LAW AND SOCIETY

Faith, Reason, and Consent

Legislating Morality in Early American States

Wm. G. Miller

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CHAPTER 1

Legislating Morality: Four Streams of Thought

In contemporary American culture it has become commonplace to hear people on the street, and even politicians, arguing that government should not "legislate morality." In a 2005 debate over a law to regulate sexually suggestive cheerleading performances in Texas public schools, Representative Senfronia Thompson, a state legislator from Houston, was quoted as saying, "You can't legislate morality. This is a ridiculous bill. It's stupid and it's insulting."[i] It is striking to compare this statement to the statement of the leaders of Pennsylvania who wrote that state's first constitution in 1776:

> That a frequent recurrence to fundamental principles, and a firm adherence to *justice*, *moderation*, *temperance*, *industry*, and *frugality* are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to *exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws* as are necessary for the good government of the state.[ii]

The difference in perspective between a 21st century Texas state legislator and those of 18th century Pennsylvanians is obviously extreme. The latter deems moral regulation as essential to the preservation of liberty. The former finds any attempts to write laws that

involve a commitment to regulating moral behavior absurd and intrusive. Lest one considers this a difference of historic eras only, some reflection reveals otherwise. The opinion that law should reflect certain moral principles remains in the 21st century, in spite of claims to the contrary. The same person who, like Representative Thompson, claims that laws should not restrict the free expression of cheerleaders may adamantly condemn the legal system of another country that does not protect women from being physically abused at will by their husbands. It is easy to be blind to the fact that we expect laws to restrict what we consider immoral and unjust. Perhaps, what Representative Thompson meant in her comment was that she did not think sexually suggestive cheerleading performances are wrong enough or harmful enough to regulate.

Moral regulation in laws is alive and well in the United States today. A significant degree of the fighting over the legislation of morality, whether it is over sexually suggestive cheerleading routines, homosexual marriage, or abortion rights, occurs on the battlefield of state politics.[iii] This book will address the topic of the legislation of morality as it was understood and implemented by early American state founders and legislators. It will focus attention upon founding state constitutions and legislative acts in the revolutionary period and the years following.

This first chapter will set the stage by discussing various streams of thought found in the modern era on the topic that are influential in current thinking about the legislation of morality. The second chapter will discuss the three foundational principles that were most influential in the thinking of the American state founders' approach to moral legislation. Chapters three and four will examine perspectives expressed in the early state constitutions concerning the nature of God and man. The fifth chapter will involve a study of each of the early state constitutions to determine what perspectives were prevalent in the various documents. Chapters six and seven will look at the legislative acts of early American states in order to see how the commitments and perspectives expressed in the states' constitutions worked out in practice. Chapter eight will discuss how the findings of this study compare with current scholarship on the topic of early American moral legislation. Finally, the book will conclude with a brief discussion of the relevance of early American state moral legislation to current American political thought on the subject.

LEGISLATION AND MORALITY

Laws are rules for behavior in a given political community, enforced by authorities, the breaking of which leads to the consequence of punishment. Thus, when laws are created, judgments are made by legislators that certain behavior is harmful to the community or individual citizens. Certain behavior is deemed acceptable and other behavior unacceptable. This act of judgment is a moral act. Morality involves making distinctions between right and wrong behavior. This is what legislators do. Whether they require all citizens to contribute to the costs of supporting the poor (e.g., in the form of welfare programs) or whether they ban high school cheerleading performances that are deemed sexually suggestive, lawmaking is a moral act.

The principles of morality that guide lawmakers may vary significantly from one nation to another, within the various legislatures of a given nation, and even within a single legislative session. This does not negate the fact that whenever any legislative act occurs, it involves morality.[iv] At the most basic level, the reality of this is evident when one considers the question of murder. Every nation in the world that has a system of law has some kind of prohibition against the arbitrary taking of another person's life. Even if a serial murderer claims that he feels good by taking the life of someone else—perhaps he was abused by his father and feels empowered by destroying others' lives—such behavior is prohibited by the community with the consequence of severe punishment. This prohibition, by force of law, is a moral judgment that is imposed upon everyone in the community.

Some legislation might seem less moral in content than others, but any law that regulates behavior is moral in nature. The crucial question is not, "Does law regulate morality?", but rather, "What kind of morality does law embody?" The latter question begs an additional question: "Whose morality does lawmaking embody?" In many ways, this third question has taken center stage in the debate of lawmaking in contemporary American life. Within a society that is committed to both democratic and liberal principles, the fear of majority tyranny is real when it comes to legislation. Equally fearful is the imposition of one elite minority group's morality upon the rest of society, whether that group is on the left or the right side of the political spectrum. Should the moral commitments of the majority be imposed upon minority groups whose moral commitments are in conflict with the majority?

Should one group be allowed to impose their morality upon the majority? One approach to the making of laws assumes that legislation should reflect established moral commitments of the community, as the excerpt from Pennsylvania's constitution exemplifies. However, many 21st century Americans seem committed to a process of lawmaking that seeks to embody the ever-changing moral inclinations of the people at a given point in time. "Our laws need to catch up with the times," one might hear among contemporary Americans.

Another perspective argues for a pluralistic approach in which the diverse voices of individuals and groups should be heard and respected, giving no special place to any one group's moral position. However, even a pluralistic approach to legislation ultimately comes to a point of making moral judgments. It presupposes that the best rules for a community are those that are acceptable to most or all people. It does not take long to realize that even when a pluralistic approach to lawmaking is utilized, there are still moral limits that all parties must share if any laws are to be made. A strong commitment to basic rights including the right to life (e.g., prohibition of murder) and right to property (e.g., prohibition of theft) exists in American society in spite of a great diversity of opinion about morality. There are even less fundamental moral commitments that are shared. For example, Americans maintain a commitment to provide people with the opportunity to be materially rewarded more for hard work and the use of one's talents than if one chooses not to work or not to exercise their talents. Some shared moral commitments might be easily overlooked because they are so implicit and obvious that no one takes the time to realize how much they impact legislative decisions.

The rest of this chapter will consider various ways of thinking about legislation that have been influential since the enlightenment and are still influential to various degrees in contemporary American society. The two questions, "What kind of morality does the law embody?" and "Whose morality does lawmaking embody?", are clearly central to the following discussion.

THE BATTLEGROUND OF MORAL LEGISLATION

In the culture wars that began in this country during and following the 1960's, law and morality have taken center stage. On one side has been the rhetoric of liberalism and individual expression, on the other, that

of conservative and religious values. Law has been the battlefield upon which the war has been fought, whether in the enacting of legislative bills (or their being defeated), in the vetoing of bills by the executive branch (i.e., the US *president or state governors)*, or in the judicial review process. Law has remained a primary concern in this war because of its authoritative place in American public life. It is largely respected as the final word on what is acceptable and unacceptable. Despite the existence of some cynicism about how "blind" the American justice system really is the public expects law to be enforced regardless of a person's position in society.

Appeals are made by those with opposing views about the extent to which law should regulate individual behavior, both in the formal debates on the floor of the U.S. Congress as well as the state legislatures and in the informal debates that occur in the media, in books, in schools, in homes, in local coffee shops, and increasingly on the Internet. On the public square, opinions are voiced in the form of popular clichés: "who are they to say how I can live," "that is just not right," "they are imposing their morality on us," "if we let people do that it will lead to chaos." In intellectual circles, the appeals are more sophisticated though, perhaps, not greatly different in substance.

The culture wars have their roots in philosophical debates that have been going on much longer than four decades. These debates, while reflecting in some sense issues at least as old as the recorded political philosophy of the ancients, have taken their current shape largely from the enlightenment period and the rise of liberalism. There are several streams of thought that result from the political theory of this period and influence contemporary American life.

Each of the following streams of thought is a kind of pure approach and, we shall see, an extreme approach. Though they have been influenced by great political thinkers and writers, in their unsophisticated, simple form they are often a kind of caricature of what is found in the political philosophers and theorists. The first stream has a relationship to the thought of Thomas Hobbes.[v] This approach to legislation is based upon the absolutization of *authority* in the ruler-ruled relationship. The second stream has ties to the thought of Rousseau. The absolutizing of the authority of the people, or *public will*, is foremost in the version of popular sovereignty that results from this stream. The third stream of thought is based upon an absolutization of *theory* and the power of human reason to deduce systems, methods,

or constructs for ordering human communities. It is akin to Kant in its abstract rationalism.[vi] The fourth stream of thought flows from the older religious tradition that remained. The theological principles revealed in *religion,* whether Christian, Muslim, Jewish or the theological principles of any particular sect within one of these major religious traditions, is the final standard by which legislation is judged (i.e., the ideas and concepts relevant to legislation that emerge out of authoritative religious texts).

THE FOUR STREAMS

Authority—The First Stream

The authoritarian approach to legislation asserts that the body (or individual) bestowed with the authority to make and enforce law is accountable to no external constraints in the form of public opinion, moral principles, or religious authorities. The basis for such authority may differ but ultimately, in whatever way the ruler or ruling body is recognized as being authoritative, lawmaking is imposed on the ruled by the ruler.

This perspective on lawmaking is alive and well in the 21st century. It often finds expression in a deep cynicism towards the modern democratic experiment—a rejection of the claim that Western democracies are governed by the will of the people. According to these cynics, legislators in democratic regimes will do whatever it takes to get elected and then make laws according to their own self-interest or the interests of their elite supporters. In other words, one can claim that democracy incorporates public opinion, but at the end of the day, an elite group of people run things as they wish. People who hold this view may express their position in a variety of ways, for example, indifference (e.g., “What difference does it make who I vote for, it won’t matter.”) or insolent deviance (e.g., “I have no qualms about breaking the law anytime it’s in my own interest and I can get away with it. I’ve got to look out for Number 1. No one else will.”).

Political thinkers have been acutely aware of this approach to political rule and lawmaking since antiquity. The argument put forward by Thrasymachus in Plato’s *Republic* is a classic example of this “might makes right” stream of thought. “Each [ruler] makes laws to its own advantage,” says Thrasymachus, “ … and they declare what they

have made … to be just for their subjects, and they punish anyone who goes against this as lawless and unjust."[vii] The Divine Right of Kings was a later doctrine of unrestricted monarchical authority. The king was supposed to be accountable to God in the use of his power, but practically speaking was not accountable to any person or agreed upon moral or constitutional principles.

Hobbes provided an alternative doctrine to the divine right of kings with his version of social compact theory. Everyone, according to Hobbes, must lay down all his or her rights to one supreme sovereign in order to create a peaceful society. Thus, Hobbes argues that the sovereign (monarch or ruling body) should have "the whole power of prescribing the Rules".[viii] There are no principles of justice or morality external to the will of the sovereign ruler by which to judge the rightness of law. "By a Good Law, I mean not a Just Law: for no Law can be Unjust. The Law is made by the Sovereign Power, and all that is done by such Power, is warranted, and owned by everyone of the people."[ix] Law is merely what the political ruler says it is.

This stream of thought has continued in 20th century philosophic discourse, to a certain extent, in the form of legal positivism. One of the major thrusts of legal positivism has been to attempt to separate morality from legality. For legal positivists, law is a social construct.

> The concept of law presupposed by legal positivism could be recognized in the assumption that "the existence of laws is not dependent on their satisfying any particular moral values of universal application to all legal systems; the existence of laws depends then upon their being established through decisions of human beings in society."[x]

There is no use having theoretical discussions about what law *should have been* enacted; there is no room for appeals to universal principles of morality when it comes to what law is or says. Many legal positivists admit that morality is relevant when discussing the merits of laws, but when it comes to the making and enforcing of the law, the only fact that matters is what the legal authorities say the law is.

Many modern regimes operate according to the authoritarian position without any significant attempts to hide the fact. Stalin's communism in the 20th century is one example of this approach on a large scale. Many dictatorships still exist across the globe, in which law

and legislative process operate according to the dictates of a single ruler or a single party that wields absolute power.

Public Will—The Second Stream

The second stream is akin to the first. Instead of the will of a single ruler or ruling body being the basis for lawmaking, ultimate authority for the making of law resides in the will of all the people. The development of the concept of the *general will* by Rousseau has had a critical role in the formation of this highly influential way of thinking about the proper ordering of human communities. Rousseau's concept of the general will is not simply a compilation of individual wills, like a public opinion poll. Rather, it conceives of political communities having a corporate will that is based upon common interest, i.e., what is good for the entire community.

> There is often a great difference between the will of all and the general will. The latter considers only the common interest; the former considers private interest, and is only a sum of private wills. But take away from these same wills the pluses and minuses that cancel each other out, and the remaining sum of the differences is the general will.[xi]

While there is debate about what exactly Rousseau meant by his concept of general will, one thing is clear: it is a concept that entails absolute authority. "It is no longer necessary," writes Rousseau, "who should make laws, since they are acts of the general will."[xii] He goes on to dispel any idea that the law can be judged by any external constraints or principles. There is no possibility that "the law can be unjust, since no one is unjust toward himself; nor how one is free yet subject to the laws, since they merely record our wills."[xiii] Any law made according to the dictates of the general will is self-imposed law. Every person in the community, as a consequence of being a participant of the general will and a subject of the state, is both ruler and ruled.

The recent developments in this stream of thought have largely dropped Rousseau's philosophical approach, which discussed general will to a significant extent in an esoteric manner. Political science today is largely concerned with public opinion polls and the preference

of registered voters, not with seeking to determine what the true general will or true common interest is. What can be measured and quantified is what the people say is good or bad behavior at a point and time—and the people should get laws that coincide with what they believe.[xiv] This approach to public policy has been used extensively in the 20th century and does not appear to be lessening as we entered the 21st century.

> Public opinion has achieved a remarkable, though largely unnoticed, ascendancy. The burden of proof is now on those who oppose public opinion … Indeed, recent polls suggest that the public has become enamored of its own wisdom: in one 1999 survey, some 80 percent of respondents believed that the nation would be better off if leaders followed public views.[xv]

In general, this stream of thought finds a great deal of support in western democratic regimes, even if in a form somewhat alien to and at odds with Rousseau's general will. It appeals to the belief that the people are really in charge. Legislators have no right to do as they wish; they are accountable to the public. If they diverge significantly from public opinion, they will pay during the next election. The same can be said for political parties and their agendas. They will pay the price of being marginalized if they do not keep their finger on the pulse of public opinion and march according to its heartbeat. The public will dictates the decisions of elected officials; they are puppets of the people.

Theory—The Third Stream

While the enlightenment spawned a democratic ideal, it also put a new emphasis upon human reason and its powers to order political life. Kant's moral philosophy is representative of the second stream's reliance on theoretical reason. His categorical imperative is a rational construct that attempts to determine a method for identifying good versus bad behavior. Kant's moral philosophy promises a framework that is universal. This can then be translated into laws that punish bad and reward good behavior. Enlightened human reason, in this stream of thought, is deemed able to attain objective certainty about whether a proposed law should or should not be enacted.

On the streets, on the floors of legislatures, and in the back offices of government in democratic regimes, rational theories and the use of reason in general still finds a great deal of support as the best way to judge the merits of proposed legislation. When the media wants to hear the definitive answer to tough questions about some legislative battle, they interview professors of universities and writers of academic books. The objective views of rational academicians are often perceived as carrying more weight than the opinions of random people interviewed on the street, the views of religious leaders, or the agendas of partisan politicians. Legislators have also been known to call upon experts in sociology, psychology, and other fields of study when they want an objective analysis or judgment.

Absolutized rational approaches to politics have as their disadvantage a disconnection with real life. They lead to policies and legislation that is supported by sound rationalistic theories but which may fail to connect with real people and real circumstances in political communities. They also assume that people in general, or at least decision-makers, have the capacity to be completely rational and objective. And then, one wonders, who is capable of judging what it truly means to be rational? As Sandel puts it:

> Now what is to guarantee that I am a subject of this kind, capable of exercising pure practical reason? Well, strictly speaking, there is no guarantee; the transcendental subject is only a possibility. But it is a possibility I must presuppose if I am to think of myself as a free moral agent.[xvi]

Religion—The Fourth Stream

Some would say that religion and theology have become completely irrelevant to politics. This has certainly been the view held by many with respect to European society. Consider the viewpoint of the current Pope:

> The state came to be understood in purely secular terms, as grounded in rationalism and the will of the citizens …. Public life came to be considered the domain of reason alone, which had no place for a seemingly unknowable God: from this

> perspective, religion and faith in God belonged to the domain of sentiment, not of reason. God and His will therefore ceased to be relevant to public life.[xvii]

Though viewed as outdated and irrelevant on many counts, religion's influence on political life in America and, specifically on issues related to legislation, remains surprisingly profound at the outset of the 21st century.[xviii] While tolerance has been praised and the influence of secularism has spread extensively in the 20th century, religion has refused to be vanquished from public life. This truth is most evident in American life as compared to the other western democracies found in Europe and Asia-Pacific.

Religion has been a major influence in political life during ancient times (e.g., Egypt, Persia, Rome, and China) as well as in the Middle Ages in Christian Europe and Muslim empires. During certain times religion was merged with politics, for example, in the form of an emperor who embodied both supreme religious and political authority (e.g., the Egyptian Pharaoh and the Roman Emperor). Other times, a distinction between political and religious authority existed, but religion maintained a significant, rival position vis-à-vis politics (e.g., Medieval Europe). During the period leading up to the Enlightenment in Christian Europe, religion was tightly bound up with public life as a whole.[xix] Since that time, politics in Europe has significantly broken away from the influence of religion.

While Europe may now claim to be secularized, leaving behind the times when the church was a relevant and influential voice in public dialogue about political matters, religion in the United States has sustained its public voice. This has been possible, if not for other reasons, because Americans have remained religiously active. Of course, religion remains a critical factor in politics in democracies in the Muslim world, the foremost example being Turkey, and in parts of Asia, for example in India. When it comes to legislation, religion has its loudest voice on moral issues. The resistance to abortion rights legislation has gained its support in the United States largely from the activism of churches and religious groups, or groups whose objectives are grounded in religious principles. In the Islamic world, the status of Sharia law in society is one of the major battles being fought.

The two sides of the debate about the degree to which religion should influence legislation are often zealous in their positions.

Secularists are intentional and active in seeking to ban religious influence in the formal process of politics (e.g., ACLU in the United States). They hold a suspicious view toward religion and can point to numerous historical examples of the religious oppression of individuals and minority groups. Religious groups, on the other hand, fear the chaos and immorality that they claim will result from secularizing society.[xx] They view religion as a stabilizing factor that contributes to the necessary moral formation of citizens, whose moral principles should be generally embodied in the laws. In addition, religious groups are often zealous in their conviction that their morality is right and good, and should be reflected in the laws. This conviction is sometimes supported by a view that America has always embraced Christian moral principles and embodied them in its laws. The Christian conservatives would like to keep it that way. Their opponents, however, are offended and view Christian conservatives as backward-looking and dangerous.

BY WILL OR BY PRINCIPLE

Of the four streams of thought discussed above, the former two bear a resemblance to one another as do the latter two. In the former two, the will of either one person or a group of people is the controlling factor. What is the will of the ruler? What do the people want? The will of the sovereign, whether in the form of one, a few or the many, is the basis for legislation. It defines the morality that is embodied in law. Thus, the legislation of morality is simply a fleshing out of the morality that is present in the opinions of the ruler or the people at a given time.

The latter two streams of thought both build a basis for law that is principled. They incorporate fixed principles of morality that are the ultimate standard. Good laws embody these principles and should be sustained. Bad laws conflict with these moral principles and should, therefore, be repealed. An *oughtness* is involved in viewing legislation through the lens of moral philosophy or religious theology. Laws can and should be subject to scrutiny according to moral principles derived from philosophy or theology. Cicchino has succinctly expressed this point well:

> In his discussion of human law in the Summa Theologica, St. Thomas Aquinas argues: “[T]he force of a law depends on the extent of its justice. Now in human affairs a thing is said to be

> just, from being right, according to the rule of reason." St. Thomas is by no means alone in his sentiments about the law. For a wide variety of thinkers throughout history from Plato to Martin Luther King, Jr., a law opposed to justice, a law that inflicts harm on human beings without sufficient justification, is unworthy of the name "law." It has no claim on our obedience. As Aquinas quoted approvingly from Augustine, "That which is not just seems to be no law at all."[xxi]

The individual streams of thought discussed above represent extreme approaches to the legislation of morality. By absolutizing authority, the public will, a theory, or one particular religious perspective as a basis for moral legislation, laws have a tendency to become oppressive. The proof of this judgment is found in considering the logical outcomes of such approaches. Extreme approaches justify the arbitrary rule of dictatorships, severe oppression of minorities by majority tyrannies, rigid rationalistic rule, and religious liberty-crushing theocracy. The absolutized rule of a sovereign Leviathan, in spite of all Hobbes' claims about its security, is likely no better consolation for the subjects than the absolutized rule of materialistic rationalism, such as is found in the politics of "The World State" in Huxley's *Brave New World*.

THE MERGING OF STREAMS

A merging of streams is often sought as a way of mitigating the negative affects that results when only one stream is incorporated. A merging of the streams seeks to appreciate and incorporate the legitimate advantages of each approach while moderating the negative aspects. The early American tradition of legislating morality is one such approach to the merging of streams.

Faith, reason, and consent were the instruments, one could say, by which moral standards were identified and embraced as worthy to provide a foundation and justification for moral legislation. As shall be demonstrated in more detail later, the early American state founders were convinced of certain principles on the basis of faith and reason. Faith revealed to them certain principles of divine law, while principles of natural law were deduced by reason. They believed the principles of divine and natural law were sound and reliable. However, they also believed that those principles necessitated a commitment to consent, or

what has been called popular sovereignty. Since they were convinced that "all men were created equal", they believe the people must have some role in how their rules were made. Popular sovereignty was primarily understood, as we shall see in the following chapters, to be derived from faith and reason but also required by principles of divine and natural law. This work will seek to demonstrate these claims and to discuss the distinct manner in which the state founders weaved these commitments together.

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[i] *Quick: a product of the Dallas Morning News*, Wednesday, May 4, 2005, page 4. Lest one think this an exceptional case, consider the views of Justice William L. Brennan who one writer as claimed "has captured the spirit of mainstream liberalism nicely in his notion that the political order established by the Constitution of the United States is 'facilitative.' According to a facilitative conception of politics, government—whether federal, state, or local—has no authority to judge matters of 'personal' morality. The question of whether a concept of the good is 'valid' or 'evil' is for individuals to decide for themselves free of governmental intrusion. The proper concern of government is to preserve the freedom of individuals to pursue *whatever* conceptions of the good they happen to favor (so long as they do not violate the rights of others)." (Robert P. George, "The Unorthodox Liberalism of Joseph Raz".) However, is not the judgment about whether someone has violated another's rights is itself a moral judgment?

[ii] Pennsylvania Declaration of Rights, sec. XIV. (Italics added by author.)

[iii] Kimberly A. Hendrickson, "The Survival of Moral Federalism".

[iv] See Kent Greenawalt, "Legal Enforcement of Morality". Greenawalt provides a thorough and convincing argument that lawmaking is inherently a moral activity.

[v] In practice, this line of thought has surely been expressed from the very beginning of human politics. Individuals or groups claimed the authority to make the rules for how everyone in a community must behave. In the philosophical tradition, it was present in the writings of Plato (e.g., Thrasymachus in *The Republic*) and Machiavelli. Of course, Hobbes version differs in terms of the basis of authority. For Thrasymachus the basis of authority is blatant force, while for Machiavelli it is a kind of shrewd intelligence. For Hobbes it is a social compact to grant supreme authority to one political ruler or group in order to overcome the chaos that results when limitless human desire is unrestrained.

[vi] As Von Dohlen succinctly puts it, "Kant affirms the possibility of rational universal ethical norms that enable individuals to exercise control over there desires and determine morally right action *independently of any consequences*." Richard F. Von Dohlen, *Culture War and Ethical Theory*.

[vii] Plato, *Complete Works*.

[viii] Thomas Hobbes, *Leviathan*.

[ix] Ibid.

[x] Giorgio Pino, "The Place of Legal Positivism in Contemporary Constitutional States". This description of legal positivism is an attempt by Pino to identify a typical view of legal positivism, though it is a contested label.

[xi] Jean-Jacques Rousseau, "On the Social Contract".

[xii] Ibid.

[xiii] Ibid.

[xiv] This approach is along the lines of Delvin's concept of the legislation of morality. For a good discussion of Delvin and his conception of laws which embody a shared morality, see C.L. Ten, "Enforcing a Shared Morality".

[xv] Robert Weissberg, "Why Policymakers Should Ignore Public Opinion Polls". See Steven Kull, *Expecting More Say: The American Public on Its Role in Government* (Washington: Center on Policy Attitudes, 1999).

[xvi] Michael J. Sandel, "The Procedural Republic and the Unencumbered Self".

[xvii] Joseph Ratzinger, "The Spiritual Roots of Europe: Yesterday, Today, and Tomorrow".

[xviii] An example of this is found in Marx and Hopper, who complain about too much faith-based influence on public policy dealing with the problem of the teen pregnancy problem and not enough "fact-based" influence. "The social work profession has a historical relationship with organized religion, and many religious institutions have developed excellent social services. However, politically driven, faith-based social policy threatens to further erode the quality of the U.S. social welfare system and the professional status of social work. An understanding of and appreciation for, the historical significance of professional social work is needed, which, in turn, might produce a renewed emphasis on 'fact-based' social policy development." Jerry D. Marx, and Fleur Hopper, "Faith-Based Versus Fact-Based Social Policy: The Case of Teenage Pregnancy Prevention".

[xix] During the period of Christian Europe, prior to the secularizing influences that began in the 19th century, "religion governed the whole of life, both individual and collective; it presided over all social activities, nothing escaped its vigilance and control, and the state ensured that its rules of worship as well as its moral directions were respected … It had in its charge welfare assistance to the poor and eduction; universities and hospitals were institutions

of religious origin and ecclesiastical status." Rene Remond, *Religion and Society in Modern Europe.*

[xx] For example, see Donald P. and Kenneth J. Meier Haider-Markel, "The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict". Haider-Markel and Meier discuss religious groups involvement on the issue of gay and lesbian rights and their appeal to biblical principles of morality.

[xxi] Peter M Cicchino, "Reason and the Rule of Law: Should Bare Assertions Of 'Public Morality' Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?"

CHAPTER 2

Three Grounding Principles for Moral Legislation: Popular Sovereignty, Natural Law, and Divine Law

While the mantra, "You can't legislate morality", is popular, this perspective is a completely unintelligible position. When government creates any kind of rules for its citizens in the form of laws, it is legislating morality. The process of arrest, indictment, trial, conviction, and sentencing of life imprisonment for a murderer is the result of the legislation of morality. Creating punishments for the polluting of the environment is legislating morality. This chapter is concerned with the relationship between divine law, natural law, and popular sovereignty, which are the critical concepts for the early American state founders when it comes to the task of legislating morality.

This work is concerned with addressing only the legislative function not the entirety of what government does. In addition, not all that legislatures do is of primary concern for this work. One example of legislation that this work will not be addressing is legislative measures that establish or fund basic public services, even though moral concerns might determine how those services are made available or distributed.[xxii] In contrast to the issue of efficient provision of public services, the kind of legislation this work is concerned with directly regulates the behavior of citizens.

Consider the issue of marriage. There are many ways that a society can choose to conduct and recognize marriage. Should marriages be established only by the consent of the individuals being joined, or by their parents? Should age be considered in the issue of marriage consent? Should marriages be viewed fundamentally as a religious institution that is recognized by government? Should marriage be defined as between one man and one woman or between any two individuals? A political order's marriage legislation will reflect moral judgments about what is praiseworthy and blameworthy concerning marriage. One political order will determine that it is blameworthy and morally unacceptable to recognize a homosexual marriage, while another will determine that restricting a homosexual couple from marrying is blameworthy. On what grounds do the two political orders make their legislative judgments? In what respects, and on what grounds, can government regulate the sexual relationships of individuals? Clearly, the issue of legislation that regulates citizens' behavior is vital in shaping the political order.[xxiii]

The principles by which a regime makes judgments concerning its legislation play a critical role in determining the character and future of that regime. Its legislative judgments are most important when making laws that are moral in nature.[xxiv] Laws that are moral in nature directly or indirectly influence the development of the character of individual citizens. As an example, consider the contemporary debate about legalizing of marijuana. Legislators must consider the consequences of legalizing a drug like marijuana. What will be the consequences on the behavior and long-term character formation of citizens? For example, will it negatively affect the work ethic of citizens? Will it cultivate habits and characteristics in citizens that will lead to an increase in the number of fatalities from automobile accidents? If marijuana were legalized, would it create a precedence that would lead to the legalization of other currently illegal drugs? If other illegal narcotic drugs, including cocaine and heroine, were made legal and easily accessible what would be the consequences on the character of citizens?

One argument in favor of legalizing the use of a drug like marijuana is that its use in private does not threaten the rights of other citizens.[xxv] In this line of thought, the use of marijuana by private citizens does not cause harm to others and, therefore, should not be prohibited. Greenawalt provides a helpful way of thinking about the

various categories of moral regulations. He lists five categories of moral regulation:

> (1) to perform acts that benefit others, (2) to refrain from acts that cause indirect harms to others, (3) to refrain from acts that cause harm to themselves, (4) to refrain from acts that offend others, and (5) to refrain from acts that others believe are immoral.[xxvi]

In terms of these categories, prohibiting the use of marijuana could be sought on the basis of arguments that fall under categories 2-5 listed above. For example, it could be said to be indirectly harmful to others for various reasons, whether due to second hand smoke or due to the impact it has on the ability of individuals to provide for the financial needs of family members. One could also claim it is harmful to users themselves for a variety of reasons.

If a regime is only concerned with keeping citizens from violating others' rights to life, liberty and property, legalizing marijuana would be acceptable if its use were placed within limits similar to those imposed for alcoholic consumption (e.g., restrictions against driving while intoxicated). If a regime is concerned with cultivating certain characteristics within citizens that are considered relevant to and necessary for a good political order (as "good" is defined by that particular political order), other concerns like those listed in Greenawalt are a valid basis for the regulation of behavior.

As the later chapters will discuss in detail, the early American state founders and early legislators were concerned about and supported regulating many aspects of citizens' behavior including profane language, use of alcohol, involvement in gambling, and observance of religious rituals. Since these types of behaviors do not necessarily threaten others' rights to life, liberty, property or worship of other citizens (these being the four most prevalent rights asserted by the early American states), one must consider why the states justified such regulations of behavior.

There are three prominent grounding principles, which the early American state founders laid as a foundation for moral legislation: popular sovereignty, natural law, and divine law. Confronted with those who claim that the American Revolution was a popular movement, putting power in the hands of the people to be their own

rulers, this study will affirm the prominent position of consent in the early American state constitutional tradition. When confronted with those who claim it was a modern movement intended to give prominence to reason and rational government, it will provide ample evidence in agreement. And, in response to those who claim that the United States were founded on faith, it will resounding reply, "it is true." This is due to the fact that the evidence reveals that the early American state founders sought to found political communities that were grounded upon principles of all three.

They attempt a merging of three of the four streams of thought discussed in chapter one. However, it is the manner in which they are merged which makes their approach unique and worthy of consideration. The manner in which this was done placed an emphasis on the authority of the people expressed through consent, the use of human reason to discern natural law and/or natural rights, and the basic moral commitments of Christian faith.

A commitment to consent of the people in the revolutionary period is best known in the phrase, "No taxation without representation." Consent is a principle that requires approval and acceptance of citizens as a prerequisite for just legislation. Any policy that neglects obtaining the consent of the people is unjust. The people are, therefore, viewed as authoritative. The state founders espoused a particular version of popular sovereignty that will be discussed in more detail later.

Human reason was viewed as one of the primary capacities that makes rule by consent a possibility in the minds of the early American state founders. Reason provides the capacity for people not merely to pursue their own good in a self-interested manner, but rather to discern standards for living in community that are good and right. The basic framework that defines right relations between people is usually referred to as natural law or natural right. Natural law and natural right theories presume that human reason is competent and responsible enough to determine what is morally acceptable or unacceptable.

Natural law and popular sovereignty are not necessarily incompatible. For example, a proponent of natural law may argue that human beings, as naturally free and equal, have the right to establish moral legislation through consent, under the condition that the moral legislation established by consent meets the conditions of natural law. As an example of this, see Thomas Jefferson's "Inauguration Address—March 4, 1801."

> All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal rights must protect, and to violate which would be oppression.[xxvii]

The public will is viewed by Jefferson as sovereign only so long as it abides by the dictates of reason, i.e., of natural law.

Divine law, the third grounding principle, includes moral standards human beings are obliged to follow that God has revealed and preserved through traditions, customs, and sacred writings of religious communities. Only certain moral standards supported by religion, not the whole of religious obligations of any particular sect, are claimed to be relevant to political life and should be reflected in the laws. The perspective of faith is not necessarily incompatible with a commitment to both popular sovereignty and natural law. Depending on the nature of the divine law in question, citizens are at liberty to make collective decisions arbitrarily within the bounds of both the general principles and more concrete moral standards of a divine law. For example, the divine law may dictate that human life should be protected from harm, but communities must decide for themselves if traffic laws are necessary or not to protect human life from harm. If laws are deemed necessary, there is a variety of ways that those laws could be established and enforced that would result in protecting individuals from harm. Divine law may also allow for the operation of natural law within the bounds of divine law (i.e., human reason can determine certain moral boundaries designed by God without the aid of revelation, while other aspects of proper moral boundaries require revelation to ascertain).

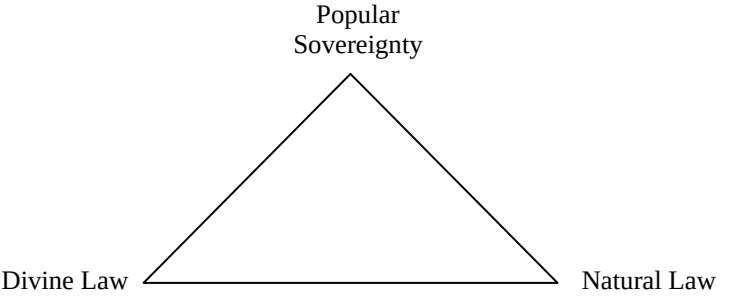
The relationship between these three grounding principles and their priority vis-à-vis one another is a primary concern for this work. Someone who is a proponent of popular sovereignty as the fundamental principle of the political order might only incorporate principles of divine law and natural law if they are not viewed as fixed principles. One can argue in support of legislation consistent with religious teaching, for instance, because popular opinion supports such legislation. When public opinion changes, however, the legislation can and ought to change if popular sovereignty is the most fundamental principle for moral judgments in legislation.

This position becomes problematic for a regime when public opinion begins to embrace principles that are detrimental to the perpetuation of the regime. If those principles are applied in legislation, the commitment to popular sovereignty becomes self-defeating. Natural and divine law, on the other hand, are viewed as problematic for a variety of other reasons. One problem arises when the existence of a superior source of morality, i.e., God or reason, is deemed unverifiable or implausible. According to this perspective, appeals to reason or God are viewed as rhetorical instruments of political power in the hands of the ambitious and power-hungry. Certain kinds of moral legislation are deemed necessary according to the so-called fixed principles of reason or the divine, when in reality those principles are the instruments of the ruling class. Another difficulty with natural or divine law arises when the rule of one or the few is said to be authorized by these fixed standards, e.g., the divine right of kings. Such a view, from the perspective of advocates of popular sovereignty, too often leads to unjust oppression of the many by the few.

It is possible for regimes to be constructed with more or less emphasis on the principles of divine law, natural law, or popular sovereignty. The graphic below is intended to illustrate the possible spectrum within which any given constitution could situate itself. A constitution could be grounded entirely on natural law principles. In such a regime, human reason is utilized and consulted to determine what is universally true about human beings and political communities to identify general principles for guidance of deliberations concerning moral legislation. A constitution could be grounded entirely upon divine law. An example would be something akin to ancient Israel, which was established on the requirements of the Hebrew Scriptures and traditions, or Muslim regimes established on the authority of the Koran.

A constitution could be grounded on popular sovereignty. While a direct democracy would be one possibility, representative republics may also be based wholly on the principle of popular sovereignty. Of course, another possibility is that a regime can be placed somewhere within these three poles. One might imagine, for example, a regime falling in between the three poles in such a way that natural law is most emphasized, but popular sovereignty is understood to operate within the bounds of natural law, placing the regime on the upper part of the top left line.

ILLUSTRATION 1: THREE BASES FOR MORAL LEGISLATION



When looking at the early American state tradition and the presence of divine law, natural law, and popular sovereignty commitments found in it, one is confronted with the question, "Which of the three views did they deem most authoritative?" Surely, one of the three will ultimately trump the others, when there are conflicts between them. Of course, a fourth alternative to these three poles is the position reflected in the first stream of thought found in chapter one. In this case, the advantage of the strongest, or ruling class, is what has ultimate authority in all political decisions, including moral legislation. This position will not be considered by this work, in large part because of the extreme contrast between such a view and the content of the state constitutions. If one were to take this position seriously, in a discussion of the state constitutions, one would have to make the argument that the drafters were attempting something along the lines of what Charles Beard suggests in his famous work on the U.S. Constitution.[xxviii] All discussion concerning equality and property rights must be interpreted as a rhetorical smoke screen in an endeavor by the well-off and influential colonists to sustain their position of power in American society.[xxix] A discussion of this perspective is outside the scope of this work. The original intent of the state constitutions is presumed to be accessible by means of a straightforward, literal reading of the documents. There is no convincing evidence by Beard or other scholars to warrant taking an alternative approach.

Let us return to the question of where the early American state constitutions fall within the three poles listed above. None of the three can be completely disregarded in light of the language used in the constitutional documents. The employment of language such as "people have a right by common consent", "the laws of nature and reason", and "the duty which we owe to our Creator" are examples of the fact that American state founders recognized a role for the three poles in the discussion of politics.

This work will demonstrate that many, if not all, of the state founders understood divine law to have some degree of relevance and authority. The right or duty to worship is asserted in every state constitution. The fact that the right to worship is a consistent theme in the state constitutional tradition demonstrates a conviction that God, specifically citizens' individual relationships to God, is relevant to these new states. This concern for citizens rightly relating to God is not just evident in granting the right to worship. Nine of the eleven states considered in this study create legislation that regulates one or more of the following: profane language (understood in terms of disrespect for God), blasphemy, and the observance of the Sabbath. All three of these types of regulations issue out of Judeo-Christian theological principles. These pieces of legislation, enacted shortly after ratification of the states' constitutions, demonstrate a commitment to regulate behavior in ways consistent with the requirements of divine law.

Natural law is also given a prominent place by the state founders. Of the eleven constitutions two explicitly mention the laws of nature (Georgia, New York), six explicitly mention natural rights (Virginia, Delaware, Pennsylvania, North Carolina, Vermont, Massachusetts), while three do not make explicit mention of either (New Jersey, Maryland, South Carolina).[xxx] The American founders tend to articulate the dictates of nature in terms of natural rights more than in terms of natural law. However, for the founders they are intricately connected. The connection between natural law and natural rights for the American state founders is no where articulated as clearly in the state constitutions as it is in the *Declaration of Independence*, which provides some helpful insights to what is most likely going on in the minds of the state founders.

In the *Declaration*, natural law entitles a group of people to separate themselves into a distinct political entity. This natural law implies a right of a people to create a new political order on the basis

that all human beings are created equal. Thus, in the *Declaration*, there is a clear hierarchy of the roles of divine law, natural law, and popular sovereignty. God created natural laws that govern all things including human beings. The doctrine that human beings are created equal by God demands that political regimes are governed by the will of the people (rather than, for example, the divine right of kings doctrine).

A political regime, of course, must operate within the higher requirements of divine and natural law, which are the basis for the political authority of the will of the people. The *Declaration* does not provide details about how a political order should restrict or discourage behavior that is detrimental, for example, to citizens' pursuit of happiness, to physical health, and to a proper use of liberty. The *Declaration* is, of course, more concerned with the British government's use of power in ways that are detrimental to individuals' enjoyment of their rights. The state constitutions are concerned with limiting government from those kinds of abuses, but in addition, they take up the issue of how to create legislation that discourages citizens from making personal life choices that hinder other citizens or themselves from the enjoyment of rights.

One finds many laws in early American state legislation that restrict citizens from violating the natural rights of others (e.g., theft, murder, and assault). However, the kinds of laws that are more important to this study are laws that restrict citizens' behavior even when the rights of another citizen are not threatened by such behavior. These kinds of laws demonstrate a commitment to general principles of human nature that provide a standard for human behavior.

A Massachusetts law prohibiting cursing and profane swearing provides an example of an appeal to the natural law. In that legislation natural law seems to be in view when cursing is said to be "inconsistent with the dignity and rational cultivation of the human mind." In a manner consistent with Massachusetts' explicit commitment to the hierarchy of divine law over natural law, however, the legislation goes on to point out that this behavior is inherently inconsistent with the nature of man because the human mind owes a reverence to the Supreme Being who created the human mind.

As will be evident from this work, there are very few examples from the constitutions or legislation that make a succinct argument for moral legislation purely on the basis of natural law, in other words, on the basis of reason alone. Such grounds may be implied, but most of

the clear reasoning given in support of moral legislation is based upon divine law or popular sovereignty or both. One of the most notable examples of an appeal to natural law comes in New York's constitution when "the benevolent principles of rational liberty" are to guide the state in restricting religious authorities from being oppressive toward citizens.[xxxi]

Popular sovereignty is a very prevalent principle of moral legislation in the early state constitutions and legislation. Ten of eleven state constitutions assert the authority of the people within the regime, five of which go on to state that the people have the "exclusive" right of political authority. The happiness of the people is cited in ten of eleven constitutions as an aim of the political order. There are many examples of moral legislation based on popular sovereignty. In New Jersey various kinds of gambling are "declared to be common and public nuisances and offenses" by the legislature.

Similar kinds of language are found in other moral legislation, as will be pointed out in later chapters. The question that must always be asked of these examples, however, is whether public opinion is authoritative because it is understood in light of and subject to the requirements of a higher standard of natural or divine law. In other words, would the state founders consider a moral law supported by public opinion just and constitutional if it violates the dictates of natural or divine law? If a state's constitution establishes popular sovereignty on theological grounds, a popular sovereignty rationale for specific moral legislation must ultimately be understood as justified and limited by the theological principles established in the constitution.

The next chapter will examine the account of the nature of God given by each constitution. The view of God expressed in each constitution will be studied to determine whether that view places obligations and limits on the nature of moral legislation to be enacted by the state. Whether or not a state affirms belief in a God who created human beings is critical in determining the kinds of obligations that ought to be placed upon its citizens. The typical affirmation of a Christian God in the constitutions will influence the kind of behavior, including the kinds of religious practices that are considered acceptable and unacceptable when the states' legislatures draft moral legislation.

The states' views on the nature of human beings are also critical to the kind of moral legislation that are deemed necessary and appropriate for the regime. Chapter four will seek to determine what view of

human nature is espoused by each state constitution. Some of the primary concerns taken up in that chapter will be whether the constitutions articulate a fixed view of human nature. The states deal with this issue largely in the context of their discussions regarding the rights of citizens. Thus, the kinds of rights affirmed by each state's constitution and the basis for affirming those rights (i.e., nature, divine revelation, or convention) provide guidance and standards for the state's future legislators.

Chapter five will compare the findings of chapters three and four to determine whether the constitutions explicitly direct their legislatures to regulate private morality and, if so, on what basis. The primary concern is to determine if the constitution provides guidance about what kind of morality is to be legislated. For example, does the legislature have a mandate to regulate private morality even when a citizen's behavior does not threaten the rights of other citizens? If so, is government permitted to do so on the basis of popular sovereignty, natural law, or divine law?

[xxii] Consider the topic of public roadways. A government could decide to invest taxes into making its roads more useful for a variety of reasons. Public opinion may suggest that the majority of people prefer nice roads to pothole-filled ones. Or, perhaps, the government officials decide that the roads they travel should be improved because they are annoyed by bad roads. Another possibility is that the roads are necessary to distribute goods and services to people who require them for sustenance (e.g., food and medical care). Or, perhaps, the religious rituals of the nation require that people can gain assess to sacred religious sites. It is in the best interests of virtually every political order to build and maintain roads even though the motives for such efforts may vary greatly. One exception to this assertion about the necessity of roads for political orders is a regime like ancient Sparta, which may decide that good roads to neighboring regimes is not necessarily advantageous to the formation of the kind of citizen virtue it espoused. In addition, tyrannical regimes could conceive of reasons not to have good roads. Roads may pose a threat because they increase the mobility of the people and, therefore, the potential for rebellion.

[xxiii] One could argue that legislation concerning moral issues is more complicated and central to the nature of a particular political order than any other political function, including other kinds of legislation, national defense, judicial functions, and executive functions.

[xxiv] This relationship between law and the character of citizens is discussed at length by Aristotle who claims that the nature of law is "the sort of thing to make citizens good and just." Aristotle, *Politics*, 3.9.

[xxv] An example of this argument can be found in NORML's (The National Organization for the Reform of Marijuana Laws) rationale for legalizing marijuana use. On the web site's section entitled "Principles of Responsible Cannabis Use" they claim that marijuana use should be allowed as long as users respect the rights of others. "The responsible cannabis user does not violate the rights of others, observes accepted standards of courtesy and public propriety, and respects the preferences of those who wish to avoid cannabis entirely."

[xxvi] Greenawalt, "Legal Enforcement of Morality".

[xxvii] Thomas Jefferson, *The Life and Selected Writings of Thomas Jefferson*.

[xxviii] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*.

[xxix] "The first firm steps toward the formation of the Constitution were taken by a small and active group of men immediately interested through their personal possessions in the outcome of their labours. No popular vote was taken directly or indirectly on the proposition to call the Convention which drafted the Constitution. A large propertyless mass was, under the prevailing suffrage qualifications, excluded at the outset from participation (through representatives) in the work of framing the Constitution. The members of the Philadelphia Convention which drafted the Constitution were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system." (Beard.) See West (*Vindicating*, 1997) for a repudiation of Beard's theory.

[xxx] The fact that these three states do not make explicit mention of natural rights or the laws of nature does not exclude the possibility that they assume one or the other to be influencing the conclusions of their constitution and later legislation, as will be evident by the detailed analysis that will follow.

[xxxi] "Constitution of New York, 1777".

CHAPTER 3

The Nature of God in the Early American State Constitutions

Many of the early American state constitutions mention or briefly articulate theological principles. This chapter will engage in an analysis of many passages in the constitutions to determine what convictions are expressed in the founding documents about the nature of God. The analysis in this chapter is not meant to suggest that an American civil religion can be constructed that applies to all the early state constitutions. Rather, it will examine the degree to which each constitution founds its state in light of a specific theological framework. As will become clear, perspectives of faith had a prominent place in the early state constitutional tradition.

This chapter's analysis is intended to draw out a clearer understanding of what the passages reflect about the nature of God. It is based on the contention that those who drafted and ratified the constitutions took these passages seriously as a reflection of what they believed to be true about the divine, without any hidden agenda behind their insertion. A discussion of the theological framework found in each constitution will be taken up following a discussion of two categories of theology prevalent in many of the constitutions.

The two categories concerning the nature of God found in many of the constitutions are (1) the holiness of God and (2) the relational nature of God. Virtually all the descriptions of God found in the early state constitutions fall into one of these two categories. Divine attributes in both of these categories are especially relevant to the later topics of human nature and the nature of Government.

The category of Divine holiness encapsulates a collection of attributes that set God apart from anything or any being that exists. Terms including omnipotence (what the states refer to as "almighty"), omniscience, and immutability describe attributes that fall into the category of holiness. They describe characteristics of God that set the divine being apart from any other being. Human beings are limited in terms of power and knowledge. In addition, human beings, unlike the divine, exist in a condition of change and uncertainty. Consequently, understanding God as holy also involves an element of mystery, since it involves attributes that are foreign to human experience.

The phrase "the relational nature of God" refers to attributes describing a divine commitment to cultivate relationships with human beings. The divine being is often described by the early state constitutions as a God who engages with human beings and expects to be engaged by humans. Creatures are created with a design to engage in certain kind of relationship with the Creator. References to the incarnate god-man Jesus Christ portray the divine as having a communicative nature. This explicitly Christian view of God, along with references to God as Creator and the "Author of Existence", differs from pantheism, for example, in that the divine is a separate entity from everything in the created universe. The divine is not a force or energy that is present in all things. The divine may be the source of existence for all things, and may even be the present sustainer of all things' existence, but exists as a distinct entity apart from all things. The relational nature of God can be understood in a variety of ways. God can be understood as one who speaks to human beings, as one who listens to human beings, or as one who both speaks to and responds to human beings. In terms of the early state constitutions, the most prevalent example of God speaking is the view that the Old and New Testaments are inspired, i.e., that they are God's message to human beings. The most prevalent example of humans relating to God is in references to worship or prayer. In some states, both worship and inspired scripture are referenced.

VIRGINIA

In Virginia's 1776 Bill of Rights, the issue of religion is first taken up in sec. 16, at the end of the first section of the constitution.

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

It defines "religion" as "the duty which we owe to our Creator." This statement provides significant insight into the drafters' understanding of the nature of God.

First, the existence of the divine is assumed by the assertion that worship is a duty. Given that this statement is placed in a constitutional document that provides the "basis and foundation of government" for the state,[xxxiii] this assumption of the existence of God is understood to be a fundamental truth upon which the right to worship, as well as the other rights, are grounded.

Second, God is of such a nature that people are required to worship through the direction of both "reason and conviction."[xxxiv] The reference to reason and conviction, in contrast to "force and violence," indicates that this God is to be approached by means of the mind and the heart or soul, not merely through rote habit, acts of religious ritual or brute force. God is not primarily concerned with the bodily, but rather with the spiritual and mental elements of human beings. The divine being is not concerned with getting human beings to conform their behavior to some outward standard as much as to worship from an inner movement of mind and soul. Any endeavor intended to force people to perform any religious rituals is prohibited by the constitution, because such actions are contrary to the nature of true worship. This concern of government with religious actions is necessitated by a recognition that the divinely-endowed right to worship according to conscience exists prior to government. In other words, the nature of government must conform to the nature of human beings, who are obliged to worship in a particular way because of His nature. But one must not get ahead of oneself; human nature will be discussed in the next chapter.

Third, God is a Creator. The Virginians understand God to have been the originator of human beings and, presumably, of all things. This aspect of God as Creator seems to be one of the primary reasons

necessitating worship: God is the source of human existence and therefore people must worship. The obligation is upon each person.

The final phrase of sec. 16 discusses the duty of humans to exhibit certain characteristics. While Virginia leaves the question of religious expression open to the reasoning and convictions of each individual, the three Christian characteristics of forbearance, love, and charity are considered the "mutual duty of all."[xxxv] While Virginia does not give any one Christian denomination a monopoly on right *forms of worship*, they are seemingly convinced that these Christian *moral traits* are required by God of everyone. Virginia's praise of these Christian virtues suggests a moral perspective derived from revelation rather than reason, since love, forbearance and charity are principles expounded by biblical teachings.

Another plausible interpretation, however, is to see Virginia's constitution as portraying a deistic rather than a theistic view of God and religion. Section 16 provides several clues that support a deistic interpretation. First, the obligation to worship is directed to "our Creator" rather than to Jesus, Christ, Father or any other identification of God that conveys a personal God of revelation. Second, emphasis is placed on reason. While deism's characteristic emphasis on reason and its ability to discern the truth about the nature of things is not in conflict with many theistic perspectives, the distinction is found in deism's complete reliance on reason. Christian theism in particular places a much greater emphasis upon faith and belief, aspects that are not emphasized in Virginia's section 16. Third, there is no reference to the authority of the Old and New Testaments. While deism does not necessarily reject the teachings of sacred texts, such texts have a higher degree of authority in theism. The obligation to practice "Christian forbearance, love, and charity" reflects a respect for biblical teachings for its teachings on virtue. However, this does not mean that biblical teachings are authoritative for a Christian deist in the same respect as they are for a Christian theist. A Christian deist, for example, may conclude that the ethical teachings of Jesus are admirable and worthy of imitation, even though the miracle stories, the claims of Jesus' divinity, or other prophetic claims are rejected[xxxvi]

For the purposes of this study, the key difference between Christian deism and Christian theism revolves around the basis for judgment being reason alone versus a reason-assisted faith. Deism "differs from theism by not accepting doctrines that require belief in

revelation … Post-Reformation religious conflicts led many [deists] to attempt systems of NATURAL RELIGION which would be based on rational insight, independently of any revelation, and therefore universally acceptable."[xxxvii] Thus, if Virginia is interpreted as deistic, as presented above, one would expect moral legislation to be established by its lawmakers according to the dictates of reason, or according to rationally deduced natural laws rather than according to the dictates of revelation.

NEW JERSEY

New Jersey appears to strive for a more stringent separation of church and state than Virginia. There is no explicit or implied obligation that the nature of God places on human beings. There is very little said about the nature of God. The divine is mentioned only once and described as "almighty." Worship is not a duty or something owed by human beings, but rather a "privilege".

> That no person shall ever, within this Colony, be deprived of the inestimable *privilege* of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience; nor, under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform. [xxxviii]

While Virginia primarily emphasizes protection *to* practice religion freely, New Jersey emphasizes protection *against* social or political obligations to worship in a specific manner. It takes a stance on religion from a negative position.

This negative position toward religious freedom is also evident in its non-establishment clause, the first use of such a clause in the state constitutional tradition. "There shall be no establishment of any one religious sect in this Province, in preference to another." [xxxix] Such a position does not restrict religious activity, but emphasizes the danger

of spiritual oppression by either religious institutions or the state. The reason New Jersey is more explicit in its opposition to established religions is probably due to its greater religious diversity compared to the predominantly Anglican Virginia. While this position in no way hinders religious worship, it does not suggest that government should encourage worship either. The non-establishment clause suggests that politics should avoid promoting any specific form of worship or religious institution.

While it is not entirely clear why New Jersey avoids the typical language of "right to worship" or "duty to worship" found in other constitutions, the privilege to worship is called "inestimable." With this choice of terms, New Jersey seems to reject the position that worship is obligated by the nature of God or that it has the status of an individual natural right. "Privilege" suggests merely that freedom of worship is a positive right being granted to the people of New Jersey because it values the liberty of its people; i.e., it is a good political order.

One must be careful not to conclude, as the non-establishment clause might suggest, that New Jersey's lack of theological principles suggests an anti-religious bias. In the same section as the non-establishment clause, there is a clear demonstration of a Protestant Christian bias.

> No Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others fellow subjects.[xl]

Notice that only "Protestant inhabitant[s]" are guaranteed civil rights. The passage sheds an entirely different light upon the issue. Based upon this Christian qualification in order to be eligible for protection of civil liberties, one could conclude that the Protestantism is politically advantageous as well as a good for human beings. Reading section XVIII carefully, one recognizes that an obligation to support a specific religious organization can be required of citizens so long as a person is not forced to contribute to institutions that are

"contrary to his own faith and judgment."[xli] This leaves open the possibility that government can compel a citizen to worship or contribute financially to a religious organization so long as each citizen can choose which religious organization will receive his or her contribution.

In the end, one must conclude that New Jersey supports and endorses the practice of Protestant sects so long as no one sect gains a place of advantage over others through political means. Even though New Jersey does not provide specific descriptions of the nature of God, the divine-human relationship enters into consideration for politics and is being encouraged with the qualification that no one Protestant group is to control the religious landscape of the state. The significance of New Jersey's guaranteeing civil rights only to those who are Protestants ought not be underemphasized. With this position, New Jersey is essentially creating a Protestant state by attaching political consequences to an individual's choice to embrace or reject Protestant religion.

DELAWARE[xlii]

While Delaware is concerned with individuals being forced to worship contrary to their conscience, the constitution clearly encourages a specifically Christian mode of worship and belief.

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship. [xliii]

Civil liberties are only granted to individuals professing the "Christian religion."

> That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state,

> unless, under colour of religion, any man disturb the peace, the happiness or safety of society. [xliv]

Given this preference for Christianity, its non-establishment clause,[xlv] like that found in New Jersey, provides a restriction against government preference of one Christian sect or denomination over and against other Christian sects. Delaware, in contrast to New Jersey, is more generic in its preference for "the Christian religion" rather than the more narrow preference for Protestantism. This broadens civil liberties to include those who have a Catholic Christian view of God and worship.

Delaware's oath of office includes a profession of a Christian Trinitarian view of God. "Profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed forevermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration."[xlvi] The first part of this oath emphasizes a tripartite view of God as Father, Son, and Holy Spirit, an affirmation that is held exclusively by Christians. The phrase implies that (1) Jesus is the divine agent that provides eternal salvation, and (2) the Holy Spirit is a present agent of support and assistance for Christians. The second part acknowledges the authority of Christian scriptures as a source of truth. This passage demonstrates that Delaware is firmly committed to Christian theism. Notice, however, that this oath is limited to public officials. These affirmations of Christian doctrine are not required of all residents or citizens of the state. Their inclusion in oaths of office, however, speaks loudly regarding the importance placed on the religious doctrine that ought to be encouraged and is considered necessary for public officials.

Delaware most closely follows the pattern established by New Jersey in portraying religion, specifically Christian religion, as good for its people. Christianity is something to be encouraged to the degree that government can. Delaware broadens its stance compared to New Jersey in its clause guaranteeing rights to those "professing the Christian religion," rather than limiting the guarantee to Protestants. Like New Jersey, Delaware establishes a constitutional basis for significant political consequences for individuals who reject Christianity, apparently establishing this on the basis of the natural right to worship the "Almighty" God of Christianity. While including a clause that could restrict non-Christians from enjoying civil liberties, it is also

strong in its language forbidding the forcing of a citizen to worship outside bounds of "his own free will and consent."[xlvii] There is a respect for allowing people to choose diverse forms of worship, while establishing a clear preference for and endorsement of the Christian view of God. Apparently citizens are free to choose atheism in Delaware, but may face political consequences in doing so, since civil liberties may not be guaranteed in that case.

PENNSYLVANIA

Pennsylvania takes up the nature of God in its preamble.

> AND WHEREAS it is absolutely necessary for the welfare and safety of the inhabitants of said colonies, that they be henceforth free and independent States, and that just, permanent, and proper forms of government exist in every part of them, derived from and founded on the authority of the people only … we, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government) in permitting the people of this State, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society.[xlviii]

This passage mentions or suggests at least three significant characteristics of God. (1) God is the governor of the universe. The Old Testament says of God, "You are the ruler of all things."[xlix] The divine governor of the universe is, however, committed to the liberty of the governed, as the phrase from Pennsylvania's constitution recognizes. God governs the universe through divine design (e.g., endowing human beings with rational abilities), but the possibilities for human achievement must be attained by means of human performance. (2) God knows a great deal that humans do not. While it is not stated, the implication is that the divine is omniscient. Viewing God as omniscient is consistent with the biblical view of God that most Pennsylvanians would have held. "Are not five sparrows sold for two pennies? Yet not one of them is forgotten by God. Indeed, the very hairs of your head

are all numbered."[l] Just as this New Testament passage emphasizes the knowledge of God with respect to human beings, so the Pennsylvania constitution points out that only God knows the degree to which human beings can attain happiness through the improvement of government. (3) God desires that humans attain happiness to the fullest extent of their potential. As we discover in the subsequent passage, God is the one who has granted the natural rights and blessings that define human "safety and happiness."

> WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man. [li]

Divine blessing involves granting authority to people who can institute "just, permanent, and proper forms of government."[lii] While it shall be explained more fully in the next chapter, it is relevant to point out that the immediate source of government authority is the people, but, the authority of a people to govern themselves is granted ultimately by the Author of their existence.

In the preamble of Pennsylvania's 1776 Constitution, the divine is called the "Author of existence."[liii] Pennsylvania presumes that the divine is a creator.[liv] However, the wording places more emphasis on God as the source of being. While this passage does not explicitly state that humans have an obligation to worship as a consequence of God's being the source of their existence, it certainly suggests such a conclusion. An implied obligation is also evident by the larger context of this passage. Individuals are said to have blessings bestowed upon them by God. Notice that their "natural rights" are only one set of blessings that have God as their source; there are apparently other kinds of blessings as well.[lv] Generosity is clearly one of the divine attributes. The various blessings, most importantly endowed rights, become the basis for establishing the ends of government. Because God gives natural rights and other blessings intended to be enjoyed by individuals, good government exists as one of the means to those higher ends. While God gives blessings, the full enjoyment of some of them depend upon human initiative. Human beings are not forced to experience or enjoy these blessings even though they are inherently

beneficial. With the blessings come responsibilities but not an obligation that is immediately enforced by divine judgment.

Pennsylvania goes the furthest of all the state constitutions in establishing a theology that links God to natural rights. The divine is twice referred to as the "governor of the universe."[lvi] God legislates natural law and "rules" through the mandates of that law. The divine relates to human beings through that law, the scriptures, and future rewards and punishments.[lvii] The term "governor" suggests a personal God that is actively involved in ruling over the universe rather than one who simply creates natural law and steps back from the universe and allows events to unfold according to human choice in a deistic mode. A governor does not typically bring to mind the image of a deistic God, thrusting the universe into existence and then stepping back to see what will happen to it. Governors are involved in actively executing policy and law. This perspective of an active deity is suggested by the reference to God "permitting the people of this State … deliberately to form" a government and society that "promote[s] the general happiness of the people."[lviii] Lest one think that the divine stands aside, requiring human beings to make something of themselves, this passage points out that God has created this opportunity for Pennsylvanians to found a new state.

The only explicit linkage of the divine to Christianity is the reference to the Christian Bible as inspired by God in the oath of office for the legislators.

> I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.[lix]

The guarantee of civil rights, however, is offered to anyone who believes in the existence of God, without any Christian qualifications on the nature of that deity.

> Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship.[lx]

The guarantee of civil rights being the broader commitment in its constitution, Pennsylvania might be viewed as to taking a more philosophical than theological approach to the existence of God as the source of being and order. Unlike what we found in the New Jersey and Delaware constitutions it does not attach the guarantee of civil liberties to Christianity or, more, specifically, Protestantism, but to those "who acknowledge the being of God," which is not strictly limited to Christianity. However, the requirement of public officials to acknowledge the inspiration of Christian scriptures does emphasize a Christian view of God.

Section II of Pennsylvania's 1776 Constitution states that "all men" have the right to worship "according to the dictates of their own consciences and understanding."[lxi] While this section tells us much about the nature of man, which will be taken up later, it also speaks to the nature of God. The right addressed in this section is "to worship Almighty God." It is not a right to worship any god of an individual's making, nor is it a right to worship one or more gods who are less than all-powerful. It is a right to worship a divinity that is unhindered by other forces or beings; the right is to worship an omnipotent God. This right excludes several world religions. Buddhism is excluded on the basis that its doctrines are "independent of any belief in a supreme creator god."[lxii] Any religion that worships a variety of gods, including Hinduism for example, would be excluded also.[lxiii] Other religions that would seem to be rejected are those that do not view God as a separate entity, whose power and identity is distinct from the power and identity of created beings or forces.[lxiv] This leaves the other three major world religions (i.e., Christianity, Judaism, and Islam) that meet the conditions of this right to worship.

The nature of God as portrayed by this constitution implies an "ought" to worship. The God who is the source of being, who governs the entire universe, who has exceptional or complete knowledge, who is good with respect to human beings, and who is all-powerful ought to be worshipped. Unlike Virginia, however, Pennsylvania does not explicitly equate the right to worship with a duty or obligation. The nature of God as portrayed in the constitution seems to suggest an obligation to worship, but the constitution stops short of saying so. While no person is politically obligated to acknowledge "the being of God" only those who do can be guaranteed the rights of citizenship under the constitution.[lxv] This fact suggests that belief in and worship

of the divine, as portrayed in the constitution, is crucial for human happiness and the good of the community.

In section 10 of the Pennsylvania constitution, state representatives are required to make two oaths of office. The first oath is a promise to be a "faithful honest representative and guardian of the people" opposing legislation that could be "injurious to the people" or "abridge their rights and privileges."[lxvi] The second oath involves a statement of faith. The representatives are required to affirm a belief in monotheism. As addressed above, this constitution affirms the existence of one God rather than any form of polytheism. This oath attributes the characteristic of justice to God. "The one God … rewarder of the good and the punisher of the wicked."[lxvii] In the end, God requires each individual to be accountable for his or her actions. God will not let the wicked off scot-free, nor leave the good unrewarded. This function is possible due to God's attributes of omniscience, omnipotence, and authority. Only the divine being is justified in passing ultimate judgment, as well as knowledgeable and powerful enough to do so.

The Pennsylvanians are convinced that the Bible is divinely revealed: "the [Holy] Scriptures of the Old and New Testament … given by Divine inspiration."[lxviii] Scriptures are to be held sacred by public officials. This tells us more than just their convictions about the status of the Bible. It reveals that God was viewed as an initiator vis-à-vis human beings. A belief in the scriptures as being divinely inspired portrays a God who desires to communicate to people. This is a relational God, a Creator who wants to provide assistance and insight to rational creatures. The passage does not explicitly provide a statement of the intended role of scriptures. However, it suggests that these sacred books of the Bible ought to provide the community and the leaders with standards for, along with insights into, human life that bear on politics. God is viewed as a counselor whose advice, which can be found in scripture, is critical for public officials.

While Pennsylvania uses language in some sections that suggests a more philosophic and, perhaps, deistic view of God, it incorporates at least as much language that is less deistic and obviously theistic. Its commitment to the divine inspiration of the Old and New Testaments is a significant example of a view of God grounded on revelation as well as reason. Pennsylvania's advocacy of the New Testament brings with it a specifically Christian view of God. Additionally, the divine is perceived as a being committed to the good of human beings. Relating

to God and pursuing enjoyment of divine blessings, including natural rights, are central to a fulfilling human life. All of life, including human life, is inextricably linked to God and, therefore, government must operate in light of this view.

MARYLAND[lxix]

Maryland follows Virginia in attesting that the nature of God obligates worship.

> That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty.[lxx]

Very little in the way of ascribing to a particular view of God is given in the constitution outside of the obligation to worship and the preference for the Christian religion (i.e., religious freedom is granted only to those "professing the Christian religion"). In this same section, the legislature is given the power to require financial support of a Christian denomination of each person's choosing.

> The Legislature may, in their discretion, lay a general and equal tax for the support of the Christian religion; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county. [lxxi]

In the only other significant reference to religion, the oath of office requires allegiance to Christianity.

> That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State … and a declaration of a belief in the Christian religion.[lxxii]

The people are free to worship according to their consciences, so long as it falls within the bounds of Christianity, generally speaking.

Maryland does not directly make a connection between the nature of God and human politics as Pennsylvania does in discussing natural law and the requirement of faith for citizenship. This mid-Atlantic state, however, does require the adherence of its leaders to Christianity as crucial to a well-ordered and free society. The combination of a Christian oath of office and guarantee of civil rights exclusively to Christians demonstrates that in Maryland's view Christian theism is politically relevant, and thus endorsed.

NORTH CAROLINA

The right to worship in North Carolina is given in broad language, simply referring to God as "Almighty." The endorsement of Protestant Christianity is found in the oath of office for those "holding any office or place of trust or profit in the civil department within this State."[lxxiii] Like Maryland, North Carolina seems concerned primarily with the theological tenets held by leaders, either assuming leaders will have substantial influence on the rest or that the religious beliefs of citizens is less influential on the operation of government. Compared to Maryland, North Carolina is much more specific in its oath: (1) it specifies a preference for "Protestant" rather than generically "Christian" religion,[lxxiv] (2) it requires belief in "the divine authority" of the Bible, and (3) it limits acceptable theology to beliefs that are compatible "with the freedom and safety of the State."[lxxv]

North Carolina's oath of office affirms a view of God that is triune, communicative, and prescriptive vis-à-vis mankind. However, the emphasis on Protestant Christianity as opposed to Catholic or Orthodox Christianity, demonstrates a subtle but important difference with regard to understanding God's role in human communities. The general preference for Protestant Christianity implies (1) a rejection of the notion that divine authority and doctrine is regulated through a hierarchical church structure, (2) an endorsement of the freedom of individual believers to interpret scripture without the regulation of a hierarchy of national church authorities, and (3) a belief in salvation granted only as a result of personal faith in the work of Jesus in the crucifixion and resurrection. The Protestant view of God emphasizes

the accessibility of each individual to God directly without human agency.

North Carolina is aware that religion must have legitimate limits. It prohibits "religious principles incompatible with the freedom and safety of the State."[lxxvi] North Carolina presumes that God would not obligate a worshipper to hold and to live out principles that are in conflict with state sovereignty and security. Implied, therefore, in this statement is the principle that the divine does not require any beliefs or practices of human beings that would undermine good government. In other words, God is a friend of good government and not an enemy. The wording used here provides a litmus test for acceptable religious doctrine and practice. The implication is that any form of worship that threatens the security of the community and the legitimate authority of government is a form of false religion.[lxxvii]

To suggest that North Carolina's constitution is Christian may be a stretch. It is far less concerned with the nature of God, particularly when one looks at its Declaration of Rights section, compared to its predecessors. However, alongside its non-establishment clause in section XXXIV, the oath of office in section XXXII requires a profession of God's existence, as well as belief in Protestantism and the inspiration of the Christian Bible. On the other hand, this oath, by being placed in the "Form of Government" section rather than in the "Declaration of Rights," is potentially less binding in the future. It is less binding because of section XLIV's statement that makes a distinction between the non-amendable "Declaration of Rights" and the amendable "Form of Government."

By distinguishing between the "Declaration of Rights" and the "Form of Government," North Carolina is implying that the concepts in the former are the grounding principles upon which the state is founded. The only reference to the divine in that section is when the divine is called "Almighty God" in the right to worship clause. One could conclude, therefore, that while North Carolina prefers Protestant Christianity for its public officials, it is less committed to Christianity than some states. While being a public official requires a commitment to Christianity, there are no other political consequences given for citizens who choose to reject Christianity.

GEORGIA

Georgia mentions the "laws of nature and reason" in its preamble, but seems content to leave the phrase ambiguous rather than spell out its meaning.

> Whereas the conduct of the legislature of Great Britain for many years past has been so oppressive on the people of America that of late years they have plainly declared and asserted a right to raise taxes upon the people of America, and to make laws to bind them in all cases whatsoever, without their consent; which conduct, being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppose such oppressive measures, and to assert the rights and privileges they are entitled to by the laws of nature and reason.[lxxviii]

Human beings are entitled to "rights and privileges" by these "laws of nature and reason."

Indicating that these laws are fixed by nature and are accessible by reason neither confirms nor denies that some divine entity is understood to be their source. Much of the natural law tradition prior to the writing of Georgia's constitution, however, would suggest that the reference to "the laws of nature and reason" carries with it an understanding that God created those laws. For example, while Locke uses the two terms "the Law of God" and "the Law of Nature" as if they are distinct categories in *Two Treatises of Government*, he specifies that God is the source of the law of nature.[lxxix]

> The rules that they make for other men's actions, must, as well as their own and other men's actions, be conformable to the law of nature, i.e. to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good, or valid against it.[lxxx]

Locke's equating of the law of nature and the "will of God" demonstrates that God is the source of the law of nature as well as the source of the law of God.

Georgia requires that its civil officials be "of the Protestant religion." Outside of this requirement, the constitution, like Maryland and North Carolina's, provides no discussion of theological principles or commitments. Along with those two states, however, it has enough theological concern and preference to require Christian faith in its rulers. Georgia prohibits forced contributions to teachers of a different profession of belief than the citizen.

> ART. LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession. [lxxxi]

This admits the possibility of legislation that requires financial contributions being paid to religious organizations that do conform to a citizen's profession of faith. On the other hand, the constitution does not suggest that a requirement of religious taxation is good or beneficial, even though it appears to be permissible according to the constitution.

In the final analysis, Georgia proves itself to be the most secular permanent constitution in the revolutionary period. The two explicit references to God are included in the oaths of office ("so help me God") and the reference to the "the year of our Lord" when dating the document.[lxxxii] The reference that most closely resembles a theological principle is the reference given in the preamble to "the laws of nature and reason."[lxxxiii] However, unlike the *Declaration of Independence*, Georgia does not link the laws of nature to God. Presumably, an established and immutable natural law governs human beings and is accessible by means of reason alone. Notice, however, that even though Georgia diverges from the other states in its lack of references to God, its constitution does not necessarily present a thoroughly popular sovereignty perspective. Its key reference to the natural law provides a standard by which the legitimacy of popular will must be judged. The reference to God in the oaths implies that God is viewed as the enforcer of oaths and the ultimate judge of human beings. Thus, while Georgia's constitution is more secular in its limited theological language, it recognizes the relevance of God and a fixed law of nature to politics even if in a more limited and less explicit manner than many other states.

NEW YORK

In the body of New York's constitution the term "God" is only mentioned in the context of excluding ministers from serving in civil offices; the term "Christian" is mentioned only in the context of a non-establishment section.

> And whereas the ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function … [lxxxiv]

> That all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers … are repugnant to this constitution, be, and they hereby are, abrogated and rejected.[lxxxv]

These passages suggest that God is largely considered irrelevant to politics by the constitution of New York. However, New York includes the *Declaration of Independence* in its preamble. After the insertion, the preamble states that "the reasons assigned by the Continental Congress for declaring the united colonies free and independent States are cogent and conclusive."[lxxxvi] The reasoning of the *Declaration*, with which New York's constitution agrees, includes a reference to rights entitled to people under "the laws of nature and of nature's God." In addition, those rights are "endowed by their Creator."

New York appears to be in full agreement with the *Declaration's* assertion that God exists, has established laws, and has endowed humans with rights. The *Declaration* ends by making the following appeal for divine involvement in their affairs: "for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor." The people of New York mirror this statement in their state's constitution: "we approve the same, and will, at the risk of our lives and fortunes, join with the other colonies in supporting it."[lxxxvii] While they do not explicitly agree with the *Declaration* that they have "a firm reliance on Divine Providence" it is explicit that they

agree with the reasoning of the *Declaration*, presumably including the principles concerning natural rights and law being rooted in the divine.

Natural and divine law is a cornerstone of the equality of human beings according to the *Declaration*. The divine ordering of creation results in the "self-evident" truth that all human beings are made equal vis-à-vis one another by God. "All men are created equal … they are endowed by their Creator with certain unalienable rights … among these are, life, liberty, and the pursuit of happiness."[lxxxviii] God is not aristocratic; no one person or group of persons is given political power on the basis of a supposed endowment of divine authority. God is not in the business of favoritism, politically speaking.[lxxxix] Locke's *First Treatise* is designed to deny the charge that God divinely appoints some individuals to rule over others. Locke's view is clearly presumed in the *Declaration*.

The following statement, also from the *Declaration*, is an appeal to the justice of God in political crisis: "Appealing to the Supreme Judge of the world for the rectitude of our intentions … with a firm reliance on the protection of Divine Providence."[xc] In a united fashion, the colonies stake their claim to independence from Britain and ask God to judge the legitimacy of their claim. The divine is clearly understood to be imminent in human affairs and able to judge between the conflicting parties. Given the imminence of God and the justice of the claim for independence, divine assistance is sought. New York is placing its hope upon a God that is willing and able to intercede. The assumption is that appeals to the divine will be heard and justice executed, in a sort of partnership between the honorable, revolutionary actions of New Yorkers and the hand of God.

The insertion of the *Declaration* aside, New York's constitution can certainly be interpreted as viewing God as irrelevant and, perhaps, problematic. It is very firm in its commitment to prohibiting the state from giving a "particular denomination of Christians or their ministers" the status of an "established" religion.[xci] It includes a striking prohibition against Christian ministers "at any time hereafter, under any presence or description whatever" from being "eligible to, or capable of holding" any public office.[xcii] Freedom of religion is expressly limited from "justify[ing] practices inconsistent with the peace or safety of this State."[xciii] Religious people cannot simply do anything they want when practicing their religion.

The body of New York's constitution may not be so neutral or negative toward religion as just suggested. New York's policy restricting ministers from public office may not reflect a distrust of religion. "Ministers of the gospel" are understood to be "dedicated to the service of God and the care of souls."[xciv] It is because of this calling in their lives that they "ought not to be diverted from the great duties of their function" by public office. If one reads this in a simple, straightforward manner, the constitution is prohibiting ministers from office so that they can fulfill a function of great concern and relevance to the political order–their calling to serve God and minister to the souls of men.

In spite of this concern for the spiritual needs of its citizens, New York is committed to keeping church and state largely separated in terms of function and interaction. Granting political power to religion is strictly prohibited. The reasons for creating this kind of limitation were obvious to New York. Religious agenda mixed with political power is a recipe for injustice.

> We are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided* , That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[xcv]

The divine being will never require or encourage worshippers to force others into their manner of religion. While this passage does suggest that there are false as well as politically dangerous modes of religious expression it does not claim that there is only one true mode of religious expression. The latter issue is left open. God may be a god that can be appropriately worshipped in a variety of modes.

The phrase "benevolent principles of rational liberty" is unique to New York in the early state constitutions. The emphasis on rational principles raises the possibility that New York expresses a view of God that is deistic as was discussed in the section on Virginia above. The reference to "spiritual oppression" by "wicked priests" demonstrates a mistrust of institutionalized religion—presumably religion that is founded upon claims of special revelation. The "benevolent principles of rational liberty" could very well be understood by New York as involving something akin to what Virginia described as the duty to practice "Christian forbearance, love and charity" toward one another. In other words, principles of toleration that come from Christianity are embraced because they are reasonable. Under the guidance of principles of rational liberty, each person is free to decide how he will practice religion. This passage, therefore, suggests that reason should ultimately be the judge of religion and not revelation. Unlike many other constitutions, New York's constitution includes no acknowledgement or statement of the authority of the Old and New Testament. The mention of the terms "licentiousness" and "wicked priests" indicates that there are fixed boundaries within which religious expression can exercise its liberty. Certain behavior is judged to be wrong even if done in the name of religion. Those boundaries are presumably based on the principles of rational liberty as well.

New York ends up with a constitution that recognizes the existence of a divine being and natural standards established by that being, even thought it may be more deistic than theistic in its theology. However, New York is less specifically Christian than some of its predecessors. Its discussion of God tends to use philosophical rather than theological language, which is consistent with a deistic perspective of religion and the divine. The one notable exception is its discussions of "ministers of the gospel." The constitution is committed to monotheism, but it is not as strongly committed to a distinctively *Christian* version of monotheism, compared with other states.

VERMONT

Vermont's constitution generally follows the pattern set by Pennsylvania. It does so in the way it refers to theological principles, with the exception of one section. After Vermont declares in its right to worship section that "all men have a natural and unalienable right to

worship ALMIGHTY GOD," it adds the following qualifier in addition to Pennsylvania's qualification of individual conscience: "regulated by the word of God."[xcvi] In other words, the right to worship God is limited by the regulation of the Bible. This qualification is enormously significant. The Bible is the true divine message to mankind as far as the citizens of Vermont are concerned. God is the god of Christian revelation. The divinity is not disengaged from people, but intends to speak to human beings through the instrument of the written word. If a particular form of worship is contrary to the guidance of the Bible it carries with it no right of religious expression.

Since Vermont obviously refers to the Christian Bible, including the Old and New Testaments, it is excluding not only non-monotheistic religions (e.g., Hinduism and Buddhism) but also Judaism and Islam. In the same section, where Pennsylvania guarantees citizenship only to those who profess belief in "the being of God," Vermont guarantees citizen rights only to an individual who "professes the protestant religion."[xcvii] The final distinction that Vermont includes is a requirement that "every sect or denomination" must "observe the Sabbath, or the Lord's day, and keep up … some sort of religious worship which to them shall seem most agreeable to the revealed will of God."[xcviii] Vermont places emphasis on Protestantism and the role of the Bible as the standard that legitimizes religious expression. This represents another strong statement regarding Vermont's belief that God is the God of the Christian Bible, and has more far-reaching implications than those of Pennsylvania.

Vermont takes the Christian preferences found in Pennsylvania and adds more specifically Protestant boundaries to the religious freedom it grants. Civil rights are only guaranteed to Protestants and religious liberty is only guaranteed to groups conforming to the teaching of the Bible. It is obviously establishing itself as a Protestant Christian state. This has a significant impact on the issue of legislating morality, as will be addressed in later chapters.

SOUTH CAROLINA

South Carolina is the only American state to explicitly establish an official state religion. Vermont's first constitution regulates religion and narrowly restricts religion to sects that "observe the Sabbath" and practice religion according to the "revealed will of God."[xcix] By

narrowing the category of what constitutes an acceptable religion, Vermont essentially creates limits for freedom of worship such that Christian denominations are the only legitimate religions. South Carolina also gives Christianity a privileged place in the state, but it goes even further in its endorsement of Protestantism: "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State."[c] This establishment section should not cause one to assume that South Carolinians consider themselves intolerant. The language communicates a genuine concern for tolerance between Christian Protestant denominations (even though by contemporary standards the qualification of only allowing a variety of Protestant sects would be considered intolerant). "All denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges."[ci]

The theological requirements for an established church are clearly laid out. Every established church must believe:

> 1st That there is one eternal God, and a future state of rewards and punishments. 2nd That God is publicly to be worshipped. 3rd That the Christian religion is the true religion. 4th That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice. 5th That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.[cii]

While expressly creating a barrier against non-Christian religions obtaining "established" status, these requirements attempt to prohibit such things as persecution of Quakers, a practice that the Church of England followed in 17th century England. Many persecutions of one group of Christians toward another had occurred, and one did not have to look to Europe for such examples. The founding of Rhode Island as a result of religious conflict provided a case in point. South Carolina's broad requirements for establishing church groups would prohibit any one Christian denomination from gaining exclusive influence and power in the society. However, South Carolina is intentionally excluding at least two major Christian traditions from established status—Catholicism and Eastern Orthodox. One could argue that there were virtually no Eastern Orthodox believers (e.g., Russian Orthodox

and Greek Orthodox) in their state for this tradition to be relevant. South Carolina's stance, however, represents blatant discrimination against Catholicism, which does have a presence in colonial America.

From a 21st Century American perspective, South Carolina's constitution appears religiously intolerant, but when one considers the strong representation of Anglicans in the state's colonial period and the language of section XXXVIII, a decent respect for pluralism is being demonstrated, albeit within exclusively Protestant limits. For example, South Carolina is so concerned that new churches be able to come into being that if more than fifteen males over the age of twenty-one

> unite themselves in a society for the purposes of religious worship, they shall … be constituted a church, and be esteemed and regarded in law as of the established religion of the State, and on a petition to the legislature shall be entitled to be incorporated and to enjoy equal privileges.[ciii]

South Carolinians clearly wanted to create a Christian state, but not one that would establish a state religion that would be centrally controlled by one particular denominational hierarchy. Further evidence of this is that ministers are prohibited from holding any political office, and thereby increasing the influence of their particular Christian sect.[civ]

The constitution expresses a deep concern that ministers be positive role models and examples to their congregation. It provides a unique oath required of ministers of established churches. In this declaration, a minister must commit to the following:

> That he is determined by God's grace out of the holy scriptures … to teach nothing as required of necessity to eternal salvation but that which he shall be persuaded may be concluded and proved from the scripture, that he will use both public and private admonitions, as well to the sick as to the whole within his cure, as need shall require and occasion shall be given, that he will be diligent in prayers, and in reading of the same, that he will be diligent to frame and fashion his own self and his family according to the doctrine of Christ, and to make himself and them … wholesome examples and patterns to the flock of Christ, that he will maintain … quietness, peace, and love among all people.[cv]

This declaration demonstrates a theology that views God as a being who communicates with humans through scripture, desires human beings to respond through prayer, and is pleased with courteous, wholesome, and mutually-caring human interpersonal relationships. Proper religion never condones "reproachful, reviling, or abusive language," "quarrels and animosities," "hatred of the professors," or "irreverent or seditious" speech about government.[cvi]

South Carolina endorses a belief in God that is specifically Christian. God has ordained the sacredness of the Sabbath, the obligation of people to worship publicly, and the role of the Bible to be a "rule of faith and practice." However, South Carolina does not require all citizens to affirm this view of God. It does not forcibly require all citizens to be involved with one of the established churches. To vote for state legislators, a citizen merely has to "acknowledge the being of God, and believe in a future state of rewards and punishments."[cvii] While this excludes atheists and others from voting it provides suffrage to other religious groups (e.g., Jews and Muslims). The Christian theology affirmed by the constitution does not completely cut off non-Christians from political involvement in South Carolina.

Like New York, South Carolina shields ministers from being encouraged or pressured into making a career change into politics. "Ministers of the gospel are … dedicated to the service of God and the cure of souls."[cviii] If this passage is interpreted in a straightforward manner, South Carolina is genuinely concerned with keeping their ministers from being "diverted" from a life of ministry. A skeptic might conclude that the drafters of this constitution were worried that ministers might come to have too much political power. Their influence in the community could be viewed as a means to attaining to political offices for the purpose of furthering particular religious interests. Perhaps both issues were at stake for South Carolina. If the former is a genuine concern, it reveals that the South Carolina drafters understood God to be pursuing a cure for the people's spiritual depravity. This suggests a fundamental conflict between a God who is holy and a people who are not, which its endorsement of Protestantism recognizes and attempts to address.

Just as the state is intended to be a supporter of religion, religion ought to render support to the state. Worship ought never involve criticism of the state. "No person whatsoever shall speak anything in

their religious assembly irreverently or seditiously of the government of this State."[cix] God does not advocate verbal complaint against government as a part of religious practice. The church is prohibited from the business of stirring up insurrection. In other words, the church has no authority in the realm of government.

South Carolina is more concerned with religion becoming prostituted to political agendas than vice versa. As a result, there exists a close-knit relationship between church and state. The state must constantly be aware of the primary role played by the state's established local churches and support them. Ministers must not allow any seditious behavior in the churches. Its constitution is confident in the truth of Protestant theology. It is the one constitution to put all its eggs in the basket of divine law, i.e., Christian revelation. There is no explicit mention of natural law or natural rights. South Carolina gives no indication that God grants rights universally, though its suffrage standard might indicate such a view. The state's view of God emphasizes divine obligation placed upon people rather than political rights granted to them. Duty rather than rights is the theme of this constitution and one's duty is to the God of Christianity. There is no doubt that South Carolina's 1778 constitution is the constitution most committed to endorsing Christianity in early America.

MASSACHUSETTS

John Adams, the principle author of the oldest written constitution still in force today, was obviously familiar with Pennsylvania's 1776 constitution. The following section from Massachusetts' preamble is very similar to a phrase in Pennsylvania's preamble:

> We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design.[cx]

Notice the deliberate way Adams changes Pennsylvania's wording of "great Governor of the universe" to "great Legislator of the universe" in Massachusetts' constitution. Both acknowledge the goodness of the divine, but Massachusetts is virtually begging for divine guidance with the final phrase. This phrase represents the closest example of a kind of prayer for divine assistance in a state constitution.

Massachusetts' replacement of "governor" with "legislator" in the phrase is a subtle but significant change in how God is viewed. As legislator, God is acknowledged to hold not only a position of authority in the universe, but is the creator of the laws that govern the universe. In some respects, this difference in wording can suggest that God enacts the laws of nature, which then govern the universe. Lest this passage be interpreted in an overly deistic manner, the rest of the sentence points out that the divine is intricately involved in human affairs. It is the providence of God that has afforded the people of Massachusetts "an opportunity … of entering into an original, explicit, and solemn compact with each other." God has given this opportunity. It is not merely the result of random chance that arose after a deistic god spun the world and its natural laws into existence and withdrew from involvement.

Massachusetts hopes for and seeks an active role by God in giving discernment and guidance to the state's founders. The partnership of God and man is evident in this preamble. The whole enterprise is the founding of a government designed by representatives for a collection of people, under God's guidance. It reflects a view of God similar to the Jewish rulers and people as represented in the Old Testament. King David wrote in one of his psalms: "I will praise the LORD, who counsels me."[cxi] In another Psalm, the Jewish people of the period of the exodus were criticized for not paying heed to the counsel of God: "But they soon forgot what he had done and did not wait for his counsel. In the desert they gave in to their craving; in the wasteland they put God to the test."[cxii] Massachusetts takes heed of this biblical critique of the Hebrew exodus as they are founding their state. They want God's partnership so that their government will be well founded and blessed. They understand that their natural rights, which the legislator of the universe granted, are at stake along with other potential "blessings of life."[cxiii] God has given them the potential for "safety, prosperity, and happiness," and divine assistance is perceived to be necessary for its achievement.

In another noteworthy passage involving theological principles, Massachusetts follows the lead of Virginia, but with another adjustment. Virginia's is one of two constitutions prior to Massachusetts to state worship a duty.[cxiv] Massachusetts brings the issue of worship to the forefront of its "Declaration of Rights." While Virginia places the issue of worship at the end of its "Bill of Rights," Massachusetts puts its discussion of worship immediately after the discussion of man as being free and equal by nature, giving it a prominent place.[cxv] Massachusetts describes worship as a "right as well as [a] duty."[cxvi] It is not entirely clear why he does so, but Adams, as the constitution's drafter, claims that religion is both a right that human beings may always legitimately enjoy, as well as a duty that human beings are obliged to practice.

The public nature of this right/duty is also emphasized by Massachusetts. Piety, or regular worship of God, is a duty of all people. The encouragement of it is considered a critical issue for governance. Thus, the legislature is given the mandate to require Protestant religious instruction in the state.[cxvii] The constitution directs its government to provide religious education to its young people in the Protestant religion according to the Protestant preferences of individual citizens.

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality.[cxviii]

Massachusetts makes the notable addition of including "piety" among its list of virtues (compared to the lists found in Virginia, Pennsylvania, and Vermont) that are "necessary to preserve" free government.[cxix] Government is not concerned merely with material issues, but is compelled to address issues of the soul.[cxx] While it restricts government from forcing individuals to worship contrary to their conscience, Massachusetts' conviction that Protestant Christianity is necessary for both the happiness of its citizens and the preservation of a civil government leads it to conclude that government encouragement of various forms of Protestantism is necessary and good.

The people of Massachusetts are seeking divine assistance by "devoutly imploring His direction."[cxxi] This is a striking example of a kind of prayer being included in a constitution. God is assumed to be responsive to the petitions of human beings. The divine is expected to hear and respond to people, providing wisdom and insight. Massachusetts desires God to play a role in a divine-human endeavor to establish a good government. This insight is not expected in the form of direct divine intervention, like the giving of the Ten Commandments on Mount Sinai, because the construction of government is understood to be the responsibility of the people of Massachusetts. They expect guidance, one can assume, through the use of their rational faculties since the compact is being entered into deliberately.[cxxii] Wise use of faculties and careful deliberation, in light of the laws of human nature established by the legislator of the universe, is the object of their petition.

As God provides assistance to Massachusetts, the intended result is the promotion of the Christian deity. Massachusetts is concerned with being a state in which the reputation of the Christian God is exalted. It is concerned with God's reputation in the area of education, if not in other respects. "The honor of God, the advantage of the Christian religion" as a result of the educational process is a praiseworthy end.[cxxiii] This phrase about the honoring of God is placed in the context of Harvard University's mandate to encourage the "arts and sciences, and all good literature."[cxxiv] Scholarship is expected to lead to exaltation of the Christian God. Divinity is in some respect incarnated in nature, and yet separate enough to be an entity that is honored apart from nature. The Christian God is revealed in careful study of both the natural world and human experience and, consequently, such study is to be endorsed and encouraged by Massachusetts.

Massachusetts is very concerned with both the theological understanding and the character formation of its citizens. Only those who are members of "denominations of Christians" are guaranteed equal "protection of the law."[cxxv] However, many of the civil liberties listed in the declaration of rights are not explicitly limited to Christians, among which are trial by jury, protection of property, and suffrage rights. So, while it has many elements that would classify it as a Christian state, e.g., its commitment to encourage and persuade citizens to affirm Protestant theology, it does not limit individual civil rights to those who profess this theology. Therefore, one must conclude that it is

more moderate than some state constitutions, but certainly more radical than others in its ties to Christian theology. One must also conclude, however, that Christian theology is the standard by which Massachusetts is expected to judge moral issues.

CONCLUSION

One of the most striking observations that can be made from this chapter is that every region of the early United States has one or more state constitutions that significantly address theological principles. The chart below demonstrates some of the overlap. For example, a concern with belief in a God who will execute future rewards and punishments is addressed in at least one state in each region (Vermont, Pennsylvania, South Carolina). While some have suggested that there are regional constitutional patterns that stem from cultural differences, including religious differences, this study suggests otherwise when it comes to the states' concern with the nature of God. Some states that tend to avoid the issue of theology more than others (for example, Georgia, Maryland, and New York), but not one constitution fails to use Judeo-Christian terminology and all but one state refers to Christianity, Protestantism or the inspiration of the Bible in a positive way.[cxxvi] The pattern found in the constitutions demonstrates that belief in God and, specifically, Christian theology was taken to be a relevant issue for politics at the state level.

As a balance to that support for Christianity, most states are equally concerned with maintaining some degree of religious pluralism. There is a respect for the diversity of appropriate forms of worship, in the sense that only South Carolina establishes state endorsed churches, and even South Carolina allows non-Christians to have rights of citizenship. Virtually across the board, the early state constitutions suggest that there is no one religious methodology or set of rituals that ought to be required of all human beings. While the states are largely Christian in their theological outlook, they respect and legalize a multitude of approaches for individuals and groups to live out their right or duty to worship.

While pluralism is a theme, the encouragement of religious institutions is certainly also a theme. People are not merely encouraged to worship privately, but publicly. For example, the God recognized by the constitution of Massachusetts is to be worshipped publicly, not just

in the realm of an individual's private life.[cxxvii] "Public worship" is mentioned five times in Massachusetts' constitution. South Carolina's establishment of the Protestant religion includes a qualification that "God is publicly to be worshipped."[cxxviii] Thus, the form of Protestant religion that South Carolina establishes must involve corporate worship.

It is also noteworthy to mention that there is a fair amount of attention paid to theological issues in oaths of office in the early state constitutions. The fascinating point about this is that they believe that government officials will honor these oaths. In other words, they expect that the officials will not undertake the oath if they do not genuinely believe its content. The alternative interpretation of these passages is that the oaths are merely pretense, to satisfy the public's religious leanings and to attempt to create added public confidence in the officials' character. However, this latter interpretation is not supported by evidence from other public or private documents from this period of which this author is aware. States with theological content in the oaths of office appear to expect officials to pay due respect to the oaths, honestly giving the oath or disqualifying themselves from service. However, these kinds of oaths would seem to fit in the category of a "parchment barrier" to political thinkers like James Madison.[cxxix] It is an attempt to require prospective candidates to be Christians, thereby protecting the community against self-aggrandizing leaders who do not have the best interest of the public in mind. They assume that genuinely Christian officials will have a greater tendency to be good leaders. The problem with these oaths is that no one can accurately determine the beliefs of an individual if that person is willing to deceive others for the sake of personal gain. Nonetheless, states seem to expect that prospective candidates would be trustworthy when faced with these oaths out of reverence for God or fear of future, divine punishment.

There is a fairly broad spectrum of the states' concern for the attributes of God in their constitutions. Several constitutions demonstrate little to no concern for discussing specific views of the divine (e.g., Maryland, North Carolina, and Georgia). However, nine of eleven constitutions describe God with one of the following terms: Creator, Almighty, Jesus Christ, Author of Existence, or Eternal. Some states provide a great deal of description of the divine, both in terms of the holiness and communicative nature of God (see Table 1 below).

Virginia, Delaware, Pennsylvania, Vermont, South Carolina, and Massachusetts certainly fall into this category, as the table below demonstrates. Only Maryland and Georgia fail to use any descriptive terms in reference to the divine, but both of them require an affirmation of Christianity or Protestantism in their oaths of office. Their endorsement of Christianity, generally speaking, or specifically Protestantism, is loaded with a great deal of theological content. While these two states seem to conclude that discussing theological principles is irrelevant to their founding document, their oaths of office obviously imply a presumption of and preference for a Christian or Protestant view of God.

The communicative nature of God is prominent in the state constitutions. This aspect of the nature of God is most evident in the constitutions' concern with the right to worship. While this speaks to their view of human nature, it also speaks to the nature of God, as a being that is approachable to human beings. All eleven constitutions include a statement of the right to worship. In so doing, every state admits that God is accessible to human beings and that people ought to have opportunities for relating to the divine. The unanimity among the states on this issue demonstrates, if nothing else, that the accessibility of God is a good for many, if not all, human beings.

The overall picture of the state constitutions' recognition of and incorporation of Christian theology into their political framework is fairly pervasive, with a few notable exceptions. The spectrum ranges from Georgia, which could be argued to rely on a natural law or rights basis for its constitution (largely leaving theology out of the discussion), to South Carolina, which relies almost entirely on Christian theology as the basis for good government. Within that spectrum the majority of the states are more moderate, with more leaning toward South Carolina than Georgia.

TABLE 1: Nature of God in Early American State Constitutions

	VA	NJ	DE	PA	MD	NC	GA	NY	VT	SC	MA
"Creator"	x			x				x	x		x
Duty to worship	x				x						x
Right to worship[cxxx]		x	x	x		x	x	x	x	x	x
"Almighty"[cxxxi]		x	x	x		x			x		x
"Protestant"		x				x	x		x	x	x
Non-establishment		x	x			x		x			x
"Christian"	x		x		x					x	x
Trinitarian deity			x								
Inspiration of OT & NT[cxxxii]			x	x		x			x	x	
No clergy in civil office			x			x		x		x	
"Author of existence"				x					x		
God as source of natural rights or natural law				x				x	x		x
"Governor of the universe"[cxxxiii]				x					x		x
"Being of God"				x		x				x	
Goodness of God				x					x		x
Monotheism				x						x	
Rewarder of good, punisher of wicked				x					x	x	
Established church										x	
Requirement of public worship										x	x

[xxxii] "Constitution of Virginia, 1776".

[xxxiii] Ibid.

[xxxiv] Ibid.

[xxxv] Ibid.

[xxxvi] An example of this is Thomas Jefferson's tendency to emphasize the moral teachings of Jesus while de-emphasizing or discarding the miracle stories and claims of divinity. See "Letter to John Adams, Monticello, October 13, 1813" ("We must reduce our volume to the simple evangelists, select, even from them, the very words only of Jesus, paring off the amphiboligisms into which they have been led, by forgetting often, or not understanding, what had fallen from him, by giving their own misconceptions as his dicta, and expressing unintelligibly for others what they had not understood themselves. They will be found remaining the most sublime and benevolent code of morals which has ever been offered to man.") as well as "Letter to Peter Carr, Paris, August 10, 1787."

[xxxvii] Thomas Mautner, *A Dictionary of Philosophy*. "Referring to the doctrine of 'natural religion' … according to which while reason assures us that there is a God, additional revelation, dogma, or supernatural commerce with the deity are all excluded. Supplication and prayer in particular are fruitless: God may only be thought of as an 'absentee landlord.'" (Simon Blackburn, *The Oxford Dictionary of Philosophy*.)

[xxxviii] "Constitution of New Jersey, 1776". (Italics added.)

[xxxix] Ibid.

[xl] Ibid.

[xli] Ibid.

[xlii] Delaware and Pennsylvania's declaration of rights sections resemble one another in many ways. It is not entirely clear who was borrowing from whom. Delaware's declaration of rights was ratified prior to Pennsylvania's. However, Pennsylvania's declaration of rights was in the process of being drafted and may have been accessible to New Jersey.

[xliii] "Constitution of Delaware, 1776".

[xliv] Ibid.

[xlv] Ibid.

[xlvi] Ibid. Pennsylvania's oath to office differs by requiring affirmation of God as creator and governor of the world and rewarder of good and evil-doers, rather than the Trinitarian view of God. This may reflect the subtleties of Quaker theology held by many influential Pennsylvanians. While the theology implied in this section of Delaware's constitution seems to provide much greater clarity with regard to its understanding of God as Christian, Pennsylvania's requirement of belief in the sacredness of scripture is loaded with a similar degree of Christian theology. Holding to the belief that both the Old and New Testaments are divinely inspired, carries with it an assumed belief in Christian doctrine therein, including the Trinitarian

viewpoint expressed in the New Testament. Delaware is simply more direct in its emphasis of the exclusively Christian Trinitarian theology.

[xlvii] Ibid.

[xlviii] "Constitution of Pennsylvania, 1776".

[xlix] 1 Chronicles 29:12 (NIV).

[l] Luke 12:6-7 (NIV).

[li] "Constitution of Pennsylvania, 1776".

[lii] Ibid.

[liii] Ibid.

[liv] Section 10 includes an oath of office for state representatives, which includes the description of God as "the creator and governor of the universe."

[lv] "Constitution of Pennsylvania, 1776".

[lvi] Ibid.

[lvii] Ibid. See the oath of office in "Frame of Government," Sec. 10, for a description of God as "rewarder of the good and the punisher of the wicked" and as the inspiration behind the message of Christian Bible.

[lviii] Ibid.

[lix] Ibid.

[lx] Ibid.

[lxi] Ibid.

[lxii] S. G. F. Brandon, ed., *A Dictionary of Comparative Religion.*

[lxiii] Ibid.

[lxiv] For example, Taoism (Brandon.) or the contemporary New Age movement.

[lxv] South Carolina's constitution of 1778 makes the same requirement for citizenship (Sec. XIII).

[lxvi] "Constitution of Pennsylvania, 1776".The Constitution of South Carolina, 1778 requires belief in "a future state of rewards and punishments" for the right of suffrage.

[lxvii] Ibid. The Constitution of South Carolina, 1778 requires belief in "a future state of rewards and punishments" for the right of suffrage.

[lxviii] Ibid. "Holy" is not in Pennsylvania's 1776 constitution, but is added by Delaware's 1776 constitution. North Carolina's constitution reads, "the divine authority either of the Old or New Testaments."

[lxix] The order in which the states are being examined is according to the dates the constitutions were ratified. However, some states drafted and approved the "Declaration of Rights" section of their constitution prior to the time they ratified their entire constitution including the Form or Frame of Government section. This is the case with Maryland. Their declaration was pass on August 14th, 1776, prior to the approval of both Delaware and Pennsylvania's constitutions. This raises some interesting questions regarding the manner in which different states borrowed ideas and wording from one another. Delaware and Maryland are clearly related, since

there is a great deal of material in their respective declarations of rights that are shared verbatim. However, the question of who borrowed from whom goes beyond the scope of this work.

[lxx] "Constitution of Maryland, 1776".

[lxxi] Ibid.

[lxxii] Ibid.

[lxxiii] "Constitution of North Carolina, 1776".

[lxxiv] This stands to reason since Maryland has a significant Catholic poplulation at that time.

[lxxv] "Constitution of North Carolina, 1776".

[lxxvi] Ibid.

[lxxvii] See John Locke, *A Letter Concerning Toleration*.

[lxxviii] "Constitution of Georgia, 1777".

[lxxix] In Book II, §66, Locke mentions that honoring parents is required both by the "Law of God and Nature," referring to the 5th commandment from the 10 Commandments (Exodus 20:12) and the fact that right reason requires every person to honor their father and mother separate from revelation. John Locke, *Two Treatises of Government*.

[lxxx] Ibid. Book II, §135.

[lxxxi] "Constitution of Georgia, 1798".

[lxxxii] "Constitution of Georgia, 1777".

[lxxxiii] Ibid.

[lxxxiv] "Constitution of New York, 1777".

[lxxxv] Ibid.

[lxxxvi] Ibid.

[lxxxvii] Ibid.

[lxxxviii] Ibid.

[lxxxix] Coming up with this interpretation from the Christian Bible is problematic, especially in the Old Testament texts. For example, Daniel states in a prayer in the Book of Daniel: "Praise be to the name of God for ever and ever; wisdom and power are his. He changes times and seasons; he sets up kings and deposes them. He gives wisdom to the wise and knowledge to the discerning" (Daniel 2: 20-21). In addition, Saul and David, the first two kings of the united kingdom of Israel and Judah were both anointed by God through a prophet, not by the consent of the people (I Samuel 9 & 16).

[xc] "Constitution of New York, 1777".

[xci] Ibid.

[xcii] Ibid.

[xciii] Ibid.

[xciv] Ibid.

[xcv] Ibid.

[xcvi] "Constitution of Vermont, 1777".

[xcvii] "Constitution of Pennsylvania, 1776". "Constitution of Vermont, 1777".

[xcviii] "Constitution of Vermont, 1777".

[xcix] Ibid. In the context of the other religious references in Vermont's constitution this clearly means religion that is validated by the Christian Bible.

[c] "Constitution of South Carolina, 1778".

[ci] Ibid.

[cii] Ibid.

[ciii] Ibid.

[civ] Ibid.

[cv] Ibid.

[cvi] Ibid.

[cvii] Ibid.

[cviii] Ibid.

[cix] Ibid.

[cx] "Constitution of Massachusetts, 1780".

[cxi] Psalm 16:7 (NIV).

[cxii] Psalm 106:13-14 (NIV).

[cxiii] "Constitution of Massachusetts, 1780".

[cxiv] "Constitution of Virginia, 1776". The other constitution is Maryland.

[cxv] Virginia's placement of its religious liberty section may have to do with its connection to section 15, which addresses the character of the people needing to be just, moderate, temperate, frugal, and virtuous (Virginia Bill of Rights, Sec. 15). The cultivation of these moral qualities needed to preserve a free society are encouraged by religion and thus they both become complementary to the political objective.

[cxvi] "Constitution of Massachusetts, 1780".

[cxvii] Ibid.

[cxviii] Ibid.

[cxix] Ibid.

[cxx] While the mandate of Protestant religious public education is clearly motivated by political objectives (e.g., forming law abiding character in citizens), Massachusetts may also be motivated by an obligation to pursue the best interests of individual citizens. Giving citizens training in Protestant Christianity could be thought to contribute to their personal pursuit of happiness and fulfillment.

[cxxi] "Constitution of Massachusetts, 1780".

[cxxii] Ibid.

[cxxiii] Ibid.

[cxxiv] Ibid.

[cxxv] Ibid.

[cxxvi] New York references to Christian more than any other, but by embracing the Declaration includes references to God as a Creator and to the law of God as fundamental to the reasoning supporting revolution.

[cxxvii] "Constitution of Massachusetts, 1780".

[cxxviii] "Constitution of South Carolina, 1778".

[cxxix] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*. No. 48.

[cxxx] New York reads: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind" (Sec. XXXVIII). New Jersey reads: "the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience" (Sec. XVIII). Georgia reads: "All persons whatever shall have the free exercise of their religion." (art. LVI). South Carolina reads: "all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges" (Sec. XXXVIII).

[cxxxi] Massachusetts reads: "Supreme Being" (Declaration of Rights, art. II).

[cxxxii] North Carolina reads: "no person, who shall deny … the divine authority either of the Old or New Testaments" (Form of Government, Sec. XXXII).

[cxxxiii] Massachusetts reads: "great Legislator of the universe" (Preamble).

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CHAPTER 4

The Nature of Man in Early American State Constitutions

This chapter will examine the understanding of human nature in each state's constitution. It will do so with a view to the overarching topic of this work—the legislation of morality. A specific understanding of what a human being is, or ought to be, is central to the issue of moral legislation. This study will attempt to discern whether the constitutions espouse a particular view of human nature that has bearing on future legislative deliberations. The study of the state constitutions will be preceded by a short discussion of two crucial topics regarding human nature that will be prevalent, either explicitly or implicitly, in the state constitutions: the dual nature of human beings and the rights of human beings.

DUAL NATURE OF HUMAN BEINGS

The early state constitutions recognize that both the immaterial (mind or soul) and material (body) component of human nature are relevant to politics. The needs of body and soul or mind are both addressed in early state constitutions to varying degrees. The material component of human nature is typically addressed by the constitutions' concern for the rights to life, liberty, and property. The right to life and liberty is asserted in all the constitutions but New Jersey and Georgia. Of the eleven constitutions under consideration, eight are explicit in their concern with rights of physical property. Of the three remaining constitutions, (1) New Jersey indirectly addresses the issue through its

endorsement of the common law of England, which protects rights to property, (2) New York mentions life, liberty, and property in the preamble in such a manner that the right to them is implied, and (3) Georgia does not take up the topic at all.

The state constitutions are unanimous on two issues that are relevant to the immaterial aspect of human nature. They are the right to trial by jury and freedom to worship according to conscience. The former issue is, to be sure, an issue that intersects with material concerns, but it demonstrates a fundamental assumption about the immaterial aspect of human nature. The states' commitment to right to trial by jury reveals an underlying conviction that human beings are individually capable of deliberate choice. Rationality is one of the universal attributes of human beings acknowledged in the states' commitment to trial by jury. Serving on a jury requires the capacity to draw comparisons and analyze information, but it also involves the capacity to make moral judgments.

The two primary categories of rights that the constitutions assert demonstrate a view of human nature that involves both an immaterial and a material aspect to human nature. There are categories of rights concerned with bodily issues (i.e., life, liberty, and property) and rights concerned with the mind or soul. These rights are mentioned in most state constitutions and are the foundation for many other rights in the constitutions. The most common right associated with the mind or soul is worship. This right is a concern taken up by each of the constitutions, in a variety of different ways, and impacts many issues addressed by the constitutions, as will be evident below.

RIGHTS OF HUMAN BEINGS

The nature of a written constitution presumes a social inclination, if not a social nature, in human beings. A constitution is a commitment by a group of individuals to live together in a political community under a certain political structure. This commitment by individuals to be members of a political community demonstrates a desire to have social connections with other individuals rather than to live alone. The reasons for being connected to a political community are various (e.g., self-defense, physical sustenance, and the pleasure of social intercourse), but the fact that individuals consent to live under a

particular set of agreements demonstrates a desire to live together rather than alone.

While human beings are understood by the early American state constitutions to be social beings who share life together, each person has the individual responsibility to care for his or her own well-being. The early state constitutions view all human beings as being capable of governing their own lives and participating in some degree in the decision making process of establishing the rules of the society. Equality is understood, in its early American conception, as the universal (or virtually universal) competency of individuals to properly pursue the best interests of both their bodies and their minds or souls. Thus, when the state constitutions discuss the individual pursuit of happiness, we will see that this involves opportunities to pursue one's best interests in at least several, if not all, of the following areas: materially (i.e., physical sustenance), socially (i.e., interpersonal relations), and religiously (i.e., one's personal relationship to the divine).

A right is understood by the early American constitutions as the prerogative each individual has to pursue a good objective for oneself. A concept of natural human rights reflects a view of human beings as rational—as a reasoning creature. Of course rights doctrine can be based on faith convictions or on the basis of authority (i.e., positive rights), but natural rights doctrine reflects a theoretical perspective that is based upon certain premises and corresponding reasoned conclusions. What is found in the early state constitutional tradition is no where near rational theorizing akin to Kant's moral philosophy, however, it does reflect an approach to politics that involves and values human rationality.

That human beings have rights is clearly a shared viewpoint of early Americans. All of the state constitutions, with the possible exception of South Carolina, reflect this conviction. The question is not whether Americans understood themselves to have certain rights, but rather how they defined those rights. Some rights are understood to be inalienable—never to be violated. Other rights are alienable, meaning that under certain conditions, they may be violated.

The nature of the right determines the nature of the liberty required or demanded by it. Any right requires a certain degree of liberty for individuals to enjoy the right. Liberty is defined in terms of the limits or boundaries appropriate to the particular right. Take tennis as an

example. If tennis were granted as a right, the enjoyment of that right would require a certain amount of liberty. The liberty one experiences in playing a sport like tennis is defined by and bounded by the rules of the game which dictate such things as a certain sized court with a properly placed net of a certain height. Within these and the other boundaries established by the rules of the game and the physical features of the particular court upon which one competes, a person has the liberty to enjoy the right to play tennis. Thus, liberty is never an absolute freedom to do whatever an individual wants to do. Liberty is distinct from license, which is never advocated by the state constitutions. Liberty is a proper use of freedom within the bounds of one's own rights and the rights of others.

The right to worship is a good example of a right that requires certain limits or boundaries. Since people do not always agree on the proper manner of worship, as exemplified by the proliferation of Protestant sects that emerge from the Reformation period, each individual is left with the responsibility and, according to most American state constitutions, the right to judge for themselves.[cxxxiv] One person ought not manipulate the deliberations of another by means of physical force or threats when it comes to religious expression. However, the early Americans recognize the appropriateness of placing certain kinds of limitations on the freedom of religious expression. The Americans of this period tend to look to conscience as the guide within each individual that leads them to fully enjoy their right to worship, which is viewed by early Americans to be a critical component of happiness.

The connotation of the term "conscience" indicates a limitation, but a good limitation. Conscience is not something that humans create, but something innate. It is an inner judge of the motives, thoughts and actions of an individual. As an extreme example, no early American state would have allowed children to be sacrificed on the basis of freedom of religion. Such actions would not be considered as a legitimate interpretation of the guidance of conscience because they violate the dictates of natural law. An appeal to conscience in support of a behavior that threatens the right to life of another is an obvious misinterpretation. The problem with the rule of conscience when it comes to religious expression when the violation of others' rights are not involved, however, is to determine whose conscience decides what forms of religious expression fall within the legitimate bounds of

conscience. Some constitutions take little interest in making judgments about what kind of religious expression is acceptable, leaving that question entirely to individual worshipers. Several other constitutions, as we shall see, conclude that a solution is found in the inspiration of Scripture as a standard of judgment for worship, leading to a governmental regulation of acceptable forms of religion within the state.

For some states, the right of religious freedom is not only necessary because it contributes to happiness, but because it is politically expedient. Failing to protect religious liberty can lead to civil conflict, listed explicitly by New York as a serious concern.[cxxxv] Since religious convictions are at stake, an attempt by government or other groups in society to regulate religious expression will tend to lead to conflict. Locke's *Letter on Toleration* is one attempt to address just this concern. The religious wars of Europe had demonstrated the devastation that could stem from attempts to regulate religion. Thus in the view of the states, even political leaders who may not be motivated by the desire to serve the interests of the citizens are wise to grant a certain degree of religious liberty.

Each state's constitution will be examined to ascertain the extent to which the states view certain material and immaterial ends as being fixed in human nature and view them as being politically relevant. In the constitutions, human ends are often discussed in the context of rights. Thus, whether or not a state's constitution discusses certain rights as fixed by nature or positive reveals a great deal about that constitution's view of human nature. A natural right to worship, for example, demonstrates a conviction by the state's founders in worship as a fixed end of human existence.

Natural law, divine revelation, and popular sovereignty will again be relevant to this chapter. If a non-fixed view of human ends is found in constitution, this would suggest a lack of commitment to the principles of natural law and divine law, both of which place fixed obligations on people. These fixed obligations are inconsistent with a view of human nature that leaves the question of ends up to each individual person. A citizen is at liberty not only to pursue their

individual ends in the manner they choose, but they are at complete liberty to determine what those ends are. Clearly the issues referred to here are not merely preferences like what kinds of food a person eats, but rather something like the general principle that all people are obligated and have the right to care for their own physical health and sustenance. Understanding how the constitutions view human nature will show which potential sources of authority within a political community (i.e., natural law, divine law, and popular sovereignty) are acknowledged and brought to bear on the issue of the legislation of morality.

VIRGINIA

Virginia begins its Bill of Rights with the topic of the nature of human beings.

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[cxxxvi]

Notice that this is not a claim that human beings are unqualifiedly free and independent. They are only *equally* free. Human beings cannot do anything they want to do.[cxxxvii] There is a relative freedom and independence that each person has by nature, the boundaries of which are defined by the "certain inherent rights" of other human beings. The principle that each person in a community has these rights creates boundaries within which every other person must exercise his or her own rights. In relation to other human beings, each individual is free and independent, with the right to identify what contributes to his or her happiness and to pursue it.

The question of whether all Virginians are understood to have rights such as freedom of religion arises in light of the slave-owning culture in that state. The famous Virginian founding father, Thomas Jefferson, seems to conclude that certain rights are inherent in people of color as well as Europeans. It is for this reason that he suggests that

black slaves would be justified in rebelling against the whites at some point.

> Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep for ever: that considering numbers, nature and natural means only, a revolution of the wheel of fortune, an exchange of situation, is among possible events: that it may become probable by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.[cxxxviii]

In light of the following statement made in Virginia's constitution, the slaves in Virginia would be justified in rebelling: "*All men* are by nature equally free and independent."[cxxxix] If the slaves are considered to be free by nature, they are being unjustly treated in Virginia to such a degree that rebellion would seem to be even more justified than the Americans' rebellion against Britain

Whereas there are examples of states being very specific about granting and withholding political rights to specific kinds of people, Virginia's language is surprising in its lack of distinction between the rights of freemen and the rights of slaves. As will be addressed below, many other states make clear distinctions by granting full rights only to freemen or "white men," while granting limited rights to other groups. Virginia's constitution mentions the category of "freeholder" twice but only as a requirement for serving in the state legislature.[cxl] Suffrage rights in Virginia are not limited in principle to freemen or "white men." Its Bill of Rights states, "All men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage."[cxli] Thus, on the issues of both property and suffrage, rights that other states will limit to freemen, property owners, or "white men," Virginia makes no distinction. In doing so, it seems that enslaved people in their society were and would continue to have their rights violated in spite of Virginian's recognition of those rights in their constitution.

One wonders if the representatives who drafted the constitution had hopes that the constitution would become a self-fulfilling prophecy, or whether they made an assumption that other states did not seem to make—slaves were not men at all. The latter interpretation might be plausible, except for the inclusion of a statement by Virginia

addressing this issue when justifying its revolution from British rule. Among a list of grievances, Virginia includes the following statement: "By prompting our negroes to rise in arms against us, those very negroes whom, by an inhuman use of his negative, he hath refused us permission to exclude by law."[cxlii] King George refused to allow Virginians to exclude the slave trade from bringing African slaves into Virginia. This refusal is viewed as inhuman by the constitution. Why? It is not inhuman towards the whites, since they benefited from having free labor, allowing them to increase their profits and wealth. It is obviously inhuman to the slaves. If African slaves were viewed merely as animals, then the King's actions would not be inhuman. Who would call the transportation of livestock from Africa to North America for the use of their labor inhuman? The inhumanity is due to the fact that the African slaves imported to Virginia are human beings with all the rights of any other human beings.

One conclusion that follows from recognition of the general equality of mankind is that no particular group of people has a hereditary right to privileged status, or a right to rule over others.

> That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.[cxliii]

No group can justly claim higher status than any other group on the basis of their pedigree. One may argue that this principle was intended to apply to different classes of whites in Virginia, but not blacks. If this principle was meant to address the relationship between would-be white aristocrats and low-class whites, it is illogical for it not to be applicable also to the black man or woman in bondage on a plantation. If the plantation owner deserves no more privileges or rights than the white blacksmith struggling to make a living, the black man plowing the cotton fields ought to have equal rights with both. That is the sense of the language of Virginia's Bill of Rights because it does not do what other southern states did—it does not make a clear distinction between slave and free, or black and white.

The Bill of Rights of Virginia grants the rights to enjoy "life and liberty, with the means of acquiring and possessing property, and

pursuing and obtaining happiness and safety" to "all men by nature."[cxliv] It asserts, in section 4, that no group of people is superior to any others by virtue of their family lineage. Regardless of the motives of those who were influential in drafting Virginia's constitution, its content is surprisingly universal in its assertion of rights, given the social conditions present in the state in 1776. While not all the rights listed in the Bill of Rights are grounded in nature or God, the most fundamental rights are. Included in these are (1) the rights of life, liberty, and property as well as those that follow directly from those—to pursue and obtain happiness and safety (sec. 1), (2) the corporate right to "reform, alter, or abolish" their government (sec. 3),[cxlv] and (3) the right to worship, which is necessitated by every person's duty to worship.

The natural rights in Virginia's constitution address both bodily issues as well as issues of the soul. None of the other rights listed are identified as being "by nature" or "natural." Thus, all the other rights mentioned in the constitution are both positive in nature and subordinate or secondary rights, in the sense that they are deduced from these more fundamental individual natural rights. The higher rights are "by nature", "inherent", "inalienable," "indubitable", or by divine mandate. The secondary rights are described in a distinctly different manner as shown by the following examples: government "is, or *ought to be*, instituted for the common benefit, protection and security of the people, nation or community" (sec. 3), "legislative and executive powers … *should be* separate and distinct from the judiciary" (sec. 5), elections for representative "*ought to be* free" (sec. 6), "all power of suspending laws … *ought not be* exercised" (sec. 7), "excessive bail *ought not to be* required" (sec. 9), "general warrants … without evidence of a fact committed … *ought not to be* granted" (sec. 10) (italics mine).

The natural rights to life, liberty, property, political authority (to have a say in their political life), and worship suggest certain ends being fixed in human nature. All human beings have common ends such as physical sustenance, labor, acquisition of physical necessities, and participation in a political and religious community.

In addition to the assertion in Virginia's Constitution that all men have certain rights by nature, the document also includes a list of virtues that are necessary for people to preserve the "blessings of liberty": justice, moderation, temperance, frugality, and virtue. These

virtues provide clarity describing the manner in which Virginia is convinced these ends are to be enjoyed and attained.

> That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.[cxlvi]

The virtues are necessary in terms of the political conditions required for the enjoyment of rights. It is less clear if these virtues are considered to be good ends in themselves for all human beings. They appear to be viewed as a means to happiness for Virginia's citizens directly (i.e., the virtues directly contribute to the happiness of a person who cultivates them in his or her life) and indirectly (i.e., the cultivation of these virtues by all citizens leads to a society in which people can then attain happiness by other means). Regardless of whether they are direct or indirect means to individuals' enjoyment of their natural rights, they are apparently characteristics that are required, meaning that they are fixed and not just one good set of virtues among many options. They are tied, one way or another, to the fixed ends of human beings and are relevant to government and the legislation of morality.

Worship according to one's own conscience and understanding is another of the primary rights protected by the constitution. It also leads Virginia to draw conclusions about the necessity of cultivating certain character qualities within citizens.

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

The reference to conscience as something that "dictates" suggests that it provides guidance regarding the object and manner of a person's religious expression. Conscience is viewed as being an inner ability of individuals to discern truth. The existence and nature of God obligates

human beings to practice religion according to the dictates of their conscience. In order to fulfill this obligation, God is understood to have created human beings with this inner guide that provides assistance in determining the right manner of religious practice. While it is also understood by many early Americans as a guide to making moral judgments about behavior that is right or wrong, the constitutions focus more on the role of conscience as a guide to an individual's worship.

Conscience is not viewed as a capacity to *independently* or *autonomously* make moral judgments or to form their own understanding of spirituality or religion. People have a religious obligation to relate to God and others in a certain way, with emphasis on the inner motives and beliefs rather than externally coerced behavior. For Virginia, conscience and reason appear to be working together to direct this proper living out of religious obligation. When operating correctly, this passage suggests that conscience and reason are mutually affirming that a person is working out his or her obligations to God and others in accordance with the standards of revealed Christian teachings. This passage, therefore, seems to be contradictory with the possibility of a deistic interpretation of Virginia's constitution as was discussed previously, according to which reason would be the primary judge of religious expression.

It is the Christian teachings of forbearance, love and charity that are expressed as obligations for all people. If anything, reason has the lesser priority when compared with conscience and the requirements of Christian teachings. Rationality and faith direct a person, this is true, but they must conform to the dictates of conscience and Christian standards of interpersonal relations. The presumption that all members of the society are obliged to exhibit Christian love towards one another is an astounding statement to be found in what is considered a liberal republican constitution. Essentially Virginia is saying that all citizens can decide what they want *to believe* regarding how they worship God, but everyone is obliged *to act* toward their fellow citizen in a manner consistent with biblical moral teachings.

The only two usages of the term "duty" are in this passage about Christian love, charity and forbearance and the passage immediately following regarding religion. It is not clear how government is expected to encourage the people to fulfill this duty. Its insertion suggests that the cultivation of these characteristics is relevant to the success of government and other social institutions. One reason that

they are considered admirable of imitation is that the antithesis of these Christian virtues can easily tend to result in violations of natural rights and the social bond. In other words, reason affirms revelation because these Christian teachings are conducive to all people enjoying their natural rights. People have a natural propensity to be impatient and only look out for one's own interests. Clearly the cultivation of these qualities will keep people from violating the rights of others.

NEW JERSEY

Theological and philosophical language is largely absent in New Jersey's constitution in spite of the fact that it essentially creates a Protestant state. The topic of human nature is largely unaddressed in its constitution as well. In the preamble, New Jersey makes a vague reference to the "just rights" of the people to revolt against King George.[cxlviii] There is no indication of what this phrase means or what other situations might impinge upon the "just rights" of the people. In addition, there is not a single mention of the term "property" in the New Jersey constitution, which is striking in light of the broader tradition.

In order to get some sense of what might fall under the "just rights" of human beings for New Jersey, one must read carefully and piece together elements from various places in the document. In the preamble, a reference to the happiness and safety of the people is mentioned as a goal for government, but this passage is quoted from a resolution of the Continental Congress encouraging states to establish new constitutions. In addition to its exclusion of a discussion of "property," New Jersey makes no mention of a right to "liberty" or "life". The two rights explicitly mentioned are (1) "the inestimable right of trial by jury," which is mentioned in every state constitution, and (2) "the inestimable privilege of worshipping Almighty God."[cxlix]

In contrast to its mentioning only two individual-oriented rights, New Jersey addresses several corporate rights of the community. The constitution states that Britain's "constitutional authority" was conditioned on its defense and advocacy of the "common interest of the whole society."[cl] This language, from the opening passage of the preamble, establishes a view of the people as a kind of corporate whole. The phrase suggests that human beings are social beings with corporate, or communal interest. "A people," as well as an individual,

has a distinct identity. Thus, the British kings have authority because it is granted in the compact between "the people" and the king.[cli] There is no indication, however, that this relationship between the body of governed people and the head of state is governed by fixed principles of nature, although the compact seems to have an embedded sense of natural right since both sides are expected to be faithful to the commitment to the other.

A political order consists of a symbiotic relationship of "reciprocal ties" in which the people offer "allegiance" and the king provides "protection."[clii] As long as both sides keep up their side of the contract, the relationship is intact. When the king is unfaithful to provide adequate protection the "just rights" of the people are violated. What New Jersey fails to do in its constitution is to clarify whether or not the rights violated are understood to be merely positive rights or natural rights. Unfortunately this cannot be ascertained by the passage.

Do human beings have natural rights, or merely conventional rights of contract between two parties? Unfortunately, a clear answer is nowhere given by the New Jersey constitution. What New Jersey does say about rights suggests that they are viewed by the state as merely conventional. The constitution lays out rights that have been agreed upon by two parties, not fixed by nature. "Representatives of the colony of New Jersey … after mature deliberations, agreed upon a set of charter rights and the form of a Constitution."[cliii] In contrast, the foundational rights in Virginia's constitution are viewed as inherent in the nature of mankind. If New Jersey's constitution is indeed operating out of a perspective of convention with regard to human rights, it is presenting a very different view of human beings than Virginia. People then do not have a secure footing in nature as the basis for their rights. There is no way of judging whether the rights granted to citizens by a political order are just or not just; they are simply just on the basis of being consented to by both the people and the rulers. In light of the early American value of equality, the only rights that exist are what people decide to give each other in a political arrangement. Popular sovereignty, in this case, is the dominant mode. There is not fixed end for human beings being presumed or proposed by New Jersey.

In spite of its commitment to citizens' profession of Protestantism, New Jersey does not assert that God is the source of individual rights, as is the case in Virginia and some of the other states. The perspective that rights are conventionally defined provides not other explicit basis

for dealing with moral issues other than convention. This interpretation leads to moral legislation being justified when it accords with the will of the people, or popular opinion. In contrast to Virginia, there is no natural basis for a clear cut human end in New Jersey's constitution, with the one exception of the explicit guarantee of rights to Protestants and the requirement that state officials profess the Protestant religion in section XIX. This exception, however, could be a significant exception, i.e., one that creates difficulties for an interpretation that concludes that convention rather than nature is the basis for judgments about both rights and morality. Since the constitution makes it explicit that citizens must be Protestants, it follows that the cultivation of a Protestant ethic in citizens is deemed politically relevant. The question one must ask is whether the Protestant preference in the constitution is meant to imply that New Jersey understands Protestant Christianity to be the proper fixed end for all people. Since Protestantism is endorsed by the constitution in a round about but significant manner, an alternative interpretation must be considered in which New Jersey's view of human nature and future moral legislation are presumed to be based on Protestant theological principles, even though this is not made explicit.[cliv]

DELAWARE

The initial sections in Delaware's constitution address both the rights of the political whole ("the people") and the rights of individuals within the whole.

> That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.[clv]

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto; but no part of a man's property can be justly taken from him or applied to public uses without his own consent or that of his legal Representatives.[clvi]

The former quotation puts emphasis on the corporate entity of citizens who together enter into a political compact. This demonstrates, like the right to trial by jury, the ability of all people to make rational judgments for themselves. The latter quotation places emphasis on individual citizens. Human beings are parts of a social whole as well as separate entities as individuals, and have rights that correspond to their corporate and individual identities. The rights of individuals include (1) freedom of worship, life, liberty, and property, (2) reparation for property loss by criminal acts, (3) trial by jury, (4) protection from giving self-incriminating evidence, (5) protection against seizure or search without warrant, and (6) protection against quartering of troops in private residences.[clvii]

Delaware's constitution, for the first time in the American state tradition, makes a distinction between the category of "freeman" and other individuals. Only freemen are guaranteed the rights to suffrage and reparation of criminal damages.[clviii] This distinction raises some difficult questions for Delaware's constitution. If "every member of society" has a right to life, liberty and property, but only freemen are guaranteed reparations for damages, how can someone who is not free, e.g., a slave or indentured servant, have a right to liberty and property? If a slave is under the ownership of a master, how can that slave have freedom of person and property? In its "Declaration of Rights" section, Delaware's constitution asserts a commitment both to universal human rights and to the practice of slavery, which is simply inconsistent. Delaware creates at least two fundamentally distinct categories of people in its society. There are slaves and freemen.[clix]

While one might interpret Delaware as unquestionably committed to the institution of slavery because it uses the term "freeman", this is qualified by article 26 in the "Form of Government" section. This article prohibits the importation of slaves.

> No person hereafter imported into this State from Africa ought to be held in slavery under any presence whatever; and no negro, Indian, or mulatto slave ought to be brought into this State, for sale, from any part of the world.[clx]

This places Delaware in opposition to the expansion of the institution of slavery. The significance of article 26 is punctuated by the fact that

it is included with the Declaration of Rights in a section of the constitution that is never to be altered.

> No article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of suffrage,) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any pretence whatever.[clxi]

This discouragement of slavery is more consistent with the constitution's position that "every member of society" has the right to life, liberty and property than the implied position that slavery is legitimate because of the use of the term "freeman." Given the wording of the constitution, it would seem that every person has a right to own property, to trial by jury, to protection against seizure or search of property or person. Delaware does not exclude those rights from certain groups in the society; it does not distinguish between freeman and slave. Thus it finds itself in a situation similar to Virginia's on the issue of slavery. The principles of its constitution stand in contradiction to the practice of slavery in the state.

Delaware provides a clear description of the relationship between the rights of an individual citizen and the obligations owed to the political community.[clxii] Rights are taken up far more clearly than in New Jersey, but Delaware follows the model of New Jersey in failing to ground them on philosophical or theological principles, leaving open the possibility that they can be interpreted as rights grounded on convention rather than fixed. In contrast, Virginia is clear in its conclusions that rights are fixed. This raises the same issue as was discussed in New Jersey. There is no clear articulation of the ends of human beings outside of the issue of religion. There are no explicit principles given that present a fixed nature of human beings, nor are there particular character traits mentioned that provide guidance in the legislation of morality. The only statement of principles to guide moral legislation is found in the sections on religion.

The preference for Christianity in citizens and public officials may suggest that Christian theological principles are to be the standard for appropriate moral legislation, but it is by no means certain. An equally valid interpretation would be that government is charged with

encouraging Christianity's preference in the society, but that it has no clear mandate to legislate morality according to Christian principles. The constitution does clearly grant government the authority to legislate morality in the strict confines of protecting the rights of life, liberty, property and freedom of worship. However, similar to the findings in New Jersey, the commitment to the Christian faith in its citizens suggests that government is permitted to legislate morality in a manner consistent with Christian ethics, even if doing so is not mandated by the constitution explicitly.

PENNSYLVANIA

Pennsylvania, slightly altering Virginia's wording, claims that equality and independence are characteristics of every human being at birth in section 1 of its Declaration of Rights.

> That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[clxiii]

Pennsylvania asserts that political circumstances or positive law does not define these rights. They are not granted merely by means of compact or constitutional authority. Regardless of the social sophistication or technological complexity of the society in which an individual is raised, regardless of an individual's manners or character, every person has certain rights. Every individual is competent, by nature, to use freedom appropriately to pursue his or her own best interests.

Pennsylvania explicitly grounds its conception of individual rights on both nature and nature's God. God has ordained certain rights and has granted additional blessings to individuals.

> Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man.[clxiv]

From the outset, Pennsylvania distinguishes between rights of individuals and the corporate body even though both categories have rights that are fixed by nature. Individuals have natural rights and other blessings bestowed by God, while "the people" have an unalienable right to revolution when government violates individual rights.[clxv] Thus, the right to revolution is built upon the individual natural rights stated at the outset of Pennsylvania's constitution. The right to revolution is the right or "authority of the people" to determine the structure of their government. This right is apparently a natural right due to the capacity of all people to deliberate and make good choices regarding their governance. If they determine that government is operating in a manner that hinders or restricts the people from enjoying their rights, the people can overthrow it. Pennsylvanians are grateful for their deliberative capacity and the opportunity in the state's founding to deliberately "form for themselves such just rules as they shall think best."[clxvi]

Individuals have rights that are higher in priority than the rights of the corporate community. However, Pennsylvania, like Delaware, makes it clear that there are obligations owed by individuals to the political community. Its constitution includes, verbatim, Delaware's statement regarding the obligation of individuals to personally contribute during public exigencies.

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto.[clxvii]

The difference is subtle but significant between Delaware and Pennsylvania on the emphasis given to the different elements of the mutual obligation between individual and government. Whereas Delaware begins in section 1 of its Declaration of Rights with the corporate authority of people over government, Pennsylvania begins with the universal natural rights of individual human beings. While Delaware's approach suggests that the foremost obligation is that of the individual to the whole of the society (i.e., the individual is a part of the "whole" political community), in Pennsylvania the foremost obligation is of the government to the individual (i.e., the government is made up of a collection of "whole" individuals).

Pennsylvania is clear that the rights of life, liberty, and property are inalienably rooted in each individual. As discussed above, the issues of race, talent, personality, pedigree, and physical features have no bearing on these rights according to the wording in section I of Pennsylvania's Declaration of Rights. Each individual is expected to have the requisite abilities and talents to enjoy and manage these individual rights. This is clear from Pennsylvania's section on vocations.

> As every freeman to preserve his independence, (if without a sufficient estate) ought to have some profession, calling, trade or farm, whereby he may honestly subsist, there can be no necessity for, nor use in establishing offices of profit, the usual effects of which are dependence and servility unbecoming freemen, in the possessors and expectants; faction, contention, corruption, and disorder among the people.[clxviii]

In order for the individual right of liberty and independence to be enjoyed, citizens must commit to become productive in a vocation. It is critical for each citizen to make his own living in order to avoid becoming overly dependent on others. "Offices of profit" put individuals in a position of dependence on others and are viewed as a corrupting influence on the enjoyment of rights. Poverty also presents a problem for the political order. The failure of individuals to develop a vocation results in poverty, which naturally turns into social conflict between the haves and the have-nots. Pennsylvania wants to be a middle class regime characterized by a strong work ethic because this will result in the enjoyment of individual natural rights to the greatest degree.

The commitment to the independence of the individual is also evident in its commitment to broad suffrage rights. Its suffrage rights are, in theory, the most broadly granted to that point. There is no ambiguity as in Virginia about how much attachment to the community is necessary and there are no property assessments. The only requirement is that someone has paid public taxes of some kind. To pay taxes one must have the right to own property. Pennsylvania, however, gets itself into a similar predicament as was found in Delaware by using the term "freemen." The use of this term presumes that some

citizens are free to acquire and own property and others are not. Both Pennsylvania and Delaware make it clear that only freemen are entitled to suffrage rights.[clxix]

While the constitution of Pennsylvania affirms the natural rights to life, liberty, and property for "all men," it identifies one group of people as freemen in contrast to some inhabitants who are not. The use of this term, "freemen," suggests that some people are not free to labor for the acquisition and ownership of property, and Pennsylvania grants suffrage rights only to "freemen."

> Every freemen of the full age of twenty-one Years, having resided in this state for the space of one whole Year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector. [clxx]

Thus, Pennsylvania creates the same problem encountered in Delaware. Everyone is granted the rights to life, liberty and property at the outset, but the introduction of the category of "freemen," with suffrage rights granted exclusively to such people, creates an irresolvable contradiction. Only the inhabitants who are freemen are truly granted the status of full citizens.

Pennsylvania's constitution gives only freemen the opportunity to be involved in political decision-making. The freemen of the commonwealth are charged with judging the uprightness of their leaders. As a result, leaders are "at all times accountable to them."[clxxi] When making laws, legislators are kept accountable in part by the constitutional command that all prospective laws be "printed for the consideration of the people."[clxxii] So that laws are "maturely considered … the reasons and motives for making such laws shall be fully and clearly expressed in the preambles."[clxxiii] The public is expected not only to have the capacity to deliberate about the wisdom and justice of new laws, it is expected to be public-interested enough to take action and oppose unjust laws with their suffrage. Pennsylvania intends to make the public's wisdom effectual, not only by having bills printed, but by prohibiting proposed laws from being enacted until after new elections for state assemblymen. "All bills of public nature shall be printed for the consideration of the people … and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly."[clxxiv] Human beings, then, are viewed as rational and public-spirited, in addition to being endowed with individual rights.

While the constitution expresses optimism about human beings in general, the devices designed to keep government accountable to the people demonstrate a recognition that individual people or groups, particularly those with political power, will tend to violate the rights of others. In order to discourage such violations, Pennsylvania commits itself to cultivating character qualities that lead to (1) a respect for the individual rights of others and (2) the individual enjoyment of one's own rights. The positive characteristics of "justice, moderation, temperance, industry, and frugality" are qualities deemed necessary to avoid violations of others' rights and to most fully enjoy one's own. If people intend to keep government accountable to the interests of all individuals, they must have these characteristics. These qualities are also required of just political leaders.[clxxv] They are the characteristics of an efficient public official who will pursue the best interests of the public.

Pennsylvania recognizes that these qualities will not always be present in prospective leaders. It warns against a dark side to human nature as well as the positive potential of human beings. All officials need to be kept accountable to the people or else the government may need to be reformed or overthrown.[clxxvi] Human nature involves both the capacity to manage their own rights as well as the capacity, and propensity, to unjustly trespass the rights of others. While "no part of a man's property can be justly taken from him," the propensity of people with authority to do this is very real and, indeed, this sort of oppression is mentioned in the preamble as legitimizing rebellion against Great Britain.[clxxvii] Because of the tendency of individuals to go astray by purposefully violating the rights of others or unintentionally doing so while pursuing their individual rights, certain limits to liberty are necessary and good. For example, though freedom of religion is asserted, Pennsylvania's constitution does not say that individuals have the right to create whatever religion they might come up with in their imagination.

The nature of God, as expressed in its constitution, limits the boundaries of freedom of religion to a Christian conception of God, if not a Protestant conception. While Pennsylvania gives individuals the liberty to not "attend any religious worship," citizen rights are guaranteed only to an individual who "acknowledges the being of God." [clxxviii] Pennsylvanians may choose to be atheists, but if they do they will not be guaranteed civil rights. While Pennsylvania does not

explain this limitation on freedom of conscience, the most likely reason is because atheists lack the necessary accountability to a divine judge for being unjust in this life. In contrast to Christians, atheists have no expectation or fear of judgment by an omniscient and omnipotent God after death if they are caught and punished for violating others' rights in the present life. Since there is no reason for an atheist to respect the rights of others when he or she can get away with violations, atheism is considered dangerous and unacceptable in a political order established to help individuals enjoy their natural rights.[clxxix] While the freedom of religion section does not include any Christian references, the guarantee of civil liberties is limited to theists and the oath of office is explicitly Christian. Thus, Pennsylvania's constitution clearly prefers theism, specifically Christianity, as defining legitimate boundaries within which free conscience must operate.

Pennsylvania represents the most sophisticated view of human nature in the constitutions up to the time it was drafted. It specifically addresses (1) the relationship between an individual and the community of other individuals, (2) the rights pertaining to both body and soul, and (3) the competence of all to discern justice in spite of the innate tendency in human nature to violate others' rights. Pennsylvania is committed to both a Christian worldview and a virtuous life for its citizens. Its view of human nature presents a challenging prospect for government in preventing vice while cultivating Christian virtue, and with it happiness, in its citizens.

MARYLAND

Maryland begins with the same clause that Delaware did in its Declaration of Rights. Both choose to make their opening clause a statement about human nature in corporate terms, rather than utilizing the approach of Virginia and Pennsylvania, which starts with language about human nature in individual terms.

> I. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.
>
> II. That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof ….

> IV. That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.
>
> V. That the right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free and frequent, and every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.

Four of the first five articles in Maryland's Declaration of Rights address issues that most directly concern the people as a whole. Outside the reference to trial by jury and the common law of England in section III and suffrage rights in section V, the first individual right listed is in section XI, concerning the right to "petition the Legislature, for the redress of grievances."[clxxx]

While Maryland makes no mention of natural or God-given rights of individuals, the first article suggests natural rights are in mind when it states that "all government of right originates in the people." However, when life, liberty and property are protected in a statement in section XXI, these rights are not said to be natural rights.

> XXI. That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land. [clxxxi]

The establishment of the right of life, liberty and property in Maryland is qualified by the possibility of them being withheld "by the judgment of his peers, or by the law of the land." This is not to suggest that Virginia and Pennsylvania would disagree with these qualifications.

For example, taking a citizen's property in the form of a fine for breaking the law is not a violation of rights on the part of the government. To demonstrate this, one has only to consider the following section from Pennsylvania's "Declaration of Rights":

> But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives.[clxxxii]

A fine for breaking a law does not violate the citizen's rights because that person has consented to pay a fine whenever breaking a law created by means of his or her representatives. The same would be true of cases when a citizen commits murder taking someone else's life. When a representative republic creates a law endorsing capital punishment for murder, its citizens have consented to have their lives taken if they murder. The difference between the constitutions of Maryland and Pennsylvania is that the latter is explicit in stating that these rights are fixed by nature, whereas Maryland merely posits the rights without mentioning whether the rights are understood to be positive in nature or fixed by nature.

Maryland subtly places more emphasis on the material nature of human existence than do the other constitutions. First, its statement regarding the obligation of individuals to "contribute his portion" toward government is expounded more thoroughly than other similar passages.

> XIII. That the levying taxes by the poll is grievous and oppressive, and ought to be abolished; that paupers ought not to be assessed for the support of government; but every other person in the State ought to contribute his proportion of public taxes, for the support of government, *according to his actual worth, in real or personal property*, within the State; yet fines, duties, or taxes, may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community. [clxxxiii]

This explanation puts an added emphasis on the material property of individuals and points out that people can be evaluated by means of their "actual worth." Second, Maryland repeats the statement in

Delaware regarding reparations for damages to property and prohibition against seizures and searches.[clxxxiv] Third, the statement on suffrage rights more specifically defines the necessary attachment to the community in terms of property when compared with the passage it is borrowed from in Virginia and later in Delaware and Pennsylvania.

> Every man, *having property in*, a common interest with, and an attachment to the community, ought to have a right of suffrage.[clxxxv]

Compare this statement with the suffrage statement in Virginia's constitution:

> All men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage.[clxxxvi]

Maryland shuts the door on any interpretation of the suffrage clause that might include non-property-holders. The amount of property required for suffrage is later specified as fifty acres of land or property worth thirty pounds.[clxxxvii]

While all this may suggest that Maryland is emphasizing the materialistic aspect of human nature, the constitution includes sections that also address immaterial aspects of human nature. Maryland's constitution includes the following:

> XXXIII. That, as *it is the duty of every man to worship God* in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet *the Legislature may, in their discretion, lay a*

> *general and equal tax for the support of the Christian religion*; leaving to each individual the power of appointing the payment over of the money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county.[clxxxviii]
>
> XXXV. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of support and fidelity to this State, and such oath of office, as shall be directed by this Convention or the Legislature of this State, and *a declaration of a belief in the Christian religion*.[clxxxix]

These issues extend far beyond an interest in material well-being and the rights of life, liberty and property strictly speaking. Maryland recognizes that human beings are more than just material beings and acknowledges that religion is relevant to the regime. Worship is asserted as a duty of for every person, the legislature may require a tax in support of the Christian religion, and the oath of office requires belief in Christianity. Thus, Maryland's constitution is clearly not wholly materialistic in its concerns.

These references to worship portray a state that is committed to more than just protecting the right of individuals to acquire and enjoy private property. Maryland recognizes the religious component of human life, acknowledging and addressing the immaterial component of human nature as politically relevant. Thus, while there is no mandate for Maryland to legislate morality on the basis of Christian theological principles, such a practice is permitted, if not suggested, by the constitution, just as was found in New Jersey and Delaware.

NORTH CAROLINA

In only two cases does North Carolina's constitution fix the rights listed in its "Declaration of Rights" on theological or philosophical grounds. It states that trial by jury is "sacred" and the right to worship is natural and unalienable.[cxc] All other rights are given in a positive manner.[cxci] North Carolina's Declaration of Rights begins with the following article: "All political power is vested in and derived from the people only."[cxcii] Virginia and Pennsylvania contain similar phrases but

not in their early sections on rights. Compare the phrases above to phrases from the two opening statements in Virginia and Pennsylvania: "all men are by nature … and have certain inherent rights," "all men are born … and have certain natural, inherent and inalienable rights."[cxciii] These are not rights that are chosen and posited by the state, but are *in* human nature. Thus, North Carolina follows the pattern of Delaware and Maryland in choice of language—language that is not explicit in recognizing individual natural rights as a ground to political rights and governmental limitations. In North Carolina, the first 6 articles address issues that involve corporate or governmental concerns.[cxciv]

When North Carolina gets around to discussing individual rights, the emphasis is on legal issues. Sections VII-XIV in North Carolina's Declaration of Rights all deal with individual rights being granted for criminal and other legal procedures. Rights are restricted to freemen in certain cases, while in other cases granted to "every man" or left unspecified. Freemen are guaranteed due process of trial by jury in cases of criminal charges, protection of person and property from seizure, and reparation for damages or loss of liberty. Everyone is guaranteed the right to be informed of charges, to "confront the accusers and witnesses with other testimony," to not give self-incriminating evidence, and to not be arrested or searched without warrant.[cxcv]

Section XIV states the right to trial as a "sacred and inviolable" right in issues concerning property. It does not specify that this right is only granted to freemen, but it is implied, since ownership of property, including ownership of one's person, does not apply to non-freemen. Slaves, therefore, are given the right to some sort of trial, but not necessarily a jury trial or protection against arrest and search without a warrant. However, if a non-freeman inflicts damage on another person or property, there is no guarantee of a jury trial.[cxcvi] No clear reason is given as to why the delineations are made they way they are. North Carolina attempts to spell out the differences between freemen and non-freemen and, at least, avoids the difficulties addressed in Delaware by not granting every member of society the right to life, liberty and property. While legitimizing slavery, North Carolina seems to specify that certain rights apply to all people. A straightforward reading of the text, therefore, suggests a dignity to human nature that demands certain rights for all, protections against "cruel and unusual punishments" for

convicted criminals whether free or non-free inhabitants as well as the right to worship according to conscience.[cxcvii] Thus, human beings seem to have some level of inherent dignity, even when enslaved to others.

In spite of the recognition that all men have a certain level of inherent dignity, North Carolina's constitution is inequitable in the rights conferred upon inhabitants of the state, especially with regard to property holders. For example, to be an elector for state senators, one must be a freeman who owns at least fifty acres of land.[cxcviii] This creates a kind of two-tiered structure of citizenship. Anyone who resides in the state and owns land or pays taxes (which presumably means that the person owns some degree of property) can elect members of the popular house of the legislature, while only larger landowners can participate in both houses. These requirements suggest that those who have a stake in property ownership have more at stake in the state and should have more influence on government—the more the ownership, the more the influence granted. Virginia, in comparison, grants suffrage rights simply to all who demonstrate "sufficient evidence of permanent common interest with, and attachment to, the community"[cxcix] leaving the question of suffrage rights open to interpretations that would not necessary require property ownership.

North Carolina provides no clear articulation of individual natural rights as a fundamental basis for its constitution. It suggests that there is a certain dignity to all people, but certainly not to the degree of states like Virginia and Pennsylvania. Even recognition of universal human dignity is merely implied by positive rights, so that nothing ties these positive rights to fixed natural rights or divine revelation. Outside of the reference to trial by jury as "sacred", only the right to worship is fixed by nature. The result is a kind of two-tiered view of human nature. Only two rights, trial by jury and religious freedom, are granted to all people on the basis of nature. All other rights are stated without a clear articulation as to whether they are viewed as rights fixed in human nature or merely conventional rights.

GEORGIA

Georgia uses the phrase "common rights of mankind" in its preamble. It states that these rights are grounded in nature and reason.[cc] However, nature and reason apparently discriminate between different kinds of human beings because the rights granted by Georgia's constitution are

not granted to all inhabitants. Georgia's article on freedom of religion is the exception.

> ART. LVI. *All persons whatever* shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.[cci]

In comparison, the description of those who have suffrage rights provides an example of how Georgia discriminates in its granting of rights.

> ART. IX. *All male white inhabitants*, of the age of twenty-one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and shall have been resident six months in this State, shall have a right to vote at all elections for representatives, or any other officers, herein agreed to be chosen by the people at large; and every person having a right to vote at any election shall vote by ballot personally.[ccii]

Apparently, nature and reason dictate that everyone has the right to freely exercise religion, while withholding rights of citizenship from some racial groups is appropriate.

Georgia is the first state to make a fundamental distinction between people of color and "white" Europeans. Up to this point, the state constitutions have made distinctions for limiting people's involvement in political life based on one's status as slave or free, not on ethnicity, though given the nature of slavery at the time—i.e. black slavery—the two would seem to mean the same. According to Georgia's view, all human beings are guaranteed religious rights by nature, but certain racial groups are not guaranteed political rights.

All men are created equal with regard to the need to relate to the divine, but not with regard to having equal political rights vis-à-vis other human beings. Notice how the preamble describes the reasoning for America's revolution against Britain.

> Whereas the conduct of the legislature of Great Britain for many years past has been so oppressive on the people of

> America … being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppose such oppressive measures, and to assert the rights and privileges they are entitled to by the laws of nature and reason.[cciii]

The obligation for Americans to resist British oppression of natural rights seems to be dependent on the Americans being freemen. The slaves in America apparently do not have the same obligation to resist oppression under the newly established American states. Here we are forced to read the passage in light of the later sections distinguishing between blacks who are slaves and whites who are free. It implies that blacks are slaves by nature and whites are free by nature, and thus entitled to political rights. Or, it is a subtle admission that blacks are men and free by nature but that the current conditions in Georgia force the state to treat them different anyway. One difficulty with the interpretation that view blacks as slaves by nature is the use of the phrase "common rights of mankind." How can the political rights being discussed be common if they are only granted by nature to certain ethnic groups? The drafters of Georgia seem to be falling into a contradiction or are forced into an uncomfortable compromise with the slave-holding customs and traditions in the state.

While white males seem to have an intrinsic motivation to exercise their political rights, e.g., to vote in order to protect their rights, Georgia does not take for granted public-spiritedness in free white property owners. It creates an additional external motivation for the political participation of qualified white males. Georgia encourages the participation of qualified electors by creating penalties for those who choose not to cast their ballots. "Every person absenting himself from an election, and shall neglect to give in his or their ballot at such election, shall be subject to a penalty not exceeding five pounds."[cciv] The nature of people, it seems, requires some external encouragement to be politically active, in spite of the fact that they have political rights by nature. Georgia's constitution questions whether propertied persons in a republican free market society will be public-spirited on their own, even though it is in their own best interest to do so.

An argument can be made that Georgia's approach is an attempt to construct a regime dominated by middle class influence. The extremely rich will not care that they have to pay a fine that is minor relative to

their income level if they have more important matters to attend to than voting. The extremely poor will not qualify to vote under the suffrage qualifications. Thus, the main group affected by this penalty is the middle class. Citizens of this class have enough property to vote, but are not so rich as to consider the fine insignificant. The need for the fine, however, suggests that some people will not be politically-minded enough to vote without a consequence being attached. This view of human nature brings into question the suitability of people for life in a democratic republic, depending on whether this constitutional position reflects a concern for most people lacking public-spiritedness rather than just a small percentage of qualified voters.

The concerns regarding human beings' suitability for life in a democratic republic is also evident in Georgia's oath to office. Each official being inaugurated must make the following pledge: "I have obtained my election without fraud or bribe whatever."[ccv] Georgia's constitution recognizes that there is a propensity for human beings to seek dishonest advantage. Whether or not such oaths are effective, the inclusion of this statement in the oath demonstrates both some degree of optimism as well as some degree of pessimism regarding human nature. While it assumes that candidates will be tempted and some may succumb to fraud and bribery in order to win elections, it also assumes that if such behavior occurs, the official-elect will not bring him or herself to say the oath and, perhaps, will admit to the wrong committed. However, if a candidate is willing to cheat in an election, why would that person not be willing to lie in an oath of office? Apparently, Georgia expects that people will have such a high respect for the integrity of one's oath that it will deter people from fraudulent behavior at the outset.

Georgia's view of human nature is difficult to pin down in precise terms. At least some human beings can ascertain the content of natural rights by means of reason. A racial bias exists, which may or may not be justified on the basis of deliberative capacities. Georgia is not clear on the issue of why blacks lack political rights by nature while whites are granted political rights. The result is a contradiction between a belief in the hierarchy of whites over blacks and the concept of "common rights of mankind." However, at least these two certainties emerge from Georgia: (1) The right to free exercise of religion is universal, and (2) Certain political rights are contingent on race and the possession of property. Georgia leaves the question of the rights to life

and liberty unaddressed. These conclusions regarding human nature create the possibility that fixed principles of nature and reason can be a firm basis of judgment regarding moral legislation. But the difficulty posed by the view of two distinct kinds of human beings based on race creates the possibility for two natural standards of morality for blacks and whites.

NEW YORK

New York, by including the *Declaration of Independence* as part of its preamble, identifies God as the direct source of human rights.

> We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are, life, liberty, and the pursuit of happiness.[ccvi]

Whether or not the section that New York's constitution quotes from the *Declaration* should be viewed as representative of New York's position is a fair question. But, as was previously mentioned, New York's constitutional convention later remarks that they "unanimously resolve that the reasons assigned by the Continental Congress for declaring the united colonies free and independent States are cogent and conclusive."[ccvii] The principles asserted in the *Declaration* include an understanding that people are "endowed by their Creator" with rights. New York does not hesitate to conclude that the reasoning of the *Declaration* is sound. The assertion by the *Declaration* that human rights to life, liberty and the pursuit of happiness are endowed by God means that they are fixed, having their source in the divine. God is the one who has given people the right.

Political society is the means for enjoying these rights and every people is entitled to pursue political arrangements that make such enjoyment possible. "When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them …." Thus, the laws of nature, which were created by God, and the laws of God entitle the Americans to create for themselves a new political society. Standing on the reasoning of the

Declaration, then, New York grounds the basis for its political order on both divine law and the divinely legislated natural law.

The equality of human beings is addressed by New York in its clause that protects every member of society's "rights or privileges."[ccviii] One must conclude that the individual rights to life, liberty and the pursuit of happiness, as cited in the *Declaration* fall under this guarantee, as does the following guarantee of religious worship. [ccix]

> This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[ccx]

The phrase, "to all mankind," seems to be a way of emphatically granting this right to every human being in society. Both the rights listed in New York's Preamble and the right to worship are prior to, or more fundamental than, the political order. On the topic of conscience, New York demonstrates that it believes people, generally speaking, have the capacity to make right moral choices. Its constitution points out that any attempt to justify political conflict or "licentiousness" by an appeal to conscience is the result of a faulty view of "the liberty of conscience."

A violator of another's rights may claim, "I did X because I was guided by my conscience." New York will not permit someone to steal someone else's horse, for example, because his or her religious views claim that doing so is required. In addition to injustices that involve the violation of the life, liberty and property of others, New York recognizes that people can appeal to conscience in order to engage in privately immoral practices. Some religious group might claim that having sexual relations with animals that they own is one of their religious rituals. Section XXXVIII in New York's constitution refers to just this sort of thing. It claims that even when no other person is harmed by such acts, an appeal to conscience can never legitimize what it calls licentious behavior. Human conscience will never guide a

person to act in a manner that is morally depraved. In other words, licentious behavior is not merely that which threatens the peace or safety of the community, it is behavior that is morally unacceptable even when there is no immediate affect or consequence on others in political society. Some behavior is simply wrong for anyone to do.

New York makes the assumption that everyone knows what licentiousness includes, since no description of it is included in this passage. In light of the preamble, however, the standard of morality must be presumed to be the natural and divine law, which can never be violated by an appeal to conscience or otherwise. Therefore, government may rightly punish persons who exercise or advocate some form of private immorality. Government must also make judgments regarding religious institutions and their practices, and it can do so on the basis of "the benevolent principles of rational liberty". The passage points out a necessity for overlap between church and state. It requires the state to make judgments of religious organizations and individuals, in terms of both private morality and public safety.

VERMONT

Vermont takes many of its comments in its Preamble from Pennsylvania verbatim, with the exception of a section justifying its claim to be a newly independent state. Thus, all the comments above concerning Pennsylvania's preamble apply to Vermont. Individual natural rights are grounded on the "Author of existence."[ccxi] When Vermont begins its "Declaration of Rights" it borrows section I from Pennsylvania. However, Vermont makes a striking and original addition to the statement concerning the rights to life, liberty and property.

> I. THAT all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one Years, nor female, in like manner, after she arrives to the age of eighteen

> years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.[ccxii]

This is the first case in which a state constitution explicitly prohibits slavery, consistently applying the principles of individual natural rights to all its inhabitants. Notice also that both males and females are included under this section, protected from being bound to another person as "servant, slave, or apprentice." Vermont makes a clear statement in this section regarding its view of the equality of human beings, whether they have a history of being enslaved or have a different ethnic heritage.

Between sections I and II, Vermont makes another change in comparison to Pennsylvania. Instead of immediately following section I on natural individual rights to life, liberty and property with a section on the natural right to freedom of worship as Pennsylvania did, Vermont inserts an original passage on the topic of property.

> That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.[ccxiii]

This passage is like a parenthetical explanation of Vermont's understanding of the relationship between property and the political community. On the one hand, all private property is subject to the exigent needs of the community. Someone who owns a farm near an encampment of the Continental Army may be required to give up some of his stored wheat, so that the soldiers do not face starvation. However, private property is a natural individual right that must not be violated by a just government. Therefore, the constitution makes it clear that in the farmer's scenario, either Vermont or the Continental Congress must make provision to repay the farmer for the share of his wheat given for an urgent public necessity. The government never has a right to take someone's property without fully compensating the individual, but it does have the right to demand the use of private property when circumstances dictate the necessary use of it for sake of the community's well being.

The same qualification for public use of the life and liberty of citizens is made later in section IX.

> That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore, is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto; but no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives; nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent; nor are the people bound by any laws but such as they have, in like manner, assented to, for their common good.[ccxiv]

This passage is borrowed verbatim from Pennsylvania's Declaration of Rights, section VIII. Vermont acknowledges that individuals who receive government protection for the enjoyment of rights, have an obligation to give up the enjoyment of life, liberty and property for the "common good."

This passage is critical as a justification for the use of citizens as soldiers in a liberal society. It provides three criteria by which government is authorized to require the sacrifice of enjoyment of life, liberty and property. First, there must be a genuine necessity to justify the loss of life, liberty or property of citizens. While the passage does not spell out what necessities are legitimate, the mention of "bearing arms" suggests that national defense is one of the primary issues at stake. Second, if the service required of a citizen for a public exigency violates that person's conscience, then the person ought to be able to "pay such equivalent" so that the required service can be replaced by another. For example, if a Quaker is restricted from fighting in the army during time of war because of religious conviction, that person can be exempted from service on the condition that money is given which will compensate another citizen to serve as a soldier. Third, the public use of a citizen's life, liberty or property must be justified on the basis of the direct consent of the individual (e.g., voluntary enlistment into the army) or the indirect consent of a body of representatives (e.g., legislation that creates a draft).

This demonstrates that the status of natural individual rights as being "certain natural, inherent and unalienable" does not mean that every loss of the opportunity to enjoy one's life, liberty and property is unjust. Essentially, the liberal principles of government espoused by Vermont along with some of the other states allows for temporary alienation of these rights. The fundamental principle that justifies this alienation of rights is an appeal to consent. To take up the example again from Vermont's section IX, each of the three points mentioned above have their source in consent. The third point obviously makes that clear, but the other two are also justified on the basis of consent.

The first point on public exigencies makes the assumption that what is necessary for the "common good" is good for the individual. Thus, there is an obligation placed upon the individual for the sake of the common good because of the express or tacit consent, in Locke's terms, of the person staking his or her claim with this particular political community.

The second point above points out that even when religious convictions trump the ability of a citizen to contribute certain kinds of service for the common good, the tacit consent of that person to be a member of the political community justifies requiring an equivalent form of contribution. Ultimately, the rights remain unalienable in the sense that the only agent that can cause those rights to be relinquished or violated, one could say, is the individual him- or herself. Apparently, this relinquishing of rights by personal consent does not break the principle of inalienability. This principle is important for judgments concerning moral legislation and it is a principle that can be identified in other states. Both Pennsylvania and Delaware, for example, include this identical passage in their Declaration of Rights.

In most other respects, Vermont follows the example of Pennsylvania when it comes to passages that relate to a particular view of human nature. It borrows the passage concerning the natural and unalienable right to freedom of worship with the additions mentioned in the previous chapter on the nature of God. This demonstrates Vermont's identification of the ends of man in terms of Protestant Christianity, including a presumption that certain characteristics are virtuous and other characteristics are vicious. It emphasizes the capacity of its citizens to deliberate and make good moral judgments when it comes to proposed legislation and elections of representatives. But, like Pennsylvania, Vermont recognizes the propensity of people to

violate the rights of others, which when left unchecked, allows vice to flourish in society.

SOUTH CAROLINA

The following passage is the only mention of life, liberty, and property in South Carolina's constitution.

> XLI. That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land. [ccxv]

The passage does not even use the term "right" and does not ground the protection of life, liberty and property on any fixed principles. Nothing in the constitution asserts that any human rights are fixed. The language of the constitution is positivistic in character, even on religious issues. While South Carolina is the most radical in its encouragement and endorsement of religion, it never asserts the right to free expression of religion according to individual conscience. South Carolina is the least tolerant of free religious expression.

While South Carolina creates an established church, it does not seek a state church in the mold of, for example, the Church of England or the Lutheran Church in Germany. South Carolina's approach to an established church is unique. Instead of establishing one denomination or institutional church, the constitution permits the establishment of any group of people who adhere to a certain set of commitments, mostly doctrinal issues. It gives a description of the kind of local churches it wants to encourage and promote. The last of the requirements given for any group being an established state church is "that it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth."[ccxvi] Notice that the final point bears on the relationship of religion and politics. Christianity, as defined by South Carolina, obligates its followers to give truthful testimony. A free society or government requires honesty and integrity in citizens, especially in trials and elections. Also noteworthy from this list of requirements is the reliance on the Christian Bible as providing a "rule of faith and practice." South Carolina clearly endorses the belief

that Christianity is necessary for the good for its citizens. While South Carolina understands Christianity to be the proper goal of all people in its society, it does not necessarily trust in any specific religious institution to be the best or sole regulator of religious life. It seems to encourage a multiplicity of Protestant sects, so long as they remain loyal to the basic requirements stated.

One of the reasons Christianity is preferred by South Carolina is the belief that human beings are in need of a spiritual "cure." In section XXI, while addressing the topic of vocational Christian ministers, the constitution points out that ministers "are by their profession dedicated to the service of God and the cure of souls."[ccxvii] The importance placed on Christian ministers by South Carolina suggests a presumption that (1) human beings are composed of soul as well as a body and (2) the soul of every person is in need of a cure. The great duty of Christian ministers is to apply a cure for the souls of every member of society. This spiritual need for salvation is the closest thing one finds in South Carolina to a universal attribute in human nature.

The end of South Carolina's section XXXVIII includes a long passage that is a charge to Christian ministers.

> No person shall officiate as minister of any established church who shall not have been chosen by a majority of the society to which he shall minister, or by persons appointed by the said majority, to choose and procure a minister for them; nor until the minister so chosen and appointed shall have made and subscribed to the following declaration, over and above the aforesaid five articles, viz: "That he is determined by God's grace out of the holy scriptures, to instruct the people committed to his charge, and to teach nothing as required of necessity to eternal salvation but that which he shall be persuaded may be concluded and proved from the scripture; that he will use both public and private admonitions, as well to the sick as to the whole within his cure, as need shall require and occasion shall be given, and that he will be diligent in prayers, and in reading of the same; that he will be diligent to frame and fashion his own self and his family according to the doctrine of Christ, and to make both himself and them, as much as in him lieth, wholesome examples and patterns to the flock of Christ; that he will maintain and set forwards, as

> much as he can, quietness, peace, and love among all people, and especially among those that are or shall be committed to lids charge. No person shall disturb or molest any religious assembly; nor shall use any reproachful, reviling, or abusive language against any church, that being the certain way of disturbing the peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors, and that profession which otherwise they might be brought to assent to.[ccxviii]

This passage includes, among other things, an exhortation for ministers (1) to teach on matters of eternal salvation in a manner consistent with Christian scriptures, (2) to admonish people in private and in public as the need arises,(3) to be diligent in prayer, and (4) to make himself and his family a Christian example to the community. South Carolina is depending on the successful work of such ministers. One of its chief aims is for people to be converted to and committed to the truth of Christianity.

Clearly South Carolina's constitution is establishing a Christian state and society in manner that is altogether different from the other states. Its view of human beings as having universal need (which receives a great deal of attention rather than natural rights, which South Carolina may or may not also affirm) seems to drive this distinctiveness. Since it is the universality of need rather than universality of right that is central to its founding document, there is no contradiction in the document when it withholds civil rights from certain members of society. The structure of the society established does not require adherence to a rights doctrine in South Carolina. The constitution withholds civil rights from any people that fall into certain categories, such as those who are enslaved (and thus of African descent) without contradicting its principles. Human need for South Carolina is not ultimately political in nature, but spiritual. Thus, one must conclude that according to its constitution, any arrangement of politics that is most conducive to the curing of souls, is just. The extent to which the constitution addresses religion and the manner in which it establishes a state church demonstrates the commitment to this view in South Carolina's constitution. Of the roughly 5,300 words found in the body of the constitution, approximately 1,030 words are used

specifically to address religion, over 900 in the main section on religion.

MASSACHUSETTS

The Massachusetts constitution begins with what is essentially a paraphrase of the opening passage from the Pennsylvania preamble. Notice the similarities in the two passages.

> **Massachusetts Preamble**
> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

> **Pennsylvania Preamble**
> WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness

The natural rights of individuals, along with divine "blessings of life," are prior to government and provide the basis for government. Individual natural rights are presumed in both as the starting point for all discussion of government and those rights have God as their source.

Following Delaware and Pennsylvania, Massachusetts subtly balances the concerns of individuals with the concerns of the whole people or society. In the second paragraph of the preamble, the social compact is discussed.

> The body politic is formed by a voluntary association of *individuals*: it is a social compact, by which *the whole people* covenants with *each citizen*, and *each citizen* with *the whole people*, that all shall be governed by certain laws for the common good.[ccxix]

The political compact begins with individuals as distinct entities, but as soon as a group of individuals come together, the "whole people" has its own identity as well. Immediately after establishing the identity of a people through the process of compact, the people are obliged to form a government. "It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws … that every man may, at all times, find his security in them."[ccxx] This new entity of "the whole people" is responsible to form a government of their own choosing, one that will establish equitable rule of law. Even though Adams is writing the constitution, and it will be reviewed and edited by a convention, ultimately it is the people who are responsible for creating an equitable form of government.

Just as Massachusetts articulates a balanced perspective on the responsibilities shared by individuals in the political order, so it portrays a balanced perspective on the responsibilities shared between human beings and God. In the third paragraph of the preamble, the constitution attributes the opportunity to found a just government to God, but points out that it remains the responsibility of the people to capitalize on the providential opportunity.

> We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity.[ccxxi]

The people have the opportunity to create a new constitution through deliberation and in a peaceable manner. This clearly demonstrates a point that is implicit in the first two paragraphs: human beings have been given the capacity to make rational choices and there is a standard by which to judge their choices. It also assumes that not all new

constitutions of civil government will be rationally, peaceably, or well chosen. Massachusetts is well aware that many governments have been established by means of fraud and violence. So, even when a people has a providential opportunity to establish a rationally constructed and peaceably established government, it is very possible that such opportunities will be squandered.

Massachusetts' first article in its "Declaration of Rights" is a paraphrase of Pennsylvania and Virginia, declaring the natural freedom and independence of each person, with the corresponding rights to life, liberty, property and pursuit of happiness and safety.

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.[ccxxii]

There are two potentially noteworthy differences that distinguish Massachusetts from the other two. The first difference is the change from human beings considered "equally free and independent" to simply "free and equal."[ccxxiii] Adams apparently felt that either there was a distinction between the two or that the term "equally" was unnecessary.

Virginia and Pennsylvania recognize that freedom and independence are equally innate in individuals, but not in an unqualified sense. Adams states it in an unqualified way. But, does Adams mean for it to be read in an unqualified way, or is his wording merely to emphasize the importance of the principle of equality. Adams other writings indicate the latter.

> The meanest and lowest of the people are by the unalterable, indefeasible laws of God and nature, as well entitled to the benefit of the air to breathe, light to see, food to eat, and clothes to wear, as the nobles or the king. All men are born equal; and the drift of the British constitution is to preserve as much of this equality as is compatible with the people's security against foreign invasions and domestic usurpation.[ccxxiv]

Equality, to Adams, is compatible with a political structure in which some are lower in terms of social class or political position and some are higher.[ccxxv] There will be the "mean" and the "nobles" in any political arrangement. Yet, both have an equal right "to breathe … to see … to eat … to wear" clothes. This means that a constitution cannot completely preserve the equality that exists between two people naturally. (The emphasis of Adams on the equality each human being has at birth clearly portrays his commitment to equality by nature.) Rather, the constitution is meant to preserve equality as much as is possible while structuring the political order so that it can contribute to the good of its citizens. In other words, some people must rule and some must be ruled in order for a good political order to function. This view points out that people can never achieve complete equality in a political society. The nature of a political order demands some level of inequality to develop. Adams statement that "all men are born free and equal" must be understood to emphasize that *at birth* every newborn baby is a free and equal creature. A good political order recognizes this aspect of human nature and seeks to respect and preserve this natural condition of individuals vis-à-vis one another as much as possible.

The second difference in Massachusetts' first article of its "Declaration of Rights" compared with Pennsylvania's and Virginia's is Adam's wording that the rights of life and liberty must be "reckoned." This suggests that people do not simply know their rights, but rather their rights are identified through a reasoning process. Adams provides some insight into how he understood the process by which rights are reckoned at the beginning of his *A Dissertation on the Canon and Feudal Law*.

> The poor people, it is true, have been much less successful than the great. They have seldom found either leisure or opportunity to form a union and exert their strength; ignorant as they were of arts and letters, they have seldom been able to frame and support a regular opposition. This, however, has been known by the great to be the temper of mankind; and they have accordingly labored, in all ages, to wrest from the populace, as they are contemptuously called, the knowledge of their rights and wrongs, and the power to assert the former to redress the latter. I say RIGHTS, for such they have, undoubtedly, antecedent to all earthly government,—*Rights*,

> that cannot be repealed or restrained by human laws—*Rights*, derived from the great Legislator of the universe.[ccxxvi]

The "populace" will not normally know their rights intuitively. People come to know their rights through the use of "arts and letters." When people overcome ignorance through learning, they will be conscious of their rights recognizing that such rights are antecedent to and, therefore, beyond the jurisdiction of government to challenge. Thus, people must engage their mind in order recognize that they have the right to life, liberty, and property.

Massachusetts' Article II mirrors Virginia's section 16 in stating that human beings have a duty to worship God, with the qualification that freedom to worship does not justify "disturb[ing] the public peace, or obstruct[ing] others in their religious worship."[ccxxvii] This emphasis on worship is re-enforced in the list of citizen qualities given in article III and XVIII.

Massachusetts follows the pattern of Virginia and Pennsylvania in listing the qualities considered essential in the citizenry, but makes a change that is crucial. Virginia and Pennsylvania's lists include justice, moderation, temperance, frugality and industry. Massachusetts includes these virtues, but with the important addition of piety, which it places first in the list.

> Article XVIII. A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of *piety*, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth. [ccxxviii]

Massachusetts is convinced that a religious foundation is the chief attribute needed in order to maintain a free society. This is not the first time piety is mentioned. It is addressed much earlier in the constitution in another passage emphasizing its critical role in a free society.

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality.[ccxxix]

The virtues listed in Virginia and Pennsylvania's constitutions describe an inner disposition that results in a certain way of relating to others and material things. Massachusetts' approach is to encourage a certain way of relating to God. Perhaps piety is placed first because it is understood to be that which will contribute to the cultivation of all that other virtues, which involve property and relationships with others.

That piety is given precedence over the other moral virtues can be seen by (1) the comparison between Massachusetts article III and XVIII and the pattern established by both Virginia (Bill of Rights, sec. 15) and Pennsylvania (Declaration of Rights, sec. XIV) and (2) the placing of piety at the beginning of the list of virtues. Virginia, Pennsylvania, and Massachusetts all address the issue of what kind of qualities must be cultivated in the people for liberal government to work. Massachusetts decides to focus on the cultivation of inner religious conviction in its citizenry first in order to maintain the morality necessary in a liberal regime. A fervent personal commitment to one's religious doctrine and standard of morality supported by an institutional structure that promotes personal piety, becomes a primary vehicle for good character formation in Massachusetts.

In article XVIII, Massachusetts closely copies Pennsylvania, except that it adds piety to the beginning of the list of virtues. Both states authorize government to keep "an exact and constant observance" of both the fundamental principles of the constitution and the list of virtues "in the formation and execution of the laws."[ccxxx] As a result of the emphasis on piety, however, Massachusetts' ends article III by granting the legislature the authority to spend public money "for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality."[ccxxxi] While Massachusetts makes clear its reliance upon religion for the cultivation of necessary character qualities, Virginia and Pennsylvania make no such connection between religion and citizen virtues. It is possible that the latter two states understand a

connection between religion and character formation to be essential, but if they do, they do not grant government oversight or involvement in the cultivation of piety.

In addition to piety, Massachusetts emphasizes the role of education in a free society. Towards the end of the constitution, Massachusetts discusses the priority of education. There are two levels of education that are endorsed by chapter V of the "Frame of Government." In section I, the topic of undergraduate education is taken up. Harvard University is the institution of concern to Massachusetts.

> Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty-six, laid the foundation of Harvard College, in which university many persons of great eminence have, by the blessing of God, been initiated in those arts and sciences, which qualified them for public employments, both in church and state: and whereas the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America.[ccxxxii]

First, notice that the founders of Harvard were both wise and pious. Their piety, apparently influenced their role in founding this praiseworthy institution. Second, Harvard's mission is to encourage "arts and sciences, and all good literature," which "tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States." Notice that an assumed goal of higher education is to honor God and increase the prestige of Christianity. Higher education is directed toward the advancement of Christianity because Christianity is the presumed proper end of human beings. This commitment to Christianity is also evident in oaths to office, which include belief in Christian religion and "a firm persuasion of its truth."[ccxxxiii]

The kind of character Massachusetts believes is best to cultivate in young people is clearly articulated in its section on elementary and secondary public education.

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; *to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments* among the people.[ccxxxiv]

This section on education, entitled "The Encouragement of Literature, etc.," points out that the primary objective of offering education at public expense is "to countenance and inculcate the principles of humanity" as well as the cultivation of virtue. Notice how the list of character qualities differs from what one finds in much of the classical tradition, especially the absence of the virtue of courage and the concern for honor. This list of qualities is humble and meek, resembling Christian qualities more than the classical qualities.

John the Baptist in the *Gospel of Luke*, presents a teaching with content very similar to that found in this section of Massachusetts' constitution.

> 'The man with two tunics should share with him who has none, and the one who has food should do the same.' Tax collectors also came to be baptized. 'Teacher,' they asked, 'what should we do?' 'Don't collect any more than you are required to,' he told them. Then some soldiers asked him, 'And what should we do?' He replied, 'Don't extort money and don't accuse people falsely--be content with your pay' (Luke 3:11-14).

In this biblical passage one finds benevolence, charity, honesty, and sincerity. In another New Testament example, industry, frugality, and social affections are addressed:

> Make it your ambition to lead a quiet life, to mind your own business and to work with your hands, just as we told you, so that your daily life may win the respect of outsiders and so that you will not be dependent on anybody (1 Thes. 4:11-12).

Certainly there are similarities that can be drawn between the list of qualities found in Massachusetts and the classical works on virtue, for example, Aristotle's *Ethics*. The most surprising difference between Massachusetts' list and the classical tradition, whether Roman or Greek, is the lack of concern for courage and honor in these passages. As a result, this list of qualities more closely imitates the Bible than other non-Christian sources in the western tradition.

One might counter this interpretation by pointing out the section concerning militia in Massachusetts. In the passage where the governor is granted authority as the commander in chief, his responsibility is to

> put in warlike posture, the inhabitants thereof … and with them to encounter, repel, resist, expel and pursue, by force of arms … and also to kill, slay and destroy, if necessary, and conquer, by all fitting ways, enterprises, and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment, or annoyance of this commonwealth.[ccxxxv]

While the necessity for military action will require courage on behalf of the citizens, nowhere in this passage or the rest of the constitution is courage considered a virtue or mentioned as something to be cultivated and encouraged in citizens. The reasoning may well be attributed to the fact that Massachusetts' military philosophy is entirely defensive. When a free people are called to defend their own lands and property, Massachusetts seems to presume that they will exhibit sufficient courage and bravery. But, this presumes that such warlike behavior is only a necessity, rather than a natural virtue for human beings.

Besides the cultivation of specific characteristics in citizens, Massachusetts' public school system is intended to promote "agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country."[ccxxxvi] These objectives promote material prosperity in the state. They will lead to more than sufficient resources for citizens to have physical needs being met. However, the prosperity that this knowledge will generate must be well managed by citizens who have cultivated the list of virtues discussed above. Massachusetts does not presume that the encouragement of trade and commerce will automatically cultivate the necessary character qualities for a successful liberal regime but, rather, anticipates the need for these qualities to be intentionally cultivated from youth so that its citizens will not mismanage or squander their material prosperity.

Education is intended to develop knowledge and morals, the former for the sake of material prosperity and the latter for communal harmony. When put together with the religious issues discussed earlier, one finds a view of human nature with three distinct parts in Massachusetts' constitution. Human beings are physical beings, social beings, and spiritual beings. Each person needs sufficient material resources, harmonious social relationships, and a right relationship to the divine. Massachusetts make a serious attempt to address all three aspects, which in combination are critical to individuals enjoying their natural rights and the blessings of life. Massachusetts views its founding as a divinely orchestrated opportunity to construct a society and government that will allow its people to enjoy their divinely endowed rights to the fullest extent.

CONCLUSION

Human nature is articulated to varying degrees of specificity by various state constitutions. One does not find patterns grouped by region. The claim that individuals are by nature free and independent or equal, for example is made by at least one state in each region (e.g., Virginia, Pennsylvania, Massachusetts—see Table 2 below). Notice also that the southern states are not the only states to exclude claims regarding natural freedom. Four Mid-Atlantic states (New Jersey, Delaware, Maryland, New York) exclude these claims about human nature. Of the two New England states that choose to keep their colonial charters rather than draft new state constitutions, Connecticut's makes no

mention of individual natural rights, and Rhode Island's mentions "just rights and liberties" without indicating whether or not they are considered natural or positive rights carrying over from English common law.[ccxxxvii] These two states are obviously satisfied with authoritative political documents that fail to ground individual rights on theoretical principles. Both Delaware and Maryland have declaration of rights sections that closely resemble Virginia, Pennsylvania, and Massachusetts' in sections, but do not include the statements about natural equality and independence. Thus, whether or not such a claim is included is not entirely driven by whether the state is a pervasively slave-holding society or by regional and cultural differences. Clearly, the southern states do draft some sections of their constitutions very carefully to authorize and protect slavery, as discussed above. But, even in the southern states, certain aspects of the nature of a human being are shared across racial lines.

The inviolability of trial by jury is a principle that is virtually unanimously held by the early American states. What does this commitment demonstrate about their view of human nature? First, it demonstrates that all men are capable of deliberating. Everyone can think rationally and draw conclusions based on facts. Second, people have the ability to make conclusions that are just. They can judge and make a distinction between justice and injustice. This ability is not perceived to be the exclusive possession of those who are intelligent, talented, or experienced. Bright people who are able to study the nature of electricity, like Franklin, and who have a multitude of talents, like Jefferson, have no advantage over a collection of common folk in hearing the facts of a criminal case and deciding what the just verdict is. While Americans realize that it is imperative for judges to be unbiased, they largely place legal verdicts in the hands of randomly-chosen commoners.

Every early American constitution mentions conscience. The constitutions portray conscience primarily as a guide to lead each individual to proper expression of worship. By and large, the constitutions presume that people will worship. Some states assert that people are obliged to worship. But regardless of whether they claim that worship is a universal duty of mankind or not, the assumption is that people will worship and that each person is responsible for heeding well the guidance of his or her conscience.

Rights language is present in virtually every constitution (except South Carolina). Rights are those means to objectives to which an individual is entitled. In most early American constitutions, individuals are entitled to the opportunities to make a living, move around freely, and own private property. No person, however, has a right to property simply, but rather the right to acquire property. No person has the right to peace with God or eternal salvation or spiritual favor before God simply, but rather the right to worship God in a manner that leads to those spiritual objectives. Thus, rights are understood as *rights to* and not *rights from* something. They are not essentially understood to be barriers that keep some other person or group from making them do something. They are not negative. In other words, they are not an excuse to do nothing with one's life. The statement, "I have the right to ruin my life if I want to," communicates an understanding of the term "right" of which the early state constitutions know nothing. A right is what guarantees an individual the freedom to pursue his or her best interest. It is the opportunity for individuals to attain good objectives for themselves.

The following table identifies references to certain terms and concepts that relate to human nature in the state constitutions. Trial by jury and conscience are the only concepts mentioned by each state constitution.

TABLE 2: Human Nature in Early American State Constitutions

	VA	NJ	DE	PA	MD	NC	GA	NY	VT	SC	MA
Conscience	x	x	x	x	x	x	x	x	x	x	x
People by nature free	x			x					x		x
People by nature independent/ equal	x			x				x	x		x
Just government grounded in people or by "compact"[ccxxxviii]		x	x		x	x		x			
Trial by jury	x	x	x	x	x	x	x	x	x	x	x
Right of life and liberty	x		x	x	x	x		x	x	x	x
Right to property[ccxxxix]	x	x	x	x	x	x		x	x	x	x
Goal of happiness and safety[ccxl]	x	x		x	x		x	x	x		x
Property assessment for all suffrage[ccxli]		x			x		x	x		x	x
Property assessment for upper house, no assessment for lower house[ccxlii]						x					
No property assessment for suffrage[ccxliii]	x		x	x							

[cxxxiv] Only Georgia and Maryland exclude explicit mention of "conscience".

[cxxxv] "Constitution of New York, 1777".

[cxxxvi] "Constitution of Virginia, 1776". Bill of Rights, Sec. 1.

[cxxxvii] Locke is acutely aware of the importance of qualifying human liberty. He defines government as "the establishment of society upon certain rules or laws, which require conformity to them" and absolute liberty as the condition whereby can "do whatever he pleases." John Locke, *Essay*

Concerning Human Understanding. In light of those two definitions Locke asserts, "'No government allows absolute liberty.' I am as capable of being certain of the truth of this proposition as of any in the mathematics." Locke, *Essay Concerning Human Understanding*. (In the opening passages of *The Second Treatise*, Locke couples freedom/rights with duties—i.e. the laws of nature "obliges" or "binds" one to refrain from (and do) certain things.)

[cxxxviii] Jefferson, *The Life and Selected Writings of Thomas Jefferson*. Query XVIII. Notice that while Jefferson is commonly considered a deist (for example in his treatment of the New Testament Gospels) he refers to supernatural interference in this passage, a concept that is in conflict with deistic principles.

[cxxxix] "Constitution of Virginia, 1776". Italics mine.

[cxl] Ibid.

[cxli] Ibid.

[cxlii] Ibid.

[cxliii] Ibid.

[cxliv] Ibid.

[cxlv] Another way of saying that a right is natural or fixed is to say that it is "indubitable" or "inalienable." These are rights that human reason can deduce beyond any doubt and that cannot be dismissed under any circumstances.

[cxlvi] "Constitution of Virginia, 1776". Virginia's list has a strange aspect that is removed by Pennsylvania. Among a list of virtues (justice, moderation, temperance, and frugality), Virginia includes the term "virtue." It is very curious that the drafter would have placed "virtue" among a list of virtues, unless this term is not understood to be the genus of which the other terms are a species. The easy solution is to attribute this to sloppy writing by the drafters. This author is unaware of another explanation the might stem from a unique usage of "virtue" during this period that makes this passage more understandable.

[cxlvii] Ibid.

[cxlviii] "Constitution of New Jersey, 1776".

[cxlix] Ibid.

[cl] Ibid.

[cli] Ibid.

[clii] Ibid.

[cliii] Ibid.

[cliv] Both interpretations, however, result in similar kinds of conclusions about moral legislation since the state has made it clear that it wants to promote and uphold the practice of Protestantism as a good for the state even if this commitment is based upon conventional preference rather than upon natural rights or divine law. A popular sovereignty approach, apparently, is still expected to lead to moral legislation being made that is consistent with Protestant ethics. The basis for such legislation is the popular

opinions held by a predominantly Protestant population. So, whether New Jersey is interpreted to take an approach emphasizing theological or popular sovereignty, the legislation of morality should be expected to be consistent with Protestant moral principles.

[clv] "Constitution of Delaware, 1776".

[clvi] Ibid.

[clvii] Ibid. Note: the right for reparation of property injuries incurred is only guaranteed for a "freeman."

[clviii] Ibid. Section 6 is a curious passage. It states that liberty necessities people participating in the legislative process, but then limits citizenship, and thereby limiting liberty, to one group of people, who are "freemen".

[clix] "Constitution of New Jersey, 1776".

[clx] "Constitution of Delaware, 1776".

[clxi] Ibid.

[clxii] When the rights of the individual in Delaware come in conflict with the obligation to contribute to government, the rights of the individual have priority, but they do not absolutely trump the corporate responsibility. When Quakers have religious convictions against fighting in wars, Delaware and Pennsylvania find a creative way for the individual right to be guarded, while requiring the individuals to fulfill their obligations. The clause "conscientiously scrupulous of bearing arms" addresses the rights of individuals not to bear arms in war if they have convictions against doing so. This right is tied to conscience with the implied context being religious conviction. Thus, it demonstrates a practical example whereby right to freedom of religious conscience works out in practice. Notice, however, that the right not to bear arms does not release the person from political responsibility. Even though the person's religious convictions are respected, the individual must pay the "equivalent" monetary expense of serving in the military so that a replacement soldier can be paid to serve. (see "Constitution of Delaware, 1776".) Though this clause is included in two states that had large Quaker populations and is addressing their pacifist religious convictions, it provides a good example of the respect that is present in the American constitutions for the individual right of conscience, while fulfilling obligations to the community. Vermont includes the clause as well. It is unclear whether this is so because of the presence of any groups of people that have religious convictions against bearing arms or whether they are simply borrowing the clause from Pennsylvania, after whose constitution theirs is closely modeled.

[clxiii] "Constitution of Pennsylvania, 1776".

[clxiv] Ibid.

[clxv] Ibid.

[clxvi] Ibid.

[clxvii] Ibid.

[clxviii] Ibid.

clxix "All elections ought to be free and frequent, and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right of suffrage." ("Constitution of Delaware, 1776".) "Every freemen of the full age of twenty-one Years, having resided in this state for the space of one whole Year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector." ("Constitution of Pennsylvania, 1776".)

clxx "Constitution of Pennsylvania, 1776".

clxxi Ibid.

clxxii Ibid.

clxxiii Ibid.

clxxiv Ibid.

clxxv Ibid.

clxxvi Ibid.

clxxvii Ibid.

clxxviii Ibid.

clxxix On the problem of atheists in civil society see also, Locke, *A Letter Concerning Toleration*. "Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all."

clxxx "Constitution of Maryland, 1776".

clxxxi Ibid.

clxxxii "Constitution of Pennsylvania, 1776".

clxxxiii "Constitution of Maryland, 1776". Italics added.

clxxxiv Ibid.

clxxxv Ibid. Italics added.

clxxxvi "Constitution of Virginia, 1776".

clxxxvii "Constitution of Maryland, 1776".

clxxxviii Ibid. Italics added.

clxxxix Ibid. Italics added.

cxc "Constitution of North Carolina, 1776".

cxci For example, "the people of this State ought to have" (Sec. II), "no man or set of men are entitled" (Sec. III), "powers of government, ought to be" (Sec. IV), "ought not to be" (Sec. V, XI, XIII, XVI, XVII, XXIII), "ought to be" (Sec. VI, XX, XXII, XXIV), "every man has a right to be" (Sec. VII), "no freeman shall be" (Sec. VIII, IX), "should not be required" Sec. X, "no freeman ought to be" (Sec. XII), "ought to remain" (Sec. XIV), "ought never to be" (Sec. XV), "the people have a right" (Sec. XVII, XVIII).

cxcii "Constitution of North Carolina, 1776".

cxciii "Constitution of Virginia, 1776". "Constitution of Pennsylvania, 1776".

cxciv The people have the "right of regulating the internal government and police" of the state (Sec. II). Special public emoluments or

privileges are only given to those who have earned it for unique contribution to society; the people will honor no one simply on the basis of heredity (Sec. III). Sections IV, V, and VI address the principles of separation of powers, of legislation by consent of representatives of the people, and of free election of representatives, respectively.

[cxcv] "Constitution of North Carolina, 1776".

[cxcvi] Ibid.

[cxcvii] Ibid.

[cxcviii] Ibid. To vote for representatives to House of Commons, one must have a freehold of land of any size or be a tax-paying resident. "Constitution of North Carolina, 1776".

[cxcix] "Constitution of Virginia, 1776". Delaware uses the same phrase as Virginia except that it specifies that only freemen have the right to vote ("Constitution of Delaware, 1776".) It should also be noted that, for Virginia, this section is not the final word on suffrage rights. Later in Virginia's "Form of Government, it states: "The right of suffrage in the election of members for both Houses shall remain as exercised at present" ("Constitution of Virginia, 1776".) However, this does not seem to suggest that suffrage rights stay the same in the future. The context of this second reference to suffrage rights is concerned with starting up the government. For example, it discusses the need for each house to "settle its own rules of proceeding." Its reference to suffrage rights appears to be a statement to settle the initial issue of suffrage rights for the first elections prior to the first legislature ever assembling. On the basis of the legislature's interpretation of section 6 it has the authority to adjust the rights of suffrage to meet the state's fundamental principle listed in the Bill of Rights.

[cc] This is the first reference to human rights being tied to reason in the state constitutions. The rights are typically tied to nature or God, if they are not merely positively asserted.

[cci] "Constitution of Georgia, 1777". Italics added.

[ccii] Ibid. Italics added.

[cciii] Ibid.

[cciv] Ibid.

[ccv] Ibid.

[ccvi] "Constitution of New York, 1777".

[ccvii] Ibid.

[ccviii] Ibid.

[ccix] The right of the people to abolish or reform their government when the current government is not conducive to the "certain, inalienable" individual rights, which is found in the preamble, is a corporate right of the people and, therefore, not relevant to this discussion of guaranteed individual rights.

[ccx] "Constitution of New York, 1777".

[ccxi] "Constitution of Vermont, 1777".

[ccxii] Ibid.
[ccxiii] Ibid.
[ccxiv] Ibid.
[ccxv] "Constitution of South Carolina, 1778".
[ccxvi] Ibid.
[ccxvii] Ibid.
[ccxviii] Ibid.
[ccxix] "Constitution of Massachusetts, 1780". Italics mine.
[ccxx] Ibid.
[ccxxi] Ibid.
[ccxxii] Ibid.
[ccxxiii] Ibid.
[ccxxiv] John Adams, *The Revolutionary Writings of John Adams*.
[ccxxv] However, Adams use of the term "drift" implies that while some of the arrangements of the British constitution are compatible with the equality principle, others may not be.
[ccxxvi] Adams, *The Revolutionary Writings of John Adams*.
[ccxxvii] "Constitution of Massachusetts, 1780".
[ccxxviii] Ibid. Italics added.
[ccxxix] Ibid.
[ccxxx] Ibid.
[ccxxxi] Ibid.
[ccxxxii] Ibid.
[ccxxxiii] Ibid.
[ccxxxiv] Ibid. Italics added.
[ccxxxv] Ibid.
[ccxxxvi] Ibid.
[ccxxxvii] "Charter of Connecticut, 1662". "Charter of Rhode Island and Providence Plantations, 1663".
[ccxxxviii] North Carolina reads: "all political power is vested in and derived from the people only" (Declaration of Rights, Sec. I). Georgia reads: "the people, from whom all power originates" (Preamble). New York reads: "governments are instituted among men, deriving their just powers from the consent of the governed" (Preamble from *Declaration of Independence*).
[ccxxxix] New Jersey reads: "the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter" ("Constitution of New Jersey, 1776".) This reference to the common law of England carries with it an understanding of the right to hold property. For example, notice the right to provisions in the Magna Carta: "**28.** No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this." (*Magna Carta*.) New York does not

explicitly cite a right to property. The preamble implies some kind of right to life, liberty and property, by in its statement that that these must be protected against the "cruel depredations of our enemies" ("Constitution of New York, 1777".) New York's insertion of the *Declaration* also suggests the right of people to property, thought that document fails to explicitly state a right to property.

[ccxl] Georgia reads: "good order and well-being of the State" (art. VII) and "peace and safety of the State" (art. LVI). These instances may or may not apply to this category, since they seems to put the emphasis on the social condition rather than on the condition of the people themselves.

[ccxli] Georgia provides for suffrage on the basis of having a "mechanical trade" only if its property assessment is not attainable (Georgia, art. IX).

[ccxlii] North Carolina requires that an elector has paid some tax to vote for lower house, but no property assessment (North Carolina, "Form of Government," Sec. VIII).

[ccxliii] Pennsylvania requires that an elector has paid some tax to vote for member of its one legislative house (Pennsylvania, "Frame of Government," Sec. 6). It should be noted, however, that none of the constitutions restrict the legislature from imposing property assessments, especially since the language of Virginia, Delaware, and Vermont all include the following formulation: "sufficient evidence of permanent common interest with, and attachment to, the community" (Virginia, "Bill of Rights," Sec. 6; Delaware, "Declaration of Rights," Sec. 6; Vermont, "Declaration of Rights," Sec. 8). This phrase would certainly provide justification for state legislatures requiring a property assessment.

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CHAPTER 5

The Constitutionality of Moral Legislation in Early State Constitutions

This chapter will discuss the nature of government in light of the previous two chapters' discussion of the nature of God and of human nature in the constitutional tradition. It will focus on the implications of those previous topics for moral legislation. Two questions will be asked of each state constitution: (1) To what extent is the constitution directing government to legislate morality and (2) What is the objective of such moral legislation? These questions will be addressed in light of earlier observations made in each state concerning the nature of God and human nature. Two of the most prominent categories of legislation are (1) moral laws that restrict citizens from violating the rights of other citizens (i.e., rights to life, liberty, property, and worship), and (2) moral laws that regulate behavior that does not threaten the rights of others.

Moral legislation limited to issues in the first category exhibits an approach to politics that gives government a more restricted role in citizens' endeavor to enjoy their rights and to attain happiness. There is less expectation for government to have a role in citizens cultivating the right kinds of virtues and avoiding the wrong kinds of vices. Citizens are expected to be able to do so with minimal encouragement from laws. Obviously the "minimal" encouragement is considered to be necessary, because individuals' pursuit of happiness (including enjoyment of their natural rights) is impossible if government does not

provide a context in which behaviors such as murder and theft are prohibited and punished.

Governments authorized to regulate citizens' behavior, both when others' rights are and are not threatened, embrace a much more expansive approach to the legislation of morality. Behavior that is not inherently a threat to another person's right to life, liberty, property, or worship can be prohibited if the behavior is determined to be detrimental to a person's pursuit of happiness and enjoyment of rights on the basis of constitutional principles. For example, if a constitution affirms a view of human nature grounded on Christian theological principles, fornication can be prohibited even if the two persons are consenting unmarried persons. This example is an appropriate prohibition because fornication, in a Christian view of human nature, is a behavior that is never conducive to the attainment of happiness or the enjoyment of natural rights. This more expansive approach to legislating morality, while still placing the responsibility upon citizens to proactively pursue their own enjoyment of rights and attainment of happiness, allows government to have a much more active role in directing citizens to their own good. This more expansive approach can be taken regardless of whether a political community relies more upon natural law, divine law, or popular sovereignty as a basis for its legislative judgments. What differs is the basis for determining what behaviors are considered to be good for its citizens.

The distinction between these two categories of moral legislation will be at the heart of this chapter. In order to better understand the early American constitutions' approach to moral legislation, the topics of civil law and political power will be discussed as an introduction to the analysis of the state constitutions. The issue of legitimate use of political power and the role and making of law is obviously of central importance to the question of legislation of morality, as the above paragraphs demonstrate. In addition, since law making is intended to serve the interest of the community for all the early American states, the issue of popular sovereignty will be taken up to discuss the various views of popular sovereignty held by early Americans.

CIVIL LAW & POLITICAL POWER

As discussed in the last chapter, many of the early American constitutions articulate a belief in, and commitment to, individual

natural rights. If such rights are grounded in the nature of human beings and recognized by a regime, why is there a need for civil law? The answer for the early Americans comes out of their view of human nature. There is a tendency for human beings to violate the natural rights of others when seeking to enjoy one's own natural rights. Thus, civil law is understood to provide necessary limits on individual liberty to safeguard against violations of natural rights. For example, when one person prepares to reap a harvest of grain after plowing and sowing his or her field, others have a propensity to take the grain for themselves if they are stronger since doing so is easier than plowing and sowing for themselves. It is because of this propensity of human beings to infringe on the rights of others that the need for civil law arises. Civil law consists of clearly established rules for the community that are applicable to all. Civil law is in contrast to giving one person or group the power to make arbitrary judgments whenever disputes arise. Consistent with their strong commitment to equality, civil law for the Americans must be enforced without preference for any individual or groups so that each individual's rights are protected.

Civil law, of course, is not self-enforcing. There must be human agency to execute the laws established. In order for government to fulfill its function of protecting citizens from having their rights violated by other citizens or foreigners, it must have sufficient power to deter or punish violations of the laws. The problem with political power, however, is that it is a two-edged sword. Political power can be used to legitimately punish those who violate the rights of their citizens. However, it can also be used illegitimately when government officials use their political power to violate the rights of fellow citizens. For this reason, Americans attempt to dull the sharpness of the latter side of the blade in order to hinder government from illegitimately using political power. The potential for government officials' abuse of their power is just as real as the potential for individuals to use their resources to violate others' rights for personal gain. The goal for early Americans is to hinder the use of political power for illegitimate ends, while entrusting government with ample force to legitimately deter and punish violators of rights. The means to this end are multitudinous in the state constitutions, including separation of powers, fixed terms of office, and free elections.

Many of the methods constructed to restrict governmental power from being used illegitimately are associated with the process of

making good laws. They are attempts to influence the law making process so that good laws are enacted. Obviously, good laws cannot completely solve the problem. Good laws cannot completely stop a government official from using the power vested in him or her to oppress citizens. If you give a police officer a gun, you run the risk of that officer unjustly killing a citizen. Good laws, however, provide clear rules defining what citizens and public servants can and cannot do to other citizens. They define legitimate versus illegitimate use of political power. Good laws define acceptable and unacceptable behavior for both the private citizen as well as the public official, and spell out the implications for overstepping those laws. The question that this chapter will address is the extent to which the state constitutions authorize their governments to regulate moral behavior. Do they support a more restricted approach to the legislation of morality or a more expansive role?

The American states attempt to structure political power in such a way as to construct a regime which makes good laws, executes them well, and judges justly when disputes about interpretation of law arise. Separation of powers, for example, is an attempt to distance the law-making function from the executive function so that the persons who wield the political sword are not the same persons who make the rules for how and when the sword can be used. If the role of making law and the power to execute it are placed in the same political office or body, the potential increases for laws being enacted that (1) are preferential toward the ruling group and (2) are in conflict with the principles of natural rights. Separation of powers, therefore, is a device whose function is to limit the use of political power in a manner that protects citizens' rights from violation by government.

POPULAR SOVEREIGNTY

No person has a natural right to rule politically—this much is very clear to the early Americans. Popular sovereignty means that all the inhabitants of the political community collectively retain ultimate sovereignty within the regime. The principle of popular sovereignty is clearly a dominant theme in the early state constitutionalism. "All power is vested in, and consequently derived from, the people," is an often-cited sentiment in constitutions.[ccxliv] Donald Lutz and other state constitutional scholars have rightly pointed out the emphasis on the

authority of "the people" in early state constitutions. It is one of the dominant themes in the early documents and is found explicitly in all but South Carolina's constitution. (See Table 3 at the end of this chapter.) Maryland suggests a subtle clarification that not all government is established by popular sovereignty, but that all *legitimate* government, or "government of right," must be so established. North Carolina's wording adds what previous constitutions assumed—the power referred to is *political* power.

A clear-cut distinction between good and bad government is made by the American state constitutions. Only governments whose authority is granted by the people for the benefit of the people are legitimate. This conviction in early American political philosophy leaves no room for such theories as divine right of kings, or a "might makes right" approach to government. Any government that does not have its authority resting on the consent of the people is illegitimate. Such governments are despotic, making the entire population subject to the despot or the ruling class.

An example of this is the assertion found in seven of the eleven constitutions that the people have a right to reform or overthrow oppressive government (see Table 3 at the end of this chapter). The people retain the right to take the reins of government away from an oppressive administration at any time. One can say that government exists for the purpose of protecting individual rights, rather than individuals existing for the purpose of contributing to the interest of the government. "Government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community."[ccxlv]

To claim that the early Americans were concerned with regulation of behavior only when others' rights are threatened is an incomplete view. Some states understand the objective of government to extend beyond merely protecting individual rights. One justification for extending government's power to regulate behavior beyond limiting violations of others' rights is by claiming that government is ultimately instituted to help people enjoy their natural rights and attain the goal of happiness.[ccxlvi] This understanding of the aim of government includes the protection of individual rights, as a sort of minimum requirement, but does not exclude other kinds of regulations of citizens' behavior for government's concern. Regardless of whether the government's objective is to protect individual rights exclusively or to be involved in

the broader issues that fall under the objective of contributing to the citizens' happiness, government does not have a natural right to exist. In both cases, its function is derived from the rights and needs of individuals.

Many constitutions seem to make the connection between viewing political sovereignty as residing in the people and understanding the aim of government as the good of its citizens by placing the two principles in close proximity in the documents.[ccxlvii] This connection reflects another commitment to the enjoyment of individual rights. The people, who are the source of political authority, are viewed as a collection of individuals who have as their aim the enjoyment of their rights to life, liberty property, and worship rather than some corporate goal like national glory and honor, for example. "The good of the whole," as Delaware and Maryland put it, is a fairly ambiguous concept if it is not spelled out in particulars. Many of the specific rights and structures of government established by the constitutions are attempting to define and implement the government's contribution to the good of all citizens.

What the early constitutions mean by the concept of the good of the whole, or as alternatively worded, "the common benefit" or "the common interest of the whole society," are a set of conditions conducive to individual enjoyment of rights and blessings. At least three possible aims for government are apparent which contrast with this understanding of government's objective.

The first alternative aim for government is the interests of a separate governing group or class. The politics of self-aggrandizement on the part of governing officials clearly does not provide conditions in which individual citizens or inhabitants can most fully enjoy their rights to life, liberty and, especially, the acquisition and enjoyment of property. The governing class's greed will lead them to take from the subjects to satisfy their desires.

Second is the goal of imperial conquest. This may result in some amount of material prosperity for citizens and inhabitants as a result of plundering the resources of other nations. A nation that has this aim may attempt to reach its objective by economic means; it may make economic dominance its primary concern.[ccxlviii] If national glory, honor, or wealth is the primary political objective, the corporate entity of "nation" is superior to the individual. This reverses the proper priority.

The third possible aim of government is when the objective is to provide what is beneficial for individuals, but the conclusions about what is beneficial for individuals is arbitrarily determined by the governing class. This can happen when some expert group or dominant group defines a plan for the individual happiness and security of all citizens, which is then implemented and regulated by government. While this approach is said to be concerned with the good of individual citizens, it diverges from the early state constitutions by not allowing individuals to be responsible for having a role in defining and pursuing what they understand to be good for themselves. The defined good for all citizens could vary from something along the lines of Marxist intellectuals establishing a materialistic objective requiring regulated distribution of all property to religious clergy establishing a spiritual objective dedicated to the salvation of every soul. It does not seem to occur to the early Americans that their view of individual natural rights can be accused of being a theory constructed by elites, which the people themselves have not also recognized and affirmed. Natural rights theory, as it is mentioned in the various state constitutions, was perceived to be discernable to everyone; its truth was universally recognized.

The study of the individual states' below will be looking closely to determine if each constitution grants its government the power of legislating morality and if so to what extent and on what grounds. In light of the principles held by early Americans discussed above, one might conclude that the legislation of morality should be limited to laws that protect the rights of others or that it should be limited by additional concerns as well, for example, the pursuit of happiness of its citizens. The constitutions will be evaluated closely to determine if and why a constitution might authorize laws that place limits on citizens even when their behavior may not violate the rights of other citizens.

VIRGINIA

Virginia emphasizes the priority of individual rights over the concerns and interests of government. Government exists for the following purpose: "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community."[ccxlix] This end of government is stated early in the document in section 3 of the Bill of Rights. It is built upon the

propositions of sections one and two, which immediately precede it: (1) Human beings are by nature free, (2) individuals have the right to life, liberty, and acquisition of property, (3) political power is derived from and accountable to the corporate collection of individuals in the political community, therefore, (4) government's objective ought to be the good of the people in the community. This seems to suggest that good law is primarily concerned with material objects (life, liberty, property), but this would overlook the references to happiness in both section 1 and 3 of the Bill of Rights. The references to happiness involve more than just the material concerns of citizens while certainly including material concerns. Section 1 states that the pursuit of happiness is a right for all men. Section 3 states that the best government is that "which is capable of producing the greatest degree of happiness." This concern for happiness suggests that Virginia is not only concerned with keeping citizens safe in terms of their physical well-being and protection of property, but also concerns itself with the more ambiguous, personal issue of happiness. A political order is apparently conceivable to Virginia in which the citizens are safe from the threat of physical harm and theft and yet are significantly hindered from pursuing an inner sense of happiness. The reason for making this claim is that Virginia does not equate the two but suggests a distinction by listing both as part of the goal of good government.

Virginia's complete description of the best regime is that which is "capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration." [ccl] The first component of good government—the happiness and safety of its citizens—is obviously difficult to attain but can be approached to varying degrees by successful regimes. Second, the regime must be protected against "maladministration." The document does not define maladministration, but one can certainly make reasonable assumptions about what is meant. Certainly problems of inefficiency, corruption, and injustice would fall into the category of maladministration. While the constitution has little to say about the level of government efficiency, clearly a lack of good administrative procedures would negatively affect the ability of government to attain its objectives. A poorly structured government that fails to grant adequate powers to officials will also make even the best intentions of government officials lame. Perhaps maladministration is intended to refer to a host of issues

that may be detrimental to attaining the goal of happiness and security for citizens.

Lest one think that Virginia's concern for effective administration be understood in 21st century terms—including such programs as government regulated health care, government regulated retirement programs, etc.—consider that the happiness of the citizens is understood in terms of rights. Those rights are the opportunities for citizens to pursue happiness as a personal responsibility. In other words, one must not falsely assume that the references, (1) to government involvement in "producing the greatest degree of happiness" and (2) to government administration, suggests that government is supposed to be the primary agent in the attainment of happiness for individual citizens. The opening section of the Bill of Rights clearly articulates the conviction that every person has the right to life, liberty, the acquisition of property, and the pursuing and obtaining of their own happiness and safety. Notice that citizens "cannot, by any compact, deprive or divest" these rights. So, even though citizens take on obligations to the political community when choosing to be part of it, they do not forfeit or relinquish their right to life, liberty, property and pursuit of happiness. The emphasis is upon individuals being responsible for pursuing their personal happiness. Government does not carry the burden of producing happiness, but for structuring the regime so that it is "capable of producing" happiness. It creates the environment conducive for citizens to produce their own happiness.

Virginia's approach assumes that her citizens are capable of being citizens according to the definition of a political philosopher like Aristotle, who defined a true citizen as one able both to rule and be ruled.[ccli] Virginia is committed to cultivating "justice, moderation, temperance, frugality, and virtue" within its society so that its citizens are adequately prepared to rule and be ruled.[cclii] If Virginia's citizens and legislators are to deliberate well over the course of time with regard to the principles of free government and the happiness of the people the cultivation of these citizen virtues must be taken seriously and attained to a significant degree. Virginia's endeavor to create a government that most approaches the best regime relies heavily on the cultivation of these character traits.

Virginia's understanding of what kind of virtues are good for its citizens is defined in terms of the constitution's view of the nature of

God and human nature. There is a delicate tension between government actively seeking to encourage the kinds of character qualities in its citizens that will lead to their personal happiness and the commitment to allow citizens the liberty to personally discern and pursue their own happiness. In order for individual citizens to enjoy their lives and liberties, to acquire material goods for sustenance and future security and to relate to others with forbearance, love, and charity they must avoid a multitude of vices that will hinder such pursuits. Thus, government can attempt to encourage the kind of character needed for citizens to attain those objectives by discouraging behavior that is contrary to them. Yet, the attainment of happiness falls under the responsibility of individual citizens. While happiness for human beings can be defined in general terms, it can only be clearly perceived and achieved by each individual person.

One would expect, therefore, to find moral legislation that would, generally speaking, prohibit activities that hinder individuals from fulfilling their duty to practice religion as their individual consciences dictate, from cultivating the virtues in section 15, and from acquiring goods necessary for life. A law that prohibits the practice of granting monetary credit to individuals, for example, could be viewed as legitimate because it is deemed a hindrance to the cultivation of frugality (one has only to think of the contemporary problem of personal credit card debt in American society). However, an argument could be made that personal credit is necessary for individuals to attain the capital necessary to start a new business, which could provide the potential of securing future acquisition of material necessities. To prohibit an individual from obtaining capital through credit, the government may be restricting his or her ability to secure material goods for physical well-being in the future. Thus, the goal of cultivating frugality, while protecting the right to acquire private property, is one example of the difficulties government faces when trying to cultivate various kinds of moral character in citizens without unjustly violating its citizens' natural rights.

The same kind of tension can arise with regard to the government's mandate to encourage individual happiness through fulfilling the duty to practice religion according to individual conscience. Legislation that prohibits productive labor one day a week, designated as a day of Christian worship, is an example of a law intended to encourage individual fulfillment of a religious obligation.

However, such legislation may be interpreted as denying liberty to individuals to acquire property. Some citizens may argue that they can work seven days a week without hindering their obligation to worship. Perhaps, in accordance with the dictates of their consciences, they belong to a religious group that meets twice a week during the evening rather than one day a week during the day.

Virginia's constitution faces an inherent tension between the "firm adherence" to cultivate virtue and respect for the equally free and independent nature of individual citizens. This tension, which is similar to that found in some of the other states, is a necessary reality for Virginia because of its commitment to a fixed view of human nature in terms of virtues considered obligatory for all citizens and its commitment to natural rights. Virginia's constitution does not seem to question the ability of its future state government to navigate through that tension. The constitution requires its future legislators to do so remaining equally committed to both concerns. In order to do so, laws that regulate private morality beyond the scope of protecting the life, liberty and property of other citizens are clearly legitimate if they can be shown to be an effective means of contributing to the cultivation of citizen virtues without violating individual rights.

NEW JERSEY

New Jersey's constitution includes no references to moral virtues and no assertions that human beings have a duty or right to worship. It refers to "just rights" but provides no indication of what they are.[ccliii] The happiness and safety of the people is considered a good objective of government, but without any definition of happiness or safety. [ccliv] There is no doctrine of individual rights articulated. The rights to life, liberty, acquisition, or worship mentioned in other constitutions are completely lacking in New Jersey's constitution. The constitution, therefore, fails to articulate principles upon which judgments regarding proposed moral legislation might be made. One conclusion is to assume that moral legislation can be enacted that corresponds to the representative's understanding of that which is conducive for the happiness and safety of the people. In other words, this view would conclude that legislation on moral issues is appropriate when the representatives, being the indirect agents of the people, think it is appropriate. The only standard by which moral legislation can be

judged, in such a case, is the current view of happiness and safety held by the people—i.e., popular opinion.

Even though New Jersey includes passages on the "privilege" to worship and the limited guarantee of civil liberties to Protestants, these passages are irrelevant with regard to moral legislation that regulates behavior in a manner beyond protection of others' rights, since both passages are given in negative language. For instance, while no one can be prohibited from worshiping God according to conscience, no one can be compelled to worship in any particular manner and, apparently, there is no obligation for human beings to worship.[cclv] While the constitution creates a barrier protecting Protestants from being politically persecuted, it does not suggest that Protestantism ought to be encouraged. The result is a constitution that gives its legislature guidance for creating legislation on moral issues chiefly with a view to restraining actions from violating others' rights.

One can make a case for a restrictive approach to the legislation of morality in New Jersey's constitution. However, since the constitution states that the happiness of the people is an aim of the regime, one can make a case that a more expansive approach to moral legislation is acceptable depending on how happiness is defined. In the end, New Jersey seems to fall into the category of allowing for moral legislation beyond merely protection of others' rights if the representatives of the people find it conducive for the citizens' happiness. Since political authority is "derived from the people," they may decide, through their legislative representatives, to enact moral legislation that regulates behavior beyond simply protecting others' rights. Thus, popular sovereignty is the primary principle guiding decisions about moral legislation. Whether or not New Jersey's understanding of popular sovereignty is understood by the state's founders to rest upon other foundational principles, such as natural rights or theological principles, is unclear.

DELAWARE

The right to life, liberty, and property is granted in Delaware's constitution, but without any natural or theological basis. It is granted in a positive manner for "every member of society," without suggesting that this right is fixed for all human beings.[cclvi] The only right listed in Delaware is the right to worship "Almighty God."[cclvii] However,

worship is not explicitly politically relevant. Nor is there any reference to the need to encourage specific moral virtues. The only passage that might be argued to weigh into the discussion of moral legislation is found in the oath of office.[cclviii] Delaware requires its legislators to make a religious oath that includes acknowledging a Trinitarian doctrine and the inspiration of Christian scripture. Why does Delaware think this oath is relevant to the function of holding political office, or specifically to the function of lawmaking? One could argue that they wanted legislators to deliberate about lawmaking from a specifically Christian moral position. Such an argument is perhaps plausible, but the constitution provides no support for such a position outside of this one passage. Additionally, the oath might be understood to function in an entirely different capacity. It is possible that Delaware thinks that Christians will have more integrity in their public service. This does not necessary imply that their Christian belief ought to translate into legislation that seeks to cultivate certain Christian moral virtues or punish private vice as defined by Christianity.[cclix] As a result, the evidence suggests that Delaware's constitution authorizes moral legislation only as far as it pertains to the positive rights of life, liberty and property and the right to worship according to their conscience. It does not direct the state legislators to make laws that will encourage certain moral virtues or even suggest that such legislation is beneficial to the state.

PENNSYLVANIA

Pennsylvania makes a quantum leap compared to the three preceding constitutions in its discussion of the legislation of morality. It includes many of the elements discussed in Virginia and more. Individual natural rights of life, liberty, property and worship are all strong commitments in Pennsylvania, and provide the foundation for the entire constitution. Government is judged on the basis of how well it encourages the enjoyment of these rights in its citizens. Thus, Pennsylvania identifies moral virtues that are necessary to attain this objective. Its list of moral virtues includes a slight, but deliberate change from what is found in Virginia. It substitutes "industry" for "virtue" in its list of character qualities that are considered critical for cultivation in the society.[cclx] Virginia's list addresses concerns for moderating passions (so as to avoid unjust trespasses of others rights),

limiting excessive consumption, and discouraging unwise spending, but unlike Pennsylvania it does not specify the need to cultivate a strong work ethic. Virginia's list of moral virtues is largely negative in nature. While Virginia excludes (or at least does not promote) the ancient virtues of courage or liberality, which are positive in nature, Pennsylvania offers an alternative positive virtue: industriousness.[cclxi] Moderation, temperance, and frugality can be understood to address the need to restrain one's passions, while industriousness directs people to exert their energy in a manner that increases their enjoyment of their natural rights without violating the rights of others. Pennsylvania concludes that it is essential to encourage the cultivation of a strong work ethic (industriousness), because this contributes to the proper end of government, i.e., the good of the citizens themselves. A strong work ethic is obviously essential to the enjoyment of the natural right to life, including the right to acquire and enjoy property.

The latter half of Pennsylvania's passage on the moral virtues demands special attention. This is a new addition compared to Virginia's version.

> The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.[cclxii]

While Virginia is fairly vague with regard to the relevance of these virtues to government, Pennsylvania cites two ways in which these moral virtues are relevant. First, these character qualities serve as the qualifications of a good public official. When choosing their officials in elections, Pennsylvania's ought to consider these qualifications more so than other issues. It is a call for citizens to think not of a person's charisma, talents, or business achievements, but of a person's character. Second, this list serves as a measure by which legislators should be judged in their track record of making good laws. The state's legislators are directed to "exact a due and constant regard to" these moral virtues in "the making " of laws. Essentially, this list provides the qualifications of good lawmakers and, therefore, of the making of good law. Laws should be enacted that contribute to the cultivation of these qualities in citizens.

If the passage on moral virtues is not enough to convince one of Pennsylvania's commitment to cultivating moral virtues in its citizens, consider section 45 in the "Form of Government." In combination with the moral virtue section, Pennsylvania gives a clear mandate to its government to create legislation that will cultivate specific moral virtues and discourage vice in its citizens. "Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution."[cclxiii] The language has a sense of urgency—"laws … shall be made and *constantly* kept in force" (italics mine). While a constitution like Delaware's can be seen to direct its legislature to prohibit certain kinds of public vice that violate the rights of life, liberty and property of others (e.g., prohibitions against murder, theft, and breaking of contracts), Pennsylvania directs its legislature to extend the scope of moral legislation into broader categories of vice and gives it a mandate to use legislation to encourage certain kinds of virtue. Pennsylvania makes this a primary role of government, essential to its overall objective. Pennsylvania, compared with Delaware or New Jersey, asserts a fundamentally different understanding of the nature of government in this respect.

A specific example of appropriate government involvement in the cultivation of moral virtues is found in section 36 of the "Frame of Government." That section makes a strong statement against the establishment of "offices of profit." Pennsylvania wants to discourage the granting or receiving of credit, because such practices are understood to be contrary to industriousness and frugality. Instead, it is good for citizens to "have some profession, calling, trade or farm, whereby he may honestly subsist."[cclxiv] Cultivating productivity and fiscal responsibility is the proper concern of government. Thus, Pennsylvania provides an example of how government can step in and regulate the use of private property. It is justified in prohibiting the practice of loaning capital in exchange for interest, because this use of private property is detrimental to the cultivation of good moral virtues as defined by Pennsylvania.

The second part of section 45 includes a statement for the promotion of religion. "And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges,

immunities and estates."[cclxv] This passage is striking not only because of its strong endorsement of religion, but because of the way it is placed together with the mandate to enact legislation for moral formation. While the two are not tied together explicitly, placing of them in the same section is striking, suggesting that good laws and good religion are the necessary ingredients for the formation of good citizens.

Pennsylvania presents a picture of the good citizen and the means by which government can and ought to play a role in the formation of virtue in its citizens. While the constitution does not endorse a kind of "Big Brother" government that regulates all of life, neither is it suggesting that moral legislation ought to be merely limited to keeping people from harming the life, liberty and private property of others. Government ought to have a role in the cultivation of citizen virtue of a certain kind. As another example, the oath of office includes a statement that God is "the rewarder of the good and the punisher of the wicked."[cclxvi] The statement presupposes that certain ways of living are good and other ways are wicked and, additionally, that people are capable of knowing the difference. The second part of the oath addresses the means for people "knowing the difference." "I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."[cclxvii] To some degree, there are fixed, ascertainable principles of morality and those principles are linked to the revealed religion of Christianity. While these statements are only required to be affirmed by public officials, they provide evidence that suggests that moral legislation enacted in Pennsylvania is intended to be founded upon and informed by a Christian moral framework.

Pennsylvania gives expansive powers to the government to make legislation designed to cultivate morality in people and it gives direction about the kind of morality that ought to be cultivated. The government officials, and one can presume, the people, are not at liberty to define for themselves the kind of characteristics that are morally upright. That is not an issue open for debate. It is good to cultivate moderation. It is good to cultivate frugality, industriousness, and, if section 45 is taken into consideration, piety. (As we shall see, Massachusetts will take up piety and explicitly make it the foremost virtue.)

MARYLAND

Maryland's "Declaration of Rights" is filled with references to protection of life, liberty and property (sec. V, XIV, XVII, XVIII, XXI, XXIII, XXIV, XXVIII, XXX, and XXXI). Initially the emphasis appears to be strictly upon the material security of individuals, their liberty, and their protection from oppressive government. However, such a conclusion would be premature. The passage that first raises complications for this interpretation is Section XXXIII. In that section, Maryland asserts that worship is a duty and then grants protection of religious liberty only for those "professing the Christian religion."[cclxviii] If worship is an obligation for all people and Maryland stakes its claim on the Christian religion, one can assume this to have significant implications for legislation. To say that government under this constitution has a mandate to endorse Christianity is too strong. However, to say that government ought to take care not to discourage Christianity is entirely appropriate even if not explicitly directed by the constitution.

While all this is indirectly relevant, another clause in this section more explicitly addresses the topic of this chapter's examination of the nature and extent of moral legislation authorized by the early state constitutions. It comes in the passage where the freedom of religion is qualified.

> No person ought … to be molested … on account of his religious persuasion … unless...any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.[cclxix]

This passage categorizes several kinds of injustices that people may attempt to justify on the basis of freedom of religion: (1) disturbance of the "order, peace, or safety of the State", (2) infringement of "the laws of morality" (3) injury to others (in terms of "their natural, civil, or religious rights"). The latter two categories are relevant here. The "laws of morality" could, in some contexts, be interpreted strictly in light of the natural rights of life, liberty, and property. However, since the third point specifically mentions natural rights, such an interpretation seems unlikely. It seems more likely to be referring to moral issues that lie

outside the category of laws concerned with those natural rights. This section demonstrates an anticipation of laws being enacted that protect the rights of others as well as laws that regulate behavior even when the rights of others will not be violated.

A later passage supports the interpretation that the state is expected to enact laws extending beyond protections against the infringement of others' natural rights of life, liberty, and property. In section XI of the Form of Government, a distinction is made between laws intended to raise public revenue and those meant to raise revenue only incidentally. The latter forms of legislation include laws that intend to reform the morals of citizens.

> It is declared, that no bill, imposing duties or customs for the mere regulation of commerce, or inflicting fines for the reformation of morals, or to enforce the execution of the laws, by which an incidental revenue may arise, shall be accounted a money bill.[cclxx]

Laws that inflict fines for the "reformation of morals" are concerned with more than just protecting the rights of citizens, suggesting that government is expected to have a proactive role in the moral formation of citizens. Passages like section XXXIII indicate that the presumed standard for morality is Christianity. Thus, in a somewhat indirect manner, Maryland's constitution authorizes the government to have a role in the formation of Christian moral virtues in its citizens through its laws. What is less clear in the constitution is what kinds of moral behavior are deemed unacceptable and on what basis certain kinds of behavior are considered blameworthy and praiseworthy. There is no list of virtues or vices in the constitution. However, as demonstrated in the previous two chapters, the evidence is clear that Maryland is preferential toward Christianity. Thus, it is logical to assume that the basis for the legislation of morality for Maryland's lawmakers is Christian moral teachings. Examples of moral virtues derived from Christian teachings that are addressed in other constitutions include piety (addressed later in Massachusetts), love and charity (addressed in Virginia). There are of course other virtues that can be derived from Christian teachings including chastity and generosity.

NORTH CAROLINA

North Carolina borrows part of Pennsylvania's Declaration of Rights, section XIV, but with the list of virtues removed. It results in an ambiguous statement. Compare the two sections below:

> **North Carolina, *Declaration of Rights* XXI.**
> That a frequent recurrence to fundamental principles is absolutely necessary, to preserve the blessings of liberty.[cclxxi]

> **Pennsylvania, *Declaration of Rights* XIV.**
> That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.[cclxxii]

It is not at all clear what "fundamental principles" refers to in this section or elsewhere (though it's reasonable to assume this statement points to the equality principle and the social compact). For some reason, North Carolina deletes some the most informative sections of Pennsylvania's passage from their version. The removal of the list of virtues was clearly an intentional choice, and yet, North Carolina felt strongly enough about the passage to include the part about "fundamental principles." Notice that the last phrase, "to … keep a government free," is also removed. Do North Carolinians not consider theirs a free government? If not, is it because of the existence of slavery? North Carolina's constitution establishes a government that preserves liberty only for freemen, so in a very real sense, their constitution does not establish a free government. Nor does it establish a government in which a specific set of virtues is considered requisite for the perpetuation of it. However, the constitution begins with the assertion that all political power is grounded in the people. Much of the content in the first 18 articles addresses the rights of individuals, almost exclusively the rights of freemen. The rights to life, liberty and

property are mentioned, but are not explicitly tied to God or nature in this passage. Perhaps these rights are the fundamental principles referenced in section XXI. However, in addition to the lack of basis for these rights in nature or God, there is no explicit statement defining the end of government in terms of these rights.

The right to trial by jury in any controversies involving property and the guarantee not to have their liberty restrained is given only to freemen.

> XII. That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.
>
> XIII. That every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.
>
> XIV. That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.[cclxxiii]

However, all men, presumably including slaves, are guaranteed the right to worship according to their own consciences.

> XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.[cclxxiv]

The political and religious arenas are addressed in a manner that suggests an inherent separation between the two even by the manner in which North Carolina grants equal rights with regard to worship and unequal rights with respect to liberty and property.

There is nothing in the North Carolina constitution that directs government to be concerned with cultivating moral virtues in citizens. The removal of the list of virtues from section XXI indicates an unwillingness in the constitution to be specific about the issue of moral

formation for inhabitants of the state. Government is directed merely to keep people from violating the rights of free citizens and inhabitants' natural right to worship. Even the section on persons' immigrating into the state includes a specific change from the similar passage in Pennsylvania's constitution. Pennsylvania states that "every foreigner of good character" who makes an oath of allegiance, purchases property, and resides a year shall be "deemed a free citizen."[cclxxv] North Carolina removes the phrase "of good character" from its passage. It is a subtle but telling example of this constitution's avoidance of the issue of the moral character of citizens. Thus, while Christianity is viewed with a small degree of preference, North Carolina does not provide a great deal of guidance for the legislation of morality on any particular set of fixed principles. This is not to suggest that there is no basis for legislating morality, especially when it comes to restraining behavior that violates rights, but rather that North Carolina is unclear about the legislation of morality when a citizen's behavior does not threaten the rights of others.

GEORGIA

Georgia's standard for good law-making is succinctly put: "make such laws and regulations as may be conducive to the good order and wellbeing of the State"[cclxxvi] In comparison to the stance of other constitutions, this is unique. To define good law in terms of the "good order and wellbeing of the State" rather than in terms of the interests of the individuals within the state is unique. Perhaps, this passage should be interpreted in light of a definition of "State" as the collective interest of individual citizens. A quick glance at the other usages of the term "State" in Georgia's constitution does not support such an interpretation, however. One of the qualifications for legislators is residence of "twelve months in this State." Later, the phrases "pay tax in this State," "trust in this State", and "true allegiance to this State" are used. The various usages suggest a definition of "State" as a whole political entity made up of citizens as parts, rather than a political collection of individual "wholes". The use of the term, state, is interesting in light of other states' references to their regimes as commonwealths.[cclxxvii] The use of the term "State" suggests that the regime has its own legitimate interests that are independent from the interests of individual citizens.[cclxxviii]

Before drawing the conclusion that Georgia's constitution calls for legislation that is driven by the agenda of the government over and against individual interests, one must keep in mind that the preamble places the emphasis on the people.

> We, therefore, the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, do ordain and declare, and it IS hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State.[cclxxix]

"All power originates" from the people. All government is intended to benefit the people. This does not give the impression that government should have interests separate from the interests of the people. While this clarification may place Georgia in the vein of tradition of states like North Carolina and Delaware, it stops far short of giving government a mandate to encourage and cultivate certain moral virtues in its citizens to the degree found in Pennsylvania, for example. A reference to "good order and wellbeing" may be intended to bring to mind the protection of basic, material rights—life, liberty, and property, the protection of these basic rights is clearly no insignificant matter when it comes to the legislation of morality.

Creating laws that cultivate a respect for the life, liberty and property of every citizen is a fundamental for the attainment of good government as understood by Georgia. In fact, Georgia's preamble mentions the citizens' happiness as a primary aim of government. This concern for happiness could justify regulating behavior that does not violate others' rights if such behavior is inherently destructive to the attainment of happiness (e.g., the argument that drug use is ultimately self-destructive). Its constitution is less clear, however, than some states as to whether or not, and in what manner, government should have a role in regulating behavior when others' rights are not threatened. Georgia, with its vague and minimal discussion of the topic, does not provide clear direction for this more extensive approach to the legislation of morality.

NEW YORK

At the end of its unprecedented lengthy preamble, New York's constitution gives its version of the purpose of government: "to secure the rights and liberties of the good people of this State, most conducive of the happiness and safety of their constituents." This combination of providing protection of rights and/or liberties and creating a regime most conducive to promoting the happiness and safety of the people is not unique in the state constitutional tradition.[cclxxx]

Establishing and maintaining a regime that is conducive to the happiness of individual citizens may or may not be interpreted to include a governmental mandate to regulate behavior that does not threaten the rights of others. New York does not explicitly give such a mandate. Evidence for an implicit mandate for government to do so would have to be taken from section XXXVIII—the "free exercise of religion" section.

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[cclxxxi]

For the purposes of this discussion, it is important to notice that licentiousness behavior is juxtaposed with "practices inconsistent with the peace and safety of this State." Clearly the latter category involves behaviors that are immoral and must be punished and, therefore, are behaviors that are proper objects of legislation. As discussed before, this category involves moral issues, but does not necessarily provide a clear mandate to regulate behavior when the rights of others are not threatened.

Behavior that is perceived to negatively affect only the citizen who engages in it does not threaten the "peace and safety" of the state. Some behavior, however, is deemed unacceptable for citizens not because they threaten the lives, liberties, or properties of other citizens, but because they are understood to be wrong. Licentiousness involves the personal pursuit of desires that are viewed as inherently bad, even if

they do not threaten others. As Locke puts it, while "no one ought to harm another in his life, health, liberty, or possessions," neither does a person have the "liberty to destroy himself."[cclxxxii] New York's constitutional stance against licentiousness, therefore, suggests that a person does not have the right to engage in behavior that is self-destructive even if it does not threaten others' rights. In spite of this, no clear statement is made that government ought to or is empowered to make law that punishes self-destructive behavior that does not threaten others' rights.

Behavior that threatens the peace and safety of the State is obviously the kind of behavior that government must restrict as is licentious behavior that threatens the objectives of government, i.e., violates the rights of others (e.g., driving while intoxicated). By placing licentious behavior alongside behavior that threatens the peace and safety of the State in the text, the constitution seems to suggest that both kinds of behavior should be restricted by legislation. However, this evidence for the authorization of government to regulation morality beyond the rights to life, liberty, and property is clearly not as strong as that found in some other states. Without a great deal of support elsewhere in the constitution for a broad authorization for the legislation of morality, New York's constitution is not entirely conclusive on the matter of legislating morality.

VERMONT

As previously mentioned, Vermont's constitution follows the model of Pennsylvania. The sections concerning encouragement of vocations that cultivate independence (sec. 36) and concerning laws for the encouragement of virtue (sec. 45) are taken virtually verbatim with no significant additions or deletions.[cclxxxiii] Thus, the government is given a mandate to legislate morality aggressively in terms of deterring vice as well as promoting virtue. A few differences in Vermont's document are worthy of discussion, however. The first phrase of note comes in the preamble, where Vermont makes its claim for independent statehood. The charge is made that a lieutenant governor of the colony of New York made a false representation "to the court of Great Britain" in 1764 in order to obtain jurisdiction over Vermont. This lieutenant governor is said to have done so "in violation of the tenth command," i.e., the Old Testament tenth commandment prohibiting covetousness.

This recognition of the universal validity of the Ten Commandments is an entirely unique case in the state constitutions. In a striking and explicit manner, it demonstrates not only the reverence paid to biblical moral standards but also that Vermont considers those standards to be applicable regardless of any particular regime's legal procedures. In other words, while British legal protocol was apparently followed, New York's actions were unjust in light of the moral principles of the Ten Commandments. So, when one comes to section XLI in the Frame of Government, the obvious conclusion is that the Ten Commandments, if not other moral principles from the Christian scriptures, are intended to be the judge of virtue and vice.

The other interesting addition in Vermont is found in section XXVIII of the "Frame of Government." "That no person, shall be capable of holding any civil office, in this State, except he has acquired, and maintains a good moral character."[cclxxxiv] It is obvious that "good moral character" is understood in terms of Christian morality from the larger context of the constitution discussed above (including the pertinent discussions from duplicate sections in Pennsylvania's constitution). The use of the terms "acquire" and "maintain", however, sheds light on Vermont's view of moral formation. Good moral character must be acquired and maintained. The state is committed to having public officials that have acquired good character as defined by a Christian moral framework. Thus, it must establish a government that will contribute to that end, both by promoting virtue and by preventing vice. Acquiring and maintaining good moral character, however, is the responsibility of the individual. "He has acquired, and maintain[ed]" good character. The government cannot do this for the individual, but it can apparently contribute to the process. Notice that this interpretation is consistent with the direction to decrease the salary of a public office if it becomes too lucrative. "Whenever an office, through increase of fees, or otherwise, becomes so profitable as to occasion many to apply for it the profits ought to be lessened by the legislature."[cclxxxv] Public offices must never be sought for the wrong reasons. Low salaries will help the individual who aspires to public service to maintain his or her good moral character, not being tempted to serve in public office because of lucrative salaries.

SOUTH CAROLINA

South Carolina's perspective toward moral issues is not only Christian, but also Protestant. The constitution, however, provides no clear direction to its legislature to create and enact moral legislation of any particular kind. South Carolina's overall approach suggests that the strong presence of state churches, which meet the given criteria, will morally form the state's citizens. The "holy scriptures" are the "rule of faith and practice" in South Carolina, but not by direct means of government agency but by the establishment of Protestantism in the state.[cclxxxvi] In light of the character qualities exalted in section XXXVIII, this makes perfect sense. The ministers are to be examples to the others in their "quietness, peace, and love." In contrast to this exemplary character are those who (1) use "reproachful, reviling, and abusive language" and (2) "disturb the peace, and … hinder the conversion of any to the truth, by engaging them in quarrels and animosities." Good moral character in citizens is viewed as a means to the more significant ends of eternal salvation through Christianity for individuals, more so than such character in citizens is desired as a means to perpetuate a successful regime. While the cultivation of Christian morals in citizens is a clear goal, it must be reiterated that the constitution provides no clear role or boundaries for the government's role in that cultivation through legislation.

Government's role is to provide protection for and endorsement of established state churches, which will cultivate the needed moral virtues that will meet the ultimate human need of salvation. The establishment policy of the constitution authorizes the legislature to enact laws that could do such things as grant state churches public funds (e.g., through a tax given to an established church of a citizen's choosing), require public schools to include religious instruction under the direction of local established church ministers, or set aside public land for established churches to construct meeting facilities. Given the previous interpretation of South Carolina's constitution as a political community built upon natural needs rather than natural rights, this is a very logical conclusion. Government is limited in what it can do directly to contribute to the highest and proper end of an individual and must depend upon and provide support for Christian religious institutions to accomplish that goal.

MASSACHUSETTS

The foundational principles for governmental involvement in the moral formation of citizens in Massachusetts are given in article III of the constitution's "Declaration of Rights."

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.[cclxxxvii]

There is no question that morality is of crucial concern for Massachusetts' constitution. The responsibility of government to superintend moral formation is in large part tied to religion. It becomes expedient for the government to cultivate piety, religion, and morality. The means by which these are cultivated are public worship and public religious instruction. It is for this reason that the legislature is obligated to guarantee that public worship and religious instruction occur in each region of the state. Thus, Massachusetts depends largely on religion for the proper moral formation of its citizenry, but as we shall see, this does not exclude government from having a direct role in other ways.

The concern for good character is so strong in Massachusetts that it reformulates one of the key phrases used in other early state constitutions. Instead of the normal usage of life, liberty, and property, Massachusetts inserts "character" and removes "liberty" on one occasion. Massachusetts guarantees the remedy to each citizen for "all injuries or wrongs which he may receive in his person, property, or

character."[cclxxxviii] The insertion of character is unique in the constitutional tradition. As a result, good government must be committed to protecting the moral reputation of a person with good moral character. The state guarantees protection of one's reputation as an upright moral person in the community. Anyone that falsely attempts to degrade someone's reputation is being unjust.

The addition of piety to the list of virtues in article XVIII is significant on its own, not to mention that it places this character trait at the beginning of the list. This formulation of the list of moral virtues suggests that Adams saw the five traits as being listed in order of importance, reflecting the nature of a human being. Individuals are responsible, foremost, to relate rightly to God (piety), next, to other people (justice and, perhaps, moderation and temperance) and, finally, to material things (industry and frugality). Piety requires an intentional commitment to relate rightly to God, justice to relate rightly to other people, and industriousness to relate rightly to the material world. These three concerns are completely consistent with the biblical principles that direct human beings to rule over and cultivate the earth (Genesis chapters 1-3) and love God and other human beings (e.g., the "Great Commandment", Matt 22:37-40). Legislation must take this order into account. There are moral implications at each level. Finally, people should expect legislators to pay an "exact and constant observance of [piety, justice, moderation, temperance, industry, and frugality], in the formation and execution of the laws."[cclxxxix] These three relationships of human beings (to material things, other people, and the Creator) ought to be the concern of lawmakers when deliberating over proposed laws.

When one comes to the final sections of Massachusetts' constitution, the concern for moral virtue is reiterated in the discussion of education. "Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties."[ccxc] It turns out that good moral character is not the only ingredient essential for the preservation of liberty. Liberal regimes must also cultivate wisdom and knowledge, which Massachusetts intends to promote by means of public education, the capstone of which is Harvard University. Notice, however, that while education is an important ingredient for liberty, cultivation of moral virtue precedes the virtues of knowledge and wisdom. The order of discussion suggests a moral philosophy akin to Aristotle's, in that

the cultivation of moral virtues comes before the cultivation of intellectual virtues. One great difference, of course, between Massachusetts' approach and Aristotle's is the reliance upon Protestant Christianity in the cultivation of moral virtues, not just as an instrument for political ends, but also as an end in itself, i.e., as the end of human beings.

The consequence for the legislature is clear. Laws must contribute to the cultivation of both moral virtues, including the list given in article XVIII of the Declaration of Rights, and the intellectual virtues, through good public education. Both of these directives are given in the context of a Protestant understanding of human nature. Protestant Christianity is to be the judge of what is morally and intellectually virtuous.

CONCLUSION

By in large, government does not have an independent end in the early American state constitutional tradition. It is essentially a means to the ends of individual citizens (in terms of individuals' relationship to things, other people, and the divine as discussed in the previous chapter). Government, while it is given extensive authority (e.g., the authority to deprive individuals of property and their lives for criminal acts), does not have a power or right of its own. Its right to exist and have authority rests on the prior rights of individuals. No state ever claims that a government body or institution has a natural right to exist or take specific actions. Its powers are limited by, and the actions of its officials are constantly intended to be accountable to, the people.

There are generally three possible approaches to moral legislation being espoused by states. Moral legislation may legitimately restrict the liberty of citizens (1) if popular opinion judges that the legislation is both good for the political community and does not violate the rights of others (i.e., life, liberty, property, religion/worship), (2) if the legislation either discourages vices or encourages the cultivation of virtue (as understood in terms of natural or divine law) in addition to it not violating the rights of citizens, (3) only if such liberty threatens the rights of others. The three different approaches can lead in drastically divergent directions over time.

The first approach may look the same as the second so long as public opinion is influenced by the doctrines of natural or divine law. However, if public opinion no longer supports a position of natural or

divine law, the two approaches will diverge. The third approach is essentially the libertarian position, in which legislators are expected not to meddle with the private lives of citizens so long as they do not harm another citizen's body or property, or impede their freedom of movement and religion. From the previous study of the state constitutions, we can be sure that three states' constitutions (Pennsylvania, Vermont, and Massachusetts) are definitive about not taking the third approach. The other eight states' constitutions are not explicit in giving lawmakers the authority to legislate morality beyond the scope of protecting citizens' rights.

Chapter six will look more closely at the three states that are explicit about granting powers for extensive moral legislation. The three state constitutions of Pennsylvania, Vermont, and Massachusetts build their basis for government authority on the following rationale.[ccxci] First, God grants individual natural rights to human beings as well as other potential blessings. Second, the individual rights define and limit the actions of individuals vis-à-vis one another in a political community. Third, an authoritative structure of government is established to facilitate the enjoyment of individual rights and blessings (1) by protecting against violations of rights by fellow citizens, (2) by guarding against attacks of external enemies, and (3) by promoting and supporting the kind of society that cultivates characteristics in citizens necessary for the enjoyment of the rights and blessings.

Chapter seven will look more closely at the other eight states, which are less clear about their approach. Several constitutions give government a role in legislating on moral issues within the bounds of the natural or positive rights of life, liberty, and property with the possibility of legislating morality on the basis of popular opinion (New Jersey, Delaware, North Carolina, Georgia).[ccxcii] Other constitutions provide less clarity but suggest that legislation of morality is presumed to involve more than the narrow scope of protection of the rights of life, liberty, property, and religious freedom (New York, Maryland). In one case, the role of moral formation appears to be completely entrusted to religion (South Carolina). The following two chapters will attempt to gain more insight into the early American states' views about the legislation of morality by examining the legislation enacted by the lawmakers of those states immediately following the ratification of the constitutions.

TABLE 3: Constitutional Positions Relevant to Moral Legislation

	VA	NJ	DE	PA	MD	NC	GA	NY	VT	SC	MA
Authority of the people	x	x	x	x	x	x	x	x	x		x
Government instituted for enjoyment of natural rights				x				x	x		x
Happiness of citizens	x	x	x	x	x	x	x	x	x		x
Right to reform or abolish government	x		x	x	x			x	x		x
Concern for citizens' virtue	x			x					x		x
Concern for "fundamental principles"	x			x		x			x		x
Reference to legislation of morality				x	x				x		x
Re-authorizing Common Law of England[ccxciii]		x	x		x						
Exclusive right of people of state to have political authority			x	x	x	x					x
Perpetual guarantee of rights and fundamental principles			x	x		x			x		
Concern for character in immigration and/or education				x					x		x

[ccxliv] "Constitution of Virginia, 1776". Cf. New Jersey, Preamble; Delaware, Declaration of Rights, Sec. 1; Pennsylvania, Declaration of Rights, Sec. IV; Maryland, Declaration of Rights, Sec. I; North Carolina, Declaration of Rights, Sec. I; Georgia, Preamble; New York, Preamble; Vermont, Declaration of Rights, V; Massachusetts, Declaration of Rights, art. V. New Jersey reads: "All the constitutional authority ever possessed by the kings of Great Britain over these colonies … was, by compact, derived from

the people." Delaware reads: "All government of right originates from the people." Pennsylvania and Vermont read: "All power being originally inherent in, and consequently derived from, the people." Maryland reads: "All government of right originates from the people." North Carolina reads: "All political power is vested in and derived from the people only." Georgia reads: "The people, from whom all power originates." New York reads: "deriving their just powers from the consent of the governed." Massachusetts reads: "All power residing originally in the people, and being derived from them." South Carolina implies that the people are the source of political power by its recognition that the constitution was being "agreed upon by the freemen of this State" (South Carolina Constitution, Preamble).

[ccxlv] "Constitution of Pennsylvania, 1776". Cf. Virginia, Bill of Rights, Sec. 3; New Jersey Preamble; Delaware, Declaration of Rights, Sec. 1; Maryland, Declaration of Rights, Sec. I; Georgia, Preamble; New York, Preamble; Vermont, Declaration of Rights, VI; Massachusetts, Declaration of Rights, art. VII. Virginia reads: "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." New Jersey reads: "for the common interest of the whole society." Delaware reads: "instituted solely for the good of the whole." Maryland reads: "instituted solely for the good of the whole." Georgia reads: "for whose benefit all government is intended." New York reads: "most conducive of the happiness and safety of their constituents." Massachusetts reads: "Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people."

[ccxlvi] Another justification would be that a regulation of behavior—a limitation on a person's liberty—may be required for the sake of an emergency (e.g., martial law during times of civil unrest) or for the sake of the demands of the community as a whole (e.g., limitations on use of natural resources like gasoline due to scarcity of supply.)

[ccxlvii] New Jersey, Delaware, Pennsylvania, Maryland, Georgia, Vermont.

[ccxlviii] It is possible to construct an understanding of government that pursues the fulfillment of individual rights by means of military conquest or economic conquest. Such a view is only legitimate, however, if individual rights are understood as positive rights or, perhaps, individual rights granted by God solely to one people ethnic group. However, such an approach is incompatible with a belief that all human beings have natural rights.

[ccxlix] "Constitution of Virginia, 1776".

[ccl] Ibid.

[ccli] Aristotle, *The Politics*. Book 3, Chapter 4.

[cclii] "Constitution of Virginia, 1776".

[ccliii] "Constitution of New Jersey, 1776".

[ccliv] Ibid.

[cclv] Ibid.

[cclvi] "Constitution of Delaware, 1776".

[cclvii] Ibid.

[cclviii] Another passage that could be considered relevant is the passage endorsing the common law of England, but the endorsement of the common law is not asserted on the grounds of a principles argument. Thus, the common law seems to be relevant merely on the basis of its being customary in the states heritage. In other words, it is still beneficial, but it does not have revered position because it is grounded on true principles of human nature.

[cclix] "Private vice" here referring to behavior that does not infringe on the rights of life, liberty and property of another person.

[cclx] "Constitution of Pennsylvania, 1776".

[cclxi] It is important to note, however, that in its section on religion Virginia does affirm the positive virtues of love and charity, which are not insignificant positive virtues! Interestingly, Virginia does not include those virtues in its "civic" virtues in section 15.

[cclxii] "Constitution of Pennsylvania, 1776".

[cclxiii] Ibid.

[cclxiv] Ibid.

[cclxv] Ibid.

[cclxvi] Ibid.

[cclxvii] Ibid.

[cclxviii] "Constitution of Maryland, 1776".

[cclxix] Ibid.

[cclxx] Ibid.

[cclxxi] "Constitution of North Carolina, 1776".

[cclxxii] "Constitution of Pennsylvania, 1776".

[cclxxiii] "Constitution of North Carolina, 1776".

[cclxxiv] Ibid.

[cclxxv] "Constitution of Pennsylvania, 1776".

[cclxxvi] "Constitution of Georgia, 1777".

[cclxxvii] The constitutions of Virginia, Delaware, Pennsylvania, Vermont, Massachusetts all make references to their regime as a commonwealth.

[cclxxviii] Such a suggestion is supported by the use of a fine for those who neglect to vote. Georgia, the only state to impose such a fine, promotes a public spiritedness in its citizens, but imposing such a fine (art. XII). It apparently does not seem to think that individuals will have enough of a concern with the State as they should.

[cclxxix] "Constitution of Georgia, 1777".

[cclxxx] Cf. New Jersey preamble; Virginia's Bill of Rights, Sec. 1; Pennsylvania preamble; Georgia preamble

[cclxxxi] "Constitution of New York, 1777".

[cclxxxii] Locke, *Two Treatises of Government.*

[cclxxxiii] "Constitution of Vermont, 1777".

[cclxxxiv] Ibid.

[cclxxxv] Ibid.

[cclxxxvi] "Constitution of South Carolina, 1778".

[cclxxxvii] "Constitution of Massachusetts, 1780".

[cclxxxviii] Ibid. See also art. XXIX.

[cclxxxix] Ibid.

[ccxc] Ibid.

[ccxci] Also included would be Vermont and possibly Maryland, which must be inferred to fit into this category through some interpretative assumptions.

[ccxcii] However, as discussed, one can argue that New Jersey falls into a category that allows for extensive legislation on moral issues so long as the people and their representatives want such laws.

[ccxciii] The Common Law of England has many laws that involve regulation of private morality, for example laws against the breaking of the Sabbath.

CHAPTER 6

A Constitutional Mandate: Moral Legislation in Post-Revolutionary Pennsylvania, Vermont, and Massachusetts

Thus far this work has focused upon principles for the legislation of morality found in the early state constitutions. The constitutions give significant insights into the early Americans' views of politics, as they are those states' authoritative statements about how to establish a good political order, not just the views of individuals who published writings on political philosophy. The positions found in the constitutions reflect a broader perspective on politics than what is found in the thought of only a handful of famous and widely read American founders, such as Madison, Jefferson, Adams, and Hamilton. In addition, it presents perspectives that were directed toward how to legislate morality at the local level, which is the arena in which most Americans felt it was appropriate to do so. The conclusions found in the state constitutions are also unique in that they represent views of politics that had to be reached by consensus among a local leaders.

The early American state legislative acts also provide unique insight into their views of politics. The laws that will be examined were all written within a short time after the drafting of the constitutions. They represent both a second source to judge the perspective of early American state leaders on the topic of moral legislation as well as a

means to determine if the views put forward in the constitutions were fleshed out in the lawmaking process.

As we saw in the previous chapter, the Pennsylvania, Vermont, and Massachusetts constitutions explicitly grant the power to their governments to legislate morality beyond the protection of life, liberty, and property. These three states will be examined in this chapter to determine whether their legislators in the years following ratification understood themselves to be responsible for legislating morality beyond the protection of life, liberty and property. This chapter will attempt to determine whether the statements in the constitutions that granted this power were understood to be relevant to the actual practice of legislation or whether they were ignored or considered to be merely rhetorical in nature by early American state lawmakers.

The approach of legislating morality beyond protection of life, liberty and property was not a new concept with the early American states. *The Cambridge Platform*, while a statement largely addressing matters of religion, is an example from the early colonial period of the belief that law should shape the moral character of citizens. This document was drafted and adopted in 1648 by a church synod in Cambridge, Massachusetts. It was largely concerned with the governance of churches, forming a constitution of the Congregational churches. In addition to addressing the structure of authority in churches, it discussed the role of civil government in contrast to the objectives of churches.

> It is the duty of the magistrate to take care of matters of religion … The end of the magistrate's office is not only the quiet and peaceable life of the subject in matters of righteousness and honesty, but also in matters of godliness; yea, of all godliness.[ccxciv]

The Cambridge Platform goes on to state that government should be involved with any "such acts as are commanded, and forbidden in the Word"—referring to the Bible. Following which, it makes clear what kinds of issues fall into this category.

> Idolatry, blasphemy, heresy, venting corrupt and pernicious opinions, that destroy the foundation, open contempt of the Word preached, profanation of the Lord's Day, disturbing the

> peaceable administration and exercise of the worship and holy things of God, and the like, are to be restrained and punished by civil authority.[ccxcv]

Several of these issues are taken up the state legislatures following ratification of their state constitutions. This is not to say that the states merely follow traditional opinions from the colonial period, but neither are their convictions about the proper role of government's regulation of morality coming out of a vacuum. However, while the tradition of extensive government involvement in the legislation of morality existed in the colonial period, this work is concerned with determining the thinking behind the decisions of early American legislators. This chapter and the following one will attempt to determine what kinds of moral legislation the early state legislatures enact and to determine if they do so on the basis of popular sovereignty or the fixed principles of either natural or divine law.

Another alternative is to argue that the early state lawmakers were following colonial tradition without deliberately drawing conclusions for themselves. If one interprets the early American lawmakers as merely following tradition, he or she must provide evidence that indicates that they borrowed from tradition without deliberation. One of the strongest pieces of evidence demonstrating a deliberate approach by the lawmakers, however, is the fact that most legislatures rewrote many laws addressing citizens' behavior even though they had colonial laws that had addressed those same issues. Other states, as will be pointed out below, adopted an approach whereby their legislatures stated all colonial laws were still in force barring some conditions, including references to allegiance to the British monarch. This approach suggests a less deliberate approach to moral legislation in the post revolutionary period. However, this approach of re-enacting colonial laws does not necessarily mean that lawmakers had abandoned a principled commitment to those colonial moral laws. Such an approach may be motivated by a desire to be more efficient with their time (i.e., they agreed with the colonial approach to moral legislation and felt no need to spend the additional time needed to re-draft such laws) than a lack of thoughtfulness about moral legislation.

The other topic at hand in this examination of early state moral legislation is concerned with the various aims of the new laws. The next two chapters will consistently consider not only whether the

legislation addresses moral behavior that extends beyond protecting the rights of other citizens, but also the question of why such a law was justified in doing so. In other words, the moral legislation discussed in the next two chapters will be examined in order to determine, if possible, what the law is intending to accomplish. The laws may be intended to promote (1) the material or secular (i.e., non-religious) good of individual citizens, (2) the spiritual or religious good of individuals citizens, (3) the secular good of the community as a whole, (4) the religious good of particular religious communities. In addition, the good of an individual citizen can be viewed from two alternative points of view. A law can be viewed as promoting the good of an individual directly (e.g., a law that requires observance of the Sabbath as a good end in itself for every citizen because observance of the Sabbath itself is viewed as a necessary component for the fullest extent of an experience of human happiness). Or, a law can be viewed as promoting the good of an individual indirectly (e.g., a Sabbath law is a religious obligation that may lead to happiness because a citizen's practice of the Sabbath can assist him or her in the cultivation of meaningful worship, which is required for human happiness).

The legislation to be examined below will be discussed in light of these possible aims, and in light of whether the laws are intended to contribute directly to the good of individuals or only indirectly. A libertarian view, holding to the position that limits on liberty are only legitimate when the rights of others (i.e., life, liberty, property, religion/worship) are threatened, would argue that laws should never be used to proactively guide a person toward their own good (e.g., to cultivate moral virtues). A popular sovereignty view can hold the position that extensive legislation is legitimate whenever public opinion supports it (i.e., the majority thinks such limits on liberty are either directly or indirectly good for citizens). Natural and divine law views support limits on liberty whenever the fixed standards discernable by reason and/or revelation justify such a limit. As one can see, the difficulty is in seeking to determine why the lawmakers create the laws, since one particular law may be equally motivated by a popular sovereignty position as a natural or divine law position. Thus, whenever the lawmakers are explicit about their aims or their justification for creating a limit to liberty, such passages are of critical value to this study.

PENNSYLVANIA

In earlier chapters, section 45 of Pennsylvania's "Frame of Government" was discussed. This section of the constitution establishes a commitment by the state to make laws that address issues of immorality and vice.

> Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution.[ccxcvi]

The following series of notations taken from Pennsylvania's legislative minutes demonstrates the degree of commitment to section 45 by the state's legislative body in the late 1770's.

> [February, 1779]
> On motion, Ordered, That Mr. Ralston, Mr. Gardner, and Mr. Harris, be a committee to bring a bill for the suppression of vice and immorality.[ccxcvii]

> [March 3, 1779]
> The committee appointed for that purpose, brought in a bill intituled "An act for the suppression of vice and immorality," which being read one full time, was ordered to lie on the table for consideration and a second reading.[ccxcviii]

> [March 6, 1779]
> The bill intituled, "An act for the suppressors of vice and immorality," was read the second time, and being read and debated by paragraphs, was ordered to be transcribed for a third reading, and in the mean time printed for public consideration.[ccxcix]

> [March 26, 1779]
> The bill intituled, "An act for the suppression of vice and immorality," having been printed for public consideration,

> was read the third time, and being again read and debated by paragraphs, was ordered to be engrossed for a fourth reading.[ccc]
>
> [March 30, 1779]
> The bill intituled, "An act for the suppression of vice and immorality," having been engrossed according to the order of the house, and now read and compared at the table, was enacted into law, and the speaker directed to sign the same.

These actions by the legislature are taken in the midst of the Revolutionary War, in which Pennsylvania was as active as any state. Not only are actions taken to make laws that satisfied section 45 in the constitution, they are taken very quickly after ratification of the constitution, even though Pennsylvania is in the midst of war. Many of the other actions taken during this period of time are urgent measures necessary to prosecute war against Great Britain. Yet, during this time of significant peril, Pennsylvania's legislators find the legislation of morality a primary concern.

The legislative act created by the committee begins by laying out the topics to be addressed.

> An act for the suppression of vice and immorality.
> Section 1. Whereas sufficient provision hath not hitherto been made by law for the due observation of the Lord's day, commonly called Sunday, and the prevention of profane swearing, cursing, drunkenness, cock fighting, bullet playing, horse racing, shooting matches, and the playing or gaming for money or other valuable things, fighting of duels, and such evil practices; which tend greatly to debauch the minds and corrupt the morals of the subjects of this commonwealth. [ccci]

Section 1 draws attention to the fact that Pennsylvania already had laws in force from the colonial period that addressed these issues. In section 17 of this act, the titles of those colonial laws are listed: "*An Act to restrain people from labour on the first day of the week*," "*An Act for the more effectual preventing accidents that may happen by fire, and for suppressing idleness, drunkenness and other debaucheries*," "*An Act for the more effectual suppressing profane cursing and swearing*," and "*An Act to prevent all dueling and fighting of duels within this*

province and territories."[cccii] From the titles of the colonial laws, it is apparent that most if not all of the immoral behavior being addressed by this new law was addressed previously. Yet, Pennsylvania is still committed to refining and reemphasizing its position on these issues in part because the colonial laws, like the common law, were generally not considered binding absent approval of the state legislature. It begins by addressing the issue of the Sabbath.

> Sect. 2. Be it enacted, and it is hereby enacted, by the representatives of the freemen of the commonwealth of Pennsylvania, in general assembly met, and by the authority of the same, That if any person shall do any kind of work of his or her ordinary calling, or follow or do any worldly employment or business whatsoever, on the Lord's day, commonly called Sunday (works of necessity or mercy only excepted) or shall use or practice any game, play, sport or diversion whatsoever on the said day … shall for every such offence be fined the sum of three pounds, to be levied by distress and sale of the offender's goods and chattels … or in case the offender shall have none, he or she shall be committed to the common goal or work house of the county, there to remain without bail or mainprise for the term of ten days.
>
> Sect. 3. Provided always, That nothing in this act contained shall be construed to prohibit the dressing of victuals in private families, bake houses or houses of public entertainment, or to waterman landing their passengers on the Lord's day commonly called Sunday, nor to the selling of milk before nine of the clock in the morning or after five in the afternoon of the said day. [ccciii]

This Sabbath legislation is not significantly different from that found in other states, for example, in Virginia and New Jersey, except that instead of placing those who cannot pay the fine in stocks as Virginia and New Jersey do, Pennsylvania confines them in a workhouse for 10 days. While the stocks may be painful and shameful, the punishment established in the other two states could be endured in just two to four hours. Ten days of detention seems fairly severe comparatively.

The sections addressing swearing and cursing in the act are broken up into to categories.

> Sect. 4. And be it further enacted by the authority aforesaid, That if any person of the age of sixteen years or upwards, within this commonwealth, shall profanely swear or curse by the name of God, Christ, Jesus, or the Holy Ghost … for every such offence, the party so offending shall forfeit and pay the sum of ten shillings, or suffer imprisonment in the goal or house of correction at hard labour for any time not exceeding five days.
>
> Sect. 5. And be it further enacted by the authority aforesaid, That whosoever shall swear by any other name or thing, in the hearing of any justice of the peace … shall, for every such offence, forfeit and pay the sum of five shillings, or suffer imprisonment for any term not exceeding two days in the goal or house of correction at hard labour. [ccciv]

It is clear from these passages that the legislators are making a distinction between types of swearing and cursing based upon whether Christian references to the divinity are involved. This represents a preferential position toward Christianity by making punishments that are offensive to that particular religion and deity more severe. Such an approach is not surprising in light of the fact that the constitution has been founded to a significant degree upon Christian theological principles.

The sections on drunkenness, gaming, dueling, and theatrical shows is fairly similar to what is found in the other states.

> Sect. 6. And be it further enacted by the authority aforesaid, That any person or persons intoxicating or abusing him or herself with excessive drinking … shall, for every such offence, forfeit and pay the sum of ten shillings, or suffer imprisonment for any term not exceeding five days in the goal or house of correction at hard labour ….
>
> Sect. 8. And be it further enacted by the authority aforesaid, That if any person shall promote or encourage any match or

matches of cock fighting or bullet playing, or appear in any public or private place with a cock or cocks prepared to fight for any bet or prize; or, in like manner, assembled to play at bullets for any bet or prize; or shall enter start, or run any horse, mare or gelding, for any bet or prize; or shall promote or be concerned in any shooting match, for any plate, prize, sum of money, or other thing of value whatsoever; or shall make, print, publish, or proclaim any advertisement of notice, of any plate, prize, sum of money, or other thing of value, for the use of cock fighting, bullet playing, horse racing, or to be shot for, by any person or persons whosoever; he, she, or they … shall forfeit and pay the sum of five hundred pounds ….

Sect. 13. And be it further enacted by the authority aforesaid, That if any person within this commonwealth shall challenge the person of another to fight at sword, pistol, rapier or other dangerous weapon, such person so challenging shall forfeit and pay for every such offence … the sum of five hundred points, or suffer twelve months imprisonment without bail … and the person accepting such challenge shall in the like manner forfeit and pay the like sum of five hundred pounds, or suffer the like imprisonment; and moreover the said challenger, or challenged (when he accepts) shall be disabled ever after from holding any office of profit or honor within this state.

Sect. 14. And be it further enacted by the authority aforesaid, That every person and persons whatsoever, that shall, from and after the publication of this act, erect, build or cause to be erected or built, any play house, theatre, stage or scaffold, for acting, shewing, or exhibiting any tragedy, comedy or tragic comedy, farce, interlude or other play, or any part of a play whatsoever, or that shall act, shew, or exhibit them, or any of them, or be in anyways concerned therein, or in selling any tickets for that purpose in any city, town or place in this commonwealth, and be thereof legally convicted in any court of quarter sessions in this commonwealth, shall forfeit and pay the sum of five hundred pounds.[cccv]

The relative concern for drunkenness, gaming, dueling, and theatrical shows when compared to swearing and Sabbath breaking is also not significantly different from other states. These immoral activities are punished even when they do not violate others' rights to life, liberty, and property. To be sure, the prohibitions against swearing and Sabbath breaking involve reasoning that is not deduced from natural law, but either from public opinion or Christian revelation. The constitution was demonstrated to be more fundamentally grounded in principles of divine law than on popular sovereignty. The legislation in no way contradicts that conclusion or gives reason to assume that the lawmakers are justifying their actions on the basis of public opinion rather than on the basis of theological principles.

VERMONT

From previous findings one would expect to find extensive legislation in Vermont for the prevention of vice and encouragement of virtue. Of the 12 issues taken up by moral legislation in the eleven states (see "Table 4: Early American State Moral Legislation" found at the end of the chapter seven), 9 are found in Vermont's legislation. Of the 8 pieces of legislation addressing issues of morality that extend beyond the protection of life, liberty and property, 7 were enacted in a period of less than a month, demonstrating a focused commitment on the part of the legislators to address moral concerns in the state. An additional point to keep in mind with Vermont is that it is the only state being discussed that had no prior colonial precedent, since it was not a distinct political entity prior to its constitution. Vermont follows the practice of many other states by prohibiting drunkenness (six shilling fine or three hours in the stocks), gaming (twenty shilling fine), lotteries, and profanely swearing "by the name of God" or cursing (six shilling fine or three hours in the stocks).[cccvi]

Vermont extensively regulates sexual and marital relationships. The first example is a law prohibiting adultery, polygamy, and fornication. The introduction of the bill is straightforward in its justification for these prohibitions: (1) obedience to the law of God, (2) pursuit of peace in family relationships.

March 8th 1787.

An Act against adultery, polygamy and fornication.

Whereas the violation of the marriage covenant is contrary to the command of God, and destructive to the peace of families: Be it therefore enacted by the general assembly of the state of Vermont. That if any man be found in bed with another man's wife, or woman with another's husband, the person so offending … shall be severely whipped on the naked body, not exceeding thirty-nine stripes, unless it shall appear on trial, that it was involuntary in one of the parties; in which case no punishment shall be inflicted on the party not consenting. And if any person shall commit adultery, and be thereof convicted before the supreme court, he, she, or they, shall be set upon the gallows for the space of an hour, with a rope or ropes about his, her, or their neck or necks, and the other end cast over the gallows; and also shall be severely whipped on the naked body, not exceeding thirty-nine stripes; and shall from the expiration of twenty-four hours after such conviction, during their abode in this state, wear a capital A of two inches long, and proportionable bigness, cut out of cloth of a contrary colour to their clothes, and sewed upon the upper garments, on the outside of their arm, or on their back, in open view. And if any person or persons, having been convicted and sentenced for such offence, shall, at any time, be found without their letter so worn, during their abode in this state, he or they shall, by warrant from any justice of the peace, be forthwith apprehended and publicly whipped, not exceeding ten stripes ….

That if any man or woman, who have been, or shall hereafter be, divorced according to law, or where their marriage has been or shall be declared null and void, shall cohabit or converse together as man and wife, and be thereof convicted as aforesaid, every such person shall suffer the like pains and penalties as are above mentioned.

Be it further enacted by the authority aforesaid, That if any person or persons in this state, being married, or who shall hereafter marry, do at any time presume to marry any other person, the former or other husband or wife being alive, or shall continue to live together so married, that then every such

> offender shall suffer and be punished as in case of adultery; and such marriage shall be, and hereby is declared to be null and void.
>
> Always provided, That this act, or anything therein contained, shall not extend to any person or persons whose husband or wife shall be continually remaining beyond the seas, by the space of seven years together; or whose husband or wife shall absent him or herself the one from the other, by the space of seven years together, in any part of this or the united states of America, or elsewhere, the one of them not knowing the other to be living within that time ….
>
> And be it further enacted by the authority aforesaid, That every person who shall commit fornication within this state and be duly convicted thereof, before any county court in this state, before the intermarriage of such person offending, shall pay a fine not exceeding four pounds … and if unable to pay the same, he or she shall be assigned to service by the court before whose conviction shall be had.[cccvii]

This legislation is an extensive regulation of citizen's private sexual relations. The primary concern for Vermont is keeping sexual activity within the bounds of a marriage covenant, which is understood as an institution grounded in divine law. When a person is involved in sexual relations as a violation of their own marriage vows or as a violation of another person's vows, the penalty is far more severe than when two persons engage in sexual relations outside of marriage. The penalty for fornication (when neither party is married) is a fine "not exceeding four pounds." But, if an unmarried person is convicted of sexual relations with a married person, the penalty is almost as severe as if he or she were breaking a marriage vow him or herself. Such a person's penalty is a whipping of no more than 39 stripes. The person who breaks his or her marriage vow, in addition to the punishment of 39 stripes, faces the threat of hanging. In addition to these severe punishments, an adulterer who lives through the physical punishments must wear a public sign of his or her offense—a large *A* for adulterer on the arm or back. When one considers that most communities in the state were small and most people remained in the community into which they were born, the punishment of wearing a letter of shame indefinitely in public is severe.

The marriage vows are taken so seriously, that even a couple who has been divorced may not return to living together without being charged with adultery. Apparently, if a divorced couple wants to renew their relationship, they must do so through re-establishing the marriage covenant. In addition, polygamy is prohibited, demonstrating a definition of marriage, when combined with the sodomy law below, that is limited to a commitment between one man and one woman. Like other states, however, Vermont accepts the reality that some married individuals are either abandoned or experience loss from an unconfirmed death of a spouse. In both cases, after seven years has passed, the individual may remarry with the assumption that the marriage has become null and void. Even this clause demonstrates a higher value on the marriage covenant than other states that require only 5 years for abandonment or unconfirmed death of a spouse.

Not only is sexual activity confined by the state to heterosexual monogamous marriage, Vermont regulates how marriages covenants are to be established and it restricts certain kinds of such unions.

> Passed February 27, 1787.
> An act for regulating marriages and for preventing and punishing incest and incestuous marriages.
> For as much as the ordinance of marriage is honorable to all; and it being proper that the solemnization of it should be in such a decent and orderly manner as will best contribute to the happiness of families and peace of society:—Therefore.
> Be it enacted by the general assembly of the state of Vermont, That no person shall be joined in marriage before the intention of the parties has been published by the minister, or town clerk, in some public meeting or meetings for religious purposes, in the town, society, or parish, where the parties do ordinarily reside or such purpose or intention be posted, in fair writing, at some public place in each of the towns, there to stand so that it may be ready at least eight days before such marriage.
> That no person whatsoever in this state, other than the lieutenant governor, justices of the peace within their respective jurisdiction, or ordained ministers of the gospel within the town and society, (or in any other town within the same county, wherein there shall be no ordained minister)

wherein they respectively dwell, and while they continue in the exercise of the ministry, shall solemnize any marriage ….

And if any person or persons, other than the persons intending marriage, or their legal guardians, shall presume to deface or pull down any such publishment set up in writing as aforesaid, before the expiration of eight days after the time of its being set up; every such person or persons shall be fined the sum of forty shillings, or be set in the stocks one whole hour.

And every person herein before empowered to join in matrimony, shall keep a fair register of each marriage by them respectively solemnized, which may be given in evidence in any court of record in this state.

Be it further enacted by the authority aforesaid, That no man shall marry any woman within the degrees of kindred herein after named, that is to say, no man shall marry his grandfather's wife, wife's grandmother, father's sister, mother's sister, father's brother's wife, mother's brother's wife, wife's father's sister, wife's mother's sister, father's wife, wife's mother, daughter, wife's daughter, son's wife, sister, brother's wife, son's daughter, daughter's daughter, son's son's wife, daugther's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter, brother's son's wife, sister's son's wife.

And if any man shall hereafter marry any woman, who is within the degrees before mentioned in this act, every such marriage shall be, and is hereby declared to be, null and void.

And all children which shall hereafter be born of such incestuous marriage, shall be forever disabled to inherit by descent.

And that every man and woman who shall marry, or carnally know each other, being within any of the degrees before mentioned in this act, or being so married, shall continue to dwell in the same house at any time after the space of forty days after the publication hereof, and be convicted thereof before the supreme court; such persons shall suffer the like punishment as is directed to be inflicted in case of adultery, except that instead of the letter *A* to be worn by an adulterer, the capital letter *I* shall be worn by such incestuous person.[cccviii]

This act states that the goal is "the happiness of families and peace of society." It does not mention the "command of God" as does the act addressing polygamy, adultery and fornication discussed above. Instead, this act appeals to the fact that "the ordinance of marriage is honorable to all." Clearly, this act demonstrates Vermont's conviction that its citizens' happiness is only attained through cultivating a high degree of respect for and careful regulation of marriage, but compared to the act concerning adultery, fornication, and polygamy, there is no appeal to divine law. However, the appeal to public opinion does not necessarily negate the reference to the command of God in the previously discussed act. Since marriage is understood to be a God-ordained institution intended to contribute to a peaceful society and happy families, it should be honored by all. In addition, one must remember the findings of the previous chapters concerning Vermont's constitutionalism, which demonstrated a commitment in the state to principles derived from divine law as more authoritative then popular opinion.

This legislation goes on to carefully layout the procedure for how marriage covenants are established. The entire community is to be made aware of the commitment to enter marriage with public notices. The seriousness Vermont expects from its citizens' in this process is indicated by the punishment given for those who vandalize the public wedding notices: a fine of forty shillings or one hour in the stocks. The latter part of the legislation defines and restricts incestuous marriages. The punishment is equal to that given for adultery in the above legislation, including the use of public shame.

Vermont's law regarding bastardy follows the pattern established by other states.

> Passed February 27, 1787
> An act concerning bastards and bastardy. Be it enacted by the general assembly of the state of Vermont, That he who is accused by any woman of being the father of a bastard child, begotten of her body, she continuing constant in such accusation, being examined upon oath, and put to the discovery of the truth in the time of her travail, shall be adjudged the reputed father of such child, notwithstanding his denial thereof; and shall stand charged with the maintenance thereof, with the assistance of the mother, as the county court

> in that county where such child is born shall order; and give security to perform such order, and also to save the town or place where such child is born, free from charge for its maintenance ….
> And be it further enacted by the authority aforesaid, That whenever the woman shall neglect to prosecute for the maintenance of her bastard child, the selectmen of any town interested in the support of such child, where sufficient security shall not be offered to save said town from all charge and expense of maintaining the same, may bring forward a suit, in behalf of such town, against him who shall be accused of begetting such child; and may also take up and pursue any suit begun by the mother of such child, for the maintenance thereof, in case she shall fail to prosecute the same to final judgment.[cccix]

The primary issue taken up by the legislation is the expense of raising the child. This law is designed to "save the town or place where such child is born, free from charge for its maintenance." Thus, while the law does establish consequences for people having children out of wedlock, the primary concern of this law is not to regulate sexual relations as much as it is to manage the financial consequences that result from such situations. However, when the requirements of this law are viewed in light of the previous legislation concerning adultery and fornication, a great deal of deterrence is established against people being sexually active outside of marriage. For example, when a single woman is entreated by a married man to engage in a sexual affair, she must consider the possibility of receiving 39 lashes (for sexual relations with a married person), enduring a pregnancy out of wedlock, legally accusing the man of fathering the child and a possible trial, and providing the necessary security to the local government for raising of the child after giving birth. In addition, if the woman is married and considering an extramarital affair, she faces one hour of being "set upon the gallows"—a punishment meant to cause serious contemplation of the crime committed. This punishment required the convicted adulterer to "stand or sit on the gallows for one hour with a rope around the neck (as a reminder of the Bible's demand for death)." [cccx] This would be akin to strapping someone in an electric execution chair for an hour. In the same example, the married man would face the

39 lashes, one hour upon the gallows, the adultery *A* being worn in public, and providing financial assistance for raising the child. These are significant deterrents for both men and women considering engaging in sexual activity outside of marriage.

Though Vermont takes the marriage clause very seriously, there is a provision in its legislation for divorce in certain cases.

> Passed March 8, 1787.
> An act relating to bills of divorce.
> Be it enacted by the general assembly of the state of Vermont, That no bill of divorce shall be granted to any man or woman lawfully married, but in case of adultery, fraudulent contract, intolerable severity, or willful desertion for three years, with total neglect of duty; or in case of seven years absence of one party, not heard of; in which case, and in all others above mentioned, the supreme court may and said court is hereby empowered, on due proof, to grant a bill of divorce to the aggrieved party; and both parties shall thereupon be deemed single; and may lawfully marry again.
> And be it enacted by the authority aforesaid, That it shall be in the power of the court granting such divorce, where the wife shall be the innocent party, or where the same is granted intolerable severity, to set off to her such part of her husband's estate, according to such husband's degree and circumstances in life, and in such manner as in their discretion shall be thought expedient.[cccxi]

The cases listed are: (1) adultery on the part of one of the parties, (2) a marriage contract that is "fraudulent" (e.g., polygamy), (3) abuse, and (4) abandonment. The court can, in these cases, grant a divorce. Both parties are then free to re-marry, with the only punishment for cases of abuse, in which an abusive husband may be required to give some portion of his estate to his wife. Unlike the practice of some states, however, the party who has violated the marriage covenant is free to marry again after incurring the punishment required by law (e.g., after incurring sentencing for the crime of adultery).

Private sexual relations are taken up in one additional piece of legislation that was enacted the same day as the two pieces of legislation addressing marriage above. This piece of legislation defines

four acts to be felonies and establishes the punishments for each. Two of the acts are private sexual acts, wrapping up Vermont's position on sexual behavior.

> Passed March 8, 1787
> An act for the punishment of divers capital and other felonies.
> Be it enacted by the general assembly of the State of Vermont, that if any man or woman shall be with any beast, by carnal copulation; such person shall be put to death, and the beast shall be slain and buried.
> That if any man lieth with mankind as he lieth with a woman, they both shall suffer death, except one of the parties were forced, or under fifteen years of age; in which case the party forced, or under the age aforesaid, shall not be liable to suffer said punishment.
> That if any person shall bear false witness, willfully, and of purpose to take away any man's life, such offender shall be put to death ….
> That if any person shall willfully blaspheme the name of God the Father, Son, or Holy Ghost; every person so offending, shall be punished by whipping, not exceeding forty stripes, on the naked body.[cccxii]

This legislation includes Vermont's sodomy law and it is stated in very succinct terms. Engaging in sexual intercourse with either animals or with a person of the same sex is a felony. In both cases, a conviction carries the set penalty of death. The only exception is in the case of a non-consenting or underage partner in homosexual intercourse. This emphasizes the position of Vermont regarding the right and proper place of sexuality in human relations within the marriage covenant. Vermont follows the biblical approach. Even the language is consistent with that of the King James Version of the Bible prominent at the time. "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death."[cccxiii]

This piece of legislation concludes by defining blasphemy as felony. It is another example of the commitment to Christian theological principles in Vermont's legislature, consistent with the state's constitution. By speaking against the triune name of God as

defined by Christian theology, a person incurs the severe punishment of up to 39 stripes.

Vermont's commitment to legislating morality according to Christian theological principles is also evidenced in an extensive piece of legislation devoted entirely to the issue of the Sabbath.

> Passed March 9, 1787.
> An act for the due observation of the Sabbath.
> Be it enacted by the general assembly of the state of Vermont, That no tradesman, artificer laborer, or other person whatever, shall upon land or water, do any labour, business or work, of their ordinary calling, or any kind whatever (works of necessity and mercy only excepted) nor use any game, sport, play or recreation, on the first day of the week or Lord's day, or any day of public fasting or thanksgiving, on pain that every person, so offending, shall forfeit and pay a fine, not to exceed ten shillings, as the nature of the offence may require; that whatever person shall on the Lord's day, in or near any meeting house or place of public worship, by rude, profane, or tumultuous behaviour, either in words or actions, or in any manner whatever, disturb those who shall be therein assembled for religious worship, shall incur a penalty not exceeding forty shillings; and if the person convicted of any of the aforesaid offences be unable to pay, he shall be set in the stocks not exceeding two hours.
> And be it further enacted by the authority aforesaid, That every person who shall travel, journey, or drive a team, or drove of any kind, on said day, (unless in time of war, or some business that concerns war, or that they are belated and forced to lodged in the woods, wilderness or highway the night before, and in such cases to travel no further on that day than the next inn, or place of shelter) shall pay a fine, not exceeding twenty shillings, as the nature of the offence may require.
> That every person who shall go from his or her place of abode on said day, unless to or from public worship on God, or on some work or business of necessity or mercy shall pay a fine not exceeding sixteen shillings.

That whatever person or persons shall keep or stay at the outside of the meeting house during the time of public worship, (there being sufficient room in the house) or unnecessarily withdraw themselves from the public worship to go without doors, or profane the time by playing or profanely talking, shall pay a fine not exceeding six shillings ….

And be it further enacted by the authority aforesaid, The grand jurymen, tythingmen, and constables, of each town, shall carefully inspect the behaviour of all persons on the Sabbath or Lord's day, and due presentment make, of any profanation of the worship of God, on the Lord's day, or on any day of public fast or thanksgiving, and of any breach of Sabbath, which they, or any of them, shall see or discover any person to be guilty of, to the next justice of the peace, who is hereby empowered to proceed therein according as the nature of the offence requires.

That each grand juryman, tythingman, or constable shall be allowed three shillings per day for each day that he shall spend in prosecuting such offenders, to be paid by the person offending … and all fines imposed for the breach of this act on minors, shall be paid by the parents, guardians, or masters, (if any be) otherwise such minors to be disposed of in service to answer the same; and upon refusal or neglect of payment of such fines, and charges of prosecution, the offender may be committed, unless he be a minor, in which case execution for the fines and charges shall go against his parent, guardian, or master, after the expiration of one month next after the conviction of such a minor, and not sooner ….

But if any children or servants, not of the age of discretion, shall be convicted of such profanation or disturbance, they shall be punished therefore by their parents, guardians, or masters, giving them due correction, in the presence of some officer, if the authority so appoint, and in no other way; and if such parent, guardian, or master, shall refuse or neglect to give such due correction, that every such parent, guardian, or master, shall incur the penalty of five shillings.

And every justice of the peace, constable, grand juryman, and tythingman, are hereby required to take effectual care, and endeavor that this act, in all the particulars thereof, be duly observed.[cccxiv]

The act begins in a similar manner with other states' Sabbath legislation by fining Sabbath breakers (no more than ten shillings for laboring or recreating, up to forty shillings for disturbing public worship, twenty shillings for traveling, and sixteen shillings for loitering about outside of one's property or place of public worship). Vermont even prohibits people from withdrawing themselves from public worship or "profaning" public worship by talking or remaining outside the place of worship when sitting is available inside (six shilling fine). Thus, not only is Vermont attempting to encourage people to attend public worship with its Sabbath law, it punishes citizens for not attending public worship services. This legislation goes on to grant powers to public officials (including the constables and grand jurymen) to see to it that the law is followed, even providing money for the prosecution of people who break the Sabbath. This law goes to the extent of requiring parents to punish young children or servants "in the presence of some officer," incurring "the penalty of five shillings" if they "refuse or neglect" to do so. This is a unique example of state regulations of the liberty of parents to raise their children as they see fit. The state is actually given the power in this law to tell parents why and how to punish their children. This is a radical example of a state's legislators enacting law that extends beyond the protection of life, liberty, and property on the basis of Christian theological principles. Vermont takes this law so seriously that it adds a final comment to state officials exhorting them to "duly observe" the execution of this law.

Vermont is so concerned that its Sabbath law is enforced that two years later, in 1791, it enacts an "addition" to the earlier legislation.

> Passed Jan. 26, 1791
> An act in addition to an act entitled, An act for the due observation of the Sabbath or Lord's day.
> Whereas said act is found insufficient to prevent unnecessary traveling, journeying, and driving teams and droves on the Sabbath or Lord's day, or the first day of the week.
> It is hereby enacted by the general assembly of the sate of Vermont, That every sheriff, constable, grand juror and tythingman by, and they are hereby, within their respective precincts, impowered and directed, without warrant, to apprehend any person unnecessarily traveling , journeying or

> driving sleighs, teams, or droves, on the Sabbath, and such person or persons safely keep, and have before the next assistant or justice of the peace on the day next succeeding, to be dealt with as the laws directs; and each and every of the officers aforesaid, are hereby vested with the same power to command necessary assistance as is by law given to constables in the discharge of their office and duty, and all persons disobeying such command shall be liable to the same pains and penalties to which persons refusing to assist sheriffs in their office and duty, when thereunto commanded, are by law subjected.[cccxv]

This addition grants even broader powers to government officials to enforce the Sabbath law, particularly in order to cut down on Sabbath breaking by people traveling on the Sabbath. The new legislation grants the power to apprehend travelers "without warrant," which is presumably constitutional on the argument that when an official sees someone traveling on the Sabbath there is sufficient evidence to arrest an individual without a warrant. The primary thrust of the addition, however, is that it requires all citizens to assist government officials in apprehending Sabbath breakers. This would be particularly important when trying to apprehend people who are traveling on horseback or horse drawn carriage. Government officials may require the assistance of citizens who have horses readily available to chase down and apprehend such travelers. All this demonstrates the deep concern Vermont has to protect and encourage the Christian practice of the Sabbath.

MASSACHUSETTS

Like Vermont, Massachusetts' constitution grants legislators a mandate to legislate morality on the basis of Christian theological principles. Like Vermont, Massachusetts' legislators take the responsibility seriously and create a great deal of legislation to regulate the private lives of its citizens beyond the protection of life, liberty and property. Massachusetts prohibits incestuous marriages, divorce (except under specific conditions), polygamy, sodomy, profane cursing and swearing, Sabbath breaking, adultery, fornication, and gaming.[cccxvi] Massachusetts addresses 8 of the 12 categories listed in Table 4 in its legislation

following the ratification of its state constitution. Like Vermont, it takes the marriage covenant and the regulation of sexual relations within the bounds of marriage very seriously. An extensive piece of legislation regulates how marriages are to be established. [cccxvii] It is the only constitution to specifically define rape as a crime and establishes the death penalty as the sentence for any convictions.[cccxviii] Otherwise, it largely follows the pattern established by other states in its legislation of morality. What is most unique about Massachusetts is its articulation of the rationale for much of its moral legislation in the preamble of the bills, of which most articulate a theological basis.

The first example of a theological rationale for moral legislation is found in the preamble of the legislation concerning profane cursing and swearing.

> An Act to prevent Profane Cursing and Swearing.
> Whereas the horrible practice of profane cursing and swearing, is inconsistent with the dignity and rational cultivation of the human mind, with a due reverence of the Supreme Being and his Providence, and hath a natural tendency to weaken the solemnity and obligation of oaths lawfully taken in the administration of justice; and to promote falsehood, perjuries, blasphemies and dissoluteness of manners; and to loosen the bands of civil society.[cccxix]

This preamble draws a connection between the nature of God, the nature of man, and the nature of political life. This bill's preamble demonstrates not only a commitment to legislate in a way that is consistent with the theological commitments found in Massachusetts constitution, but it also reiterates those commitments. Back in article III of it Declaration of Rights, Massachusetts stated:

> As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality.[cccxx]

Earlier in the constitution's preamble, the people put themselves in a posture of dependence upon the divine, imploring God to help them in their struggle to establish a society in which people could enjoy their divinely-endowed natural rights and other God-given blessings. Therefore, when the bill "to prevent profane cursing" states that "the dignity and rational cultivation of the human mind" should involve "due reverence" for God, Massachusetts is following the precedent of the constitution, believing that citizens will attain virtue and happiness only when they cultivate a reverent fear of and reliance upon God. Profanity and cursing is viewed as contrary to the divine design for which human beings were created. In addition to being "below" the nature of man, such behavior is detrimental to civil society, weakening the force of oaths and leading to distrust among citizens.

The "Profane Cursing and Swearing" law intends to contribute to both a private and public good. The private good is understood in terms of a view of a human being as a rational creature who owes respect to God. Language that degrades or insults other people or God also contributes to a deterioration of trust and natural affection among members of society, thus having concern for the public good. Respect for others is required to establish social order and cultivate common courtesies among citizens. However, mutual respect is understood to be dependent on everyone having a higher respect for the maker of all human beings. Everyone is responsible to a higher being for the ways they relate to fellow human beings. Profane language represents a lack of respect for God and other citizens; it damages an individual's relationship with God and with others. Thus, the theological conviction that God must be worshipped leads to the conviction that profane language is inconsistent with both the good of the individual citizen and the good of the society.

Massachusetts is so concerned about the misuse of language it includes a provision in the act that offenders of the law are put on record for each offence. This is a device that appeals to an individual's sense of social shame or, to put it in other terms, an appeal to the desire to protect one's personal reputation.

> IV. And be it further enacted, That every Justice of the Peace, hearing any person or persons utter any profane oath or curse, or before whom any person or persons shall be convicted or

> profane cursing or swearing, by other evidence, shall cause the conviction to be drawn up in the form following.
>
> > _____ ff. Be it remembered, That on the ____ day of the year of our Lord __ A.B. was convicted before me, one of the Justices of the Peace for the county of _____ of swearing one (or more) profane oath, (or oaths) or of uttering on (or more) profane curse (or curses) as the case shall be. Given under my hand and seal the day and year aforesaid.
>
> Which said form and conviction shall be deemed and taken to be final to all intents and purposes, (saving as herein is after expressed;) and the said Justice before whom such conviction shall be, shall cause the same to be fairly written and returned to the then next Court of General Sessions of the Peace, for the county where the offence is committed, there to be read in open Court, and to be filed by the Clerk of the Peace, and remain and be kept amongst the records of the said Court. [cccxxi]

Government officials are sternly commanded to execute this law. While punishment for the common citizen is "a sum not exceeding eight shillings, nor less then four," public officials who neglect their duty to execute the act pay a fine of forty shillings.[cccxxii] Anyone who refuses to assist a public official in apprehending an offender of this law is also liable to a forty-shilling fine. In order that no one "may pretend ignorance of this law," the act establishes a process for successful promulgation.

> VII. Provided always, and it is hereby enacted, That no person … may pretend ignorance of this law, but that it may be generally known.
>
> VIII. Be it further enacted, That a printed copy of this act shall be transmitted to every minister within the government, to whom it is hereby recommended to read or cause the same to be publickly read before their several congregations, on the Lord's day, next succeeding the choice of town officers yearly.

> IX. And be it further enacted, That the Justices of the Supreme Judicial Court and the Justices of the Peace for the several counties, at their General Sessions, shall cause this act to be publickly read at the opening of their respective Courts, from time to time.
> [This act passed October 19, 1782.][cccxxiii]

The provisions about public readings of this act are unique attempts to make the populace aware of the importance being placed upon restricting profane language. Though regulating language is a very difficult goal to obtain through legislation, Massachusetts commits itself to diligently pursue that objective, believing that misuse of language is so detrimental to the good of its citizens' and its society that it is a necessary regulation.[cccxxiv]

The law prohibiting adultery and polygamy adds further insight into the thinking of legislators in creating moral legislation that limits the liberty of citizens. It makes explicit what has been implicit in much of this chapter's discussion.

> An Act against Adultery, Polygamy and Lewdness. Whereas chastity of behaviour, and the due observance of the marriage covenant, are highly conducive to the peace, good order and welfare of the community, and the violation of them productive of great evils to individuals and the publick. [cccxxv]

The restriction of liberty established by this law is justified because adultery and polygamy are destructive to individuals who engage in such behavior and destructive to the society at large. Since Massachusetts' government is established to promote the attainment of individual happiness, that which is destructive to individual happiness may be prohibited by the force of law. Since Massachusetts and other states have a view of reality that is informed by Christian theological principles, it should not be surprising that they prohibit behavior that is revealed to be bad for human beings by Christian doctrine.

Since Christian doctrine informs Massachusetts' political judgments and is viewed as the standard of truth, the state is justified in providing safeguards to protect Christian doctrine from being discredited. Thus, the state establishes a law prohibiting blasphemous

language, which includes language that communicates disrespect for the sources of Christian doctrine.

> An Act against Blasphemy.
> Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That if any person shall willfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, or by cursing, or reproaching Jesus Christ, or the Holy Ghost, or by cursing or contumeliously reproaching the holy word of God, that is, the canonical scriptures, contained in the books of the Old and New Testaments, or by exposing them, or any part of them, to contempt and ridicule; which books are as follows, Genesis, Exodus, Leviticus, Numbers, Deuteronomy, Joshua, Judges, Ruth, Samuel, Samuel, Kings, Kings, Chronicles, Chronicles, Ezra, Nehemiah, Esther, Job, Psalms, Proverbs, Ecclesiastes, the Song of Solomon, Isaiah, Jeremiah, Lamentations, Exekiel, Daniel, Hosea, Joel, Amos, Obadiah, Jonah, Micah, Nahum, Habakkuk, Zephaniah, Haggai, Zachariah, Malachi, Matthew, Mark, Luke, John, Acts, Romans, Corinthians, Corinthians, Galatians, Ephesians, Philipians, Colossions, Thessalonians, Thessalonians, Timothy, Timothy, Titus, Philemon, Hebrews, James, Peter, Peter, John, John, Jude, Revelations, every person so offending, shall be punished by imprisonment, not exceeding twelve months, by sitting in the pillory, by whipping, or by sitting on the gallows, with a rope about the neck, or binding to the good behaviour, at the discretion of the Supreme Judicial Court before whom the conviction may be, according to the aggravation of the offence.
> [This act passed July 3, 1782.][cccxxvi]

Disrespect for the Bible is equated with disrespect for God. This is logically consistent since biblical writings are understood to be God's revelation of Himself and His instructions for the human beings He created. God is so closely identified with the Bible that to disrespect it is to disrespect God. It is also the source of Christian doctrine, which reveals what is good and bad for individuals and society. In other

words, it accurately points the way to human happiness. Not only is disrespect for scripture considered disrespect toward God, but disrespect for creation (or nature) and government are as well. Both the physical universe and institution of human government are understood to be so closely associated with God (because they are created by God) that to disrespect either is to disrespect God. This legislation makes even clearer the extent to which Massachusetts is defining itself as a Christian state.

If the law on blasphemy is not enough to make the point, the preamble to its law on the Sabbath provides more evidence.

> *An Act for the making more effectual Provision for the due Observation of the Lord's Day; and for repealing the several Laws heretofore made for that Purpose.*
> Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labour and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errorers of human conduct; for publick and private worship of the Maker, Governour and judge of the world, and for those acts of charity which support and adorn a Christian society: And whereas many thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society, and to the great disturbance of well disposed persons; and to the great damage of the community, by producing dissipation of the manners and immoralities of life. [cccxxvii]

Again one finds the intention to cultivate both reverence for God and respect for others. In this piece of legislation, Massachusetts explicitly understands itself to be defined by the phrase, "a Christian society," which is used twice. People who profane the Sabbath are described as "thoughtless and irreligious," a condition that contributes to "their own great damage"—demonstrating the conviction that Christian doctrine and religious practices lead to the attainment of individual happiness in addition to its being "promotive of the welfare of a community." Thus, when the legislators enact this law, they are attempting to help citizens

to attain their own happiness as well as to avoid "great damage of the community." This is a clear example of government viewing itself to be justified in limiting the liberty of individuals when such limits are not considered detrimental to the pursuit of individual happiness, but rather required for it.

Massachusetts' Sabbath law is clear in its position that the attainment of individual happiness requires Christian worship. In addition to requiring people to respect the Sabbath by not laboring on the Sabbath, it requires citizens to participate in public worship. Unlike many states, Massachusetts establishes punishments for those who fail to participate in "public worship of God on the Lord's Day."

> VIII. Be it further enacted, That each person being able of body, and not otherwise necessarily prevented, who shall for the space of one month together, absent him or herself from the publick worship of God on the Lord's Day, shall forfeit and pay the sum of ten shillings, provided there be any place of worship on which they can conscientiously and conveniently attend. [cccxxviii]

At least once a month, the state requires each citizen to attend public worship or face a fine.

One of the articles in the Sabbath legislation reveals the extent to which Massachusetts perceives Christian theology to be relevant in the arena of politics.

> And although it is the sense of this Court that the time commanded in the sacred scriptures to be observed as holy time, includes a natural day or twenty-four hours: Yet, whereas there is a difference of opinion concerning the beginning and ending of the Lord's Day, among the good people of this Commonwealth, and this Court being unwilling to lay any restrictions, which may seem unnecessary or unreasonable to persons of sobriety and conscience. [cccxxix]

The issue of when the Sabbath starts and ends is important to Massachusetts' legislators. The conclusion is made that while there is some "difference of opinion concerning the beginning and ending of the Lord's Day," a twenty-four hour period every week is proscribed

by God to be "holy time" for worship, reflection, social interaction, and rest. The various interpretations of Christian theology are taken into account. However, the legislators attempt to make judgments in accordance with what is generally agreed upon as accurate Christian doctrine and practice. Thus, government does not attempt to make theological judgments as much as to discern the theological judgments that are generally agreed upon.

Along with the typical fines found in early American states for breaking the Sabbath, Massachusetts' Sabbath law provides some additional provisions, as it does in its law prohibiting profane language, to pursue its successful execution.

> XV. And be it further enacted, That the persons so chosen and serving as wardens shall be held and obliged to enquire into, observe and inform of all offences against this act; and every such warden is hereby authorized and empowered to enter into any of the rooms or other parts of any inn or publick house of entertainment on the Lord's Day, and the evening preceding and succeeding; and if such entrance shall be refused to any warden, the landlord or licenced person shall forfeit the sum of forty shillings for each and every offence.
>
> And the said wardens are hereby further authorized and empowered within their respective towns, to examine all persons suspected as unnecessarily traveling as aforesaid, on the Lord's Day, and to demand of all such persons the cause the cause therof, together with their names and places of abode: And if such persons shall refuse to make answer to such demands, or shall not give to such warden or wardens, such reasons for their traveling upon the Lord's Day, as shall satisfy such wardens of the necessity thereof, such wardens shall return the names of all such persons as they shall know or can obtain the name of, to a Justice of the Peace; and such Justice shall proceed to trial of the offence, of the offender shall be within the count, or otherwise such warden shall return the names of such persons, and the offence, to the grand jury, for their consideration and proceeding thereon. And if any person shall willfully give false answer to any such demands of any wardens, every person so offending, shall forfeit five pounds for each and every offence: And any two

> Justices of the Peace, quorom unus, for any county where such person shall be found, shall have full power and authority to enquire into, try and determine such offence.
> XVI. And be it further enacted, That it shall be lawful for each and every warden or wardens, that have already been chosen, or that may hereafter be chosen in consequence of this act, either by himself or with such assistance as he shall judge needful to take or call to his aid, forcibly to stop and detain any person or persons he shall suspect of unnecessarily traveling as aforesaid, for and during such space of time as shall be necessary for demanding the cause or reason of such person's traveling, his name and place of abode, and receiving the answers to such demands … And every person who shall be required to assist and give aid to any warden, that shall refuse or neglect so to do, shall for every such offence, forfeit and pay the sum of forty shillings, unless such person or persons so refusing or neglecting shall make reasonable excuses to the acceptance of the court or Justice before whom they shall be tried ….
> XX. And be it further enacted, That in case any person that shall be convicted of profaning the Lord's Day in any of the instances mentioned in this act, shall not immediately pay the sum or sums by him forfeited as aforesaid, he shall be punished by being committed to the common goal of the county, there to remain not exceeding ten days, nor less than five days ….
> XXIV. And be it further enacted by the authority aforesaid, That this act shall be publickly read by the Clerk of the Peace, at the opening of each Court of General Sessions of the Peace within this State, and by each Town-Clerk annually, at the yearly meeting in the month of March. [cccxxx]

Massachusetts authorizes public officials, called wardens, to proactively execute the Sabbath laws. They even give these officials powers that, under most conditions (i.e., on the other six days of the week), would be considered a clear violation of privacy and individual natural right. The wardens can detain people who are traveling and search the premises of "public houses," apparently without a warrant. This is allowed, of course, because violation of the Sabbath is never

understood to be consistent with individuals' pursuit of their own happiness. Everyone else is expected to assist the wardens in their responsibility to execute this law, at the risk of fine for refusal to do so.

The act against dueling provides one further example of how it defines individual happiness and the appropriate restrictions of liberty by government for the attainment of happiness. Dueling is representative of a behavior that is never conducive to human happiness.

> An Act against Dueling.
> Whereas divers persons, from the want of a due regard to the life of man, and in contempt of the authority and government of the Supreme Giver and Disposer of life, a regard to which is essentially necessary to the preservation and happiness of a republick, and in violation of the wise and righteous laws of civil society, have voluntarily and maliciously engaged in the detestable and infamous practice of Duelling, whereby upon false notions of honor, that result from a want of moral sense and human feeling, many lives have been lost, and many families have been brought to distress and ruin.[cccxxxi]

Dueling is the result of "false notions of honor" that deceive some men. When a man concludes that he is obliged to uphold his own honor or the honor of his family by engaging in a duel, he is erroneous in his thinking. This legislative preamble describes this lack of good judgment as "a want of moral sense and human feeling." Apparently, his conscience has failed to operate effectively or been ignored. The person who holds a conviction that dueling is honorable for someone who has been publicly insulted, for example, is wrong. Only government, as a divinely instituted entity, and God Himself have the authority to take a person's life. People who engage in private dueling are not respecting these established authorities. In addition, such behavior fails to respect the rights of other citizens as well. "Many families have been brought to distress and ruin" when fathers have been killed in duels, leaving wives and children with no means for subsistence.

Behavior like dueling represents an extreme example of a vice that must be restricted and punished by government. Massachusetts' post-revolution legislators have been shown to have a strong interest in

restricting vices that hinder the attainment of individual happiness. However, they also perceive themselves to have a role in promoting the virtues that lead to individual happiness.

One of the direct ways that Massachusetts thinks it can assist in the cultivation of such virtues is in public education.[cccxxxii] The act below, addressing public education, makes the cultivation of virtue a primary goal in public schools.

> An Act to provide for the Instruction of Youth, and for the Promotion of good Education.
> Whereas the Constitution of this Commonwealth hath declared it to be the duty of the General Court, to provide for the education of youth; and whereas a general dissemination of knowledge and virtue is necessary to the prosperity of every State, and the very existence of a Commonwealth;
> Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That every town or district within this Commonwealth, containing fifty families, or householders, shall be provided with a schoolmaster or schoolmasters of good morals, to teach children to read and write, and to instruct them in the English language, as well as in arithmetic, orthography, and decent behaviour, for such term of time as shall be equivalent to six months for one school in each year …..
> Be it further enacted by the authority aforesaid, That it shall be, and it is hereby made the duty of the President, Professors and Tutors of the University at Cambridge, Preceptors and Teachers of Academies, and all other instructors of youth, to take diligent care, and to exert their best endeavours, to impress on the minds of children and youth committed to their care and instruction, the principles of piety, justice and a sacred regard to truth, love to their country, humanity and universal benevolence, sobriety, industry and frugality, chastity, moderation and temperance, and those other virtues which are the ornament of human society, and the basis upon which the republican Constitution is structured; and it shall be the duty of such instructors, to endeavour to lead those under

> their care (as their ages and capacities will admit) into a particular understanding of the tendency of the before mentioned virtues, to preserve and perfect a republican Constitution, and to secure the blessings of liberty, as well as promote their future happiness; and the tendency of the opposite vices to slavery and ruin.
> [This act passed June 25, 1789.][cccxxxiii]

The specific character traits listed closely resemble the traits listed in the constitution: "humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people." Massachusetts does not simply mention the importance of moral formation in the lives of students, it defines the standard to which public teachers are to be held. The public teacher is not merely communicating information and teaching basic academic skills, but inculcating certain moral qualities in students. The instructors in public education charged with the task of helping their students understand that the "before mentioned virtues" will tend to "promote their future happiness" as well as perpetuate and perfect "a republican Constitution." Giving their students an appreciation for virtue, as defined by this act, is not only a political objective but also one that is designed to contribute to individual happiness in their lives. As discussed previously, most of these virtues are consistent with and informed by Christian ethics. Thus, the state is understood to have a role in helping to cultivate the ethics of Christianity into its citizens because it contributes to their pursuit of happiness.

One last example ought to be addressed in this study, even though it is not a legislative act. The document in question, however, is a government document. It represents a statement on behalf of the citizens rather than merely the political thought or opinion of a single citizen. The document is a proclamation of the Governor of Massachusetts, John Hancock. It demonstrates the degree to which Massachusetts understands itself to be a Christian state, including the conviction that human beings attain to their happiness by means of Christianity.

By His Excellency John Hancock, Esquire, Governour of the Commonwealth of Massachusetts. A Proclamation, For a Day of Fasting and Prayer.

It being the duty of all Men publicly to Acknowledge their Dependence upon Almighty God, and by Prayer and Supplication, to seek unto Him, for those Blessings and Favours, which the returning Seasons of the Year, render necessary to their Support and Comfort: And it being the incumbent Duty of the Rulers of a People professing Christianity, as well to cultivate amongst them by Public Acts, a Temper of Piety and Devotion, as to recommend upon particular Occasions their unity in earnestly and humbly imploring the Divine Blessings, upon their Public and Private Concerns; and it having been the laudable Practice of this State, to set apart one Day in the Opening Season of the Year, for Fasting and Prayer:

I have therefore thought it fit to appoint, and by, and with the Advice of the Council, I do appoint Thursday, the Seventh Day of May next, to be observed as a Day of Humiliation, Fasting and Prayer, throughout this Commonwealth. And I do recommend it to the People of every Religious Denomination, to assemble themselves upon that Day, and with true Contrition of Heart, to confess their Sins, and to implore Forgiveness of God, through the Merits of the Saviour of the World; and most fervently to beseech the Almighty Ruler of the Universe, that it will please Him, to Smile upon and Bless the United States of America; to give Wisdom, Virtue and Firmness, to the General Councils of our Confederated Republic; to Bless this Commonwealth, and to Guide and Direct its Government; that He will continue to Save, and Protect us from all External Enemies, and to Bless us with internal Peace and Security: That He will continue to Bestow upon the People, the Blessings of Health: That He will Bless the Labours of the Husbandman, and cause the Earth to yield her expected Increase: That He will prosper our Manufactures, Trade, Navigation and Fishery; and that He will by His Spirit and Grace, cause the People of this Land, under a Wise Administration of Government, to lead Quiet and Peaceable Lives, in all Godliness and Honesty: And still continue to

> them the Blessings of Religious and Civil Liberty; that He will Bless and Prosper our Allies, and cause the Religion of Jesus Christ, to be extended, and the whole Earth filled with the Glory of God.
> And I do earnestly exhort the People of this Commonwealth, to cease from all Labours and Recreations on that Day; and to observe it with seriousness and Devotion.
> Given at Boston, the Sixteenth Day of March, in the Year of our Lord, One Thousand seven Hundred and Eighty-nine, and in the Thirteenth Year of the Independence of the United States of America.
> By his Excellency's Command, John Hancock.
> With the Advice and Consent of the Council, John Avery, jun. Secretary.
> God Save the Commonwealth of Massachusetts.[cccxxxiv]

This proclamation establishes a day of prayer and fasting in the state. Unlike Thanksgiving Day, in which citizens are called upon to be thankful in an ambiguous manner for all their blessings, this day of fasting and prayer is clearly a Christian holiday. Hancock refers to the citizens of Massachusetts as "a people professing Christianity." He calls upon them to "to confess their Sins, and to implore Forgiveness of God, through the Merits of the Saviour of the World." There is no doubt that this is an exclusively Christian religious practice. While this proclamation does not carry with it the force of law, with a punishment attached for those who do not respond to the proclamation, it further demonstrates the extent to which Massachusetts understands human happiness to be attained by means of Christian ethics and practices. The experience of a life of divine blessing by citizens and the advancing of "the Religion of Jesus Christ" are primary objectives of the political order.

CONCLUSION

The findings of the states examined in this chapter have confirmed the findings found in their constitutions. The passages in their constitutions are not interpreted merely as rhetorical statements, but mandates to legislate morality beyond protection of life, liberty and property. These states extensively legislate morality in the years following the

ratification of their constitutions. In some cases the states have been shown to be openly Christian in their moral legislation, but in every case, they have committed themselves to enacting moral legislation beyond the scope of protection of life, liberty and property in a manner consistent with Christian theological principles.

[ccxciv] *The Cambridge Platform.*

[ccxcv] Ibid.

[ccxcvi] "Constitution of Pennsylvania, 1776".

[ccxcvii] *Journals of the House of Representatives of the Commonwealth of Pennsylvania Beginning with the Twenty-Eighth Day of November, 1776, and Ending the Second Day of October, 1781.*

[ccxcviii] Ibid.

[ccxcix] Ibid.

[ccc] Ibid.

[ccci] *Laws Enacted in the First Sitting of the First General Assembly of the Commonwealth of Pennsylvania.*

[cccii] Ibid.

[ccciii] Ibid.

[ccciv] Ibid.

[cccv] Ibid.

[cccvi] *Statutes of the State of Vermont.*

[cccvii] Ibid.

[cccviii] Ibid.

[cccix] Ibid.

[cccx] Donald Hafner, "To Be Set Upon the Gallows for the Space of One Hour: A Tale of Crime and Punishment in Colonial Lincoln, Massachusetts". Hafner's article describes an incident in which this punishment was used.

[cccxi] *Statutes of the State of Vermont.*

[cccxii] Ibid.

[cccxiii] Leviticus 20:13 (KJV).

[cccxiv] *Statutes of the State of Vermont.*

[cccxv] Ibid.

[cccxvi] *The Perpetual Laws of the Commonwealth of Massachusetts, from the Commencement of the Constitution, in October 1780, to the Last Wednesday in May, 1789.*

[cccxvii] Ibid.

[cccxviii] Ibid.

[cccxix] Ibid.

[cccxx] "Constitution of Massachusetts, 1780".

[cccxxi] *The Perpetual Laws of the Commonwealth of Massachusetts, from the Commencement of the Constitution, in October 1780, to the Last Wednesday in May, 1789.*

[cccxxii] Ibid.

[cccxxiii] Ibid.

[cccxxiv] Massachusetts' regulation of language is not a violation of the constitution especially in light of the fact that it does not grant freedom of speech except in the legislature. The only other reference made to language expression is the right to free press. Individuals are not given a right to freedom of speech in the constitution.

[cccxxv] *The Perpetual Laws of the Commonwealth of Massachusetts, from the Commencement of the Constitution, in October 1780, to the Last Wednesday in May, 1789.*

[cccxxvi] Ibid.

[cccxxvii] Ibid.

[cccxxviii] Ibid.

[cccxxix] Ibid.

[cccxxx] Ibid.

[cccxxxi] Ibid.

[cccxxxii] An example of its indirect approaches to cultivate virtue is the Sabbath law. As discussed above, that legislation punishes people who consistently withdraw from public worship. In doing so, it is indirectly attempting to cultivate virtue in citizens by exposing them to Christian doctrines on virtue and righteous living.

[cccxxxiii] *The Perpetual Laws of the Commonwealth of Massachusetts, from the Commencement of the Constitution, in October 1780, to the Last Wednesday in May, 1789.*

[cccxxxiv] John Hancock, *A Proclamation, for a Day of Fasting and Prayer*.

CHAPTER 7

Ambiguous Constitutionality: Moral Legislation in Post-Revolutionary Virginia, New Jersey, Delaware, Maryland, North Carolina, Georgia, New York, and South Carolina

The constitutions that are less clear in providing authorization for the legislation of morality beyond the protection of life, liberty, and property are Virginia, New Jersey, Delaware, Maryland, North Carolina, Georgia, New York, and South Carolina. This is not to say that their constitutions do not contain evidence to suggest that extensive legislation of private morality is a role granted to legislators, but if it is granted it is presumed or implicit rather than explicitly stated. These states, unlike the three other states, do not provide a clear mandate in the constitution to enact moral legislation that extends beyond protection of life, liberty and property. Their legislation will be examined, therefore, to determine how the legislators interpreted the constitution on the issue of the legislation of morality, including whether there is a distinct difference between the legislation enacted in these states compared with the three others.

VIRGINIA

Section 15 and 16 in Virginia's "Bill of Rights" are the most crucial passages when it comes to the issue of moral legislation. Section 15 claims that the virtues of "justice, moderation, temperance, frugality, and virtue" are necessary for liberal government, presumably authorizing lawmakers to enact legislation with their cultivation in citizens as a goal (though the constitution is not explicit in this regard). Section 16 raises the question, however, as to whether Christian ethical practices (e.g., "the mutual duty of all to practice Christian forbearance, love, and charity towards each other"), which are the duty of all people, are directly relevant to legislation. In Virginia's early state legislation, one finds that its government understood itself justified in restricting behavior contrary to the virtues listed in sections 15 and 16, and in taking other measures that encourages the practice of Christian religion.

An active role of government in regulating morality is not viewed by Virginia as a violation of its position on individual liberty. *An Act reducing into one, the several Acts to prevent unlawful Gaming* points out the degree to which Virginia understood government regulation of moral behavior to be appropriate and not at odds with the protection of individual natural rights.

> V. AND to prevent gaming at Ordinaries and other public places which must be often attended with quarrels, disputes, and controversies, the impoverishment of many people and their families, and the ruin of the health, and corruption of the manner of youth, who upon such occasions frequently fall in company with lewd, idle and dissolute persons, who have no other way of maintaining themselves but by gaming: *Be it further enabled*. That if any person or persons shall at any time play in an ordinary, race-field, or any other public place, at any game or games whatsoever, except billiards, bowles, backgammon, chess, or draughts, or shall bet on the sides or hands of such as do game, every such person upon conviction thereof … shall forfeit and pay twenty dollars … and moreover, every person so convicted, shall be committed to the County Jail, there to remain until he, or they, give sufficient security for his, her, or their good behavior for twelve months next after such conviction.[cccxxxv]

This anti-gambling act punishes those who participate in gambling on games as well as those who are involved in playing such games. The rationale for such a law is given at the top of the paragraph. The list of negative consequences is as follows: (1) "quarrels, disputes, and controversies", (2) "impoverishment of many people and their families, and the ruin of the health, (3) "the corruption of the manner of youth." Notice that only the first two cases could even remotely be considered as a violation of the rights of life, liberty and property of other citizens. One could attempt to argue that since gaming fosters quarrels, which might be shown to increase the likelihood of physical assault and injury between gamers, it ought to be discouraged.

The second point invokes a concern for the well being of family members who may be dependent on the gambler. Since gambling tends to financial ruin, it violates the rights of family members (i.e., spouses and children) who depend upon those lost family resources for their subsistence. Thus, the argument would have to be that a society should not allow someone to rob their children or spouse of the means to subsist, which gambling could be said to do.

While the first two points may indirectly relate to the violation of others rights, the last point, clearly has nothing to do with the violation of the life, liberty or property of another person. A commitment to avoid the "corruption of the manner of youth[s]" is made on the basis that certain manners or ways of behaving are understood to be wrong. One could contend, however, that this corruption of manners is tied to the first two issues in a very indirect way. In other words, government cannot allow the youth to become involved in this kind of lifestyle because it will lead to them violating the rights of others eventually, whether through physical assaults of other gamers or failing to provide for their future families. By means of these indirect arguments, one could put forward a position that this legislation is based on the principle of protecting the rights of others. However, such a perspective does not satisfactorily address the third basis for this law with its concerns for avoiding the development of certain habits in the state's youngsters. Virginia's lawmakers are clearly attempting to shape the character of its citizens with this law beyond merely cultivating a high level of respect for the rights of others. The object of this law, stated positively, is to develop a sense of frugality that will, in the long run, result in the individual's proper enjoyment of the right to property. The recognition that there are appropriate and inappropriate

means of acquiring property is evidence that Virginia is willing to legislate morality beyond the protection of life, liberty and property.

A more clear-cut example of government regulation of the persons, or bodies, of individual citizens beyond the scope of the rights to life, liberty and happiness is the topic of *An Act declaring the Punishment of the Crime of Buggery*. In this act, Virginia's legislature regulates the private sexual activities of its citizens as well as their private property.

> I. BE *it enacted and declared, by the General Assembly*, That if any do commit the detestable and abominable vice of Buggery, with man or beast, he or the so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without the benefit of Clergy.[cccxxxvi]

Buggery, either in the form of sodomy or bestiality, is categorized among the worst of crimes. This crime may be punished with equal severity to murder—capital punishment. Notice that this is a clear regulation limiting what an individual may do sexually, both in the privacy of their own home or elsewhere. If government should only regulate behavior when others' life, liberty and property are threatened, an individual citizen should have the right to do whatever they want with their own bodies so long as this activity does not threaten others. However, Virginia legislates with a view to other ends that justify this regulation of sexual behavior. It is determined that no one is justified in having sexual relations with a member of the same sex or with any animal, even if that animal belongs to the individual in question. Sodomy is said to be "detestable and abominable."

This judgment against sodomy provides little clear reasoning for the prohibition, unlike the statement justifying a ban against gaming above. Sodomy is understood to be a vice that ought to be discouraged and even punished by government authorities. How can Virginia come to the conclusion that this law hinders fellow citizens' "enjoyment of life and liberty, with the means of acquiring property, and pursuing and obtaining happiness and safety" which the constitution establishes as government's aim in section one of the Bill of Rights?

A reason for such a restriction can be deduced from the content of the constitution. Sodomy can be understood to run contrary to the kinds of citizen virtues that section 15 of the Bill of Rights claims are

necessary for the preservation of a free government (i.e., especially its understanding of virtue). However, in what way is sodomy contrary to the list found section 15? Had the list included chastity it would require little discussion to understand Virginia's stance against sodomy. Section 16's claim that all Virginians have a duty "to practice Christian forbearance, love, and charity towards each other," adds needed critical information to the discussion. Since the type of forbearance, love, and charity expected of people is derived from Christian teachings, one can conclude that the constitution's conception of virtue is understood in light of Christian moral teachings also.[cccxxxvii] Clearly, a Christian conception of virtue incorporates chastity. A Christian understanding of chastity permits sexual relationships only in the context of a marriage of a man and woman. Any other sexual practices are a distortion of the proper purpose for sexuality. The following passages are examples of biblical teachings that denounce the practice of sodomy.

> If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads ….
> If a man has sexual relations with an animal, he must be put to death, and you must kill the animal.
> Leviticus 20:13 & 15

> Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion.
> Romans 1:26-27

Virginia's approach to sexuality is entirely consistent with these biblical passages.

Sodomy, as well as fornication and adultery (see below), is viewed as a serious vice. While Virginia makes no appeal to Christianity in its anti-sodomy (or its fornication and adultery legislation below), its position that sexual activity should be reserved for marriage is equivalent to a Christian position, which may be held by Christian deists and natural law advocates as well as Christian theists. Sexual passions, as well as greed and the pursuit of self-aggrandizement, are

dangerous when not properly moderated and when not controlled and directed in a marriage relationship.[cccxxxviii] Thus, it would be consistent for a Christian deist or natural law advocate to view sodomy, as well as fornication and adultery, as immoderate behavior that should be discouraged by government.

An Act for the effectual Suppression of Vice, and punishing the Disturbers of Religious Worship and Sabbath Breakers is another example of government legislation of morality beyond the rights to life, liberty, and property in Virginia. The first section deals with the "suppression of vice."

> I. BE *it enacted by the General Assembly*, That if any person or persons shall profanely swear or curse, or shall be drunk, he, she, or they so offending, for every such offence, being thereof convicted by the oath of one or more witnesses … shall forfeit and pay the sum of eighty-three cents for every such offence … and if any person or persons shall refuse to make present payment, or give sufficient security for the payment of the same in a reasonable time, not exceeding six months, then the said fines and penalties shall be levied upon the goods of such person or persons by warrant or precept from any justice of the peace … if the offender or offenders be not able to pay the said sum or sums, then he, she, or they shall have and receive ten lashes upon his or her bare back, well laid on, for every such offence.[cccxxxix]

The two behaviors punishable in this, its first section, are cursing and drunkenness. Neither of these behaviors is inherently dangerous to the rights of life, liberty or property of other people. Drunkenness might be considered a threat if the law punished *public* drunkenness only. This could be justified by arguing that being drunk in public can tend to disruptions that cause injury to people or private property. The law does not do so, making it unlawful to be intoxicated even in one's own home. The justification of this limitation of individual's right to property and liberty is presumably the conviction that drunkenness is a vice that is detrimental to the preservation of free government and/or the obligations required by a Christian conception of virtue.

The other issue addressed in this first section of the act is the use of language. Here again, cursing and swearing in no way directly

threaten the life or property of another person. Language alone cannot damage someone's home or body. Yet, such behavior is deemed unacceptable for everyone in every instance. According to the law, a person is liable to punishment for swearing while working in his field, doing business in town, or sitting in his own home. Just as with drunkenness, such behavior is inconsistent with the virtues listed in section 15 and 16 of the Bill of Rights. Swearing and cursing are examples of immoderate behavior that hinder an attitude of forbearance and charity. One additional point concerning this law is noteworthy. Unlike some states, Virginia does not reference specific divine names (e.g., Jesus, Christ, Holy Spirit) in its cursing legislation. The constitution excludes such specific references to Christian names for God, which provides additional evidence in support of a deistic approach by Virginia as discussed in previous chapters.

The fifth section of the *Act for the effectual Suppression of Vice* deals with restrictions against working on Sundays.[cccxl]

> V. IF any person on a Sabbath day shall himself be found labouring at his own, or any other trade, or calling, shall employ his apprentices, servants, or slaves in labour, or other business, except it be in the ordinary household office of daily necessity, or other work of necessity or charity, he shall forfeit the sum of one dollar and sixty-seven cents for every such offence, deeming every apprentice, servant, or slave, so employed, and every day he shall be so employed, as contributing a distinct offence.[cccxli]

This act makes individuals liable not only for their own observance of the Sabbath but also for its observance by any "apprentice, servant, or slave, so employed." If a person attempts to use their person and private property in a productive manner on Sunday, or employs someone else to do so, the citizen is fined for the number of people who have been employed, including him or herself. This commitment to the Sabbath is in direct conflict with the right to acquire property, unless one understands those rights to be subordinate to Judeo-Christian teachings. Here one finds the most striking example of the legislation of morality in Virginia on the basis of teachings that seem to extend beyond what deism would approve of on rational grounds. Observance of a day of rest and worship one day in every seven is not

a concept deduced by reason, but mandated by divine revelation. However, it is not necessarily contrary to a Christian-informed deism, if the practice of the Sabbath is understood to be time for every citizen to consider how they are living and to receive instruction on the value of citizen virtues in Christian church services—to direct their lives "by reason and conviction." Interestingly, the forced observance of the Sabbath is not considered a violation of the right to freedom of religious belief and practice. This demonstrates that the primary issue of concern for Virginians is not the free exercise of any kind of religion, but rather of traditional of Judeo-Christian religion. This example demonstrates the difficulty of determining precisely the reasoning of the lawmakers. In the same way that Virginia's constitution is vague enough to allow for both a deistic or theistic interpretation, its legislation is unclear since an explanation of the reasoning for this legislation is not provided.

The final section from *An Act for the effectual Suppression of Vice* addresses sexuality between consenting persons of the opposite sex. The same issues involved with homosexual relations discussed above are relevant here as well, in the sense that adultery and fornication (assuming both parties are consenting) do not threaten the life, liberty, and property of other citizens.

> VI. EVERY person not being a servant or slave committing adultery, or fornication … shall for every offence of adultery, forfeit and pay twenty dollars, and for every offence of fornication ten dollars. [cccxlii]

While the penalty is not near as severe as that for homosexuality, the $20 fine and $10 fine for each act of adultery and fornication respectively are serious punishments, considering that the punishment for breaking the Sabbath is $1.67. Thus, Virginia is not merely taking the position that homosexuality is always unacceptable and heterosexuality is always acceptable. Rather, its legislators conclude that sexual activity must be confined to marriage for it to be permitted.

The legislative decisions to regulate moral behavior in Virginia are made in a manner consistent with the fixed moral principles of both Christian theism and a Christian deism. The regulations enacted are consistent with section 15's commitment to develop particular character traits in its citizens when those virtues are understood in a traditional manner. Virginia's legislation takes a principled approach to

moral legislation (i.e., based on principles of revealed religion or reason) in its late 18th century lawmaking rather than an approach that is guided by public opinion.

NEW JERSEY

In light of the state's constitution, one would expect to find moral legislation in New Jersey that is far less bound to a Christian ethic and, perhaps, expect to find very little moral legislation that extends beyond protection of life, liberty, and property when compared with Virginia. However, the door is left ajar in New Jersey, as pointed out in chapter five, for extensive moral legislation on the basis of popular sovereignty, i.e., when public opinion supports regulating private behavior. Thus, while a theoretical basis was not clearly established in New Jersey's constitution, moral legislation could be justified on the basis that citizens would view it as good and necessary for the state.

The laws discussed below were all enacted in the late 1790's, demonstrating a commitment to extensive moral legislation in New Jersey that extends far beyond the years during or immediately following the Revolution. The first legislation to be examined here involves a particular form of gaming—horseracing.

> An act concerning horse-racing
> Passed the 3d of March, 1797
> I. Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, That all racing, running, pacing or trotting of horses, mares or geldings, for money, goods or chattels, or other valuable thing, shall be, and hereby are declared to be common and public nuisances and offenses against this state.[cccxliii]

This act identifies the problem of horse racing under the heading of a "common and public nuisance" and offense "against the state." This wording meets the expectation attained from the earlier examination of the state's constitution, since there is very little specific information given by the constitution to guide legislators. There is no theoretical principle appealed to in the reasoning of this legislation either. Rather, the practice of horse racing is common accepted as an annoyance.

People would prefer not to have such practices in their state. This is the language of popular sovereignty, not natural law or divine law.

A similar law passed less than a month earlier addressed a variety of issues that would, along with horse racing, fall into the category of gaming.

> An act to prevent gaming
> Passed the 8th of February, 1797
> I. Be it enacted by the Council and Assembly of this state … That all playing at cards, dice or other game, with one or more die or dice, or with any other instrument, engine or device, in the nature of dice, having one or more figure or figures, number or numbers thereon, or at billiards, or A.B.C. or E.O. tables, or other tables, or at tennis, bowls or shuffle board, or at farro-bank, or other bank of the like kind, under any denomination whatever; and all cock fightings, for money, goods, chattels, or other valuable thing, shall be, and hereby are declared to be offenses against this state, and the authors, parties, betters, wagerers, contrivers, and abettors in and of the same, shall be prosecuted and proceeded against by indictment.[cccxliv]

Since this act fails to mention horse racing, the horse racing act discussed above had to be added later. This act prohibiting games with dice, billiards, tennis, etc. simply declares that they are "offenses against the state." Again, there is no principled argument providing a basis for this legislative action. In addition to all the forms of gaming addressed above, New Jersey also made a law prohibiting lotteries during this time period.

> An act for suppressing of lotteries.
> Passed the 13th of February, 1797
> I. Be it enacted by the Council and Assembly of this state, and it is hereby enacted by the authority of the same, That all lotteries for money, goods, wares, merchandize, chattels, lands, tenements, hereditaments, or other matters or things whatsoever, shall be, and hereby are adjudged to be common and public nuisances …. no person or person shall, within this state, publicly or privately, erect, set up, open, make or draw

> any such lottery or lotteries; and every person who shall offend in the premises, shall forfeit for every such offence, two thousand dollars.[cccxlv]

This anti-lottery legislation demonstrates the strong commitment against such forms of gaming and gambling by establishing a fine of $2,000 for those convicted of engaging in these kinds of practices. Compared to the other fines established in other states for various crimes, this is a large sum. Once again, though, the act prohibiting lotteries provides no principled argument against it. Lotteries are judged to be "common and public nuisances." The issue of fairness in the games, or, on the other side of the coin, unfair manipulation of games does not appear to be the primary concern. The games are not prohibited only when such games are "rigged". The language merely reflects a public distaste for such activity. So, even if the games are fairly administered, New Jersey decided to have no part of them. This is constitutionally justifiable on the basis that gaming, in the opinion of the majority, is not viewed as an activity that is good for society or for the attainment of individual happiness.

Following the moral legislation prohibiting gaming established in 1797, New Jersey passed an extensive act addressing a variety of private moral issues in 1798. This act begins by addressing the Christian Sabbath.

> An act for suppressing vice and immorality.
> Passed the 16th of March, 1798.
> I. Be it enacted by the Council and Assembly of this state, and it is hereby enacted by the authority of the same, That no traveling, worldly employment or business, ordinary or servile labour or work, either upon land or water (works of necessity and charity excepted) nor shooting, fishing (not including fishing with a seine or net, which is hereafter provided for) sporting, hunting, gunning, racing, or frequenting of tippling houses, nor any interludes or plays, dancing, singing, fiddling or other music for the sake of merriment, nor any playing at foot ball, fives, nine pins, bowls, long bullets, or quoits, nor any other kind of playing, sports, pastimes or diversion, shall be done, performed, used or practiced by any person or persons within this state, on the Christian Sabbath, or first day

> of the week, commonly called Sunday; and that every person … shall, for every such offence shall be committed, the sum of one dollar; and that no person shall cry, shew forth, or expose to sale, any wares, merchandise, fruit, herbs, meat, fish, goods, or chattels, upon the first day of the week, commonly called Sunday … upon pain, that every person so offending shall forfeit and pay, to the use of the poor of the township where such offence shall be committed, the sum of two dollars … and in case no such distress can be had, then every such offender shall, by a warrant under the hand and seal of the said justice, be set publicly in the stocks, for any space of time not exceeding four hours … it shall be lawful for any constable or other citizen, to stop every person so offending, and to detain him or her till the next day, to be dealt with according to law … And provided also, That nothing in this act contained, shall be construed to prohibit the dressing of victuals in private families, or in lodging houses, inns, and other houses of entertainment, for the use of sojourners, travelers or strangers.[cccxlvi]

Anyone caught breaking the Sabbath must pay $1 and anyone attempting to sell any merchandise on Sunday must pay $2, along with the potential of being put in the stocks if payment cannot be made. There is a clear distinction made between these kinds of "worldly employments" and spiritual activities. This demonstrates a fundamental commitment to a view of human nature that acknowledges a spiritual component in people. This spiritual nature of human beings is what is at stake in this legislation. Apparently, without such legislation, human beings will tend to ignore their spiritual needs. New Jersey is attempting to nip in the bud the tendency of a free market, liberal society's influence on citizens to lose sight of spirituality with the prospect of getting ahead materially. Both the hope of economic betterment and the enjoyment of worldly recreations afforded by economic improvement are threats to the practice of religion. Therefore, this law prohibits both kinds of activities.

While this act does not explicitly state that its purpose is to promote Christianity, the goal of the act is obviously directed toward that end. Even though the constitution does not establish the state as a Christian state, the legislators understand the promotion of the

Christian religion to be a good objective and, therefore, see no contradiction between this law and the constitution. An important difference between Virginia and New Jersey is that Virginia explicitly establishes its constitution on fixed philosophical and/or theological principles.

In New Jersey, however, the language of the documents is reversed, with the authority of the people being the principle established by the constitution. This has already been discussed in previous chapters, particularly with a view to the opening section of the constitution's preamble.

> WHEREAS all the constitutional authority ever possessed by the kings of Great Britain over these colonies, or their other dominions, was, by compact, derived from the people, and held of them, for the common interest of the whole society; allegiance and protection are, in the nature of things, reciprocal ties; each equally depending upon the other, and liable to be dissolved by the others being refused or withdrawn.[cccxlvii]

According to this section, government has authority only on the basis of the people's consent. Other states affirm the principle of consent as well, but often they make it clear that consent must be understood in terms of fixed principles concerning the nature of God and human beings. New Jersey does not do so. Rather, it simply asserts that the authority of the people is supreme. With that basis, legislation is legitimately enacted that supports preferential treatment of Christianity only if the people want it.

The preference for Christian religion is clear when, in section IV of "Vice and Immorality" piece of legislation, there is a clause inserted that provides a pass for offenders of the Sabbath who have demonstrated a regular commitment to the Sabbath.

> IV. And be it enacted, That if any person charged with having labored or worked on the first day of the week, commonly called Sunday, shall be brought before a justice of the peace to answer the information and charge thereof, and shall then and there prove to the satisfaction of the said justice, that he or she uniformly keeps the seventh day of the week as the Sabbath,

> and habitually abstains from following his or her usual occupation or business, and from all recreation, and devotes the day to the exercise of religious worship, then such defendant shall be discharged. Provided always, That the work or labor … has not disturbed other persons in the observance of the first day of the week as the Sabbath; And provided also, That nothing in this section contained shall be construed to allow any such person to openly expose to sale any good, wares, merchandize, or other article or thing whatsoever, in the line of his or her business or occupation.[cccxlviii]

New Jersey takes its commitment to the Christian Sabbath very seriously. The goal is to influence individuals to devote one day a week to Christian worship.[cccxlix] In order to encourage such religious behavior, penalties are established against anyone who breaks the rules of the Sabbath. Restricting individuals from their freedom to be involved in productive labor or recreation on a particular day of the week might seem to be a violation of individual liberty. However, besides the fact that New Jersey's constitution makes no mention of the individual right to liberty, this legislation does not require a citizen to attend a Christian religious service. Yet, it does, as shown above, reward those who do if they inadvertently or periodically violate the rules.

After establishing regulations for the Sabbath, the "Vice and Immorality" act regulates language. It is important to remember that New Jersey's constitution does not establish a right to free speech or press. Thus, there can be no claim of inconsistency between the constitution and this law when New Jersey prohibits swearing and cursing.

> VIII. And be it enacted, That if any person or persons shall, at any time or times hereafter, profanely swear or curse … shall, for every such offence, forfeit and pay … the sum of one half of a dollar.
>
> IX. And be it enacted, That in case any person shall profanely swear or curse, in the presence or hearing of any justice of the peace for any county, while in the execution of his office, every such justice of the peace shall, and is hereby authorized

> and required to convict every such offender of such offence, without any other proof whatsoever.
>
> X. And be it enacted, That in case any person, who shall be convicted of profanely swearing or cursing, shall not immediately pay down the respective sums so forfeited … within six days, then every such offender … shall by warrant … be set publicly in the stocks for any space of time not exceeding two hours for any single offence … but if the offender shall not be above the age of fourteen years, and shall not forthwith pay the said forfeiture, or give security for the payment therof, the parent or master shall pay the same, to be recovered by distress and sale of the good and chattels of such parent or master. [cccl]

When compared to the penalty for lotteries, the penalty for swearing is obviously minor. The 50 cents swearing fine falls into a similar category of significance when compared with the $1 and $2 fines for Sabbath breaking. These fines are not primarily designed to keep the wealthy from trespassing, since a wealthy person might not be concerned with such a small fee. However, the fine is for each offense and could become a nuisance to even the wealthiest foul-mouthed person.

For the lower economic classes, this fine would be fairly significant, something to be avoided if one wanted to have food on the table. Whether wealthy or not, it is an issue of concern for parents as well. Interestingly, this is the only legislation being examined in New Jersey that makes the parents liable for their children's behavior. It communicates a concern that children under the age of 14 will be influenced into to this bad habit of swearing. The parent is held responsible for the behavior of such children. For self-interest alone, parents will be inclined to train their children not to swear. If they fail to succeed in this training and their children end up with a habit of using offensive language, they will end up paying a significant price over time.

The penalty for swearing will not cause a person to go into bankruptcy, however, since the alternative of being put in the stocks is available. One can imagine that many of the lowest class of citizens would be forced to choose this alternative if convicted with regularity.

The force of this punishment is two-fold. First, it takes the time of a person who might have urgent cares to attend to with his or her home, farm, or business. Second, it is painful. Third, it subjects a person to public shame. Whether a person is concerned with getting ahead economically, being physically comfortable, or well thought of in his or her community, there is a price to pay by being placed in the stocks.

Drunkenness is placed in the same category of relative importance by New Jersey. This is evident by its assignment of a $1 fine for every offense of drunkenness.

> XI. And be it enacted, That if any person shall become intoxicated or drunk by the excessive use of spirituous, vinous, or other strong liquor … every person so offending shall forfeit and pay for every such offence, one dollar … and in case any person, who shall be convicted of drunkenness as aforesaid, shall not immediately pay down the sum so forfeited … within three days, every such offender shall, by warrant under the hand and seal of such justice, be set publicly in the stocks for any space of time not exceeding four hours. [ccli]

While public drunkenness could be said to lead to violations of the rights of others, as discussed in Virginia, protection of the rights of others cannot completely justify the prohibition of drunkenness in one's private life. Like breaking the Sabbath, the $1 fine can be exchanged for up to four hours in the stocks. The thought of being placed in stocks for two hours versus four hours gives a good picture of the relative significance New Jersey places on the value of the Sabbath, sobriety, and clean language.

One final section of the suppression of vice act addresses theatrical shows and exhibitions. New Jersey is more explicit in its reasoning for prohibiting certain kinds of theatre shows than for most of its other prohibitive legislation.

> XII. And whereas public shews and exhibitions of divers kinds have of late become very frequent and common within this state, whereby many strangers and worthless persons have unjustly gained and taken to themselves considerable sums of money, and it being found on experience, that such shews and exhibitions tend to no good or useful purpose in society, but

> on the contrary, to collect together great numbers of idle and unwary spectators, as well as children and servants to gratify vain and useless curiosity, loosen and corrupt the moral s of youth, and straighten and impoverish many poor families, Be it farther enacted by the authority aforesaid, That if any person or persons … so offending, and being thereof convicted before any justice of the peace of the county … shall, for every such offence, forfeit and pay … the sum of sixteen dollars … That if in the opinion of any three justices of the peace of any county, city, or town corporate, where any interlude, farce or play is proposed to be performed, it shall be deemed that such interlude, farce or play is innocent, or may probably tend to answer any reasonable or useful end, it shall and may be lawful for them … to give license in writing for such interlude, farce or play to be performed.[ccclii]

The first reason for prohibiting theatrical shows arises from experience. Apparently there have been people who have accumulated a great deal of wealth by organizing theatrical shows. New Jersey's legislators have concluded that these strangers have historically been "worthless persons" unworthy of the degree of wealth they have accumulated in the process. This statement demonstrates a conviction that the accumulation of wealth is acceptable only by certain, just means and with certain manners. Though not explicitly expressed, it is implied that people should only be allowed to accumulate wealth if it involves production, i.e., a vocation that produces goods and services with a clear sense of utility. Thus, the first objection to theatrical shows is the unjust gain of those who organize them.

The second objection is that these shows appeal to useless curiosity, corrupt morals, and impoverish the lower classes. The preceding statement that the shows "tend to no good or useful purpose in society" seems to be a drastic understatement in light of the charges against them. The fairly steep fine of $16 demonstrates the desire of New Jersey to stem the tide of these shows. While the reference to useless curiosity is fairly ambiguous, the latter two charges are more clear-cut. The shows have a morally degrading influence on the audience. Their morally corrupting justifies the establishment of government regulation. Thus, while the shows do not threaten the rights of life and liberty of a citizen, they do not contribute to a

virtuous citizenry. In addition, the shows are said to indirectly harm people by contributing to material impoverishment. In modern terms, the act would argue that Hollywood executives and actors are unjustly becoming wealthy because their wealth is not generated by means of the production of goods and services of utility, they do not serve the "common interest of the whole society," as the constitution puts it. It would additionally argue that most movies harm the moral uprightness of citizens and tends to unproductive use of their finances. New Jersey is aware, however, that theatrical shows may have a positive influence. The prospect is left open for shows that, through government censorship, could be deemed acceptable for the public. One can imagine shows that have positive moral messages or patriotic themes. While they would not have any utilitarian impact on society, they could have a positive influence on the formation of moral character, or in the worst case, not have a negative impact on citizens.

The last act to be examined from New Jersey is an act that addresses the issue of idleness of citizens.

> An act to describe, apprehend and punish disorderly persons.
> Passed the 10th of June, 1799.
> I. Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, that … all persons, who shall go about from door to door, or place themselves in streets, highways or passages, to beg, crave charity, or collect alms, or who shall wander abroad and lodge in taverns, inns, beer houses, out houses, houses of entertainment, market houses, barns or other places, or in the open air, and not give a good account of themselves, or who shall wander abroad, and beg or solicit charity, under pretence of being or having been soldiers, mariners, or seafaring men, or of loss of fire, or other casualty, or of loss by the Indians, or by war, or other pretence of thing; and all persons, who shall leave, or threaten to leave their families to be maintained by the city, township or county, or to become chargeable thereto, or who, not having sufficient property or means for their subsistence, or support shall live idle, or not engage in some honest employment, or not provide for themselves or families; and all persons, who shall use, or pretend to use, or have any skill in physiognomy, palmistry, or like crafty science, or who

> shall pretend to sell destinies or fortunes; and all runaway servants or slaves, and all vagrants or vagabonds, common drunkards, common night walkers, and common prostitutes, shall be deemed and adjudged to be disorderly persons ….
> III. And be it enacted, That it shall be the duty of every constable, and lawful for any other person, to apprehend, without warrant or process, any disorderly person of the description aforesaid, and to take him or her before any justice of the peace of the county, where apprehended; and it shall be the duty of the said justice to commit such disorderly person, when convicted before him, by the confession of the offender, or by the oath or affirmation of one or more witness or witnesses, to the work house of the city, town or county, there to be kept at hard labor for any time not exceeding three calendar months.[ccliii]

One can only wonder how this act would be deemed constitutional if New Jersey, like so many other states, had declared the right to liberty in its constitution. The individual has not only a right to acquire property, but is also obliged to preserve themselves, and hence acquire the means of subsistence. The thought that a person whose crime is a failure to engage in "honest employment" can be confined in a "work house" for up to three months is shocking to the contemporary American mind.

The issues addressed in this act are (1) a failure to make oneself productive in society, (2) a failure to provide for the material needs of family members, requiring the community at large to sustain them, and (3) the exercise of vocations that are detrimental to society (i.e., "physiognomy, palmistry, or like crafty science[s]"). Any persons who fit this description are confined to a time of forced labor, in which they are made to be productive for society. The proper exercise of liberty is interpreted in this legislation as engaging in a vocation that is "honest" and provides for the needs of family members. Being idle in life or engaging in certain vocations is not perceived as a permissible use of one's liberty. The failure to provide for one's family can be interpreted as a violation of the rights of others' property, since the community will unjustly be forced to make provision for those needs. But, the "disorderly person" who has no family, or leaves his or her family with the means to live and takes on an idle lifestyle does not necessarily

threaten the rights of others; even such people are expected to work in a productive vocation.

New Jersey addresses a surprising number of moral issues in its legislation given our analysis of its constitution. Of the 12 categories of moral issues identified in all the states, outlined in Table 4 below, 9 are found in New Jersey's legislation. However, while New Jersey extensively legislates morality, its approach must also be understood in light of its constitution's emphasis on the authority of the people and the reasoning that was found above in some of the legislation. In two cases above, the reasoning for prohibitions was that certain behaviors are "common and public nuisances." This reasoning is consistent with our findings in the constitution. The laws enacted are acceptable because the representatives of the people have made the judgment that none of these restrictions are a violation of the will of the people, whose authority is the basis for just government. Since the people of New Jersey share the values of a Christian ethic, moral legislation that is consistent with Christianity is enacted.[ccliv] According to this logic, however, if the people change their views on happiness, legislators would be justified in changing the laws concerned with private morality.

DELAWARE

Delaware's state legislature enacted very little legislation that regulates morality from the late 1770's through the 1790's. This lack of commitment to address moral issues beyond the scope of protection of life, liberty and property seems to be a validation of the analysis of Delaware in chapter five. It was shown there that the state's constitution provided no evidence to suggest that its legislature was authorized to legislate morality on any other basis than that of protecting life, liberty, property and the right to worship. Unlike most other states, Delaware does not create new laws to prohibit behavior like drunkenness and cursing. The first clue, however, that Delaware is concerned with legislating morality beyond protection of life, liberty and property is found in the constitution. The clue is found in the following article from Delaware's constitution that addresses legislation previously enacted by its colonial legislature.

> The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature.[cclv]

Therefore, if previous legislation is not altered or repealed, it is not only still in force but re-affirmed by the new state's legislature.

There are many examples of repealed laws after the Revolution, but the colonial laws that address moral issues beyond the protection of life, liberty and property are not among them. Delaware's colonial government extensively regulated morality. In 1719, Delaware's colonial legislature enacted a law that categorized both sodomy and bestiality as felonies.[cclvi] Later, a law was enacted that prohibited adultery and fornication. The preamble of that law states that it is enacted "for the preservation of virtue and chastity among the people of this government, and to prevent the heinous sins of adultery and fornication."[cclvii] The intent of such a law obviously extends beyond a concern for the protection of life, liberty or property of its citizens. This colonial law establishes a punishment of 50 £ or 21 lashes for adultery and 21 lashes for fornication. Another colonial law establishes a punishment of 5 shillings for drunkenness, 5 shillings for profane language, defined in part when someone profanely uses the "name of God, Christ Jesus, or Holy Spirit."[cclviii] In this same law, blasphemy is punished more severely with 39 lashes, receiving a branding with the letter "B", and 2 hours in the public stocks. No repeal is recorded on the books for any of these laws prior to 1796.

Not only do these laws demonstrate a willingness in Delaware to retain its moral legislation that extends beyond protection of life, liberty, and property, they are consistent with Christian theological principles in content. The law on blasphemy is particularly noteworthy, with its punishment for disrespect for the Trinitarian formula of the divine names of "Christ Jesus" and "Holy Spirit". This colonial law prohibits expressing disrespect not just for any divinity, but specifically for the Christian God.

Two other states, New Jersey and South Carolina, make a similar remark in their constitutions that the colonial laws are still in force if not repealed by the new state's legislature or if not contrary to the principles of the constitution.[cclix] Of the four, Delaware and South Carolina find no reason to repeal or to change their previous laws

concerning morality. New Jersey and New York demonstrate a commitment to take up issues of morality following the ratification of their new constitutions and, therefore, their new laws are more relevant to this study, since they reflect the most current views of what morality ought to be regulated.

Delaware, in not writing new legislation, must be assumed to be satisfied with the colonial laws in force and, for that reason, the colonial laws are relevant to this study. This assumption is supported by the legislature's action in 1787 to alter a previous law on the topic of petit treason and in 1790 to alter previous laws concerning marriage by Justices of the Peace.

> An Act to alter the judgment at Common Law against persons convicted of petit treason.
> Whereas by the rules and practice of the Common Law adopted by this state, the judgment pronounced against persons convicted of the crime of petit treason appears to this present General Assembly to be too severe, and contrary to the mild spirit of the constitution and laws of this state provided for the punishment of other offences.[cccl x]

This 1787 act demonstrates the legislature's mode of altering colonial era laws it feels must be adjusted or repealed. In this case, the action is to alter the law so that sentences are lightened for petit treason, or the murder of ones lawful superior (e.g., a slave who murders a master or a wife who murders her husband).

In the 1790 law concerning marriage, a previous judgment to allow marriages to be officiated by Justices of the Peace is repealed, authorizing only religious ministers to officiate.

> An Act to regulate marriages.
> Whereas matrimony is an honorable institution of Almighty God, designed for the mutual convenience and happiness of mankind; and the sober, discreet, and advised union of persons in matrimony is the duty of every good citizen, and the unadvised, clandestine, loose, and unseemly proceedings of marriage, tend to introduce a contempt and irreverent regard for that holy institution, and a dissoluteness of manners among the thoughtless part of the community: And whereas great and manifold inconveniences may arise to persons

> secretly and improperly uniting themselves in marriage, without the knowledge of their parents, guardians, or friends; and the causes are now removed, which rendered it convenient to have marriages celebrated by Justices of the Peace: And whereas it is necessary to declare what marriages shall be deemed legal:
>
> Be it therefore enacted by the General Assembly of Delaware, That the rites of marriage, between any white persons, inhabitants of this state, shall not be celebrated by any person within this state, unless by ministers or preachers of the gospel, appointed or ordained according to the rites and ceremonies of their respective churches, or by the religious society to which they belong, according to the established mode and usage of such society; and if any person shall celebrate the rites of marriage as aforesaid, contrary to the true intent and meaning of this act, he shall forfeit and pay for every offence, One Hundred Pounds lawful money of this state.[cclxi]

Delaware's legislators are aware of the previous legislation and choose deliberately to change the law's position on the regulation of marriages. Whatever the previous circumstances, whether the inconveniences mentioned were caused by the war or a lack of ministers, the situation has changed so that Delaware's legislature can require all marriages to be officiated by "ministers or preachers of the gospel."

The title, "ministers of the gospel," makes it clear that authority is being given exclusively to Christian ministers. Notice the severe 100 £ punishment for the crime of officiating a marriage without authorization. This demonstrates the strong commitment of Delaware to have all marriages authorized by Christian ministers. Even non-Christian citizens must have a Christian minister officiate their weddings; only marriages authorized by a Christian church are legal.

The final clue that Delaware is concerned with legislating morality beyond the protection of life, liberty and property is found in a legislative act of 1786. The title of this law is evidence in itself.

> An Act for the suppression of idleness, vice, and immorality.
>
> Whereas it has been too much the practice, in some parts of this state, for people to assemble themselves together under

> the various pretences of horse-racing, foot-racing, cock-fighting, shooting-matches, etc. which are frequently made with intent to vend and sell strong liquors; thereby promoting idleness, vice, and immorality, to the great prejudice of religion, virtue, and industry.
> [Note: see dictionary for meaning of "prejudice" here as disadvantage.][cccLxii]

Delaware's legislators clearly understand themselves to have the authority to restrict liberty in order to regulate morality, even if no one's life, liberty or property is threatened. The legislators take the task of suppressing "idleness, vice, immorality" seriously enough to address immoral influences not addressed by previous legislation. The act creates a fine of 10 £ for anyone who is involved in any of the practices mentioned. The lawmakers even clarify their reasons for restricting these activities: they are harmful to "religion, virtue and industry." The issue is not merely a dislike for these activities among public opinion. Religion, virtue and industry appear to be considered as good ends in themselves for citizens. Anything that is detrimental to the promotion of religion, virtue and industry is rightly regulated by civil law.

This law, along with the previous issues addressed above, suggests that Delaware does in fact consider the legislation of morality beyond protection of life, liberty and property, to be within the scope of government. In addition, evidence suggests that there are fixed principles that govern government's regulation of morality in the minds of Delaware's legislators. Even though the constitution does not give Delaware's legislature a clear mandate to legislate morality in broad terms, the action of the legislature shows that it understands itself to have the authority to do so in a principled manner.

MARYLAND

In the last chapter, it was pointed out that Maryland's constitution presumes that there will be laws enacted for the reformation of morals, creating an expectation that the legislature will enact such laws. However, examples of legislation of morality following the ratification of the state's constitution are few. Acts on marriage and fornication are enacted by the legislature in 1777 and 1781 respectively. The act on marriage is consistent with the findings of chapter three, in which it

was found that there is an endorsement of Christianity in the constitution.

> 1777
> Chap. XII. An Act concerning marriages.
> III. And be it enacted, That the rights of marriage between any white persons, objects or inhabitants of this state, shall not be celebrated by any person within this state, unless by ministers of the church of England, ministers dissenting from that church, or Romish priests, appointed or ordained according to the rites and ceremonies of their respective churches, or in such manner as hath been heretofore used and practiced in this state by the society of people called quakers; and if any person shall celebrate the rites of marriage between any white persons, as aforesaid, contrary to the true intent and meaning hereof, he shall forfeit and pay for every offence five hundred pounds current money.[cccLxiii]

While there is tolerance for a variety of different kinds of marriages (Catholic or Protestant, including Quaker), the only marriages given legal status in Maryland are those conducted under the authority of Christian churches. In other words, the state is making a clear statement of endorsement of Christianity in its marriage legislation. In order to attain the legal status of being married, citizens must choose a Christian church of some kind to authorize the marriage.

In addition to defining legal marriage, the legislature creates regulations and consequences for those who have children outside of the institution of marriage.

> 1781
> Chap. XIII. An Act directing the proceedings against persons guilty of fornication.
> Be it enacted, by the general assembly of Maryland … that it shall and may be lawful for any justice of the peace within this state, as often as he shall be informed of any female person have an illegitimate child, to issue his warrant to the constable of the hundred in which such person resides … who shall call on her for security to indemnify the county from any charge that may accrue by means of such child, and, upon neglect or

> refusal, to commit her to the custody of the sheriff of the county, to be by him safely kept until she shall give such security; but in case she shall on oath discover the father, then the said such father, if a resident of the county, before him, and shall cause him to give security in the sum of thirty pounds current money, to indemnify the county from all charges that may arise for the maintenance of such child ….
>
> II. Provided always, That in case any person charged with being the father of a bastard child should think himself aggrieved by the judgment aforesaid, it shall and may be lawful for the said justice, and he is hereby required, to cause such person to enter into recognizance for his appearance at the next county court … and if the person so charged be found guilty by the verdict of a jury, the court shall immediately order such person to give security to indemnify the county from any charges that may accrue for the maintenance of the said child.[ccclxiv]

This act does not follow the example of Virginia in making adultery and fornication a moral issue, but rather it makes the issue of children out of wedlock a financial and political issue. Instead of creating punishments for the acts of fornication and adultery, the Maryland is concerned with financial accountability for the birth of "illegitimate" children.

The issue addressed by Maryland's legislation, in contrast to Virginia, is the financial cost to the state of caring for illegitimate children not the sexual behavior of citizens. Thus, an unwed mother is required to put up money to the state as security in case she leaves the child in need of state care. If the mother is willing to disclose the name of the father, the father is then made responsible for such security. This approach protects the rest of the population from incurring the costs of one citizen's irresponsibility. In other words, while this act may appear to be moral legislation addressing an issue outside the scope of the rights of life, liberty and property, this appearance is not entirely accurate. The act is designed to protect the rights of property of all citizens from a citizen who may neglect to care for an illegitimate child in addition to making citizens responsible for their sexual behavior and offspring.

In the final analysis, Maryland takes very little action in the way of legislating morality beyond the issue of rights to life, liberty and property immediately following the revolution. The example of regulating marriages is the only example in this work's findings.

NORTH CAROLINA

North Carolina's constitution requires a profession of Protestant theology from its political leaders, while not explicitly grounding its constitution on theological or philosophic principles. While the state demonstrates a commitment to the inalienable right to worship, a concern for theological principles is not found to be significantly relevant to legislation in the constitution. North Carolina does not emphasize a fixed principle of individual natural rights either. The constitution's preamble gives government the responsibility of making the political order "most conducive to [the people's] happiness and prosperity."[cccLXV] Therefore, in light of its strong popular-sovereignty leanings, one would expect to find legislation that is based largely on the desires of the people and protection of the positive rights asserted in the constitution.

Like all the other states (except Vermont, which has no previous history as a political entity) North Carolina has a previous tradition of legislation from its colonial period. In 1741, it enacted a colonial law that punished Sabbath breaking with a 10 shilling fine, profane swearing and cursing with a fine of two shillings to ten shillings depending on the circumstances, drunkenness with a two to five shilling fine, and bastardy with a fine of security for future care of the child.[cccLXVI] The examples of moral laws from North Carolina's colonial period demonstrate a willingness to regulate behavior beyond the protection of life, liberty and property.

In light of the findings of previous chapters concerning North Carolina's state constitution, one would expect to find legislation of morality in the post revolutionary period that is built upon the principle of popular sovereignty more than on theological principles. What one finds following the ratification of the state's constitution, however, is a striking reliance upon theological principles in its legislation. The first example of this, while not a piece of moral legislation in the same respect as most of the laws examined in this work, reveals the

legislators' perspective on the relevance of theological principles to government.

1777

An Act concerning Oaths.

I. Whereas lawful Oaths, for the Discovery of Truth, and establishing Right, are necessary, and highly conducive to the important Ends of good Government; and being most solemn Appeals to Almighty God, as also omniscient Witness of the Truth, just and omnipotent Avenger of Falsehood, such Oaths ought therefore to be taken and administered with the utmost Solemnity:

II. Be it therefore enacted by the General Assembly of the State of North Carolina, and by the Authority of the same, That Judges, Justices of the Peace, and other Persons, who are or shall be empowered to administer Oaths, shall (except in the Cases in this Act excepted) require the Party to be sworn to lay his Hand upon the Holy Evangelists of Almighty God, in Token of his Engagement to speak the Truth, as he hopes to be saved in the Way and Method of Salvation pointed out in that blessed Volume, and in further Token, that if he should swerve from the Truth, he may justly be deprived of all the Blessings of the Gospel, and made liable to that Vengeance which he has imprecated on his own Head; and after repeating the Words, *So help me God*, shall kiss the Holy Gospels, as a Seal of Confirmation to the said Engagements.

III. And be it enacted by the Authority aforesaid, That in all Cases when any Judges, Justice of the Peace, or other Persons, are or shall be empowered to administer any Manner of Oath in this State, and the Person to be sworn shall be conscientiously scrupulous of taking a Book Oath in Manner aforesaid, and pray the Benefit of this Act, it shall and may be lawful for all such Judges, Justices, and other Persons, and they, and each of them, are hereby required to excuse such Person from laying Hands upon or touching the Holy Gospels; and the said Judges, Justices, and others, are hereby directed in such Case to administer the Oath required, in the following Manner, to wit, The Party so conscientiously scrupulous, and praying the Benefit of this Act, shall stand with his right Hand

> lifted up towards Heaven, in Token of his solemn Appeal to the Supreme God, whose Dwelling is in the highest Heavens, and also in Token, that if he should swerve from the Truth, he would draw down the Vengeance of Heaven upon his Head, and shall introduce the intended Oath with these Words, *viz. I* A.B. *do appeal to God, as a Witness of the Truth and Avenger of Falsehood, as I shall answer the same at the great Day of Judgment, when the Secrets of all Hearts shall be known, that, etc.* as the Words of the Oath may be. And it is hereby declared, That an Oath thus administered and taken, with the right Hand lifted up, is and shall be a lawful Oath in this State.[cccLxvii]

This act demonstrates the importance placed upon oaths and points out the reliance of the state upon a specific theological principle that God is the "Avenger of Falsehood," to whom all people who take oaths must be accountable. While people who refuse to take oaths on the Christian Bible are given an alternative method, this method involves theological content that excludes certain worldviews, such as atheism. Strong ties between good government and a Christian or theistic theology is being made by this legislation. This connection is not nearly as evident in the state's constitution.

Legislation following the ratification of the constitution that deals directly with moral issues is less clear about the connections between theoretical principles and legislative acts. There is no reiteration of laws concerning Sabbath breaking, swearing or cursing, drunkenness, or bastardy that were enacted in the colonial period. However, one example of post-Revolution period moral legislation in North Carolina addresses the topic of "disorderly persons".

> 1784
> An Act for the Restraint of idle and disorderly Persons.
> I. Whereas it becomes necessary for the Welfare of Community to suppress wandering, disorderly and idle Persons:
> II. Be it therefore enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the Authority of the same, That it shall not be lawful for any Person or Persons who have no apparent Means of

> Subsistence, or neglect applying themselves to some honest Calling for the Support of themselves and Families, and every Person so offending, who shall be found sauntering about neglecting their Business, and endeavouring to maintain themselves by gaming or other undue Means, it shall and may be lawful for any Justice of the Peace of the County … to demand Security for his or their good behaviour, and in Case of Refusal or Neglect to commit him or them to the Gaol of the County for any Term not exceeding ten Days, at the expiration of which Time he shall be set at Liberty if Nothing criminal appears against him, the said Offender paying all Charges arising from such Imprisonment; and if such Person shall be guilty of the like Offence from and after the Space of twenty Days, he or they so offending shall be deemed a Vagrant, and be subject to one Month's imprisonment with all Costs accruing thereon, which if he neglects or refuses to pay, he may be continued in Prison until the next Court of the county, who may proceed to try the said Offender, and if found guilty by a Verdict of a Jury of good and lawful Men, said Court may proceed to hire the Offender for any Time not exceeding the Space of six Months to make Satisfaction for all Costs …
>
> III. And be it further enacted by the Authority aforesaid, That it shall not be lawful for any Person or Persons of ill Fame or suspicious Characters to remove him or themselves from one County to another in this State without first obtaining a Certificate from the Sheriff of said County … [cccLxviii]

This is a clear limitation on the right to liberty, strictly speaking. However, North Carolina never grants the right to liberty in its constitution. Even other states that do, however, interpret such a right in terms of liberty that has defined limitations.

North Carolina addresses the topic of liberty in its Declaration of Rights with the following section:

> XIII. That every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.[cccLxix]

The disorderly persons legislation, however, does not violate this constitutional article, since the article allows the liberty of a citizen to be restricted as long as it is done so through a process of law. The legislation is presumably constitutional on the basis that vagrancy is not acceptable according to public opinion. The language of the legislation closely follows expectations one would have from the constitution. There is no theoretical basis asserted for this law. Consequently, one is left to presume that this limitation of liberty is justified on the basis of public opinion about what is conducive for the good of individuals and/or society at large.

The issue of polygamy is addressed by later legislation, giving such behavior the status of felony.

> 1790
> An Act to refrain all married Persons from marrying again whilst their former Wives or former Husbands are living.
> Whereas many evil disposed persons, going from one part of our country to another, and into places where they are not known, do marry, having another husband or wife still living, to the utter destruction of the peace and happiness of families:
>
> I. Be it enacted … That if any person now married, or who hereafter shall be married, doth take to him or herself another husband or wife, while his or her former wife or husband is still alive, every such offence shall be felony, and the person so offending shall suffer death as in cases of felony. Provided always, That this act shall not extend to any person or persons whose husband or wife shall continually remain beyond sea for the space of seven years together, nor to any person whose husband or wife shall absent him or herself in any other manner for the space of seven years together, such person or persons not knowing his or her said husband or wife to be living within that time.
>
> II. Provided also, and it is hereby enacted, That this act shall not extend to any person or persons, who are or shall be at the time of such after-marriage divorced according to the mode established, or which hereafter shall be established by law, nor to any person or persons whose former marriage is by law

> declared to be void and of no effect, nor to any person or persons for or by reason of any former marriage had or made within the age of consent.[cccLxx]

This legislation, while not contrary to Christian ethics, is not explicitly linked to Christian theology either. A provision for legal divorce is referenced, but never articulated. The act also takes up the case in which a spouse is abandoned or suffers the unverified loss of their spouse, either at sea or while traveling. The same conclusions could be made about the popular sovereignty basis for this polygamy legislation as with the vagrancy act. However, lest popular sovereignty be too quickly assumed as the basis for these two pieces of legislation, one must remember that both are topics addressed in Christian teachings. The lack of explicit reasoning for the legislation on these two issues makes a definitive conclusion difficult to reach.

In 1788, North Carolina's legislators take up the issue of gaming. A phrase in the preamble of the act raises some concern for assuming a purely popular sovereignty approach to moral legislation in North Carolina.

> 1788
> And Act to revive Part of an Act, entitled, An Act to suppress excessive Gaming.
> Whereas by the Repeal of the above recited Act, Gaming Debts to any Amount are recoverable before any Jurisdiction in the State, whereby many Abuses and Injuries arise, and Vice and Immorality are encouraged: For Remedy whereof,
> I. Be it enacted … That from and after the passing of this Act, every Promise, Agreement, Note, Bill, Bond or other Contract, to pay, deliver or secure Money or other Thing won or obtained by playing at Cards, Dice, Tables, Tennis, Bowls, or other Games, Horse-Racing excepted, or by wagering or betting on either of the Parties who shall play at such Games, or to repay or secure Money or other Thing lent or advanced for that Purpose, or lent or advanced at the Time of such gaming, playing, betting, laying or adventuring, shall be void; and every Conveyance or Lease of Land, Tenements or Hereditaments, sold, demised or mortgaged … to satisfy or

> secure Money so won … shall be and is hereby declared void.[cccLxxi]

In the preamble of the act, gaming is said to lead to "abuses and injuries" as well as to encourage "vice and immorality." References to abuse and injury suggest a concern for the violation of the right to life, liberty or property. "Abuse" or "injury" could be believed by popular opinion to be indirectly caused by gaming. The terms vice and immorality connote an appeal to a sense of right and wrong that is everywhere applicable.

North Carolina's legislation is confusing in light of the analysis of its constitution. It is safe to say that its legislators do not, when drafting post-revolutionary legislation, follow a consistent principled approach in enacting moral legislation. While the constitution suggests a largely popular sovereignty approach, other evidence derived from legislation regulating the practice of oaths suggests that the legislators were relying on theological principles to guide their deliberations. The other pieces of legislation of morality that extend beyond the scope of protection of life, liberty and property provide no clear appeal to theological or philosophic principles for their basis. At best, the theological principles must be inferred in light of the evidence of the legislation dealing with oaths.

GEORGIA

The earlier discussion of Georgia's constitution concluded that legislation of morality beyond the protection of life, liberty and property is not a primary concern. Even though there is reference to a fixed law of reason, the issue of legislating morality broadly seems to be irrelevant in the constitution. The history of Georgia's colonial government does not portray the same lack of concern for legislation that regulates private morality. In 1762, Georgia's colonial legislature enacted legislation entitled "An Act for preventing and punishing vice, profaneness and immorality, and for keeping holy the Lord's day, commonly called Sunday."[cccLxxii] This act clearly portrayed a view of government that saw the encouragement of religion as one of its functions. The act's preamble states the following:

> Whereas there is nothing more acceptable to God than the true and sincere worship and service of him, according to his holy will, and that the keeping holy the Lord's day is a principal part of the true service of God, which in this province is too much neglected by many. [cccLxxiii]

Among other things, the act establishes fines for breaking the Sabbath, thereby entering a moral arena that extends beyond life, liberty, and property. This also demonstrates an endorsement of Christian instruction and ethics.

Of all the moral legislation in Georgia after the state's constitution is ratified, three issues arise that extend beyond the scope of protecting life, liberty and property: gaming, profanity, and vagrancy. On February 1, 1788, Georgia's lawmakers demonstrated their concern for moral legislation by making amendments to colonial-period legislation in an act entitled, *An Act to amend an act, entitled, 'An act for the punishment of vagabonds, and other idle and disorderly persons,' passed the twenty-ninth day of February, 1764.*

> Whereas the pernicious practice of gaming is carried to a great length in this State to the great detriment and hurt thereof, to prevent which as much as may be, and to enhance the fines and penalties to be levied by several laws heretofore made to suppress, and to prevent such gaming: Therefore be it enacted … That every person or persons liable to penalties and forfeitures, as are pointed out in the said acts. [cccLxxiv]
>
> That if any public officer shall take a profane oath, he shall forfeit the sum of five shillings for every such offence: And any other person or persons whatsoever, not being a public officer, for such offence shall forfeit two shillings and six-pence.[cccLxxv]
>
> I. Whereas divers idle and disorderly persons, having no visible estate, or lawful employment, and who are able bodied men capable of laboring for their support, yet frequently strole from divers parts of the world to this State, and from one county to another within the same, neglecting to labor or to follow any honest employment for their support … by which means they become a pest to society; for remedy whereof, Be it enacted … That all able bodied persons, not having some

visible property sufficient, or who follow some honest employment sufficient for the support of themselves and for their families (if any) and who shall be found loitering and neglecting to labor for reasonable wages; and likewise all persons who run from their habitations, and leave wives or children without suitable means for their subsistence, and all other idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employment or honest labor, shall be deemed and adjudged vagabonds.

II. And be if further enacted by the authority aforesaid, That if any such vagabond as aforesaid shall be found within any county in this State, wandering, strolling, loitering about, or misbehaving himself, it shall be lawful for any justice of the peace of the county … to examine and inform himself as well by the oath and examination of the person apprehended … and if it shall then appear that any person so apprehended is under the description of vagabonds within this act, if it doth appear upon trial that any such person doth not cultivate at least three acres of ground in some grain or other, or that he is of some mechanic trade, and works at that trade for his support, or that he is in some honest employment engaged by the State … the said justice shall cause every such vagabond to give bond with sufficient security, for his good behavior, and for his engaging himself to some lawful calling, or honest labor; and if he shall fail to give such security, to the satisfaction of the justice, then the said justice is hereby required to commit him to the common gaol of the county, there to remain until such security be given, or until the next superior court of the said county; which court is hereby empowered if no security be then offered to bind such vagabond to service, or wages for the term of one year, and such wages after deducting the charge of the prosecution … in full of all other recompense or reward whatever; but if any such vagabond be of such evil repute that no person will receive him into service, in such case the court shall order him a number of lashes not exceeding thirty-nine, to be well laid on his bare back, at the public whipping post, and then to be discharged; and in both cases every such vagabond shall be afterwards liable to the like prosecution and punishment for

> every offence of vagrancy whereof he shall be guilty as aforesaid.[cccLxxvi]

In two of the three issues addressed, the punishments are associated with the crime. The gaming legislation punishes the crime of using money in a manner that is considered "pernicious" with monetary fines: 100 pounds for owning a billiard table with intent to utilize for gaming, 20 pounds for every incidence of gaming in a public facility, and 100 pounds for horse racing. The crime of vagrancy is punished in some cases by requiring a one year term of productive labor in society, the wages of which are paid to the court. These laws are not explicitly related to theological or philosophical moral principles. While they are not inconsistent with the principles of Christian ethics or principles in the Western philosophic tradition, they are not tied to such principles either. For example, a vagrant person is simply said to be a "pest to society," whereas gaming causes "great detriment and hurt" to the State. This language suggests an approach to lawmaking primarily on the basis of the principle of popular sovereignty. These behaviors are viewed as a nuisance or a destructive influence on society.

The one exception to this is found in the title of the act in which the law against profanity is included. It was enacted in August 14, 1786 under the title of *An Act to regulate taverns, and to suppress vice and immorality*. As in our previous discussions, the use of the terms "vice and immorality," suggests a view of moral principles that are fixed by nature or theological principles. However, more evidence is needed to argue that the moral legislation created after the ratification of the constitution is grounded upon anything besides an appeal to popular opinion.

Two other legislative acts provide the kind of additional evidence needed to get more insight into the thinking of Georgia's legislators. The first act is dated November 15, 1778 in the midst of the war. This act is clearly an attempt to clarify the status of law in Georgia. It reauthorizes the colonial laws in order to avoid having to write an entirely new corpus of law immediately.

> An Act to revive and continue the several acts therein referred to.
> Whereas several useful and necessary laws of this State (then province) are expired, and divers other good and wholesome

> laws will expire with this present session; and to the end that disputes and difficulties nay not arise touching the present validity of the said laws so made and passed as aforesaid within the said territory of Georgia,
> I. Be it enacted by the representatives of the freemen of the State of Georgia in general assembly met, and by the authority of the same, That from and after the passing of this act, all laws heretofore made in the then province now State of Georgia, have not been repealed, and all the laws of England, as well statute as common, and heretofore used and adopted in the courts of law of the then province, now State of Georgia, and which were used and of force at the time of the revolution … shall be of full force, virtue, and effect, to all intents and purposes as were heretofore had, used, and revived, as the law of this land.[cccLxxvii]

The purpose of this legislative act is identical to the constitutional provisions in several other states addressed above. This act, therefore, preserves the legal status of all previous moral legislation, including that of 1762 (addressed above). There is no legislation within several decades following the ratification of the constitution that seeks to amend or reject the laws of 1762. Georgia does not repudiate their early colonial positions, which grounded their moral legislation on Christian moral positions.

The second legislative act to be examined does not establish moral laws but rather involves public education. Enacted on January 27, 1785, this act reveals with greater clarity the perspective of Georgia's legislators towards the government's role in the moral formation of citizens.

> An Act for the more full and complete establishment of a public seat of learning in this State.
> As it is the distinguishing happiness of free governments, that civil order should be the result of choice, and not necessity, and the common wishes of the people become the laws of the land, their public prosperity, and even existence, very much depends upon suitably forming the minds and morals of their citizens. Where the minds of the people in general are viciously disposed and unprincipled, and their conduct

> disorderly, a free government will be attended with greater confusions, and with evils more horrid than the wild uncultivated state of nature: It can only be happy where the public principles and opinions are properly directed, and their manners regulated. This is an influence beyond the sketch of laws and punishments, and can be claimed only by religion and education. It should therefore be among the first objects of those who wish well to the national prosperity, to encourage and support the principles of religion and morality, and early to place the youth under the forming hand of society, that by instruction they may be molded to the love of virtue and good order ….
>
> This country, in the times of our common danger and distress, found such security in the principles and abilities which wise regulations had before established in the minds of our countrymen, that our present happiness, joined to pleasing prospects, should conspire to make us feel ourselves under the strongest obligation to form the youth, the rising hope of our land, to render the like glorious and essential services to our country.[cccLxxviii]

At the outset of the passage, the impression is given that popular opinion should be the dominant principle directing the course of the regime, including legislation. "The common wishes of the people" is said to be that which drives legislation. However, the passage goes on to point out that "public principles and opinions" need to be "properly directed" and "their manners regulated." Both of these components (i.e., properly directed opinions and regulated manners) demonstrate that Georgians do not think one opinion is as good as any another. In other words, public opinion that is not well directed is not worthy of being followed or incorporated in legislation.

The passage goes on to admit that public opinion must be shaped by "principles of religion and morality" if the regime is to attain its good objectives. Georgia has previously found security in "principles" which were wisely "established in the minds" of the people. Thus, Georgia's leaders think that their state must be guided by theological and moral principles. The reference to "principles of religion" suggests a commitment to Christian principles of morality, since its constitution requires civil officials to be "of the Protestant religion" as was pointed

out in chapter three. The reference to "principles of … morality" probably refers to moral principles derived from the western philosophic tradition, understood to be those derived from what Georgia's constitution calls "the laws of nature and reason."

While Georgia recognizes the necessity of right principles being cultivated in the thinking of its citizens, it rejects the notion that government is capable of regulating this cultivation process. The cultivation of citizens' character and right thinking is "beyond the sketch of laws and punishments." Thus, the state's legislators recognize that success is dependent on religious and educational institutions. This conclusion is consistent with the constitution. In light of this passage, the constitution must be interpreted as withholding an extensive mandate for government to legislate morality because government is not the proper agent for moral formation, not because proper moral formation is considered to be an irrelevant issue in the state of Georgia.[cccLxxix]

The fact that Georgia does not repeal the laws of 1762, does not necessarily contradict this position. There were surely too many other concerns to make colonial moral legislation worth repealing, especially since these laws are in line with the principles understood to be necessary for proper moral formation. Therefore, while the constitution does not clearly articulate its position, evidence suggests that theological and philosophical principles were understood by Georgians to provide the needed foundation upon which the state was to be built and sustained. However, they also were convinced that these principles could not effectively be inculcated into the thinking and moral character of the people through governmental means, but only through the religious and educational institutions.

NEW YORK

In previous chapters, New York's constitution was found to grant the powers to legislate on issues of private morality implicitly, creating the expectation that government should do so, even though it does not explicitly grant the power to do so. Given the findings from previous chapters, the basis for regulating private morality through legislation is found in the constitution's natural rights doctrine. The view of natural rights in the constitution is grounded on a philosophically oriented deism or theism more so than a revelation-oriented Christian theology.

This chapter's analysis of New York's legislation will seek to determine whether the legislators understood themselves to have the responsibility implicitly granted in the constitution to regulate private morality based on philosophical or theological principles. All of the laws to be examined were enacted in 1788 with the exception of one enacted in 1787. This demonstrates a concern by New York's legislators in 1788 to address a variety of moral issues in one legislative session.

The first example of New York's legislators regulating private morality is found in a law created to address the issue of children born out of wedlock. However, like Maryland, it takes a stance against bastardy in order to protect private property rather than on theistic principles. The law is meant to prevent people from leaving their children to the care of government, or indirectly placing the burden of caring for children on the community at large.

> An Act for the Relief of Cities and Towns, from such Charges as may arise from Bastard Children born within the same.
> Passed 7th February, 1788.
> Whereas bastards, or children begotten and born out of lawful matrimony, are often left to be kept and provided for at the charge of the respective cities or towns in which the same are so born, to the great burden of the same cities or towns; for remedy whereof,
> I. Be it therefore enacted by the people of the state of New-York … That any two justices of the peace of any city, or of any county … upon examination of the cause and circumstance, shall and may, by their discretion, take order for the better relief of every such city or town, in part or in all, and shall may likewise, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father with the payment of money weekly … and if after the same order by them subscribed under their hands, the mother or reputed father, upon notice thereof, shall not for his or her part observe and perform the said order, shall be committed to the house of correction, or (for want thereof) to the common gaol of such city or county, there to remain without bail or mainprise, except he or she shall put in sufficient surety to perform the said order ….

II. And be it further enacted … if any woman shall be delivered of a bastard child, which shall be chargeable, or likely to become chargeable to any city or town, or shall declare herself to be with child, and … charge any person with having gotten her with child, it shall and may be lawful to and for such justice or justices … to issue out his or their warrant or warrants, for the immediate apprehending such person so charged as aforesaid, and for bringing him before such justice or justices … and the justice or justices before whom such person shall be brought, is and are hereby authorized and required to commit the person so charged as aforesaid, to the house of correction, or common gaol of such city or county, unless he shall give security to indemnify such city or town ….

VI. And whereas the putative fathers and lewd mothers of bastard children, often run away out of the city or town, and sometimes out of the county, and leave the said bastard children upon the charge of the city or county, and leave the said bastard children upon the charge of the city or town where they are born, although such putative father or mother have estate sufficient to discharge such city or town: Therefore, Be it further enacted by the authority aforesaid, That it shall and may be lawful for the overseers of the poor of such city or town where any bastard child be born, to apply to any two justice of the peace of the city or county, where the estate real or person, or any part thereof, of such putative father or lewd mother, may be, and by warrant under the hands and seals of the said two justices who are hereby authorized and required to issue the same to seize and take the goods and chattels, and to let out and receive the annual rents and profits of the lands and tenements of such putative father, or lewd mother, so absconding as aforesaid, for and towards the bringing up and providing for such bastard child so left as aforesaid; and … to sell and dispose of so much and so many of the said goods and chattels, at public vendue, to the highest bidder, and to receive the said rents and profits, or so much thereof as shall be ordered by the said sessions, and to apply

> the money arising thereby towards the bringing up and providing for such bastard child so left as aforesaid.[ccclxxx]

The consistent issue in this act is the concern for funds to support the upbringing of a child left to public care. The law makes the father and/or mother responsible to provide the needed resources for the care of the child, so that there is not a "great burden" placed on the rest of the individuals in the community to cover the costs associated with the child's upbringing. Irresponsibility on behalf of the parents is taken seriously enough to justify the government's seizing private property and collecting rent from the parents' property if they abandon the child. Thus, like in Maryland, the issue is not only a judgment concerning private morality (e.g., parents are responsible to care for their own), but also an issue of protection of private property.

Two laws that are more clearly regulating private morality are associated with marriage. This law, enacted in 1787, involves an element of concern for private property, but goes beyond that concern.

> An Act directing a Mode of Trial, and allowing of Divorces in cases of Adultery.
> Passed 30th March, 1787.
> Whereas the laws at present in being within this state, respecting adultery, are very defective, and application have, in consequence, been made to the legislature, praying their interposition: And whereas it is thought more advisable for the legislature to make some general provision in such cases, than to afford relief to individuals, upon their partial representations, without a just and constitutional trial of the facts:
> I. Be it therefore enacted by the people of the state of New-York, represented in senate and assembly, and it is hereby enacted by the authority of the same, That it shall and may be lawful, in all cases of adultery … for the party injured to exhibit or present a petition or bill to the chancellor of this state … setting forth the adultery of which he or she complains. Whereupon a subpoena, and other process shall issue, as in other causes in the said court, until the party complained of shall appear and answer the allegations of the said bill or petition, which answer shall be received without

oath; and if the party complained of shall, by his or her answer, deny the fact or facts of adultery stated in the said bill or petition, the chancellor shall and may thereupon direct such proper issue or issues, as to him shall seem expedient for trial of the fact or facts of adultery state in the said bill or petition, which issue or issues shall be tried either by a special or common jury, before judged of the supreme court, or some or one of them, as the bar of the said court, or at any circuit court within this state, as the chancellor for the time being, shall direct. But if the said party complained of shall not, in his or her said answer, deny the allegations of the said bill or petition, or if such proceedings shall be had in the same court of chancery, that the said bill or petition ought, according to the course of that court, to be taken pro confesso, then, and in either of the said cases, the chancellor shall nevertheless direct proof to be made before one of the masters of the said court, of the facts stated in the said bill or petition, who shall report the same proofs, and his opinion thereon, to the chancellor, as such time as shall be by the said court of chancery for the purpose appointed.

II. And be it further enacted by the authority aforesaid, That if by the verdict of a jury, upon trial of such issue or issues as aforesaid, it shall appear or be found that the said party complained against was guilty of adultery, if sufficient proof has been thereof had in the manner herein before prescribed, where the fact or facts stated in such bill or petition as aforesaid, have been confessed by the answer of the party complained against, or ought, according to the course of the said court of chancery, to be taken pro confesso, then, in any such case, the chancellor shall and may proceed, by sentence or decree in the same court, to pronounce the marriage between the said parties to be dissolved, and both of them freed from obligations of the same: Provided, That such dissolution of such marriage, shall in no wise affect the legitimacy of the children thereof. And the chancellor shall and may thereupon take such order touching the care and maintenance of the children (if any there be) of that marriage, and also touching the maintenance of the wife, or any allowance to be made to her, and the security to be given for

> the same, as from the circumstance of the parties, and the nature of the case, may be proper and sufficient.
> III. And be it further enacted by the authority aforesaid, That after the dissolution of any marriage has been pronounced by virtue of this act, it shall not be lawful for the party convicted of adultery, to re-marry any person whatsoever; and that every such re-marriage shall be null and void; but that the other party may make and complete another marriage, in like manner as if the party convicted was actually dead; any law, usage, or custom to the contrary thereof in any wise notwithstanding.[cccLxxxi]

This law was motivated by the desire to replace "very defective" adultery laws in New York. New York had already addressed the issue of adultery in its colonial laws, but it felt such laws were inadequate.

The legislators had been entreated to improve their laws on adultery, though it is not mentioned by whom (whether by the public or government officials). The situation appears to be one in which parties charged with adultery were not considered to have adequate due process. The current process did not involve a "just and constitutional trial of the facts." In spite of this problem, the solution offered does not do away with punishments for adultery, rather it attempts to make the process more constitutional and just. If the party or parties charged with adultery are found guilty, the court may dissolve the marriage, requiring the husband (if a convicted party) to provide financial support for the ex-wife and any children. In addition, any convicted party is prohibited from re-marrying. In other words, a convicted adulterer risks having his or her marriage nullified, incurring financial commitments, and being forbidden from re-marrying. Only the second of the three punishments relate to a concern for private property.

The requirement to provide financially for an ex-spouse and children may well be based on the reasoning of the bastardy laws enacted a year later. If so, it is an issue of making people responsible for their choices and indirectly protecting private property of the community at large from paying for an individual's poor choices. The first and third punishments listed above are not an issue of protection of private property. The nullifying of the marriage is an intrusion of government into a very private matter. It allows government to intervene in an adulterous marriage and dissolve it. Even a convicted

adulterer who wants to try to salvage his or her marriage can be barred from doing so under the authority of this law.

The judgments of this legislation of morality are not explicitly made on the basis of theological or philosophic principles. The previous laws are said to be "very defective", but no principles are given as a sound basis for this new legislation. While this response to adultery is not found in the teachings of Christianity or the Bible, however, its judgment that adultery is wrong is. Thus, the commitment to punish adultery and create a deterrent against its practice is consistent with Christian moral principles. At the outset of this chapter, however, it was noted that New York's constitutional basis for legislating morality is a philosophically oriented theism more so than principles from Christian theology. However, the two views, as it relates to adultery, need not be seen in conflict. A philosophic theism can be demonstrated to view adultery as a blameworthy practice as much as Christian theology does. Philosophic arguments have been articulated for the existence of a divine being who created human beings with a particular design for their lives including monogamous marriage. For example, Locke makes the argument that "adultery, incest, and sodomy … cross the main intention of Nature, which willeth the increase of Mankind."[cccLxxxii]

The second law addressing marriage was enacted in February 1788. It makes a strong statement against the practice of polygamy, giving it the status of a felony.

> If any person or persons being married, or who hereafter shall marry, do at any time marry any person or persons, the former husband or wife being alive, then every such offence shall be felony … but neither this act, not any thing therein contained, shall extend to any person or persons whose husband or wife shall be continually remaining without the United States of America for the space of five years together, or whose husband or wife shall have absented him or herself the one from the other by the space of five years together, the one of them not knowing the other to be living within that time; nor to any person or persons who are, or shall be, at the time of such marriage, divorced by the sentence or decree of any court having cognizance thereof; nor to any person or persons where the former marriage hath been, or shall be, by the

> sentence or decree of any such court, declared to be void and of no effect.[cccLxxxiii]

Again, while there is no explicit theological basis given for the decision to prohibit polygamy, this law demonstrates a strong commitment to the heritage of western Christianity. While the Bible has many examples in the Old Testament in which polygamy was practiced, the New Testament suggests that marriage between one man and one woman is the standard for followers of the Christian faith.

> Here is a trustworthy saying: If anyone sets his heart on being an overseer, he desires a noble task. Now the overseer must be above reproach, the husband of but one wife, temperate, self-controlled, respectable, hospitable, able to teach, not given to drunkenness, not violent but gentle, not quarrelsome, not a lover of money.
> I Timothy 3:1-3

This standard for marriage, while given to church leaders, has become the standard accepted in Christian tradition for all believers. The teaching of Jesus in the New Testament does not explicitly condemn polygamy, nor does the Old Testament. The broader more prevalent biblical standard is for people to honor marriage as a sacred commitment not to be violated. New York's view that polygamy is not only wrong, but demands the most severe punishment is, therefore, more consistent with the western Christian tradition than it is with the older biblical tradition, especially that found in the Old Testament (e.g., King David and King Solomon, both revered Old Testament figures, had polygamous marriages).

The law forbidding polygamy clearly steps beyond the bounds of protection of life, liberty, and property in its regulation of private morality. It is does not provide its reason for prohibiting the practice, giving the impression that there is no question of its blameworthiness. However, a marriage of consent between more than one woman and one man, or more than one man and one woman, does not infringe on the rights to life, liberty or property of others. While the law takes a firm stand against polygamy, it is not so inflexible as to ignore extenuating circumstances. It does allow for re-marriage in cases where a spouse has left the country and not returned within a five-year

period, or has abandoned a spouse and remained absent for at least a five-year period. In this way, New York provides a way for men or women whose spouses have abandoned the marriage to re-marry. This is especially important for women in a period of history when being abandoned by their husbands left them without the means to provide for their family's financial needs.

There are two laws that relate to the use of one's labor or property. They demonstrate a concern for a solid work ethic and productivity. The first example is a law prohibiting most forms of gaming. This piece of legislation is not unlike what has been found above in other gaming laws. The justification for prohibiting gaming is simply stated: "the laws now in force, for preventing the mischiefs which happens by gaming, having been found insufficient."[ccclxxxiv] In other words, gaming leads to consequences that are inappropriate. The wording of this short phrase could be taken to suggest a popular sovereignty approach to legislation. It is as if New Yorker legislators are saying, "Since it causes problems we do not want the practice of gaming to be allowed." What it also reveals is that laws against gaming were previously enacted and still in force. This law, therefore, demonstrates a renewed commitment to restrict such behavior, creating a law that is more effective at restricting gaming than the older law had been.

The gaming law declares any winnings from gaming void.

> That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever … or other valuable thing or things whatsoever won by gaming or playing at cards, dice, tables, billiards, tennis, bowls, shuffle-board, or other game or games whatsoever; or by betting on the sides or hands of such as do play at any of the games aforesaid … shall be utterly void. [ccclxxxv]

In a later section of the gaming legislation, a clarification of what is meant by the "mischiefs" associated with gaming. Here one sees that the lifestyle of people involved in gaming is of utmost concern: "divers lewd and dissolute persons live at great expenses, having no visible estate, profession or calling, to maintain themselves, but support those expenses by gaming only."[ccclxxxvi] Gaming is not considered a "profession or calling." It is contrary to the understanding of natural rights established by the constitution. As discussed in previous

chapters, the doctrine of natural individual rights espoused by early Americans is intended to provide people with opportunities to acquire property so that they can be personally responsible for physical sustenance, not be at the mercy of feudal lords or other authorities. A lifestyle of gaming is not considered an appropriate means for provided for one's physical needs. The reason for this is that it does not conform to the early American view of what is a just form of acquisition of property. Their views had been influenced by enlightenment thinkers like Locke and Adam Smith who tie acquisition of property to productive labor.[cccclxxxvii] Acquiring property through the means of gambling is not productive because it does not produce any tangible commodities with intrinsic value. Labor that is just leads to the production of tangible commodities. For example, a piece of steel is transformed into a horseshoe by a black smith and a seed is transformed into a harvest of wheat by a farmer sowing and reaping. Both of these examples are productive toward meeting material needs.

This analysis of gambling as it relates to the right to acquire property raises a significant point. The various issues discussed above are often addressed in ways that are consistent both with theological principles and with natural individual rights doctrine. This is no surprise, since the natural individual rights doctrine was previously demonstrated in several states' constitutions to be built upon the foundation of theological principles. Thus, an argument for monogamous marriage can be understood not only in terms of the commands of revealed religion, but as the conditions for the natural right to pursue happiness. If humans were created by a divine being with a particular design in which monogamous marriage is the optimal condition for personal fulfillment, than government regulation of marriage contributes to citizens attaining happiness. To put it in other terms, polygamous marriage is understood to never lead to personal fulfillment or happiness, and thus it falls outside the appropriate limits of individual liberty. Likewise, acquiring property through gambling falls outside the boundaries of legitimate vocations.

In addition to gambling not being considered a legitimate vocation, it encourages other kinds of immoral behavior. Gamblers, the legislation asserts, tend to be "lewd and dissolute." Gambling tends to produce a lifestyle characterized by overindulgences. The use of the term "lewd" suggests overindulgences associated with sexual behaviors while "dissolute" suggests other kinds of materialistic overindulgences.

One has only to think of the contemporary conditions associated with gambling in New Jersey and Nevada to understand what the early American legislators had in mind. Besides making any winnings from gambling void, the legislation attempts to deter gambling by making people who are suspected of living off of gambling winnings put down "sufficient sureties" as a guarantee for good behavior for a year. If the person cannot put down the required money for security of good behavior, that person can be put into a workhouse or jail until the security can be provided. Any person who puts down the required security who is found to gamble during that 12-month period with a sum greater than twenty shillings forfeits the security money.[cccclxxxviii]

The issue of having a legitimate vocation by which a person can acquire property is taken up by a second piece of legislation from 1788. It deals with "disorderly persons." It follows the approach of other states that have similar legislation. Disorderly people are defined as those who have no "visible means of livelihood." [ccclxxxix] A primary concern is with men who "leave their wives and children." Disorderly persons are described as follows:

> All persons, who not having wherewith to maintain themselves, live idle without employment, and also all persons who go about from door to door, and place themselves in the streets, highways or passages, to beg in the cities or towns where they respectively dwell, and all jugglers, and all persons pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes, or to discover where lost good may be found; and all persons who run away and leave their wives and children, whereby they respectively become chargeable to any city or town; and all persons wandering abroad and lodging in taverns, beer-houses, outhouses, market-places, or barns, or in the open air, and not giving a good account of themselves, and all persons wandering abroad and begging, and all idle persons not having visible means of livelihood, and all common prostitutes, shall be deemed and adjudged disorderly persons"[cccxc]

These practices do not contribute to the good of the community or of the disorderly person him or herself. They do not produce personal sustenance or the sustenance of one's wife or children. The penalty

may be placing the convicted person into a workhouse for up to sixty days. Such a person also has his or her liberty to travel regulated. If a person who is apprehended without the necessary money to return to his or her legal place of residence, anything of value on their person may be sold in order to guarantee their return. This guarantees that the person does not become a burden on a community that is not the legal place of residence of the individual. If the traveler does not have enough money or other property to guarantee passage back to the place of his or her legal residence, the local government may force the person to be employed with earnings being put toward such passage. [cccxci]

These laws concerning vocations and the appropriate boundaries of liberty when it comes to one's labor have been demonstrated to be closely tied to the early American view of natural individual rights grounded on either deistic or theistic theological principles. The commitment to a strong and productive work ethic is a predominant theme in the Protestant traditions prevalent in the early American state culture. Not surprisingly, it shows up in legislation. For New York, however, the constitution's position is fairly generic when it comes to its theological principles. It is not as explicitly Protestant or Christian in its language as other states. The last example of legislation, however, demonstrates that vaguely theistic language is interpreted by legislators as endorsing a Christian ethical point of view. While this piece of legislation addresses drunkenness and profane language,[cccxcii] it also prohibits the breaking of the Sabbath.

> There shall be no traveling, servile labouring, or working (works of necessity and charity excepted) shooting, fishing, sporting, playing horse-racing, hunting, or frequenting of tipling houses, or any unlawful exercises or pastimes, by any person or persons within this state, on the first day of the week, commonly called Sunday.[cccxciii]

New York's Sabbath law is very similar to those found in other states. The fine for Sabbath breaking is six shillings. Any person attempting to sell goods on the Sabbath must forfeit any revenues taken in as well as any goods that had not been sold that were displayed for sale.[cccxciv] The uniqueness of this commitment to honor the Sabbath in New York demonstrates a commitment to endorse a specific command from Christian practice, whether espoused from a Christian deistic or

Christian theistic point of view. The previous restrictions addressed in New York are not explicitly tied to specifically Christian moral principles, but rather can be deduced from general principles of natural law.

The findings from the previous chapters imply that the legislature has the power to enact legislation that regulates private morality. This power was understood by the state's legislators, as is demonstrated by a number of examples above. The example of the Sabbath law seems to be grounded in a specifically Christian point of view, whether deistic or theistic,

SOUTH CAROLINA

South Carolina falls into a similar situation to that found in Delaware. The state's legislature enacts very few new laws that address moral issues beyond the protection of life, liberty and property after ratification of the constitution. However, the constitution states that the colonial laws are still in force after ratification.

> That the resolutions of the late congress of this State, and all laws now of force here, (and not hereby altered,) shall so continue until altered or repealed by the legislature of this State, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration.[cccxcv]

The colonial laws in South Carolina deal with moral issues extensively and there is no record of them being repealed or altered in the years after ratification.

In 1703, South Carolina prohibited blasphemy and profane language.

> An Act for the more effectual suppressing of Blasphemy and Prophaneness.
> Whereas some persons have of late years openly avowed and published many blasphemous and impious opinions, contrary to the doctrines and principles of the Christian religion, greatly tending to the dishonor of Almighty God, and may prove destructive to the peace and welfare of this province:

Wherefore, for the more effectual suppressing of the said detestable crimes, Be it enacted That if any person or persons, having been educated in, or at any time having made profession of the Christian religion within this province, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or shall assert or maintain there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and shall, upon indictment or information in any of the courts of record within this part of the province, be thereof lawfully convicted, by the oath of two or more credible witnesses, such person or persons for the first offence, shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, be member of the assembly, or have or enjoy any employment or employments, ecclesiastical, civil or military, or any part in them, or any profit or advantage appertaining to them, or any of them; and if any person or persons so convicted as aforesaid, shall at the time of his or their conviction, enjoy or possess any office, place of trust, or employment, such office, place of trust or employment shall be void, and is hereby declared void; And if such person or persons shall be a second time lawfully convicted as aforesaid, of all or any of the aforesaid crimes, that then he or they shall from thenceforth be disabled to sue, prosecute, plead or use any action or information in any court of law or equity or to be guardian of any child, or executor or administer of any person, or capable of any legacy or deed of gift, or bear any office, civil or military, or benefice ecclesiastical, or be capable of being a member of assembly for ever within this part of the province; and shall also suffer imprisonment for the space of three years without bail or mainprize, from the time of such conviction.

II. Provided, That no person shall be prosecuted by virtue of this act for any words spoken, unless the information of such words shall be given upon oath before one or more justice or justices of the peace within 4 days after such words spoken, and the prosecution of such offence by within 3 months after

> such information; Provided also, That any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid, shall for the first offence, upon his, her or their acknowledgment and renunciation of such offence or erroneous opinions, in the same court where such person or persons was or were convicted as aforesaid, within the space of 4 months after his, her, or their convictions, be discharged from all penalties and disabilities incurred by such convictions, anything in this act contained to the contrary thereof in any wise notwithstanding.
> May 6, 1703.[cccxcvi]

The law prohibits any denial of or disrespect for Christian doctrine by people educated in Christian doctrine. The law is clear to specify that only those who have been exposed to Christian doctrine are bound to be respectful and faithful to it in their writings or speech. Such citizens in South Carolina are not at liberty to make public statements that are derogatory toward Christian theological principles such as the Trinitarian view of God, monotheism, and the divine inspiration of Christian scripture. The law's punishment is to restrict the convicted person from employments in government, religious organizations, or the military. If convicted a second time, the punishment becomes more severe, involving 3 years of imprisonment.

The final section of the law, however, demonstrates South Carolina's willingness to ease the punishment for people who renounce their blasphemous or profane statements. If the renunciation is made within 4 months after conviction, the punishment is discharged. In this way, South Carolina's law compares to other states on this topic in that it attempts to restrict citizens from degrading the Christian God and Christian doctrine, but in many ways it is more lenient in allowing those convicted of the crime to escape the punishment if they renounce their statements. This is a more gracious approach, recognizing that people may fall into "erroneous opinions" and quickly recognize their mistake. The bottom line is that South Carolina, from early in its colonial period, demonstrates a commitment to Christianity as a right and good end for human beings. Therefore, no one is justified in being derogatory towards the Christian religion.

South Carolina also enacts a law against bastardy in 1703. This law includes the typical punishments for a woman convicted of giving birth to a bastard child, including the possibility of fines, jail time, and public whipping. [cccxcvii] The reasons for this law are threefold: "Whereas great charges ariseth upon many places in this province by reason of bastardy, besides the great dishonor to Almighty God, and the evil encouragement of lewd life." As mentioned previously, South Carolina is concerned with the violation of the rights of property of other citizens whose taxes often become necessary to support bastard children since there is no father to assist in providing the necessary finances for the upbringing of the child. In addition to this, bastardy is dishonoring to God, and no one has a right to dishonor God. Finally, bastardy is considered the result of vice. To leave those involved in bastardy unpunished results in "the evil encouragement of lewd life." It is morally wrong.

In 1712, South Carolina enacted its version of a Sabbath law. The preamble of the act presumes that government is justified in encouraging Christian religious practices in its citizens.

> An Act for the better observation of the Lord's Day, commonly called Sunday.
> Whereas there is nothing more acceptable to God than the true and sincere service and worship of him, according to his holy will, and that the holy keeping of the Lord's Day is a principal part of the true service of God, which in many places of this Province is so much profaned and neglected by disorderly persons. [cccxcviii]

South Carolina's colonial Sabbath law institutes punishment for anyone that neglects to participate in public worship on Sunday.

> Be it therefore Enacted that all and every person and persons whatsoever, shall on every Lord's Day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately, and having no reasonable or lawful excuse on every Lord's Day shall resort to their parish church, or some other parish church or some meeting or assembly of religious worship, tolerated and allowed by the laws of this Province, and shall

> there abide orderly and soberly during the time of prayer and preaching, on pain and forfeiture for every neglect the sum of 5 shilling of current money of this Province.[cccxcix]

The law is similar to other later Sabbath legislation. It goes on to establish additional fines of 5 shillings for anyone engaging in labor.[cd] Traveling and recreational activities are banned, public facilities are restricted from any forms of entertainment, and anyone attempting to sell goods must forfeit such goods. This legislation, like Massachusetts' law later in the century, establishes a procedure by which "church wardens" are authorized and charged with enforcing the Sabbath regulations.

In addition to its own writing of legislation during the colonial period, South Carolina adopted certain English laws to be in force. The laws adopted from English law include: *An Act against deceitful, disorderly, and excessive Gaming*[cdi] and *An Act for the more effectual suppressing Prophane Cursing and Swearing*.[cdii] This collection of colonial laws still in force after the ratification of the constitution demonstrates a legislative commitment to address issues of morality beyond protection of life, liberty and property. The theological commitments from the constitution in addition to the reasons given in legislation above suggests that South Carolina based its moral legislation on Christian theological principles during colonial times and made no attempt to change that position after the ratification of the state's constitution. Even though analysis of the constitution concluded that moral formation was expected to be carried out largely by means of the Protestant state churches of South Carolina, the fact that very little changes were made to colonial-period legislation concerning personal morality suggests that the legislators affirmed a role for government to regulate private morality.

CONCLUSION

In conclusion, the moral legislation from the eight states examined in this chapter is very similar to the moral legislation found in the three states that were given a clear constitutional mandate to legislate morality in a principled manner. Of the eight states, seven states' legislatures (Virginia, New Jersey, Delaware, North Carolina, Georgia, New York, South Carolina) demonstrate a commitment to legislate

morality beyond protection of life, liberty and property. Of those, evidence suggests that four (Virginia, Delaware, New York, South Carolina) of them do so on the basis of theological and philosophic principles in the same manner as Pennsylvania, Vermont, and Massachusetts. The study of North Carolina proved inconclusive as to whether it was basing its moral legislation on fixed principles or popular opinion or both. Georgia is a unique case in which its conviction appears to be that the regulation of morality should occur through non-governmental means and, yet, as an early state it kept colonial legislation that extensively regulated morality. Of the eleven states examined, only one (Maryland) lacked evidence to suggest a commitment of state legislators to legislate beyond protection of life, liberty and property. But, even Maryland regulates marriage and sexuality with legislation. This demonstrates that the American founding generation of states leaders were largely committed to a principled approach to legislating morality beyond protection of life, liberty and property. The early American state leaders understood government to be bound to regulate the morality of citizens according to a combination of fixed moral principles, usually principles that are rooted in Christian theology, whether deistic or theistic while recognizing the need for consent of the governed.

TABLE 4: Early American State Moral Legislation

	VA	NJ*	DE*	PA	MD	NC	GA*	NY*	VT	SC*	MA
Gaming	X	X	X	X		X	X	X	X	X	X
Homo-sexuality	X		X						X		X
Marriage/ polygamy	X		X	X	X	X		X	X		X
Drunken-ness	X	X	X	X				X	X		
Cursing/ swearing	X	X	X	X			X	X	X	X	X
Adultery/ fornication	X	X	X		X			X	X		X
Sabbath	X	X		X			X	X	X	X	X
Divorce		X		X				X	X		X
Usury		X									
Theatres		X		X							
Idleness/ vagrancy		X		X		X	X	X			
Blasphemy			X						X	X	X

* These states include a constitutional provision explicitly stating that colonial law is still in force unless repealed or altered by the state's new legislature, with the exception of Georgia, which enacts legislation that functions in the same manner.

[cccxxxv] *A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature, as Are Now in Force; with a Table of the Principle Matters*. Enacted December 8, 1792.

[cccxxxvi] Ibid. Enacted December 10, 1792.

[cccxxxvii] The claim that Virginia's constitution operates on principles of Christian deism does not negate this suggestion. Christian deism accepts Christian moral teachings.

[cccxxxviii] The restriction of sexual relations to monogamous marriage is also important for many advocates of natural law for the reason that such a restriction is viewed as necessary for procreation and the upbringing of children in the context of a stable family unit.

[cccxxxix] *A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature, as Are Now in Force; with a Table of the Principle Matters.*

[cccxl] Sabbath laws were prevalent in the American colonies. They had also been adopted the British. An example of British Sabbath law is given below:

King Charles II

29° *Car*. II. C. 7. N. 3. An Act for the better Observation of the LORD'S Day, commonly called *Sunday*. Tradesman, Artificer, *&c*. doing the Business of their Calling on the Lord's Day, shall forfeit 5 *s*. Persons exposing Goods to Sale on that Day, shall forfeit the Goods so exposed. Drover, Waggoner, *&c*. travelling on that Day, shall forfeit 20 *s*. Person using a Boat, *&c*. except upon an Occasion to be allowed by a Justice of the Peace, shall forfeit 5 *s*.; the Penalties to be employed to the Use of the Poor; but the Officer convicting may give a Reward to the Informer, not exceeding a Third Part of the Forfeitures. Person serving a Writ, *&c*. on that Day, shall answer Damages, as though he had done it without a Writ."

(From *House of Lords Journal Volume 17, 8 January 1703*; see http://www.british-history.ac.uk/report.asp?compid=14631)

[cccxli] *A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature, as Are Now in Force; with a Table of the Principle Matters.*

[cccxlii] Ibid.

[cccxliii] *Laws of the State of New Jersey; Revised and Published under the Authority of the Legislature.*

[cccxliv] Ibid.

[cccxlv] Ibid.

[cccxlvi] Ibid.

[cccxlvii] "Constitution of New Jersey, 1776".

[cccxlviii] *Laws of the State of New Jersey; Revised and Published under the Authority of the Legislature.*

[cccxlix] The assumption that the laws reference to "Sabbath" is specifically Christian is made because only Christian churches observe the Sabbath on the first day of the week, i.e., Sunday.

[cccl] *Laws of the State of New Jersey; Revised and Published under the Authority of the Legislature.*

[cccli] Ibid.

[ccclii] Ibid.

[ccccliii] Ibid.

[ccccliv] "Constitution of New Jersey, 1776".

cccliv "Constitution of Delaware, 1776".

ccclv *Laws of the State of Delaware*.

ccclvi Ibid.

ccclvii Ibid.

ccclviii "Constitution of New Jersey, 1776". "Constitution of New York, 1777". "Constitution of South Carolina, 1778".

ccclix *Laws of the State of Delaware*.

ccclx Ibid.

ccclxi Ibid.

ccclxii *Laws of Maryland Made since M,Dcc,Lxiii, Consisting of Acts of Assembly under the Proprietary Government, Resolves and Convention, the Declaration of Rights, the Constitution and Form of Government, the Articles of Confederation, and, Acts of Assembly since the Revolution*.

ccclxiii Ibid.

ccclxiv "Constitution of North Carolina, 1776".

ccclxv *Laws of the State of North Carolina.*

ccclxvi Ibid.

ccclxvii Ibid.

ccclxviii "Constitution of North Carolina, 1776".

ccclxix *Laws of the State of North Carolina.*

ccclxx Ibid.

ccclxxi *A Digest of the Laws of the State of Georgia.*

ccclxxii Ibid.

ccclxxiii Ibid.

ccclxxiv Ibid.

ccclxxv Ibid.

ccclxxvi Ibid.

ccclxxvii Ibid.

ccclxxviii Ibid.

ccclxxix While government is not seen as the primary agent of moral formation, it does still have some role, for example, with public education.

ccclxxx *Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, since the Revolution from the First to the Twentieth Session, Inclusive.*

ccclxxxi *Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, since the Revolution, from the First to the Twentieth Session, Inclusive.*

ccclxxxii Locke, *Two Treatises of Government*. Later in the Second Treatise, however, Locke suggests that the marriage compact is of a limited, voluntary nature unlike the Christian concept of a covenant for life before God. "But though these are Ties upon *Mankind*, which make the *Conjugal Bonds* more firm and lasting in Man, than the other Species of Animals; yet it would give one reason to enquire, why this *Compact*, where Procreation and Education are secured, and Inheritance taken care for, may not be made

determinable, either by consent, or at a certain time, or upon certain Conditions, as well as any other voluntary Compacts, there being no necessity in the nature of the thing, nor to the ends of it, that it should always be for Life" (Bk. II, Chp. VII.81).

[cclxxxiii] *Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, since the Revolution from the First to the Twentieth Session, Inclusive.*

[cclxxxiv] Ibid.

[cclxxxv] Ibid.

[cclxxxvi] Ibid.

[cclxxxvii] "The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property.*" Locke, *Two Treatises of Government*. "The property which every man has in his own labour, as it is the original foundation of all other property, so it is the more sacred and inviolable." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations.*

[cclxxxviii] *Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, since the Revolution from the First to the Twentieth Session, Inclusive.*

[cclxxxix] Ibid.

[cccxc] Ibid.

[cccxci] Ibid.

[cccxcii] The sections of this legislation addressing drunkenness and profane language proscribe a punishment of three shillings or up to two hours in the stocks for each offense.

[cccxciii] *Laws of the State of New York, Comprising the Constitution and the Acts of the Legislature, since the Revolution from the First to the Twentieth Session, Inclusive.*

[cccxciv] Ibid.

[cccxcv] "Constitution of South Carolina, 1778".

[cccxcvi] *The Public Laws of the State of South Carolina, from Its First Establishment as a British Province Down to the Year 1790 Inclusive.*

[cccxcvii] Ibid.

[cccxcviii] Ibid.

[cccxcix] Ibid.

[cd] Ibid.

[cdi] Ibid.

[cdii] Ibid.

[cdiii] A reference to existing laws against adultery is made in legislation following the ratification of the state constitution.

CHAPTER 8

Contemporary Scholarship and Early American State Legislation of Morality

The findings of this study of the early American state constitutions and those states' subsequent legislative acts have revealed that there is sufficient evidence to conclude that all the states, to one degree or another, communicate an expectation for government to have a legitimate role in regulating morality beyond the protection of life, liberty and property.[cdiv] Some of the moral legislation from the post revolutionary period has been shown to be explicitly grounded in Christian theological convictions while other states suggest a basis in popular sovereignty. Seven of the eleven states (Virginia, Delaware, Pennsylvania, New York, Vermont, South Carolina, Massachusetts) enacted some degree of moral legislation upon fixed principles, whether philosophical or theological. While a great deal of the post revolutionary legislation does not provide a clear articulation of the reasoning of the law makers, those that do from these seven states provide compelling evidence that many political leaders from the founding period understood government as having a legitimate authority to regulate private morality on fixed principles, whether derived from natural or divine law, or both. This chapter will compare and contrast our findings with the views of early American political scholars regarding the role of theological and philosophical constitutional principles in legislating morality.

The conclusions of two scholars, Donald Lutz and Daniel Elazar, who attempt to articulate a comprehensive assessment of the political philosophy of the early American state constitutions will be compared with the findings of this work. Of course, other scholars address this topic in the course of developing a theory of early American political philosophy broadly speaking. However, Lutz and Elazar provide the most comprehensive and well-argued positions challenging the conclusions of this study.

LUTZ'S ASSESSMENT OF EARLY AMERICAN STATE CONSTITUTIONALISM

Donald Lutz advances the theory that the dominant theme of early American state constitutionalism was popular sovereignty, meaning the primacy of the arbitrary will of the people, rather than natural law or Christian theology. Donald Lutz is very aware of the evidence that demonstrates the commitment of the early Americans to natural rights doctrine, natural law, and Christian theism. Even though he advances popular sovereignty as the dominant theme of early American constitutionalism, he acknowledges that their understanding of civil liberties is derived from natural liberty, which is understood in light of "the laws of God."[cdv] All individuals are ultimately responsible to God as individuals. But, human beings are by nature designed to live in community with other human beings. Lutz quotes Samuel Williams as an example of this early American concept of the relationship between politics and a theologically informed view of human nature: "We cannot therefore either improve or enjoy ourselves as God designed, but in a state of society."[cdvi] In other words, human beings are understood to have been created by God to attain fulfillment in this life in a certain kind of political community. A good political community is characterized by consent of the governed because God designed people to bear individual responsibility for their own lives.[cdvii]

As a result of the divinely-designed natural liberty in human nature, civil liberty must be constructed by means of the consent of individual members of the community. At one point, Lutz recognizes that the early American's conception of a good political society may not overstep the boundaries established in natural liberty by the law of God or natural law. "Throughout the period in question, Americans defined political liberty as the people being subject only to laws based

upon their own consent. They were not, however, free to consent to laws that were contrary to their natural liberty, i.e., contrary to the laws of God."[cdviii] The interpretation put forward by this work and this first quote by Lutz are in no way in conflict.

The turn in Lutz's argument, which is crucial for his conclusions, comes when he takes up the issue of the "common interest." Alongside his analysis of natural liberty and its implications on a political community, Lutz argues that for the early Americans the community takes precedence over the individual. He does this by arguing that while the most fundamental basis of liberty in human life is rooted in the natural liberty of individuals, "individual interests" can "lead some astray."[cdix] As a result, early Americans, according to Lutz, are convinced of two fundamental principles of politics.

> First, because humans' highest moral and material existence is in communities, and because a community is defined by a commonly held set of values, interests, and rights distributed through a limited population, the people in a community have a common interest in protecting and preserving these values, interests, and rights. Second, when there is a conflict between the values, interests, or rights of the community and those of specific individuals, or a portion of the community, those of the community are superior.[cdx]

Lutz's complete forsaking of fixed principles, whether of nature or of God, occurs in his accusation of *Federalist* 10 being insufficient. It is insufficient for Lutz because there must be more involved in the political decision-making process than a political process that allows rival interests to reach compromises. "There must be values, attitudes, and commitments—a mental stance, if you will—that lead people to frame their discourse, approach problems, and justify solutions in terms of the long-term community interests."[cdxi] Lutz, at this point, fails to draw into the discussion the fixed standards of human nature that ought to provide clear boundaries for the decision-making process. He recognizes the early American's reliance on theological principles to establish their liberty but when it comes time to establish boundaries for liberty in the political society, those principles are replaced by more variable principles of popular opinion. The people's "values, attitude, and commitments" become the judge of limits on liberty rather than

natural law or "the laws of God." This work has shown that many early American constitutions and subsequent legislative limits on the liberty of individuals (which are the most authoritative documents of the early Americans' convictions at the state level of government) are not established on the basis of popular opinion about what constitutes good "values" for the community, but on fixed moral principles derived from philosophy or theology.

In the final analysis, Lutz ignores the theological or philosophic principles found in most state constitutions when it comes to the issue of legislating morality. Popular sovereignty becomes dominant in his analysis of limits on liberty and the legislation of morality, with the result that the fixed view of human nature that originally established the principle of popular sovereignty fades out of the discussion.

> [The Americans] firmly believed that *on their own authority* they could form themselves into a community, create or replace a government to order their community, select and replace those who hold government office, *determine which values bind them as a community* and thus which values should guide those in government when making decisions for the community, and replace political institutions at variance with these values.[cdxii]

In Lutz's view, a constitution "amounts to a comprehensive picture of a people at a given time."[cdxiii] He projects this view onto the early Americans.

> During the early colonial era, the Bible answered many of these questions, the relative homogeneity of the population eased the problems further, and the availability of unsettled land meant that those under suspicion of lacking sufficient virtue had somewhere to go. Moving westward became the ultimate solution to these questions. The Bible's decline as the center of American culture, increasing heterogeneity, and the closing of the frontier did not invalidate the commitment to live together but made it more problematic.[cdxiv]

What is of critical importance to Lutz is what the people believe at any point in time, regardless of whether the people understand

themselves to have convictions about timeless moral principles. As has been demonstrated, the early Americans did not have such a fluctuating view of what values ought to guide their political order. Their decisions about how to legislate morality, as studied in this work, clearly portray political leaders and communities firmly convinced that fixed moral principles exist that are binding on human beings everywhere at all times.

While Lutz recognizes that the early Americans were genuinely committed to the "concept of inalienable rights" and natural liberty, his interpretation of their constitutionalism does not take their commitment to those ideas seriously enough. He makes a shift away from the divine or natural limits to a kind of "self-interest well understood" when it comes time to address the legislation of morality. He asserts, "true self-interest was the pursuit of the common good of the community."[cdxv] In this way, the emphasis on consent and popular sovereignty becomes identified with a collective self-interest rather than bound by perspectives of reason and faith (i.e., natural or divine law doctrines) upon which they were originally established. By the beginning of Lutz's following chapter, the shift is complete.

> The starting place for most American thinking on politics was the idea that the community and its government originate in the consent of the people—a definition of popular sovereignty …. Popular sovereignty rests upon three deeper assumptions that in effect form a unit. Together, they are fundamental to the American form of government. The first is the belief that the American people, if given enough time, can distinguish between what is good (what is congruent with their values, long-term interests, and common rights) and what is not … And the logically prior assumption is that the American people will choose the good—their own shared values, long-term interests, and rights …. The third assumption is implied in the second. If a people can be trusted to choose the good once it is distinguished from what is not, they must therefore possess certain qualities that incline them to the good. Logically prior to those two, and most fundamental to popular government, is the assumption that the American people are a virtuous people—that they are able and willing to seek the common good.[cdxvi]

Lutz fails to identify a central component of a virtuous people in the eyes of many early Americans—a certain fixed understanding of what virtue is, not one that can fluctuate as popular opinion might change over time within a community. Even his use of the term "values" reflects a perspective that would have been alien to early Americans; it reflects a sense that what we consider to be good is only a subjective value rather than a timeless moral principle.

Compare Lutz's quotation above with the following quotation from Georgia's lawmakers, a state that did not even have a strong commitment to legislating morality.

> Where the minds of the people in general are viciously disposed and unprincipled, and their conduct disorderly, a free government will be attended with greater confusions, and with evils more horrid than the wild uncultivated state of nature: It can only be happy where the public principles and opinions are properly directed, and their manners regulated. This is an influence beyond the sketch of laws and punishments, and can be claimed only by religion and education. It should therefore be among the first objects of those who wish well to the national prosperity, to encourage and support the principles of religion and morality, and early to place the youth under the forming hand of society, that by instruction they may be molded to the love of virtue and good order. [cdxvii]

Georgia's legislators are obviously not approaching politics from a position that regards changeable public opinion as the most fundamental basis for making judgments about moral legislation. As discussed in previous chapters, however, the fact that they rely on "principles of religion and morality" to guide the state does not mean that they reject popular sovereignty in the context of natural or divine law.[cdxviii]

After defining popular sovereignty in terms of "values" and "interests" rather than nature and revelation, Lutz then raises the issue of virtue in the people. For early Americans, "the people must be virtuous, or all is for naught."[cdxix] Lutz does not perceive early Americans as being libertarians, but attributes the ability of the Americans to come to consensus on a specific meaning of "virtue" as a result of the unique historical circumstances of their time.

> For at least one brief historical period, encompassing the founding era in America, the moral instruction of radical Protestantism was not in essential conflict with the prudent recommendations derived from Enlightenment political theory …. Temperance was the religious equivalent of moderation, a crucial virtue in classical Greece. Industry and frugality might be called essential virtues for a people hoping to achieve national economic independence and develop a strong economy, but American Calvinistic Christians also saw them as religious virtues. Honesty could also serve both traditions of virtue.[cdxx]

While this analysis might be an accurate historical assessment of what happened in that period, Lutz fails to recognize that both the most influential enlightenment influences (e.g., Locke and Montesquieu) and the various Christian influences on the founding hold to an understanding of virtue that is fixed in human nature. Both would agree that the qualities addressed in the above quotation are by nature virtuous for human beings. They are not qualities that they created for themselves as "values," but characteristics both groups would agree are defined by an unchanging human nature. In addition, Lutz's description of the influence of Enlightenment political theory with strong ties to classical Greek thought seems somewhat exaggerated in light of what was found in the constitutions and legislation. The previous chapters have demonstrated an extensive influence of Christian theological principles as well as Enlightenment philosophy.

Lutz is not alone in neglecting the role of theological and philosophical principles in his concept of popular sovereignty in the early Americans. Willi Paul Adams introduces his study of republicanism in state constitutions with such an emphasis. "The new order had to be republican in nature. That much was clear. The new order had to rest on the ideal of popular sovereignty."[cdxxi] The rest of his study goes on primarily to discuss matters of how popular sovereignty translates into establishing structures of government, rules for selecting public officials, and limitations on government power, without any recognition that they understood themselves to be doing so in light of fixed moral principles.

Early American political leaders believe that the people are justified in revolting because of a specific and fixed view of human

nature, whether from an enlightenment perspective, a Christian perspective, or a combination of both. To many scholars, the American colonists accuse the British of injustice because they coerced the colonists without getting their consent for such superintendence. The problem with this view is that early Americans did not appeal to the authority of the people to resist such superintendence on an arbitrary basis. They did not believe an arbitrary will of the people justifies resistance to government. Take, for example, Pennsylvania's justification for independence in its constitutional preamble:

> WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness.

The basis for revolution in this example is not simply "common consent," but common consent legitimized by the British failure to protect their enjoyment of natural rights, which were established in human nature by God.

Charles McIlwain's view of early American political thought is representative of a school of thought that perceives early state constitutionalism as derived from the previous colonial and English tradition. This approach suggests that the early Americans were merely a product of historical influences. "Our early American written constitutions might be said with little exaggeration to consist mainly of a codification of institutions and principles long in actual force. They are far less doctrinaire or *a priori* than those of France or the rest of continental Europe."[cdxxii] This view concludes that the early Americans did not seriously contemplate or deliberately choose the theological and philosophical principles upon which they founded their regimes. Their constitutions, according to this view, are more a reflection of their historical tradition and practice than rational decisions. This study, however, has demonstrated that the early American state leaders were deliberate in their writing and ratification of constitutions and

their legislative acts. Their high degree of deliberation has been made clear by the extent to which early Americans wrote publicly about their founding legal documents, as pointed out by Kruman.

> The publication of innumerable essays about both the framing and the texts themselves spoke eloquently to the special importance Americans attached to the documents. Newspapers regularly printed the entire constitutions of other states, and essayists closely scrutinized them. Constitution makers themselves carefully examined the handiwork of other states. One representative of the New York committee of safety subscribed to a variety of newspapers in order to aid the provincial congress with word of developments elsewhere. [cdxxiii]

The early Americans were both thoughtful and careful in their judgments regarding their constitutions and legislative acts.

ELAZAR'S ASSESSMENT OF EARLY AMERICAN STATE CONSTITUTIONALISM

Lutz, while admitting that the Americans built their view of popular sovereignty on fixed philosophical and theological principles, ultimately believes those fixed principles of nature or God to be jettisoned by the early Americans in favor of arbitrary public opinion. Initially, Daniel Elazar seems to differ from Lutz when he appears to argue that early American state constitutionalism is built on fixed theoretical principles. He admits that philosophical principles were understood to legitimatize popular revolt from Britain and provided a foundation for state constitutionalism, but only in certain regions of what would become the United States. He delineates two patterns of constitutionalism in the early American period: (1) the "Commonwealth Pattern", and (2) the "Commercial Republic Pattern."[cdxxiv]

Elazar defines the "Commonwealth Pattern," which "derives largely from the constitutions of the states of greater New England," in the following terms:

> These constitutions, as brief or briefer than the federal document, concentrate on setting forth the philosophic basis

> for popular government, guaranteeing the fundamental rights of the individual, and delineating the elements of the state's government in a few broad strokes.[cdxxv]

Elazar's recognition of the crucial role of theoretical principles in early American political thought (whether philosophically or theologically derived) is also prominent in his analysis of the *Declaration of Independence*.

> The problematic phrase 'all men are created equal' has been both a keystone of American political life as well as a major bone of contention. The idea of equality has become a potent force in modern life. The *Declaration's* position rests in part on the Judeo-Christian view that all people are equal before God and in part on the teachings of the 'new political science,' which argued that all people are equal because they share the same basic nature … people have been 'endowed by their Creator with certain unalienable Rights.' This means that, just as one is born with two lungs and a heart, each person is also born possessing certain natural rights that belong to him or her by virtue of God's creation or nature's endowment. Therefore these rights can be said to precede government. They are not granted or given by government, and most importantly, they cannot be taken away or surrendered. The purpose of government is to guarantee them.[cdxxvi]

The influence of this way of thinking on constitutionalism is largely limited for Elazar, however, to the northeastern states. For example, the middles states are viewed as having a "Commercial Republic Pattern". Elazar describes these states' constitutions as follows:

> The second pattern has prevailed in the middle states … These states have built their constitutions upon a series of compromises required by the conflict of ethnic and commercial interests and ideals created by the flow of various streams of migrants into their territories and the early development of commercial cities …. These constitutions tend to be longer than those written in the commonwealth mold, primarily because the compromises written into them have had

> to be made explicit and presented in detail to soften potential conflicts between rival elements that have sharply divergent views of what is politically right and proper.[cdxxvii]

This work, however, has demonstrated that prominent examples from each region of the United States, not just states in greater New England, follow the model of "setting forth the philosophical basis for popular government." While Elazar seems more willing than Lutz to take seriously the role of foundational principles in some constitutions, he denies that this characteristic is present in states from every region of the new nation.[cdxxviii]

In addition to Elazar's interpretation arguing that different regions were more or less committed to fixed principles, his final position seems to be very similar to Lutz's in presenting a view of the early American political thought that leaves fixed principles behind. Elazar's final interpretation of the early American conception of human nature is more clearly revealed in some of his remarks on the *Declaration*.

> In the few succinct words of the Declaration's most famous phrase, the whole foundation of American political life is sketched out. That foundation is rooted in certain fundamental 'truths' that are taken to be 'self-evident,' that is, axiomatic and immediately accessible to reason and common sense in a manner not unlike the way phenomena of nature are immediately accessible to sight and touch. The founders held that these self-evident 'truths' are grounded in reason and experience—especially human experience rightly understood—which allow us to say that these 'truths' are more worthy of our attention than others.[cdxxix]

Elazar is very careful in his language in this quotation. He interprets the early Americans to be founding their political orders on "truths" that are rooted "especially [in] human experience rightly understood." These truths are "taken" to be self-evident by the Americans. This wording suggests that it is their perception of reality that makes them more worthy of attention. Their reason does not deduce fixed principles to guide the nation but rather is an instrument to interpret their experience. Thus, truth is derived from human experience. I strongly doubt that this is the language the early Americans would use to

describe their own convictions. They viewed themselves and their political communities to be bound to fixed principles, whether derived from reason or revelation. Therefore, Elazar does not, in the opinion of this work, sufficiently acknowledge that the American's commitment to popular sovereignty was undergirded by even more fundamental theological and philosophical principles, which this work has demonstrated was crucial to early American constitutionalism.

The early Americans were focused in their commitment to establish political orders in which citizens could be most likely to attain to their own happiness. They firmly believed that certain principles had to guide their political judgments if their goal was to be attained. Happiness, for early Americans, cannot be imparted to citizens by government, rather government must cultivate a society in which it is possible for individuals to attain it. Elazar points out that the right to happiness has been interpreted in various ways.

> The meaning of this right for the founders is not entirely clear. Some suggest that they understood this to mean the right of everyone to pursue, within the limits of everyone's liberty, their own version of happiness. Others, accepting the freedom implicit in the above, suggest that the founders believe there was such a thing as true happiness but that it could be attained only through free pursuit. Still others see the phrase as applying to political happiness only.[cdxxx]

Happiness, as the early Americans understand it, involves elements that are universally true (a set of conditions required for "true happiness") as well as elements that vary for each individual (one's "own version of happiness"). Public worship was viewed as an element of human life necessary for everyone's happiness, as demonstrated by the widespread Sabbath laws. However, even worship must be a voluntary endeavor motivated and pursued by each individual, not by means of physical force.[cdxxxi] In the area of physical sustenance, each person is responsible to acquire basic necessities by reaping the fruits of labor.

The degree to which a person possesses and acquires property seems to be left open to the talents and ambitions of the individual, so long as the individual does not encroach on the rights of others in doing so. An example of this is found in a prohibition against monopolies in Maryland. "That monopolies are odious, contrary to the

spirit of a free government, and the principles of commerce; and ought not to be suffered."[cdxxxii] This prohibition represents a concern for every one to have equal opportunities to acquire material gain. Locke also recognizes that happiness is defined, largely if not entirely, in individualistic terms. "The greatest happiness consists in the having those things which produce the greatest pleasure … 'tis not strange, nor unreasonable, that they should seek their happiness by avoiding all things that disease them here, and by pursuing all that delight them; wherein it will be no wonder to find variety and difference."[cdxxxiii] Each person has the right to discern for him or herself what leads to personal happiness, including acquisition of material goods.

Pursuit of happiness, then, could be seen as a condition in an individual in which a right relationship to God in worship, and right relationship to other people, and the acquisition of material resources is attainable for all. The rights to worship, to life, and to property are common characteristics for all people in this definition of happiness—a sort of "true happiness." However, the working out of the enjoyment of these rights is unique for each person and must be attained by each person. But, in addition to these elements needed for happiness, the Americans had a view of ethics that was informed by Christian theology and moral philosophy. Therefore, government has the authority to limit liberty when certain behaviors are judged to violate those principles. Liberty, understood by the early Americans, never justify the most destructive vices going unpunished by government. Thus, the early Americans demonstrated a commitment to extensive legislation of morality, even in some cases when their constitutions did not explicitly mandate that role for government.

CONCLUSION

In the end both, Lutz and Elazar understate the influence of the principles that are most foundational in the state constitutions. Like Lutz and Elazar, some historians also conclude that the early American period was a time in which theological and philosophic principles were replaced by a deeper commitment to the relativistic will of man. "Examining constitution, property, and contract, historians contend that 1776 marked the beginning of a new positivistic and instrumental legal order, where ancient notions like natural law, oracular style of judging, and community justice were jettisoned to forge a fungible and useful

legality suited to a modernizing, capitalistic society."[cdxxxiv] Ultimately this is the view of Lutz, when he agrees with Sir Barker that theological and philosophic principles are replaced by a deeper commitment to constitutions. "The founders saw three different entities competing for the title of sovereign: the legislature, the community, and natural law. Sir Ernest Barker has aptly observed that the Americans chose a fourth—the sovereign constitution.[cdxxxv]" This equates to a positivistic, arbitrary decision to make the will of the people, as expressed in a written constitution, the supreme authority. These conclusions are certainly not consistent with the findings of this work's study of the early state constitutions and the subsequent legislation. Those documents suggest that the majority of early American state leaders viewed fixed principles of natural law and divine law as the foundation upon which the constitutions and laws of their states rested.

[cdiv] Even though Maryland's post revolutionary legislative track record does not include a great deal of moral legislation, the constitution suggests that laws for the "reformation of morals" is expected to be the norm in the state.

[cdv] Donald Lutz, *The Origins of American Constitutionalism*.

[cdvi] Ibid. Lutz quotes Samuel Williams, *A Discourse on the Love of Our Country* (Salem, Mass., December 15, 1775), 9.

[cdvii] "Since all civil rights derive from the basic natural right of consent, and since all men have the same capacity for such choice, everyone has the same rights in equal amounts. Theophilus Parsons speaks of God, 'who at our births, disperses his favors, not only with a liberal , but with an equal hand.'" (Lutz.) Lutz quotes Theophilus Parsons, *The Essex Result*, in Hyneman and Lutz (eds.), *American Political Writing*, I, 487-88.

[cdviii] Ibid.

[cdix] Ibid.

[cdx] Ibid.

[cdxi] Ibid.

[cdxii] Ibid. See also Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*. Italics mine.

[cdxiii] Lutz, *The Origins of American Constitutionalism*. The following is another example of this view in Lutz: "The difference between

totalitarian and popular governments lies in the probability of arbitrariness. If a people (a majority of them) agrees to shift from applying the death penalty to a wide variety of offenses, including sodomy, horse theft, and blasphemy, to no death penalty at all, the probability that such a change in cultural mores is frivolous or will engender serious opposition because it is at odds with the fundamental beliefs of many people is far less than if the shift were imposed by a solitary ruler. If such changes require an extraordinary majority, the probability is reduced even further. Presumably, with popular consent, the shift in cultural mores has already taken place, so that the political decision is mostly ratification of an accomplished fact." (Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*.)

[cdxiv] Lutz, *The Origins of American Constitutionalism.*

[cdxv] Ibid. Lutz seems most concerned with making the point that Americans were not as individualistic as they have been made out by other scholars, but were highly communal in their outlook.

[cdxvi] Ibid.

[cdxvii] *A Digest of the Laws of the State of Georgia.*

[cdxviii] In the beginning of this chapter, Lutz quotes Theophilus Parsons in the *Essex Result*: "the voice of the people is said to be the voice of God." Notice that while Lutz seems to lean toward interpreting this statement as if Parsons had said, "the voice of the people *is* the voice of God." (Lutz, 82 citing Theophilus Parsons, *The Essex Result* (Newburyport, Mass. 1778), 489-90, in Charles S. Hyneman and Donald S. Lutz (eds.)) Richards quotes another example of early Americans who had a view of popular sovereignty not grounded in reason or revelation. "'By PHYSICAL LIBERTY I mean that principle of *Spontaneity*, or *Self-determination*, which constitutes us *Agents*; or which gives us a command over our actions, rendering them properly *ours*, and not effects of the operation of any foreign cause.—MORAL LIBERTY is the power of following, in all circumstances, our sense of right and wrong; or of acting in conformity to our reflecting and moral principles without being controuled [sic] by any contrary principles.—RELIGIOUS LIBERTY signifies the power of exercising, without molestation, that mode of religion which we think best; or of making the decisions of our own consciences respecting religious truth, the rule of our conduct, and not any of the decisions of our fellow-men.—In like manner; CIVIL LIBERTY is the power of a *Civil Society* or *State* to govern itself by its own discretion, or by laws of its own making, without being subject to the impositions of *any* power, in appointing and directing which the collective body of the people have no concern; and over which they have no controul [sic].'" (David A. J. Richards, *Foundations of American Constitutionalism*. Richards is quoting Richard Price, *Observations on the Nature of Civil Liberty, The Principles of Government, and the Justice and Policy of the War with America*, in *Two Tracts on Civil Liberty*, 1776, 6.)

[cdxix] Lutz, *The Origins of American Constitutionalism.*

[cdxx] Ibid.

[cdxxi] Willi Paul Adams, *First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*.

[cdxxii] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern*.

[cdxxiii] Marc W. Kruman, *Between Authority & Liberty: State Constitution Making in Revolutionary America*.

[cdxxiv] Daniel Judah Elazar, *The American Constitutional Tradition*.

[cdxxv] Ibid.

[cdxxvi] Ibid.

[cdxxvii] Ibid.

[cdxxviii] See Elazar's description of the distinctions between New England, the Middle States, and the southern states. (Elazar, *The American Constitutional Tradition*, pp. 115-119.)

[cdxxix] Elazar, *The American Constitutional Tradition*.

[cdxxx] Ibid.

[cdxxxi] There were a few examples to the contrary in the state legislative acts studied in this work, which required participation in public worship.

[cdxxxii] "Constitution of Maryland, 1776". North Carolina also prohibits monopolies in its "Declaration of Rights" (XXIII).

[cdxxxiii] John Locke, *An Essay Concerning Human Understanding*, ed. Roger Woolhouse (London: Penguin Books, 1997), 247.

[cdxxxiv] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*.

[cdxxxv] Gerald Stourzh, *Hamilton and Republican Government*.

CHAPTER 9

Considerations for Legislation of Morality in the 21st Century

Within American consciousness there has developed an interesting combining of a commitment to toleration and a distaste for "radical" views—views that deviate too far from the mainstream. The combination of these two is odd in the sense that toleration would seem to suggest a willingness to put up with views that are different and, therefore, seem radical from one point of view. Tolerance, it seems, has its limits in modern American society. American tolerance is open to diversity as long as the diverse views are not exclusive in their claims or impose moral standards on others. Every opinion is acceptable as long as it is not too extreme or too far wide from the generally accepted positions. In other words, opinions are encouraged but deeply held convictions are suspicious, especially if they are irrational, too extreme, or restrictive. Deeply held convictions are the stuff that fanaticism is made of, or so it goes.

From a contemporary American perspective, the early state founders may be viewed as radical, even in an oppressive sort of way. Contemporary American society has come to embody a mentality of "I should be able to do anything I want as long as I don't hurt anyone." People with this mentality, if they are thoughtful at all, usually assume that the U.S. Constitution supports their viewpoint, especially by the rights listed in the amendments. "I have the right to live as a please." It is true that in comparison to the active moral regulation supported by and found in the early state constitutions and legislative acts, the U.S. Constitution is much more permissive. However much Americans

might think morality and lawmaking should be kept separate—in most cases the majority of my students think this way—the relationship between the two cannot be severed. At both the local and national level, one cannot ignore the fact that many of the most contentious political issues in American society revolve around issues of moral legislation, for example, abortion, sexual orientation, smoking in public, marriage, use of narcotics, and euthanasia, just to name a few. Lest this short commentary extend further than appropriate, it is time to turn to one last discussion as a way to consider how the findings of this work relate to current thinking about the legislation of morality in American political thought.

The last task of this work is to compare the view of John Rawls, arguably the most influential writer in American political thought from the 20th century, with the approach found in the early American state founders. This task will set the context to provide some concluding thoughts on the relevance of the findings of this work for contemporary American politics.

RAWLS' ORIGINAL POSITION

The approach of John Rawls is the most important and most relevant example in the last century in which the merging of streams discussed in chapter one is attempted in American political thought. Its broad influence and acceptance makes it worthy of consideration here. It is hoped that this brief discussion of Rawls will not do a disservice to his sophisticated theory.

Rawls attempts to address the issue of how to legislate with a combination of commitments to popular sovereignty and rational theory. The cornerstone of his thoughts on legislation and morality is his concept of the original position.

> In the original position the parties are not allowed to know their social position; and the same idea is extended to other cases. This is expressed figuratively by saying that the parties are behind a veil of ignorance. In sum, the original position is simply a device of representation: it describes the parties, each of whom are responsible for the essential interests of a free and equal person, as fairly situated and as reaching an

> agreement subject to appropriate restrictions on what are to count as good reasons.[cdxxxvi]

The original position begets just rules of behavior by means of members of a political community mentally putting themselves behind a "veil of ignorance" with regard to their current identity. In other words, people must think about what behavior should be permitted or prohibited *not* on the basis of their current opinions, convictions, and other personal traits, but rather based on the hypothetical condition in which they view themselves as no one in particular in their society. "The parties are not allowed to know their social position," and therefore must consider what would be the best way to structure society or make laws from the perspective of being any member of the society (or, we could say, from the perspective of every member of society).[cdxxxvii]

Rawls' method is theoretical in nature, putting forward a rational basis for objectively making moral judgments in public life. In this sense, he follows in the footsteps of Kant. Rawls method is meant to result in the fairest way of determining just rules for society. Rawls claims that his method is universally applicable, though not as Kant's was, in terms of outcome. The method results in moral judgments that are derived from and gain their legitimacy from the persuasions and values of the people of a given society. Behavior that would be most acceptable to all and least offensive to all is what should be permitted and behavior that would be least acceptable and most offensive should be prohibited. This is the best possible arrangement in which to sustain liberty in a diverse society according to Rawls. "There is no better way to elaborate a political conception of justice for the basic structure from the fundamental intuitive idea of society as a fair system of cooperation between citizens as free and equal persons."[cdxxxviii]

The original position method is to be worked out in light of the actual opinions, convictions, and other traits of groups and individuals that are present in a given society; its judgments are not derived from universal principles of morality. "The veil of ignorance … has no metaphysical implications concerning the nature of the self."[cdxxxix] One does not put on a veil of ignorance in the sense of seeking to put off subjectivity and put on a kind of metaphysical objectivity, as was the case with Kant. Rather, one puts off personal subjectivity to put on a kind of subjectivity of all (within one's own society). Legislators

should not appropriate universal moral principles in legislation. That which is justly prohibited in one society may very well be permitted in another depending on the current social and cultural conditions—depending on the opinions and beliefs of the people. Thus, the rational method Rawls proposes for determining rules for a political community involve a universal claim, but the rules that will result from the method in various cultural contexts may vary broadly on the basis of the diverse beliefs, values, and desires of its members.

Rawls' theory has been sought as a solution to the oppression of minority rights and individual liberty that can result when the will of the majority is granted absolute authority in democratic regimes. As rightful members of a liberal community, individuals and minority groups should have a say in and have their values respected by the laws. Laws have been written to assure that equal opportunities are available to women, ethnic groups, and individuals of various other persuasions. Reasonable laws must not restrict the freedom of expression of individuals or groups within society unless that expression injures, offends, or inhibits the freedom of others to enjoy their rights. Behavior is permitted that was previously prohibited in light of new social developments (e.g., homosexuality, adultery, abortion) while other behavior is prohibited that was previously permitted (e.g., prayer in schools, smoking in public places, ethnic segregation). These adjustments are often viewed as being a rational response to changes in society.

Nonetheless, the current conditions of multiculturalism in American society put the theory of original position to a difficult test, since a great many different points of view must be taken into account when making laws. It sounds good to American ears to say that every individual and group should have their values respected, but is that prudent or possible? Can you actually build a sustainable political order if you take that approach to an extreme? When various groups and minorities have interests that are in conflict with one another, even the reasonable approach of the original position is stretched to the breaking point. It is questionable whether people from extremely different cultural perspectives have the capacity to effectively understand the implications of certain laws upon others who are so different from themselves.[cdxl]

There is also the problem of what the original position requires of people who take their own beliefs seriously, primarily, though not

exclusively, people with religious convictions. While there is no opportunity here to develop this thinking in a more thorough manner, the requirements of Rawls theory creates real difficulties for many in American society. People who have deeply-held convictions, whether they are derived from faith commitments or from rational theories, are forced to mentally put aside something that is virtually impossible for them to disassociate.

> Rawls insists that free selves must regard themselves as a self-originating source of valid claims. This seems to preclude not only moral obligations being derived from society but from a transcendent deity or religious order. It may even preclude moral claims derived from natural law.[cdxli]

Rawls' theory requires people to view themselves as a "self-originating source" of their convictions. He writes, "Claims that citizens regard as founded on duties and obligations based on their conception of the good and the moral doctrine they affirm in their own life are also, for our purposes here, to be counted as self-originating."[cdxlii] However, some people believe that their convictions are not "self-originating" but rather have their source in the Divine or in eternal Ideas or Reason. They believe they have discovered truth that exists outside themselves and places obligations upon them, rather than a truth that they constructed or choose to prefer over alternative truth claims. When Michael J. Sandel considers Rawls' theory, he asks, "Can we view ourselves as independent selves, independent in the sense that our identity is never tied to our aims and attachments?"[cdxliii] In other words, people who believe in truth claims not because they have decided to affirm it but because they believe they are true do not meet Rawls' criterion of being "free" and are thus incapable of living in a liberal society.

The early American founders view is obviously at odds with Rawls view of a liberal society. They might respond to Rawls in much the same manner that Sandel does when he writes, "To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."[cdxliv] In spite of the fact that the constitutional and legislative texts studied in this work do not provide a thorough or entirely cohesive perspective, it is a perspective that was worked out by real people in a real political situation. When

compared with Rawls, they believe that people with firm commitments to principles of faith and reason can create and live in a free society. They present an alternative that does not shy away from building society on the basis of firmly held moral convictions. Their judgments do not give equal standing to all views and opinions or to all behaviors in society.

The state founders did not seek to create a society along the lines of what most current political thinkers would call liberal. Yet, they were firmly convinced that they were constructing states in which liberty was a defining principle. The difference is one of perspective concerning morality. They would certainly charge some contemporary American laws dealing with moral issues with license. They would seek to reform the existing constitutions and legislation to reflect a commitment to principles of natural and divine laws or immigrate to a society that upheld such commitments.

Perhaps one of the considerations that this study of the early American states' approach to moral legislation presents us with is a rethinking of state and local autonomy. Included in the changes that have occurred since the Civil War regarding state sovereignty has been a limiting of the role of state governments to freely choose how they want to legislate morality. Certainly there is still a significant amount of moral legislation that occurs at the state level, but the degree to which states can chart their own course has been increasingly limited in the last 100+ years. This has been a source of great frustration for the states. Some states have wanted to place a ban on the practice of abortion, but have been restricted from doing so by the federal courts. Other states have attempted to redefine marriage to legalize or prohibit homosexual unions. These sorts of examples create a great deal of tension and frustration from people who hold certain convictions that they take very seriously. Perhaps it would be a positive development to allow states a bit more room to legislate based upon moral principles that their citizens hold—even to allow moral regulation of behavior that is deemed immoral for religious reasons by most of the state's citizens. As long as the liberty to freely migrate and work in other states with different regulations exists, such an approach may be worthy of consideration.

In spite of the many historical developments that have occurred since the time the state founders established new political orders, some things remain. Americans are still inspired by and committed to the

most fundamental rights that the forefathers held. The right to life, liberty, property, religion—and, yes, the pursuit of happiness—remain as deeply embedded traits of American consciousness. Unlike most nations, the United States is a regime characterized neither by ethnicity nor ultimately by language or shared history or religion, but by a commitment to live under these shared foundational principles.

[cdxxxvi] John Rawls, "Justice as Fairness: Political Not Metaphysical".

[cdxxxvii] Ibid.

[cdxxxviii] Ibid.

[cdxxxix] Ibid.

[cdxl] See, for example, Susan Moller Okin's feminist critique of Rawls' in her article "Justice as Fairness: For Whom?" Okin's response is dealing with the issues between male and female. How do you resolve differences of viewpoint in a liberal society that are much more at odds with on another, e.g., fundamentalist Islamists and homosexuals?

[cdxli] Von Dohlen, *Culture War and Ethical Theory*.

[cdxlii] Rawls, "Justice as Fairness: Political Not Metaphysical".

[cdxliii] Sandel, "The Procedural Republic and the Unencumbered Self".

[cdxliv] Ibid.

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