequently overlooked, dimension of the Awakening is precisely the substantive changes it precipitated in religious discourse manifested in this shift toward rationalism and a theory of rights.

This chain of events began, then, with the tumultuous uprising of revivalism that appeared in 1739 and continued through the early 1740s. Though the colonies had experienced earlier revivals in the mid 1730s, the wave of religious enthusiasm that was ignited in 1739 far surpassed its predecessors in intensity and scope. The “Great Awakening” as it became known, swept believers into ecstatic frenzy throughout the colonies over the course of the next five years. Itinerant preachers, such as the Anglican evangelist George Whitefield, exhorted believers to eschew religious formalism and submit themselves to the immediate spiritual workings of God. Wild scenes of emotion ensued as worshippers responded to the evangelical call and underwent alleged spiritual conversion.

Unconventional in both style and substance the revivals predictably aroused considerable controversy. The open flouting of ecclesiastical convention upset many clergy. A number of prominent clergy raised objections to the violation of traditional parish and congregational boundaries by revivalist preachers. Charles Woodmason, an Anglican missionary in South Carolina, denounced the revivalist itinerants as “roving Teachers that stir up the Minds of the People against the

¹⁸ Stout dismisses the possibility that there was an ideological connection between the Awakening and the Revolution, saying, “there is no clear and consistent link between revivalism and republicanism at the level of ideas.” Stout, 1977, p.523.

Establish'd Church, and her Ministers." The "Itinerants" were a "Sett of Rhapsodists-- Enthusiasts- Bigots- Pedantic, illiterate, impudent Hypocrites-- Straining at Gnats, and swallowing Camels, and making Religion a Cloak for Covetousness Detraction, Guile, Impostures and their particular Fabric of Things."¹⁹ Others complained of the "Disorders in Practice." As one group of pastors reported, the revival violated the sanctity of the ministerial office through encouraging lay exhorters who, with "*no education and but low Attainments in Knowledge, in the great Doctrines of the Gospel, without any regular Call...*take upon themselves to the *Preachers* of the Word of GOD."²⁰

These complaints suggested a more general underlying concern regarding the theological challenge posed by revivalism. Beneath the spectacle and the emotionally charged appeals was a radical challenge to the idea that faith could be subject to rational human judgment. Implicit in the call for believers to turn away from a reliance on human faculties in knowing God and give priority to an experiential religion was the claim that faith was ultimately based on the *internal* revelation of the spirit within. As Whitefield put it,

The sum of the matter is this: christianity includes morality, as grace does reason, but if we are only mere Moralists, if we are not inwardly wrought upon, and changed by the powerful operations of the Holy Spirit, and our

¹⁹ "Journal of C.W. Clerk. Itinerant Minister in South Carolina" in Charles Woodmason, Carolina Backcountry on the Eve of the Revolution Chapel Hill. University of North Carolina Press. 1953, pp.42-47.

moral actions proceed from a principle of a new nature...then we shall be found [unworthy] at the great day.²¹

True knowledge of God, promoters of the revival insisted, was derived from the most direct and immediate experience of the divinity, divine inspiration. The experience of internal revelation was thus considered the ultimate source of divine truth. Knowledge gained from revelation, thus, should have precedence over all other claims of truth. Wholly mundane in its subject matter, reason was in contrast condemned by revivalists. Its status as a faculty of the earthly realm meant that it was neither a necessary nor a sufficient condition of true knowledge and its place in religion was at best a distraction to the practice of true faith.

Revivalist ministers launched this theological critique by decrying the “moralism” that they saw as endemic in religion in the colonies. Attention to the efficacy of human faculties in the process of salvation, they argued, obscured the inscrutable and supernatural nature of the divine spirit. Illumination of divine truth was necessarily an intuitive and immediate experience that could not be understood in rational terms. Appealing to this idea, Thomas Foxcraft, minister from Boston, asked fellow clergy;

With what Face, can we call ourselves *Christian* Ministers, if our preaching

²⁰ *The Testimony of the Pastors of the Churches in the Province of the Massachusetts-Bay in New-England, at their Annual Convention in Boston, May 25, 1743*, pp.6-7.

²¹ George Whitefield, *The Works of the Reverend George Whitefield*, London, 1872, vol. 5, p.267.

is upon the Principles and Laws of *Nature* (tho' taken into Christianity) while we consider 'em only under their *natural* Form, under the notion of meer *Morality*, or *Natural Religion*; forgetting that by their being incorporated into the *Gospel*, they have lost *that* Respect, chang'd their *Use* and end, put on a *new* Form, and in Effect are turn'd into *Evangelic* Principles and Rules, so that there's (strictly speaking) nothing at all meerly *moral*, nothing purely *natural* in the *Christian Creed* or *Canon*.²²

From this stance revivalist ministers assailed clergy who promoted preparatory activities for salvation. The advocates of such "moralism" were denounced as crypto-Pelagians and Romanists, and accused of being purveyors of "abominable good Works."²³ The formality and apparent lack of spirituality in preaching also raised the ire of revivalists. Such "religious decay" was roundly condemned and the credibility of established ministers questioned. Typical of these charges, Whitefield declared, "the Lord gave me to open my Mouth boldly, against unconverted Ministers...*For I am verily persuaded, the Generality of Preachers talk of an unknown, unfelt Christ.*"²⁴ Likewise, the prominent itinerant preacher James

²² Quoted in C. M. Newlin, Philosophy and Religion in Colonial America New York. Philosophical Library. 1962, p.75.

²³ Andrew Croswell, *Boston Weekly Post-Boy*, April 12, 1742, quoted in Mark Valeri, Law and Providence in Joseph Bellamy's New England, Oxford. Oxford University Press. 1994, p.43.

²⁴ George Whitefield, *Seventh Journal*, p. 38, quoted in C. Wright The Beginnings of Unitarianism in America, Boston. Starr King Press. 1955, p.42.

Davenport indicted clergy in Massachusetts, alleging that “*Most of the Ministers of the Town of BOSTON and the COUNTRY are unconverted, and are leading their People blindfold to Hell.*”²⁵

The starkness of this challenge to theological orthodoxy had a polarizing effect on the religious scene. Many were attracted to the call for an experiential religion and believed that it had awoken worshippers from a deep-seated spiritual lethargy. Jonathan Edwards, a prominent Congregational minister from Northampton, Massachusetts, for example, concluded in *A Treatise Concerning Religious Affections* that “Upon the whole, I think it clearly and abundantly evident, that true religion *lies very much in the affections.*”²⁶ Others, however, strongly resisted the a-rationalist thrust of revivalism. Voicing a common complaint, Charles Chauncy, minister of the First Church in Boston, lamented that “Men who, though they have *no Learning*, and but *small Capacities*, yet imagine they are able, and without Study too, to speak to the *spiritual Profit* of such as are willing to hear them....and are vain enough to think themselves fit to be *Teachers* of others.”²⁷ Observing the activities of revival ministers, Boston minister John Caldwell expressed regret that “They lay aside *Reason*, the *Candle* of the Lord. They will not be dealt with in that Way, nor

²⁵ Quoted in Wright, 1955, p. 42.

²⁶ Jonathan Edwards, *A Treatise Concerning Religious Affections*, 1746, in *Works*, 1845, I, p.291. In this tract Edwards, like many other supporters of the revivals, remarked on how the evangelical fervor had arisen out of a time of “extraordinary dullness in religion.”

²⁷ Charles Chauncy, *Seasonable Thoughts on the State of Religion in New-England*, 1743, p.226.

regard its Dictates, they are unreasonable Men, from whom we ought all to pray...that we may be delivered.”²⁸ Similarly, an observer writing in *The Boston Evening Post*, described how revivalist preachers had “declared themselves mortal Foes to *Humane Reason*, in Matters of Religion, as a thing dangerous and destructive to the Souls of Men, and are heard snarling at REASON (that fair offspring of the Father of the Light) in a most rude and opprobrious Manner...” The writer continued, citing the authority of the Hebrew prophets and the apostles in opposition to this position as well as “the most eminent Divines” in England, who, he claimed, had “labour’d more abundantly in the Rational Way of Preaching.”²⁹

These conflicting reactions grew more pronounced as the revivals became increasingly associated with wild scenes of emotion and extreme denunciations of ecclesiastical authorities. Rancorous differences emerged on the relative importance of reason and spiritual piety in faith. Facing serious intra-denominational tensions the Congregationalists and Presbyterians split into pro and anti-revival factions: the Congregationalist New Lights stood alongside the Presbyterian New Side as supporters of the revival and advocates of spiritual piety, and Congregationalist Old Lights and the Presbyterian Old Side as opponents of the revival and advocates of the use of reason in faith.

Making an important contribution to the ensuing religious turmoil were the “paper wars” that raged between supporters and opponents of the revivals. Undertaken through published pamphlets and newspaper articles, these debates were

²⁸ Newlin, 1962, p.80.

²⁹ Newlin, 1962, p.80.

characterized by the exchange of bitter invective between the two sides. Supporters of the Awakening were denounced as enthusiastic and antinomian; opponents as Pharisaic and Arminian. "Such distinguishing names of reproach," wrote Edwards, "do as it were divide us into two armies, separated, and drawn up in battle array, ready to fight one with another..."³⁰ The debates also provided the opportunity for an elaboration of doctrinal differences. Opponents of the revival, in particular, took this opportunity to explain exactly why they felt revivalism was misguided. These efforts wreaked a heavy toll on the evangelical cause by bringing to light some of the implications of the revivalist position. Most damaging in this respect were the charges that exposed the extreme nominalism that underlay the a-rationalist thrust of revivalism. The arbitrary and unfathomable image of God's rule over humanity proved to be a source of particular difficulty.

The radical nominalism presented by revivalism renewed a familiar concern for the Protestant tradition; seeking assurance that one has been elected for salvation. If the unregenerate are at the mercy of a wrathful God who assigns grace by arbitrary and mysterious decrees without regard to merit, how can the individual seek assurance regarding his or her election? With their fate completely unknown to them, believers faced the prospect of constant anxiety. Fearing that such fears could lead to skepticism and even atheism, seventeenth century Reform theologians, as we have seen, attempted to address this problem by introducing elements of a rational soteriology. But such an attempt to reconcile earthly faculties with religious knowledge was anathema to revivalists. The intervention of reason into the process

³⁰ Quoted in Perry Miller, Jonathan Edwards Amherst. University of Massachusetts Press. 1949, p.179.

of salvation could only corrupt what they saw as a wholly spiritual phenomenon. Such a position offered little comfort to those who were concerned with providing some certainty to religious life in the natural world. Revivalism threatened to reverse the steps that had provided a more secure foundation for religious belief.

These fears were often voiced in complaints about the authenticity of revival conversions. In the hands of revivalists salvation became an entirely intuitive and hence subjective experience that seemed to encourage self-delusion and moral licentious. Chauncy, for example, argued that the religious enthusiasm ignored accepted standards of sanctity. He cautioned against those who saw conversion as granting instant and complete grace. His parishioners were admonished to “think not the measure of your *first endowments*, to be greater than it is.” “Take care to keep your *zeal* under the government of *sound judgments*,” he insisted.³¹ A group of prominent New England pastors charged revivalists with being too uncritical in accepting accounts of conversion based on “secret Impulses” rather than on “the *written Word* [and] the *Rule* of their Conduct.” The emphasis of revivalists on religion of the heart, they argued, placed undue weight on unverifiable private experience as opposed to the objective standards provided by “*Scripture and Reason*.” Making a similar point, Jonathan Mayhew, a close associate of Chauncy and minister of the West Church in Boston, described participants in the revivals as “enlightened Ideots” who “impute all their ravings and follies and wild imaginations to the spirit of God; and usually think themselves *converted*, when the poor unhappy

³¹ Charles Chauncy, *The New Creature Describ'd*, 1741, pp.39, 42.

creatures are *only* out of their wits.”³² One newspaper writer observed how worshippers at revivals “faint away, fall down upon the Floor, wallow and foam...and seem perfectly bereav’d of their Reasons.” Afterwards, the writer noted, many are “fil’d with...an infallible Assurance: And generally with a bitter, censorious and uncharitable Spirit, against all such as have not experienced these Raptures, or that don’t look upon them as evidence of an extraordinary and miraculous Conversion.”³³ Observing the wild spectacles that often accompanied the revivals, Chauncy complained of the subordination of legal obligation to faith that evangelicalism seemed to sanction. Such doctrine was “repugnant to all the conceptions we have of God as ‘just and holy’; it encouraged people to assume that “*Virtue* was of no Account in the Eye of Heaven.”³⁴

Other complaints in this vein focused on the moral arbitrariness of evangelicalism. Mayhew, for example, declared that “those people who are offended with moral discourses, under the notion that they are not *evangelical*, are grossly ignorant of the spirit and design of Christianity.”³⁵ Similarly, Lemuel Briant’s opposition to this doctrine was recorded in *The Absurdity and Blasphemy of*

³² Jonathan Mayhew, *Seven Sermons upon the Following Subjects*, 1749, p.39.

³³ Newlin, 1962, pp.78-9.

³⁴ Chauncy, 1743, pp.282-3.. For more explicit charges of revivalist immorality, see Windham Churches, *The Result of a Council of Churches of the County of Windham*, 1747. See, Valeri, 1994, fn 8, p.69.

³⁵ Mayhew, 1749, p.109.

Depretiating Moral Virtue, where he characterized objections to moral efforts of the unregenerate as a “senseless Superstition” and a “groundless Recumbency.”³⁶

The appeal to reason that characterized the litany of complaints directed at revivalism clearly indicated the merit of a more rationalist approach to religion in the natural world. Tentatively a number of these critics began to supplement their denunciations of revivalism with theological writings that attempted to sketch out a rationalist alternative. These efforts were undertaken by a number of liberal New England clergy, with Charles Chauncy, Jonathan Mayhew, Lemuel Briant and Ebenezer Gay at the forefront. Drawing on the work of Clarke and other Latitudinarians,³⁷ these clergy elaborated an image of the earthly realm, which, even if recognized as inferior to the heavenly realm, was ascribed an important affinity to it. Within this natural realm, accordingly, man was attributed a moral competency that was seen as providing a substantial foundation for the achievement of divine morality. Drawing a clear contrast with the traditional image of the chasm that separated these two realms, these liberals depicted the continuities between them. Summing up this relationship, Gay wrote, “Revealed Religion is an *Additional* to Natural built not on the Ruins, but on the strong and everlasting Foundations of it.”

³⁶ Lemuel Briant, *The Absurdity and Blasphemy of Depretiating Moral Virtue*, 1749, quoted in H. F. May, *The Enlightenment in America*, New York: Oxford University Press., 1976, p.56. Briant, a close colleague of Mayhew, was the minister for the First Church, Quincy, Massachusetts.

³⁷ The debt that these theological writings owe to Clarke and the English Latitudinarians is acknowledged by a host of scholarly commentaries. See, for example, John Corrigan, *The Hidden Balance: religion and the social theories of Charles Chauncy and Jonathan Mayhew* New York: Cambridge University Press. 1987, ch. 2, and Conrad Wright, “Rational Religion in Eighteenth-Century America,” in Wright, ed., *The Liberal Christian: essays on American Unitarian History* Boston, Beacon Press. 1970.

The realization of the providential design laid out in the natural world was seen as a significant step in religious life; one which was complimented not supplanted by revelation. "Revelation gives us the same (tho' clearer) Ideas of the Attributes of God, which we have from Nature and Reason," Gay insisted.

Lacking someone of outstanding intellectual capabilities the theological revision by the liberal camp was often undertaken in small incremental steps. Closely engaged with each other's work and the ongoing "controversies" that they contributed to, individual clergy built upon precedent to gradually push the boundaries of orthodox doctrine. The first step in this direction was an effort to reestablish a rational soteriology. Attempting to counter the precariousness posed by revivalism, these clergy presented salvation as a more orderly and intelligible process. Rather than being a mysterious spirit, God was presented as embodying infinite goodness and justice. Because the nature of these qualities was eternal, the will of God was not arbitrary and mysterious but constant and comprehensible. God, Mayhew wrote in his *Seven Sermons* of 1749, governed the world "with a steady, uniform principle of justice and goodness...with a view at promoting the moral rectitude, and so of advancing the happiness of his creatures."³⁸ In assigning grace, God would therefore judge people according to these strict principles of justice and goodness. And because human reason was able to comprehend these principles, the believer would be able to know their fate, depending upon his or her behavior in this life.

³⁸ Mayhew, 1749, p.46.

This rationalization of the process of salvation clearly allowed the believer some control over the process of salvation. Using natural reason, the individual could gain knowledge of the divine and motivate the will to act in accordance with these truths, thus achieving the conditions necessary for salvation. Thus, Mayhew wrote, "The doctrine of the gospel undoubtedly is, that we are *justified by faith*; but it is a great mistake to infer from hence, that we are accepted to the divine favour, and entitled to eternal life, without unfeigned repentance, and new obedience."³⁹ Obedience to God's will was therefore a necessary condition of achieving salvation, because God would only reward those who made "a sincere tho' imperfect Conformity to the divine Image and Will." Similarly, Lemuel Briant insisted that "*Grace*" was grossly misunderstood when Men "conceive of it so as to destroy all moral Agency, and set themselves down with this vain Thought, that nothing on their Part is necessary to Salvation."⁴⁰ While grace was still necessary for regeneration it was not sufficient without a voluntary turning towards God and the performance of good works. Such an insistence on natural morality as a condition for salvation went far beyond the rational soteriology that had been introduced into the Reform tradition by William Perkins. This liberal version suggested that there was some affinity between God's will and natural morality. If good works were required for salvation, did this not imply that the natural faculties could gain some access to the divine?

From this stance of muted criticism liberal clergy became increasingly bold in their challenges to Reform doctrine. A central object of this criticism was the

³⁹ Mayhew, 1749, p.52.

⁴⁰ Briant, 1749, quoted in Wright, 1955, p.68.

notion of man's absolute lack of free will and moral agency. In this regard these critics of the revival found themselves less and less willing to accept predestination. Pointing out the harshness of this doctrine clergy asked how it could be possible that a benevolent deity would condemn to hell children who die in infancy. Samuel Webster, minister at Salisbury, Massachusetts, for example, stirred particular controversy on this question by launching a damning indictment of the doctrine of original sin in his anonymous, *A Winter Evening's Conversation* (1757). Aiming to evoke a spirit of compassion, Webster famously asked his audience to cast judgment on the merit of revivalist position.

What doleful apprehensions must they have of this thine excellency and glory, who can suppose that thou shouldst pronounce a sentence by which myriads of infants, as blameless as helpless, were consign'd to the blackness of darkness to be tormented with fire and brimstone forever! Is this consistent with infinite goodness, nay with any general character of goodness? Impossible!...⁴¹

The stark contrast between God as divine goodness and God as force of arbitrary and capricious rule gave dramatic credibility to the alternative presented by liberals. They persuasively argued that the doctrinal tenets of original sin and

⁴¹ Samuel Webster *A Winter-Evening's Conversation upon the Doctrine of Original Sin*, 1757, in E. S. Gaustad "The Theological Effects of the Great Awakening in New England" The Mississippi Valley Historical Review 40, 4 (March 1954), p.700.

predestination lead to a moral impoverishment that undermined Christian life in the natural world.

Following the implications of this argument, liberals began to explicitly reject the idea that man had inherited Adam's guilt. They argued that, contrary to traditional doctrine, man did not carry the burden of the original sin but rather suffered God's transformation of the natural world from Paradise into a place of labor, suffering and death. In terms of moral capacities, man was said to be endowed with an impaired or imperfect nature, "neither Righteous nor Wicked, but capable of being either" as John Tucker described it, rather than inheriting a wholly depraved nature. God had implanted in man, as Tucker explained, "certain Appetites and Passions," which are innocent of themselves, but capable of leading us astray unless they are kept under proper restraint. But, God has also given man, "an intelligent Nature: He has bless'd us with the Power of Reason, and implanted in us that *moral Sense* which we call *Conscience*."⁴² No longer crippled by depravity man was now a rational being who could follow the dictates of natural law to realize his "natural" moral being.

Perhaps the most thorough and detailed exposition of the liberal version of theological rationalism, however, was Ebenezer Gay's *Natural Religion as Distinguish'd from Revealed* of 1759. Delivered as one of Harvard's annual Dupleian lectures, established in honor of the late Paul Dudley, the Chief Justice of Massachusetts, the lecture offered a systematic defense of the emerging liberal

⁴² John Tucker, *Observations on the Doctrines, and Uncharitableness, &c. of the Rev. Mr. Jonathan Parsons, of Newbury*, 1757, in Wright, 1955, pp.88-89. Tucker was minister at Newbury, Massachusetts.

doctrine.⁴³ Following the framework of Clarke, Gay portrays the earthly realm as consisting of a fixed moral system through which man could achieve some affinity with God.

Gay sets the tone for his account of this natural moral system by rhetorically asking how a “DEVOUT Hermit...might profit in knowledge, living in a Desart, without Men and Books?” The hermit would respond Gay asserted, by pointing out the multiple sources of knowledge he had access to in the natural world. “I have one Book which I am always studying and turning over Day and Night,” the hermit would answer, Gay claims. “The Heaven, the Earth and the Waters, are the Leaves of which it consists.” Reflecting on this tale, Gay concludes that “the Characters of the Deity are plainly legible in the whole Creation around us: And if we open the Volume of our own Nature, and look within, we find there a law written; - a Rule of virtuous Practice prescribed.”

In his explanation of the moral system that inheres in the natural world Gay echoes Clarke’s argument in *A Discourse of Natural Religion*.⁴⁴ Gay argues that examination of “the Natures and Relations of Things” reveals moral principles and man’s obligation to obey them. In the “constitution” of “Nature,” God publishes his

⁴³ For more on the historical context of the lecture, see, James W. Jones, Shattered Synthesis: New England Puritanism before the Great Awakening New Haven. Yale University Press. 1973. Robert J. Wilson, The Benevolent Deity Philadelphia. University of Pennsylvania Press. 1984, ch. 9, and Alan Heimart, 1966, pp.5-6. Evaluating the significance of Gay’s Dudleian lecture, Jones describes it as the “locus classicus” of eighteenth century clerical liberalism and Heimart characterizes it as “the manifesto of Congregational Liberalism.”

⁴⁴ Gay’s debt to Clarke is postulated in other commentaries on *Natural Religion*. See, Wilson, 1984, p.172.

intent for mankind and provides the means by which man can fulfill the duty owed to his Creator. "In the due Exercise of their natural Faculties, Men are capable of attaining some knowledge of God's will, and their Duty, manifested in his Works." Natural understanding thus discerns from the natural world the "Difference between Good and Evil, Right and Wrong...that relate to the moral Conduct toward our Maker, Mankind, and ourselves." Knowledge of these moral recommendations is in itself suggestive of an individual's capacity to perform them, Gay insists. For

Whoever observes the divine Workmanship in human Nature, and takes a Survey of the Powers and Faculties with which it is endowed, must needs see that it was designed and framed for the Practice of Virtue: That Man is not merely so much lumpish Matter, or a *Mechanical* Engine, that moves only by the Direction the Capacity to know them would be in vain (which nothing in Nature is) if there was no Ability to do them. of an impelling Force; but that he hath a Principle of Action within himself, and is an Agent in the strict and proper Sense of the Word. The special Endowment of his Nature, which constitutes him such, is, the Power of Self-determination, or Freedom of Choice.

Man was thus a moral agent who could recognize and fulfill the providential design indicated to him in the natural world. Realization of the moral end indicated by Nature was neither a causal necessity as in the metaphysics of the natural sciences, nor was it an utter impossibility as was the attainment of true morality according to Reform doctrine. Instead, it was a teleological end that was produced by an

individual freely choosing a course of action consistent with his 'nature.' The attainment of the natural "virtue" in this way, cleared the way for salvation, Gay argued. The performance of a righteous natural life by men "qualifys them. in a measure, for religious Practice, as his Regeneration, or Renovation of them doth more so." Finally, Gay concluded by noting the complimentary relationship between natural and revealed religion. Contrary to the traditional image of a chasm between the two, Gay enjoins his audience to

not depreciate and cry down Natural Religion, on Pretenses of advancing the Honour of Revelation- as if they were two opposite Religions. and could no more stand together in the same Temple than Dagon and the Ark of God. Whatever Distinction we observe between them, there is no Contrariety in the one to the other: They subsist harmoniously together, and mutually strengthen and confirm each other. Revealed Religion is *Additional* to Natural; built, not on the Ruins, but on the strong and everlasting Foundation of it.⁴⁵

Motivated by a sense that traditional doctrine was failing to offer a sufficiently secure foundation for religious life, these liberal clergy pieced together what amounted to a formidable theological rationalism. Departing from many of the staple doctrines, the liberal adoption of rationalism offered an alternative not only to evangelicalism but to the orthodox Reform tradition as a whole. Defenders of

⁴⁵ Gay, 1759, p.19.

orthodoxy found themselves vulnerable to the charge that the insistence on God's omnipotence undermined the moral accountability of man and as a result encouraged fatalism and moral apathy. The rationalist refrain that "wherever necessity begins, liberty ends" and "that a necessary agent is a contradiction," became a telling reminder of the inherent difficulties that orthodox doctrine faced in dealing with moral life in the natural world.

With these liberal endeavors only compounding the ill reputation brought upon evangelicalism by the excesses of "enthusiasm," a number of moderate supporters of the revival turned their attentions to offering a response in kind. Led by Jonathan Edwards, this effort aimed at elaborating a theological defense against the charge that orthodox doctrine failed to provide a secure moral foundation for religious life. Specifically, the goal was to demonstrate that an orthodox theology could reconcile moral responsibility with the notion of divine sovereignty. As Edwards's put it, the task was to show "that God's moral government over mankind, his treating them as moral agents...is not inconsistent with a determining disposal of events."⁴⁶ Edwards and his colleagues did not, however, shore-up orthodoxy along conventional Reform lines. The theological scheme elaborated by Edwards, and later articulated in the New Divinity movement led by Edwards's followers Joseph Bellamy and Samuel Hopkins, incorporated important aspects of theological rationalism while at the same

⁴⁶ Jonathan Edwards, *Freedom of Will*, 1754, Paul Ramsey, ed., New Haven. Yale University Press. 1957, p.431.

time attempting to retain the dualist distinction between the earthly and heavenly realm characteristic of orthodox doctrine.⁴⁷

Edwards's attempt at this feat of reconciliation was developed over the course of a number of theological treatises written in the early 1750s. He prepared the way for this endeavor with some earlier writings in which he attempted to apply a Clarkeian model to a Reform notion of a sub-divine natural world. In these writings Edwards provides a preview of the model of theological rationalism that he employs in his more mature later work. Edwards sketches an image of a natural world governed by rational principles of fittingness and congruency. This discernible "natural law" consists of physical relationships as well as ostensibly moral relationships. Thus, Edwards writes that "The wisdom of God" is apparent in the constitution of the universe, "so that those things are established to be done that are fit to be done" and things are connected in his constitutions "that are agreeable one to another."⁴⁸ This natural rational order does not, however, rise to the level of a true

⁴⁷ Interpretations of Edwards's thought have often overlooked the rationalist dimension of his theology in favor of his supernatural concerns. See, for example, Bruce Kuklick Churchmen and Philosophers: From Jonathan Edwards to John Dewey Yale University Press. 1985, and the discussion by Murphey in Elizabeth Flower and Murray G. Murphey, A History of Philosophy in America, New York. Capricorn Press. 1977, vol.1. For a recent exception to this, see Norman Fiering Jonathan Edwards's Moral Thought and its British Context Chapel Hill. University of North Carolina. 1981. Regarding conventional wisdom on Edwards's theology, Sydney E. Ahlstrom writes; "In view of the scope, subtlety, and significance of this [theological] effort, it is an outrage that Edwards should be best known throughout America as a hell-fire revivalist and by a few lines from one imprecatory sermon, delivered outside of his own parish, on 'Sinners in the Hands of an Angry God.'" Ahlstrom, 1961, pp.246-7.

⁴⁸ Jonathan Edwards, *Discourses on Various Important Subjects*, 1738, p.11. The influence of Clarke is manifest in his use of the "fittingness"

moral order. Authentically “moral” as opposed to merely “natural” relations occur only through the direct assistance of God and entail an affective sentiment rather than ratiocinative understanding. The natural order could thus supply important rationalistic understandings, but this knowledge would fall short of true knowledge and remain formalistic and mundane until infused with the Spirit.

Edwards developed this framework into a coherent system in his *The Nature of True Virtue* written in 1755. Following hard on the heels of his effort to reconcile predestination with moral responsibility in *Freedom of Will*, Edwards directed his attentions in *True Virtue* toward reconciling attributes of moral volition with a continued sense of man’s inherited depravity.⁴⁹ His specific goal in this endeavor was to mount a serious rebuttal to the claim gaining currency within moral theology and moral philosophy that natural morality was analogous to true morality. There are numerous “sensations, propensities and affections of the mind, and principles of action, that often obtain the epithet of “virtuous” and by many are supposed to have the nature of true virtue,” Edwards wrote. But these “are entirely of a distinct nature from this,” he continued, “and have nothing of that kind; and therefore are erroneously confounded with real virtue.”⁵⁰

analogy. Edwards’s Diary shows that he read Clarke’s *Discourse of Natural Religion* in the early 1730s and was lending out the book to parishioners and colleagues in the middle of the decade. See, Fiering, 1981, p.65.

⁴⁹ Jonathan Edwards, 1754.

⁵⁰ Jonathan Edwards, *True Virtue*, 1765, in P.Ramsey, ed., Jonathan Edwards’ Ethical Writings New Haven. Yale University Press. 1989, p.561.

Edwards made his case by explaining in detail how these much-touted instinctive perceptions in fact amounted to a rather thin morality that was reducible to either a self-regard or a primitive form of ethical conduct. The aesthetic sense, for example, to which a number of commentators had attributed a moral capacity, Edwards claimed was capable only of perceiving superficial ethical relations.⁵¹ This limitation, he argued, was related to the formal and rationalistic character of perception in the unregenerate. Natural man was endowed with an intellectual or ratiocinative type of understanding that could apprehend only formal relationships such as regularity, equality, proportion and symmetry.

Whereas others had inferred a full moral sense from this kind of aesthetic perception, Edwards drew a sharp distinction between the two. Equipped to appreciate the “mutual consent and agreement of different things in form, manner, quantity, and visible end or design,” man could find enjoyment in the regularity of an equilateral triangle⁵² or the symmetry manifest in a beautiful plant, a building and the notes of a melodious tune. Edwards even agreed that this rationalistic type of understanding could furnish a form of moral judgment in the sense of encouraging reciprocity and retribution in human relationships. Men, Edwards wrote, are disposed to commend the “harmonious corresponding of one thing to another” in

⁵¹ Edwards’s example of this viewpoint is Francis Hutcheson’s *An Enquiry into the Original of Our Ideas of Beauty and Virtue*, 1726. See, Edwards, 1765, p.562, fn.1.

⁵² Edwards, 1765, p562.

moral matters, believing that “he should suffer evil in *proportion* to the evil of his doings,” and that “he that loves” should receive “the proper returns of love.”⁵³

But this natural sentiment, Edwards insisted, was more akin to pleasure taken at geometry than an example of genuine morality. Appreciation of beauty at this mundane level, whether manifested in the regularity of architecture or in the regularity of human relations, was lacking, Edwards argued, in the depth of understanding and emotional affinity characteristic of true virtue. Illustrating this distinction, Edwards noted that true virtue did not increase in proportion to men’s capacity for this kind of “secondary” beauty. The fact that “men’s delight in the beauty of squares...and the beautiful figures in a piece of embroidery” are not “raised to a great height in some eminently virtuous or holy men” nor “wholly lost in some others that are very vicious and lewd,” shows that “men’s approbation of this sort of beauty does not spring from any virtuous temper, and has no connection with virtue.”⁵⁴

Edwards extended this analysis in his examination of the natural sentiment of sympathy. Where benevolent sentiments towards others were not attributable to this primitive sense of reciprocity, Edwards argued, they could be explained by an additional rationalist inclination, the desire for self-consistency. Just as man was inclined to favor consistency and harmony in the world around him, so he was also endowed with “an inclination to feel and act as one with [himself]” by not “doing that to others which he should be angry with them for doing to him.” Man applied

⁵³ Edwards, 1765, p.569.

⁵⁴ Edwards, 1765, p.573.

this test of self-consistency when considering his own relationships with others or those between other people. In either case the sympathy induced was based on criteria of self-agreement or self-love rather than the disinterested and universal benevolence characteristic of true virtue. As Edwards explained;

being uneasy in the consciousness of disagreeing and being inconsistent with ourselves in what we do, is quite a different thing from approving or disapproving actions because in them we agree and are united with Being in general...The former (i.e. an inclination to agree with ourselves) is a natural principle: but the latter (i.e. an agreement or union of heart to the great system, to God the head of it, who is all and all in it) is a divine principle.⁵⁵

However insistent Edwards was in distinguishing these natural sentiments from true virtue he nonetheless accepted that they made an important contribution to morality in the natural world. Even if the moral sense did not exhibit the depth of feeling or pure motives of true virtue, Edwards reminded the reader that it still tended toward the same end as its divine counterpart; that is, general benevolence. Describing the practical consequences of moral judgment derived from rationalist understanding, for example, Edwards wrote, "The tendency and consequences of justice...is agreeable to general benevolence, viz. as in many respects it tends to the

⁵⁵ Edwards, 1765, p.590.

glory of God, and the general good- which tendency also makes it beautiful to a truly virtuous mind.”⁵⁶

Edwards drew a similar conclusion when examining these moral sentiments more generally. The “moral sense” he wrote, “approves the very same things which a spiritual and divine sense approves; and those things only; though not on the same grounds, nor with the same kind of approbation.”⁵⁷ Natural conscience was similarly described as concurring with true virtue in this respect despite its essential differences;

For, although it sees not, or rather does not taste its primary and essential beauty, i.e. it tastes no sweetness in benevolence to Being in general...yet this natural conscience, common to mankind, may approve of it from that uniformity, equality and justice which there is in it, and the demerit which is seen in the contrary, consisting in the natural agreement between the contrary and being hated of Being in general.⁵⁸

From these slightly tentative beginnings Edwards went on to become much bolder in his assessment of the parallels between natural morality and true virtue. He struck a distinctly positive note in his concluding words on the moral capacities of conscience. “Thus, if the understanding be properly enlightened, and errors and

⁵⁶ Edwards, 1765, p.572.

⁵⁷ Edwards, 1765, p.595.

⁵⁸ Edwards, 1765, p.594.

blinding stupefying prejudices are removed,” Edwards declared, the natural conscience “concurs with the law of God, and is of equal extent with it, and joins its voice with it in every article.”⁵⁹ Similarly, Edwards described man’s affinity for “the mutual consent and agreement of things,” which he attributed to the fact that it offers “some image of the true, spiritual original beauty” of divine order.⁶⁰ In sum, whether exhibiting caution or not, Edwards ascribed natural morality such a close affinity to divine law that his position came remarkably close to that of his liberal opponents.

Moreover, also like his liberal rivals, Edwards suggested a conception of moral agency in this account of natural man. Not only was man cognizant of this divine order in the natural world, he was also able to motivate the will to conform to its dictates. For example, examining the “secondary” beauty of the natural order, Edwards described how the “beauty of order in society” was achieved when the different members of society fulfill their particular “capacities and talents, and everyone keeps his place and continues in his proper business.” This notion of moral agency is again apparent in Edwards’s account of the duties related to natural justice. For, Edwards suggested, not only is man aware of the “natural agreement of one thing to another” in human relations, but he also carries the burden of having to enact this natural justice. Thus Edwards described the duties entailed in specific relationships; “duties of children to parents, and of parents to children; duties of husbands and wives; duties of rulers and subjects; duties of friendship and good neighborhood.” All these duties, he continued, are required by God and laid out by

⁵⁹ Edwards, 1765, p.594.

⁶⁰ Edwards, 1765, p.564.

him in his intelligible natural design. And as man is indebted to God as his “Creator, Preserver, and Benefactor,” it is man’s duty to carry out these obligations as best he can.⁶¹

By assigning this kind of second-tier divine order to the natural world, Edwards furnished natural man with a moral competency while retaining a traditional soteriology. Man could obey God’s design for the natural world by complying with natural law, yet remain devoid of “true virtue” and remain entirely at the mercy of God for salvation. Such a reconciliation of natural theology with traditional tenets of divine sovereignty must have seemed positively reassuring in comparison to revivalism or seventeenth century Reform theology. In place of the uncertainty of *Deus absconditus* was a much more orderly scenario in which man was capable of comprehending at least provisional truths and conforming to them.

However ultimately convincing this effort to retain a traditional dualism, what remains significant in this account is the opening it gave to the authority of natural reason. Edwards’s adoption of a natural theology introduced into the orthodox canon an unprecedented authority for the capacities of reason. Despite its limitations, reason became an important means by which man could achieve some affinity with God. It provided access to God’s will through knowledge of natural law as well as the motivation to act in accordance with its commands. Such newfound access to divinity in this way diminished the sharp distinction between the earthly and heavenly realms characteristic of the Reform tradition. Under Edwards’s formulation it was much less clear whether there was still a distinction in kind

⁶¹ Edwards, 1765, p.569.

between these two realms or whether in fact they were joined together as a continuum.

In ascribing this authority to reason and the natural law revealed through it, Edwards and his colleagues joined liberal clergy in a theological discourse that gave a moral potential to the actions of natural man. Man was endowed with a 'nature' or essence, which it was his obligation to fulfill through his moral actions. Man was now seen as embodying God's will when he performed the duties necessary to fulfill this essential being. Because the duties prescribed by this "natural law" were divinely-sanctioned and part of man's obligation to his Creator, the performance of them was afforded a distinct moral authority. The claims that individuals made in respect to the performance of these duties were therefore expressed in terms of individual rights. Rights provided for the individual autonomy necessary to fulfill these obligations whether an individual was discerning the general nature of man's obligation to God, working out the specific forms that this duty to God should take, or actually executing these duties. Used in this way, the concept of rights encompassed both rights derived from liberties and rights related to the performance of positive duties prescribed by natural law.

In the wake of these developments religious discourse more generally begins to exhibit features that suggest the influence of this natural theology framework. This influence is particularly evident in clerical discussions of the moral conduct of natural man. New Divinity leaders Joseph Bellamy and Samuel Hopkins, for example, began in the late 1750s to describe in their sermons a fixed moral order in the natural world. They described God's rule over humanity as predictable and

intelligible; a far cry from the former image of direct divine intervention by an inscrutable and arbitrary divine will. This fixed design held individuals accountable for their behavior by ensuring that vice was punished and virtue rewarded. They argued that biblical events and secular history revealed that God protected righteous people and punished the unjust by way of this providential order.⁶² Reflecting on British defeats in the French and Indian War in a fast-day sermon, Hopkins suggested that such disasters followed “the natural course of things.” “Many Calamities and Evils that may be considered as [direct] divine Judgements,” he argued were best seen instead as “the Natural Consequence of the Corruption and Wickedness of a People.”⁶³

Implicit in these accounts was a notion of the unregenerate as morally capable. These sermons typically exhorted obedience to the “wholly just and good” law embodied in this moral order. Bellamy, for instance, showing a marked departure from his earlier pessimism regarding the unregenerate, urged his parishioners to make sacrifices on behalf of the British effort in the French and

⁶² For an account and sermon references, see, Mark Valeri, “The New Divinity and the American Revolution,” William and Mary Quarterly 3rd Ser. 46, 4. (1989) pp.750-751.

⁶³ Samuel Hopkins, *Joel 2.20*, Aug. 23, 1755, quoted in Valeri, 1989, p.751. Valeri’s study demonstrates that a number of other New Divinity ministers also adopted this natural theology framework, including Levi Hart and Jonathan Edwards, Jr. (Edwards’s son), both prominent ministers in New England.

Indian War. Should New Englanders attain “moral virtue” in this way, he continued, prosperity, harmony, and peace would take the place of “devastation and ruin.”⁶⁴

Other sermons of this period go beyond reference to these themes and suggest the influence of this natural theology as an underlying theological perspective. New Light minister Samuel Sherwood, in his fast-day address of 1774, for example, declared that “The divine constitution, and government of God over his intelligent creatures, is fixed.” As “rational creatures,” he continued, God “has made men in such a manner, and placed them in such circumstances, as plainly to discover his will.” And men should submit themselves to God’s will, “as they may be assured, that whatever God requires, is fit and right for his subjects to comply with.”⁶⁵

Men are thus described as moral agents capable of comprehending and acting on the prescriptions for human conduct derived from natural law. They are “obliged to act according to the natural and evident relation of things...” explained Samuel Cooke in his election sermon of 1770, and this “divine will...is the law by which all their actions must be regulated, and their state finally determined.”⁶⁶ This natural law, as Samuel West explained, is far from condoning a state of licentiousness. “The law of nature gives men no right to do anything that is immoral, or contrary to the will of god, and injurious to their fellow-creatures; for a state of nature is properly a

⁶⁴ Joseph Bellamy, *A Sermon Delivered before the General Assembly...on the Day of the Anniversary Election...on the Day of the Anniversary Election, May 13, 1762*, in Bellamy Works, I, pp.518, 523.

⁶⁵ Samuel Sherwood, *Scriptural Instructions to Civil Rulers, and all Free-born Subjects*, 1774, in Ellis Sandoz, ed., Political Sermons of the American Founding Era, 1730-1805 Indianapolis. Liberty Fund. 1991, p.383.

⁶⁶ Samuel Cooke, *Election sermon*, 1770, in J. W. Thornton, ed., The Pulpit of the American Revolution, Boston. Gould & Lincoln. 1860, p.168.

state of law and government, even a government founded upon the unchangeable nature of the Deity, and a law resulting from the eternal fitness of things.” When man violates these laws of nature he “exposes himself to the resentment of mankind, the lashes of his own conscience, and the judgment of Heaven.” “This plainly shows,” West continued, “that the highest state of liberty subjects us to the law of nature and the government of God. The most perfect freedom consists in obeying the dictates of right reason, and submitting to natural law.”⁶⁷

Further illustrating this idea of a divine moral order that man is obliged to realize we also see frequent exhortation to the duties recommended by natural law. Applying this principle to the “rule and authority exercised among men,” Eliphalet Williams, for example, argued that civil government ought to be “modell’d according to the divine rule and government.” In regards to the exercise of civil authority, he continued, no “human edicts” are “to be observed, when contradicting the divine statutes,” and conversely, “in matters consonant to God’s will, all are obliged to submit to the laws made by earthly rulers.”⁶⁸ On a similar note, Charles Turner described how magistrates were obligated to “carry on the designs of his [God’s] providence.” The role of magistrates, he went on, is “not to enslave mankind, and involve them in misery and ruin- not surely to enrich and aggrandize themselves and their families...but...to be his ministers, *for good to the publick*.”⁶⁹

⁶⁷ Samuel West, *Election sermon*, 1776, in C.H. Hyneman and D. S. Lutz, eds., American Political Writings during the Founding Era, Indianapolis. Liberty Fund. 1983. I, pp.41, 44-5.

⁶⁸ Eliphalet Williams, *Election sermon*, 1769. Evans 11533.

⁶⁹ Charles Turner, *Election sermon*, 1773. Evans 13053.

These accounts go on to describe the individual's fulfillment of this moral order as a form of self-realization. Examining the natural endowments of human individuals, Edward Barnard described how the "perfect wisdom" of God "hath made nothing without design." "The faculties of the minds of men," he insisted, "are for improvements, the talents given them for use in some particular sphere." Moreover, the realization of these prescribed ends is described as leading to "happiness."⁷⁰ "Embrace his precepts and observe his orders," Williams wrote, and "the greatest felicity is to be enjoyed."⁷¹ Summarizing this sentiment, Daniel Shute declared, "every creature in the universe...is so constituted, as that acting agreeably to the laws of nature, will promote its own happiness, and of consequence the grand design of the creator."⁷²

The incorporation of this rationalist perspective in the religious writings of both liberal and evangelical clergy demonstrates the pervasiveness of this new theological paradigm. Man's natural being had been endowed with a new moral purpose the corollary of which was a morally-imbued conception of individual rights. As a creature of God, man had a duty to realize God's intention that mankind be preserved and fulfill its potential as far as possible. To fulfill this end man was considered furnished with moral powers or 'rights' that allowed him to pursue his own survival and flourishing as well as assist others in the same task. As one of Gay's protégés, Simeon Howard, explained, rights were a logical corollary of these

⁷⁰ Edward Barnard, *A Sermon Preached*, 1766. Evans 10235.

⁷¹ Williams, 1769, p.43.

⁷² Daniel Shute, *Election sermon*, 1768, in Hyneman and Lutz, 1983, I, pp.109, 111.

moral duties. The obligation to pursue happiness meant that “the benevolent and impartial Father of the human race, has given to all men a right, and to all naturally an equal right to” liberty. Man is furnished with liberty in order that he “pursue his own happiness in whatever way, and by whatever means he pleases,” within the bounds of the law of nature. And no man has “a right to restrain him in the exercise of this liberty, or punish, or call him to account for using it.” Likewise, Howard explains how man is forbidden from giving up his capacity of moral volition.

A man cannot...give up the liberty of private judgment in matters of religion, or convey to others a right to determine of what religion he shall be, and in what way he shall worship God. A grant of this nature would destroy the foundation of all religion in the man who made it, and must therefore be a violation of the law of nature; nor would he be obliged to abide by it, if in consequence of it, he should be required to act contrary to the dictates of his conscience.⁷³

The rights granted man thus correspond to those powers necessary for the recognition of his relationship to God and the duties that are deduced from recognition of this relationship.

Informed by this fundamental stricture of *realizing* one’s human potential as opposed to merely preserving oneself, imposing limits on governmental power was

⁷³ Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston*, 1773, in, Hyneman and Lutz, 1983, I, pp.187, 189.

accordingly a matter of moral duty not merely self-interest. The right to resist magistrates that “enslave mankind” was thus derived from an obligation to fulfill this overarching moral duty. This right was not reducible, as Hobbes suggests in *De Cive*, to the atomistic reasoning that it would be unintelligible that men would tolerate such a denial of their private freedom.⁷⁴ The “power granted to rulers is to be limited by the great end and design of society and government,” Howard explains, “and he must be destitute of common sense, who does not know that this is the general good, the happiness and safety of the whole society.” Accordingly, even if a people should “neglect to prescribe any bounds to the power of their rulers,” Howard writes, “this power would nevertheless be limited, and *they* would at liberty to refuse submission to such restraints or laws, as were plainly inconsistent with the publick good.”⁷⁵ The logical conclusion of the connection of rights with this overarching moral imperative was that the people not only have a right but have a duty to resist such violations of natural law. Anticipating Jefferson’s formulation in the Declaration of Independence, Mayhew explained in a celebrated sermon,

If it be our duty...to obey our kind merely for [the] reason, that he rules for the public welfare...it follows, by a parity of reason, that when he turns tyrant, and makes his subjects his prey to devour and destroy, instead of his

⁷⁴ “since no man is tyed to impossibilities, they who are threatened either with death (which is the greatest evil to nature) or wounds, or some other bodily hurts, are not stout enough to bear them, are not obliged to endure them.” To put up with such oppression, Hobbes insisted, was “contrary to the very nature of compacts” to bind us to the performance of what was psychologically inconceivable. Hobbes, 1642, in Warrender, 1983, cht. 2, sect.18, pp.58-9.

charge to defend and cherish, we are bound to throw off our allegiance to him, and to resist...Not to discontinue our allegiance in this case would be to join with the sovereign in promoting the slavery and misery of that society, the welfare of which we ourselves, as well as our sovereign, are indispensably obliged to secure and promote...⁷⁶

Rights in this Pufendorbian sense, as Burlamaqui noted “have a natural connection with our duties, and are given to man only as means to perform them. To renounce this sort of rights would be therefore renouncing our duty, which is never allowed.”⁷⁷

Newly sensitive to the moral agency of man in the natural world, liberal and evangelical clergy disseminated this language of rights through their religious discourse. Though liberal clergy were geographically concentrated in the Boston area, their writings attracted an audience throughout the colonies. This was particularly true when these clergy became central protagonists for the patriot cause during the imperial crisis. The sheer geographical scope of evangelical churches, however, is likely to have made them particularly important in spreading these ideas in the colonies. New Light Congregational ministers were distributed throughout the

⁷⁵ Hyneman and Lutz, 1983, I, pp.188.

⁷⁶ Jonathan Mayhew, *A Discourse Concerning Unlimited Submission and Non-resistance to the Higher Powers*, 1750, quoted in, Clinton Rossiter, “The Life and Mind of Jonathan Mayhew,” William and Mary Quarterly 3rd ser. 7, 4 (Oct. 1950), p.551.

⁷⁷ Jean-Jacques Burlamaqui, *Principles of Natural Law and Politic Law*, 1748, Oxford. W. Green. 1817, I, VII, § VIII, p.45.

New England region, and New Side Presbyterians were found throughout the middle colonies and the South.

Clergy propagated these ideas directly through oral proselytizing as well as through the circulation of published sermons. Religious literature accounted for over two-thirds of the books and pamphlets printed in the colonies in the first half of the eighteenth century, and about one-half from 1750 to 1775.⁷⁸ For most colonists, however, exposure to religious discourse was mostly in the form of oral communication from the pulpit. As one modern commentator has put it, “the pulpit was in that day the most direct and effectual way of reaching the masses- far out-rivalling the newspaper, then only in its infancy.”⁷⁹ Clergy were among the few voices of authority that colonists were regularly exposed to. Between 55 to 80 percent of the adult population is estimated to have had regular contact with the church in the mid-eighteenth century and many of these worshippers are likely to have been regularly exposed to pulpit sermons.⁸⁰ Harry Stout estimates that these churchgoers were likely to have listened to an average of seven thousand sermons in a lifetime. Moreover, to the extent that churchgoers tended to hold ministers in high esteem these messages were likely to have been received with deference and respect. On this Stout writes that until the last decade of the colonial era there were at the

⁷⁸ C. H. Van Tyne, “Influence of the Clergy, and of Religious and Sectarian Forces, on the American Revolution,” American Historical Review 19, 1 (Oct., 1913), fn, p.54.

⁷⁹ Van Tyne, 1913, p.54.

⁸⁰ Patricia U. Bonomi and Peter R. Eisenstadt, “Church Adherence in the Eighteenth-Century British American Colonies,” William and Mary Quarterly 3rd. ser. 34, 2 (April 1982), p.275.

local level few, if any, competing public speakers offering alternative messages. “For all intents and purposes,” Stout writes, “the sermon was the only regular voice of authority” in the lives of most Americans. In a world where communication was predominately aurally-based for many people, the sermon was likely to be particularly influential in disseminating new ways of thinking.⁸¹ Having been repeatedly exhorted by ministers to think of themselves as moral agents equipped with rights, many Americans at the eve of the Revolution are likely to have translated this message into a *mentalité* that was ready to be invoked in the evaluation of political events.

The rights theory that had begun to permeate American culture in the form of religious discourse would subsequently receive systematic definition and elaboration in the teaching of moral philosophy in the colleges. These academic endeavors provide an opportunity to consider in some detail the form in which natural rights theory was being appropriated in the colonies as it become assimilated into more general discourse as a central political idiom.

⁸¹ Harry S. Stout, The New England Soul: Preaching and Religious Culture in Colonial New England New York. Oxford University Press. 1986, pp.3-4. See also, Stout, 1977.

Chapter 3: Natural law and natural rights teaching in the colleges: the secular counterpart to theological revision

The theological reformulation of the post-Awakening era prompted educators in the colonies to adopt a teaching program that could reinforce these new theological insights from an academic perspective. Closely tied to the church in terms of funding and organization, it was natural that the colleges would adjust their curricula in response to the theological changes. Furthermore the respect that educators in the colonies held for intellectual developments in the learned centers of Europe meant that there was a general eagerness to incorporate the “new learning” into teaching. Prior to the mid-eighteenth century, however, the adoption of “new learning” texts in curricula had been limited to the natural sciences. Wary of contemporary efforts to limit the scope of ethics to the secular domain thereby ridding it of its connection with theology, American educators were reluctant to apply the “new learning” to the study of human behavior.¹ But the shift toward a more rationalist doctrine in

¹ See, Norman Fiering Moral Philosophy at Seventeenth-Century Harvard: a discipline in transition Chapel Hill. North Carolina University Press. 1981, cht. 6, Theodore Hornberger, Scientific Thought in the American Colleges, 1638-1800 Austin. University of Texas Press. 1945, p.40, G. Stanley Hall, “On the history of American College Text-Books and Teaching in Logic, Ethics, Psychology and Allied Subjects,” Proceedings of the American Antiquarian Society 9 (1894), pp. 152-3, Louis F. Snow, The College Curriculum in the United States New York. Teachers College, Columbia University. 1907, Frederick Rudolph, Curriculum: A history of

theology effectively opened the way for the adoption of Enlightenment texts in the discipline of ethics. Sensitive to the developments occurring around them and eager to exploit the opportunity afforded them, educators set about incorporating into their teachings a comprehensive program of natural ethics.

The “new” moral philosophy that had developed as a secular compliment to theological rationalism in Europe served this need. As it had done in the ‘old’ world, moral philosophy, encompassing natural law as a sub-discipline, provided systematic explication as to how the moral theory entailed in natural religion was applied to secular life. Natural law was simply the juristic component of this secular enterprise that focused specifically on examining how this moral order translated into a system of rights and duties for individuals. In sum then, the teaching of moral philosophy in the colleges provides an ideal opportunity to examine in some detail the form in which natural rights theory took shape in the academy and was subsequently disseminated to a generation of students.

The form in which moral philosophy and natural rights were taught in the colleges is well illustrated by the teaching of Francis Alison at the College of Philadelphia and Jonathan Witherspoon at the College of New Jersey. Both Alison and Witherspoon were distinguished exponents of the teaching of moral philosophy in the colonies, whose courses were considered immensely influential and were widely imitated. Assessing Alison’s talents, Ezra Stiles, the president of Yale, described Alison as “the greatest Classical Scholar in America.” One of his former students, Dr. Matthew

the undergraduate course of study since 1636 San Francisco. Jossey- Bass. 1977.

Wilson paid tribute to “his indefatigable labours and assiduous applications in promoting a liberal education, and good learning.”² A number of his students went on to play important roles in the Revolution and founding of the new republic.³ Witherspoon was similarly praised by his contemporaries. Reflecting upon the qualities of his former teacher, Ashbel Green, a subsequent president of the college of New Jersey, remarked that “in promiscuous company, he had more the quality called *presence*- a quality powerfully felt, but not to be described- than any other individual with whom the writer has ever had intercourse, Washington alone excepted.”⁴ Under Witherspoon’s leadership the College of New Jersey became known as “the school of statesmen” because of the large number of alumni that became distinguished political figures.⁵ One of these alumni, James Madison, was

² Quoted in Thomas C. Pears, Jr., “Francis Alison,” Journal of Presbyterian History 29 (1951).

³ Among the students educated by Alison at Philadelphia were, Charles Thomson the secretary of the Continental Congress, George Read and Thomas McKean, both signers of the Declaration of Independence, and Hugh Williamson, a member of the North Carolina delegation at the Federal Convention. Douglas Sloan, The Scottish Enlightenment and the American College Ideal New York. Teachers College, Columbia University. 1971, pp.94-95.

⁴ Henry Lyttleton Savage, ed., The Life of the Revd John Witherspoon, Princeton. Princeton University Press. 1973, pp.58-9.

⁵ Among those who attended the college at this time and went on to distinguished careers in politics, were, James Madison, John Beatty, Hugh Brackenridge, Gunning Bradford, William Bradford, Aaron Burr, Philip Freneau, John Henry, Henry Lee, Morgan Lewis, Aaron Ogden, and Caleb Wallace. Dennis F. Thompson, “The Education of a Founding Father,” Political Theory 4,4 (November, 1976), p.529. For more on Witherspoon’s legacy at the college of New Jersey, see, Mark A. Noll, Princeton and the Republic, 1768-1822: the search for a Christian Enlightenment in the era of Samuel Stanhope Smith Princeton. Princeton University Press. 1989, ch. 4.

sufficiently impressed with Witherspoon's teaching to stay at Princeton for six months following his graduation to study with "the old Doctor," as Madison called him.⁶ And after he left college Madison continued to consult Witherspoon's list of recommended readings in purchasing books for his own library and recommending acquisitions to others.⁷ More generally, Witherspoon's lecture notes on moral philosophy are known to have been particularly influential among the network of Presbyterian colleges. Notes from Witherspoon's courses were used in courses taught by his students and then by students of their students.⁸

Before we examine Alison and Witherspoon's teachings it is worth briefly considering their intellectual backgrounds. While this is important to demonstrate the manner in which ethical and religious concerns were closely bound up with their academic agendas, such a survey also indicates the lineage of Alison and Witherspoon's intellectual activities in the colonies. Significant in this respect is the common influence of the intellectual environment of the Scottish Enlightenment and of Francis Hutcheson in particular. With both studying in Scotland in the second quarter of the eighteenth century, Alison and Witherspoon were educated in an

⁶ On Witherspoon's influence on Madison, Ketcham writes, "Witherspoon's intellect and habits of mind are, in fact, the keys to the climate of opinion which so impressed Madison during his years at Princeton. Madison stayed there for six months following his graduation to read under Witherspoon, and always held "the old Doctor," as he called Witherspoon, in respectful admiration." Ralph Ketcham, "James Madison at Princeton," Princeton University Library Chronicle 28 (Autumn 1966), pp.39-40.

⁷ "From William Bradford," (4 April 1775), and "From William Bradford," (27 May 1773) William T. Hutchinson and William M.E. Rachal, eds., The Papers of James Madison Chicago. 1962, Vol. 1, pp.143, 86, 89.

⁸ Flower and Murphey, 1977, p.236.

intellectual environment in which Pufendorbian rights theory had been favorably received and was well established in university teaching.

The intellectual climate that Alison and Witherspoon encountered in Scotland was favorably disposed to continental developments in natural law. Since the late seventeenth century Scottish universities had undergone a period of intellectual enterprise in which Protestant Scholasticism had given way to the innovations of the “new learning.” With the turn against political and ecclesiastical dogmatism initiated by the Restoration and reinforced by the 1688 Revolution, the Scottish universities found themselves afforded a degree of tolerance in regards to intellectual affairs.⁹ Exploiting this opportunity, the new generation of professors embraced continental developments in the natural sciences and natural ethics. For the study of ethics, the professor of moral philosophy at Glasgow, Gershom Carmichael, was particularly influential. Through his efforts to promote Pufendorf’s work on natural law, Carmichael was instrumental in establishing this rights tradition as the cornerstone of eighteenth century Scottish moral philosophy.

Carmichael’s annotated edition of Pufendorf’s *On the Duty of Man and Citizen* (*De officio hominis et civis*), published in 1718 and 1724, stimulated widespread interest and lead to the establishment of Pufendorf’s work as the set text for moral philosophy at his own university, Glasgow, in 1727.¹⁰ Subsequently

⁹ See, Ronald G. Cant, “Origins of the Enlightenment in Scotland: the Universities” in R. H. Campbell, ed., The origins and nature of the Scottish Enlightenment Edinburgh. John Donald. 1982.

¹⁰ Francis Hutcheson, Carmichael’s successor as Professor of Moral Philosophy at Glasgow, went so far as to claim that Carmichael’s appendages to the text were of more value than the text itself. For more on Carmichael’s natural law legacy in Scotland, see, James Moore and Michael

adopted by Sir John Pringle at Edinburgh, and continued at Glasgow by John Loudon and Francis Hutcheson, *On the Duty of Man* became the cornerstone of moral philosophy teaching in Scotland through the eighteenth century. The text also provided the foundation for the theory of natural law and rights subsequently elaborated by Scottish intellectuals in their own right, particularly Francis Hutcheson but also later figures such as Lord Kames, Adam Ferguson, Thomas Reid and Dugald Stewart. Despite their various differences in regards to moral psychology, epistemology and theology, all of these representatives of the Scottish Enlightenment advanced a Pufendorfian theory of natural law in the sense that they conceived of rights as related to moral ends beyond the discrete individual.¹¹

As students at Edinburgh and Glasgow in the 1730s and 40s, Alison and Witherspoon were exposed to this Scottish appropriation of the “new learning.” Both men studied Pufendorf in Pringle’s moral philosophy class at Edinburgh and were likely involved in wider discussions on the subject at the university more generally. A fellow student of Witherspoon’s, Alexander Carlyle, for example, writes in his autobiography of frequent gatherings of friends during 1743, including Witherspoon,

Silverthorne, “Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland,” in Istvan Hont and Michael Ignatieff, eds., Wealth and Virtue: the shaping of political economy in the Scottish Enlightenment Cambridge. Cambridge University Press. 1983, and “Natural sociability and natural rights in the moral philosophy of Gershom Carmichael,” in V. M. Hope, ed., Philosophers of the Scottish Enlightenment Edinburgh. Edinburgh University Press. 1984.

¹¹ See, Knud Haakonssen, “Natural law and moral philosophy: the Scottish synthesis,” in M. A. Stewart, ed., Studies in the Philosophy of the Scottish Enlightenment Oxford. Clarendon. 1990.

in an Edinburgh tavern where the chief topics of conversation were “the deistical controversy and moral philosophy.”¹²

The ascendancy of reason evident in the “new learning” was also apparent in developments within the Scottish church. It was in the controversies precipitated by discussion over the role of reason in religion that Alison and Witherspoon witnessed firsthand how these issues could be manifested in a practical sense. Through the early eighteenth century a number of clergy began to argue in favor of rational inquiry as opposed to a dogmatic reliance on conventional articles of faith such as scripture.¹³ The theological dispute that arose on this issue led to an ecclesiastical rupture within the church of Scotland. The church became divided into an evangelical faction, the Popular Party, and a liberal Moderate Party.

Alison and Witherspoon took sides in the ensuing controversy- Alison supporting the Moderate cause, Witherspoon becoming a protagonist for the Popular Party. Despite their alignment on opposing sides, both developed similar perspectives on the role that religion should play in religion. Caught in the midst of academic institutions that impressed upon them the importance of reason, both Alison and Witherspoon seem to have arrived at common conclusions about how rationalism could benefit religion.

Of the two, Francis Alison took the most direct route to this end in his time spent in Scotland. Born in Ireland in 1705, he was educated at one of the

¹² Alexander Carlyle, in John Hill Burton ed., The Autobiography of Dr. Alexander Carlyle of Inveresk, 1722-1805 London. T. N. Foulis. 1910, p.72.

¹³ See, James K. Cameron, “Theological Controversy: A Factor in the Origins of the Scottish Enlightenment,” in, Campbell, 1982.

‘dissenting’ Presbyterian academies, probably that of Francis Hutcheson in Dublin. He went on to study at the University of Edinburgh, where he was awarded an M.A. in 1733. He then studied divinity for two years, probably at the University of Glasgow, which awarded him a doctor of divinity degree in 1756. In the midst of the ensuing ecclesiastical controversy in Scotland, Alison followed the lead of his mentor, Francis Hutcheson, then teaching at Glasgow, and rallied behind the moderate cause.

Remaining faithful to his devout religious background, Witherspoon took a less obvious route to incorporating rationalist ideas into this thinking. The son of a New Side Presbyterian minister, Witherspoon remained firmly committed to orthodox Presbyterianism in his years at Edinburgh. After receiving a master of arts in 1739, he went on to study theology, and was licensed to preach in 1743. He was called as minister of the Church of Scotland parish in Beith, Ayrshire in 1745.

Witherspoon quickly established a reputation as an effective polemicist for the Popular party in the Church of Scotland. In 1753 Witherspoon published a witty satire called *Ecclesiastical Characteristics* that purported to describe the convictions and actions of the Moderates. For example, Witherspoon wrote that, when preaching a Moderate always took his authorities “from heathen writers,” and relied on “*none*, or as few as possible, from Scripture.” The publication of fifteen editions of this work by printers in Edinburgh, Glasgow, London, Philadelphia, and Utrecht over the next several years made Witherspoon a celebrity. In addition to this satire Witherspoon had other writings published, including an attack on the Moderates’

attendance at the theater and a treatise denouncing clerical meddling in public affairs.¹⁴

But despite being a vocal critic of the rationalist ‘excesses’ that allegedly characterized the Moderates, Witherspoon was by no means opposed to the use of human reason. Indeed, among evangelicals he distinguished himself by his consistent emphasis on the importance of secular learning. Emphasizing the importance of “the union of piety and literature” Witherspoon criticized piety without human learning, which, he claimed, risked “disgracing the most glorious truths, by a meanness and indecency.”¹⁵ It was this distinction as an “enlightened” evangelical rather than a reputation as an evangelical firebrand that was attractive to the New Side trustees at the College of New Jersey in their search for a new president.¹⁶ As an outside figure that was orthodox in his doctrine but also distinguished in his learning, Witherspoon promised to help heal the schism with the Old Sides. Witherspoon accepted the trustees’s invitation and arrived in Princeton to assume his new position in 1768.

¹⁴ For more on Witherspoon’s anti-Moderate writings, see Jack Scott, “Introduction,” An Annotated Edition of Lectures on Moral Philosophy by John Witherspoon Newark. University of Delaware Press. 1982, pp.5-6, and Sloan, 1971, p.109.

¹⁵ See, Ned Landsman “Witherspoon and the Problem of Provincial Identity” in Richard B. Sher and Jeffrey R. Smitten, eds., Scotland and America in the Age of the Enlightenment Edinburgh University Press. 1990, p.36. Quotes from an address to graduating students delivered in 1775, in Works of John Witherspoon Edinburgh. Ogle and Aikman, 1804-5, vol.3, p.105.

¹⁶ Peter J. Diamond, “Witherspoon, William Smith and the Scottish Philosophy” in Sher and Smitten, 1990, p.128.

By incorporating aspects of the “new learning” to their particular theological perspectives, both Alison and Witherspoon were well equipped for the religious and intellectual climate they would encounter in America. Alison arrived in the colonies in 1735 on the cusp of the outbreak of the Great Awakening. Settling in Pennsylvania, Alison became a pastor in the Presbyterian congregation at New London in Chester County. Caught in the midst of the controversies precipitated by the Awakening, Alison joined the “Old Side” protest against the revivalists and quickly became distinguished as a spokesman for the movement. By 1739 Alison had opened a school in New London where he, with the aid of one or two assistants, offered instruction through the collegiate level. Alison taught courses in logic, metaphysics and ethics, and moral philosophy, the last of which was based on *A Short Introduction to Moral Philosophy* by his former mentor, Francis Hutcheson. Under Alison’s stewardship, the New London academy established an outstanding reputation and served as the official seminary of the (Old Side) Synod of Philadelphia from 1743 until 1752.¹⁷ In 1752 Alison accepted Benjamin Franklin’s invitation to become head of Philadelphia Academy, which was chartered as the College of Philadelphia in 1755.

Despite their positions on either side of the theological divide, Alison and Witherspoon promoted very similar educational agendas in their new positions at Philadelphia and New Jersey. Both men sought to advance the teaching of the “new learning,” and placed particular emphasis on the importance of moral philosophy. The study of natural philosophy and moral philosophy in particular, Alison and

¹⁷ Sloan, 1971, cht. 3.

Witherspoon insisted, promised to benefit the Christian faith. Arguing the need for the inclusion of moral philosophy in college curricula in a letter to Ezra Stiles, the president of Yale, Alison wrote, “without this branch of knowledge, we shall be ill able to defend our holy christian religion; to understand the right of mankind; or to explain and enforce the duties which we owe to God, our neighbors, and our selves.”¹⁸ Witherspoon similarly exhorted the benefits that the study of moral philosophy would bring to religion in the introductory lecture in his moral philosophy course.

The noble and eminent improvements in natural philosophy, which have been made since the end of last century, have been far from hurting the interests of religion; on the contrary, they have greatly promoted it. Why should it not be the same with moral philosophy, which is indeed nothing else but the knowledge of human nature.¹⁹

Moral philosophy was for both men a discipline that encapsulated the ultimate purpose of academic study; the empirical investigation of man’s divine nature. To this extent moral philosophy assumed precedence over other subjects, reflected in its capstone status in the course of study. “You may plainly perceive both how

¹⁸ Alison to Ezra Stiles, May 27, 1759, quoted in Sloan, 1971, p.98.

¹⁹ John Witherspoon, *Lectures on Moral Philosophy*, 1772, in Jack Scott, ed., An Annotated Edition of “Lectures on Moral Philosophy” by John Witherspoon Newark. University of Delaware Press. 1982, p.64.

extensive and how important moral philosophy is..." Witherspoon declared. "Its importance is manifest from this circumstance, that it not only points out personal duty, but is related to the whole business of active life. The languages, and even mathematical and natural knowledge, are but hand maids to this superior science."²⁰

Natural law and natural rights according to Francis Alison and Jonathan Witherspoon

A review of the moral philosophy courses taught by Alison and Witherspoon suggests that both endorsed a Pufendorfian theory of rights.²¹ The courses clearly indicate a conception of natural ethics whereby man is endowed with a moral scope and purpose that transcends the atomistic 'self.' Wholly unoriginal in form and content, many of the ideas presented bear a very close resemblance to the moral philosophy and natural law texts Alison and Witherspoon encountered in Scotland. In respect to the theory of rights presented it seems that Alison and Witherspoon either drew upon the Pufendorfian paradigm as it had been elaborated by Hutcheson

²⁰ Witherspoon, 1772, p.150. On the precedence of moral philosophy over natural philosophy, the statement by Colin Maclaurin, the famous Newton expositor, in 1748 was typical: "Natural Philosophy is subservient to the purposes of a higher kind, and is chiefly to be valued as it lays a sure foundation for Natural Religion and Moral Philosophy; but leading us, in a satisfactory manner, to the knowledge of the Author and Governor of the universe." Quoted in Becker, 1922. p.49-50.

²¹ For documentation of these courses I use Witherspoon's own lecture notes, Witherspoon, 1772, and the lecture notes taken from Alison's class by Jasper Yeates, titled, *Moral Philosophy*, 1760, from the University of Pennsylvania library collection of Rare Books and Manuscripts. References to the latter text is hereinafter cited as "Yeates, 1760."

or drew upon it directly from *On the Duty of Man and Citizen*. For the most part Alison and Witherspoon simply reiterated the formula as it had been laid out by Hutcheson; Alison followed Hutcheson's abridged "Compend" edition, published as *A Short Introduction to Moral Philosophy* in 1747, and Witherspoon, the more complete edition *A System of Moral Philosophy*, published in 1755.²²

From the outset of their courses, Alison and Witherspoon are quick to establish that, contrary to the claims of some "infidel" philosophers, the study of human nature is nothing other than the study of God's counsel for life in the natural world. "I do not know any thing that serves more for the support of religion," Witherspoon declares, "than to see from the different and opposite systems of philosophers, that there is nothing certain in their schemes, but what is coincident with the word of God."²³ Consistent with this image of a divinely-ordered natural world, Alison and Witherspoon go on to describe a moral system discernible to man through his natural endowments. We should "expect to find in the Nature of Things around us and in our Constitution and structure," Alison claims, "some clear evidence shewing the proper Business of Mankind; for what course of Life and Offices we were formed by

²² See, Sloan, 1971, cht.3-4 for the similarities with Hutcheson. Caroline Robbins claims that in his moral philosophy classes Alison "dictated" passages of the *Compend*, see Robbins, "'When It is That Colonies May Turn Independent: An Analysis of the Environment and Politics of Francis Hutcheson (1694-1746)" *William and Mary Quarterly* 3rd. ser, 11, 2 (April 1954). On Witherspoon, Sloan writes, "In organization, in content, and even in formulation of ideas, the similarity between the lectures of Witherspoon and those of Hutcheson is unmistakable." p.122.

²³ Witherspoon, 1772, p.64.

our Creator, and what are the proper means of our Happiness.”²⁴ Similarly, Witherspoon says, “It seems a point agreed upon, that the principles of duty and obligation must be drawn from the nature of man. That is to say, if we can discover how this Maker formed him, or for what he intended him, that certainly is what it ought to be.” Unlike Alison, however, Witherspoon is somewhat qualified in his assessment of this human capacity to acquire knowledge by natural means. Revealing his enduring commitment to the doctrine of original sin, Witherspoon claims, “The knowledge of human nature,” is often “confused” or made “difficult” by the “corruption of our nature.” Only “by the remaining power of natural conscience,” he concludes, can these errors be detected and opposed.²⁵

The accounts presented by Alison and Witherspoon become most revealing, however, when they consider the scope of the moral directives entailed in natural law. Unlike “brutes” or other “inferior creatures” men are unable to rely on instinct to conform to natural law. Human observance of natural law thus requires rational volition or moral choice. From this premise Alison and Witherspoon proceed to explain how man discerns the moral directives that are apparent in the design of nature. As Witherspoon puts it, reason “shows that we are the workmanship of God, that the world is governed by his providence, and that reflections on our own constitution and that of nature have the force of divine laws, pointing what God requires of us.”²⁶

²⁴ Yeates, 1760, p.3.

²⁵ Witherspoon, 1772, p.66.

²⁶ Yeates, 1760, p.5.

As Alison and Witherspoon sketch the process by which man becomes aware of the moral purpose assigned to him by God, it is increasingly apparent how benevolent this moral order is. Recognizing the “Weakness and Ignorance” of his solitary state, Alison describes how man observes his own natural affinity to a moral community with fellow men. This impulse toward community is not motivated by atomistic concerns. Underlying this “sociality” is a natural benevolence towards others. This disposition is embodied in the natural tendency to derive happiness from the promotion of the general good. As Witherspoon asserts, “there seems to be in the nature of things an intrinsic excellence in moral worth, and an indelible impression of it upon the conscience, distinct from producing or receiving happiness.” Such a powerful moral sense cannot be reduced to private interest, Witherspoon insists. “Once more,” he concludes, “it is certain that virtue is as really connected with private as with public happiness, and yet to make the interest of the agent the only foundation of it, seems so to narrow the mind, and to be so destructive to the public and generous affections as to produce the most hurtful effects.”²⁷

Having recognized this benevolent design, man proceeds to deduce an obligation to comply with and fulfill the moral directives assigned to him. Grounding this sense of obligation in a natural sense of dependence and indebtedness towards God, Alison says, “it would be the basest of Ingratitude in us and attended with the greatest Disadvantage to the publick Good, to be disobedient to this Will.”²⁸ Witherspoon concurs, noting that, “our relation to him [God] not only lays the

²⁷ Witherspoon, 1772, p.86. It seems likely that Witherspoon is referring here to Hobbes.

²⁸ Yeates, 1760, pp.74-75.

foundation of many moral sentiments and duties, but completes the idea of morality and law, by subjecting us to him, and teaching us to conceive of him, not only as our Maker, preserver and benefactor, but as our righteous governor and supreme judge. As the being and perfections of God are irrefragably established, the obligation of duty must ultimately rest here.”²⁹

From man’s basic duty to God, Alison and Witherspoon, following Hutcheson, derive two fundamental duties of action for the individual; self-preservation and promotion of the common good. Introducing these norms as the “grand Principles of the Law of Nature,” Alison describes self-preservation as a duty that relates personal interest to the general good of humanity. “Every man...is obliged by his Creator,” Alison declares, “to take care of his Body and improve his Mind. For he thereby not only promotes his own happiness, but is with the greatest Ease and success beneficial to Mankind.”³⁰ Placing the principle of self-preservation” under the heading “our duty to ourselves,” Witherspoon ascribes it a similar importance in nurturing God’s creation. He describes it as a moral law that obliges one “to guard against any thing that may be hurtful to our moral character...to be active and diligent in acquiring every thing necessary for life and comfort,” and “to take all proper methods to preserve and acquire the goods both of mind and body.”³¹

²⁹ Witherspoon, 1772, p.92.

³⁰ Yeates, 1760, p.66.

³¹ Witherspoon. 1772, p.115.

The notion of an individual's duty to preserve and cultivate God's moral creations is continued in Alison and Witherspoon's discussion of the second principle of natural law, promotion of the common good. Describing this obligation, Alison declares, "We are to promote, as we have an opportunity, the common Good of all, and that in particular of societies or Persons, while it no way obstructs the common Good or that of greater Societies."³² Similarly, under the heading "our duty to man," Witherspoon describes it as a moral law that consists in a "calm and deliberate good will" towards others that has "for its object their greatest and best interest."³³ Though self-preservation and promotion of the common good are considered complimentary in principle they can in practical instances conflict. Thus, Alison concludes his account of these "grand Principles" by noting that even though we should generally sacrifice our personal interest in favor of "the greater Good of societies" when they come into competition, we should allow "self-love" to prevail "all other Things being equal."³⁴

Not surprisingly this framework has clear implications for the conception of rights. The moral strictures imposed on man by natural law clearly entail action directed toward specific ends. In this sense, rights are powers granted for a 'right' purpose, not powers granted for any end consistent with private interest. As Witherspoon explains, "Right in general may be reduced, as to its source, to the supreme law of moral duty; for whatever men are in duty obliged to do, that they

³² Yeates, 1760, p.80.

³³ Witherspoon, 1772, pp.109-110.

³⁴ Yeates, 1760, p.80.

have a claim to, and other men are considered as under an obligation to permit them.”³⁵

Accordingly, rights can refer to an authority exercised over any number of things that are related to the performance of these duties. A logical prerequisite to all others and hence the most indispensable, is the right over one’s own person and actions. This right or cluster of rights referred to as “liberty,” encompasses the absence of subjection in one’s command of one’s own physical and moral personality- one’s life, actions body, honor, and reputation. This liberty is considered a “natural right” because it exists in a person by nature and does not depend on the agreement of others. Furthermore, because control over these faculties is indispensable to an individual’s discovery of natural law and his obligation to comply with it, this right is considered inalienable. These rights encompass, as Witherspoon explains, control over faculties which a person cannot give away, such as “a right over his own knowledge, thoughts, &c,” as well as control over personal qualities which a person ought not give away, such as “a right to judge for himself in all matters of religion, his right to self-preservation, provision, &c.”³⁶

The remaining rights listed by Alison and Witherspoon are divided into three categories; power over one’s own things, known as Property or *Dominion*; power over the persons and actions of others, known as authority; and power over the

³⁵ Witherspoon, 1772, p.110. Both Witherspoon and Alison’s discussion of rights follows particularly closely Hutcheson’s in *System* and *Compend*, see, Jack Scott, 1982, p.113, fn.9.

³⁶ Witherspoon, 1772, p.111.

property of others, known as *Servitus*. All these rights are adventitious in the sense that they are instituted by individuals through contractual and quasi-contractual arrangements to facilitate the fulfillment of duties. Because these rights are not indispensable to these ends they are considered alienable. For example, the right of self-defense and property rights, as Witherspoon explains, “may be alienated in a state of society for the good of the whole as well as of private persons.”³⁷ Alison makes essentially the same point, saying that when “the general Interest and Safety” comes into competition with “that of Individuals or small Parties” it may be necessary “to omit or do things contrary to the Rights of particular Persons.” This would mean, Alison continues, giving precedence to the “more sacred” Law of Nature “when it derogates from one of less importance.” Property rights, however, must be treated with special caution in this regard, Alison adds. Because “Property...is a sacred thing...the causes of violating its Rights must be of the highest Nature, some terrible evil to be avoided, or some exceeding great Advantage to be obtained.”³⁸

Having established the principles of ethics Alison and Witherspoon move on to consider the sub-field of “Politics.” Here, by way of an account of the powers entrusted to government we get a further sense of the robustness of the moral design assigned to mankind. As we would expect, the purpose attributed to government is much more extensive than was the case under the minimalist framework of Selden and Hobbes. The powers of government are not restricted simply to protecting the

³⁷ Witherspoon, 1772, p.111.

³⁸ Yeates, 1760, pp.170-1.

liberty of the individual, allowing the individual to define his or her ends. Rather, government is presented as an instrument that can positively *assist* in the realization of *prescribed* ends. The ends ascribed to man are objective ends ordained by God, and thus government can be entrusted with the responsibility of facilitating these prescribed ends.

Consistent with this perspective the benefits of civil society are seen in broad terms by Alison and Witherspoon. Alison describes how civil society offers a means of both “obtaining defence against the injuries to be feared from men” and, tellingly, “promoting the general happiness by the concurring force of multitudes.”³⁹ Similarly, Witherspoon’s account of the benefits enjoyed in society includes not only security but also the likelihood of achieving certain qualitative ends. It “is of the most undoubted certainty,” Witherspoon forthrightly declares, that “our happiness and the improvement of our powers are only to be had in society.”⁴⁰

In sum, Alison and Witherspoon’s courses demonstrate how the teaching of moral philosophy and natural law served as a secular counterpart to the new rationalist paradigm in theology. By providing a systematic foundation for the principal tenets of this paradigm-- a fixed and intelligible moral order, and the moral competency of man-- this secular learning offered further relief to the uncertainty that surrounded ethical thinking in the colonies. To the extent that Alison and Witherspoon were representative of intellectual thinking in the colonies at this time, their exposition of natural law seems likely to give an indication of the type of theory

³⁹ Yeates, 1760, p.174.

⁴⁰ Witherspoon, 1772, p.123.

that was generally subscribed to within intellectual circles. Certainly the moral philosophy teaching at the other American colleges would seem to indicate the pervasiveness of this approach to natural law. Outside of the colleges of Philadelphia and New Jersey students are known to have studied one or more of the Pufendorbian natural law texts of Pufendorf himself, Hutcheson, Burlamaqui, or Vattel at Harvard, Kings College and William and Mary.⁴¹ Furthermore, these texts seem to have been in wide circulation more generally. The demand for Burlamaqui's *Principles of Natural Law*, for example, was so great that editions of it were printed at Boston in 1793 and at Cambridge, Massachusetts, in 1807. And indicating the esteem that these texts were held in, Benjamin Franklin wrote in December 1775 describing the reception of Vattel's *The Law of Nations* at the Continental Congress in Philadelphia. The book, wrote Franklin, "came to use in good season, when the circumstances of a rising State made it necessary frequently to consult the law of nations." Since its arrival, Franklin continued, the book has "been continually in hands of the members of our Congress now sitting."⁴²

⁴¹ See, Samuel Eliot Morison, Three Centuries of Harvard, 1636-1936 Cambridge, Harvard University Press. 1936, pp.135-36, Anna Haddow, Political Science in American Colleges and Universities, 1636-1900 New York. Appleton-Century Company. 1939, pp.11-12, and David W. Robson, Educating Republicans, Westport, Conn.. Greenwood Press. 1985, ch. 2, and Jesse S. Reeves "The Influence of the Law of Nature Upon International Law in the United States," American Journal of International Law 3,3 (July., 1909), p.551. Insufficient evidence is available to determine what texts were used in moral philosophy courses at Queen's or the College of Rhode Island.

⁴² Reeves, 1909, p.552.

The handful of published texts on natural ethics by American authors also followed this trend.⁴³ Thomas Clap's *Essay on the Nature and Foundations of Moral Virtue and Obligation* (1765), for example, is instructive in this respect because of its clear delineation of what distinguishes a "reputable" system of natural law from that proposed by writers such as Hobbes. In systematic steps, Clap explains how moral virtue is best understood as "conformity to the *moral Perfection of God*," as far as this is possible by "his Creatures." God's perfection, Clap insists, is communicated to man, such that he is capable of "conceiving of the *natural* Relations of Things...and "of understanding the Nature of Right and Wrong, or the *moral* Relations of Things." "Such a Being," Clap concludes, is a "MORAL AGENT and is capable of *moral Virtue*." Such a moral capacity, Clap insists, cannot be reduced to "Self-Love" or "Self-Interest" as is suggested by "many celebrated Authors [i.e. Hobbes]."

But for a Man to make the *sole, supreme, or ultimate End* of all Being and Action to be for *himself alone* or his *own* Happiness, as the *summum Bonum*; and to regard God and all other Beings, only so far as they may *serve himself* or be subservient to his own Happiness, or *gratify his*

⁴³ The two most notable of these texts were, Samuel Johnson, *Ethica, or Things relating to Moral Behavior* Philadelphia, 1746, and Thomas Clap, *Essay on the Nature and Foundations of Moral Virtue and Obligation* New Haven. 1765. A renowned scholar and theologian, Clap was president of Yale from 1739 to 1766. Johnson's text was the less widely circulated of the two because of the author's conversion to Anglicanism. See, Norman S. Fiering, "President Samuel Johnson and the Circle of Knowledge," William and Mary Quarterly, 3rd Ser, 28, 2 (April 1971).

Principles of Self-Love, is the most absolute Inversion of the *Order, Dignity and Perfection* of Being: and one of the worst Principles that can be in human nature.⁴⁴

Clap's forthright rejection of a natural morality based on self-interest is indicative of the distance that separated the American reception of natural rights from what had previously taken place in Europe. Whereas the minimalist paradigm of Selden and Hobbes had picked up adherents in seventeenth century Europe (particularly England and Holland),⁴⁵ it proved remarkably unattractive in mid-eighteenth century America. Fearing the consequences of moral subjectivism, Americans reached out for a secure and objective vision of human morality. As a result they opted for the morally-anchored Pufendorbian theory of natural law. The conception of natural rights that accompanied this framework was appropriately morally-bound, giving sanction to actions that were linked to these prescribed ends.

⁴⁴ Clap, 1765, p.16-17.

⁴⁵ Seventeenth century adherents of the minimalist paradigm included the Dutch Hobbesians, Lambert Velthuysen, the pseudonymous 'Lucius Antistes Constants,' and Johann de la Court, and in England, Jeremy Taylor, John Vaughan, and Anthony Ascham. See, Tuck, 1979, cht. 6-7.

PART 3: Rights at the Founding

Chapter 4: The use of rights in political discourse

Although the use of rights in political discourse is generally much less clearly delineated than what we have seen in religious and educational discourse, there are sufficient indications to gain a sense of the tradition that Americans were likely working within. Political writings provide evidence in this respect either by addressing the issue of rights itself in some detail, or through discussion of issues that are closely related to attributes that distinguish these two traditions of natural rights. I begin my review of rights theory at the founding by concentrating on the former source of evidence, examining political writings that reveal in some way the substantive content of rights. I then proceed to employ the more indirect approach by considering how debates on political representation illuminate the underlying theories of rights that informed political thinking.

My review of the treatment of rights in political literature examines contributions from a number of prominent figures of the American founding, whose writings and public statements received widespread attention. Aside from their prominence in politics these figures are particularly appropriate for the present task because of the

broad range of political persuasions represented. The political outlooks associated with these figures run the gamut from the conservatism of Alexander Hamilton and Theophilus Parsons to the more democratic leanings of Jefferson, Thomas Paine and James Wilson. Such ideological diversity provides an ideal basis for examining the understanding of rights. For if common themes in regards to rights theory can be identified among this diverse crowd, it would seem reasonable to conclude that these commonalities are representative of a consensus within political thinking more generally.

Perhaps the most clearly stated and systematic exposition of natural rights in political writings is James Wilson's law lectures of 1791. Commissioned by the legislature of Pennsylvania, Wilson was instructed to undertake a systematic examination of how American jurisprudence differed from its English counterpart. Responding to this charge, Wilson began his account by declaring that the distinguishing feature of American jurisprudence was its rejection of William Blackstone's doctrine that in a civil society ultimate sovereignty was held by government. In contrast to the English tradition, he explained, the "*vital* principle" of American constitutional law was "that the supreme or sovereign power of the society resides in the citizens at large." In drawing this contrast, Wilson laid out the distinct American emphasis on rights and its central importance to the conception of government. Rights were not, Wilson insisted, "civil privileges, provided by society, in lieu of the natural liberties given up by individuals" as Blackstone had supposed. They were instead inalienable properties that naturally inhered in the individual, for which civil society and

government were instituted “to secure and to enlarge.”¹ By carefully distinguishing the principles of American law in this way, Wilson undertook a penetrating analysis of the American approach to rights that provides important insight into its conceptual underpinnings.

Wilson was uniquely qualified to discharge the Pennsylvania legislature’s ambitious assignment. In his career as a lawyer and politician Wilson had distinguished himself as an outstanding constitutional and legal theorist. Born in Carskedo, Scotland in 1742, and educated at the University of Edinburgh, Wilson emigrated to America in 1765. Settling in Pennsylvania, Wilson studied law under one of the province’s most distinguished lawyers, John Dickinson. Wilson’s course of study encompassed the works of many preeminent jurists, including “Puffendorf, Burlamaqui, Coke, Kames, Bracton, Hardwicke, Hale and Gellespie.”²

Embarking on a legal practice in western Pennsylvania, Wilson quickly established a reputation for his professional talents. His skill for legal argument became more widely known with the publication in 1774 of the pamphlet, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*. On the basis of his growing reputation Wilson was elected to the second Continental Congress in May 1775. There he impressed fellow delegates in debates

¹ James Wilson, *Lectures on Law*, 1791, in Robert Green McCloskey, ed., *The Works of James Wilson* Cambridge. Belknap Press. 1967. Vol. 1, pp.77- 78.

² James Wilson’s *Commonplace Book*, 1766, quoted in Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742-1798* Columbia. University of Missouri Press. 1998, p.10.

over the imperial controversy. John Adams, a fellow delegate at the Congress, commented that “There is a young Gentleman from Pennsylvania whose Name is Wilson, whose Fortitude, Rectitude, and Abilities too, greatly outshine his Masters.” Wilson served in the Continental Congress until 1783, and returned for a second stint from 1785 until 1787.

After signing the Declaration of Independence Wilson became a leading advocate of strengthening the Articles of Confederation. At the 1787 Philadelphia convention, Wilson’s role was second only to that of Madison in helping frame and secure the Federal Constitution. The legal and political acumen Wilson displayed at the convention impressed many of his fellow delegates. William Pierce, a fellow member of the Pennsylvanian delegation, commented that “Mr Wilson ranks among the foremost in legal and political knowledge. He has joined to a fine genius all that can set him off and show him to advantage.” After playing a prominent role in securing ratification of the constitution in Pennsylvania, Wilson was eager to employ his skills in the new Federal judiciary. Washington appointed him as an Associate Justice to the Supreme Court. This honor and his subsequent appointment to the Philadelphia law professorship in 1790 reflected his wide renown as the preeminent legal scholar of his generation.³

For our purposes Wilson’s account of American jurisprudence is most illuminating in his lectures “Of the Law of Nature” and “Of Man, as a Member of Society.” Through Wilson’s efforts in these lectures to explain the distinctiveness of the American approach to rights we gain a clear sense of the extent to which he

³ See, Robert Green McCloskey “Introduction,” in Wilson, 1791.

wished to distinguish his theory by its substantive moral content. In the first of these two lectures, “Of the Law of Nature,” Wilson examines the grounds of obligation that ensue from natural law. Considering the Hobbesian contention that “superiority of strength...is the true foundation of the right of prescribing laws,” Wilson insists that an obligation to do something is not synonymous with being coerced into doing something. “Because I cannot resist,” Wilson asks, “am I obliged to obey?” No, he answers. Every obligation presupposes a “superior authority” that enjoins a moral standard that transcends any person whatever his strength. Indeed the law enjoined by this rightful authority dictates that we have a right to resist malevolent commands issued by a “superiour force.” And, Wilson adds, “if resistance can prove effectual, it is a duty also.” Thus, on some occasions we may suffer under conditions of duress. But this fact does not extinguish the right of resistance, he insists; “we may continue, for a time, under a constraint; but we come not under an obligation: we may suffer all the external effects of superiour force; but we feel not the internal influence of superiour authority.”⁴

Arguing in this way, Wilson clearly distinguishes his conception of right from both the nominalist and the minimalist position within early modern natural law. For Wilson a ‘right’ is not synonymous with a morally unbounded notion of whatever an individual *can* do; the right “to do whatsoever he listeth” that we saw in Hobbes’s *Elements*. Nor is a ‘right’ synonymous with the self-interested logic of the discrete individual; the right to do whatever he considers as contributing to his self-preservation that we saw in Hobbes’s *De Cive*. Instead, Wilson equates a ‘right’

⁴ Wilson, 1791, p.127.

with the behavior of an individual that conforms to an objective standard that transcends his discrete being; behavior, in other words, that seeks to realize the moral design, his “perfection and happiness,” intended for mankind by God.

Accordingly, the moral strictures that men are bound to are described as part of the Creator’s grand design for mankind. That God intended for man this moral order can be simply demonstrated, Wilson claims, by examining our nature as human beings. Without law, for example, he claims, we would find “many of our talents and powers hanging upon us like useless incumbrances.” “Why should we be illuminated by reason, were we only made to obey the impulse of irrational instinct?” Wilson asks. And similarly, “Of what service to us would reflection be, if, after reflection, we were to be carried away irresistibly by the force of blind and impetuous appetites?” Likewise, when we consider society, Wilson argues, it is evident that it could not be sustained without the “fixed rule” provided by natural law. “The more ingenious and artful the twolegged animal, man, is, the more dangerous he would become to his equals: his ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would be deprived of all the benefits and pleasures of peaceful and social life...” Is it probable,” Wilson concludes, “that the Creator, infinitely wise and good, would leave his moral world in this chaos and disorder? Clearly for Wilson this “system of morality and duty” that God recommends to man in the form of natural law, entails a scope that transcends the perspective of the discrete individual. The standard of

morality that man is bound to is independent of the individual and its scope encompasses mankind in general.⁵

We gain further insight into the non-individualistic or 'social' character of Wilson's conception of natural law in his succeeding lecture, "Of Man, as a Member of Society." Significantly for our purposes, Wilson explicitly contrasts his approach to the approach associated with Hobbes. "Some philosophers," Wilson writes referring to the latter, "have alleged, that society is not natural, but is only adventitious to us; that it is the mere consequence of direful necessity." Accordingly, Wilson explains, "these philosophers" attribute "all the social passions and natural affections" to selfish motivations. "The love of posterity, of kindred, of country, and of mankind- all these are only so many different modifications of this universal self-love."

Wilson emphatically rejects this position. The idea that the agency of man is subsumed under such an atomistic or self-regarding logic, Wilson writes, is a "narrow and hideous" representation of our nature that is "totally repugnant to all human sentiment and all human experience."⁶ Explaining his rejection of this doctrine, Wilson argues that such a logic would not suffice to sustain society. The honoring of promises and contracts and our willingness to restrain ourselves from

⁵ Wilson, 1791, p.130. On the moral content of Wilson's conception of natural law, McCloskey writes; "Among the several things that might be emphasized about this Wilsonian concept of natural law, perhaps the most important are its explicitly deistic origin and its normative quality. This is not the secularized natural law of some eighteenth century rationalists nor is it merely a morally indifferent rule of necessity like the "laws" of motion. It is God's ordainment, and it imposes ethical duties on men and on states." McCloskey, 1967, p.38.

⁶ Wilson, 1791, pp.228-9.

doing harm to the innocent are all attributes of a “moral sense,” he claims, that is inconsistent with such a selfish logic.⁷

Wilson’s claims on this front are of course unconvincing. Notwithstanding his claims to the contrary, all of these social traits are recognized by Hobbes and are readily accommodated within his individualistic paradigm. Where Wilson becomes more interesting, and perhaps more persuasive in making his case, is in his discussion of the human characteristics beyond individual expediency that explain the propensity toward society. “Society is necessary as well as natural to us,” Wilson insists. Human individuals embody a natural sociability or a sympathy towards others that cannot be attributed to selfish interest. This sociability “insinuates herself into the hearts of every rank and class of men, and mixes in all the various modes and arrangements of human life.” Even if as an individual we were to eliminate all dangers and fears in our life, he argues, a solitary life would remain an impoverished one. Unable to “indulge affection or social joy,” we would be resigned to “sour discontentment, sullen melancholy, and listless languor.”⁸

Demonstrating the larger framework of his discussion Wilson goes on to link this other-regarding disposition to an overarching moral design intended for mankind. Quoting from Cicero’s *De officiis*, he writes,

There is nothing more certain, that the excellent maxim of Plato- that we are not intended solely for ourselves; but that our friends and our country claim a portion of our birth. Since, according to the stoicks, the productions of the

⁷ Wilson, 1791, pp.231-2.

earth are designed for men, and men are designed for the mutual aid of one another; we should certainly pursue the design of Nature, and promote her benign intention, by contributing our proportion to the general interest, by mutually performing and receiving good offices, in order to strengthen the love and friendship, which should always predominate in human society.⁹

This capacity for other-regarding behavior, Wilson suggests, is a manifestation of a larger moral design that enjoins the realization of the natural potential of mankind. This “moral system” that is communicated to us in the form of natural law, enjoins us to identify our interests as an individual to the interest of the system as whole. Thus, Wilson claims that “the degree of social affection, most useful to the system, is, at the same time, productive of the greatest happiness to the individual.” Continuing, he writes,

he who acts on such principles, and is governed by such affections, as sever him from the common good and publick interest, works, in reality, towards his own misery: while he, on the other hand, who operates for the good of the whole, as is by nature and by nature’s God appointed him, pursues, in truth, and at the same time, his own felicity. Regulated by this standard,

⁸ Wilson, 1791, pp.234-5.

⁹ Wilson, 1791, p.236. Cicero, *De officiis*, I, i, c.7.

extensive, unerring, and sublime, self-love and social are the same.¹⁰

Wilson builds upon these premises in his subsequent account of civil society and government. The purpose he attributes to civil society and government is clearly consistent with his previous account of the broad scope of moral duties assigned to man. Following the imperative to nurture human potential as well as preserve human life, Wilson describes how individuals come together to form society for the purpose of regulating “whatever regards their preservation, their security, their improvement, their happiness.”¹¹ The fundamental equality of men in terms of their capacity to recognize and obey natural law is also apparent in his account of the popular basis of political authority. From this observation, Wilson deduces that it cannot be the case that any man is naturally superior to any other. It follows then, he concludes, that government can only be the product of free and equal individuals coming together and establishing political authority by common consent. In this sense, contrary to Blackstone, the “redoubtable sovereign” of political authority lies in “the free and independent man.”¹²

But the fact that political authority is rightfully rooted in the constituent community and that men are capable of recognizing and obeying natural law, does not make Wilson averse to refining the popular input into government. Wilson acknowledges that though men are endowed with these moral capabilities they may

¹⁰ Wilson, 1791, p.238.

¹¹ Wilson, 1791, p.239.

¹² Wilson, 1791, p.81.

not exercise them correctly or even at all. The resultant imperfections of popular judgment, thus, make it desirable that input into government be refined through mechanisms of representation.

Men, frail and imperfect as they are, must be the instruments, by which government is administered. But, in order to guard against the consequences of their frailties and imperfections, one effort, in the contrivance of the political system, is, to provide, that, for the offices and the departments of the state, the wisest and the best of her citizens be elected. As second effort is, to communicate to the operations of government as great a share as possible of the good, and as small a share as possible of the bad propositions of our nature. A third effort is, to increase, encourage, and strengthen those good propensities, and to lessen, discourage, and correct those bad ones. A fourth effort is, to introduce, into the very form of government, such particular checks and controls, as to make it advantageous even for bad men to act for the publick good. When these efforts are successful, and happily united; then is accomplished what we truly mean, when we speak of a government of laws, and not of men...¹³

Just as Madison had argued in the Federalist Papers, Wilson believes such devices along with separation of powers, bicameralism and judicial review, improve governmental decision-making by making it more consonant to natural law.

¹³ Wilson, 1791, pp.289-90.

Though other writings at the founding are much less detailed in their treatment of rights than these law lectures, what is said is often suggestive of the type of Pufendorfian paradigm articulated by Wilson. Recurringly these discussions describe natural law as consisting of objective moral commands that impose duties upon man. Rights, in turn, are presented as derivative from these duties.

In “The Farmer Refuted,”¹⁴ for example, Alexander Hamilton described natural law as an authority created by God “binding over all the globe, in all countries, and at all times.”¹⁵ Continuing, Hamilton made clear the relationship between the moral injunctions promulgated by natural law and rights.

Upon this law depend the natural rights of mankind: the Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed them with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest; and invested him with an inviolable right to personal

¹⁴ Hamilton’s essay, published in Rivington’s New-York Gazette, February 23, 1775, was a response to the Tory, Samuel Seabury’s essay, *View of the Controversy Between Great-Britain and her Colonies*. For more on the context and subsequent influence of Hamilton’s essay, see, Anson D. Morse, “Alexander Hamilton,” *Political Science Quarterly* 5,1 (March, 1890).

¹⁵ Alexander Hamilton, *The Farmer Refuted*, 1775, in John C. Hamilton, ed., *Works of Alexander Hamilton* New York. C. S. Francis & Company. 1850, I, p.61. Significantly, in this discussion Hamilton suggests to his adversary that he study “the law of nature,” recommending “Grotius, Puffendorf, Locke, Montesquieu, and Burlamaqui.”

liberty and personal safety.¹⁶

Rights, in other words, provided man with the means of fulfilling the design that God had intended for him. Moral obligation, accordingly, is not a matter of expediency but a matter of respecting one's indebtedness to the Creator. Hamilton is thus outraged by the nominalism he detects in Hobbes. Contrary to the principles maintained by "Mr. Hobbes," he writes, moral obligation is not "a mere contrivance...for the maintenance of social intercourse." Instead, as "Good and wise men, in all ages" have suggested, it is evident "from the relations we stand in to Himself and to each other," that the Deity "has constituted an eternal and immutable law, which is indispensably obligatory upon all mankind, prior to any human institution whatever."¹⁷

The widely read and influential *The Rights of Man* by Thomas Paine similarly sketches a formulation in which duties and rights are closely related to the debt that man owes his Creator.¹⁸ Considering the "origin" of man, Paine describes how God imbued man with a fundamental moral equality. All men are created with an equal capacity for virtue, and consequently "all men are born equal, and with equal natural right." The only distinction is the "good and the bad" that men achieve in the course of their lives. The moral potential afforded man, is

¹⁶ Hamilton, 1775, p.63.

¹⁷ Hamilton, 1775, pp.61-2.

¹⁸ On the reception of *The Rights of Man* in America, see, Jack P. Greene, "Paine, America, and the "Modernization" of Political Consciousness," Political Science Quarterly 93, 1 (Spring, 1978), and Eric Foner, Tom Paine and Revolutionary America New York. Oxford University Press. 1976.

one of the greatest of all truths, and of the highest advantage to cultivate.

By considering man in this light, it places him in a close connection with all his duties, whether to his Creator, or to the creation of which he is a part; and it is only when he forgets his *origin*, or, to use a more fashionable phrase, his birth and family, that he becomes dissolute.

The duty of man, he continues, “is plain and simple, and consists but of two points. His duty to God, which every man must feel; and with respect to his neighbour, to do as he would be done by.”¹⁹ The insistence with which Paine reminds us of the larger moral being of man beyond his discrete self, clearly indicates just how morally-imbued was this conceptual framework that incorporated rights.

We are further reminded of the robust content of natural law in Jefferson’s “Opinion on Treatises with France” of April, 1793. A memorandum written for his colleagues in Washington’s cabinet, Jefferson invoked natural law to support his contention that the treaties of alliance and commerce with France should be honored despite the anticipated declaration of war by the new French republic on Great Britain and the Netherlands.²⁰ In addition to quoting at length passages from Grotius,

¹⁹ Thomas Paine, *The Rights of Man*, 1776, in Michael Foot and Isaac Kramnick, ed., *Thomas Paine Reader* New York. Penguin. 1987, pp.216-7.

²⁰ Thomas Jefferson, *Opinion on Treatises with France*, 1793, in, John Catanzariti, ed., *The Papers of Thomas Jefferson* Princeton. Princeton University Press. 1992. Vol. 25, pp.597-8. See accompanying editorial notes for background detail.

Pufendorf, Wolf, and Vattel, the essay includes a brief discussion of how natural law concerning the nature of individuals can be applied to the relationship between nations. In explaining the content of this “moral law” as it applies to individuals, Jefferson highlights the “moral duties” to “which man has been subjected by his creator.” Indicating the moral dimension of man’s social existence, Jefferson explains how these “moral duties” exist “between individual and individual in a state of nature, accompany them into a state of society, accompany them into a state of society, and the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other.”²¹

Among specifically political writings the relationship between rights and duties is perhaps most clearly delineated in Theophilus Parson’s *The Essex Result* of 1778. A commentary on the weaknesses of the proposed Massachusetts constitution, the *Result* included extensive analysis of the principles of government. The clarity with which it engaged with philosophical principles and applied them to the practice of government, gave the document widespread renown as statement of astute political thinking.²² Acknowledging the outstanding quality of ideas presented in *The Essex Result*, J. R. Pole writes; “It would be difficult to find a clearer exposition of

²¹ Jefferson, 1793, pp.608-9.

²² One indication its renown was its use by the constitution-makers in New Hampshire to justify their revision of the constitution in 1784. See, Jere R. Daniell Experiment in Republicanism: New Hampshire politics and the American Revolution, 1741-1794 Cambridge. Harvard University Press. 1970, cht.3.

the essential Whig concept of the voluntary nature of both civil and political society.”²³

Of particular interest from our perspective is the document’s unusually extended treatment of rights. Explaining the basis of legitimate political authority, Parsons undertakes a detailed review of how individuals in forming a “society” or a “body politic or State” part with certain rights but retain others. “Some of those rights are alienable, and may be parted with for an equivalent,” Parsons writes; “Others are unalienable and inherent, and of that importance, that no equivalent can be received in exchange.” Continuing, Parsons tellingly denotes the distinction between rights that are alienable and rights that are not as a matter of importance. Rights of “that importance,” he explains, are unalienable, and “are called the rights of conscience.” This leaves us with the question as to why the rights of conscience are of so fundamental importance that they cannot be alienated by the individual. Parsons immediately provides the answer.

We have duties, for the discharge of which we are accountable to our Creator and benefactor, which no human power can cancel. What those duties are, is determinable by right reason, which may be, and is called, a well informed conscience. What this conscience dictates as our duty, is so;

²³ J. R. Pole, Political Representation in England and the Origins of the American Republic New York. St. Martins Press. 1966, p.183. Pole adds that, “it is perhaps no great exaggeration to state that this document summarized the institutional ideas of the Whig-republicans when applying themselves to the domestic problems of constitutional government, no less effectively- if much less poetically- than did the Declaration of Independence on the problem of the Empire.”

and that power which assumes a controul over it, is an usurper; for no consent can be pleaded to justify the controul, as any consent in this case is void.²⁴

The conscience is therefore of such importance, and hence inalienable, because it is the means by which we are able to determine the duties that we owe our Creator. The right of conscience, like all other rights, is derivative from these duties. Unlike other rights, however, the right of conscience is indispensable to the discharge of this duty, and thus cannot be parted with by the individual.

Notwithstanding the importance of these accounts, it remains the case that much of the treatment of rights in political discourse omitted any reference to duties or a larger moral framework. Why then did Americans often use this formulation, which, if my account is correct, left out the fact that these claims were derivative from a larger moral duty? Part of the answer may simply lie in the rhetorical effectiveness of this formulation. Considering the distinctly *political* context of these writings, it may have been rhetorically more forceful to point out that their just claims were being denied than that their ability to perform a duty was being taken out of their hands. Another angle on this might be that in this respect the American discussion of rights simply reiterates a tendency common to the early modern literature on natural law. Locke's presentation of rights in the *Second Treatise*, for example, was squarely set within an argument that asserted natural equality against patriarchal

²⁴ Theophilus Parsons, *The Essex Result*, 1780, in, Hyneman and Lutz, 1983, p.487.

theories of the divine right of kings.²⁵ The consequence of this focus on natural equality was a stress on man's natural freedom and its associated rights. As Locke put it, natural equality "consists with the Equality, which all Men are in, in respect of Jurisdiction or Dominion one over another...being that equal Right that every Man hath, to his Natural Freedom, without being subject to the Will or Authority of any other Man."²⁶ But this emphasis on rights was simply a function of the argument at hand, and as we have seen, and did not detract from the larger moral context of his formulation. Thomas Elrington, in his comments on the text of his eighteenth century annotated edition of Locke's *Second Treatise*, sheds some light on this.

Throughout the whole of this treatise of Locke's, the attentive reader will perceive that his zeal for liberty has very frequently led him to speak of men's *duties* as *rights* which they might exercise or renounce at pleasure.- There are few distinctions less attended to, and yet perhaps few more important than that between those rights which can be renounced at pleasure and those which cannot. Of the latter sort, it is obvious, are all those which are connected with duties.²⁷

²⁵ Locke uses Sir Robert Filmer's *Patriarcha* in making his argument against patriarchalism.

²⁶ Locke, *Two Treatises*, 1690, II, § 4.

²⁷ Thomas Elrington, ed., John Locke Second Treatise Dublin. 1798, p.291.

Dugald Stewart offers further testimony that these moral powers were often described as rights even when they were derived from underlying duties. Commenting on the discipline of moral philosophy as it had developed in the seventeenth and eighteenth centuries he describes how ethics may be stated either as a system of duties or as a system of rights. Whichever of these is adopted, Stewart insists, the system of ethics is substantially similar. The “moralist” tends to formulate ethics as a system of “duties,” the “lawyer” as a system of “rights.” “It is this last view that the writers on Natural Jurisprudence (most of whom were lawyers by profession) have in general chosen to adopt, although, in the same works, both views will be found to be not unfrequently blended together.”²⁸

If these contemporary comments offer a plausible explanation for this anomaly it is nonetheless important to remember that the omission of duty does not necessarily pose a conceptual problem to the argument presented here. A right can imply a duty in the sense that if one has a duty to perform X, one also has a right to do X. To assert a right to do X therefore need not necessarily be understood in the permissive sense; i.e. that one has a right to do X and a right *not* to do X. The use of ‘right’ to refer to this restricted power is thus not logically flawed or contradictory; it is simply a logically weaker way of explaining the situation than would be the case if the limits on this right were spelled out. An analogous example would be to say there are *at least* three people in a room instead of saying there are *exactly* three persons when you know that there are *exactly* three persons in the room.²⁹ Within

²⁸ Stewart, 1815, Vol. 1, p.175.

²⁹ Morton White, The Philosophy of the American Revolution New York. Oxford University Press. 1978, pp.145-49.

the particular circumstances of the use of rights such an economy of words may have been perfectly acceptable and have conveyed its full meaning without ambiguity.

Chapter 5: Debates on political representation

To gain a further indication of how rights were conceived at the founding, I now turn to examine debates on representation. These debates are helpful in understanding more fully the conception of rights to the extent that they illuminate principles that are closely related to the ethical or ‘social’ dimension of rights theory we are considering. As we have seen, a central aspect of rights theory is its conception of the ontological status of the individual, and this, in turn, determines how the relationship between the individual and the community is understood. From the perspective of Hobbes, for example, the ascription of an atomistic logic to the individual means that society and government are understood in terms of agreement between self-interested individuals. These social artifacts are seen as simply conveniences to secure one’s own personal liberty. For Pufendorf, for whom the ontological being of the individual is broader, the basis for these social artifacts is quite different. Because the individual is charged with cultivating the human potential of others as well as his own, the responsibilities he delegates to government are that much more expansive. We are left with two quite different notions about the role of government that would be expected to generate quite different expectations about the personal requisites to qualify to participate *in* government. Assuming that natural law acted as a backdrop in this way, we would expect political thinking influenced by Pufendorfian theory to insist on a more robust civic standard for political participation than political thinking influenced by the Hobbesian paradigm. Debates on constitutional provisions regarding representation and suffrage, thus,

might illuminate the type of moral theory implicit in political discourse and give us some insight into the underlying theory of rights.

It is important to note here, that in adopting this methodological approach I am not taking an idealist position in regards to the influence of ideas on political practice. I am not claiming, for example, that evidence of one moral theory or another suggests that a particular principle necessarily served as a *motive* for the action concerned. For example, a participant in a town meeting debate may well be motivated by selfish considerations when he or she ascribes a certain moral end to government as a reason to retain property qualifications for suffrage. In this sense principles can be raised *ex post facto* to invest political behavior with legitimacy. Even when principles are used in this way and thus cannot be considered to act as motives, they nonetheless function as a critical argumentative resource. Principles in this sense provide a rationale for a particular action that is critical for gaining support. Accordingly, political actors draw upon the stock of accepted principles to justify the particular action they favor. They may be innovative in their use of these principles, applying them in unconventional ways and to unconventional ends, but they are nonetheless likely to attempt to connect their proposals with this stock of legitimacy. To the extent that political actors make this connection, political discourse will be related in some way to underlying principles.¹

Using this approach then, I examine debates on the scope of suffrage from the founding through the early nineteenth century. Specifically I focus upon debates

¹ For more on this approach to the relationship between principles and political action, see Quentin Skinner, "Some problems in the analysis of political thought and action" in James Tully, ed., Meaning and Context Princeton. Princeton University Press. 1988.

that addressed whether property restrictions should be maintained in the new constitutions in form of property qualifications for suffrage. Discussions on this issue surrounded the framing of the new constitutions at the founding and continued intermittently through the state constitutional conventions that abolished these restrictions in the early nineteenth century.

Examining these debates over the course of this extended period helps to put into perspective the distinct features of political discourse of the founding. What is particularly brought into sharp relief are the very different discursive features that characterize debate at the founding compared to the early nineteenth century. In the earlier period we see efforts at reform stymied by a widespread acceptance of a burdensome standard of eligibility. Proponents and opponents of reform alike seem to accept the legitimacy of a standard that requires the capacity to recognize and act on a common good that transcends private interests. Rather than reject the validity of this principle, reformers simply argue that its application errs in excluding the unpropertied from suffrage or representation. Property, they argue, is not a credible indication of virtue and the unpropertied are just as capable of demonstrating this quality as their fellow propertied brethren. Forced to reconcile their demands for inclusive participation with this requirement that all participants in the polity demonstrate a capacity for an exalted level of political competence, reformers found the going difficult. The efforts to remove this restriction on political rights have only limited success. In only three of the original thirteen states-- Pennsylvania, New Hampshire, and North Carolina (for members of the lower house)-- were property qualifications for suffrage abolished. All the other states retained some form of

property requirement, whether in terms of a freehold of certain acreage or value, or some value of personal property.

The debates that take place in the states in the early nineteenth century look quite different in contrast. Discussion in this later period is no longer preoccupied with the question of whether and how inclusive political participation can be reconciled with transcendent moral ends. Reformers instead seem to face the much less daunting requirement that unpropertied men are sufficiently respectful of civil liberty and private rights. From a preoccupation with the 'common good' and 'virtue' we see a wholly new emphasis on 'private happiness' characterize these debates. With the discursive obstacles to reform eased, the states undertake significant constitutional steps towards realizing an inclusive and egalitarian polity based on the principle of 'one man one vote.'

I begin my review of these debates by considering the historical context in which they were undertaken. By the time Americans turned their attention to constitution-making they were already well-versed in ideas about what constituted a legitimate relationship between government and constituent community. The logic of American opposition to British taxation during the imperial crisis had precipitated considerable debate regarding the basis of legitimate political authority. An insistence on the need for a close representative link between constituent community and government had been the distinctive thrust of American arguments throughout these debates. Thus, Americans embarked on the process of constitution-making beginning in 1776 having assimilated certain sympathies towards close representative links between constituent communities and government. These ideas

played an important role in debates on representation at the founding, as Americans attempted to implement Revolutionary principles in the creation of the new polities. The debates, accordingly, witnessed vying ideas about what was the primary concern in designing a system of representation; some argued that representation should be concerned with the ends of government, others, following the logic of Revolutionary thinking, argued that the a pressing need was to ensure that the relationship between government and constituent community was legitimate. In order to appreciate the confluence of ideas that characterized the subsequent debates on representation, we need to briefly consider this earlier perspective on representation that was developed during the imperial crisis.

The Stamp Act crisis and the development of a theory of representation as
“replication”

The attempt by Britain to levy taxes on the colonies in the Stamp act of 1765 triggered a lengthy and detailed consideration among Americans of the legitimate basis for political authority. The attempt by a legislature to tax a territory that had no formal representation in that body raised fundamental questions of political legitimacy for the colonists. Drawing on a long-standing notion within English constitutionalism that the people could only be taxed with the freely-given consent of their representatives, colonial writers cast the act as a violation of fundamental principles of sovereignty. As was suggested by one contributor to these debates,

Pennsylvanian John Dickinson, the issue was readily seen as a matter of individual self-government. If a man was not able dispose of himself and his possession at his own volition, it was asked, how could he be said to free? “Men cannot be happy, without Freedom; nor free, without Security of Property; nor so secure,” Dickinson wrote, “unless the sole Power to dispose of it be lodged in themselves; *therefore* no People can be *free* but where Taxes are imposed on them *with their own Consent*, given personally, or by their Representatives.”²

Rejecting this argument, British defenders of imperial policy claimed that legislative authority did not depend upon the actual representation of the community acted upon. These writers insisted that the Glorious Revolution of 1688 had invested the supreme legislature with an authority that was independent of any formal ongoing link with its constituent body. Following William Blackstone, they claimed that the Glorious Revolution had irrevocably entrusted to Parliament the sovereignty of the people. As Blackstone put it, the simple fact of a legal order required that there must be “a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. The revolution had thus vested this “supreme and absolute authority of the state,” in Parliament, the jurisdiction of which was “so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds.” Accordingly, Blackstone claimed that Parliament “hath sovereign and uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws,

² John Dickinson, *An Address to “Friends and Countrymen” on the Stamp Act*, 1765, in Paul Leicester Ford, ed., *Writings of John Dickinson*, Philadelphia. Historical Society of Pennsylvania. 1895. I, p.202.

concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal.” Parliament, Blackstone concluded, “can, in short, do every thing that is not naturally impossible; and therefore some have scrupled to call it’s power, by a figure rather too bold, the omnipotence of parliament. True it is, that what they do, no authority upon earth can undo.”³

Adhering to this doctrine of parliamentary sovereignty, English Stamp Act writers argued that all subjects of the British Crown were represented in parliament even if they did not enjoy a personal right of suffrage or actual representation for their place of residence. An “imaginary representation” thus existed, Soame Jenyns explained, for those “Copyholders, leaseholders, and all men possessed of personal property only,” as well as for the inhabitants of “Manchester, Birmingham, and many more of our richest and most flourishing trading towns” which send no members to Parliament. These subjects were as much “Englishmen” and hence subject to taxation as any other subject of the Crown, Jenyns insisted.⁴

Thomas Whately, an officer in George Grenville’s treasury department and the primary author of the Stamp Act, took a more sympathetic approach to the logic of the American argument but argued that its conclusions were nonetheless erroneous. Americans were right to point out the illegitimacy of taxation without consent, he argued, but they were wrong to assume that the colonies were not

³ William Blackstone *Commentaries on the Laws of England*, 1765-69. Reprint. Chicago. Chicago University Press. 1979, Vol. 1, pp.48-49, 143, 156-57.

⁴ Soame Jenyns, *The Objections to the Taxation of Our American Colonies... Considered*, 1765, in Bernard Bailyn, Pamphlets of the American Revolution, 1750-1776 Cambridge. Harvard University Press. 1965.

represented in the House of Commons. To be sure, he wrote, the colonists did not “chuse the Members of that Assembly”; but then again, neither did “Nine Tenths of the People of *Britain*.” In England, the right to vote was “annexed to certain Species of property, to peculiar Franchises, and to Inhabitaney in some particular Places.” Colonists, he contended, were “in exactly the same Situation: All *British* Subjects are really in the same; none are actually, all are virtually represented in parliament.” Because members of Parliament represented the entire British empire, not particular constituencies, “the Colonies and all *British* Subjects whatever, have an equal Share in the general Representation of the Commons of *Great Britain*, and are bound by the Consent of the Majority of that House.”⁵

Such a doctrine of “imaginary” or “virtual” representation was an anathema to the conception of the relationship between government and constituent community that was articulated by American writers. Characteristic of their arguments was a powerful sense of the right of constituent communities to invoke control over the political authority that was exercised on their behalf. Political authority should be viewed as a trusteeship they typically argued. Sovereign individuals had delegated power to government, and thus the constituent community that these individuals comprised retained a right to exercise control over that authority. As James Otis explained (citing Locke) in the widely circulated *Rights of the British Colonies*, legislative power was “only a fiduciary power, to act for certain ends, there remain

⁵ Thomas Whately, *The Regulations lately Made Concerning the Colonies and the Taxes Imposed upon Them, Considered*, 1765, in Edmund S. Morgan, ed., *Prologue to Revolution* Chapel Hill, University of North Carolina Press. 1962.

still ‘*in the people, a supreme power to remove, or alter, the legislative when they find the legislative act contrary to the trust reposed in them.*’”⁶

As the power held by government remained the people’s and was nothing more than a substitute for the people exercising it themselves directly, it followed that the people had the right to some form of ongoing input into the exercise of this power by government. Without such input from the constituent community, political authority would be illegitimate. Otis, accordingly, found the imposition of taxes by a legislature in which the colonists had no representation, “absolutely irreconcilable” with this standard of political legitimacy.⁷ The absence of any such representation in Parliament, Otis wrote, made the Stamp Act a “breach of the law of nature,” which deprived the colonists of “one of their most essential rights as freemen.” Continuing, he asked, “For what one civil right is worth a rush after a man’s property is subject to be taken from him at pleasure without his consent? If a man is not his *own assessor* in person or by deputy, his liberty is gone or lays entirely at the mercy of others.”⁸

This argument that the principle of popular sovereignty implied a right of a community to active consent over a political authority, was a familiar theme in these American writings. Daniel Dulany, for example, followed the example of Otis in his rejection of the British claim that Parliamentary taxation of the colonies was justified by virtue of the colonists’ “virtual” representation in the House of Commons. The legitimacy of Parliament for the inhabitants of Britain, Dulany explained, was based

⁶ James Otis, *Rights of the British Colonies Asserted and Proved*, 1764, in Bailyn, 1965, p.434.

⁷ Otis, 1764, p.440.

⁸ Otis, 1764, p.447.

on the fact that they had a share in that council; “that they appoint the members who constitute one branch of it, whose duty and interest it is to consult their benefit and to assert their rights.” But in contrast, Dulany added, “the inhabitants in the colonies have no share in this great council. None of the members of it are or can be of their appointment, or in any respect dependent upon them. There is no immediate connection; on the contrary, there may be an opposition of interest.”⁹

The lack of an “immediate connection” between the colonies and the institution that attempted to legislate over them, was also raised by the anonymous “Plain Yeoman.” Examining the claim that the colonies were in fact represented in Parliament, the “Yeoman” contrasted the situation of the unfranchised in Britain with the colonists in America. Unlike the situation in the colonies, the “Yeoman” insisted, the unfranchised inhabitants of Britain could legitimately be considered to be represented by their many fellow inhabitants of Britain who did enjoy the right of election. Thus, even if it was “unquestionably true” that the House of Commons did “actually represent” all of the inhabitants of the British Isles including those who did not enjoy the right of suffrage, it did not follow that the people in the colonies were also represented. It was plainly misguided to consider, the “Yeoman” argued, that Parliament similarly represented “a vast dominion at three thousand miles distance” where the inhabitants “have not a single voice,” despite the fact that many would enjoy that right were they in Britain.¹⁰

⁹ Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of raising a Revenue, by Act of Parliament*, 1765, in Bailyn, 1965, p.632.

¹⁰ *A Letter from a Plain Yeoman*, in Morgan, 1962, p.75.

These writings on representation amounted to an emphatic endorsement of actual consent and the importance of a close representative link between constituent community and government. Given that government belonged to the people, and that its purpose was to exercise power in its stead, it was commonly concluded that representatives should replicate as far as possible the will of their constituents. Accordingly, legitimate representation, these accounts claimed, required a close bond or sympathy between legislators and constituents. John Adams aptly captured the logic of replication in an essay opposing the Stamp Act. One of the key principles of the British constitution, he claimed, was its embodiment of popular power.

This popular power, however, when the numbers grew large, became impracticable to be exercised by the universal and immediate suffrage of the people; and this impracticability has introduced from the feudal system an expedient which we call representation. This expedient is only an equivalent for the suffrage of the whole people in the common management of public concerns. It is in reality nothing more than this, the people choose attorneys to vote for them in the great council of the nation, reserving always the fundamentals of the government, reserving also a right to give their attorneys instructions how to vote, and a right at certain, stated intervals, of choosing a-new; discarding an old attorney, and choosing a

wiser and better.¹¹

Representation, Adams argued, was nothing more than an expedient substitute for the people ruling themselves in person. With representatives serving the people in this way, it follows that they should be subject to whatever direction ensures that they replicate what the people would do themselves where they present.

First wave of constitution making- 1776-1784

This idea of representation as a replication of the will of the community became an important focus of political writings once the British lost their hold over the colonies and the newly independent states began to make efforts to reestablish political authority. Informed by the logic of individual sovereignty, Americans laid claim to a very possessive relationship between the sovereign community and the authority it entrusted to government. Because individuals had, in effect, delegated some of their *own* capacities of self-government to the civil authority it was felt that representative assemblies should attempt to replicate the will of the community they acted for. Indeed this substitute function was presented as a reason why legislative bodies

¹¹ John Adams, "The Earl of Clarendon to William Pym," *Boston Gazette*, Jan. 27, 1766, in Charles Francis Adams, ed., Works of John Adams, Freeport, NY. Books for Libraries. 1967. Vol.3, pp.480-81.

should not be distrusted. Seeking to allay fears concerning the delegation of natural authority to government, one New Hampshire pamphleteer pointed to this quality of representation. “For what matters it,” he asked, “whether they themselves [the people] execute the law, or appoint persons to do it in their stead, since these very persons, being only creatures of their own appointment, will be induced by interest to act agreeable to their will and pleasure.”¹²

This understanding of representation as serving to literally “re-present” the people in government was prominent in discussion of the substantive form that the relationship between legislator and constituent should take. Theophilus Parsons’s account in the *Essex Result* of the need for proportionate control over political authority is instructive in showing the ends to which the logic of individual sovereignty was put.

as every individual, in entering into the society, parted with a power of controuling his natural rights equal to that parted with by any other, or in other words, as all the members of the society contributed an equal portion of their natural rights, towards the forming of the supreme power, so every member ought to receive equal benefit from, have equal influence in forming, and retain an equal controul over, the supreme power.

¹² *The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural Freedom*, 1776, in Hyneman and Lutz, 1983, p.391.

This notion of representation as replication of the sovereign community was evident in the commonplace use of “miniature” as a metaphor to describe the ideal of representation. John Adams wrote in *Thoughts on Government* that a representative assembly “should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them.”¹³ Invoking the very same metaphor, Parsons in the *Essex Result* declared, “The rights of representation should be so equally and impartially distributed, that the representatives should have the same views, and interests with the people at large. They should think, feel, and act like them, and in fine, should be an exact miniature of their constituents.”¹⁴ Similarly, Thomas Paine wrote in the widely read *Common Sense* that representatives “are supposed to have the same concerns at stake which those have who appointed them, and who will act in the same manner as the whole body would act were they present.”¹⁵

Such a close-knit relationship between government and community was often justified by appealing to its effectiveness in ensuring government adequately reflect the sovereign community in its activities. Citing a popular maxim, one anonymous New Hampshire writer appealed for close representation by claiming that the people

¹³ John Adams, *Thoughts on Government*, 1776, in Hyneman and Lutz, 1983, p.403.

¹⁴ Parsons, 1780, in Hyneman and Lutz, 1983, p. 497.

¹⁵ Thomas Paine, *Common Sense*, 1776, in M. Foot and I. Kramnick, ed., *Thomas Paine Reader* Penguin Books, New York. 1987, p.68. See also, the return by the town of Beverly in response to the proposed Massachusetts constitution of 1778 described how the “*Body to represent the People...must be a miniature of the whole,*” and called for an assembly that would “be a fair and exact Epitome of the whole People...” in Oscar Handlin and Mary Handlin, ed., *The Popular Sources of Political Authority* Cambridge. Harvard University Press, 1966, p.293.

“best know their wants and necessities and therefore are best able to govern themselves.”¹⁶ Following this logic, writers often argued the merits of this type of representation by describing how it would ensure the replication of local interests in government. Representatives chosen “from among our selves, well known in our Towns, and not Strangers,” one Connecticut writer insisted, “are of our own choosing, and have the same common Interests with us, so interwoven, that they can’t be separated.”¹⁷

In addition to facilitating a positive correspondence between government and community, close representation was also seen as a means of restraining government. From this perspective representation served as a defensive device that offered protection against tyrannical behavior by government. Typical of this posture toward representation, the author of the “*The People the Best Governors*,” wrote,

The freemen give up in this way just so much of their natural right as they find absolutely convenient, on account of the disadvantages in their personal action. The question now arises, how far they can with safety deposit this power of theirs into other hands? To this I answer: That where there are representatives who hold the legislature, their power ought never to extend any farther than barely the making of laws

¹⁶ *The People the Best Governors*, 1776, p.391.

¹⁷ Stephen White *Connecticut Election Sermon*, 1763, in John Phillip Reid, The Concept of Representation, Chicago. University of Chicago Press. 1989, p.38.

Pursuing this logic further, the writer concluded that, “The more simple, and the more immediately dependent...the authority is upon the people the better, because it must be granted that they themselves are the best guardians of their own liberties.”¹⁸

On this basis, many commentators argued in favor of concrete mechanisms that would allow constituents to maintain a tight control over representatives. For example, one South Carolinian concluded that, “An ample Representation in every Republic, constitutes the most powerful Protection of Freedom, the strongest Bulwark against the Attacks of Despotism.” Since corruption- “that almost invincible Assailant of the best formed Constitutions”- could never arrive at “such irresistible Strength in a *full* as in a *nearly empty House*,” a large number of representatives would provide an effective safeguard against tyranny. Using a similar logic one Massachusetts pamphleteer argued in favor of frequent elections, declaring that, “Our safety, doth not consist so much in having our legislative body chosen from among ourselves, as it doth in reserving a power in the good people to correct and detect misdemeanors in government.”¹⁹ Similarly, Thomas Paine, in *Common Sense*, warned of the dangers of representatives holding “an interest separate from the *electors*.” To avoid this problem Paine recommended frequent elections, “as the *elected* might by that means return and mix again with the general body of the

¹⁸ *The People the Best Governors*, 1776, pp.392, 293.

¹⁹ Quoted in Marc W. Kruman, *Between Authority and Liberty* Chapel Hill. University of North Carolina Press. 1998, p.82.

electors in a few months, their fidelity to the public will be secured by the prudent reflection of not making a rod for themselves.”²⁰

Framed in these possessive terms of the sovereign community’s right to exercise control over its delegated authority, such demands exerted a powerful force in the framing of the new constitutions. These pressures, however, faced resistance from concerns that were raised regarding the ends of government. Levi Hart, a prominent clergyman in New England, aptly captures the typical thrust of these concerns. “As the good of the public is the end and design of all good laws and rules, established in a well regulated society,” he wrote,

so they must be enacted by the public, i.e. by the wisest and best men in the society, appointed by the body for this purpose.- Men who best understand the public good, and have a common interest with the body, and who are above the narrow pursuits of private interest...None therefore but the representatives of the whole body, in whom as far as possible, the interest of all ranks is contained, are proper to make laws for the regulation of society. For the same reason, those who are to execute the laws, should be appointed in such a manner, and by such authority, as in the best possible way secures their attachment to the public good.²¹

²⁰ Paine, 1776, p.68.

²¹ Levi Hart, *Liberty Described and Recommended: in a Sermon Preached to the Corporation of Freemen in Farmington, 1775*, in Hyneman and Lutz, 1983, pp.307-8.

Hart impressed upon his audience the need to ensure that those given the responsibility of exercising political power reflect those refined ends for which government is instituted. Those who undertake political responsibilities, Hart insists, have to “understand” and have a “common interest” with the public good, defined as a quality that transcends “the narrow pursuits of private interests.”

This identification of civic eligibility with a commitment to a transcendent public good was a familiar theme in debates on the scope of representation and suffrage. Echoing Hart, Parsons wrote in *The Essex Result* of the need for political officeholders to embody knowledge of the “true interest” of the state. Such a refined quality, he wrote, would only be evident among men of “education and fortune.” “From gentleman whose private affairs compel them to take care to their own household, and deprive them of leisure,” Parsons insisted, “these qualifications are not to be generally expected.”²²

The currency of this standard of civic eligibility was no more evident than in its use as the standard justification for property qualifications in the state constitutions. Virginia provided the first formulation in its Declaration of Rights of 1776, and subsequently Delaware, Maryland, Pennsylvania, and Vermont adopted the same wording in their constitutions: “All men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage.”

The differences related to this principle that arose in debates did not generally dispute its legitimacy but rather focused on how it should be properly applied. Thus

²² Parsons, 1780, p.491.

in Virginia, Jefferson and Edmund Pendleton disputed what constituted appropriate evidence of “Political Attachment.” Pendleton defended the property qualifications incorporated in Virginia’s new constitution.

Those of fixed Permanent property, who cannot suddenly remove without injury to that property or Substituting another proprietor...alone I consider as having Political Attachment. The persons who when they have produced burthens on the State, may move away and leave them to be born by others, I can by no means think should have the framing of Laws.

Jefferson countered that he could not consider any man with a family or household as having insufficient attachment to the community. “Take what circumstances you please as evidence of this, either the having resided a certain time, or having a family, or having property, any or all of them.”²³

These distinct concerns-- for ‘replication’ on the one hand and for ‘refinement’ on the other-- came into conflict in the debates that surrounded the framing of the new constitutions in the states. Calls for close and proportionate representation were typically countered by objections that such a close mapping of constituent communities in government would simply reproduce popular prejudices and impair the quality of decision-making. The dispute in New Hampshire over a plan of representation to replace the provisions of the interim constitution of 1776 is particularly instructive on this pattern of argument. The plan recommended by the

²³ Edmund Pendleton to Thomas Jefferson, Aug. 10, 1776, in William Boyd, ed., Jefferson Papers New York. Library of America. 1982. I, p.489.

New Hampshire convention proposed to replace the election of members to the lower house by individual towns with county conventions of town delegates. Indirect election of representatives at a regional level would therefore replace direct election by towns. Illustrating the impulse that favored close representation, "A True Republican" voiced his opposition to the proposal.

An inevitable consequence of adopting the present plan, is that an attention to the interest of particular towns, which now prevents members from forming themselves into parties, will be forgotten, and the members of each county will form an alliance among themselves; the interest of one county will be opposed to that of another, and the most numerous and powerful will command the suffrages of the whole. This mischief, cannot take place where each member has the local attachment confined by the constitution to the particular town he represents...should the proposed plan be adopted, a dangerous avenue will be opened for introducing powerful parties. An objection even more powerful against this innovation, is that it deprives us of a privilege essential to freemen...the power of instructing our representatives.

Without such power to bind their delegates to positive instructions, he concluded, "representation would be but an empty sound."²⁴

²⁴ "A True Republican," in *New Hampshire Gazette*, Dec. 15, 1781.

“A Citizen of New Hampshire,” however, presented the alternative viewpoint. He argued that it was precisely this elimination of local attachments that would secure good government. Under the county plan, representatives “would learn to measure on a larger scale and to move in a nobler sphere.” As for instructions to representatives, a true representative of the people should be willing to disobey them and follow “the dictates of his own conscience and judgment, assisted by the arguments and debates” which his electors could not hear. If each representative felt bound by his instructions, he would be reduced to “nothing but a piece of clockwork, and the whole General Assembly one complete puppet show!”²⁵

These debates were most revealing, however, when advocates of ‘replication’ attempted to address the objections raised by their opponents. The willingness of reformers to accept the standard of civic eligibility raised by their opponents, provides a telling indication of the prevailing credibility of this principle. In *Four Letters on Interesting Subjects*, for example, the anonymous Pennsylvanian author insisted that a close relationship between representatives and constituents would in fact enhance rather than diminish the quality of government. Annual elections strengthened by a triennial exclusion, the author wrote, would provide “the best guard against the encroachments of power,” and “would greatly increase the circle of knowledge, make men cautious how they acted, and prevent the disagreeableness of giving offence, by removing some, to make room for others of equal, or perhaps superior, merit.”

²⁵ “A Citizen of New Hampshire,” 1781, in *New Hampshire Gazette*, Dec. 22.

The New Hampshire author of *The People the Best Governors* was even more explicit in accepting the rationale of the arguments made against an inclusive suffrage. Critics were right, the author wrote, in insisting on “social virtue and knowledge” as requisite qualifications for a representative. Where they erred, the author insisted, was their contention that property was an appropriate indication of this quality. The introduction of property as a necessary qualification would have a consequence quite opposite to that intended. “So sure as we make interest necessary in this case, as sure we root out virtue, and what will then become of the genuine principle of freedom?” Concluding, he warned, “This notion of an estate has the direct tendency to set up the avaricious over the heads of the poor, though the latter are ever so virtuous.”²⁶ Even if these political actors did not themselves appreciate the need for this civic standard, they seemed to have recognized the strategic value of making an argument in which their demands were reconciled with this standard.

Yet despite the efforts to meet these objections effecting a departure from existing practice proved difficult. In only three of the thirteen states-- Pennsylvania, New Hampshire, and North Carolina (for members of the lower house)-- were property qualifications for suffrage abolished. Seven states retained the existing burden of eligibility with no or only marginal modification, while three states eased the burden by reducing the property requirement or expanding the definition of personal estate that could be used to meet the requirement. There was even less evidence of reform regarding property qualifications for candidates. Ten of the states retained existing qualifications and introduced them for offices that had

²⁶ *The People the Best Governors*, 1776, p.397.

previously been subject to royal appointment. The extent of these qualifications ranged from simply a replication of the requirement for electors, to a substantially heavier burden. Maryland, for example, required a freehold of 50 acres or “visible estate” worth £40 for electors for the House, and £500 worth of real or personal property for candidates. Two states--New Jersey and Georgia-- reduced property qualifications for candidates (but in both cases the burden remained relatively stiff compared to other states). Only one state, Pennsylvania, abolished property qualifications for candidates.²⁷

If many Americans continued to hold reservations about granting suffrage to unpropertied men there was little doubt that it should be withheld from women, slaves and Catholics. For those involved in politics (nearly exclusively white men), these categories of people were considered altogether deficient of the “independence” and “right reason” required of political participation. Catholics were supposedly dependent because of their obedience to the pope and hence lacking in independent will.²⁸ And slaves by virtue of their legal status as property, were by definition considered to have no will of their own.²⁹ For women, the situation was somewhat more complex. Their traditional dependent status-- subordinate to their fathers as daughters and to their husbands as wives once married-- was usually the

²⁷ See Appendix for a list of property qualifications in first state constitutions and election laws.

²⁸ See, Joan R. Gundersen, “Independence, Citizenship, and the American Revolution,” *Signs* 13, 1. 1987, p.65.

²⁹ For a typical account of the exclusion of slaves from citizenship, see Parsons, 1780, p.497.

reason given as to why they were denied the vote.³⁰ Adams, for example, rationalized the exclusion along these lines. He argued that “generally Speaking, Women and Children have as good Judgment, and as independent Minds as those Men who are wholly destitute of Property: these last being to all Intents and Purposes as much dependent upon other, who will please to feed, cloath, and employ them, as Women are upon their Husbands...” However, even if women’s judgment was considered good (it was deemed sufficient to allow women to testify in court and under certain circumstances to hold property rights), it was often considered short of the standard required for political participation. A lack of rationality was thus additional grounds for disqualification. Making this point, Parsons in *The Essex Result* argued that women lack a “sufficient acquired discretion; not from a deficiency of their mental powers, but from the natural tenderness and delicacy of their minds, their retired modes of life, and various domestic duties. These concurring,” he concluded, “prevent that promiscuous intercourse with the world, which is necessary to qualify them for electors.”³¹

³⁰ This presumption that adult women would be married provided a loophole that widows could potentially exploit. Propertied widows in New Jersey invoked the right to vote on the basis of this ‘independence,’ from 1776 to 1807. See, Richard P. McCormick, The History of Voting in New Jersey New Brunswick .Rutgers University Press., 1953, pp.97-111.

³¹ Parsons, 1780, p.497. Nonetheless, several contemporary commentators on this issue, including Adams himself, perceived how the logic of individual sovereignty could easily overturn these objections that denied women the vote. Responding to James Sullivan’s claim that “Every member of Society has a Right to give his Consent to the Laws,” Adams concluded his letter on a note of caution; “Depend upon it, Sir, it is dangerous to open so fruitful a source of controversy and altercation as would be opened by attempting to alter the qualifications of voters; there will be no end of it. New claims will arise; women will demand a vote; lads from twelve to twenty-one will think rights not enough attended to; and

The Federal Constitution

Many of the characteristic features of the debates in the states were again in evidence at the Federal Convention of 1787. Calls for organizing suffrage on a popular basis were a familiar refrain as were appeals to impose restrictions on these political rights to ensure the quality of decision-making in government. As was the case in the states, the main issue of contention in addressing this issue was not whether to reconcile these demands but how to do so. Overall, the majority of delegates demonstrated a willingness to modify the popular basis of the new federal government in the name of securing qualitative ends. Summing up this general consensus regarding representation, Roger Sherman of Connecticut declared, "The question is not what rights naturally belong to men; but how they may be most equally & effectually guarded in Society. And if some give up more than others in order to attain this end, there can be [no] room for complaint."³²

These concerns came to the fore of discussion in debates about the franchise for the lower house of the legislature. With the agreement by delegates that senators were to be chosen by the legislatures of the different states and that the President was to be chosen by an "electoral college" appointed by the state legislatures, discussion

every man who has not a farthing, will demand an equal voice with any other, in all acts of state." John Adams to James Sullivan, May 26, 1776, in Michael B. Levy, ed., Political Thought in America Lawrence. University of Kansas Press.1982, p.169.

³² Max Farrand, ed., Records of the Federal Convention of 1787 New Haven. Yale University Press, 1966. I, p.450.

of the franchise focused on elections to the lower house. What is interesting to observe in these discussions is the continuing efficacy of the idea that suffrage be restricted to ensure that, as Madison later put it the Federalist Papers, “the public voice...will be more consonant to the public good...”

The debate on the inclusion of a uniform property qualification for federal elections was initiated by the delivery of the report of the Committee of detail on August 6. The report proposed *not* to impose any uniform property qualifications but to leave the qualifications as they were for the lower house in each state. This decision was taken by the committee, James Wilson, one its members, explained, because of the difficulty of arriving at “any uniform rule of qualifications for all the States.” Gouverneur Morris, objected to the proposal, and moved to strike out the relevant clause “in order that some other provision might be substituted which would restrain the right of suffrage to freeholders.”³³ A number of fellow delegates expressed support for the principle that Morris had enunciated. John Dickinson, for example, declared that he considered freeholders “as the best guardians of liberty; And the restriction of the right [of suffrage] to them as a necessary defence against the dangerous influence of those multitudes without property & without principle.” Madison expressed a similar sentiment. “Viewing the matter on its merits alone,” he argued, “the freeholders of the Country would be the safest depositories of Republican liberty.” But Madison added a further concern to his account that captures the reservations many delegates held about imposing a uniform property qualification. Madison feared that such a measure would arouse popular opposition.

³³ Farrand, 1966, II, p.201.

“Whether the Constitutional qualifications ought to be a freehold, would with him depend much on the probable reception such a change would meet in States where the right was now exercised by every description of people.”

The general tenor of opinions raised on this matter reflects this mixture of principle and expediency. Delegates seem to have accepted the merit of property qualifications yet feared the consequences of imposing a uniform federal standard. As Oliver Ellsworth from Connecticut put it, those who already enjoyed the right of suffrage would “not readily subscribe to the National Constitution, if it should subject them to be disfranchised.” The final decision not to impose any uniform qualification and to leave the qualifications as they were for the lower house in each state, was thus more a matter of expediency than a matter of principle. Telling in this regard is the fact that no one at the convention proposed that the federal suffrage be *wider* than those of the individual states.

The debate over qualifications for representatives shows a similar pattern. Unable to agree on any precise property requirement, the Committee of Detail proposed that the matter be left to the legislature to settle: “The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.” John Rutledge from North Carolina and Ellsworth, two members of the committee, explained that their decision reflected the practical difficulties they encountered in setting a uniform requirement. First, as Rutledge stated, the members of the Committee had been “embarrassed by the danger on one side of displeasing the people by making them [the qualifications] high, and on the other of rendering them nugatory by making them low.” Second, according to Ellsworth,

the different circumstances of different parts of the United States and the probable difference between the present and future circumstances of the whole, render it improper to have either *uniform* or *fixed* qualifications. Make them so high as to be useful in the Southern States, and they will serve no purpose in the former.³⁴

Just as with qualifications for electors, delegates expressed their support for the principle but seemed to agree with the committee that establishing a uniform standard was impractical. Typical of the expressions of support for the principle was Charles Pinkney's declaration that "he thought it essential that the members of the Legislature...should be possessed of competent property to make them independent and respectable."³⁵ Cognizant of these difficulties but fearful of the political dangers of leaving the matter to legislative discretion, the convention decided to abandon the committee's proposal altogether and simply not include any mention of property qualifications for representatives in the federal constitution. Given that each state was likely to adopt its own property qualifications for candidates (as most had done for state elections), the delegates seemed to agree that it was pointless to risk the furor that would likely be aroused by imposing a uniform federal standard.

As we can see from these debates the absence of property qualifications in the federal constitution was not due to reasons of principle, but of expediency. In the

³⁴ Farrand, 1966, II, p.249.

³⁵ Farrand, 1966, II, p.242.

case of general suffrage this did not mean that delegates had intended for property qualifications not to operate in federal elections. They simply sought to avoid imposing a higher qualification than what was currently being employed in respective states for elections to the lower house of the state legislature. In the case of candidates this outcome reflected a sense that the varied circumstances of the states made a uniform qualification redundant. The delegates thus concluded that leaving the matter up to the states would be more likely to produce standards appropriate for each state as well as being more expedient in political terms.

Most importantly for our purposes, the reasoning offered in support of this principle suggests significant continuity with the conception of representation that influenced the design of state constitutions in the previous decade. Property qualifications were considered important because they were thought to indicate the likelihood of certain moral qualities considered important for political participation. Just as had been the case for the framers of many of the state constitutions, the delegates at Philadelphia desired to limit participation to those who were likely to exhibit “independence” and “principle” in their political involvement.

Early nineteenth century debates

The extent to which this robust language of civic eligibility distinguished political discourse at the framing of the federal constitution and the first state constitutions is brought into sharp relief by the argumentative form that the debate on representation assumes in the early nineteenth century. Concerted efforts in several states to

eliminate property restrictions on suffrage and representation lead to an intensive period of debate beginning in the late 1810s. Compared to the earlier period these debates suggest that the whole problematic within which representation was understood had been reconceived. Involvement in government was no longer ascribed the type of robust purpose that had been characteristic at the founding. Instead we see acceptance of a much more modest civic standard, that required only an appreciation of civil liberty and private rights from a potential participant. Summing up the ramifications of this conception, one participant in these debates announced that if an appreciation of liberty was the requisite standard, it followed that the scope of political rights should be broadly inclusive. For “every man knows whether he enjoys more or less liberty, or is exposed to few or greater burdens,” he explained. It was thus “unnecessary to be profoundly versed in government to appreciate all this,” since “one man feels results as well as another, although he may not clearly understand how these results are effected.”³⁶ Such a modest requirement for political participation suggests a corresponding revision of the purpose of government and its relationship to the individual. I argue that this new formulation suggests a substantial departure from previous ways of political thinking; specifically, the adoption of a fully-fledged atomistic ontology reminiscent of Hobbes.

Examining the debates at the constitutional conventions of Massachusetts in 1820-21 and Virginia in 1829-30, we can clearly discern the emergence of a new language of civic eligibility. The key issue in discussions that consider the merit of

³⁶ *Proceedings and Debates of the Convention of Louisiana*, New Orleans, 1845, p.175.

the use of property for suffrage is no longer whether and how the possession of property functions as an indication of some moral far-sightedness. Instead, debate focuses exclusively on whether this requirement serves to advance the discrete interests of members of the community; will the non-propertied be sufficiently respectful of private interests? Or alternatively, will they use their political power to infringe upon this private right? Participants in the earlier debates had of course also expressed concern about the possible threat to individual rights, including private property, posed by inclusive suffrage. But what distinguishes these debates in the 1820s is the exclusive focus on the *discrete* interests of individuals. Opponents of reform, for example, rather than focus on the contribution that property qualifications can make to a general moral good, pay exclusive attention to their use in ensuring the protection of private interests. Property, in turn, they argued, benefited society not by allowing the fulfillment of an objective moral good, but by allowing the fulfillment of the discrete happiness of the individual. Capturing this sentiment, Joseph Story at the Massachusetts convention of 1820-21, declared that property “conduces to the public good by promoting private happiness; and every man from the humblest, possessing property, to the highest in the State, contributes his proportion to the general mass of comfort.”³⁷

Proponents of reform similarly tended to agree with the idea that private happiness was the primary end of government. Where they differed with their opponents was on what was a just basis for securing this end. Reformers argued that

³⁷ Merrill D. Peterson, Democracy, Liberty, and Property: the state constitutional conventions of the 1820s New York. Bobbs-Merrill. 1966, pp.79-80.

individual liberty was the fundamental foundation for the pursuit of happiness. And because all men regardless of social condition had an equal right to liberty, all men had a just claim to participate in the community's efforts to secure this end. Thus, addressing the Massachusetts convention, George Blake of Boston decried the attempt to retain political privileges for propertied men. "Life is as dear to a poor man as to a rich men; so is liberty," he declared. "Every man, whose life and liberty is made liable to laws, ought therefore to have a voice, in the choice of legislators."³⁸

The debates in Virginia at the constitutional convention of 1829-30 offer further testimony to the currency of these ideas. Reformers and conservatives alike refer to an aggregate public good measured in terms of the happiness of discrete individuals rather than a unitary moral good. Arguing in favor of numerical representation, John R. Cooke of Frederick county, for example, declared "that the legitimate object of all Government, is to promote the greatest happiness of the greatest number; and that the perfect and entire protection of life, property, and personal liberty, constitutes the essential basis of the greatest happiness of the greatest number."³⁹

A memorial sent to the convention in support of manhood suffrage highlights how the logic of this argument tended to favor an inclusive definition of political citizenship. If the principal purpose of government was to allow the individual to pursue his own private affairs then all members of the community who were sensitive to this end could have a legitimate claim to a voice in the polity. Consistent

³⁸ Peterson, 1966, pp.63-4.

³⁹ Peterson, 1966, p.295.

with this logic the “Non-Freeholders” from the City of Richmond” argued that it was indeed true, as their opponents claimed, “that every citizen should be qualified for the proper exercise of all his rights, and the due performance of all his duties. But the same qualifications that entitle him to assume the management of his private affairs, and to claim all other privileges of citizenship,” they added, “equally entitle him, in the judgment of your memorialists, to be entrusted with this, the dearest of all his privileges, the most important of all his concerns.”⁴⁰ Recognition of one’s own private interests was no longer too narrow a perspective to justify the enjoyment of suffrage.

The change in the terms of argument did not go unnoticed by some participants in these debates. Philip Doddridge, a distinguished leader of the reform movement, issued a telling lament of how contemporary discussion had lost much of the concern for a civic ethos that had characterized earlier debates. Contributing to the debate on reform of representation, Doddridge expressed his “regret at some of the principles avowed by gentlemen on this floor, and the change which public sentiment seems to have undergone in this ancient Commonwealth.” He expressed his profound disappointment that some delegates now seemed to hold the opinion that “Government has no principle.” “The idea of patriotism and virtue even are exploded, and self-love and self-interest are the only springs of human action.” Concluding, he declared, “Against this, I solemnly protest. There was a time when this would not have been endured, when such language would have been offensive to republican ears...but now, Burke, Filmer, and Hobbes, judging from their arguments,

⁴⁰ Peterson, 1966, p.381.

have become the text books of our statesmen.”⁴¹ In evocative terms, Doddridge accurately identified how a language of self-government concerned solely with private interests had superseded a language of self-government concerned with a “common good.”

The dramatic contrast of these arguments with those of the earlier period is suggestive of the distinctively moral content of the concept of civic eligibility at the founding. The discussion of suffrage eligibility in the 1820s provides a vivid sense of how differently the relationship between the individual and the political community is conceived when seen through the lens of an atomistic logic. We get a much more limited sense of the individual’s responsibilities to others, and consequently, a much more open definition of suffrage eligibility. Debates at the founding, in comparison, convey a much more robust and morally-imbued sense of an individual’s responsibility to the fellow members of his community. The individual has a duty to adopt the perspective of a common good that transcends his discrete being. Involvement in the polity as political citizen, accordingly, requires a capacity to forgo one’s own discrete being in this way and assume this distinct moral identity.

Perhaps the most illuminating insight into this morally-bounded conception of the individual’s relationship with the community is offered by the *Address to the People* produced by the Massachusetts convention to defend its proposed constitution. Discussing the endorsement of religion in the original constitution of 1780, the *Address* examines the moral framework that the “eminent” framers had

⁴¹ *Proceedings and debates of the Virginia State convention of 1829-1830* Richmond. Richie and Cook. 1830, p.397.

considered men subject to. The framers, they write, appear to have considered religion

...as directory to every rational being, in the duties which he owes to the Creator of the universe; but leaving to every one to decide for himself, on the manner in which he shall render his homage, his accountability; and, secondly, as a social duty, prescribing rules to men in their intercourse with each other as members of the same family...They believed moral excellence to be no less the effect of example, and of habit, than of precept.⁴²

Seen alongside the conception of the political citizen that we have seen in discussion of representation and suffrage, we gain a clear sense of the surrounding framework of natural law and rights. Echoing the Pufendorfian formulation, we are presented with a picture of man enjoined to fulfill certain “social duties” in his relations with others. As we have seen it was but a short step to translate this conception of moral obligation into a robust standard of civic eligibility.

One question that needs to be addressed in concluding this account is how such a substantive conception of political citizenship can be reconciled with the distinctly modest expectations regarding human conduct that characterizes much of the discussion in the *Federalist*. The discussion of the federal constitution presented in the *Federalist* invokes a concern for the “defects” of human nature and propose a

⁴² Peterson, 1966, p.110.

constitution intended to mitigate its harmful consequences. As Madison famously put it,

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.⁴³

But such realism need not contradict the morally-grounded conception of citizenship we saw articulated in debates on representation. In evaluating the discussion of the *Federalist* we need to keep in mind the particular circumstances in which Madison, Hamilton and Jay writing as Publius were attempting to defend the proposed constitution. The constitution proposed to establish a significant governmental authority at the national level for a territory that only a decade earlier had consisted of provinces entirely independent of each other. Whereas Americans were familiar with locally-based political systems the idea of a significant trans-

⁴³ Federalist 51, The Federalist Papers Clinton Rossiter, ed., New York. Mentor. 1961, p.322.

continental political authority was something novel to them. Furthermore, the widely accepted notion that the small size of polities favored the control of political power made Americans naturally suspicious of any government whose sheer size would undermine these principles. How could a government with such necessarily limited contact with the communities it purported to represent hope to remain a responsible government?

It was with this concern in mind, forcefully raised by the Anti-Federalists, that we should view the arguments made in the *Federalist*. The authors of the *Federalist* framed their arguments specifically to address how the design of the constitution was equipped to address the unique problems a government spanning such a large territory faced. In this sense the emphasis on institutional mechanisms as opposed to the noble impulses of office-holders or electors, should not be taken as an indication of a comprehensive political vision. Highlighting these mechanisms and their ability to facilitate good government was probably the only conceivable argument that had credence for an audience so steeped in a tradition of local politics.⁴⁴

Moreover, even given these particular circumstances in which the *Federalist* was written it is important to note that Publius did give much greater importance to virtue than is often recognized.⁴⁵ A review of the full range of essays suggests a

⁴⁴ For a similar argument, see, Richard C. Sinopoli, The Foundations of American Citizenship; Liberalism, the Constitution, and Civic Virtue New York. Oxford University Press. 1992, pp.19-20.

⁴⁵ For interpretations that argue that the *Federalist* indicates an abandonment of virtue in favor of institutional mechanisms, see, Thomas L. Pangle, "The *Federalist Papers*' vision of civic health and the tradition out of which that vision emerges," Western Political Quarterly 39. 4. (Dec.

more measured position in which institutional mechanisms function as “auxiliary precautions” to a residual reliance on virtue. Madison’s discussion of the ultimate dependence of republican government on the character of the people in *Federalist* 55, for example, provides a fuller context to his discussion in *Federalist* 10 and 51.

As there is a certain degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.⁴⁶

1986), The Spirit of Modern Republicanism: the moral vision of the American founders and the philosophy of Locke Chicago. University of Chicago Press. 1988, cht. 8-10, Martin Diamond, “The Federalist,” in Morton J. Frisch, ed., American Political Thought: the philosophic dimension of American statesmanship New York. Scribner’s Sons. 1972, and Robert A. Dahl, A Preface to Democratic Theory Chicago. University of Chicago Press. 1956, cht. 1

⁴⁶ *Federalist*, 55, Rossiter, 1961, p.346. See also Madison’s speech at the Virginia ratifying convention, Jonathan Eliot, ed., The Debates in the Several Conventions on the Adoption of the Federal Constitution Philadelphia. J. B. Lippincott. 1907. Vol. 3, pp.536-37. For a similar argument, see, Lance Banning, “Some second thoughts on Virtue and the course of Revolutionary thinking,” in Terence Ball and J. G. A. Pocock, eds., Conceptual Change and the Constitution Lawrence. University of Kansas Press. 1987.

Madison's position regarding the contribution that citizens would make to government was thus neither unduly pessimistic nor unduly optimistic. While government neither required nor expected constant sacrifice from its citizenry, it did require an overall willingness to put the interests of the community ahead of purely selfish interests. The trick was to use institutional mechanisms, not as a substitute for virtue, but to neutralize negative impulses and to exploit whatever virtue was available within the political system. As Madison put it in *Federalist 57*,

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.⁴⁷

Accordingly, Publius presents the institutional checks and balances and filtering systems of representation in the constitution as mechanisms that help blunt the negative effect of factions and cultivate and magnify the scarce but indispensable pool of virtue within society. Discussing the merits of an extended republic, for example, Madison highlights the effect that large electoral districts will have on the quality of those elected. Large districts, Madison argues, will make it likely that only men with the “most diffusive and established characters” were likely to win

⁴⁷ Rossiter, 1961, p.350.

election. Such men, he continued, were likely to be “proper guardians of the public weal.” Summing up the overall benefits of the extended republic, Madison says, “Does this advantage consist in the substitution of representatives whose enlightened and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representative of the Union will be most likely to possess these requisite endowments.”⁴⁸

Once we grasp the complexity and full scope of the discussion in the *Federalist*, we are better able to appreciate how Publius’s position remained close to that expressed in the debates at the founding of the states and at the federal convention. Taking into account the particular circumstances of the proposed federal government, Publius presented an appropriately attenuated version of the civic language that had characterized earlier debates. Publius assumed that a civic ethos among citizens was necessary to sustain the national polity, but took appropriate precautions to maximize the presence of this moral quality in the working of the new national government. Publius’s commitment to the importance of this “common good” dimension of citizen participation, like the position taken in debates on representation at the founding more generally, suggests an underlying moral theory that much more closely resembles the Pufendorfian than the Hobbesian paradigm.

⁴⁸ Rossiter, 1961, pp.82, 83-84. See also, pp.217, 350-52.

Conclusion

In recent years rights theory has been subjected to a sustained critique that challenges its credibility as a moral theory. Rights talk has been accused of being a morally impoverished conceptual language that fails to provide a framework that can regulate and constrain the behavior of individuals in a desirable manner. These critics charge that rights is a theoretical language that is intrinsically individualistic in its moral content, and as such is singularly unsuited to the exigencies of a world in which individual claims must be moderated by sensitivity to the needs of others and of the community at large. Yet such an outright dismissal of rights as a vehicle of moral claims may well be injudicious. As the foregoing study suggests there may well be greater moral potential in this language than is often supposed.

The critique of rights has been most forthrightly developed in contemporary political theory. But in many ways the assumptions that underlay this critique are reflected in recent historiography of political thought at the American founding. Both the theoretical critique and these historical studies adopt a similar perspective on rights theory. This common perspective, I contend, is overly narrow and results in serious misrepresentation. For the theoretical critique the problem lies in assuming that the individualistic form of rights necessarily introduces an unwarranted egoism into moral claims. For the historiographical analysis, this problem is evident in the assumption that rights at the founding were understood in this atomistic form. Either way, these studies are marred by their common tendency

to conflate an ethical individualism with an *atomistic* moral content. As a result we are left with an impoverished view of rights as a moral discourse, both as it has been understood and how it could be understood within contemporary political discourse.

Within recent historiography this tendency has been evident in much of the literature that has focused on identifying the ideological traditions that influenced the Revolution and the founding. This historiography has been famously (or infamously) preoccupied with assessing the relative importance of two ideological traditions in particular, “republicanism” and rights-based “liberalism.” The contentious debate that has ensued has witnessed a bifurcation of scholarly interpretation into “republican” and “liberal” schools of thought. But regardless of which of these traditions is purported to be the more influential, the contributors to this debate invariably adopt a similar image of the relationship between them. We are presented with an image of ideological polarization, which reproduces some of the key assumptions about rights-based liberalism that underlie the contemporary theoretical critique. Thus we find interpretations from both sides of this debate presenting a binary image of “republicanism” and “liberalism” in which the former represents a politics associated with a unitary common good, the latter, a politics that emphasizes the private interests of the individual.

For proponents of the “republican” school asserting such a contrast between these paradigms serves to sharply delineate the substantive content of republicanism. These writers, for example, typically contrast a virtue-based republican paradigm

against an atomistic rights-based paradigm. Presented as conceptually incommensurate, it is suggested that republicanism dominated political thinking through much of this period, eventually being challenged by a nascent “liberalism.” J. G. A. Pocock, one of the leading proponents of the school, presents this image of ideological polarization between these two paradigms in particularly stark terms. The essential characteristic of republicanism or its conceptual offshoot, “civic humanism,” Pocock insists, is the precedence of a unitary common good over the private interest of the individual. The jurisprudence or rights tradition is presented as distinctly atomistic in contrast. Rights, Pocock writes, emphasized “the negative liberty to enjoy one’s life and goods in immunity from arbitrary actions” and amounted to a “possessive individualism.”¹ The distinction is made yet clearer by Pocock’s subsequent account of the relationship between ‘virtue,’ the mainspring of republicanism, and ‘rights.’ Virtue was in no way compatible with a language of rights, Pocock declares,

and if a full-bodied republic should be found emerging from the jurist’s state of nature, it was for the less than republican purpose of creating and transferring the rights which were all that a state of nature could generate.

¹ J. G. A. Pocock, “Virtues, Rights, and Manners,” Political Theory 9, 3. (August 1981), p.361. See also, Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition Princeton. Princeton University Press. 1975, and, Pocock, “The Machiavellian Moment Revisited” Journal of Modern History 53, 1 (March 1981), esp. pp.69-70.

Populism, therefore, which arose from investing a *populus* with *dominium, jus*, and *imperium*, was linguistically and politically distinct from republicanism, which arose from investing them with *virtus*.²

Echoing the charge made by the “new communitarians” within contemporary political theory, Pocock is adamant that a language of rights cannot support a perspective that transcends the discrete individual.

Gordon Wood, another leading proponent of the “republican” school, depicts these paradigms in similar terms. Wood contrasts a republicanism premised on “the sacrifice of individual interests to the greater good of the whole” with a rights-based “science of politics” premised on “self-interest and personal freedom.” By Wood’s account, the ratification of the federal constitution saw the displacement of “classical republicanism” by this emergent “liberal tradition.” Instead of defining the common good in unitary terms it was increasingly defined as the aggregate of the private interests of individuals. Likewise, government no longer depended upon the “self-sacrifice” of individuals to hold it together; instead, Americans endorsed a model of government that rested on “self-interest.”³

The picture of a morally-imbued ‘republicanism’ facing off against an atomistic ‘liberalism’ is repeated in the accounts offered by proponents of the

² Pocock, 1981, p.364.

³ Gordon S. Wood, The Creation of the American Republic, 1776-1787 New York. W. W. Norton and Company. 1969, pp.53-57, 562, 606-615.

“liberal” school. In her otherwise sophisticated rejoinder to the “republican” school, Joyce Appleby, for example, presents a similar account of mutually exclusive ideological paradigms. Classical republicanism was distinguished from “liberalism,” Appleby writes, by the priority it gave to a unitary common good over the private interest of the individual. “It was the capacity of men to rise above personal interest that made republics...possible.” In stark contrast, she writes, “liberalism” focused upon “personal freedom” and “self-determination.” “Instrumental, utilitarian, individualistic, egalitarian, abstract, and rational,” Appleby concludes, liberalism was “everything that the classical republican concept was not.” And once this “liberal” conception of abstract rights had taken root in the new republic its “fundamentally incompatibility with the venerable classical tradition” was “made starkly apparent.”⁴

But the assumption that rights embodied this atomistic form may in fact be flawed. Through the course of the foregoing study we have seen how rights at the founding were linked to certain objective moral ends that projected the individual out

⁴ Joyce Appleby, Capitalism and a New Social Order: the Republican vision of the 1790s New York. New York University Press. 1984, pp.16-22. See also, Appleby, “Republicanism in Old and New Contexts,” William and Mary Quarterly 43 (1986). For other examples of this portrayal of liberalism and republicanism by exponents of the “liberal school,” see Kramnick’s contrast of the republican “*homo civicus*” against the liberal “*homo oeconomicus*.” Isaac Kramnick, “Republican Revisionism Revisited” American Historical Review 87 (1982) p.663, and Diggins’s account in, John P. Diggins, The Lost Soul of American Politics: virtue, self-interest, and the foundations of Liberalism Chicago. University of Chicago Press. 1984, cht.1, esp. pp.20-23.

of his discrete being and made him a part of a larger moral community.

This 'social' dimension gave rights a moral power not simply to preserve oneself, but to realize the moral potential that God had furnished mankind. Using the powers that rights provided, human individuals were expected to preserve and nurture this potential in oneself as well as in others. Such a formulation of rights is clearly at odds with the notion that Americans at the founding employed an ontological atomism in their use of rights. Rights in this Pufendorfian sense enjoined the individual to fulfill certain moral ends that were not reducible to the *private* interests of the individual.

By better appreciating the complexity of the rights tradition in this way we may be able to overcome some of the enduring problems that has afflicted recent historiographical debate. One such problem is the difficulty encountered in explaining the apparently harmonious coexistence of republican and rights languages within political discourse of the time. The absence from the historical record of postulated "god and magog" ideological battles between liberals and republicans has caused confusion among contributors to this debate. Appleby, for example, writes that these paradigms were "so at odds" that "it is hard to understand how they could have coexisted in the same political discourse." Lance Banning, another exponent of the "republican school," echoes this sentiment commenting on the liberal/republican debate. He contends that attempts to decipher the meaning of the founding are compelled to recognize a fundamental discrepancy between prevailing scholarly assumptions and historical practice. While the liberal and republican traditions "*do*

begin with different assumptions about human nature,” and although “logically...they seem to us to clash,” nonetheless, Banning insists, historically they came into the English-speaking world together- and as allies, for the most part, rather than as foes.” Perplexed, he concludes asking, “How did early Revolutionaries and their eighteenth-century sources manage so coherently to blend traditions which seem so incompatible to us?”⁵

Yet this historical situation may be less puzzling when we recognize how artificial are the distinctions that modern historiography has imposed on these paradigms. Republicanism and rights are not so incompatible when we consider how the Pufendorbian conception of the latter related the individual to the good of the community as a whole. Thus the right to fulfill one’s duties to the political community could be readily interpreted in republican terms as corresponding to the virtuous behavior needed to support the republic. The logical connection of rights to duties made the language of rights compatible if not interchangeable with the language of republicanism. By shedding new light on the rights tradition in this way

⁵ Appleby, 1984, p.21, Lance Banning, “The Republican Interpretation: Retrospect and Prospect,” in Milton M. Klein, Richard D. Brown, and John B. Hench, eds., The Republican Synthesis Revisted: Essays in Honor of George Athan Billias Worcester. American Antiquarian Society. 1992, p.113. See also, J. G. A. Pocock, “Between God and Magog: the Republican thesis and the *Ideologica Americana*.” Journal of the History of Ideas 68 (1987), Gordon S. Wood, “Ideology and the Origins of Liberal America,” William and Mary Quarterly 3rd Ser. 44 (1987) p.634.

we may be able to overcome some of the obstacles that have stymied the historiographical debate in recent years.⁶

Whereas this conceptual myopia on rights arguably has weakened our understanding of political ideas at the founding, within contemporary political theory it has tended to encourage a rather narrow view of the conceptual possibilities of rights as a theoretical language. Typically this perspective is based on the assumption that the emphasis on individual moral volition, characteristic of rights, entails an absolute moral autonomy. Such an interpretation of the modern language of rights was given influential expression by Leo Strauss in his *Natural Right and History*. Strauss charged that the key feature of the modern natural law tradition was its shift from an objective standard that transcended individuals to a subjective standard vested in the individual. Defined in this way, natural law was no longer equated with what was 'right,' i.e. an objective standard of rectitude, but rather with the subjective preferences of the individual. As Strauss explains, this shift of emphasis made the individual and the ego "the center and origin of the moral world." Effectively emancipated from the bonds imposed by an objective moral order, man replaces "the

⁶ For recent attempts (from varying perspectives) to consider the commonalities between the republican and liberal traditions at the founding, see, Richard C. Sinopoli, "Liberalism, Republicanism and the Constitution" *Polity* 19, 3 (Spring 1987), James T. Kloppenberg, "The Virtues of Liberalism: Christianity, Republicanism, and Ethics in early American Political Discourse" *Journal of American History* 74, 1 (June 1987), Michael P. Zuckert, 1994, and Jean M. Yarbrough, *American Virtues: Thomas Jefferson on the Character of a Free People*. Lawrence, Kansas. University Press of Kansas. 1998.

rule of nature” with “the rule of convention.” “From now on...” Strauss concludes, “there are no natural forms, no intelligible ‘essences’: ‘the abstract ideas’ are ‘the inventions and creatures of the understanding, made by it for its own use.’”⁷

Yet as we have seen it is a mistake to assume that the rooting of moral volition in the individual that characterized early modern natural law was uniformly translated into an abandonment of objective morality. Though this position was indeed assumed by some theorists, most notably Hobbes, it was by no means either a necessary conclusion or one that was universally shared. A significant current arose within early modern natural law that attempted to avoid such a stark minimalism by injecting rights-claims with a ‘social’ dimension. According to this account the moral claims invoked in the form of rights were informed by an inner moral judgment that had the effect of restraining the individualistic claims on others. Though rights were powers possessed by the individual and exercised at his or her discretion, their connection with a broad range of obligations gave them a more substantial moral scope. Thus, in addition to invoking rights to protect oneself against harm, an individual could also invoke rights to claim acts of benevolence from others. For example, if I am in need I have a right to claim assistance from someone equipped to help me. In turn, the person performing that act of assistance has a right to gratitude and respect from the recipient of my services. By relating rights to acts of benevolence in this way, this tradition managed to articulate a sense

⁷ Strauss, 1953, pp.248-49. See also, pp. 182-3, 227.

of virtue without dispensing with the idea of rights as moral permissions.

Moral acts of benevolence were enjoined by natural law but ultimately their performance was left to the discretion of the individual.

By way of this inner moral judgment that informed one's own rights claims and the claims made by others on oneself, this tradition avoided the kind of subjectivity associated with the Hobbesian model. Rights claims were shaped and restrained by this moral capacity which served to link the individual with a 'social' moral being. Formulated in this way, rights were powers that both afforded choice to the individual *and* related the individual to what was 'right,' in other words, an objective morality beyond his or her discrete self.

Informed with this understanding of the early modern rights tradition we can see how it is mistaken to assume that the modern concept of rights was necessarily individualistic in its theoretical thrust. In the Pufendorfian formulation the characteristic emphasis on rights as permissive moral powers invested in the individual did not sever the relationship between ethics and an objective and substantial morality. Rights encompassed both a sense of moral autonomy and an objective moralism. Accordingly, making the individual the agent of moral action did not translate into a subjective individualism; the individual was the willing participant in an objective moral order not the legislator of his own moral world.

With their exercise voluntarily restrained by individual in this way, rights lose their affinity to egoistic individualism. The moral claims asserted by rights are restrained by this inner moral judgment. Framed in this way, moral autonomy and

self-direction allow the individual to apply to his relations with others the moral norms laid out in natural law. Far from giving license to absolute moral autonomy, this notion of self-direction simply allows the individual to willfully conform to God's design for humanity.

The communitarian critique of rights therefore errs in its assumption that the moral volition afforded the individual necessarily translates into a moral licentiousness. The point of moral volition was not to allow the individual to invent and pursue his own conception of the good, but to allow the individual to reconcile his own path to an objective moral order. Liberty was to be used to recognize and achieve the purpose God assigned to man. As Locke explains, the idea of absolute self-direction was quite at odds with this position.

A dependent intelligent being is under the power and direction and dominion of him on whom he depends and must be for the ends appointed him by that superior being. If man were independent he would have no law but his own will, no end but himself. He would be a god to himself and the satisfaction of his own will the sole measure and end of all his actions.⁸

To voluntarily restrain one's will according to the injunctions discerned in natural law was thus not a diminution of freedom, but rather a realization of its proper end.

⁸ John Locke, *Ethica*, Bodleian Manuscript, c. 28, fo. 141, cited in Tully, 1993, p.298.

Such a theory of rights may of course have limited application to the modern world. Its premise that morality is derived from a divine legislator independent of mankind may be difficult to reconcile with the post-Kantian principle that the authority of morals can only be found within human nature. Nonetheless, the theory of rights I have illuminated in this study does provide important insight into contemporary criticism of this language as a vehicle of moral claims. What is clear is that it is not rights per se that has sanctioned the absolute moral autonomy of the individual associated with hyper-individualism. Though the permissive side of this conception may indeed have opened the door to this development, it remains the case that in one of its seventeenth and eighteenth century formulations this rights tradition embodied a moral dimension that mitigated egoistic individualism. Whereas taken as a whole this rights theory may be impractical it nonetheless serves to point out the weaknesses of the communitarian critique and the need for a more chastened consideration of the problems associated with rights. The contemporary dissatisfaction toward rights would be better served if it were directed toward the particular form that rights have come to assume rather than the concept of rights itself.

But even given the difficulty of accepting Pufendorf's theory *in toto* we can learn much from his effort to reconcile individual liberty with moral responsibility. In this respect Pufendorf's theory of rights remains instructive, if, as is characteristic of modern liberalism, we reject that rights should be linked to a positive conception of moral good and instead give priority to individual moral autonomy. For

Pufendorf's notion of moral judgment applies as much to the exercise of rights in relation to individual autonomy as it does to more praiseworthy moral acts. Pufendorf's theory thus usefully illustrates how the exercise of rights, whatever their object, should be checked by a sense of moral restraint. Individual moral autonomy can only be maintained within society, he insists, if individuals exhibit certain moral virtues in their behavior towards others. The unrestrained exercise of rights can only lead to the dissolution of civil society.

As we have seen, the importance of these moral foundations to liberty was not lost on eighteenth century Americans. Those who witnessed the early republic often noted how morality, in the form of religious belief, served to nurture liberty. As George Washington observed in his Farewell Address, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports." Forty years later, Tocqueville offered similar testimony. "Despotism may be able to do without faith, but freedom cannot," he observed. "How could society escape destruction if, when political ties are relaxed, moral ties are not tightened? And what can be done with a people master of itself if it is not subject to God?" In America, despite the diversity of religions, he continues, "all agree concerning the duties of men [and] all preach the same morality." "Religion..." Tocqueville concludes, "should therefore be considered as the first of their political

institutions, for although it did not give them the taste for liberty, it singularly facilitates their use thereof.”⁹

Despite the importance of these moral foundations it is precisely this aspect of liberal individualism that suffers neglect in contemporary liberal theory. The acceptance of moral diversity as an incontrovertible premise has led liberal theorists to regard with suspicion the idea that virtue should be a central concern of political life. Reflecting this attitude, liberal theorists argue that political authority should assume a position of neutrality on the widest possible range of moral issues. Thus, in John Rawls’s view, “the liberal state rests on a conception of equality between human beings as moral persons, as creatures having a conception of the good and capable of a sense of justice...Systems of ends are not ranked in value.”¹⁰ And for Ronald Dworkin, the liberal state “must be neutral on...the question of the good life...political decisions must be, so far as is possible, independent of any particular conception of the good life.”¹¹ But while moral pluralism may prohibit a comprehensive morality in political life this does not mean that it prohibits morality

⁹ Alexis de Tocqueville, *Democracy in America*, 1835, Harvey C. Mansfield and Delba Winthrop, eds. Chicago. University of Chicago Press. 2000, I, pt.2, cht. 9, pp.278, 280.

¹⁰ John Rawls, *A Theory of Justice* Cambridge. Harvard University Press. 1971, p.19.

¹¹ Ronald Dworkin, “Liberalism,” in Stuart Hampshire, ed., *Public and Private Morality* Cambridge. Cambridge University Press. 1978, p.127.

per se.¹² An attenuated morality may in fact be compatible with this liberal premise and, indeed, may be vitally important to the realization of the end of individual autonomy. To deny the importance of this kind of morality is to run the risk of denigrating the very condition on which the end of liberty may depend. The Pufendorbian theory of rights provides a timely reminder of the importance of balancing the permissive side of the liberal tradition with an ethic of moral responsibility.

¹² See, Thomas A. Spragens, Jr., Civic Liberalism: Reflections on Our Democratic Ideals New York. Rowman & Littlefield. 1999, cht. 7, Peter Berkowitz, Virtue and the Making of Modern Liberalism Princeton. Princeton University Press. 1999, and William A. Galston, "Liberalism and Public Morality," in Alfonso J. Damico, ed., Liberals on Liberalism New York. Rowman & Littlefield. 1986.

Appendix

Abbreviations: Fr.- freehold, Pers. – personal, Est.- estate

New Hampshire

	1727 election law	1775 election law	1784 constitution
HOUSE			
Electors	Fr. worth £50	Taxpayer	Taxpayer
Candidates	Fr. worth £300	£200 fr.	Pers. estate worth £100 including fr. worth £50
SENATE			
Electors			Taxpayer
Candidates			Fr. worth £200
GOVERNOR			
Electors			Taxpayer
Candidates			Pers. estate worth £500 including fr. worth £250
EXECUTIVE			
COUNCIL			
Electors			The council is chosen by joint ballot from among the members of the legislature
Candidates			

SOURCES: The table is based on data in the constitutional texts and from other sources; F. N. Thorpe, The Federal and State constitutions, colonial charters, and other organic laws of the States, territories, and Colonies, now or heretofore forming the United States of America Grosse Point, Michigan. Scholarly Press. 1968, Cortlandt F. Bishop, History of Elections in the American Colonies New York. AMS Press. 1970, Albert Edward McKinley, The Suffrage Franchise in the Thirteen English Colonies in America Philadelphia. University of Philadelphia Press. 1905, Chilton Williamson, American suffrage: from property to democracy, 1760-1860 Princeton. Princeton University Press. 1960.

Massachusetts

	1691 charter	1778 draft constitution	1780 constitution
HOUSE Electors	Fr. worth 40s. per year, or pers. est. worth £40	Taxpayer	Est. worth £60, or fr. worth £3 per year
Candidates		Pers. estate worth £200 including real est. worth £100	Est. worth £200, or fr. worth £100
SENATE Electors		Pers. est. worth £60 "clear of all charges"	Est. worth £60 or fr. worth £3 per year
Candidates		Pers. est. worth £400 including real est. worth £200	Pers. est. worth £600, or fr. worth £300, or both to the amount of £600
GOVERNOR Electors	The governor is appointed by the crown	Pers. est. worth £60 "clear of all charges"	Pers. est. worth £60, or fr. worth £3 per year
Candidates		Pers. est. worth £1,000 including real est. worth £500	Fr. worth £1,000
EXECUTIVE COUNCIL Electors	The councillors or assistants are chosen by the assembly.		The councillors are chosen from among the senators by the house and senate meeting in joint session
Candidates			

Connecticut

	1715 election law (valid throughout the 18 th century)
HOUSE Electors	Fr. worth 40s. per year, or pers. est. worth £40
Candidates	Same as electors
SENATE Electors Candidates	
GOVERNOR Electors	Fr. worth 40s. per year, or pers. est. worth £40
Candidates	Same as electors
EXECUTIVE COUNCIL Electors	Fr. worth 40s. per year, or pers. est. worth £40
Candidates (“assistants”)	Same as electors

Rhode Island

	1762 election law	1798 election law
HOUSE Electors	Fr. worth £40 or 40s. per year <i>The eldest son of a qualified freeholder could also vote</i>	Fr. worth £134
Candidates	Fr. worth £40 or 40s. per year	
SENATE Electors Candidates		
GOVERNOR Electors	Fr. worth £40 or 40s. per year	
Candidates	Same as electors	
EXECUTIVE COUNCIL Electors	Fr. worth £40 or 40s. per year	
Candidates ("assistants")	Same as electors	

New York

	1699 election law	1701 election law	1777 constitution
HOUSE Electors	Fr. worth £40 free of debts, or being a freeman of the corporation of Albany or the city of New York	Fr. worth £40 regardless of mortgages	Fr. worth £20, or rented real est. worth 40s. per year
Candidates	Fr. worth £40 free of debts	Fr. worth £40 regardless of mortgages	
SENATE Electors			Fr. worth £100 clear of debts
Candidates			Fr.
GOVERNOR Electors			Fr. worth £100 clear of debts
Candidates			Fr.
EXECUTIVE COUNCIL Electors Candidates			

New Jersey

	1709 election law	1776 election law and constitution
HOUSE Electors	Fr. of 100 acres, or pers. and real est. worth £50. <i>Inhabitants of the towns of Perth Amboy and Burlington could vote if they were 'householders.'</i>	Pers. est. worth £50 proclamation money clear of debts
Candidates	Fr. of 1,000 acres, or pers. and real est. worth £500	Pers. and real est. worth £500 proclamation money
SENATE Electors		Pers. estate worth £50 proclamation money clear of debts
Candidates		Pers. and real est. worth £1,000 proclamation money
GOVERNOR Electors Candidates		The governor is elected by joint ballot of both chambers of the legislature.
EXECUTIVE COUNCIL Electors Candidates		

Delaware

	1734 election law	1776 constitution
HOUSE Electors	Fr. of 50 acres, 12 acres thereof "cleared and improved," or per. Est. worth £50 lawful money	Fr. of 50 acres, 12 acres thereof "cleared and improved," or pers. est. worth £50
Candidates		Fr.
SENATE Electors		Fr. of 50 acres, 12 acres thereof "cleared and improved," or pers. est. worth £50
Candidates		Fr.
GOVERNOR Electors		The "president" is elected by joint ballot of both houses of the legislature.
Candidates		Fr.
EXECUTIVE COUNCIL Electors Candidates		

Maryland

	1715 election law	1776 constitution
HOUSE Electors	Fr. of 50 acres, or "visible estate" worth £40. <i>Inhabitants of Annapolis could vote if they owned a town lot with a house, or "a visible estate" worth £20, or were housekeepers who had served for 5 years as apprentice to a trade.</i>	Fr. of 50 acres, or pers. est. worth £30
Candidates		Real or pers. property worth £500
SENATE Electors		2 specially elected electors per county, owning real or pers. property worth £500
Candidates		real and pers. property worth £1,000
GOVERNOR Electors		The governor is elected by joint ballot of both chambers of the legislature
Candidates		Real and pers. property worth £5,000, £1,000 thereof to be fr. est.
EXECUTIVE COUNCIL Electors		The governor's council is elected by joint ballot of both chambers of the legislature.
Candidates		Fr. of lands and tenements worth £1,000

Virginia

	1762 election law, reaffirmed in 1769	1776 constitution
HOUSE Electors	Fr. of 25 acres with 12' x 12' house; or fr. of 50 acres unsettled; or town lot with 12' x 12' house <i>Housekeepers in Williamsburg and Norfolk could also vote if they had served to any trade for 5 years.</i>	"the right of suffrage...shall remain as exercised at present."
Candidates		Freeholder, or otherwise "duly qualified according to law."
SENATE Electors		"the right of suffrage...shall remain as exercised at present."
Candidates		Freeholder, or otherwise "duly qualified according to law."
GOVERNOR Electors		The governor is elected by joint ballot of both chambers of the legislature.
Candidates		
EXECUTIVE COUNCIL Electors		The council of state is chosen by joint ballot of both chambers of the legislature.
Candidates		

North Carolina

	1760 election law	1776 constitution
HOUSE Electors	Fr. of 50 acres <i>In several towns taxpaying tenants of houses also could vote.</i>	Taxpayer
Candidates	Fr. of 100 acres	Fr. of 100 acres
SENATE Electors		Fr. of 50 acres
Candidates		Fr. of 300 acres
GOVERNOR Electors		The governor is elected by joint ballot of both chambers of the legislature.
Candidates		Fr. of 1,000 acres
EXECUTIVE COUNCIL Electors		The council of state is elected by joint ballot of both chambers of the legislature.
Candidates		

South Carolina

	1759 election law	1776 constitution	1778 constitution
HOUSE Electors	Fr. in a settled plantation; or 100 acres of unsettled but taxed land or town lot or house worth £60 proclamation money; or tax of 10s. proclamation money	Same as 1759	Fr. of 50 acres; or a town lot; or having paid taxes the preceding year; or being "taxable the present year...in a sum equal of the tax on 50 acres"
Candidates	Same as electors	Same as 1759	Same as 1759 except that general residence requirement is dropped if fr. Exceeds £3,500
SENATE Electors		The legislative council is elected by the first chamber of the legislature.	Fr. of 50 acres; or a town lot; or having paid taxes the preceding year; or being "taxable the present year...in a sum equal to the tax on 50 acres"
Candidates			Settled fr. Worth 2,000 "pound currency clear of debts: The general residence requirement is dropped if fr. Exceeds £7,000
GOVERNOR Electors		The "president" is elected by joint ballot	The governor is elected by joint ballot

Candidates		of both chambers of the legislature.	of both houses of the legislature. Settled fr. Worth 10,000 "pounds currency clear of debts"
EXECUTIVE COUNCIL Electors Candidates		One half of the privy council is elected by each chamber of the legislature	The privy council is elected by joint ballot of both houses of the legislature. Settled fr. Worth 10,000 "pounds currency clear of debts"

Georgia

	1761 election law	1777 constitution
HOUSE Electors	Fr. of 50 acres	Taxpayer "possessed in his own right of 10 pounds value," or "being of any mechanic trade"
Candidates	Fr. of 500 acres	Fr. of 250 acres, or "some property to the amount of 250 pounds"
SENATE Electors Candidates		
GOVERNOR Electors		The governor is elected by the one-chamber legislature.
Candidates		Candidates for governor must be members of the legislature.
EXECUTIVE COUNCIL Electors		The executive council is elected by the one-chamber legislature.
Candidates		Candidates for the executive council must be members of the legislature.

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