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THE CONTRIBUTIONS OF NATURAL LAW AND COVENANT THOUGHT AS SOURCES FOR PUBLIC THEOLOGY

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I. INTRODUCTION

Christian thought has long played a significant role in the shaping of American political institutions. In seeking to promote a public theology that draws upon these Christian resources for addressing contemporary American culture, one that is marked by religious and cultural pluralism, the natural law and covenant traditions have much to contribute. These two traditions are particularly appropriate in the American context as both were instrumental in shaping the United States' unique political landscape.[1] The Declaration of Independence is evidence of the hybrid nature of natural law and covenant thought that was present at the time of the American founding and upon which major institutions were created. By drawing upon self-evident truths known to all people of reason and by appealing to "nature and nature's God," the Declaration makes intentional and overt use of natural law concepts. Covenant is also a prominent feature of the Declaration as several covenantal elements are found within it, including the representative nature of government personally expressed through signatures and the appeal to God to witness and judge. Natural law and covenant both make use of the principles of consent of the people as a foundation of government, the rule of law, and the protection of civil rights, which run throughout the Declaration. As indicated by historian

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1. As for the contributions of the covenant tradition, see DOCUMENTS OF POLITICAL FOUNDATION WRITTEN BY COLONIAL AMERICANS: FROM COVENANT TO CONSTITUTION (Donald Lutz ed., 1986), analyzing the covenantal aspects of early American foundational documents. *See also* DANIEL ELAZAR, COVENANT AND CIVIL SOCIETY: THE CONSTITUTIONAL MATRIX OF MODERN DEMOCRACY (1998), providing an in-depth treatment of the use of covenant in political thought. Elazar defines covenant as "a morally informed agreement or pact based upon voluntary consent and mutual oaths or promises, witnessed by the relevant higher authority, between peoples or parties having independent though not necessarily equal status, that provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect which protect the individual integrities of all the parties to it." *Id.* at 8.

As for the natural law tradition, particularly in its American political context, the thought of Catholic public theologian John Courtney Murray, S.J., has been informative. *See* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960).

Benjamin Wright, the founders combined natural law insights with those of Puritan covenantalism and common law elements found in British and American jurisprudence to form a generalized higher law model that served as a standard by which human laws could be judged.[2]

By retrieving the helpful concepts within the natural law and covenant traditions, these two currents of theopolitical thought can serve as a guide in present day discussions on the place of moral knowledge in political and legal debate. This paper argues that natural law and covenant thought can continue to make important contributions by revitalizing the religious and moral dimensions of public life. In addition, this paper argues that the natural law and covenant traditions may be used to produce a moral consensus in society, while also limiting government authority from excessive interference in the moral sphere from undue infringement on legitimate freedoms. In the process, natural law and covenant thought provide a means of balancing individual liberty and communal responsibilities.

While there are many versions of natural law thought, the version used herein reflects the teleological natural law found in Thomist tradition. In the discussion of natural law in the American context, the writings of Jesuit theologian John Courtney Murray are used as a guide. He describes four premises of natural law which are that:

> natural law supposes a realist epistemology, that asserts the real to be the measure of knowledge, and also asserts the possibility of intelligence reaching the real . . . . Secondly, it supposes a metaphysic of nature, especially the idea that nature is a teleologic concept . . . that there is a natural inclination in man to become what in nature and destination he is . . . . Thirdly, it supposes a natural theology, asserting that there is a God, Who is the eternal Reason, Nous, at the summit of the order of being, Who is the author of all nature, and Who wills that the order of nature be fulfilled in all its purposes, as these are inherent in the nature found in the order. Finally, it supposes a morality, especially the principle that for man, a rational being, the order of nature is not an order of necessity, to be fulfilled blindly, but an order of reason and therefore of freedom.[3]

The covenant tradition as used herein represents the theological and political aspects of public thought that developed out of the Reformed traditions that

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2. Concerning the influence of natural law in the Revolutionary era, see BENJAMIN F. WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 8-11, 88-90, 327-29 (1962).

3. MURRAY, *supra* note 1, at 293-94.

were particularly influential in colonial New England. A defining element of the covenant tradition is that political relationships are based on agreements, tacit or explicit, among groups of people. The concept of covenant also extends to the inner structures of groups, whether they be families, churches, trade organizations, or political bodies. Covenantal groups are marked by voluntary participation, defined rights and responsibilities of membership, commitment to group goals and patterns of governance, and holding leaders responsible to their obligations. Another feature of covenant thought is its emphasis on the division of powers within and among levels of government. In addition, covenant communities are subject to dynamic change over time that necessitates political and social structures that can accommodate revision. Finally, the covenant tradition in its theological and political aspects acknowledges a moral aspect to life to which the community is oriented and toward which it strives.

The natural law and covenant traditions contain elements that continue to be helpful in discussing the role that religious and moral thought play in modern democracies that are marked by religious pluralism. From a Christian perspective, these traditions provide support for the modern democratic state and the inclusion of religious and moral perspectives in policy formulation and debate. As developed below, this paper will describe some of the contributions that these traditions can continue to make in understanding the role of religious thought in the public sphere by discussing: 1) the development of moral belief and action across a diverse range of voluntary associations; 2) the place of state action in the moral sphere; and 3) and personal liberty within a context of moral regulation in society.

II. ASSOCIATIONS AND MORAL FORMATION

A common strength of the natural law and covenant traditions is their view of humans as social beings that live in a complex society made up of any interrelated institutions, spheres of activity and associations. Among natural law writers, John Courtney Murray has emphasized the concept of subsidiarity and role of community associations in preserving a public space for moral development outside of the jurisdiction of the state. In addressing the principle of subsidiarity, Murray states:

> It asserts the organic character of the state—the right to existence and autonomous functioning of various sub-political groups, which unite in the organic unity of the state without losing their own identity or suffering infringement of their own ends or having their functions assumed by the state . . . . This principle is likewise the assertion of the fact that the freedom of the individual is secured at

> the interior of institutions intermediate between himself and the state (e.g., trade unions) or beyond the state (the church).[4]

The importance of associations also has been a current in covenant thought and was thoroughly explored in the thought of Johannes Althusius in the late sixteenth and early seventeenth centuries.[5] By conceiving the public arena as a matrix of multi-tiered forums that range in levels of complexity, public action need not simply be thought of as the passage of laws by the state. This emphasis on the associational aspects of social and political involvement at the intermediate levels of society highlights several elements that are important in both the natural law and covenant traditions. First, the covenant thought tradition holds that God has vested political power and action in the people. Second, covenant thought places importance on the role of personal relationships and responsibility to one another as a driving motivation for action. Third, covenant thought also allows people great range of flexibility and innovation in forming new groups to address changing concerns.

The emphasis on the intermediate levels of political life is not meant to eliminate consideration of the individual or broader levels of society that deal with statewide and national issues. It does, however, indicate that the primary means by which the individual person interacts with others on matters of wider concern are through the mediation of intermediate organizations. This reflects the reality that a group of people acting in concert has greater strength than individuals acting separately.

Political power may be used for good and bad purposes, which was one of the reasons why the architects of the American republic sought to limit the power of factions.[6] The primary method for doing so was in the concept that a large republic would have so many diverse groups that no one of them would gain so much power as to constitute a threat to the whole.[7] Across a wide republic, factions would have to work together in order to build a consensus to achieve their goals. Yet without some overarching principles that serve to guide and illuminate debate, the political process can simply become a battle between competing groups utilizing instrumental power. Because of this danger, the need to develop civic virtue through a process of moral formation is an important part of the covenant and natural law traditions that complements the role of associations in public life. Where the government lacks the

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4. MURRAY, *supra* note 1, at 334.

5. JOHANNES ALTHUSIUS, THE POLITICS OF JOHANNES ALTHUSIUS: AN ABRIDGED TRANSLATION OF THE 3RD ED. OF POLITICA METHODICE DIGESTA, ATQUE EXEMPLIS SACRIS ET PROFANIS ILLUSTRATA (Frederick Carney trans. & ed., 1964).

6. THE FEDERALIST NO. 10 (James Madison).

7. *Id.*

competency to promote a moral vision, it depends on the vitality of public associations to implement this in the populace. Otherwise, the moral consensus by which a society depends for its stability and growth exists simply in the coincidence of many private moral judgments.[8]

A. Covenant Thought

As public but non-governmental groups, voluntary associations can serve as the means by which discussions of moral and religious values enter into discussions of public policy. Not all groups can serve in this capacity as communities possessing some element of shared moral vision, however. Otherwise, groups would simply be lifestyle enclaves where people gather to pursue their own individual interests among others of like mind. Yet when properly constituted, the associative institutions of civil society can and should be the places where *moral* values are developed and conveyed.

Principles of religious freedom must be respected in a nation where different conceptions of the good and ultimate reality exist. In the absence of religious freedom, the majority's views can simply be imposed upon others in tyrannical fashion that is the antithesis of democratic ideals. The covenant and natural law traditions, while having their difficulties with the concept of religious freedom, have also been used to promote its importance by figures such as Roger Williams and John Courtney Murray. The covenant and natural law traditions, while having their difficulties with the concept of religious freedom, have also been used to promote its importance. To promote freedom, the institutions that shape moral formation and belief, primarily the church, should be kept separate from the institutions of the state, whose primary purpose is to enact laws for the public good. As expressed by Murray, natural law promotes human dignity and freedom of conscience while limiting the competency of the state to act concerning religious matters.[9]

Laws, however, will necessarily incorporate the beliefs of the people in terms of policy goals, priorities, and implementation. Indeed, it is almost impossible to conceive of a law that does not incorporate multiple levels of moral meaning and practice. Even mundane laws concerning speed limits involve public policies with corresponding moral values and priorities with respect to sometimes conflicting concerns of public safety, individual liberty, environmental welfare and economic policy, to name but a few. While the state

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8. MURRAY, *supra* note 1, at 214-15.

9. For the use of natural law ideals to promote religious liberty, see John Courtney Murray, *The Human Right to Religious Freedom*, *in* RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 241 (J. Leon Hooper ed., 1993).

must never act to coerce religious or moral beliefs on the people, the state cannot but reflect these beliefs in terms of the types of laws that it passes, the social goals it seeks for its people, its domestic and foreign policy choices, and the means by which it seeks to implement these disparate policy goals.

While there may be no single overriding solution as to how moral belief can be integrated into public discourse in a manner that respects the multiplicity of views about morality in a pluralistic society, the natural law and covenant traditions offer an approach that seeks to balance the maintenance of a communal moral vision with an openness toward diversity and innovation. The natural law and covenant traditions both embrace a notion of objective morality that can be known and that is relevant in public policy formation. This reflects the Christian commitment to the transcendent nature of moral truth that is rooted in the creative action of God in establishing the universe. Laws obtain their force and validity by conforming to this objective moral order that places all aspects of society, including the state, under the rule of law. As indicated in the Preface to the *Laws and Liberties of Massachusetts of 1647*, the authority of civil law was derived from dependence on both revelation and natural law. The preface states:

> The distinction that is put between the Laws of God and the laws of men, becomes a snare to many as it is misapplied in the ordering of their obedience to civil Authority; for when the Authority is of God and that in way of an Ordinance,[10] and when the administration of it is according to the deductions, and rules gathered from the word of God, and the clear light of nature in civil nations, surely there is no human law that tends to common good (according to those principles) but the same is mediately a law of God, and that in way of an Ordinance which all are to submit unto and that for conscience sake.[11]

As the passage indicates, moral knowledge is accessible to all on some level through the light of nature and this permits a discussion of morality across practically all moral traditions. In Puritan New England, the covenant tradition was more particular in its understanding of moral knowledge. While there may be some natural knowledge of morality that is available to all, the primary point of access to the objective moral order is through God's self-revelation in

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10. *See Romans* 13.

11. Increase Nowel, *Preface to the Laws and Liberties of Massachusetts, 1647*, *in* DONALD LUTZ, DOCUMENTS OF POLITICAL FOUNDATION BY COLONIAL AMERICANS 260 (1986) (internal citations omitted).

covenant with particular peoples in history.[12] While covenant thought sees the moral insights of scripture as being consistent with that known from human reason, scripture has the benefits of being more exact, trustworthy and clear.[13]

The use of scripture as the moral source for law was not problematic in the Puritan Christian commonwealths of New England. In that region at the time, there was a uniform religious belief and commitment to Biblical revelation. Even the rest of America did not find the moral use of the Bible as a basis of law problematic until well into the middle of the twentieth century.[14] In modern day, however, using scripture or religious understanding as a basis for formulating laws and policy becomes far more problematic under conditions of widespread diversity in moral thought.

Utilizing aspects of covenant and natural law together can help address some of the concerns involved in incorporating moral discussions across communities. The covenant concept that a people are formed as a political body based on a common moral understanding of themselves with obligations that are owed to one another provides a starting point. As noted by Donald Lutz, covenants seek to bind people into community under the witness of a higher power and in the process define the type of people they aspire to be.[15] Each succeeding generation has the opportunity to accept the same covenanted principles or to seek innovation by adopting new or refined moral understandings.

A number of moral sources inform the dynamic processes by which societal moral formation occurs. In a pluralist society, it can be expected that different communities will develop their moral understandings in accordance with their own traditions, values and methods. Those that utilize scripture as a significant source of moral knowledge would continue to do so in the development of their beliefs, while those that favor other approaches such as through scientific methods and insights would continue to utilize those sources as well. While a Christian public theology may ideally hope for a state of affairs in which all people embrace the Christian worldview, such a public theology ignores the effects of sin and is unduly triumphalistic. Utilizing the categorization of

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12. *See Letter from John Cotton to Lord Say, in* 12 NEW ENGLAND WAY, LIBRARY OF AMERICAN PURITAN WRITINGS: THE SEVENTEENTH CENTURY 414-15 (Sacvan Bercovitch ed., 1984).

13. *Id.*

14. RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 34-35 (1996).

15. *See* Donald Lutz, *The Evolution of Covenant Form and Content as the Basis for Early American Political Culture, in* COVENANT IN THE NINETEENTH CENTURY 35 (Daniel Elazar ed., 1994).

pluralism made by evangelical philosopher Richard Mouw and Dutch philosopher Sander Griffioen, a Christian public theology should avoid normative directional pluralism, which sees the proliferation of competing visions of ultimate reality and moral meaning as a positive good to be sought, but should instead accept such pluralism descriptively as a reality until Christ returns.[16] Natural law plays an important part in this process as it serves as the basis for utilizing moral language in public discourse. Once the existence of an objective moral standard is accepted as legitimate and as something that all societal groups, including the state, are under an obligation to obey, then public discourse over the content of law can follow. Rather than merely seeking to advance a group interest or implement political strategies based on power, resource mobilization and procedural tactics, substantive moral discussions would have a legitimate part in the political processes. In developing laws and policies, people of varying ideologies can attempt to determine what the law's requirements for a just society involve. As Murray suggests, this is not a process of simple majority rule, but a process by which principles and standards are sustained through public persuasion through appeals to the collective experiences and reflective thoughts of the people.[17]

B. Levels of Government

For the American polity, the highest and broadest level of agreement are the generally recognized legal principles codified in the Constitution. Also at this broadest level of agreement are the unwritten moral principles that form the basis of societal attitudes on a broad range of subjects. Often the presence of this unstated consensus only becomes apparent in times of change when this prevailing status quo is challenged. For example, an unspoken and widespread consensus regarding the status of marriage as being between that of man and woman only became an issue to be stated and defended as the concept became challenged.

At the local and associational levels, disagreements and differing policies may exist as communities come to different understandings of the moral commitments that are required of them. The multi-leveled structure of society envisioned by the natural law and covenant traditions permits complexity in the passage of laws based on the different moral commitments of various communities and locales.

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16. *See* RICHARD MOUW & SANDER GRIFFIOEN, PLURALISM AND HORIZONS: AN ESSAY IN CHRISTIAN PUBLIC PHILOSOPHY 16-19 (1993).

17. MURRAY, *supra* note 1, at 105-07.

Even given the variety of governmental and policy visions that are present in American political culture, limits still exist concerning the degree of moral disagreement that may be permitted. Society must maintain allegiance to the basic principles underlying a general national covenant, and even those who seek societal change. Dissenting speech can be given wide latitude, but this does not always translate into permissible political action, except for those practices that reflect a commitment to values which society as a whole has decided to protect, such as individual expression or the free exercise of religion. Further, such dissent need not require nor imply a moral anarchy or relativism if there is an underlying commitment to the objective reality of moral truth that all people seek to understand. For example, dissent in the form of civil disobedience can serve to promote the moral order where the laws that are disputed are seen as being in violation of the natural law. Thus, Martin Luther King, Jr., could appeal to the natural law in support of his civil disobedience against segregation.[18]

Sometimes, in fact, those who dissent from the community's description of this reality can be seen as attempting to promote a better understanding of true morality. These dissenters serve sometimes to shake the community out of an easy acceptance of prevailing norms that do not genuinely represent its core values. Moral reestablishment in this sense serves as a valid basis for the sort of civil disobedience that acts as a witness to higher natural law principles that society ought to accept. Dissent that simply advocates dissonant thought without a nexus to the larger moral discussion of a society places itself outside of the social fabric that makes up the political community. Likewise dissent that seeks to remove morality from consideration altogether undermines the foundation upon which the community is built and thereby places itself outside the bounds and protections of the law.

Given the directional pluralism that exists within societies that possess different views about ultimate reality and truth, the concept of a national covenant is less useful. A society that has made a national covenant with God as a party, such as existed in Puritan New England, is prone to abuse power, and suffer from the effects of presuming a special relationship between themselves and God. As an alternative political concept, covenant can instead be seen as the means by which people voluntarily organize into communities and governments under the principles of a higher law. The insights of natural law principles can be incorporated by viewing this higher law as knowable and capable of acceptance by all on some level.

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18. Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE, THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 293-94 (James M. Washington ed., 1986).

In this process, specific peoples can agree to particular formulations of what this law entails by making use of their knowledge learned in their communities in light of social aspects of moral understanding developed under both natural law and covenant thought. This well developed moral lore is the basis for specific covenants within different groups, and this moral lore can serve as starting points for dialogue with others that are outside of the particular community. The sense of commonality that the natural law brings helps to provide an impetus for seeking the common good across communities.

In the covenant approach, moral formation occurs within communities that have come together in recognition of an accepted moral tradition. The most prominent are the moral communities that have developed around scripture in the case of Jewish and Christian traditions. Nonetheless, other societies outside of the Jewish and Christian contexts have also developed covenant models of government and have a common moral tradition that the society uses to guide its decision making processes.[19] In any of these local communities, the moral outlook is basically homogeneous and the laws of society are based on their common heritage with the application of shared moral wisdom to the legislative process being relatively uncontroversial. While there may be discussion as to what course the covenant community should take or what specific legislation best serves the purposes of the community, the overall direction, aims and goals of the community are set.

Even where there is agreement internally, those outside of the community who do not accept its moral foundations may not find the community's reasoning convincing. It may be that the outsider would come to the same policy conclusion albeit on different grounds. In a communitarian model where groups look only to internal moral resources, there is little basis to adjudicate between competing communities and each is left as an island of moral authority unto itself. These communities may either withdraw from the larger political process to tend to their own concerns or may join with other communities to accomplish some specific political tasks without entering into dialogue as to the reasons behind their policy positions. However, by integrating natural law and covenant concepts into an approach that incorporates the social dimension of moral life, a communitarian model can be developed that allows for interaction across community boundaries.

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19. Concerning historical examples of the development of covenant societies including those in Switzerland, among the Norse and Celtic cultures and among Native North American cultures, see 3 DANIEL ELAZAR, COVENANT AND CONSTITUTIONALISM: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY, THE COVENANT TRADITION IN POLITICS 269-70 (1998).

C. *Interaction Between Communities*

Natural law provides a moral language that can span different moral communities as it is based on a common human nature knowable by all.[20] In both the covenant and natural law traditions, people are viewed as social beings who come together to form societies to promote their own flourishing, by seeking the common good or by entering into groups.[21] In its most abstract forms, natural law thought is not as useful in bridging particular moral communities because it looks only to what can be accepted in terms of reason alone apart from specific social and historical circumstances. Anything that cannot be discussed in terms of a purely rational analysis would be improper in public policy formation. This type of moral analysis lacks the rich substantive content that underlies particular moral communities.

Much contemporary reflection on natural law seeks to develop an approach grounded in historical and social context and thereby escape an overly rationalistic and abstractionist approach to moral reasoning.[22] At the same time, covenant thought can be used to push beyond a narrowly circumscribed moral community to enter into dialogue with others. Both traditions can utilize an interpersonal approach as each places great emphasis on human relationality. This enables a model of moral discourse based on mutual dialogue that references one's own community but does so in awareness of a broader horizon. In *The Responsible Self,* H. Richard Niebuhr provides a description of this dialogue, which illustrates how society may bring the communitarian aspects of covenant and the cultural transcendence of natural law together. He states:

> A democratic patriot in the United States, for instance, will carry on his dialogue with current companions, but as one who is also in relation to what his companions refer to representatives of the community such as Washingtons, Jeffersons, Madisons, Lincolns, etc. Responsive to his companions he is also responsive to a transcendent reference group and thereby achieves a relative independence from his immediate associates. Insofar he has become not only a responsive but also an accountable self. But now the

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20. *See* Francisco Suárez, *On Laws*, bk. ii, ch vii, para. 5, *in* 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ, S.J. 211 (Gwladys L. Williams, Ammi Brown & John Waldron trans. & eds., 1944) [hereinafter SELECTIONS FROM SUÁREZ]. *See generally* ALEXANDER P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 22 (2002).

21. *See* ALTHUSIUS, *supra* note 5, at 12; Suárez, *On Laws*, bk. iii, ch. ii, para. 4, *in* SELECTIONS FROM SUÁREZ, *supra* note 20, at 375-76.

22. *See, e.g.*, LISA CAHILL, SEX, GENDER AND CHRISTIAN ETHICS: NEW STUDIES IN CHRISTIAN ETHICS SERIES (1996); DAVID HOLLENBACH, THE COMMON GOOD AND CHRISTIAN ETHICS (2002).

> transcendent reference group—these founding fathers, for instance, encountered in memory and these representatives of the community in a later time encountered in anticipation—refer beyond themselves. They are persons who stand for something and represent something. They represent not the community only but what the community stands for. Ultimately we arrive in the case of democracy at a community which refers beyond itself to humanity and which in doing so seems to envisage not only representatives of the human community as such but a universal society and a universal generalized other, Nature and Natures's God.[23]

Communities exist in a tension, ideally a creative one, between the particular realities of their historical existence and the transcendent order that reaches beyond the community to others and eventually to God. As Brazilian legal scholar Roberto Unger observes, this tension cannot be fully resolved as a gap will always exist between mundane particularity and universal transcendence.[24] This gap reflects the reality that moral knowledge and political actions are imperfect.[25] In the process of looking beyond itself toward shared values belonging to common humanity, communities participate in natural law dynamics in seeking those fitting responses that relate a particular view of one limited community to the larger view of a more extensive human community. It also resonates with elements of Reformed thought that attempt to distinguish between the true virtue of the elect community and the natural virtue found in the world.[26]

As communities enter into discussion and form relational bonds, areas of common understanding can be used in forming agreement. While the moral languages utilized in the dialogue may be different, the concepts are portable, even if not all the richness of the original is captured. As Harvard theologian Ronald Thiemann observes, "disagreement requires *some* common premises or else the contending positions would simply 'talk past one another' rather than engage in true conflict."[27] In the process, communities may learn that multiple expressions exist that promote common moral truths, which would have otherwise gone unseen. At the same time, discernment is required to prevent syncretism that blends incompatible elements of other cultures into a community's moral language. One of the dangers of utilizing abstract

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23. H. RICHARD NIEBUHR, THE RESPONSIBLE SELF 85 (1963).

24. *See* ROBERTO UNGAR, KNOWLEDGE AND POLITICS 256 (1975).

25. *Id.*

26. *See* JONATHAN EDWARDS, THE NATURE OF TRUE VIRTUE (Univ. of Michigan Press 1960) (1765).

27. THIEMANN, *supra* note 14, at 107.

categories of reason in this process is that a priori categories may be imposed on varied cultural understandings rather than seeking common understanding in the midst of difference.[28]

Natural law provides a sound foundational approach for seeking moral agreement across cultural and ideological divides. At the same time, the structural aspects of covenant thought provide a platform for lawmaking across communities based on increasingly complex interactions. While moral communities can develop significant policy positions on a number of issues in reliance on their internal belief systems, they must also develop resources for explaining and permitting cross-cultural moral agreement with others in a way that fosters further discussion and growth.

From the Christian perspective, the combination of natural law and covenant thought provides a basis for internal community formation, for communication and dialogue across a number of communities, and for grounding moral agreement with others from different moral perspectives. Additionally, it is not required that the others with whom one is interacting share the same moral basis for reaching moral agreements, either internally or transculturally, so long as they possess some internal basis for doing so. As Catholic theologian David Hollenbach suggests, societies need an "intellectual solidarity" that regards differences among traditions as a stimulus to reflection and engagement regardless of cultural or religious boundaries.[29] In practical terms, different communities, and even different nations, can seek moral understandings of higher natural law principles, as those principles become known in actual historical situations. Within a nation, this consensus can guide policy formation. At the broadest level, societies can draft specific context-driven treaties on shared understandings, thereby building a legal basis for governing international relations on a wide range of issues.

It should not be expected that agreements on all issues will be reached as real differences exist across moral communities. A natural law covenant framework for public theology allows for development of greater common understanding over time on a range of issues without forcing a false conformity. In the process, the acceptance of difference and the establishment of legitimate non-exclusionary boundaries that are essential to the maintenance of true community life are permitted.

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28. Lisa Sowle Cahill notes cross-cultural misunderstandings that arise when Western values are automatically assumed to be universals in her analysis of natural law and feminism. She notes the difficulties in promoting literacy in some third world situations without understanding how it would be valued in context. *See* CAHILL, *supra* note 22, at 58.

29. For his discussion of intellectual solidarity, see HOLLENBACH, *supra* note 22, at 138.

III. STATE ACTION IN THE MORAL SPHERE

The distinctions that exist in civil society between intermediate level associations and the state permit limits to be placed on government action in the moral sphere. While political communities ordered on covenant principles like Puritan New England often sought to control all moral aspects of life with enforcement by the state, this need not be the case. As articulated by John Courtney Murray, the natural law influenced concept of jurisdiction only permits laws regulating morality when the public welfare of society as a whole is involved and where such constraint promotes human freedom.[30] Murray states:

> Therefore the moral aspirations of the law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order. It does not look to what is morally desirable, or attempt to remove every moral taint from the atmosphere of society. It enforces only what is minimally acceptable, and in this sense socially necessary.[31]

In this analysis, broad areas of private interests are respected that are not subject to state control. These areas, however, are not simply left to individual judgment. They are matters of public concern due to their implications to wider society. The empowerment of intermediate level organizations to take a more active role in the lives of community members serves as the primary means of social moral regulation for matters outside the jurisdiction of the state. This is part of the spiritual mission of the church and describes what Murray referred to as the freedom of the church that enables it to possess a free reign within larger civil society.[32]

A. Private Covenantal Organizations

Even while acknowledging that many areas of moral life are not proper for state action and lawmaking, many issues confront a political community which involve an overlap of moral and legal considerations. Many of these areas are controversial because they involve personal decisions and privacy interests that make legislation appear to be inappropriate meddling. Even so, legislation may be advisable where personal decisions have broad ranging consequences that impact society as a whole.

Marriage can serve as an example to analyze the complex set of issues

30. MURRAY, *supra* note 1, at 160-65.
31. *Id.* at 166.
32. *Id.* at 201.

surrounding attempts to circumscribe state intrusion in the private sphere. Marriage is the most intimate and personal relationship entered into by two people, yet it also serves important public purposes in achieving a measure of social and economic stability for the marital partners, their children, their extended family and the community surrounding the marriage. The strengthening of marital relationships through appropriate laws serves a public purpose beyond the purely personal and contractual aspects of the institution by promoting social stability.[33] Accordingly, marriage has long been subject to the laws and regulations of the state in the West since the time the state began taking over jurisdiction of marriage from the canon law of the church.[34]

While some state regulation is acceptable, delineating areas that are proper for legislation can be difficult and can change over time. Adultery was once seen as a criminal offense because of the impact it had on marriage and the surrounding community. In modern times, however, adultery is now seen as a private moral problem, not an issue of criminal law. Nonetheless, adultery can still be subject to legal consequences in divorce proceedings, although this too can vary depending on the jurisdiction.[35] Conversely, battery within marriage was once seen as a private domestic problem but is now subject to increased public scrutiny and criminalization.[36] It is evident in the realm of marriage that the state retains some measure of authority over matters that could be considered either moral failings or crimes depending on one's perspective.

Under the view that civil society is made up of various associations that have their own proper function, the creation and maintenance of public moral standards as it relates to marriage belongs to church and family institutions. Given the need for some state regulation in the area of marriage and divorce, however, it is proper for the state to respond to the concerns raised by churches, families and other appropriate organizations. The state may either strengthen or weaken how factors such as adultery are considered in divorce to reflect ongoing public concerns and values in this area. This is not an improper intrusion of the state into private affairs, but rather a reflection of the need for the state to be attuned to the social impacts of moral decisions on community

33. *See* Katherine Shaw Spaht, *Why Covenant Marriage?: A Change in Culture for the Sake of the Children*, 46 LA. BAR J. 116 (1998).

34. Concerning the history of state regulation of marriage, see JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN RELIGION 53, 217 (1997).

35. *See* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Daniel E. Murray, *Ancient Laws on Adultery – A Synopsis*, 1 J. FAM. L. 89 (1961).

36. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

integrity.

Arguably, it could even be appropriate for adultery to be subject to criminal sanctions if the public views adultery as sufficiently detrimental to the public good. However, other prudential factors, such as the ability to enforce anti-adultery laws, would have to be considered before any such laws were enacted. In order for an anti-adultery law to be enforceable, the moral position animating it would have to be received as true and beneficial by a sufficiently large consensus of the people that most would seek to follow the law and to see others compelled to obey as well. Nonetheless, given the inherent problem of enforcement in actual practice, limiting state involvement to the self-policing process of divorce and family court proceedings would be advisable as a matter of prudential policy. In this regard, the natural law tradition has long included prudential factors in its consideration of the lawmaking process.[37]

Whatever position that state adopts with respect to adultery, the state is taking a moral stance so that neutrality with respect to adultery is not possible. The state either must view adultery as benign, and therefore leave adultery unregulated, or view adultery negatively, and therefore attach legal consequences to the act. A position regarding the social order is present in either situation, and it is the function of the state to reflect the vision that has been worked out in the public sphere by the different intermediate organizations that promote diverse and conflicting views of the public good as its relates to marriage.

The same process can be implemented in examining the legality of same-sex marriage. While it may not be advisable to seek government involvement in the criminalization of purely personal sexual decisions given the issues surrounding effective enforcement and privacy, the state must still have some involvement in the determination of the legality of same-sex marriage given its necessary regulative role. This is another area where neutrality is not a possibility, as competing conceptions of societal good and the role that marriage necessarily pull against one another in the public sphere.

According to modern views that largely prevail in most jurisdictions, marriage is a purely contractual relationship between two individuals. This contractual relationship is created and dissolved by the decisions of those two individuals under the authority of the state. Accordingly, the overarching moral interest is the preservation of liberty and equality against unjust encroachment

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37. For example, Aquinas cautioned that "a human law should never be altered, unless the gain to the common well-being on one head makes up for what has been lost on another." Prudential balancing to promote the common good was a hallmark of the legislative process. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II q. 97, a. 2 (Benziger Bros. ed., 1947) (1274), *available at* http://www.ccel.org/a/aquinas/summa/FP.html.

on individual rights. In other concepts of marriage that retain some connections with religious and social institutions, marriage has a greater social context. In these views, marriage involves more than the decision of the two partners and extends to their children or potential children, their other family members, the community in which they live, and the various social and business organizations which interact with the family unit.

Under this view, there is adequate basis for a marriage to comply with certain basic community standards that have been worked out in the public social and moral spheres. The laws of most states reflect some combination of these two views. Citizens of the various jurisdictions are at liberty to select their marriage partners, subject to state scrutiny on grounds of incest, bigamy, age and mental capacity.

Where the state has authority for regulating marriage, its laws will generally draw from prevailing community beliefs concerning its societal meaning and role. These regulations are not neutral but reflect a certain expectation about the function marriage plays in society. The moral ramifications of marriage are thus evaluated within this broader social perspective, which may emphasize either the social or the individual aspects of marriage. Under a contract model, same-sex marriage could be permitted as a protected liberty interest. Same-sex marriage could also be permitted under natural law and covenant views to the extent that the larger community finds that it promotes the common good of the whole. In this process, personal liberty interests are but one factor that is considered along with other varied and competing societal concerns.

A public theology drawing upon the natural law and covenant traditions allows for the consideration of a number of factors, including morality, but does not require certain outcomes in what policies are actually enacted. The determination of proper actions is left to the deliberative processes available in civil society, which when appropriate, are then enacted in the lawmaking institutions of the state. For instance, arguments based in natural law and covenant thought have been used by both supporters and critics of same-sex marriage.[38]

A natural law and covenant based approach would permit the community to weigh a number of factors in determining whether same-sex marriage should be permitted. This should not be seen as a complete disavowal of modern approaches to marriage that emphasize the contractual aspects of individual choice. Great benefits have accrued to women in terms of becoming equal partners in marriage with full property and personal rights to be free from

38. *See generally* ERIC MOUNT, JR., COVENANT, COMMUNITY, AND THE COMMON GOOD: AN INTERPRETATION OF CHRISTIAN ETHICS 65, 155 (1999).

physical, emotional, and sexual abuse which had previously been seen as being immune from state regulation.[39] While many of these rights were advocated by social activists working out of, and motivated by, a Christian worldview, the contributions of Enlightenment philosophies with their emphasis on individual autonomy were also a significant force for change.[40] Natural law and covenant thought looks to consider the free choices of the individual in the context of responsible interpersonal relationships and the consequent associations that make up the social matrix of larger civil society. In doing so, the common good of the people, as a whole and as individually considered, is the goal of social policy in legislation.

The difficulties in attempting to resolve controversial public policy issues on morally neutral grounds are exemplified in recent court cases dealing with same-sex marriage. As was indicated in the discussion above, laws regarding marriage reflect societal values and judicial opinions tend to reflect these differing conceptions. While neutral grounds based solely in legal reasoning are often sought in judicial decisions, significant moral positions are unavoidably taken when the courts consider for themselves fundamental rights on a substantive basis. In the debate surrounding same-sex marriage, these background moral beliefs include not just the nature of marriage and homosexuality but also the overall place of moral values in public policy debates.

Using New York as an example, the issue of same-sex marriage was taken up in the case of *Hernandez v. Robles*, which serves to highlight many of the problems with adjudicating issues of substantive moral rights in court proceedings.[41] The plurality opinion upheld the validity of New York laws restricting same-sex marriage by determining that the New York Legislature has a rational basis to define marriage as the union of opposite sex partners.[42] This use of rational basis centers on the argument that one purpose of marriage is to promote the welfare of children and that it is reasonable for people to believe that opposite sex marriage serves this purpose better than same-sex marriage. The court reasons that while this may be controversial and is not accepted by all, it is not an irrational position to take in light of a common sense premise

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39. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L. J. 1359 (1983).

40. *See* Mary C. Segers, *Feminism, Liberalism and Catholicism, in* FEMINIST ETHICS AND THE CATHOLIC MORAL TRADITION, READINGS IN MORAL THEOLOGY 586 (Charles E. Curran, Margeret A. Farley & Richard A. McCormick eds., 1996); *see also* DONALD W. DAYTON, DISCOVERING AN EVANGELICAL HERITAGE 85 (1976).

41. *See* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

42. *Id.* at 6 (citing N.Y. DOM. REL. LAW arts. 2-3).

that children will do best with both a mother and a father in the home.[43] This reference to common sense is as close as the plurality comes to acknowledging the validity of deferring to the public's sense of morality and whether this satisfies the rational criteria required of judicial decisions. Indeed, the court accepts the position that if the restrictions on marriage were wholly irrational and based on ignorance and prejudice against homosexuals, then the measures would be found unconstitutional.

In reaching its decision, the plurality is silent as to whether restrictions based on firmly held moral beliefs rooted in religious traditions would count in the category of rational or in the category of ignorance and prejudice. The dissent holds no such qualms and places moral beliefs squarely in the realm of irrationality, permissible for private belief but never for public policy.[44] In doing so, the dissent assumes that statements about ultimate reality are impermissibly irrational in formulating public policy. However, this is itself an assertion about the nature of ultimate reality for which the dissent makes an apparent exception.

Judicial decisions are often determined based on how rights are conceptualized and described. There is much fluidity and freedom in this process of description that has significant ramifications, which further serves to indicate the inadequacy of the judicial forum in the resolution of important issues of public policy. The plurality in *Hernandez* defines the right at issue as the right to marry a person of the same-sex, which they did not see as rising to the level of a fundamental liberty right.[45] As a result, the legislature could properly restrict the practice without facing strict scrutiny. The dissent sees the issue as the right to marry in itself, which is a fundamental liberty right that may not be infringed upon by the state in the absence of a compelling interest.[46]

While the dissent sees the restriction of same-sex marriage as subject to strict scrutiny analysis, it also sees the restriction as failing to pass a rational review basis.[47] As indicated above, the plurality found that a rational basis exists for the legislation in contrast to the dissent.[48] In doing so, the respective opinions demonstrate a difference in how rationality itself is being perceived by the judges. The case shows how the legal reasoning utilized by both the plurality and dissent largely misses or ignores the truly central issues at stake. Both sides look to the existence of morally neutral reasons on the part of the legislature for

43. *Id.* at 7-8.
44. *Id.* at 33.
45. *Id.* at 10.
46. *Id.* at 27.
47. *Id.* at 30-31.
48. *Hernandez*, 855 N.E.2d at 6-8.

banning same-sex marriages. The plurality sees the existence of such grounds, while the dissent finds the reasoning to be a mask for the real basis of the prohibition, the moral disapproval of the legislative majority which is nothing more than prejudice.[49] This position relies on the assumption that moral belief is private, irrational and out of place in public policy decisions. An approach based on natural law and covenant concepts seeks to demonstrate that this need not be the case and that moral beliefs can play a role in shaping public policy decisions in a manner that respects both individual and community interests. Under this approach, legislative policies could incorporate moral views as part of rational deliberation which would be factored into subsequent judicial analysis and would not be perceived as *a priori* irrational.

IV. PERSONAL LIBERTY AND MORAL REGULATION IN SOCIETY

The above discussion highlights another important issue about the relationship between personal liberty in making moral decisions and unjust government encroachment into areas that are protected civil liberties. As has been suggested, not all areas of sexual relations are matters of public concern and should be left to the normal controls of social behavior that a society uses outside of the legal context. Yet the natural law and covenant models also recognize that there are some aspects to sexual behavior that the state does have a responsibility to regulate when the public welfare is sufficiently impacted. While no hard and fast rule of thumb exists that can demarcate what is proper and what is not ahead of time, an approach that utilizes the insights of natural law and covenant thought can provide some guidance.

Some areas of civil liberty, such as the freedoms of religion,[50] assembly,[51] and speech[52] are protected under the United States Constitution, which expresses American society's understanding of the requirements of the higher law. These areas should not be subject to government action absent a new social agreement in terms of the amendment process because they reflect the core beliefs of the people as to how liberty ought to be exercised where personal rights and social responsibilities coexist. Indeed, political philosopher John Rawls goes as far as to argue that these rights are so basic and fundamental that not even later generations could alter them through amendments, even though this would seem to privilege the moral insights of a

49. *Id.* at 32-33.
50. U.S CONST. amend. I.
51. *Id.*
52. *Id.*

single era.[53]

As the basic moral agreement among the people is a living tradition, it can be expected to change and evolve over time, and it is in fact necessary for it to do so to remain vital and maintain the allegiance of the people. While many minor changes in attitudes and beliefs are easily accommodated under the pre-existing framework of laws and informal cultural beliefs, others require significant changes in governing structures and involve debate at the constitutional level. For instance, as the equality and rights of women came to be recognized, the suffrage movement sought and obtained the right to vote.[54] The transition was not instantaneous nor easily achieved, but it did reflect the changing moral attitudes of society with respect to gender equality.[55]

In terms of policies that carry deep social significance or impact large numbers of people, decision making processes must reflect an underlying consensus of the people as a whole. It is the responsibility of community leaders, both those who are part of elected government and those who are part of the voluntary associations that comprise civil society, to help the people reflect and choose wisely. This responsibility derives from the notion that the people are the source of authority and that leaders receive and hold their lawmaking power only in their representative capacity.[56] It also reflects the notion found in both natural law and covenant thought that each society charges its leaders with the responsibility for enacting laws that comport with the higher law that governs society. While hierarchical power schemes that impose a view of morality on others are to be discouraged, the need for leadership and moral vision is still significant.

In the process of developing public policies, leaders have to rely upon the underlying consensus drawn from the moral beliefs of the people. This is part of their obligation to ensure that all laws are subject to the higher law principles that govern state and society. Because leaders have no inherent moral insights that are greater than any other citizen, their duties require an ability to both listen and persuade. Sometimes this may involve unpopular courses that are later vindicated, such that a leader need not always follow the winds of public

53. *See* JOHN RAWLS, POLITICAL LIBERALISM 239 (1993).

54. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex, Equality, Federalism and the Family*, 115 HARV. L. REV. 947 (2002).

55. *Id.*

56. Aquinas explains the purpose of laws in terms of the common good and provides a basis for the notion of consent of the people in the lawmaking process that is later taken up in greater detail by scholastics like Francisco Suárez. Aquinas states, "The planning is the business of the whole people or of their viceregent. Therefore to make law is the office of the entire people or of the public personage who has care for them. For, as elsewhere, to plan for an end belongs to the power matching that end." AQUINAS, *supra* note 37, at I-II, q. 90.

opinion as it is a reflection on the abiding underlying consensus and not the moment that is significant in setting public policy.[57]

Nonetheless, an opportunity must be given for the people to ratify or reject the policy after enough time for reflection has occurred. Those political or moral policies which develop without any opportunity for ratification by the people must be rejected as outside the proper limits of state authority. Where little possibility exists for the people to be involved in the ratification of a decision by a public official, it becomes more important for that official to refrain from imposing his or her own moral beliefs into the determination of the law and policy. Where the state action can be easily changed, the corresponding possibility that beliefs will be imposed in ways that are contrary to the public consensus is lessened.

Given the back and forth movement involved in social discussions of morality, there must be flexibility when it comes to government action that involves public moral standards. As almost every public policy carries some moral significance, whether in terms of taxation, defense, environmental regulation, or social programs, let alone more visibly moral issues like same-sex marriage and abortion, this need to be responsive is of paramount importance.

An approach influenced by natural law and covenant thought places the primary responsibility for moral formation in the larger public sphere of civil society that is the most adaptable to developments in historical context and moral understandings. Laws of the state may reflect these moral beliefs when touching areas of public concern that properly belong to the jurisdiction of the state. However, laws that simply reflect a religious or a moral position but do not involve the public good are outside of the proper jurisdiction of the state. For instance, laws banning a particular religious practice or subsidizing an evangelical crusade with public funds would always be impermissible no matter how much popular support they receive. Natural law principles of prudential judgment concerning the proper scope of government action can be applied throughout this process, but it is always in the context of the actual agreements made by the people that reflect their moral understandings. In doing so, an approach using natural law and covenant insights seeks to preserve the proper

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57. As Catholic natural law theologian Jacques Maritain suggested concerning the duties of the ruler in reflecting a deeper consensus,

> It means on the other hand, being intent on what is deep and lasting, and most really worthy of man, in the aspirations and psyche of the people. Thus it is that in incurring the disfavor of the people a ruler can still act in communion with the people, in the truest sense of this expression. And if he is a great ruler, he will perhaps make that disfavor into a renewed and more profound trust.

JACQUES MARITAIN, MAN AND THE STATE 137 (Catholic Univ. of America Press, 1998) (1951).

domain of civil freedom that belongs to the people from unjust intrusion while at the same time not adopting a view of freedom that rejects moral responsibilities to the larger society.

A natural law and covenant based framework also provides some guidance for the institutional structuring of government. The need for diversity, the role of intermediate organizations and the principle of empowering the people to participate in the political structures of society support the use of the federal structures. In this manner, some variation in laws is permitted to reflect regional, if not local, understandings concerning which laws best promote the common good in light of the higher law that circumscribes government action. It further permits tiers of involvement allowing laws to be enacted and implemented at an appropriate level to be effective pursuant to the principle of subsidiarity.[58] The use of representative government encourages some sense of the face-to-face communication and relationship that is needed to foster community in larger populations, although this becomes more difficult as size increases.

Division of power within government serves as another means of limiting the power of the state from unjust encroachment on civil liberty in natural law and covenant thought. Under this approach, the legislative representatives are vested with the greatest authority since they are the most accountable to the people. In terms of appeal to higher law principles, elected legislative representatives have the most leeway in seeking to invoke and shape the public consensus. These representatives can be expected to promote and enact laws supported by their constituencies which will have moral aspects in many cases. Further, they can be removed from office if they use their position to promote laws with moral objectives that differ from the consensus that exists among the people.

Elected executives can also invoke and seek to shape the underlying moral consensus that stands behind the law as part of their duties as leaders in the public square. While more removed from the people than representatives, elected executives still seek office in a process that can reveal their moral and religious beliefs concerning public values and can govern accordingly on those issues properly within their jurisdiction as civil lawmakers. While executives need to pay heed to the notions of prudential judgment and practicality that govern all lawmaking processes, they also have a duty to provide a moral vision for the people. This involves a careful balancing between adhering to the existing consensus and pushing the community in new directions of growth which may sometimes put the executive at odds with the electorate. Given the

58. MURRAY, *supra* note 1, at 334.

extensive range of moral issues that holders of executive power regularly confront, they will frequently have cause to consider the religious and moral aspects of policy matters where those areas are properly within the scope of their responsibilities in the political sphere.

Non-elected executive officials and the judiciary are the farthest removed from direct accountability and therefore present the greatest risk of imposing moral and religious beliefs upon the people in a manner contrary to society's consensus. While these officials and judges may invoke their expertise to help aid the discussion and development of moral consensus in civil society, imposition of moral standards in an authoritative manner is not to be preferred over inductive models of moral understanding developed in the covenant and natural law approaches. Given the obstacles that exist in overturning policies enacted by non-elected civil officials and judges because they cannot be easily removed from office, retaining moral authority in the hands of the people is the most effective basis for avoiding a displacement of the public consensus.

The judiciary retains its important function of keeping the institutions of the state within their own proper sphere in civil society. Judges have the responsibility to discern when ordinary legislation impermissibly imposes a religious or philosophical system of belief or seeks to discriminate against minority beliefs. This can be particularly difficult when these actions occur under the guise of apparently neutral legislation.[59] Further, judges would be called to evaluate whether laws directly regulate religious practices that are beyond the powers of the state to enforce. While moral content may influence legislation and public policy, the state lacks jurisdiction over the formulation of beliefs concerning ultimate reality.[60]

The importance of moral discourse within society is related to a concern for the preservation of freedom throughout both the natural law and covenant traditions. The recovery of a notion of a civil or covenant liberty that operates in a context of responsibility to both oneself and others can be used to balance an undue emphasis on natural liberty, which would overstress the significance of individual autonomy.[61] Covenant liberty does not consider individual

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59. *See, e.g.*, Employment Div., Dept. of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990) (addressing the impact of apparently neutral controlled substance laws on Native American religious practices); Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (same).

60. *See* Murray, *supra* note 9, at 237.

61. The concept of covenant or civil liberty in Puritan covenant thought is classically stated by Massachusetts Bay Governor John Winthrop. Winthrop defines this type of liberty as:

> civil or federal. It may also be termed moral, in reference between that covenant between God and man in the moral law, and the political covenants and constitutions amongst men themselves. This liberty is the proper end and object of

autonomy unimportant, but it does refuse to see the person in isolation of the many relationships that bind a person to others. Likewise, the exercise of freedom in natural law thought seeks for the attainment of moral excellence and the cultivation of virtue in accordance with the moral law of God.[62] The differences between these competing notions of freedom for political responsibility are succinctly stated by Lutheran theologian Robert Jensen as follows:

> On the one hand, freedom has meant for us what it meant for the Greek and medieval free cities, for the towns and township communities of the colonies, and for the governing class of the colonial state authorities: access to the forum where the community deliberates and decides its own good, participation in the polity. Taken of the community as such, this freedom is then the community's ability to conduct such deliberation itself. On the other hand freedom has meant for us what it means in mechanistic political theory: freedom *from* the community's deciding of the good, the existence of a space where I, as we have come with great accuracy to state it, can do my own thing. The two conceptions can at best uneasily coexist, since the one calls me into the community and the other calls me out of it.[63]

Under the natural law and covenant approaches, freedom is always understood in terms of a larger social framework that is subject to many determinative influences.[64] This is the tradition of viewing political liberty as participation in the decision-making processes of the community where freedom is exercised in light of one's moral obligations to others.[65] These commitments involve the person in the deliberations of the community as a whole. Without this notion of interdependence, real freedom only exists in those situations where one is isolated from others, and engagement with others becomes the means by which personal liberty is eroded. The exercise of

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> authority and cannot subsist without it, and it is a liberty to that only which is good, just, and honest.

JOHN WINTHROP, THE JOURNAL OF JOHN WINTHROP 1630-49: ABRIDGED EDITION 282-83 (Richard S. Dean & Laetitia Yeandle eds., 1996).

62. *See* SERVAIS PINCKAERS, THE SOURCES OF CHRISTIAN ETHICS 345 (Mary Thomas Noble trans., 1995).

63. ROBERT JENSEN, AMERICA'S THEOLOGIAN: A RECOMMENDATION OF JONATHAN EDWARDS 154 (1988).

64. *See* PINCKAERS, supra note 62, at 354; *see also* JONATHAN EDWARDS, THE FREEDOM OF THE WILL (Soli Deo Gloria Publications 1996) (1845).

65. *See* JENSEN, *supra* note 63, at 154.

freedom in the name of community responsibility need not require the affirmation of a single vision of ultimate truth by the citizens of a civil society, as it is the cultivation of responsibility to temporal civil society and the interests of citizens within this limited sphere that is the interest of the state. As such, one of the important tasks of politics is to delineate the range and bounds of freedom of a particular society.

In the natural law and covenant traditions, freedom becomes a means for engagement with others rather than withdrawal for private pursuits. It presupposes a realm of value in which different citizens and communities interact with one another to contribute to the common good. In this view, freedom is not primarily concerned with avoiding interference from others as one seeks private goods and happiness, although this should not be interpreted as denying the validity of individual freedom or private interest. Nonetheless, these values are placed within an overall context that balances the interests of the person against those of the community. Construing liberty in this relational sense emphasizes public participation by citizens in ways that blur any clear-cut demarcation between the private and public sectors. In doing so, it helps promote a vision of the common good, which is the responsibility of all people and not just the state.

V. CONCLUSION

When considered together, natural law and covenant thought provide a framework that promotes the inclusion of moral belief in the development of public policy. They do so by allowing for a matrix model of civil society that is composed of different levels of personal and group involvement. Under this framework, the state bears the responsibility for enacting laws for the common good of all society, while moral development is left to the organizations existing at the intermediate levels making up civil society. The state does not exist in isolation from larger society and depends on it for the creation of values that animate the policies it pursues.

A covenant and natural law framework also provides resources for considering how moral formation occurs within a civil society marked descriptively by directional pluralism and across the boundaries that divide civil societies from each other. Through a commitment to transcendent order existing independently of the particular community, dialogue with others can be established to develop a consensus on matters of public policy. At the same time, the approach provides resources for promoting diversity and preserving civil liberties when confronted by overreaching by the state in the name of preserving a common order.

The natural law and covenant traditions contribute to a public theology that

provides resources for balancing individual liberty and autonomy with community responsibility. In doing so, it permits moral considerations drawn from competing ideas concerning ultimate reality to be utilized in developing public policy. As political authority is vested in the people, moral discourse begins with the broader elements of civil society outside of the state. Correspondingly, when state involvement is warranted, those parts of government in closest relationship to the people are most empowered with lawmaking authority and with the ability to consider the moral values promoted by legislation. While not requiring any specific outcomes, a public theology utilizing covenant and natural law principles provides a method for permitting public consideration of morality while still protecting the civil liberties of the people.