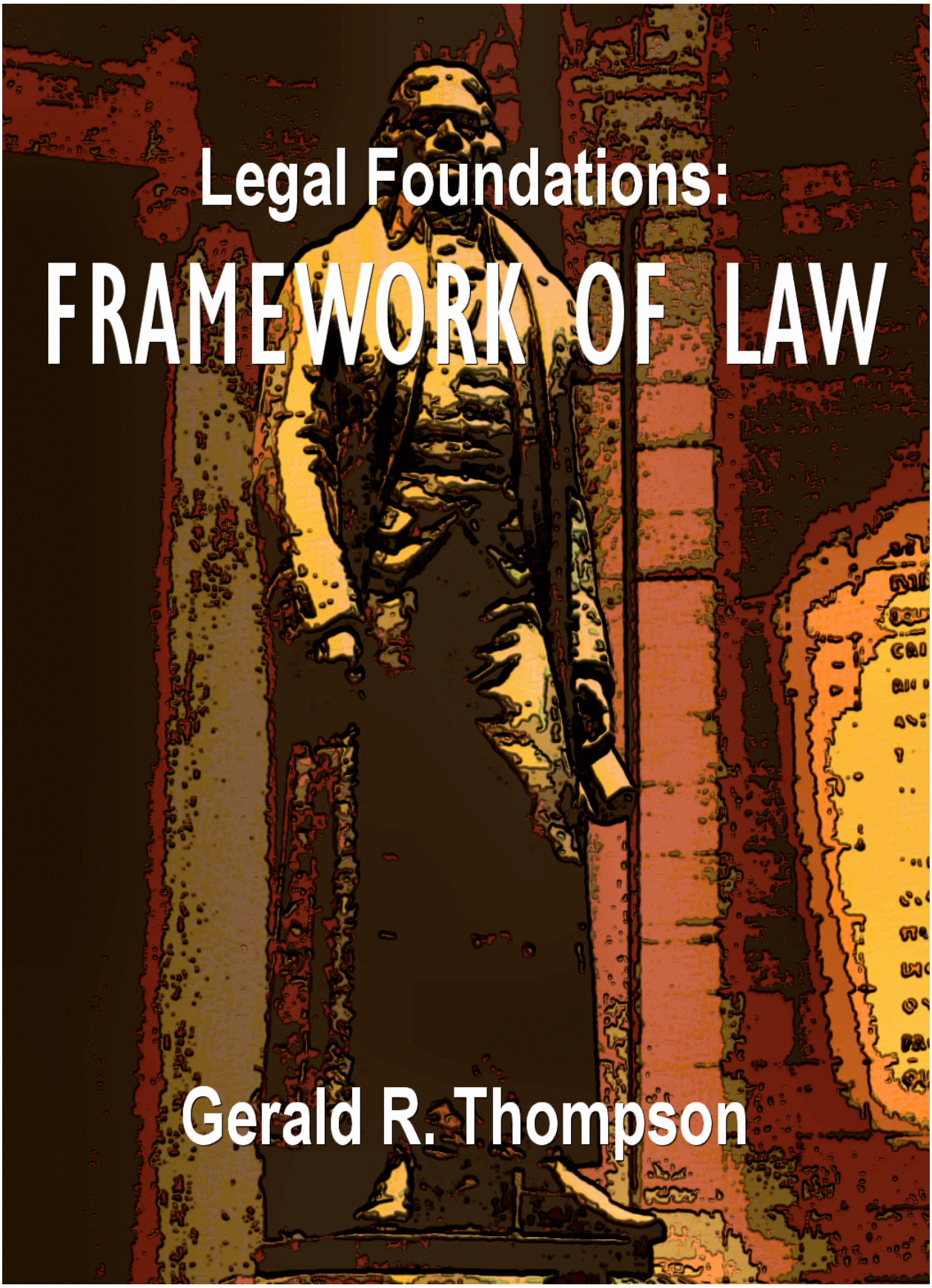
Legal Foundations:
FRAMEWORK OF LAW
Gerald R. Thompson

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The Framework of Law

GERALD R. THOMPSON

Ver. 2.6

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Published by Lonang Institute
www.lonang.com

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Preface

LONANG does not exist in a vacuum, it has a context. This context is fairly well documented throughout history, so it is not something I have made up so much as collected and organized. Like Jefferson, who claimed that the Declaration of Independence was simply the common sense of the subject which he merely wrote down, I do not claim everything I am about to write originated with me. However, I daresay I will interject some new thoughts every now and then, and at times I will question assumptions of very long standing. In one sense, LONANG is nothing new, but at the same time, everything is up for grabs.

You might think that law schools would acknowledge long-standing traditions in legal thought and try to tie together the modern with the ancient. But you would be wrong. What we are about to delve into - the foundations of law - are essentially things never taught in law school. There are a number of reasons for this, but these will have to be dealt with elsewhere.

Does the Bible speak to legal matters? Is the Bible a legal textbook? Can we know anything about law *from God's perspective* with certainty? Or, is every legal philosophy based on the Bible merely a matter of subjective opinion, not objective truth? Even if we can know God's perspective of law, is it relevant to modern nations? Do Christians have any basis for opposing modern trends in legal philosophy? Is there such a thing as a truly distinctive Christian jurisprudence? If a Christian jurisprudence exists, is it grounded in *religion*, or *law*? And, is the only result of an inquiry into such questions an endless discussion regarding rules of interpretation that can never be resolved?

I believe there is a biblical basis of legal philosophy and a distinctive Christian jurisprudence. This perspective of law is not only relevant, but to the extent it is revealed by God it is also authoritative, binding every person and every nation. Because it is based on biblical revelation, this jurisprudence is objectively real and verifiable, and we can (or should be able to) know it with certainty. Further, this perspective of law is grounded in law itself though based on biblical revelation, because the Bible is not merely a book of spiritual truths, but a revelation of truths which apply to every area of life.

The following pages will propose and examine some of the foundational principles of a biblical jurisprudence. The format of this work is to present biblical texts I believe are applicable to legal philosophy and to suggest an interpretation and application of those texts. No claim is made that the suggested interpretations of the Bible presented here are authoritative, but it every effort has been made (consistent with a grammatical-historical-literal understanding of scripture) to be as reasonable as possible. It is up to the reader to decide whether the interpretations and applications are persuasive or correct. For this reason, almost all of the referenced scriptures are quoted in full, to make it easy for the reader to verify the jurisprudential suggestions offered. Thus, in a sense, this work is necessarily incomplete. Constructive suggestions and comments are welcomed to revise and refine the legal analysis. The author invites criticism and takes full responsibility for any errors in the interpretations or applications made.

In addition to presenting biblical texts, there must necessarily be an examination of some historic legal texts and organic documents to assist in developing a Christian jurisprudence. The purposes for examining these texts include the following: 1) to corroborate the suggested biblical exposition as having been accepted at a specific time in history; 2) to demonstrate that the legal philosophy presented here is not new or novel, but has a long and rich tradition; 3) to remind the reader that biblical jurisprudence is not only relevant, but has been authoritative, in the legal affairs of real people in real-life situations, and for entire nations in actual history; 4) to show how biblical jurisprudence guided the formation of the United States of America; and 5) to demonstrate that biblical jurisprudence is an integral part of our national heritage, which we ought to study and may investigate as the truly authoritative basis for American law.

I believe that law, liberty and justice cannot ultimately be preserved in America until the biblical basis of our legal heritage is rediscovered and reaffirmed. Many scholars have recognized that the legal framework of our nation's founders has been discarded modernly to the extent that the existence of the Creator God and his laws, as revealed in nature and the Bible, have been abandoned as the legal foundation of American society. The hope is that by reacquainting ourselves with a more precise historic understanding of the Bible's legal applicability, we may be able to reverse the growing disrespect for the authority of law which has come to plague our nation.

> *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.* [VIRGINIA BILL OF RIGHTS, Sec. 15.]

> *"And those from among you will rebuild the ancient ruins; You will raise up the age-old foundations; And you will be called the repairer of the breach, The restorer of the streets in which to dwell."* [Isa. 58:12.]

CHAPTER 1

In Search of LONANG

INTRODUCTION

Law, having its source in God, is a means by which God sustains and governs the universe. It permeates existence, guiding the course of all things and affecting the behavior of every creature. Directly or indirectly, God's law governs every area of life. It is what connects us with our Creator, the world we live in, and each other. There are no ears where the voice of law is not heard, nor any place which escapes its presence. No one is immune from the operation of this law.

The Need for Legal Absolutes. In today's climate of moral and legal relativism, people are once again seeking moral and legal absolutes. The more relativism permeates our culture, the more every aspect of life becomes uncertain. Relativism asserts that the only absolute rule is, "there are no absolute rules." So, in spite of the quest for ultimate values, many are no longer sure where those values lie. Society has so long lost sight of its ultimate legal foundation that few people would recognize it when they stumble upon it. Yet, without a sure legal foundation, society cannot remain intact for long.

> *The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history.* [Trist v. Child, 88 U.S. 441 (1874), quoting from 1 Montesquieu, SPIRIT OF LAWS.]

A Higher Law. In the search for absolute ethical standards and fundamental legal rights, there is no hope unless there is a "higher law" of divine, not human, origin. As long as people still believe in the perfectibility of man, they will cling to the hope that humanity can eventually solve its own problems. But, many have already seen the futility of this position and recognize that perfection from within the species will never come. Humanity has repeatedly demonstrated that it cannot adequately govern itself apart from God's law. If we are the only ones who can give ourselves guidance then we might as well despair, because no one among us can rise above the human condition to show us a way out of the misery we have created for ourselves.

> *To arrive at absolute legal standards, one would have to disengage himself from the world and its limited standards and go "outside the world" to a "transcendental" realm of values.* [J. W. Montgomery, THE LAW ABOVE THE LAW (1975).]

> *How blessed is the man who does not walk in the counsel of the wicked, nor stand in the path of sinners, nor sit in the seat of scoffers! But his delight is in the law of the Lord, and in His law he meditates day and night. . . . For the Lord knows the way of the righteous, but the way of the wicked will perish.* [Ps. 1:1-2,6.]

The Creator's Authority. The understanding of legal absolutes embraced in the formative stages

of Anglo-American jurisprudence is based on the revealed laws of God. According to the revelation of God expressed in the Bible, God has absolute authority over all the nations of the world because He is the uncreated Creator. Biblical history reveals that when a nation denies God's authority, it leads to national judgment. On the other hand, an acknowledgment of God's authority leads to national restoration and prosperity. Thus, the biblical message is that people have a limited authority to rule others, the right to rule ultimately comes from God, and no person is above the law.

> *Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God.* [Rom. 13:1.]

CHOOSING A LEGAL SYSTEM

The future of any nation, whether prosperity or destruction, lies in its choice of legal systems. The task each people has is to discover the legal system which best conforms to reality and to institute it as the basis for public and private life. This was the choice given to ancient Israel, and by implication, is the choice each nation has today.

> *"See, I have set before you today life and prosperity, and death and adversity; in that I command you today to love the Lord your God, to walk in His ways and to keep His commandments and His statutes and His judgments, that you may live and multiply, and that the Lord your God may bless you in the land where you are entering to possess it. But if your heart turns away and you will not obey, but are drawn away and worship other gods and serve them, I declare to you today that you shall surely perish."* [Deut. 30:15-18.]

The Big Questions.

Jurisprudence is the study of the philosophy of law. The concern of jurisprudence is the nature of the foundation upon which any given legal system is built. It is concerned with the origin and nature of law, the framework of rules which shapes the construction of the whole legal system, and the compatibility of specific legal rules with the overall system and with reality. Initially, every legal system must investigate, or at least presume answers for, these three questions:

What is law? Every legal system makes implicit assumptions about the nature of law: either that law is created or it evolves, that it binds everyone or only those who choose to submit to it, that it reflects what is truly right or merely reflects the choice of the powerful, that it reflects the interests of the few or the many.

Where does law come from? Does law originate with God, nature or people? Are there any pre-existing laws which constrain us, or are we free to recognize any laws we wish? If there were no statute books, would there still be law? This area of inquiry is of preeminent importance, for once we know the ultimate source of law recognized by society, we know what is the ultimate power, or god, of that society.

What are the terms of the law which governs us? This aspect of inquiry asks how we are to

ascertain what legal rules apply to us, and how we know what those rules are. Are laws self-evident in nature? Is law whatever our conscience tells us is right or wrong? Is there any form of reliable revelation of laws which transcends our own opinions?

The Big Problems.

There was a time in America when the answers to these fundamental questions were widely known and held in common among lawyers, jurists and laymen. This common understanding of law was based on a jurisprudence which acknowledged that a transcendent Creator was the ultimate source of law, and that He revealed those laws in the physical creation and the Holy Bible. Today, that form of jurisprudence has been rejected largely by those who believe that a Creator God does not exist, that if He exists He does not concern Himself with governing people or nations, or that no one can sufficiently discern the laws of the Creator with any certainty so as to actually govern society on that basis. The modern rejection of a discernable and definite God-based jurisprudence has far-reaching consequences.

Unless a transcendent God exists, all law is arbitrary. If God does not exist independentof our own observations or reasoning, then there is no ultimate authority or giver of law to whom we can look. There would be no one to declare absolutely what is right and what is wrong, or why. All we have left is humanity, either one of us, some of us, or all of us, but ultimately there is no one among us who has the final, incontrovertible, unexaminable word. Accordingly, without God, all law is, strictly speaking, arbitrary.

> *In order to discover the rules of society best suited to nations, a superior intelligence beholding all passions of men without experiencing any of them would be needed. This intelligence would have to be wholly unrelated to our nature, while knowing it through and through; its happiness would have to be independent of us, and yet ready to occupy itself with ours; and lastly, it would have, in the march of time, to look forward to a distant glory, and, working in one century, to be able to enjoy in the next. It would take gods to give man laws.* [Jean Jacques Rousseau, 2 SOCIAL CONTRACT, Ch. 7.]

Unless God is immanent in human affairs, His laws are irrelevant. If God is not active in the governing of humanity, His laws would be of no effect. The existence of law presumes not only a rule of conduct, but also a mechanism of enforcement. God must actively enforce His laws as the great Sustainer of the universe, or else the rules He prescribes for our conduct need not be obeyed. God must be our Supreme Lawgiver, Governor and Judge (all three), or He is none at all.

> *Man, in whatever situation he may be placed, finds himself under the control of rules of action emanating from an authority to which he is compelled to bow in other words, of LAW. The moment that he comes into existence, he is the subject of the will of God, as declared in what we term the laws of nature.* [T. Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law, 1857*.]

Unless God has revealed His law authoritatively, all law is uncertain. If people are entirely

dependent upon the will of the Creator, then all human law is obliged to conform to God's law. However, unless God has revealed His law authoritatively, no one can be certain what His will is. If this were true, even all human laws would be of uncertain authority, because the extent of their conformity with God's law must remain unknown. Consequently, God must have clearly and authoritatively revealed His law to us for the governance of society, otherwise He could not hold us accountable for its obedience.

An Implicit Legal Faith.

Notwithstanding contrary claims, every legal system or philosophy of law inherently makes assumptions about the nature, origin and morality of law which shape the entire legal framework based on those assumptions.

No legal system is morally neutral. The purpose of every legal system is to declare what is right and wrong, and to establish a means of enforcing those declarations. Hence, every form of jurisprudence has an inherent morality and an intrinsic belief about the nature and existence of God and His law and its relation to us.

> *Questions about justice are fundamentally religious. This is naturally denied by those who think that the separation of church and state is a doctrine providing them with the means to structure the political order to the exclusion of Christian belief. But there is no such thing as law that does not assume a particular configuration to reality, which does not at least pretend to tell what kind of values are to be considered ultimate.* [Herbert Schlossberg, IDOLS FOR DESTRUCTION (1984).]

All legal education is morally biased. All education involves the communication of ideas about reality and purports to convey a sense of what is true. To the extent education does not purport to be grounded in reality, it has no usefulness. To the extent education purports not to be morally biased, it merely advances the belief that no moral absolutes exist, but this is itself an assertion of moral bias. Legal education is no exception.

> *The "ordinary religion of the law school classroom" . . . includes not only the more or less articulated value systems of law teachers, but also the unarticulated value assumptions communicated to students by example or by teaching methods and by what is not taught . . .. The essential ingredients of the ordinary religion of the American law school classroom are: A skeptical attitude toward generalizations; an instrumental approach toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place.* [Roger Cramton, *The Ordinary Religion of the Law School Classroom*, 2 NICM JOURNAL 72-73 (1977).]

One legal system conforms to reality better than all others. Since no legal system or belief about law can exist in a moral vacuum, the purpose of jurisprudence is to develop a legal system which best conforms to reality, that is, the legal principles God has imbedded into His creation and His word. The interests of jurisprudence are not served by defending a view of law which denies the

existence of God and the governance of His authoritatively revealed law, because such a jurisprudence is based on mere imagination, not reality. Nor is jurisprudence advanced by merely describing the current practice of society, for to do so offers no means of evaluating current practice. Merely describing current practice or the current state of the law ignores the possibility (and probability) that society has attempted to mold social environments to suit human desires, rather than to conform human behavior to fixed legal norms. Only a legal system grounded in the reality of God's existence and revelation of law can hope to advance the interests of jurisprudence and society. The pursuit of such a well-grounded jurisprudence is what is sought here.

FORM OF INQUIRY

This jurisprudential inquiry will consider, with respect to each topic that follows, the applicable biblical record, the parallel historic understanding, and some modern views.

Biblical Record. A primary impetus for writing this work is to discover whether the Bible has anything to say about the substantive rules of law. If the Bible is generally silent on such matters, that will consequently be determined. The effort to discover legal principles from the biblical text will be guided by interpretive principles following the grammatical-historical-literal approach. This approach will be employed to document or infer legal rules from case histories, examples, teachings, commandments, wisdom literature, or whatever else may suggest a legal principle or application.

Historic Understanding. In reviewing the vast amount of historic legal writings, the question generally to be answered is whether legal thinkers have ever searched the Bible forsubstantive legal content, and if so, to determine what they found. Concurrently, an attempt will be made to ascertain whether any legal writers have reached a legal position consistent with inferences suggested by the biblical record, whether or not such positions were explicitly based on biblical texts. The historic sources will focus on the writers who were most influential in the shaping of Anglo-American legal thought, particularly those who were influential in relation to the founding of the United States of America.

Modern Views. It is an understatement to say that modern legal scholarship has departed from the biblical and/or historic understanding of law in many significant respects. The question to be generally answered is: How has modern jurisprudence departed from the biblical and/or historic legal positions, and why? It appears that many such departures ultimately rest on two tenets of modern jurisprudence, namely: 1) God does not exist; and 2) the Bible cannot be an authoritative revelation of divine laws in verbal form. Consequently, the questions of God's existence and the authority of the Bible are addressed next.

BASIC APOLOGETIC ARGUMENTS

An historic perspective of law is based on the existence of a God who has verbally and authoritatively revealed His laws in the Bible. The historic understanding of God is of an uncreated Creator, a Being who is both *transcendent* (that is, one who is not part of the creation itself, because He is uncreated) and *immanent* (that is, one who is not completely detached from the creation, but

who actively participates in its governance). Thus, the God of history is one who caused the world and its most foundational laws to come into being quite apart from any human action, and who still actively enforces those laws today. The following "apologetic," or rational defense, is offered for those who may not as yet have embraced this historic understanding of God and His revelation, or their importance to modern jurisprudence.

All *a posteriori* proofs for the existence of God and the authority of the Bible are based on inductively derived inferences. That is, an observation is made of a large number of things which evidence a common trait, and an inference is drawn that all similar things have the same trait. Of course, it is also possible that God has made declarations concerning Himself, or has appeared in history, and for the witnesses of these things no inductive proof is necessary. The same is true for those who accept such eye-witness accounts. For those who doubt the validity of such eye-witness accounts, however, inductive proofs are necessary. Thus, whether a person is predisposed to accept or reject any such eye-witness accounts, some form of proof of the existence of God and the authority of the Bible is available.

God Exists.

The foundational assumption of modern jurisprudence is that God does not exist, or that if he does exist, he is irrelevant to modern legal considerations. However, this is merely an assertion of philosophical preference. It is not the only, the necessary, or even the most reasonable, starting point for legal inquiry. There are many logical, and even necessary, reasons why God's existence should be presumed for jurisprudential purposes. If the existence of God is not presumed, the consequences for jurisprudence are far-reaching.

> *It is of the utmost importance to see why a Godgrounded system has no analogues. Either God exists or He does not, but if He does not, nothing and no one else can take His place. Anything that took His place would also be Him. . . . Given what we know about ourselves and each other . . . if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why anything should. . . . As things now stand, everything is up for grabs. . . . God help us.* [Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, DUKE LAW J. (1979).]

The argument from initial creation or "first cause." Since there is a universe, it must have been caused by something beyond itself. According to the law of causality, every limited (finite) thing is caused by something other than itself. This law is inductively derived from a repeated observation of the world that nothing creates itself. Thus, if the universe began with a "big-bang," someone or something external to the universe, the "first cause," must have caused it to happen.

The possibility of the "spontaneous generation" of things was disproved many years ago. Further, the First Law of Thermodynamics holds that the universe contains a constant total quantity of matter and energy. In other words, no new physical thing can be added to the universe, because it would have to be created from nothing. If these beliefs are accurate, then only someone or something

external to the universe (a spiritual rather than a physical being) could have initially caused the universe to exist, and this first cause was God.

The argument from continuing existence, or "sustaining cause." All finite things are subject to change. Something is sustaining the existence of all finite things in the universe which prevents their non-existence. No finite cause can both cause its own existence and be a continuing effect of that cause at the same moment. Therefore, there must be an infinite uncaused cause of every finite, changing thing that exists, namely, God.

The argument from design. All designs require a designer. The greater the complexity of the design, the greater the intelligence which must have produced it, and the more compelling the implication of a designer becomes. An observation of creation evidences that there is great design in the universe, not only as to scope, but also as to complexity. This gives rise to an inference that there must be a Great Architect of the universe, namely, God.

The argument from purpose. Of all the things the universe contains, not one of those things can invest itself with a transcendent purpose for its own existence. The aggregation of everything in the universe does not provide this purpose either, for the whole is not greater than the sum of its parts. Therefore, if anything in the universe is to have a transcendent purpose, it must have been given such a purpose from some transcendent being, namely, God.

The flip side of this argument is that some people have concluded the universe has no transcendent purpose, and that life is therefore meaningless. Yet, even those who deny the universe has a transcendent purpose have come to that conclusion only after searching for it. A further observation of humanity confirms that all people search for transcendent meaning. This infers that people do have a transcendent purpose, for if they truly did not have any such purpose, no one would search for it.

The argument from conscience. The nature of the universe is not only physical, but moral. An observation of human experience demonstrates that all people are conscious of a moral law, that is, everyone has an inner sense of right and wrong. Further, this inner sense of morality has universal rules, such as knowing that murder is wrong. The existence of universal human morality implies a moral lawgiver. Therefore, there must be a Supreme Lawgiver who gave the universe its moral rules, namely, God.

The argument from superintending Providence. Both the physical universe and human society are governed by rules prescribing the behavior of all things. The stars and planets are not free to wander aimlessly in the heavens, but must follow prescribed patterns of orbit. People are also bound to follow certain behavioral patterns. However, inductive observation indicates that no law is truly self-enforcing as an abstract concept. The enforcement of rules and patterns requires the existence of an enforcer. Therefore, there must be a Great Governor of the universe who enforces and superintends all laws, namely, God.

The argument from judgment for wrongdoing. Inductive observation confirms the existence of

a universal human understanding that some things are good, while others are evil. The universal human experience of guilt implies that those things which are evil will be judged, whether discovered by other people or not. However, the only way anything can be judged is if there is a judge. And, the only way evil can be judged with justice is if there exists an unevaluated evaluator who is not himself guilty of breaking the law. Therefore, there must be a Supreme Judge of the universe, namely, God.

The Bible Is the Most Authoritative Revelation of God's Law.

The historic understanding of fixed rules of law which bind all people is based on the idea that such rules of law come from God. The Bible claims to be the most authoritative verbal revelation of God and His laws. Thus, an acceptance of the Bible's authority is central to historic jurisprudence. If the Bible's claim is true, then it is not a book which speaks truth merely to those who accept its teachings, but governs everyone, for all people have the same Creator. Therefore, it is important to establish the authority of the Bible as a revelation of God's law.

Arguments from internal evidence. There are many internal evidences concerning the Bible which demonstrate the consistency of its claims and teachings, etc. Such proofs give rise to an inference that extraordinary internal consistency implies a divine author. Critics often contend that such proofs are circular arguments which use the Bible to prove the validity of the Bible. However, the Bible is not actually one book, but many. It was written by many authors over a period well in excess of 1,000 years. Therefore, it is not "circular" to use a book written by one author to validate a book written by someone else 500 years earlier, and such internal proofs have validity.

The argument from document reliability. The laws of evidence contain a number of rules for determining the validity of ancient documents submitted as evidence in judicial proceedings. These rules of evidence can be applied to the books of the Bible to demonstrate that they meet the requirements for an ancient document to be admitted as competent evidence. [*Cf.*, Simon Greenleaf, *The Testimony of the Evangelists*.]

The argument from archaeology. One of the primary means of "proving" the authority of the Bible is to archaeologically verify the existence of events, nations and cultures mentioned in the Bible. People have claimed that many of the people and places mentioned in the Bible are merely fictitious, not historical. The fact is, it is not possible to prove the existence of every person named in the Bible, nor to verify every conversation, transaction or event described. Yet, at the same time, it is possible to archaeologically verify the existence of many ancient kings, nations and cultures scholars once thought were fictitious. Many of the battles or other events described in the Bible have been verified by ancient writings from non-Hebrew cultures. Significantly, modern archaeology has not *dis*proved any of the Bible's history, but has only confirmed it. The inference to be drawn from this is if the Bible cannot be shown to be false in any of its historic facts, then it may be true and accurate in other respects as well.

GENERAL CONSIDERATIONS

In the course of preparing this work, some recurring questions arose in terms of how to understand or apply the Bible in legal terms, which questions were not resolved by the grammatical-historical-literal interpretive method alone. These questions and the method for dealing with them are discussed below.

Behavior Modeling.

People have long understood that the way the Creator relates to us is the pattern for how we are to relate to each other.

Man is made in the image of God.

> *Then God said, "Let Us make man in Our image, according to Our likeness" . . . And God created man in His own image, in the image of God He created him; male and female He created them.* [Gen. 1:26-27.]

God has, at various times and in various ways, given patterns to men.

> *"According to all that I am going to show you, as the pattern of the tabernacle and the pattern of all its furniture, just so you shall construct it."* [Ex. 25:9.]

God's patterns include human behavior patterns.

> *Brethren, join in following my example, and observe those who walk according to the pattern you have in us.* [Phil. 3:17.]

The behavior patterns given to us by God include the manner in which people are to exercise the right to rule over others.

> *But Jesus called them to Himself, and said, "You know that the rulers of the Gentiles lord it over them, and their great men exercise authority over them. It is not so among you, but whoever wishes to become great among you shall be your servant . . .."* [Mat. 20:25-26.]

No Implied Authority.

When God's Word expresses a delegation of human authority, a presumption exists that one who receives such authority may exercise only what is expressly authorized, ***not*** that he may do everything except what is expressly forbidden. In other words, in construing biblical grants of authority, there is a presumption against inferred or implied authority.

The application of this principle has far-reaching consequences, especially when construing the extent of civil authority. Civil authority is generally described as extending to *the punishment of*

evildoers and the praise of those who do right. [*See,* 1 Pet. 2:14.] Whether civil authority also extends to performing charitable functions (that is, public welfare legislation), greatly depends on whether authority may, or may not, be implied.

If authority may generally be implied, then the express terms of any particular grant of authority are not controlling. That is, if authority can be implied beyond the express language of any grant of power, the express language is not a limitation on the authority conferred. In fact, any express grant of authority itself becomes somewhat superfluous. In the absence of an express prohibition, any authority can be implied or inferred at any time, for any purported good reason. Accordingly, every express grant of authority is unnecessary - a person can do whatever he likes until expressly restrained, even before the "grant." However, if God's Word demonstrates a pattern of expressly conferring authority, an inference can drawn that a presumption in favor of implied authority is ***not*** correct.

The biblical pattern. God's Word demonstrates a pattern of expressly conferring authority.

> *God said to them, "Be fruitful and multiply, and fill the earth, and subdue it."* [Gen. 1:28.]

> *And Jesus came up and spoke to them, saying, "All authority has been given to Me in heaven and on earth. Go therefore and make disciples of all the nations . . .."* [Mat. 28:18-19.]

Capital punishment. In the case of capital punishment, for example, God delegated the authority to execute murderers after Noah's flood.

> *"Whoever sheds man's blood, By man his blood shall be shed, For in the image of God He made man."* [Gen. 9:6.]

We might well ask whether this grant of authority was necessary, that is, whether people already had the authority to execute murderers before Noah's time. The case of Cain would seem to suggest that such authority did not exist before Noah's time, because God did not permit anyone to execute Cain for murdering his brother Abel. Thus, Cain's example infers that a presumption against implied authority is correct.

> *So the Lord said to him, "Therefore whoever kills Cain, vengeance will be taken on him sevenfold." And the Lord appointed a sign for Cain, lest anyone finding him should slay him.* [Gen. 4:15.]

Israel's census. Similarly, in the time of Moses, God had commanded that a census be taken of the men of Israel. [*See,* Num. 1:1-2.] This authority to number the army of Israel apparently did not extend to king David, because when he took a census in the absence of God's express authorization, it was regarded as wrong.

> *And the king said to Joab the commander of the army who was with him, "Go about now through all the tribes of Israel, from Dan to Beersheba, and register the people, that I may*

> *know the number of the people." . . . Now David's heart troubled him after he had numbered the people. So David said to the Lord, "I have sinned greatly in what I have done."* [2 Sam. 24:2,10.]

In the garden. The example of Adam and Eve in the Garden of Eden seems to suggest that God expressly defined certain prohibitions on human conduct, but left open other courses of conduct with respect to food, etc.

> *And out of the ground the Lord God caused to grow every tree that is pleasing to the sight and good for food . . . And the Lord God commanded the man, saying, "From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat."* [Gen. 2:9,16-17.]

However, two considerations mitigate against such a reading. That is, there are two reasons why the above narrative does ***not*** infer that man's authority to act can be generally implied.

First, God did not expressly prohibit murder prior to Noah, yet He held Cain accountable for murdering Abel. This means that the prohibition of murder must have existed when Adam and Eve were in Eden even though it was not expressed.

Second, although God expressly delegated the authority to eat plants, He did not give Adam and Eve any right to eat meat. That express delegation came, again, only in Noah's time. The inference is that no authority to eat meat could have been implied before Noah's time.

> *"Every moving thing that is alive shall be food for you; I give all to you, as I gave the green plant."* [Gen. 9:3.]

Hence, the presumption operating in Eden was the same as it is elsewhere in the Bible: human authority must originate in an express delegation from God, not merely implied.

CAVEAT. It should be observed at this point that the idea people cannot imply authority in the absence of an express grant is not antithetical to the concept of liberty. ***Liberty*** is the freedom to choose the means by which an express grant of authority is carried out. The choice of ***means*** people are to employ is not prescribed by God. Yet, the ***purposes*** for which authority is to be exercised is prescribed by God. Consequently, the means of carrying out any delegated authority may be implied or inferred, but the purposes may not. The idea of no implied authority does not result in legalism. ***Legalism*** results when people prescribe the means of exercising authority which God has left to each person to choose for himself. When the idea of no implied authority is limited to purposes, not means (as it is used herein), liberty is preserved.

Logical Consistency.

Human rationality, including logic, is part of the image of God which we reflect. That is, God made us to be rational beings and to think logically. The inference is that since we are logical, God is too,

because our nature reflects His. Therefore, we should expect not only that God is logical, but that his laws are logical, and that He has expressed His laws to us in a way which is not illogical or self-contradictory.

God does things in an orderly and rational manner.

> *For God is not a God of confusion but of peace*. [1 Cor. 14:33.]

God's law is expressed in the very nature of the created order (see *infra*). The fact that the entire universe was perfect in its creation implies that God's laws do not contradict themselves.

> *And God saw all that He had made, and behold, it was very good.* [Gen. 1:31.] *"The Rock! His work is perfect, For all His ways are just; A God of faithfulness and without injustice, Righteous and upright is He."* [Deut. 32:4.] *The law of the Lord is perfect . . ..* [Ps. 19:7.]

If God's word is everlasting, perfect, true and never forgotten (faithfully performed), God could not ever say anything which would contradict Himself.

> *"God is not a man, that He should lie, Nor a son of man, that He should repent; Has He said, and will He not do it? Or has He spoken, and will He not make it good?"* Num. 23:19. *For the Lord is good; His lovingkindness is everlasting, And His faithfulness to all generations.* [Ps. 100:5.]

God is neither irrational nor "super-rational" (using a logic which completely transcends human logic). Although we cannot fully know the mind of God (for He is infinite, we are finite), His behavior nevertheless conforms to His revelation of Himself to us. Since God's word is logical, his behavior is logical, and His laws (which are an expression of His word) are also logical.

> *In order to say that logic doesn't apply to God, you have to apply logic to God in that very statement. So logic is inescapable. . . . Logic can tell us some things about God. For instance, since God is truth, He cannot lie. (Heb. 6:18,) Logic is a valid tool for discovering truth . . ..* [Geisler and Brooks, WHEN SKEPTICS ASK.]

CHAPTER 2

The Sources of Law

INTRODUCTION.

The purpose of this chapter is to begin to seek an answer to the question, ***Where does law come from?*** At this point, the concern is not with finding out where to look for the latest legislative enactment, judicial opinion or executive order, nor even to locate more organic laws, such as constitutional texts, etc. Rather, the initial focus is on finding out where the very first laws, or the most foundational laws, came from. Necessarily, as the following evidence indicates, this will require inquiry as to the source of God's law, or the law of the Creator. Once this matter is determined, it will be easier to establish a context in which to examine the various organic and other laws of human origin.

Biblical record. God has revealed His will concerning all things, including law, in two ways. The first is the revelation of His will in the created order, which may be referred to as "God's Work." The second is the revelation of His will in special verbal form, that is, "God's Word." These two kinds of revelation, though different in form of expression, are perfectly consistent with each other, since both originate in the will of the one uncreated Creator.

Historic understanding. Historically, many great legal expositors have recognized that law is ultimately based on the will of God, the uncreated Creator. In parallel with the biblical record, the historic view was that God had revealed His law in two forms, namely, in the law of nature and in the Bible. These two revelations of law were understood to be the bases of all human laws.

GOD'S WORK - THE LAW OF NATURE

The will of God, including His law, is not something hidden from us, but has been revealed in the created universe, the handiwork, or Work, of God. This revelation is not only applicable to all people, but can be known by all people.

The observable creation. When God created the heavens and the earth, He imposed order (law) upon the entire earth and its inhabitants. Not one area of life or aspect of creation, physical or spiritual, was left ungoverned. The specific content of these rules of law will be examined in later chapters. The immediate purpose is merely to show that such laws do exist.

The creation displays the handiwork of God and reveals His existence. This revelation of God includes a revelation of His will. In other words, a revelation of the law of the Creator is linked to the created order itself.

> *The heavens are telling of the glory of God; And their expanse is declaring the work of His hands. Day to day pours forth speech, And night to night reveals knowledge. . . . The law of the LORD is perfect, restoring the soul; . . . The precepts of the LORD are right, rejoicing*

the heart; The commandment of the LORD is pure, enlightening the eyes. The fear of the LORD is clean, enduring forever; The judgments of the LORD are true; they are righteous altogether. [Ps. 19:1-2,7-9.]

The revelation of God in creation is sufficient to inform people of His nature as well as His existence. This revelation has a moral quality to it, because it is something for which everyone is held accountable.

For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men, who suppress the truth in unrighteousness, because that which is known about God is evident within them; for God made it evident to them. For since the creation of the world His invisible attributes, His eternal power and divine nature, have been clearly seen, being understood through what has been made, so that they are without excuse. [Rom. 1:18-20.]

It is possible to observe the creation and apply the use of reason so as to understand the rules of right and wrong behavior to which God expects people to conform.

Does not even nature itself teach you that if a man has long hair, it is a dishonor to him . . . But if one is inclined to be contentious, we have no other practice, nor have the churches of God. [1 Cor. 11:14,16.]

This is not to say that rules of human conduct are generally to be determined from studying rocks and trees. Rather, such rules are discerned by studying human behavior and experience, as confirmed or tested by the Bible. However, there are still behavioral patterns which can be learned from a study of animate, and possibly inanimate, things.

Go to the ant, O sluggard, Observe her ways and be wise . . .. [Prov. 6:6.]

The laws of God (rules of right and wrong) relating to human behavior revealed in creation have never been modified or rescinded, and will not be changed until the creation of a new heaven and a new earth. Therefore, whatever rules God imposed on the creation when He made it have continued to exist unchanged until the present time.

"For truly I say to you, until heaven and earth pass away, not the smallest letter or stroke shall pass away from the Law, until all is accomplished." [Mat. 5:18.]

The law written on our hearts. Since people are a part of God's creation, He has seen fit to write the knowledge of His creation law on the heart of every person. This is one way in which people are made in the image of God. [*See,* Gen. 1:27.] Thus, there is a sense in which some (but not all) of God's law is *a priori*. That is, all people carry within their hearts a knowledge of certain rules of right and wrong behavior. This innate knowledge is often referred to as the *conscience*.

Every person has a conscience, that is, a part of the law of God written on their heart.

> *For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law written in their hearts, their conscience bearing witness, and their thoughts alternately accusing or else defending them.* [Rom. 2:14-15.]

Though this scripture refers only to Gentiles (or, non-Jews), it must be equally true of all people, because all people are equally God's creation. There is no time when God would have written His law on the hearts of the Gentiles without doing so for everyone. This knowledge, though imperfect, is part of the image of God carried by all people.

In addition, God promised to write His laws much more completely on the hearts of the Jews in the future. However, this will not take place until "the times of the Gentiles are fulfilled" and the earthly kingdom of Christ is established.

> *"But this is the covenant which I will make with the house of Israel after those days," declares the LORD, "I will put My law within them, and on their heart I will write it; and I will be their God, and they shall be My people. And they shall not teach again, each man his neighbor and each man his brother, saying, `Know the LORD,' for they shall all know Me, from the least of them to the greatest of them," declares the LORD.* [Jer. 31:33-34. *See also,* Heb. 8:8-12.]

Biblical examples. The biblical record provides examples of people making civil judgments, and God holding people accountable, based on God's law as revealed in the creation and the human conscience.

Cain was punished for wrongfully killing his brother Abel, even though no express rule prohibiting such action had yet been verbalized. The only way Cain could have been held accountable for his actions is if God's law included a prohibition against murder and it had been adequately revealed to Cain in a non-verbal form.

> *And it came about when they were in the field, that Cain rose up against Abel his brother and killed him. And [God] said, "What have you done? The voice of your brother's blood is crying to Me from the ground. And now you are cursed from the ground . . .."* [Gen. 4:8,10-11.]

Moses was able to make known the generally revealed laws of God with enough specificity to resolve individual disputes before the Ten Commandments or the rest of Israel's laws were expressed in verbal form.

> *"When they have a dispute, it comes to me, and I judge between a man and his neighbor, and make known the statutes of God and His laws."* [Ex. 18:16.]

God judged the Canaanite nations for immorality even though they had not received nor been obliged to follow the special laws given to Israel. The offenses the Canaanites committed must have

violated God's law as revealed in creation and their hearts.

> *"You shall not do what is done . . . in the land of Canaan where I am bringing you; . . . you are to keep My statutes and My judgments, and shall not do any of these abominations . . . (for the men of the land who have been before you have done all these abominations, and the land has become defiled); so that the land may not spew you out, should you defile it, as it has spewed out the nation which has been before you."* [Lev. 18:3,26-28.]

The law of nature. Historically, the law revealed in the created order and the human conscience was referred to as the "law of nature," and occasionally, as "natural law." Again, the immediate purpose is to show that historically, such laws were understood to exist. The specific content of the law of nature will be discussed in later chapters.

The law of nature is the revealed will of God made known to all mankind, and is discoverable by a well-reasoned observation of human behavior and experience, as confirmed or tested by the Bible.

> *I find that it has been the opinion of the wisest men that Law is not a product of human thought, nor is it any enactment of peoples, but something eternal which rules the whole universe by its wisdom in command and prohibition. Thus they have been accustomed to say that Law is the primal and ultimate mind of God . . ..* [M.T. Cicero, DE LEGIBUS bk. 2, ch. 4.]

> *The law of nature is a dictate of right reason, which points out that an act . . . is either forbidden or enjoined by the author of nature, God.* [Hugo Grotius, THE LAW OF WAR AND PEACE (1625).]

> *God is related to the universe as creator and preserver; the laws by which he has created all things, are those by which he preserves them. He acts according to these rules because he knows them; he knows them because he has made them; and he made them because they are relative to his wisdom and power. . . . It would be absurd to say, that the creator might govern the world without those rules, since without them it could not subsist.* [Montesquieu, 1 SPIRIT OF LAWS, ch. 1 (1751).]

> *Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. . . . And consequently as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will. This will of his maker is called the law of nature. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.* [W. Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND *39-40.]

> *The law of nature, by the obligations of which individuals and states are bound, is identical with the will of God, and that will is ascertained . . . either by consulting Divine revelation, where that is declaratory, or by the application of human reason, where revelation is silent.*

[James Kent, COMMENTARIES ON AMERICAN LAW 2-4 (1827).]

The law of nature is evident not only in the external creation, but is also written on the human heart. Because the law of the creator is written on our hearts, every person is presumed to have knowledge of it, and no one can be excused from obedience to it.

> [God's law] *is near us, it is within us, written upon the table of our hearts, in lively and indelible characters; by it we are constantly admonished and reproved, and by it we shall finally be judged. It is visible in the volume of nature, in all the works and ways of God. Its sound is gone forth into all the earth, and there is no people or nation so barbarous, where its language is not understood.* [Jesse Root, *The Origin of Government and Laws in Connecticut, 1798*, reprinted in THE LEGAL MIND IN AMERICA 35 (1962).]

The maxim, "Ignorance of the law is no excuse" is largely based on the idea that a person should not be excused from fulfilling an obligation he is bound to know, such as the laws which God makes evident to everyone.

Some legal scholars have recognized that the law of nature actually is the foundation upon which the very concept of "common law" is founded. For example, the French have a maxim that the law of God and the law of the land are all one; and both preserve and favor the common and public good of the land: *Le ley de dieu et ley de terre sont tout un; et l'un et l'autre preferre et favour le common et publique bien del terre*.

> *After the Norman Conquest, holy and learned clerics . . . continued to infuse natural-law principles into the common law. It may be said that canon law was the nurse and tutor of the common law. The very name "common law" was derived from the* ius commune *of the canonists.* [John C. H. Wu, FOUNTAIN OF JUSTICE (1959), at 65-66.]

> *Common law is the perfection of reason, arising from the nature of God, of man, and of things . . ..* [Root, *Laws in Connecticut, 1798*, 35.]

GOD'S WORD - THE DIVINE LAW

In addition to the revelation of law in the created order and the human conscience, God has seen fit to reveal His law in verbal form, referred to as the Word of God, or "God's Word."

The Bible. The Bible is the written word of God revealed to mankind. That it is the most authoritative verbal expression of the law of God available to us today is discussed above.

The Bible contains rules of right and wrong behavior by which we may know what conduct is lawful and unlawful. These rules are not merely the opinion of one or more people, but originate with God Himself.

> *All Scripture is inspired by God and profitable for teaching, for reproof, for correction, for*

training in righteousness. [2 Tim. 3:16.]

The Bible was written by eyewitnesses to the events and messages recorded, and the biblical writers claim to have received such messages from God Himself.

And the Lord said to him, "Who has made man's mouth? Or who makes him *dumb or deaf, or seeing or blind? Is it not I, the Lord? Now then go, and I, even I, will be with your mouth, and teach you what you are to say."* [Ex. 4:11-12.]

The words of Jeremiah . . . to whom the word of the Lord came . . .. Now the word of the Lord came to me saying . . .. [Jer. 1:1-2,4.]

The Revelation of Jesus Christ, which God gave Him to show to His bondservants, the things which must shortly take place; and He sent and communicated it by His angel to His bondservant John, who bore witness to the word of God and to the testimony of Jesus Christ, even to all that he saw. [Rev. 1:1-2.]

Biblical examples. The Bible contains many revelations of God's law which cannot be known simply by a reasoned observation of the creation or self-reflection, but which are uniquely made known in the written word.
The Jewish feasts are an example of God's law which was specially revealed to ancient Israel through verbal revelation.

"These are the appointed times of the Lord, holy convocations which you shall proclaim at the times appointed for them. In the first month, on the fourteenth day of the month at twilight is the Lord's Passover. Then on the fifteenth day of the same month there is the Feast of Unleavened Bread to the Lord; for seven days you shall eat unleavened bread. On the first day you shall have a holy convocation; you shall not do any laborious work." [Lev. 23:4-7.]

Similarly, God's will for the Church was specially revealed through the written word.

Now you are Christ's body, and individually members of it. And God has appointed in the church, first apostles, second prophets, third teachers, then miracles, then gifts of healings, helps, administrations, various kinds of tongues. [1 Cor. 12:27-28.]

Multiple forms of revelation. The Bible does not support the view that all law, or even all of God's law, must come from a unitary source to the exclusion of all others. Thus, God has revealed His laws in multiple forms, all of which are valid, and all of which must be taken into account if a person would know the "whole counsel of God" concerning His laws. In this there is no contradiction, because each law has the same lawgiver.

"But the witness which I have is greater than that of John; for the works which the Father has given Me to accomplish, the very works that I do, bear witness of Me, that the Father

> *has sent Me. And the Father who sent Me, He has borne witness of Me. . . . You search the Scriptures, because you think that in them you have eternal life; and it is these that bear witness of Me."* [Jn. 5:36-37,39.]

The divine law. Historically, the revelation of the law of the Creator in the form of God's Word was variously referred to as the divine law, the revealed law, or the law of nature's God. However, each of these terms connoted the same thing, namely, the law of the Creator as found in the Bible. Although the law of nature is evident to all men and discoverable by a reasoned observation of the world, the divine law is ascertainable exclusively from the verbal revelations of God's will as found in the Bible.

> *Divine providence . . . in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in diverse manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.* [Blackstone, 1 COMMENTARIES *42.]

> *"The dignity of its original, the sublimity of its principles, the purity, excellency and perpetuity of its precepts, are most clearly made known and delineated in the book of divine revelations; heaven and earth may pass away and all the systems and works of man sink intooblivion, but not a jot or tittle of this law shall ever fall.* [Root, *Laws in Connecticut, 1798*, 35.]

The law of nature and the Bible. The law of nature and the divine law are perfectly consistent with each other, since both reflect the will, and the law, of the same Creator.

Ever since the original Fall into sin by Adam and Eve, human reason has been corrupt, and our ability to accurately discern the law of nature has been imperfect. Therefore, to the extent the Bible reveals aspects of the law of nature, it confirms them, and also acts as a more authoritative guide for discerning the will of the Creator than human reason applied without the benefit of the Bible.

> *And if our reason were always, as in our first ancestor before his transgression, clear and perfect . . .* [discovering the law of nature] *would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error. . . .* [The divine laws] *when revealed, are found upon comparison to be really a part of the original law of nature . . . But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since . . . the revealed law is (humanly speaking) of infinitely more authority that what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.* [Blackstone, 1 COMMENTARIES *41-42.]

Although perfectly consistent, the law of nature and the Bible are not the same. There are some aspects of God's law which command or prohibit things which the law of nature does not command or prohibit. (For Grotius, "volitional" divine law means the same thing as "positive" divine law as revealed in the Bible.)

> *The law of nature differs . . . from volitional divine law; for volitional divine law does not enjoin or forbid those things which in themselves and by their own nature are obligatory or not permissible, but by forbidding things it makes them unlawful, and by commanding things it makes them obligatory.* [Grotius, LAW OF WAR.]

There are also some aspects of God's law which have been given to some people and not to others. Thus, the divine law also differs from the law of nature in this respect as well.

NATURAL LAW THEORIES

Natural law theories have played an important role in shaping the jurisprudence of western society for many centuries, and there are still natural law proponents among modern legal scholars. The purpose of this section is to distinguish a jurisprudence based on the law of nature and the Bible from some modern natural law theories, and to answer some criticisms.

Natural law distinguished. In some historic writings, "law of nature" and "natural law" are used interchangeably, and when so used, it is often obvious that the writer acknowledges God as the author of that law. However, some historic writers, such as Aristotle, viewed natural law as a purely materialistic phenomenon, that is, they assumed natural law did not originate with God. In order to distinguish these two systems of thought,it may be useful to adopt a convention of terminology for this work.

Accordingly, "natural law," as used here, refers to the observation of the natural universe and the use of reason alone to derive principles of law from it, but without any recourse to, or acknowledgement of, the will of God or any verbal revelation of His will. The phrase "law of nature," on the other hand, will be used to denote the biblical-historical view of jurisprudence which is based on the law of nature as tested and confirmed by the Bible. Natural law theories, therefore, are not the same as a jurisprudence founded on the law of nature and the Bible.

Many criticisms have been levied against natural law theories by modern legal writers. Some of these criticisms, to the extent applicable to a law of nature jurisprudence, are described next, along with some possible responses.

The "non-universality" problem. This criticism points out that so-called "natural" beliefs are not shared universally, or even generally, among people or cultures. In fact, a comparative study of legal systems indicates that the normal state of affairs is cultural pluralism and a diversity of legal rules which are culture dependent.

However, some legal commentators, such as Grotius, viewed common assent as a form of validation

for the existence of the law of nature. However, as to Grotius, the focus of his examination of the law of nature was directed toward the law of nations, which in many ways depends on international agreements defining the relationships between nations. C.S. Lewis demonstrated the existence of inter-cultural assent as to eight principles of natural law in what he called the *Tao*. Indeed, we might expect some inter-cultural common assent on particular legal norms if there is a truly objective law of nature.

However, neither Grotius nor Lewis would concede that the law of nature is a function of human agreement. That is, the existence of the law of nature does not in any way depend on whether people follow it. In fact, Lewis expressly disclaimed this position, in accordance with the biblical-historical view.

> *I am not trying to prove its validity by the argument from common consent. Its validity cannot be deduced. For those who do not perceive its rationality, even universal consent could not prove it.* [C.S. Lewis, THE ABOLITION OF MAN, 95.]

Because a law of nature jurisprudence accepts biblical revelation, it is not confined to what people can reason from an observation of the world. In other words, the Bible is the only objective measure of what constitutes the rules of the law of nature. When people embrace laws contrary to biblical revelation, it may only indicate the extent to which people are in rebellion against the Creator. Such rebellion does not mean that the law of nature does not exist. The validity of the criticism of "non-universality" entirely depends on the non-authenticity of biblical revelation, which was shown not to be a well-reasoned position, above.

The vagueness problem. This criticism notes that a natural law theory based solely on a reasoned observation of the universe will yield little in the way of specific legal rules. In fact, whatever legal rules are derived will be vague and difficult to apply in any particular case.

A recent natural law theorist has framed the "inner morality of law" in solely procedural terms, that is, that law should have the following attributes: 1) generality of application; 2) promulgation of the law to the party affected; 3) prospective legal operation (no ex post facto laws); 4) intelligibility and clarity; 5) avoidance of contradictions; 6) avoidance of impossible demands; 7) constancy or permanence through time; and 8) congruence between official action and declared rule. The implication is that natural law contains no rules of substantive content. [*See,* Lon L. Fuller, The Morality of Law.]

However, a law of nature jurisprudence, in which recourse is had to the verbal revelation of God's law in the Bible, provides a source from which we may derive many rules of substantive law. Historically, this was often done. For example, James Madison argued in favor of the U.S. Constitution's scheme of separation of powers based on reason and experience, or if you will, natural law principles. *See,* The Federalist No. 47. Such a scheme has support from the experience of ancient Israel and even the language of Isa. 33:22. Madison would be astounded at the inability of modern scholars to discern this basic principle of substantive law from nature.

The Bible often summarizes the over-arching principles of law in such formulas as to do justice, love kindness, and walk humbly with your God (Mic. 6:8) or to love the Lord with all your heart and love your neighbor as yourself (Mat. 22:37-40). However, these formulas do not define the limits of specificity with which the Bible speaks about law. These formulas are summaries of, not limitations on, law and in no way negate the detailed legal rules expressed elsewhere in the scriptures. Again, the validity of the criticism of "vagueness" entirely depends on the non-authenticity of biblical revelation, which was shown not to be a well-reasoned position, above.

The "naturalistic fallacy." This criticism recognizes that natural law theory contains no objective criterion of truth. After all, natural law can, and has, been bent in any direction people have wanted. If the criterion is reason, what makes one person's reasoning better than another's? Another way of stating this objection is that values (or *ought*) cannot be derived from facts (or what *is*). Accordingly, all legal values are infused into the facts by the observer.

However, this criticism, however, is itself founded on an objective criterion of truth, that is, that it is objectively reasonable to assume that all reason is subjective. It could be argued that this criterion is itself unreasonable and subjective. Thus, the objection is self-defeating.

Although the use of reason is a valid means of ascertaining legal truth, it is not the exclusive means, nor is it the most authoritative means. Whatever we reason to be a rule of the law of nature must be checked against, and is controlled by, God's law revealed in the Bible. It is the validity of the Bible which lends greater certainty to knowledge of a rule and guards against a continued and corrupted use of reason.

> *But know this first of all, that no prophecy of Scripture is a matter of one's own interpretation, for no prophecy was ever made by an act of human will, but men moved by the Holy Spirit spoke from God.* [2 Pet. 1:20-21.]

Behavioral v. Physical laws. This objection states that normative laws of human behavior are not like the physical laws of science. One form of this criticism says that behavioral laws are of a purely human origin, because natural laws are necessarily amoral. Another form of this objection asserts that physical laws and behavioral laws are necessarily of a different nature because behavioral laws can be disobeyed, whereas physical laws cannot.

However, historically, the idea that the will of the Creator would include the governance of both inanimate objects and human behavior was not viewed as inherently contradictory. In other words, nature is not amoral (without moral quality).

> *Law . . . is applied indiscriminately to all kinds of action, whether animate, or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. The whole progress of plants . . . the method of animal nutrition . . . and all other branches of vital economy - are not left to chance, or the will of the creature itself, but are . . . guided by unerring rules laid down by the great creator.* [Blackstone, 1 COMMENTARIES *38-39.]

> *The instinct common to other animals, or that peculiar to man, does not constitute another kind of law. The distinction, which appears in the books of Roman law, between an unchangeable law common to animals and man, which the Roman legal writers call the law of nature in a more restricted sense, and a law peculiar to man, which they frequently call the law of nations, is of hardly any value.* Grotius, LAW OF WAR.

The true difference between physical and behavioral laws is in their enforcement. God has delegated authority to enforce many (but not all) of the behavioral laws to mankind, but enforces all remaining laws Himself (see *infra*), although often in ways that are known only to Him. Although people may disobey a law, in an ultimate sense, all violations are eventually accounted for and punished where appropriate. Therefore, in this ultimate sense, no one "gets away" with violating any of the behavioral laws originating in the law of nature. Thus, the difference between physical and behavioral laws lies in the means and timing of their enforcement, not in their inherent nature or quality as laws.

> *Do not be deceived, God is not mocked; for whatever a man sows, this he will also reap. For the one who sows to his own flesh shall from the flesh reap corruption, but the one who sows to the Spirit shall from the Spirit reap eternal life.* [Gal. 6:7-8.]

This scripture has in view the laws of human behavior, not the laws of vegetation.

> *God will bring every act to judgment, everything which is hidden, whether it is good or evil.* [Ecc. 7:14.] *And I saw the dead, the great and the small, standing before the throne, and the books were opened . . . and the dead were judged from the things which were written in the books, according to their deeds.* [Rev. 20:12.]

The problem of "ontological dualism." "Ontology" is a term referring to the nature of reality. According to this criticism, belief in a transcendent God necessarily involves two realities, whereas only one reality exists.

However, a law of nature jurisprudence does not presuppose the existence of two realities. There is only one reality, but that reality has both a spiritual and a physical component. This criticism is just a restatement of the age-old "mind-body problem" philosophers have struggled with for many years. Human experience indicates that people have both a mind and a body, and these are not exactly the same. Philosophers have been unable to explain how these two "realities" coexist and interrelate with each other. A common "solution" to the problem is to assert that the mind does not exist apart from the body and thoughts are merely chemical and electrical in nature.

Such a "reductionist" approach postulates that the only things which really exist are physical (that is, only matter and energy) in nature, and that God cannot exist. However, if a transcendent and immanent God does exist, as discussed above, then the reductionist hypothesis must be wrong. There is no inherent contradiction in God, a spirit, having created people with both a physical body and a spirit. That God would be unable to govern the creation He has made by laws He has revealed makes no sense. The only thing that makes sense is that God can, and does, reveal His laws to us

and hold us accountable to them.

The problem of avoiding responsibility. According to this criticism, no certainty exists in making moral decisions because nature cannot provide answers to moral dilemmas. Consequently, moral choices are all made by man. When people base legal decisions on the law of God, they are really attempting to escape responsibility for making laws.

However, it is by the imposition of a law of divine origin that people can be held accountable at all. By laying down rules of right and wrong behavior which apply to all people in all places and at all times, the Creator has set the ultimate standard of accountability to which all people, whether rich or poor, weak or powerful, must answer. A law of nature jurisprudence does not avoid responsibility, it requires and defines it.

Perhaps the question should be, when people refuse to acknowledge the existence of God's law, aren't they just attempting to escape responsibility for enforcing and obeying it? After all, it is God's law which holds men accountable. Without a truly objective legal order, that is, a legal system of divine origin, people are free to do whatever they wish - and what kind of accountability is that? Therefore, the people who deny God and His laws seem to be the ones who are trying to escape responsibility.

CHAPTER 3

The Characteristics of Law

INTRODUCTION.

The purpose of this chapter, and the next, is to answer the question, ***What is law?*** Another way to phrase this question is, How do we know a law when we see one? The answer to this question will have important consequences. For example, if we determine that not everything said by God (the Supreme Sovereign of the world) is law, then we would be ill advised to believe that everything said by our public officials is law. Therefore, before we can profess obedience to the law, we must be careful to distinguish it from things which are really not law at all.

The biblical record demonstrates that the characteristics, or nature, of law reflect the nature of God Himself. The historic understanding of the nature of law parallels the biblical record in most every respect. The preeminent characteristic of God for legal purposes is that He is the uncreated Creator of everything that exists. Thus, when God created the world, He prescribed the rules of law by which everything would be governed. This is implied in the fact that God created the universe and all it contains.

> *In the beginning God created the heavens and the earth. . . . And God made . . . the stars also.* [Gen. 1:1, 16.] *The earth is the LORD's, and all it contains, the world, and those who dwell in it.* [Ps. 24:1.]

THE DEFINITION OF LAW

The general definition of law most accepted during the founding of America and for the next century was the one given by Blackstone:

> *Law, in its most general and comprehensive sense, signifies a rule of action . . . which is prescribed by some superior, and which the inferior is bound to obey.* [Blackstone, 1 COMMENTARIES *38.]

Law, being ***prescribed*** by a superior, is therefore created (not the product of evolution), objectively real (not artificial or merely subjective in the mind of the inferior) and mandatory (not voluntary) upon the inferior.

Created by God (not invented by man, nor evolving).

Because everything which exists was created by God, law is the product of creation, not evolution. Just as the laws of gravity and thermodynamics did not gradually evolve, but were fixed and established at the time of the initial creation, so the laws of nature concerning human behavior have neither gradually evolved into or out of existence, but were created by God from the beginning.

Biblical record. The creation was spoken into existence by the Word of God.

> *Then God said . . . and it was so.* [Gen. 1:6,7,9,11,14,15,24,29,30.]

In creating the universe, God prescribed the rules by which the universe was to be governed.

> *Give thanks to the God of gods . . . To Him who made the heavens with skill . . . To Him who made the great lights . . . The sun to rule by day . . . The moon and stars to rule by night, For His lovingkindness is everlasting.* [Ps. 136:2,5,7-9.] *Then the LORD answered Job out of the whirlwind and said, . . . "Where were you when I laid the foundation of the earth! . . . Do you know the ordinances of the heavens, or fix their rule over the earth?"* [Job 38:1, 4, 33.]

When He created the universe, God also created the laws which govern human conduct and the various authorities which govern mankind.

> *Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God.* [Rom. 13:1.] *For by Him all things were created, both in the heavens and on earth, visible and invisible, whether thrones or dominions or rulers or authorities - all things have been created by Him and for Him.* [Col. 1:16.]

Historic understanding. The law of nature was understood to be the creation of God, not the result of impersonal forces operating according to random chance.

> *Thus when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be.* [Blackstone, 1 COMMENTARIES *38.]

Human laws, following the divine pattern, were understood to be created by people, not merely having evolved into existence. Thus, all human laws must be promulgated (or announced) in some form, and the date of promulgation is the date of creation.

> *[A] bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. . ..* [Blackstone, 1 COMMENTARIES *45.]

Further, the need to promulgate laws implies that there can be no *ex post facto* laws.

> [In the case of an *ex post facto* law,] *it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law . . .. All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term "prescribed."* [Blackstone, 1 COMMENTARIES *46.]

Objectively revealed by God (not merely reasoned by man, nor merely subjective).

Law is part of the objective reality created by the Creator whether people choose to recognize it or not. People can disobey the law of nature as it pertains to the rules of human behavior, but no one can change the law of nature or avoid its inevitable enforcement. Accordingly, God has taken great care to make His laws known to us, so that we cannot claim ignorance with respect to this objective reality.

Biblical record. The objective reality of God's nature and His laws is plainly revealed in nature.

> *The heavens are telling of the glory of God; And their expanse is declaring the work of His hands. . . . The law of the LORD is perfect, restoring the soul; The testimony of the Lord is sure, making wise the simple.* [Ps. 19:1,7.] *For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men, who suppress the truth in unrighteousness, because that which is known about God is evident within them; for God made it evident to them. For since the creation of the world His invisible attributes, His eternal power and divine nature, have been clearly seen, being understood through what has been made, so that they are without excuse.* [Rom. 1:18-20.]

God took care to reveal a portion of His laws to Israel in order to establish the objective legal purpose and framework of that nation.

> *Then the LORD said to Moses, "Thus you shall say to the sons of Israel, `You yourselves have seen that I have spoken to you from heaven. . . . Now these are the ordinances which you are to set before them.'"* [Ex. 20:22; 21:1.]

God continues to reveal His Word (and by implication, His law) to all men through Jesus.

> *God, after He spoke long ago to the fathers in the prophets in many portions and in many ways, in these last days has spoken to us in His Son, whom He appointed heir of all things, through whom also He made the world.* [Heb. 1:1-2.]

Historic understanding. The pre-existing legal order of divine origin was acknowledged as being objectively real.

> *Among men endowed with a right and sound mind there is an unchangeable law, which is called the law of nature. And if men having sick or distorted mentalities think otherwise, that has no bearing on the matter.* [Grotius, LAW OF WAR.]

Human laws, after proper promulgation, are an objective reality for which no one can claim ignorance as an excuse.

> *But when [law] is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were*

> *admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.* [Blackstone, 1 COMMENTARIES *46.]

Mandatorily imposed by God (not adopted by man, nor volitional).

The duty to obey any law is a mandatory obligation. Although the establishment of the form of government among men requires the consent of the governed in the form of a civil covenant, or constitution, a ruler does not require any additional consent of the governed to enact or enforce laws validly adopted pursuant to such constitution. The persons governed are bound to obey the law even though they neither ask for the obligation nor individually consent to its imposition.

Biblical record. God's inherent right to rule over the entire creation originates in the fact that He is the uncreated Creator. Thus, the law of nature obliges every person, irrespective of individual consent, for no one can escape the fact he was created by God.

> *[W]ho are you, O man, who answers back to God? The thing molded will not say to the molder, "Why did you make me like this," will it? Or does not the potter have a right over the clay . . ..* [Rom. 9:20-21.]

God establishes those persons whom He desires in positions of authority.

> *"I have made the earth, the men and the beasts which are on the face of the earth by My great power and by My outstretched arm, and I will give it to the one who is pleasing in My sight."* [Jer. 27:5.]

The foregoing in no way implies that God or His law remove freedom of choice from people as to whether they will serve Him or not. The choice to serve God is governed by love (a volitional act), not legal obligation. However, this does not mean a person may choose whether the law of God will apply to him. If a person refuses to serve God, the law of sin and death [*Cf.* Rom. 8:2] will condemn him irrespective of whether he chooses to acknowledge the law or to be punished.

Historic understanding. The law of nature was regarded as mandatorily binding on all people, including all public officials.

> *This law of nature . . . is of course superior in obligation to any other. . . . no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. . . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.* [Blackstone, 1 COMMENTARIES *41,42.]

> *The rules that they* [the legislators] *make for other men's actions must . . . be conformable to the law of nature - i.e., 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. [John Locke, 2D TREATISE ON GOVERNMENT, 77.]

Human laws were also recognized as something which is mandatory in nature. This is implicit in the fact that "ignorance of the law is no excuse."

A RULE OF ACTION

Law, being defined as a prescribed "rule of action," is therefore characterized as permanent, uniform and universal. That is, law cannot exhibit relativity as to time, person or place. The form which law takes as a rule of action also reflects God's nature. Although there are many attributes of God's nature, three which are most important for describing the nature of law are God as eternal, God as no respecter of persons, and God as omnipresent.

Permanent (not relative as to time).

God's eternal nature is reflected in the permanence of His law. A permanent law is one which neither changes with time, nor varies in its application over time.

God is an eternal being, existing from everlasting to everlasting, without beginning or end.

> *Before the mountains were born, Or Thou didst give birth to the earth and the world, Even from everlasting to everlasting, Thou art God.* [Ps. 90:2.] *Do you not know? Have you not heard? The Everlasting God, the LORD, the Creator of the ends of the earth Does not become weary or tired. His understanding is inscrutable.* [Isa. 40:28.]

God is an eternal being whose nature does not, and cannot, change. Similarly, His purposes for, and promises to, mankind never change.

> *In the same way God, desiring even more to show to the heirs of the promise the unchangeableness of His purpose, interposed with an oath, in order that by two unchangeable things, in which it is impossible for God to lie, we may have strong encouragement . . ..* [Heb. 6:17-18.] *Jesus Christ* is *the same yesterday and today,* yes *and forever.* [Heb. 13:8.]

The law of God, having been created by the Word of God and revealed by the Word of God, must necessarily be as unchangeable as the Word of God.

> *"God is not a man, that He should lie, Nor a son of man, that He should repent; Has He said, and will He not do it? Or has He spoken, and will He not make it good?"* [Num. 23:19.] *"For truly I say to you, until heaven and earth pass away, not the smallest letter or stroke shall pass away from the Law, until all is accomplished."* [Mat. 5:18.]

Uniform (not relative as to person).

God's nature as no respecter of persons is reflected in the uniformity of His laws. A uniform law is one which neither varies from person to person, nor is relative as to circumstance. That is, the law must not discriminately apply to some people but not to others.

God is no respecter of persons, that is, for the purposes of divine justice, God does not show anyone favoritism or partiality.

> *"For the LORD your God is the God of gods and the Lord of lords, the great, the mighty, and the awesome God who does not show partiality, nor take a bribe.* [Deut. 10:17.] *And opening his mouth, Peter said: "I most certainly understand now that God is not one to show partiality."* [Acts 10:34.]

The law of nature applies to every person on the earth uniformly, since all people are uniformly the creation of God.

> *Now we know that whatever the Law says, it speaks to those who are under the Law, that every mouth may be closed, and all the world may become accountable to God . . . for all have sinned and fall short of the glory of God . . .. Or is God the God of Jews only? Is He not the God of Gentiles also? Yes, of Gentiles also . . ..* [Rom. 3:19,23,29.]

The uniformity of the law of nature is exemplified in the case of the Gentile nations whom God judged for various offenses against nature, even though they had not received the covenant law of Israel or any other verbal revelation of God's law.

> *"Do not defile yourselves by any of these things; for by all these the nations which I am casting out before you have become defiled."* [Lev. 18:24.]

Even God's covenant law, within the jurisdiction of the covenant, applied to all men uniformly.

> *"There is to be one law and one ordinance for you and for the alien who sojourns with you."* [Num. 15:16.]

Universal (not relative as to place).

God's omnipresent nature is reflected in the universality of His law. A universal rule is one which is not relative as to place. That is, to the extent the lawmaker has territorial jurisdiction, all places within that jurisdiction must be governed the same.

God has unlimited territorial jurisdiction.

> *Where can I go from Thy Spirit? Or where can I flee from Thy presence? If I ascend to heaven, Thou art there; If I make my bed in Sheol, behold, Thou art there. If I take the wings*

> *of the dawn, If I dwell in the remotest part of the sea, Even there Thy hand will lead me, And Thy right hand will lay hold of me.* [Ps. 139:7-10.]

Since God has created the entire world, there is no place where the law of nature does not apply.

> *The heavens are telling of the glory of God; And their expanse is declaring the work of His hands. . . . Their line has gone out through all the earth, And their utterances to the end of the world.* [Ps. 19:1, 4.]

God governs all nations (and by implication, all places) to an equal degree.

> *[God] made from one, every nation of mankind to live on all the face of the earth, having determined their appointed times, and the boundaries of their habitation . . ..* [Acts 17:26.]
> *"This is the plan devised against the whole earth; and this is the hand that is stretched out against all the nations. For the LORD of hosts has planned, and who can frustrate it? And as for His stretched-out hand, who can turn it back?"* [Isa. 14:26-27.]

Historic understanding of law as a rule of action.

The law of nature was recognized as being permanent, uniform and universal.

> *The law of nature, again, is unchangeable - even in the sense that it cannot be changed by God.* [Grotius, LAW OF WAR.]

> *This law of nature, being coeval with mankind and dictated by God himself . . . is binding over all the globe, in all countries, and at all times . . ..* [Blackstone, 1 COMMENTARIES *41.]

> *The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind.* [Kent, COMMENTARIES 2-4 (1827).]

Human laws, following the divine pattern, were also viewed as needing to be permanent, uniform and universal.

> *Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." . . . And, first, it is . . . something permanent, uniform, and universal.* [Blackstone, 1 COMMENTARIES *44.]

OTHER FORMS OF SOVEREIGN WILL

Although God's law is an aspect of His revealed word, some things God has said are not in the nature of law. That is, not all expressions of God's will, even those in verbal form, are permanent, uniform and universal in character. Some things God has said were directed to specific people, and

were limited in their application to particular times or places.

Orders. God has often directed specific individuals to perform a specific task. These directions are inapplicable to people in any uniform sense, and are situation specific. Consequently, such a direction is not in the nature of a law, but in the nature of an order. The following are some examples of divine orders:

> *And the LORD said to Joshua, "See, I have given Jericho into your hand . . . And you shall march around the city, all the men of war circling the city once. You shall do so for six days . . . then on the seventh day you shall march around the city seven times, and the priests shall blow the trumpets."* [Josh. 6:2-4.]

> *And while Peter was reflecting on the vision, the Spirit said to him, "Behold, three men are looking for you. But arise, go downstairs, and accompany them without misgivings; for I have sent them Myself."* [Acts 10:19-20.]

Judgments. Similarly, God has often pronounced judgment on particular people or places as a result of some particular sin. Although the sins which were committed may have violated laws of general applicability, the sentences pronounced are not applicable to anyone other than the person specified in the judgment itself. Consequently, judgments are not law either, because they are directed to specific people and situations. The following are examples of divine judgments:

> *Then the word of the LORD came to Elijah the Tishbite . . . "And you shall speak to [Ahab], saying, `Thus says the LORD, Have you murdered, and also taken possession?' And you shall speak to him, saying, `Thus says the LORD, In the place where the dogs licked up the blood of Naboth the dogs shall lick up your blood, even yours.'"* [1 Ki. 21:17, 19.]

> *"Woe to you, Chorazin! Woe to you, Bethsaida! For if the miracles had been performed in Tyre and Sidon which occurred in you, they would have repented long ago, sitting in sackcloth and ashes. But it will be more tolerable for Tyre and Sidon in the judgment, than for you. And you, Capernaum, will not be exalted to heaven, will you? You will be brought down to Hades!"* [Lu. 10:13-15.]

What law is not. Not all statements made by public officials are law, but only those things which are in the nature of a rule. Any law, to qualify as law, must be characterized as a rule, not as an order, advice or counsel, or a compact or agreement between private persons.

A rule is not "advice or counsel," because a person is at liberty to follow advice or not, whereas law is mandatory solely because of its maker's will. A rule is not a "compact or agreement," even though it carries a binding obligation, because an agreement is a voluntary obligation assumed, whereas law is an involuntarily imposed obligation. A rule is not an "order," because orders apply only to specified persons, whereas a law applies to everyone in the community.

> *[Law] is a* rule*; not a transient sudden order from a superior to or concerning a particular*

> *person . . . for the operation of this act . . . has no relation to the community in general . . .. It is also called a* rule *to distinguish it from* advice *or* counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised . . .. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also. It is also called a* rule*, to distinguish it from a* compact *or* agreement*, for a compact is a promise proceeding* from *us, law is a command directed* to *us. The language of a compact is, "I will, or will not, do this;" that of a law is, "thou shalt, or shalt not, do it." . . . In compacts, we ourselves determine and promise what shall be done before we are obliged to do it; in laws, we are obliged to act, without ourselves determining or promising any thing at all.* [Blackstone, 1 COMMENTARIES *44-45.]

Not even all legislative enactments are law, if they fail to conform to the definition of a "rule."

> *A concurrent or joint resolution of legislature is not "a law"; a resolution of the house of representatives is not a "law"; an unconstitutional statute is not a "law." When a statute is passed in violation of law, that is, of the fundamental law or constitution of a state, it is the prerogative of courts to declare it void, or, in other words, to declare it not to be law.* [BLACK'S LAW DICTIONARY, 4th ed., p. 1028.]

Since law is in the nature of a rule, not an order, orders are not law. Thus, it is recognized that the role of an executive (such as a president or governor) is to enforce, not promulgate, law. The executive branch of government can enforce judicial orders, or promulgate its own orders as to inferior civil officers. However, an executive cannot pronounce rules binding upon the general population.

JUDICIAL OPINIONS

If it is true that orders are not really law, then this raises some significant implications for judicial opinions, since judicial opinions are customarily issued in the form of an order. Is a judicial opinion an order or a rule? When a judge makes a "ruling," is it a generally applicable "rule of action" like a statute? Is a judicial opinion law? Accordingly, this topic will be examined in greater detail below.

Modern views.

The modern view is that judges not only "find" law, but "make" law. In fact, many legal scholars believe this result is not only convenient, but necessary, and insist that things could not be any other way.

John Austin dismissed the Blackstonian view of case precedents as a "childish fiction." He could not understand how judges could not help but make the common law; otherwise, that law was "*a miraculous something made by nobody existing, I suppose, from eternity.*" [Austin, J., LECTURES ON JURISPRUDENCE 655 (4th Ed. 1979).]

A similar view was popularized by Oliver Wendell Holmes, Jr.:

> *The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . .* [So. Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917).]

> *The life of the law has not been logic: It has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.* [O.W. Holmes, Jr., THE COMMON LAW, at 1-2.]

The modern view of judge made law was stated succinctly by John Chipman Gray:

> *Law is made up of the rules for decision which the courts lay down: That all such rules are Law; that rules for conduct which the courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity "The Law" apart from these rules; and that the judges are rather the creators than the discoverers of the Law.* [John C. Gray, THE NATURE AND SOURCES OF THE LAW 121-123 (2nd Ed. 1921).]

The Biblical record.

The biblical record seems to suggest that the judicial function, at least as it pertains to the law of nature and the divine law, places a judge in the role of discovering law, but not creating it. This makes sense from the standpoint that one would not expect God to approve of people modifying existing divine laws, or pronouncing "new" laws of divine origin. No person or group of people can rightfully claim to "make" a new provision of the law of nature or the divine law.

The nature of judgment is to make known the law of God. The biblical record contains a number of examples in which people are held accountable to God's law. These case histories evidence a common methodology for the exercise of legal judgment.

Moses judged the people of Israel according to the following methodology:

> *"When they have a dispute, it comes to me, and I judge between a man and his neighbor, and make known the statutes of God and His laws."* [Ex. 18:16.]

By "making known" the law of God, Moses indicated that his judgment was not merely the exercise of his personal will, but rather was a declaration of law which pre-existed the dispute being brought to him. That is, Moses did not purport to "make" laws for Israel, but only to declare what laws he had "found."

Samuel, who later judged Israel, exercised a judicial function by holding King Saul accountable to the law. Like Moses, Samuel did not judge according to a legal standard which was merely right

in his own opinion, but judged that Saul had violated a pre-existing and known legal obligation.

> *Saul said, "Bring to me the burnt offering and the peace offerings." And he offered the burnt offering. . . . But Samuel said, "What have you done? . . . You have acted foolishly; you have not kept the commandment of the LORD your God, which He commanded you, for now . . . your kingdom shall not endure."* [1 Sam. 13:11,13-14.]

When Nathan judged David, he followed the same methodology for judging as did Samuel and Moses. In this case, the pre-existing law was "Do not murder." [*See,* Ex. 20:13.]

> *"Why have you despised the word of the LORD by doing evil in His sight? You have struck down Uriah the Hittite with the sword, have taken his wife to be your wife, and have killed him with the sword of the sons of Ammon. Now therefore, the sword shall never depart from your house . . .."* [2 Sam. 12:9-10.]

Note: Nathan exercised his judgment in the office of prophet, not judge. In other words, Nathan's judgment was not civil (legally enforceable), but spiritual (moral). Nonetheless, even in this context, application of God's law to a specific situation called for an exercise of judgment based on declaring pre-existing law, not creating it.

Similarly, Jesus never occupied the office of a civil judge. In fact, he expressly disclaimed such an office. [*See,* Lu. 12:14.] Yet, he did pronounce spiritual judgments from time to time. [*See, e.g.,* Lu. 10:13-15.] He also followed the pattern of judging on the basis of the pre-existing will of God, not His own will.

> *"I can do nothing on My own initiative. As I hear, I judge; and My judgment is just, because I do not seek My own will, but the will of Him who sent Me."* [Jn. 5:30.]

The nature of judgment is to resolve individual disputes. The Bible also, by way of example, indicates that the purpose of judgment is to resolve individual disputes by issuing an order to specific parties, not by promulgating rules of general applicability.

Consequently, disobedience to a judicial order by the parties to the case was viewed as contempt, and punished as a capital offense. A judicial order must never be disobeyed because it is personally directed to the parties, who have no right to usurp the judge's authority and to judge their own case. A statute, however, is not personally directed to any specific individual, and disobedience may defended in court. And, no one is bound by the judge's order except the parties to the case.

> *"So you shall come to the . . . judge who is in office in those days, and you shall inquire of them, and they will declare to you the verdict in the case. . . . According to the terms of the law which they teach you, and according to the verdict which they tell you, you shall do; you shall not turn aside from the word which they declare to you, to the right or the left. And the man who acts presumptuously by not listening to . . . the judge, that man shall die."* [Deut 17:9,11-12.]

The Bible also contains examples of both "rules" and "orders," keeping them distinct. The implication is that orders are limited to specified individuals, whereas rules are not.

> Example of a rule: *"[I]n the cities of these peoples that the LORD your God is giving you as an inheritance, you shall not leave alive anything that breathes. But you shall utterly destroy them . . .."* [Deut. 20:16-17.]
>
> Example of an order based on the preceding rule: *"Thus says the LORD of hosts . . . `Now go and strike Amalek and utterly destroy all that he has, and do not spare him; but put to death both man and woman, child and infant, ox and sheep, camel and donkey.'"* [1 Sam. 15:2-3.]

The historic understanding.

The understanding that judges do not "make" law has a certain plausibility biblically, but one may question whether any civil judicial system based on such a view will work. There is an obvious tension between the modern view of the judicial function as law-making and the biblical view of judgment as law-finding. Before we come to an opinion as to which view best conforms to the law, it may be well to consider the historic understanding of the matter. As the following evidence demonstrates, the historic understanding of judgment seems to favor judges "finding" the law, rather than "making" it. Although we may question the practicality of this view, the historic legal writers certainly seemed to think it would, and did, work.

The role of the judge is to discover, not make, law. A judicial opinion is merely the means for justifying the issuance of an order, the applicability of which is limited to the parties of the case. A judicial opinion may discern and apply law, but it does not constitute or promulgate law. A judge is not authorized to make law.

The role of the judge is to declare what law already exists. The standard legal maxim is, *Jus dicere, et non jus dare*. That is, the province of a judge is to declare the law, not to make it.

> *[Judges] are the depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.* [Blackstone, 1 COMMENTARIES *69.]
>
> *It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.* [Marbury v. Madison, 5 U.S. 137 (1803).]
>
> *When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to*

> *announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.* [U.S. v. Butler, 297 U.S. 1 (1936), at 62-63.]

Judicial opinions are *evidence* of what the law is.

> *[W]e may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law."* [Blackstone, 1 COMMENTARIES *71.]

> *The best evidence of the common law is to be found in the decisions of the courts of justice . . .. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law.* [Kent, J., 1 COMMENTARIES, at 473-78.]

The role of the judge is to exercise judgment, not will.

> *[The judicial] department has no will, in any case. . .. Judicial power, as contra-distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.* [Osborn v. The Bank of the U.S., 22 U.S. 738 (1824).]

> *The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . .. [T]he courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . [However], [t]he courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.* [THE FEDERALIST No. 78.]

The role of the judge is to resolve disputes between parties. The purpose of judicial power is to resolve individual disputes, not to promulgate rules of general applicability. A judicial opinion is an order directed to the parties to the case, not a "rule of action" prescribed for other litigants or courts to follow.

The role of the judge is to decide individual cases, not to prescribe rules of general conduct for people who are not parties to the case.

> *The province of the court is, solely, to decide on the rights of individuals . . ..* [Marbury v. Madison (1803).]

Federal judicial power extends only to "cases" and "controversies." By implication, judicial power does not extend to prescribing rules, because all legislative power has been vested in the Congress, exclusive of the federal courts. [*See,* U.S. CONST. art III, §2, and art. I, §1.]

Some past U.S. Presidents have recognized that a Supreme Court opinion may bind the parties, but does not bind the executive (or other persons) as a rule of general applicability or political action.

> *Mere precedent is a dangerous source of authority . . .. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.* [President Andrew Jackson, veto message of July 10, 1832 against a bill extending the charter of the Bank of the United States.]

> *We oppose the Dred Scott decision in a certain way . . .. We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free . . . but we nevertheless do oppose that decision as a political rule binding on the voter . . . the members of Congress or the President. . . .We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.* [Abraham Lincoln, Lincoln-Douglas debates, speech of October 13, 1858, VI MESSAGES AND PAPERS OF THE PRESIDENTS (1897), 5.]

> *I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit . . .. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it [is] limited to that particular case . . .. [I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers . . ..* [Abraham Lincoln, First Inaugural Address, March 4, 1861.]

The role of case precedent in exercising judgment. In the common law tradition, prior judicial decisions, or case precedents, are entitled to a presumption of validity in guiding the resolution of present disputes. However, case precedents are not presumed to be infallible, and therefore ought not to be followed in certain cases. When this happens, it is recognized that the prior decision, being erroneous, was not "law" at all.

Stare decisis is a latin phrase that means, "let the decision stand." It creates a presumption that case precedents have accurately determined what the law is.

> *For it is an established rule to abide by former precedents, where the same points come*

> *again in litigation . . ..* [Blackstone, 1 COMMENTARIES *69, 71.]
>
> *A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case . . . and the judges are bound to follow that decision so long as it stands unreversed . . .. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness.* [Kent, 1 COMMENTARIES, at 473-78.]

Being bound by precedent was understood as a means for limiting judicial discretion, and keeping the judge's decision to pre-existing law.

> *To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.* [THE FEDERALIST NO. 78.]

However, case precedents are binding in moral force only, that is, as a matter of persuasion, not as a matter of obligation. Prior opinions are not to be followed if plainly absurd. Thus, judicial opinions are not "law," they are only evidence of it.

> *For it is an established rule to abide by former precedents . . . Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more, if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was* bad law*, but that it was* not law *. . .. So that* the law *and the* opinion of the judge *are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may* mistake *the law.* [Blackstone, 1 COMMENTARIES *69-71.]
>
> *But I wish not to be understood to press too strongly the doctrine of stare decisis . . .. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law . . ..* [Kent, 1 COMMENTARIES, at 473-78.]

The common law tradition.

The historic understanding of judicial opinions was clearly in accord with the view suggested by the biblical record. However, these views should not be understood as contrary to the common law tradition, unless one is inclined to hold Blackstone, Kent and Chief Justice Marshall as contrary to that tradition as well. Rather, it is a question of what is really the common law tradition.

The biblical-historical views affirms the role of judges to exercise the function of judicial review, to resolve legal disputes, and to explain the legal rationale underlying each decision. Further, this

view affirms the value that case precedents have in future cases by virtue of the force of their reasoning. However, this view does not regard case precedents as legally binding on anyone other than the parties to the case, because a judicial opinion is in the nature of an order, not a "rule of action."

The biblical-historical view has been criticized and rejected modernly, among other reasons, on the basis that it is deceptive by pretending that judges aren't making law when they really are. However, the modern view is subject to a reciprocal criticism, namely, that it provides a deceptive rationale for judicial law-making, when judges shouldn't make laws at all. Under the modern view, ultimately, neither statutes, constitutions, nor prior decisions constrain any judge as a matter of legal obligation. The only *legal* constraint on a judge's law-making ability is the decision of an appellate court or higher judge to reverse the law he or she has made. Although there are many other factors which influence the ability of a judge to make law, these are ultimately *political*, that is, subject only to what people will permit as a matter of policy. In fact, judicial "law-making" circumvents the normal legislative process and prescribes rules for general society without the consent of the people through their representatives. To the extent this approach is unchecked legally, it does not uphold our legal traditions, but subverts them.

The biblical-historical view upholds the common law tradition in its best sense. Since all people are imperfect, legal judgments will often be imperfect. One purpose of the common law is to discover those imperfections and to correct them, not by prescribing new laws, but by more accurately stating what the original law was. Thus, the historical view constantly refers back to the original laws, whether prescribed in nature, the Bible, or a constitution. The modern view, however, looks back primarily to recent judicial memory, and shapes new opinions to meet new circumstances. The result of the modern view is that future cases get farther and farther from the original law so that its application can eventually be twisted to mean exactly the opposite of what the original law stated and purposed. Accordingly, under the modern view, law is rarely permanent, uniform and universal, but is often whatever the judge wants it to be.

CHAPTER 4

Equity Jurisprudence

INTRODUCTION

Having considered the biblical and historic understanding of the definition of law, it may be helpful to compare and contrast it with the historic understanding of equity and to see how equity jurisprudence has shaped the modern view of law. Equity is often used in two senses relating to law, of which only the second will be examined here.

General equity. The general sense of equity, as used by Calvin and others, is a principle which undergirds all laws in general, much as love is said to undergird all of the divine law. [*See,* Mat. 7:12; 22:40; Rom. 13:8-10; Gal. 5:14.]

> *Equity, as it is natural, cannot be the same in all, and therefore ought to be proposed by all laws, according to the nature of the thing enacted. As constitutions have some circumstances on which they partly depend, there is nothing to prevent their diversity, provided they all alike aim at equity as their end. Now, as it is evident that the law of God which we call moral, is nothing else than the testimony of natural law, and of that conscience which God has engraven on the minds of men, the whole of this equity of which we now speak is prescribed in it. Hence it alone ought to be the aim, the rule, and the end of all laws.* [Calvin, IV INSTITUTES, ch. XX.]

Particular equity. The particular sense of equity, the one which concerns us here, may be defined as a correction of a defect or error in the law, or a necessary exception to the law in order to prevent an unjust hardship.

> *From this method of interpreting laws, by the reason of them, arises what we call equity; which is thus defined by Grotius, "the correction of that, wherein the law . . . is deficient."* [Blackstone, 1 COMMENTARIES *61.]

IS GOD'S LAW IMPERFECT?

We have discovered that law is something permanent, uniform and universal. It would be helpful to determine at this point the extent to which the biblical record supports the concept of equity as a necessary or desirable exception to the law. Accordingly, the present task is to discover instances in the Bible where God's law is viewed as defective or erroneous, as contrary to justice, or subject to exceptions.

God's law as defective or erroneous.

If God's law has any defect or error, it would be imperfect. An imperfect law would require that God Himself is imperfect, for a perfect God could not make an imperfect law. Similarly, a perfect

law could not come from an imperfect God. Therefore, either God and His law are both perfect, or they are both imperfect.

God is perfect. God Himself is perfect, and He has no defects or errors. Neither does God make any mistakes. His work is perfect, and He sets the standard of perfection for all people.

> *"For I proclaim the name of the LORD . . . His work is perfect."* [Deut. 32:3-4.] *"Therefore you are to be perfect, as your heavenly Father is perfect."* [Mat. 5:48.]

The law of nature is perfect. When God made the world, He impressed His will for its governance upon the things that were made, which is the law of nature. This law of nature, upon the completion of the creation, was perfect in every way.

> *And God saw all that He had made, and behold, it was very good.* [Gen. 1:31.]

The Fall of man and the resulting curse of the ground did not introduce any defects or errors into the law of nature, for the perfection of God's handiwork and His law was still evident to the Psalmist.

> *The law of the LORD is perfect . . ..* [Ps. 19:7.]

The divine law is perfect, but modifiable. The divine law as revealed in the Bible was promulgated in the form of several divine covenants. These covenants are discussed in detail in Ch. 5 - Covenant Law. Some of the divine covenants, have been, or will be, subject to slight modification. However, such modifications can only arise from the express statements of God, not by men, nor by mere circumstances. Further, as will be shown below, covenant modification is allowed only to the extent that the **means** of effecting the covenant are changed. The **purposes** of any covenant cannot be changed or terminated. The purposes of the divine covenants are perfect.

For example, the Dominion Mandate of the Adamic covenant was made more difficult to carry out as a result of the curses following the Fall (pain in childbirth, curse of the ground, etc.). However, none of the terms or purposes of the Mandate were changed. People are still under a duty to bear children, and subdue the earth, etc. Similarly, the enmity (or "fear and dread") between animals and people inaugurated by the Noahic covenant will be substantially rolled back in the Millennium (when the wolf and the lamb graze together, etc.).

Further, the Mosaic covenant is subject to modification - though perhaps not in the way you might think at first. Jesus denied that He came to modify the covenant. However, the New Covenant with Israel [*see*, Jer. 31:31-34] will eventually modify the Mosaic covenant when Christ returns. Although even then, the purposes of the Mosaic covenant will remain intact. See my essay, *No Part of the Mosaic Covenant Has Ended* for a further discussion of this issue.

Covenant modification does not imply that a defect or error existed in the original covenant. Although Israel's covenant is regarded as "not faultless" [*See,* Heb. 8:1-13], this is solely from the standpoint that the means of the covenant did not completely accomplish all that God wanted to do.

Therefore, He set out to make it even better. However, "incompletion" as a means of spiritual redemption does not imply a "defect" or "error" in any of the legal rules under the original covenant.

God's law as contrary to justice.

Whether God's law can ever be unjust is now to be determined.

There is no injustice with God. If God's law could be shown to be unjust in any respect, it would require that God Himself is unjust, for a perfectly just God could not make an unjust law. Hence, the question is whether there is any injustice with God.

The biblical record claims God is perfect in all His ways, which means He is perfectly just. There is no injustice with God.

> *"For I proclaim the name of the LORD; Ascribe greatness to our God! The Rock! His work is perfect, For all His ways are just; A God of faithfulness and without injustice; Righteous and upright is He."* [Deut. 32:3-4.]

Justice is linked with impartiality in judgment. The normal form for legal exceptions to take is that they are granted to some people, but not others, or to people in some situations, but not others. Yet, granting exceptions to rules, particularly in a judicial setting, is a form of partiality prohibited by the law of God.

> *"You shall appoint for yourself judges and officers in all your towns which the LORD your God is giving you, according to your tribes, and they shall judge the people with righteous judgment. You shall not distort justice; you shall not be partial, and you shall not take a bribe, for a bribe blinds the eyes of the wise and perverts the words of the righteous. Justice, and only justice, you shall pursue, that you may live and possess the land which the LORD your God is giving you."* [Deut. 16:18-20.]

Justice in civil judgment requires that judges not apply the law in a partial way. That is, justice imposes a duty on every judge not to be a "respecter of persons." As shown above, God is not a respecter of persons, which means that His law applies uniformly to all people. This is also the standard for human laws. Accordingly, uniformity in the application of legal rules is a necessary element of justice. A law that is not uniform is not just.

> *"You shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly."* [Lev. 19:15.] *"You shall not show partiality in judgment; you shall hear the small and the great alike. You shall not fear man, for the judgment is God's. And the case that is too hard for you, you shall bring to me, and I will hear it."* [Deut. 1:17.] *But if you show partiality, you are committing sin and are convicted by the law as transgressors.* [Ja. 2:9.]

The definition of justice. The concept of justice is linked both to impartiality and righteousness.

That is, what is just is also right. The definition of "righteousness" is linked to the concept of ***law***, for the law declares what is right (or righteous) and what is wrong (or unrighteous). The word "justice" itself is based on the latin word "jus," which means "law." Therefore, justice would seem to mean "carrying out of the law." And, if law is the expressed will of God, then to do justice is to carry out the will of God.

It would be impossible to carry out the law of God as it should, and have the result termed "unjust." Whenever God's law is followed, the result is always just. Conversely, whenever the law of God is not carried out, no matter what the result, injustice is the result. Consequently, "justice" is not a function of, or dependent upon, someone's opinion of the results of the administration of law. Rather, the question of justice is a matter of whether the administration of law was righteous and impartial.

God's law as subject to exceptions.

In the Gospel accounts, we are told of a number of situations where Jesus acted in a manner the Pharisees regarded as unlawful. We now need to determine whether Jesus' actions can properly be considered either as unlawful or as exceptions to otherwise applicable rules of law:

Jesus knew no sin. It is the function of the law to prescribe the rules of right and wrong behavior. Consequently, for something to be a "sin," it must be a violation of law, presumably, God's law. If Jesus had sinned, he would necessarily have been a lawbreaker. If Jesus was sinless, He necessarily would never have broken any law of God or any valid (*i.e.*, consistent) human law. The biblical record clearly indicates that Jesus was sinless, therefore, he broke no valid laws.

> *Jesus the Son of God . . . has been tempted in all things as we are, yet without sin.* [Heb. 4:14-15. *See also,* 2 Cor. 5:21; 1 Pet. 2:21-22; 1 Jn. 3:5.]

Jesus was accused of breaking the traditions of the Jewish elders. Did He justify His actions on the basis of an equitable exception?

> *Then some Pharisees and scribes came to Jesus from Jerusalem, saying, "Why do Your disciples transgress the tradition of the elders? For they do not wash their hands when they eat bread." And He answered and said to them, "And why do you yourselves transgress the commandment of God for the sake of your tradition? . . . You hypocrites, rightly did Isaiah prophesy of you, saying, `This people honors Me with their lips, But their heart is far away from Me. But in vain do they worship Me, Teaching as doctrines the precepts of men.'"* [Mat 15:1-3,7-9.]

The law Jesus was accused of breaking was of rabbinic (human), not divine, origin. God's law did not require a particular form of hand washing before eating bread. Thus, Jesus did not set aside the hand washing law, rather, he declared that the "tradition of the elders" was not law at all. Rather than creating an exception to any law, Jesus upheld the supremacy of God's revealed law and affirmed its validity.

We might say that Jesus acted in the best tradition of the common law. He judged that the current human interpretations of God's law were inaccurate, and therefore did not need to be followed. The human traditions imposed no true obligation upon Jesus or anyone else, and could lawfully be ignored. Although the Pharisees regarded their legal interpretations as having been "disobeyed," in reality they had been overruled by a superior tribunal (of a spiritual, not a civil, nature). That is, in God's Court, as determined by the Son of God, the traditions and interpretations of the Pharisees were declared to be not law at all.

Jesus was accused of breaking the law of the Sabbath. Did He justify His actions on the basis of an equitable exception?

> *At that time Jesus went on the Sabbath through the grainfields, and His disciples became hungry and began to pick the heads of grain and eat. But when the Pharisees saw it, they said to Him, "Behold, Your disciples do what is not lawful to do on a Sabbath." But He said to them, "Have you not read . . . in the Law, that on the Sabbath the priests in the temple break the Sabbath, and are innocent? But I say to you, that something greater than the temple is here. . . . For the Son of Man is Lord of the Sabbath."* [Mat. 12:1-3,5-6,8.]

This scripture can be interpreted a variety of ways which indicate the lawfulness of Jesus' actions. The law of the sabbath prohibited doing any "work" [*See,* Ex. 20:8-11]. Since Jesus and His disciples were not harvesting the grain in any occupational sense, their actions were not "work" within the meaning of the law. The rabbinic interpretations of the sabbath law prescribed many rules for avoiding "work," but these were not necessarily accurate understandings of the law. Some commentators understand Jesus to have abrogated the law of the sabbath altogether. In any event, His actions do not seem to be based on any form of exception, but relied on an understanding of the law which was better than the legal understanding of His critics.

Perhaps no scripture has been used to illustrate the "exceptional" nature of Jesus' actions more than the case of the adulterous woman:

> *And the scribes and the Pharisees brought a woman caught in adultery, and having set her in the midst, they said to Him, "Teacher, this woman has been caught in adultery, in the very act. "Now in the Law Moses commanded us to stone such women; what then do You say?" . . . But when they persisted in asking Him, He straightened up, and said to them, "He who is without sin among you, let him be the first to throw a stone at her." And when they heard it, they began to go out one by one . . .. And Jesus said, "Neither do I condemn you; go your way. From now on sin no more."* [Jn. 8:3-5,7,9,11.]

This scripture could be interpreted as Jesus making an exception to the law of adultery. However, such an interpretation is not a necessary, or even the best, understanding of what Jesus did. The law of adultery required both the man and the woman involved to be tried and punished. [*See,* Deut. 22:22.] The fact that only the woman was brought before Jesus, and not the man, is a procedural error in the conduct of the "trial." Indeed, it is doubtful that the mob which confronted Jesus with the adulterous woman constituted a lawful civil tribunal at all. By directing his comments to "he

who is without sin among you," Jesus was not focusing on the general sin condition of the members of the crowd, but on the fact that no one could convict the woman in those circumstances without sin. Then Jesus affirmed the law of adultery by commending the woman to "sin no more."

Thus, in the best tradition of legal advocacy, Jesus defended the woman, not because she was innocent, but because the conduct of her trial was not just, that is, not according to the law.

Mercy and grace.

It remains to be considered how the concepts of mercy and grace impact the nature of law and equity. It may be argued that mercy and grace permit (or even require) exceptions to be made to the law which are equitable in nature, since "mercy triumphs over judgment."

> *For judgment will be merciless to one who has shown no mercy; mercy triumphs over judgment.* [Ja. 2:13.]

That mercy and grace are repeatedly affirmed and commended in the Bible is not disputed here. This fact, however, does not dispose of the issue. The question is not whether mercy and grace exist, but whether they create equitable exceptions to the law, and if so, to what extent.

Mercy and grace are by definition discretionary. That is, although the Bible repeatedly admonishes people to show mercy and grace, there is no legal obligation to do so in any particular case. Whether a person shows mercy in a given case is entirely discretionary, or volitional, based on all the facts and circumstances.

When God shows mercy or compassion toward people, it is discretionary on His part. God has mercy and compassion on whomever He wills, and in this there is no injustice.

> *For He says to Moses, "I will have mercy on whom I have mercy, and I will have compassion on whom I have compassion." So then it* does *not* depend *on the man who wills or the man who runs, but on God who has mercy.* [Rom. 9:15-16.]

Thus, the Bible has cases where God chooses to show mercy in not bringing a calamity upon people ["I will relent." *See,* Jer 18:8; Joel 2:13-14.] and other cases where He does not show mercy ["I will not relent." *See,* Ezek. 24:14; Zech. 8:14.]

Mercy and judgment, in the judicial sense, would seem to be logically inconsistent with each other. That is, judges are not supposed to exercise WILL, which is discretionary, but JUDGMENT, which is non-discretionary. Thus, if mercy is to be employed in a civil or legal context, it would seem to require employment in a non-judicial capacity. Does the biblical record support such a contention? To answer this question, it must be determined whether: 1) discretionary judgment (or, mercy) is permitted for any civil officers; and 2) discretionary judgment (or, mercy) is prohibited to judges.

Discretion is an aspect of executive power. Jesus' parable of the unmerciful slave is framed in terms

of "a certain *king*" who wished to settle accounts with his slaves. [*See,* Mat. 18:23-35.] The parable opens with the statement that the story describes what the "*kingdom* of heaven" is like, and closes with the statement:

> *"So shall My heavenly Father also do to you, if each of you does not forgive his brother from your heart."* [Mat. 18:35.]

The implication is that when God the Father forgives people, He does so in a kingly, or executive, capacity.

Another example of this can be found in Jonah, when God relented from punishing Nineveh after it repented.

> *When God saw their deeds, that they turned from their wicked way, then God relented concerning the calamity which He had declared He would bring upon them. And He did not do* it. [Jonah 3:10.]

Nineveh had already been judged and condemned by God. [*See,* Jon. 1:1-2; 3:1-4.] When God relented, did He change his mind or His judgment? Did He create an exception to the law which the Ninevites had broken? Or can this scripture be understood as evidence that God's judgment as judge did not change, but that God as King (and enforcer of the law) pronounced a stay of execution?

King Solomon furnishes a ready example of the difference between judicial judgment and executive "judgment."

> *Then the king said, "The one says, `This is my son who is living, and your son is the dead one'; and the other says, `No! For your son is the dead one, and my son is the living one.'" . . . And the king said, "Divide the living child in two, and give half to the one and half to the other." Then the woman whose child was the living one spoke to the king, for she was deeply stirred over her son and said, "Oh, my lord, give her the living child, and by no means kill him." But the other said, "He shall be neither mine nor yours; divide him!" Then the king answered and said, "Give the first woman the living child, and by no means kill him. She is his mother."* [1 Ki. 3:23,25-27.]

Solomon was under no legal obligation to pronounce the judgment he did, that is, to divide the living child in two. Thus, although his statement showed great wisdom, it was not a legal judgment at all. Rather, it was entirely discretionary on Solomon's part.

Solomon's order was also rhetorical, that is, he never really intended to have the living child cut in two. No one was bound to actually divide the child, whether the parties to the dispute or the king's officers. In other words, no one could have been held in judicial contempt for failing to divide the child.

Solomon's order was merely a device to determine the truth. That is, he did not apply any known

law to the facts, but merely made a factual determination, at which point the case was closed. Thus, his judgment was not legal in nature at all. The type of discretionary judgment Solomon used was peculiarly "executive," rather than "judicial."

Mercy and pardon are not always a good thing. In contrast to the discretionary mercy which kings may use, the biblical instruction to civil officers in pronouncing legal judgment is **not** to show mercy or to pardon. That is, judges were not to show pity because of the "harsh" result mandated by the law, nor allow a convict to avoid the legal penalty via payment of some form of ransom.

> *"Moreover, you shall not take ransom for the life of a murderer who is guilty of death, but he shall surely be put to death."* [Num. 35:31.]

> *"If your brother, your mother's son, or your son or daughter, or the wife you cherish, or your friend who is as your own soul, entice you secretly, saying, `Let us go and serve other gods'. . . you shall not yield to him or listen to him; and your eye shall not pity him, nor shall you spare or conceal him. But you shall surely kill him."* [Deut. 13:6,8-9.]

> *"But if there is a man who hates his neighbor and lies in wait for him and rises up against him and strikes him so that he dies . . . You shall not pity him . . . that it may go well with you."* [Deut. 19:11,13.]

THE RISE OF EQUITY

The early history of equity jurisprudence in England and America, in accord with the biblical record, clearly distinguished law from equity. However, the distinction between law and equity has become blurred in recent times.

Equity defined.

"Equity" may generally be defined as the correction of a defect or error in the law. This idea is apparently of ancient origin, tracing back at least as far as Aristotle.

> [Aristotle defined equity as] *an exception to the rule . . . where the lawgiver's pronouncement . . . is defective and erroneous.* [Bodenheimer, JURISPRUDENCE, at 250.]

There are a number of reasons why a law may be deemed "defective" or "erroneous." Three of the historic reasons given were the inability of legislators to foresee all situations, the unwillingness of judges to grant relief in some cases, and the need to prevent injustice in "hard cases."

The first reason for making an equitable exception to a law was when the law suffered from "universality," that is, the law was stated too broadly by the legislators. Supposedly the legislators, had they given thought to the matter, would have created an exception to the general rule in certain cases. The defect is really one of inaccurate word-crafting on the part of the legislative drafters. Thus, in theory, the statute does not accurately reflect the true law.

> *When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question.* [Bodenheimer, JURISPRUDENCE, at 250, quoting Aristotle.]

> *For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.* [Blackstone, 1 COMMENTARIES *61.]

Equity has also been justified in cases where judges (typically in the common law courts) refused, for whatever reason, to grant relief to a complainant. In such cases, the complainant would seek relief in another place (typically in the Court of Chancery).

> *The general ground for equitable relief was then, as it professes to be now, either the failure of the common-law courts to recognize a right, or their inability to enforce it. . . . [T]he theory upon which courts of equity have always acted from the earliest times [is] the desire to supply deficiencies, no matter for what cause, in purely legal remedies.* [Bispham, PRINCIPLES OF EQUITY, at 12.]

A third justification for equity relates to so-called "hard cases," that is, where a strict application of the rule of law was clear and possible, but would have resulted in a hardship. In such cases, the harshness of the law was essentially viewed as contrary to justice.

> *In the words of the English medieval jurist Christopher St. Germain, "In some cases it is necessary to leave the words of the law, and to follow that [which] reason and justice requireth, and to that intent equity is ordained; that is to say, to temper and mitigate the rigour of the law." In his discussion of the same problem Cicero . . . conveys the idea that a rigorous application of strict and invariable rules of law, untempered by equity, may at times produce undue hardship and great injustice.* [Bodenheimer, JURISPRUDENCE, at 363.]

The history of equity jurisprudence.

Many commentators on equity jurisprudence have noted that what we modernly refer to as equitable rules are not logically linked together by any underlying principle or set of principles. Rather, equity jurisprudence is uniquely defined as that form of justice historically administered by the English Court of Chancery.

> *Equity is that system of justice which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction. . .. Every true definition of equity must, therefore, be, to a greater or less extent, a history.* [Bispham, PRINCIPLES OF EQUITY, at 1,2.]

> *[I]f we were to inquire what it is that all these [equitable] rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.* [Maitland, EQUITY, at 1-2.]

Common law courts. The common law courts which developed in English jurisprudence by the end of the thirteenth century were The King's Bench, the Court of Common Pleas, and The Exchequer. Although each of these courts had jurisdiction over different subject matters, they were all regarded as "common law" courts, that is, courts governed by strict rules of law, a formalized procedure and bound by judicial precedent. At that point in time, the common law courts had no equity jurisprudence, and the Court of Chancery did not yet exist.

> *. . . the common law [refused] to adopt that part of the Roman law which may be called equitable, as distinguished from that which is merely* stricti juris. [Bispham, PRINCIPLES OF EQUITY, at 9.]

The rise of the Court of Chancery. Beginning in the fourteenth century, the Chancellor, who was the King's Secretary, was responsible for issuing legal writs to complainants who wished to bring a legal action in one of the common law courts. Gradually, the Chancellor began to take it upon himself to resolve disputes for which no legal writ in a common law court was available. This was done under the theory that the Chancellor (as the King's agent) reserved the right to adjudicate cases which had not been expressly designated for one of the common law courts. Thus, the development of special writs for handling cases in the Chancellor's office (the Court of Chancery) became known as the "extraordinary" jurisdiction of the Chancellor. The amount of cases handled by the Chancellor virtually exploded as more and more people sought these new writs as an alternative to seeking redress in the common law courts.

The battle for supremacy. One of the primary powers asserted by the Chancellor was the ability to prevent the victorious party in a common law suit from enforcing his judgment. In other words, the loser at law could sue in equity to prevent the enforcement of the judgment of the common law courts. The Chancellor did not declare the legal judgment void, but said that for reasons personal to the parties, enforcement of the judgment would be inequitable.

This exercise of "extraordinary" jurisdiction by the Chancellor was viewed as a threat by the common law judges to the rule of law. What the Chancellor viewed as equitable, the common law judges viewed as contempt of court. Eventually the battle came to a head in 1616, when lord Chief Justice Coke attempted to prevent a losing litigant at law from seeking equitable relief to prevent enforcement of the legal judgment. The matter was referred to king James I, whose lawyers upheld the power of the Chancellor.

Since that time, equity has dominated law in the sense that an equity court could prevent litigants from suing at law, but a law court had no power to prevent litigants from suing in equity. In essence, the equity courts claimed a supremacy of jurisdiction over the law courts with respect to certain cases.

> *In this way the supremacy of equity over the common law in cases of conflict was definitely and finally established.* [Walsh, EQUITY, at 29.]

The merger of law and equity. After 1616, equity was "supreme" over law in cases of jurisdictional conflict, but the two systems of justice were still very much distinct. By acts of Parliament in 1873 and 1875, however, the separate systems of law and equity were merged into a unity legal system. The effect of these acts was to confirm what Coke's conflict had foreshadowed and what had in fact developed in the intervening years: that equity was not supreme merely in jurisdiction, but in substance as well. In other words, the substantive rules of equity were supreme over the substantive rules of law. The Judicature Act of 1873 ended with these words:

> *'Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.'* [Maitland, EQUITY, at 16.]

> *It will be observed that, by the provisions of these Acts, the principles of justice, as administered in the Court of Chancery, were made to pervade the whole mass of English jurisprudence; and that, in fact, by the rules growing out of those principles, all questions of justice in England are hereafter to be determined.* [Bispham, PRINCIPLES OF EQUITY, at 22.]

American equity jurisprudence. The nature and extent of equitable powers exercised in the English Court of Chancery seem to have been adopted as the rule of practice in American equitable jurisprudence as well.

> *In the federal courts* [of the United States] *the limits of equitable jurisdiction are to be ascertained by reference to the boundaries within which the powers of the English Court of Chancery were exercised.* [Bispham, PRINCIPLES OF EQUITY, at 2-3. *See also,* U.S. v. American Bell Telephone Co., 128 U.S. 315 (1888), at 359-361.]

The nature of equity jurisprudence.

Having considered the history of equity jurisprudence, we may now inquire as to what the nature of that jurisprudence is. As the definition of equity suggests, equitable justice is a jurisprudence of discretionary judgment and exceptional situations. Historically, equity originated in the exercise of executive power by the English Chancellor, an officer of the king.

Equity is a jurisprudence of discretion. The basis of equity is the administration of grace, or discretion, to do justice. For equitable purposes, though, "justice" does not mean carrying out the law in any strict sense, but to do what the judge thinks is fair, regardless of the law. Consequently, equity is largely a matter of personal moral conscience freed from the restraints of law.

> [The exercise of extraordinary jurisdiction by the Chancellor] *was of favor, not of right; and hence those matters in which it was displayed were called emphatically "matters to be*

granted as of grace." [Bispham, PRINCIPLES OF EQUITY, at 11.]

[T]he special relief in exceptional cases through the king's prerogative of grace . . . later came to be called equity. [Walsh, EQUITY, at 2.]

Moral conscience. The extraordinary, or discretionary, jurisdiction of equity was based on the idea that it was the Chancellor's role to speak for the conscience of the king in order for justice to be served. Modern equity is based on this same idea, namely, that justice is a matter of personal conscience, not a legal prescription.

[T]he chancellor . . . was the king's secretary, was the keeper of his conscience. [Bispham, PRINCIPLES OF EQUITY, at 8.]

But equity, fundamentally, is based upon the power of the court to do what "reason and conscience" require in the particular case. This is as true today as it was in the fifteenth century . . .. [Walsh, EQUITY, at 43.]

Not bound by law. One of the familiar maxims of equity is that "equity follows the law." However, the application of this maxim is itself discretionary, not obligatory. In other words, a judge need not follow the law if it would be "inequitable" to do so. And, since equity is supreme over law in both jurisdiction and substance, it is quite clear that the extent to which equity "follows" the law is discretionary.

"In the early days there were no fixed principles upon which the Chancellors exercised their equitable jurisdiction. The rule applied depended very much upon the ideas as to right and wrong possessed by each Chancellor." [Walsh, EQUITY, at 41, quoting Prof. Holdsworth.]

[T]he customary generality of law is sacrificed in a concrete situation to the need of dispensing an individualized justice. A departure from, or relaxation of, fixed norms is deemed necessary in the interests of justice . . .. [Bodenheimer, JURISPRUDENCE, at 249.]

An executive function. Although the English common law courts exercised their powers under the general authority of the king, they were primarily judicial in nature and function, limiting themselves to a non-discretionary judgment of the laws. England never separated the three branches of government as distinctly as we have in America, vesting judicial functions in the courts, Parliament and the monarch all at the same time, so this should be no surprise.

The Court of Chancery, however, was peculiarly executive in nature. The Chancellor purported to exercise the personal conscience of the king, that is, he wielded the power of executive discretion. As stated above, the Court of Chancery could not declare a legal judgment to be void, but it could prevent its enforcement. In essence, the Chancellor asserted the power to stay the execution of a legal judgment, which is a peculiarly executive function. The power to stay an execution of judgment is of the same nature as the power to pardon, which we recognize in America as the unique prerogative of the executive branch of government.

> *[T]he power of pardoning possessed by the chief executive is essentially the power to minister equity or grace . . ..* [Bodenheimer, JURISPRUDENCE, at 251.]

The formalization of equity. In some areas of equitable jurisprudence, rules of equity became formalized through repeated usage over time. Nonetheless, these formalized rules were still based on exceptions to the rules of law. Thus, the rules of equity have never lost their character as a jurisprudence of discretionary justice.

> *[A] judicial engrafting of an exception or qualification upon a previously existing rule of law may in many cases be no more than the initiation of a new normative standard to be applied to all similarly situated cases in the future. . . . [A]s soon as [equitable relief] was granted as a matter of course in other and similar cases in which the remedy at law was found inadequate, the original equitable departure from the letter of the common law became transformed into a "rule of equity jurisprudence."* [Bodenheimer, JURISPRUDENCE, at 250.]

> *In the course of time, much of what had in its inception been an "anti-legal" exercise of discretion, or "justice without law," later formed into a body of legal rules supplementing those of the common law.* [Bodenheimer, JURISPRUDENCE, at 367.]

Individualized equity jurisprudence. Notwithstanding the formalization of some areas of equitable jurisprudence, a continuing hallmark of equity is the case-by-case method of analysis. This form of individualized equity is characterized by a "facts and circumstances" analysis where there are no formal rules, and every case is treated as exceptional.

> *This capacity of moulding a decree to suit the exact exigencies of a particular case is indeed one of the most striking advantages . . . of equitable jurisprudence.* [Bispham, PRINCIPLES OF EQUITY, at 10.]

> *An equitable decision may be one that is neither based on an existing rule of law nor designed to inaugurate a new sequence of precedents. Its sole aim may be to do justice to the parties in a case characterized by a configuration of facts unlikely ever to be repeated in reality in the same or a similar way.* [Bodenheimer, JURISPRUDENCE, at 250-251.]

> *The practical application of any of the rules in equity requires the exercise of judicial discretion. The flexibility of equity needed to adapt its relief to special cases so that hard cases may be taken outside the operation of general rules where "reason and conscience" require it, is accomplished by this exercise of judicial discretion. May we not fairly conclude that this was always true . . .?* [Walsh, EQUITY, at 43.]

Equity is not law

Despite the formalization of some areas of equitable jurisprudence, the theory underlying all of equity is that justice demands discretionary exceptions. Accordingly, equitable rules were not

permanent, uniform and universal as were the rules of law. That is, equity has always been viewed as something distinct from law in the strict sense, and that is no less true today than in earlier times.

> *Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.* [Blackstone, 1 COMMENTARIES *61-62.]

> *[T]his judicial vehicle for accomplishing justice [i.e., individualized equity], since it lacks the normative element typical for legal regulation, should clearly be distinguished from "law" in the proper sense, a distinction which Aristotle lucidly drew . . ..* [Bodenheimer, JURISPRUDENCE, at 251.]

CURRENT EQUITY METHODOLOGY

The point of the above review of the nature and history of equity is to consider the impact equitable jurisprudence has made on modern judicial decision-making. Indeed, this impact has been substantial, not merely in the extent to which rules of equity inform modern concepts of justice, but also in the fact that many judicial opinions today employ a methodology which is primarily equitable in nature, rather than legal.

A word of disclaimer is appropriate here, because the matter should not be pressed too far. That is, no present consideration is made of the legal validity of trusts, rescission, specific performance, and other legal subject matters historically reviewed in the courts of equity. That is, the present review does not concern itself with legal subject matters at all. Rather, the exclusive focus of this review is on judicial decision-making which employs equitable methodology, irrespective of the substantive legal subject matter considered.

Conflict with law

The concerns which motivate this examination are certain logical conflicts between the nature of equity and what we have discovered about the nature of law, namely:

Justice. The nature of law suggests that "justice" denotes carrying out the law. Equity, on the other hand, views carrying out the law as often contrary to justice. In fact, the underlying basis of equity is that an "equitable" rule of law may conflict with a "legal" rule of law, which places law in opposition to itself.

Discretion. The nature of law is such that a judge is to exercise judgment, not will. That is, a judge makes decisions because the law obligates him to do so. Equity, though, permits a judge to make decisions on the basis of personal discretion.

Uniformity. The nature of law requires that rules of justice be applied uniformly, and the failure to do so shows partiality on the part of the judge. However, equity allows for exceptions and special

cases to override the application of general rules.

Equitable methodology.

"Equitable methodology" as used here means any manner of decision-making which is based on the concept of discretionary, individualized, or exceptional justice. The forms of equitable methodology which pervade modern jurisprudence are:

Facts and circumstances test. Standard judicial practice with respect to a facts and circumstances analysis regards every case as exceptional, demanding extraordinary justice which is incapable of rule formulation. Consequently, only judges can decide such matters, and only on a case by case *basis.*

Balancing of interests. The idea of balancing interests is based on the concept of balancing equities. Indeed, the reason why "balancing" arose as a judicial concept was to avoid the "all-or-nothing" results of the application of the rules of the common law. Thus, balancing interests was a way to tailor remedies to the personal needs of the parties, and was just another form of facts and circumstances analysis.

Conclusions.

The above analysis suggests the following conclusions:

Executive equity. Equity which is exhibited in the form of the pardon power and stays of execution are lawful and just when such actions are within the discretionary powers of executive officers.

Judicial equity. There are some cases in which judicial equity is appropriate, and other cases where it is not.

Although God's law is perfect, human laws are not. Thus, judicial equity is appropriate where the judge finds that an imperfect human law, for whatever reason, fails to take into account some aspect of God's law which bears on the case. Of necessity, then, an "exception" must be made to the human law to properly account for the applicability of God's law. This is the best sense of judicial equity, because although an exception is made to a law, it is not discretionary, but legally necessary. Such exceptions are just because they carry out the law of God.

The reverse situation, where a human law "necessitates" the creating of an exception to God's law is not an appropriate exercise of judicial equity. God's law, being perfect, admits of no exceptions. Consequently, where God's law demands one thing, the judge has no discretion to declare that the law demands something else.

The nature of law as a rule of action which is permanent, uniform and universal mitigates against any generalized form of jurisprudence which is foundationally based on exceptional circumstances and case-by-case individualized justice.

Again, no suggestion is made here [per §70, *supra*] that equitable *subject matters*, such as trusts, specific performance, etc. are biblically or historically inappropriate matters for the promulgation of legal rules and the exercise of judicial power. However, such legal rules would most appropriately originate in the legislature, which could also define the jurisdiction of the courts to hear such matters. If this were done, judges could address such equitable subject matters from the standpoint of a statutory scheme having a non-discretionary application. And, although the subject matters would be equitable historically, their adjudication would be obligatory, not discretionary. Thus, the concern addressed herein is not equitable subject matters, but equitable *methodology* as a vehicle for exercising judicial power.

The danger. In the words of one legal commentator, *"Equity had come not to destroy the law, but to fulfil it,"* an obvious allusion to Mat. 5:17. [Maitland, EQUITY, at 17.] Perhaps a more accurate assessment would be that equity has supplanted the law. Indeed, equity methodology has captured the field of judicial decision-making today. The end result is a jurisprudence based not on law, but on individual notions of fairness. And, if that is the case, we ought to have the intellectual honesty to recognize it for what it is. Ultimately, however, continued reliance on equity methodology as a basis for general jurisprudence will set law adrift at sea without bearings, unable to administer justice according to any fixed norms or rules.

> *[T]he liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.* [Blackstone, 1 COMMENTARIES *62.]

CHAPTER 5

Covenant Law

IMPORTANCE OF COVENANTS

In prior chapters reference was made to the law of God revealed in verbal form in the Bible, variously called divine law, divine volitional law, revealed law, or the law of nature's God. The purpose of this chapter is to begin to examine the substantive content of this law. The divine law is revealed in the form of several covenants between God and people, the nature and content of which are described below.

Revelation of divine law. The divine covenants express the divine law, that is, the law of God revealed in verbal form. There are no laws of the Creator except those expressed in the law of nature and the various divine covenants revealed in the Bible. The divine covenants, therefore, are an extremely important component of the law of God.

Means of delegating authority. The divine covenants are the means by which God has delegated authority to people. That is, to the extent people have the authority to rule over others, that authority is primarily to be determined from a study of the covenants. This topic will be expanded in the succeeding chapters. These delegations of authority are covenant specific, that is, the delegations apply only to those governed by the covenant. Thus, one of the key issues is to determine, as a matter of law, to whom each covenant applies.

Necessity to rule by covenant. As we have seen already, God has an absolute right to rule over people. This authority belongs to God as the uncreated Creator of everything, and everyone, that exists. God created every individual person and every nation on the earth. As a result, God has the right to exercise any means whatsoever to effect His governance. As it turns out, however, God has chosen to rule people by covenant.

Humanity, on the other hand, has no choice but to exercise rule by covenant. This is because no human is the creator of another human. Human reproduction, or *pro*creation, does not vest parents with "creator authority" over their children the same way God has absolute authority over us. Further, no person has authority over another person as part of his or her inherent nature. That is, all people are created equal before the law. No one has the right to rule over another person solely by virtue of being born. Similarly, no one has the right to rule over another in a civil, corporate or ecclesiastical context without their consent. Since people receive all ruling authority from God, this is the exclusive means by which people can obtain authority to rule over others. Consequently, human covenants are not merely a convenient, but an absolutely necessary means for anyone to legitimately rule over another person.

Thus, the biblical covenants serve as the pattern for the way people are to rule over others. The most foundational human covenants from a legal perspective are the marriage covenant and the civil covenant, since they form the basis of family law and constitutional law. These are topics which

will be developed in separate volumes in greater detail. However, there are a number of other important applications of the covenant principles which will be treated here.

LEGAL ELEMENTS OF COVENANTS

Even though covenants are not a part of the law of nature, the law of nature nonetheless speaks to the issue of how a covenant is defined. That is, there is a law of the nature of covenants, which specifies the elements of a valid covenant and gives a covenant its binding effect. These legal elements are inferred via inductive reasoning after examining all of the examples of covenantal relations in the Bible. The divine covenants in particular have a number of other qualities about them which are not discussed here. These covenantal qualities are not omitted because they are unimportant in any larger sense, but because they have little or no practical application to jurisprudence. Accordingly, only those covenantal elements of jurisprudential significance are examined here.

The legal elements of covenants are as follows:

Justification of Authority. The law of nature requires that the authority to rule be justified. God, in His mercy, has seen fit to justify even His own authority to rule mankind, though He did not need to. For human covenants, the right to rule must be authorized by God to be lawful. This is because no human has created any other human and has no inherent authority to rule another person.

Mutual Assent. A covenant is an agreement where two or more persons each consent to be bound by certain terms and conditions. God has created mankind so that people have a choice whether to respond to God or to rebel against Him. God offers His covenants to people in such a way that each person may accept or reject the proposed relationship. Thus, no one has the right to agree to a covenant on behalf of someone else then living without their individual consent. As God's covenant relationships with mankind are not coerced, so people become bound by a covenant with each other only when they have consented.

New Relationship. Every covenant puts the parties in a new form of relationship, or community, with respect to each other. In the case of covenant relationships between God and mankind, an intimate fellowship is formed. A covenant between people also creates a new legal relationship, or community, which did not previously exist.

Irrevocably Binding. A covenant is irrevocable. In other words, the parties cannot change their minds about the agreement once they have made it, except to the extent limited modifications may be made. Because God is the God of eternal covenant faithfulness, all covenants between God and mankind can never be revoked. This same principle applies to human covenants. Unlike an ordinary contract, people cannot revoke a covenant, either by unilateral repudiation or by mutual agreement to do so.

Limited Modifiability. A covenant, even a divine covenant, can be modified by the parties, but only for the purpose of better securing the goals of the original agreement. Thus, it is the purposes or

goals of a covenant which are perpetual, and only the means of carrying out those purposes which may be modified. Any modification of a covenant is limited to the means employed to carry out the covenantal purposes. The modification of human covenants is similarly limited to changing the means, not the purposes, of the covenant. Further, any such amendment must be done in accordance with the procedural provisions of the covenant itself.

Binding on Descendants. A covenant may also be perpetual in the sense that it is fully binding on the descendants of the parties. This is the only way a covenant can last beyond the lives of the parties. God's covenants with mankind have usually been made with people acting in a representative capacity. Thus, God's covenants bind and benefit all future generations of humanity within the scope of that capacity. It is sometimes possible for people to covenant so as to bind future generations to the covenant as though they were parties themselves.

Framework for Enforcement. God has chosen the covenant as the framework within which to administer His law and to rule over mankind. People have no choice but to use a covenant framework to rule over others, so a covenant is the framework for administering human relations as well.

These seven legal elements of covenants will be examined, in this same sequence, with respect to each of the particular covenants discussed below.

THE DIVINE COVENANTS

The divine covenants are covenants between God and people, that is, covenants to which God is actually a party. Because of the need for objective verification whenever people claim to have made a covenant with God which grants them rights or authorizes them to rule over others, the divine covenants are limited to those which are verbally revealed in the Bible.

There are six divine covenants in the Bible: the covenants made with Adam and Eve, Noah and his family, Abraham, the nation of Israel, David, and the Church through Jesus Christ. Some of these covenants, such as the Abrahamic and Israelite covenants, were repeated, supplemented, ratified or confirmed on several occasions rather than agreed to all at once. However, for the present purposes, all covenantal dealings between God and the same group of people will be treated as a single covenant.

In studying the biblical covenants, particular attention must be paid to the express terms of each covenant, for the general consideration of "no implied authority" will apply. That is, the covenant texts limit the grants of authority conferred to the parties. The presumption will be that authority not expressly granted cannot be inferred, and therefore, cannot be exercised.

Adamic (Creation) Covenant.

Although the word "covenant" is not expressly used in connection with Adam and Eve, an examination of the express covenants in the Bible indicates that the elements of a covenant were also

present in God's relationship with Adam and Eve. This covenant relationship may also be inferred from either Hos. 6:7 ("like Adam they have transgressed the covenant"), or the express covenant with "day and night" mentioned in Jer. 33:20-25. Coincidentally, the Noahic covenant (an express covenant relation) was referred to as a covenant between God and the earth in Gen. 9:13. Thus, it is possible that God's covenant with "day and night" (a covenant relating to the time of creation in Genesis 1-2) is actually a reference to a covenant with Adam and Eve.

God did not justify His rule of man by His mercy, power or knowledge, but solely by the fact that He is the "uncreated Creator."

> *And God created man in His own image, in the image of God He created him; male and female He created them.* [Gen. 1:27.]

> *[W]ho are you, O man, who answers back to God? The thing molded will not say to the molder, "Why did you make me like this," will it? Or does not the potter have a right over the clay . . .?* [Rom 9:20-21.]

God told Adam and Eve not to eat of the tree of the knowledge of good and evil in order to demonstrate that His relationship with them required each to make a conscious choice.

> *And the LORD God commanded the man, saying, "From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat, for in the day that you eat from it you shall surely die."* [Gen. 2:16-17.]

Adam and Eve were empowered to act as God's vice-regents in ruling over the earth.

> *And God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth."* [Gen. 1:28.]

Adam and Eve's failure to abide by the terms of their covenant with respect to the tree of the knowledge of good and evil required God to enforce His covenant with them, but did not revoke the covenant. People must still choose responsibly before God, and the dominion mandate [Gen. 1:28] has never been repealed. [See, Gen. 9:1,7; 35:11; Lev. 26:9; Jer. 23:3.] Adam and Eve, as well as their children, continued to exercise dominion authority even after the Fall.

> *Now the man had relations with his wife Eve, and she conceived and gave birth to Cain, and she said, "I have gotten a manchild with the help of the Lord." And again, she gave birth to his brother Abel. And Abel was a keeper of flocks, but Cain was a tiller of the ground.* [Gen. 4:1-2.]

The curse of the ground modified the means, but did not alter the purpose, of man's dominion authority.

> *Then to Adam He said, "Because you have listened to the voice of your wife, and have eaten from the tree about which I commanded you, saying, `You shall not eat from it'; Cursed is the ground because of you; In toil you shall eat of it All the days of your life. Both thorns and thistles it shall grow for you; And you shall eat the plants of the field; By the sweat of your face You shall eat bread, Till you return to the ground, Because from it you were taken; For you are dust, And to dust you shall return."* [Gen 3:17-19.]

The Adamic covenant applies to all descendants of Adam and Eve by implication. Otherwise, people today could not claim to be made in the image of God, nor to exercise dominion authority. In addition, since the curse of the ground expressly applies to all descendants of Adam, the terms of the original covenant (as modified) must also apply.

> *Therefore, just as through one man sin entered into the world, and death through sin, and so death spread to all men . . . So then as through one transgression there resulted condemnation to all men . . ..* [Rom. 5:12,18.]

This covenant continues to administer the law of individual moral responsibility and individual and family dominion. Jesus implicitly recognized that God's intentions for Adam and Eve's descendants have remained unchanged.

> *And He answered and said, "Have you not read, that He who created them from the beginning made them male and female?"* [Mat. 19:4.]

<u>Noahic Covenant</u>.

The covenant with Noah and his family expressly uses the word "covenant" to describe God's relationship with them after the worldwide flood.

Since God created all things, including man, His authority includes the right to destroy His creation, and to covenant with those whom He spared from destruction.

> *Then God said to Noah, "The end of all flesh has come before Me; for the earth is filled with violence because of them; and behold, I am about to destroy them with the earth. . . . But I will establish My covenant with you; and you shall enter the ark - you and your sons and your wife, and your sons' wives with you."* [Gen. 6:13,18.]

God would not have covenanted with Noah unless Noah had first built the ark and carried out God's commands with respect to the use of that ark, evidencing Noah's assent.

> *"Make for yourself an ark of gopher wood . . .." Thus Noah did; according to all that God had commanded him, so he did.* [Gen. 6:14,22.]

Immediately after the flood, God had fellowship with no one other than Noah and his family. In this context, God reaffirmed the dominion mandate and that Noah and his descendants should continue

to rule over and subdue the earth as God's vice-regents.

> *And God blessed Noah and his sons and said to them, "Be fruitful and multiply, and fill the earth. . . . And as for you, be fruitful and multiply; Populate the earth abundantly and multiply in it. . . . Now behold, I Myself do establish My covenant with you, and with your descendants after you."* [Gen. 9:1,7,9.]

The irrevocability of this covenant is evidenced by the sign of the rainbow and the fact that God would never flood the entire earth with water again.

> *"[A]nd I will remember My covenant, which is between Me and you and every living creature of all flesh; and never again shall the water become a flood to destroy all flesh. When the bow is in the cloud, then I will look upon it, to remember the everlasting covenant between God and every living creature of all flesh that is on the earth."* [Gen. 9:15-16.]

God's original provision for man's food was that he should eat only vegetation. [*See,* Gen. 1:29.] However, this was modified and extended to include the eating of meat when the dominion mandate was restated. Thus, the purposes of the dominion mandate did not change, but the means of accomplishing dominion were modified.

> *"And the fear of you and the terror of you shall be on every beast of the earth and on every bird of the sky; with everything that creeps on the ground, and all the fish of the sea, into your hand they are given. Every moving thing that is alive shall be food for you; I give all to you, as I gave the green plant."* [Gen. 9:2-3.]

This covenant applies to the descendants of Noah for all successive generations, and even to the descendants of the animals as well.

> *"Now behold, I Myself do establish My covenant with you, and with your descendants after you; and with every living creature that is with you, the birds, the cattle, and every beast of the earth with you; of all that comes out of the ark, even every beast of the earth. . . . This is the sign of the covenant which I am making between Me and you and every living creature that is with you, for all successive generations."* [Gen. 9:9-10,12.]

This covenant continues to administer the laws of food, capital punishment, individual and family dominion, as well as the promise of the rainbow.

> *"For this is like the days of Noah to me; When I swore that the waters of Noah Should not flood the earth again."* [Isa. 54:9.]

Abrahamic covenant.

God's covenant with Abraham established faith as the key to redemption from sin and death.

Because God created all men, He can select an individual with whom to make a covenant to benefit all men.

> *"And I will make you a great nation, And I will bless you, And make your name great; And so you shall be a blessing; And I will bless those who bless you, And the one who curses you I will curse. And in you all the families of the earth shall be blessed."* [Gen. 12:2-3.]

God's covenant relationship with Abraham was conditioned on Abraham's obedience in leaving Ur and in observing the ritual of circumcision, which showed Abraham's assent.

> *Now the LORD said to Abram, "Go forth from your country, and from your relatives and from your father's house, to the land which I will show you . . .." So Abram went forth as the LORD had spoken to him.* [Gen. 12:1,4.] *"This is My covenant, which you shall keep . . .: every male among you shall be circumcised. . . ." Then Abraham took . . . every male among the men of Abraham's household, and circumcised the flesh of their foreskin in the very same day, as God had said to him.* [Gen. 17:10,23.]

God blessed Abraham as the "father of the faithful" and established faith as the key to a new relationship of close communion with God.

> *Then he believed in the LORD; and He reckoned it to him as righteousness.* [Gen. 15:6.] *Therefore, be sure that it is those who are of faith who are sons of Abraham. And the Scripture, foreseeing that God would justify the Gentiles by faith, preached the gospel beforehand to Abraham, saying, "All the nations shall be blessed in you." So then those who are of faith are blessed with Abraham, the believer.* [Gal. 3:7-9.]

The covenant with Abraham is everlasting.

> *"And I will establish My covenant between Me and you . . . for an everlasting covenant."* [Gen. 17:7.]

God's promise to "be God to you and your descendants after you" through the means of circumcision was modified to include Abraham's "spiritual descendants," that is, people who have shared in the circumcision of the heart. [*See,* Gal. 3:7-9.] However, the purpose of the covenant remained the same, namely, for God to have a people unto Himself. Thus, only the means of the covenant, not its purpose, was modified.

> *For he is not a Jew who is one outwardly; neither is circumcision that which is outward in the flesh. But he is a Jew who is one inwardly; and circumcision is that which is of the heart, by the Spirit, not by the letter; and his praise is not from men, but from God.* [Rom. 2:28-29.]

Abraham's covenant applied to his physical descendants, specifically as confirmed through Isaac and Jacob.

> *"I will . . . be God to you and to your descendants after you. And I will give to you and your descendants after you . . . all the land of Canaan, for an everlasting possession."* [Gen. 17:7-8.]

This covenant continues to administer the law of righteousness through faith and rights to the Promised Land.

> *"And I will give to you and to your descendants after you, the land of your sojournings, all the land of Canaan, for an everlasting possession; and I will be their God."* [Gen. 17:8.]

Israel's (Mosaic) covenant.

Because God created all nations, He can select a people with whom to make a unique covenant as an example to all other nations.

> *"For you are a people holy to the Lord your God. The Lord your God has chosen you to be a people for his treasured possession, out of all the peoples who are on the face of the earth. ... Know therefore that the Lord your God is God, the faithful God who keeps covenant and steadfast love with those who love him and keep his commandments, to a thousand generations ...."* [Dt. 7:6, 9.]

The people of Israel were not coerced into accepting God's covenant with them, but assented to it voluntarily.

> *Then Moses came and recounted to the people all the words of the LORD and all the ordinances; and all the people answered with one voice, and said, "All the words which the LORD has spoken we will do!" . . . So Moses took the blood and sprinkled it on the people, and said, "Behold the blood of the covenant, which the LORD has made with you in accordance with all these words."* [Ex. 24:3,8.]

Israel was intended to become a kingdom of priests, a holy nation, and "My own possession among all the peoples" of the earth. This was the new relationship God desired for that nation.

> *"Now then, if you will indeed obey My voice and keep My covenant, then you shall be My own possession among all the peoples, for all the earth is Mine; and you shall be to Me a kingdom of priests and a holy nation."* [Ex. 19:5-6.]

The covenant with Israel is irrevocable, notwithstanding the advent of the Church covenant.

> *He has remembered His covenant forever, The word which He commanded to a thousand generations, The covenant which He made with Abraham, And His oath to Isaac. Then He confirmed it to Jacob for a statute, To Israel as an everlasting covenant.* [Ps. 105:8-10.]
> *"For truly I say to you, until heaven and earth pass away, not the smallest letter or stroke shall pass away from the Law, until all is accomplished."* [Mat. 5:18.]

The scripture anticipates that the Mosaic covenant will one day be modified. I do not say that it has been modified yet. True, parts of it are suspended until such time as Christ returns to sit on the throne of David and the Jewish temple is rebuilt. But the purposes and terms of the Mosaic covenant have not changed since they were first given, almost 3,500 years ago. When the change does come, it will be by the inauguration of the New Covenant with Israel (Jer. 31:31-34).

> For if that first covenant had been faultless, there would have been no occasion to look for a second. ... In speaking of a new covenant, he makes the first one obsolete. And what is becoming obsolete and growing old is ready to vanish away. [Heb 8:7, 13.]

God's laws, which applied to Israel "throughout their generations," imply not only irrevocability, but binding effect on descendants.

> *"But as for you, speak to the sons of Israel, saying, `You shall surely observe My sabbaths; for this is a sign between Me and you throughout your generations, that you may know that I am the LORD who sanctifies you.'. . . So the sons of Israel shall observe the sabbath, to celebrate the sabbath throughout their generations as a perpetual covenant."* [Ex. 31:16.]

This covenant still administers God's plan for the nation of Israel and the Promised Land.

> *"Remember Abraham, Isaac, and Israel, Thy servants to whom Thou didst swear by Thyself, and didst say to them, `I will multiply your descendants as the stars of the heavens, and all this land of which I have spoken I will give to your descendants, and they shall inherit* it *forever.'"* [Ex. 32:13.]

Davidic covenant.

Although the word "covenant" is not expressly used in 2 Sam. 7:1-29, God's promise to keep the throne of Israel among David's descendants is referred to as a covenant in 2 Chr. 13:5; 21:7; Ps. 89:3-4; and Jer. 33:20-21.

Because God is sovereign over Israel, He has the right to choose who will rule as king.

> *"Thus says the LORD of Hosts, `I took you from the pasture, from following sheep, that you should be ruler over My people Israel.'"* [2 Sam. 7:8.]

David assented to the covenant in a prayer to God in 2 Sam. 7:18-29.

> *"Now therefore, O LORD God, the word that Thou hast spoken concerning Thy servant and his house, confirm* it *forever, and do as Thou hast spoken."* [2 Sam. 7:25.]

God promised to be a father to David's sons in a new fellowship and communion.

> *"I will be a father to him and he will be a son to Me; . . . but My lovingkindness shall not*

depart from him, as I took it *away from Saul."* 2 Sam. 7:14-15.]

The covenant with David is irrevocable.

"And your house and your kingdom shall endure before Me forever; your throne shall be established forever." [2 Sam. 7:16.]

The Davidic covenant was modified to the extent it was ultimately fulfilled by Jesus Christ (a descendant of David).

"[Y]ou shall name Him Jesus . . . and the Lord God will give Him the throne of his father David; and He will reign over the house of Jacob forever; and His kingdom will have no end." [Lu. 1:31-33.]

The covenant with David applied to his descendants.

"I have made a covenant with My chosen; I have sworn to David My servant, I will establish your seed forever, And build up your throne to all generations." [Ps. 89:3-4.]

David's covenant continues to administer the law of the right to rule as king over Israel.

"I, Jesus . . . am the root and the offspring of David . . .." [Rev. 22:16.]

Church covenant.

Since God created all men, He can extend the covenant with Abraham to all those who believe on Him.

Therefore, be sure that it is those who are of faith who are sons of Abraham. And the Scripture, foreseeing that God would justify the Gentiles by faith, preached the gospel beforehand to Abraham, saying, "All the nations shall be blessed in you." So then those who are of faith are blessed with Abraham, the believer. [Gal. 3:7-9.]

The Church covenant applies to those who choose to believe in faith.

"He who believes in Him is not judged; he who does not believe has been judged already, because he has not believed in the name of the only begotten Son of God." [John 3:18.]
"Whoever will call upon the name of the Lord will be saved." [Rom. 10:13.]

Upon entering into the new covenant relationship, a Christian becomes a member of the universal Church, having fellowship with God and other believers.

Therefore, my brethren, you also were made to die to the Law through the body of Christ, that you might be joined to another, to Him who was raised from the dead, that we might

bear fruit for God. [Rom. 7:4.] *Now you are Christ's body, and individually members of it.* [1 Cor. 12:27.]

The Church covenant will never end.

For I am convinced that neither death, nor life, nor angels, nor principalities, nor things present, nor things to come, nor powers, nor height, nor depth, nor any other created thing, shall be able to separate us from the love of God, which is in Christ Jesus our Lord. [Rom. 8:38-39.]

Because the new covenant is perfect (*i.e.*, complete), it is not modifiable at all. That is, this covenant is the ultimate redemptive covenant - perfect in purpose and in means.

For by one offering He has perfected for all time those who are sanctified. [Heb. 10:14.]

This covenant is unique in that parties do not covenant in a representative capacity. Each individual must freely choose to come to God on his own.

But as many as received Him, to them He gave the right to become children of God, even to those who believe in His name. [John 1:12.]

This covenant continues to administer the redemption from sin for all people, as well as the authority of the church in the world.

And Jesus came up and spoke to them, saying, "All authority has been given to Me in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you." [Mat. 28:18-20.]

HUMAN COVENANTS

Since man is made in the image of God, we are to relate to each other according to the pattern of the way God relates to us. And as shown earlier, people have no choice but to exercise rule over one another by way of a covenant.

Human covenants may take many forms, such as "covenants running with the land" recognized in property law. Joshua made a covenant with the Gibeonites in Josh. 9:15, a model for modern international treaties. Among the human covenants, however, two stand out as ordained of God for the ordering and preservation of society, namely, the family (or marriage) covenant and the civil covenant (or constitution). For this reason, the historic understanding of these two relationships will be examined together with relevant scriptures.

Family (or marriage) covenant.

The marital covenant is a legal relationship which has been "instituted" by God. Of all the human relations, marriage is the most foundational to the well-being of society.

A man and woman have authority to marry because God created mankind male and female, and intended for them to relate to each other in this way.

> *And God created man in His own image, in the image of God He created him; male and female He created them.* [Gen. 1:27.] *Then the LORD God said, "It is not good for the man to be alone; I will make him a helper suitable for him."* [Gen. 2:18.]

> *By statutes . . . it is declared, that all persons may lawfully marry, but such as are prohibited by God's law.* [Blackstone, 1 COMMENTARIES *435.]

An essential ingredient to any valid marriage is the consent of both parties.

> *Then they called Rebekah and said to her, "Will you go with this man?" And she said, "I will go." . . . Then Isaac brought her into his mother Sarah's tent, and he took Rebekah, and she became his wife.* [Gen. 24:58,67.]

> *[T]he law treats [marriage] as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and, lastly, actually did contract. . . in contracts the obligation must be mutual; both must be bound, or neither.* [Blackstone, 1 COMMENTARIES *433, 436.]

> *No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract* jure gentium*, that consent is all that is required by natural or public law . . ..* [Kent, COMMENTARIES.]

Upon marrying, the husband and wife become "one flesh," which is a new legal relationship. Each marriage covenant also creates a new family, which is the community formed as a result of the covenant.

> *For this cause a man shall leave his father and his mother, and shall cleave to his wife; and they shall become one flesh.* [Gen. 2:24.] *"Consequently they are no more two, but one flesh. What therefore God has joined together, let no man separate."* [Mat. 19:6.]

> *By the contract* [of marriage] *thus entered into, a society is formed, of a most interesting and important character, which is the origin of all civil society; and in which, children are prepared to become members of that great community.* [Francis Wayland, THE ELEMENTS OF MORAL SCIENCE, 1840 (1963) at 279.]

The marriage covenant is irrevocable in the sense that it binds husband and wife until one or the other dies.

> *Or do you not know, brethren (for I am speaking to those who know the law), that the law has jurisdiction over a person as long as he lives? For the married woman is bound by law to her husband while he is living; but if her husband dies, she is released from the law concerning the husband. So then if, while her husband is living, she is joined to another man, she shall be called an adulteress; but if her husband dies, she is free from the law, so that she is not an adulteress, though she is joined to another man.* [Rom. 7:1-3.]

> *[A]ll marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble.* [Blackstone, 1 COMMENTARIES *435.]

> *When a marriage is duly made, it becomes of perpetual obligation, and cannot be renounced at the pleasure of either or both of the parties. It continues, until dissolved by the death of one of the parties, or by divorce.* [Kent, COMMENTARIES.]

Because of the "hardness of man's heart," God allowed for divorce to modify the marriage covenant between a husband and wife, although God did not abrogate the law of marriage in doing so.

> *"When a man takes a wife and marries her, and it happens that she finds no favor in his eyes because he has found some indecency in her, and he writes her a certificate of divorce and puts* it *in her hand and sends her out from his house . . .."* [Deut. 24:1.] *He said to them, "Because of your hardness of heart, Moses permitted you to divorce your wives; but from the beginning it has not been this way."* [Mat. 19:8.] *But to the married I give instructions, not I, but the Lord, that the wife should not leave her husband . . . and that the husband should not send his wife away.* [1 Cor. 7:10-11.]

> *[W]hen the marriage is just and lawful* ab initio *. . . the law is tender of dissolving it . . .. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any case whatsoever, that arises after the union is made.* [Blackstone, 1 COMMENTARIES *440-441.]

In this case, it is the *form* of covenant which is binding on all descendants of Adam and Eve. That is, husbands and wives are not free to set the terms of their relationship because God has defined the terms and conditions of the institution of marriage. Further, in a civil setting, the children cannot undo the marriage of their parents.

> *Let the husband fulfill his duty to his wife, and likewise also the wife to her husband. The wife does not have authority over her own body, but the husband does; and likewise also the husband does not have authority over his own body, but the wife does.* [1 Cor. 7:3-4.]

> *[Marriages] voidable only by sentence of separation . . . are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties.* [Blackstone, 1 COMMENTARIES *434.]

The family covenant continues to administer the law of family dominion and the law of love among all family members.

> *Nevertheless let each individual among you also love his own wife even as himself; and let the wife see to it that she respect her own husband.* [Eph. 5:33.]

> *[M]arriage, being an institution of God, is subject to* his laws *alone, and not to the laws of man.* [Wayland, MORAL SCIENCE at 279.]

Civil covenant.

The civil covenant, or constitution, is also ordained by God for human society, but in a different fashion from that of the family covenant. Whereas the *form* of marriage is prescribed by the Creator, the form of a civil government is not. What is prescribed is that people, to exercise civil rulership over each other, must do so by the consent of the governed, that is, by a civil covenant. The people have liberty to choose the form of civil government that seems best to them in accordance with God's law.

All lawful civil rule is constituted by the consent of the governed and is constrained by the laws of civil authority established by God.

> *And He said to them, "Then render to Caesar the things that are Caesar's, and to God the things that are God's."* [Lu. 20:25.] *Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God.* [Rom. 13:1.]

> *The government proceeds directly from the people; is "ordained and established," in the name of the people; and . . . the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.* [McCulloch v. Maryland, 17 U.S. 316 (1819), at 403.]

A civil covenant, to be effective, requires the assent (or ratification) of the people who are to be governed. Note that Israel's covenant was also the constitution of that nation.

> *Then Moses came and recounted to the people all the words of the LORD and all the ordinances; and all the people answered with one voice, and said, "All the words which the LORD has spoken we will do!"* [Ex. 24:3.]

> *The convention which framed the [federal] constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. . . . [T]he people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments.* [McCulloch v. Maryland, 17 U.S. at 403-404.]

The covenanting parties become a new civil polity, or commonwealth, such as a nation, state or municipality. In the American federal system, each state, as well as the nation, are formed by a constitution which creates a new civil sovereign.

> *In America, the powers of sovereignty are divided between the government of the Union, and those of the states.* [McCulloch v. Maryland, 17 U.S. at 410.]

Once the people of Israel opted for a human king and made a covenant with him, it became irrevocable. [*See,* 1 Sam. 10:17-25.] Similarly, modern constitutions are irrevocable as to their general purposes (though the specific means of effecting those objects can be modified).

> *Brethren, I speak in terms of human relations: even though it is only a man's covenant, yet when it has been ratified, no one sets it aside or adds conditions to it.* [Gal. 3:15.]

> *[A] constitution [is] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.* [McCulloch v. Maryland, 17 U.S. at 415.]

Because the *form* of civil government is instituted by people and not ordained by God, a constitution can be modified so long as the modification does not violate the purposes of the covenant and complies with the law of nature and the procedural requirements for amendment. Thus, in the case of the nation of Israel, the *form* of civil government was modified upon the institution of the monarchy.

> *Then all the elders of Israel gathered together and came to Samuel at Ramah; and they said to him . . . "Now appoint a king for us to judge us like all the nations." . . . And the LORD said to Samuel, "Listen to the voice of the people in regard to all that they say to you . . .."* [1 Sam. 8:4-5,7.]

> *The constitution is . . . a superior, paramount law, unchangeable by ordinary means . . ..* [Marbury v. Madison, 5 U.S. 137, 177.]

The objects of civil government bind the descendants of the original parties to a direct obedience of the terms and conditions of the covenant as long as those objects remain unmodified. Thus, people who are born into a nation are bound by its constitution, even though they have not consented to it.

> *We the people of the United States, in order to . . . secure the blessings of liberty to ourselves and to our posterity . . .."* [U.S. CONST., Preamble.]

The purpose of a constitution is to provide a framework for the administration of law for the civil polity.

> *Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . ..* [Marbury v. Madison, 5 U.S. 137, 177.]

CHAPTER 6

Jurisdiction

INTRODUCTION

Having examined the sources and characteristics of the law of nature and the divine law, we must now determine who has the *right* to assert and enforce such laws in society. This task is essentially an inquiry into the nature of jurisdiction. The word "jurisdiction" is derived from "juris," meaning law, and "diction," which is a pronouncement or declaration. Thus, in its most general sense, jurisdiction is the power to make, declare, or apply the law. The biblical record indicates that God has allocated jurisdiction between Himself and mankind and has distributed human jurisdiction among several governing authorities. In this chapter, we will examine the most fundamental jurisdictional distinction of all, being the distinction between God and mankind.

DISTRIBUTION OF AUTHORITY

The question of who has jurisdiction over any particular matter is essentially a question of authority. A study of jurisdiction, defined above as the *right* to make, declare or apply the law, must therefore begin by asking the question, "Where does this right come from?" The *right* of jurisdiction exists, in essence, whenever it has been *authorized*. Therefore, our inquiry begins with an examination of how authority is acquired, or distributed. Who has the authority to assert and enforce any given legal rule?

The Delegation Principle.

The Delegation Principle of authority is that **all human authority is delegated, not inherent**.

All authority ultimately belongs to God. As Creator of the universe, God has absolute and unlimited authority over the entire creation. The pictorial analogy used in the Bible is that of a potter, who has the absolute right of a creator over his clay vessel to make, reform, or destroy the vessel. In the same way, God has the right of a potter over mankind, who are His creations of "clay." God's absolute authority extends not only over Israel, but every other nation and individual as well.

> *"Can I not, O house of Israel, deal with you as this potter does?" declares the LORD. "Behold, like the clay in the potter's hand, so are you in My hand, O house of Israel. At one moment I might speak concerning a nation or concerning a kingdom to uproot, to pull down, or to destroy it; if that nation against which I have spoken turns from its evil, I will relent concerning the calamity I planned to bring on it. Or at another moment I might speak concerning a nation or concerning a kingdom to build up or to plant it; if it does evil in My sight by not obeying My voice, then I will think better of the good with which I had promised to bless it."* [Jer. 18:6-10.]

The earth is the LORD's, and all it contains, The world, and those who dwell in it. [Ps. 24:1.]

God's authority even includes the right to destroy the creation which he made.

Then God said to Noah, "The end of all flesh has come before Me; for the earth is filled with violence because of them; and behold, I am about to destroy them with the earth. . . . And behold, I, even I am bringing the flood of water upon the earth, to destroy all flesh in which is the breath of life, from under heaven; everything that is on the earth shall perish." [Gen. 6:13,17.]

Some authority has been delegated to men. Since God is the only uncreated being in the universe, His is the only authority which is inherent. The authority of all created beings must be derived from God. God alone has the authority to decide what power may rightfully be exercised by all human governments. Accordingly, all authority is established, or delegated, by God.

He is the head over all rule and authority . . .. [Col. 2:10.]

And Jesus came up and spoke to them, saying, "All authority has been given to Me in heaven and on earth. Go therefore . . .." [Mat. 28:18-19.]

For there is no authority except from God, and those which exist are established by God. [Rom. 13:1.]

God reserves for Himself all authority which has not been delegated. Thus, for example, God reserves the right to judge all the nations throughout history, even to the point of again destroying the entire creation as a means of enforcing His word and His law.

. . . by the word of God the heavens existed long ago and the earth was formed out of water and by water, through which the world at that time was destroyed, being flooded with water. But the present heavens and earth by His word are being reserved for fire, kept for the day of judgment and destruction of ungodly men. [2 Pet. 3:5-7.]

And from His mouth comes a sharp sword, so that with it He may smite the nations; and He will rule them with a rod of iron; and He treads the wine press of the fierce wrath of God, the Almighty. [Rev. 19:15.]

God . . . is the author of [true] *law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.* [Cicero, III DE RE PUBLICA, XXII.]

The Limitation Principle.

The Limitation Principle of authority is that **all human authority is limited, not absolute**.

Human authority extends only to that which God gives him. Since no person is the creator of himself or another, no one may lawfully do anything except as God specifically authorizes him to act.

A person can do only what he or she is expressly authorized to do. There is a presumption against the existence of inferred or implied authority. For instance, no one could punish Cain for murdering Abel because God had not authorized anyone to exercise jurisdiction over the law of murder. (*See,* Gen. 4:8-15.)

Human authority is limited by the terms of the delegation. Since authority cannot be implied, the nature and express terms of any grant of authority are controlling. Thus, human authority is limited by the terms of God's delegation. A person's right to make, declare or enforce law is consequently a function of the terms of the delegation of authority. In this sense, authority and jurisdiction mesh.

For example, the Dominion Mandate (Gen. 1:28) gave mankind authority, or jurisdiction, over the earth, the fish, the birds, and every living *thing* on the earth. However, people are never referred to as "things" in the Bible, but as "beings." Thus, the Dominion Mandate confers no express authority for people to rule over each other, because the Mandate confers no jurisdiction over *beings*. Consequently, dominion authority is limited (by the terms of the grant) to animals, plants and the ground - the jurisdiction to rule over people must be derived from some other express grant of authority.

> *And God blessed them; and God said to them, ". . . rule over . . . every living thing that moves on the earth." . . . Then the LORD God formed man of dust from the ground, and breathed into his nostrils the breath of life; and man became a living being.* [Gen 1:28; 2:7.]

No one defines his own jurisdiction. Following the Delegation Principle, every person must derive his or her authority from someone else, which ultimately always traces back to God. If a person cannot justify any claimed jurisdiction in this way, the presumption is that the claimed jurisdiction does not exist. Moreover, since human nature is corrupted, the prerogative of defining one's own jurisdiction (especially when it comes to ruling over other people) will tend invariably to excess.

The legally defined offense of contempt can also be understood in this light. Contempt is the unauthorized assumption of jurisdiction to declare one's own authority, or to judge one's own case. In effect, a contemptuous litigant declares that he has authority to judge his own case, and that his authority is superior to the jurisdiction of the judge. By the Mosaic law, a person guilty of judicial contempt was to be executed. Although contempt isn't necessarily a capital offense today, the unauthorized assertion of jurisdiction is a serious offense.

> *"So you shall come to the . . . judge who is in office in those days, and you shall inquire of them, and they will declare to you the verdict in the case. And you shall do according to the terms of the verdict which they declare to you . . . you shall not turn aside from the word which they declare to you, to the right or the left. And the man who acts presumptuously by not listening to . . . the judge, that man shall die."* [Deut. 17:9-12.]

The Diffusion Principle.

The Diffusion Principle of authority is that **human authority is diffuse, not concentrated**.

God delegates authority via His covenants with people. The means God has chosen to use to delegate authority to mankind is the covenant. Specifically, the divine covenants contain all of the express terms of authority delegated by God to mankind. Thus, it is to the terms of the divine covenants that we must look for the terms and limitations of human authority.

God hasn't given any person total authority. God has not given all human authority to any one individual or group of people, nor has He covenanted with men only once. Rather, He has covenanted with different people throughout history and has delegated differing authority in each covenant. Later covenants do not "swallow-up" or supersede earlier covenants, so that distinctions among the various covenants persist today. (Note: The Church covenant modified prior covenants as to redemption law, but did not supersede them with respect to non-redemptive aspects. [*See, supra* §82, *infra* §134-145.]

For example, the Adamic covenant delegates the authority to take dominion and to bear and raise children. The Noahic covenant grants authority to eat meat and to inflict capital punishment for certain offenses. The Abrahamic covenant grants authority over the land of Israel. Israel's covenant delegates authority to administer the laws of a theocratic nation, and the Davidic covenant confers authority to rule as king of Israel. The church covenant grants authority to become a member of the body of Christ and to take the gospel to the world.

The diffusion of powers is the rule. God has distributed authority among mankind severally as He wills, so that human authority is diffuse and disparate. In other words, God has spread His delegations of authority around so that everyone has some God-given authority, but no one has it all, nor even a preponderance of the available authority.

These various authorities, or jurisdictions, were not all given at the same time, nor were they given to all the same people. Every covenant applies solely to its parties and, in most cases, to the descendants of the parties. The divine covenants do not all apply to the same people. Consequently, the authority delegated by each of the covenants continues to be diffused among mankind even today.

MORALITY AND RELIGION

Having established that God has all inherent authority, He has delegated some of it to mankind, and has reserved the rest for Himself, the next inquiry is to ascertain the nature of the jurisdiction God has reserved to Himself.

The contrast between the jurisdiction God has reserved for Himself and the jurisdiction He has delegated to mankind is often referred to as Morality vs. Law. In other words, the duties men owe to God (which God reserves jurisdiction to enforce directly) are *moral* obligations, whereas the

duties men owe to other people (which God has delegated to mankind to enforce) are *legal* obligations.

> *But he who knows to distinguish between the body and the soul, between the present fleeting life and that which is future and eternal, will have no difficulty in understanding that the spiritual kingdom of Christ and civil government are things very widely separated.* [Calvin, IV INSTITUTES, ch. XX.]

Jesus emphatically affirmed that not all authority has been delegated to mankind, and that God has reserved jurisdiction over people's lives.

> *And He said to them, "Then render to Caesar the things that are Caesar's, and to God the things that are God's."* Lu. 20:25.

Jurisdiction over the heart.

The hallmark of moral jurisdiction, that is, the authority over humanity which God has reserved for Himself, is the heart and mind, including freedom of thought (mind), freedom of choice (will), and freedom of religion (heart). That is, no person has jurisdiction (or the right to declare what is right or wrong, *i.e.*, what is lawful or unlawful) with respect to the heart or mind of another. (Nonetheless, a limited jurisdiction exists for authority to teach others.) This is indicated in the biblical record both by generally denying human jurisdiction over the heart and mind of others and by expressly recognizing God's reserved rights over the heart and mind.

Authority over the heart. Only God has the ability to accurately examine the heart or mind of any person. Further, He has reserved the jurisdiction to make this examination.

> *But the LORD said to Samuel, "Do not look at his appearance or at the height of his stature, because I have rejected him; for God sees not as man sees, for man looks at the outward appearance, but the LORD looks at the heart."* [1 Sam. 16:7.]

> *"I, the LORD, search the heart, I test the mind, Even to give to each man according to his ways, According to the results of his deeds."* [Jer. 17:10.]

> *"For the eyes of the LORD move to and fro throughout the earth that He may strongly support those whose heart is completely His."* [2 Chr. 16:9.]

No secrets from God. God's reserved jurisdiction over the heart and mind is total and complete. That is, there is nothing anyone can keep secret from God, even their own thoughts. Further, God reserves the right to change our hearts and minds.

> *For I am conscious of nothing against myself, yet I am not by this acquitted; but the one who examines me is the Lord. Therefore do not go on passing judgment before the time, but wait until the Lord comes who will both bring to light the things hidden in the darkness and*

disclose the motives of men's hearts; and then each man's praise will come to him from God. [1 Cor. 4:4-5.]

"This is the covenant that I will make with them after those days, says the Lord: I will put My laws upon their heart, and upon their mind I will write them . . .." [Heb. 10:16.]

The king's heart is like channels of water in the hand of the LORD; He turns it wherever He wishes. [Prov. 21:1.]

"Thus I will harden Pharoah's heart . . .." "And as for Me, behold, I will harden the hearts of the Egyptians . . .." [Ex. 14:4,17.]

No human jurisdiction over the hearts of others. People have neither the ability to examine the heart or mind of others, nor the right to judge the the heart or mind of others.

"Do not judge lest you be judged. For in the way you judge, you will be judged; and by your standard of measure, it will be measured to you." [Mat. 7:1-2.]

Now accept the one who is weak in faith, but not for the purpose of passing judgment on his opinions. . . . Who are you to judge the servant of another? To his own master he stands or falls; and stand he will, for the Lord is able to make him stand. . . . But you, why do you judge your brother? Or you again, why do you regard your brother with contempt? For we shall all stand before the judgment seat of God. [Rom. 14:1,4,10.]

Citizenship in God's kingdom. A person's citizenship in God's kingdom (a matter of the heart) depends upon matters outside the jurisdiction that God had granted to mankind. Thus, God expects His people to love Him with their hearts and minds, and to refrain from impurities of the heart and mind, regardless of whether such offenses can be judged by human courts.

"You shall not covet your neighbor's house; you shall not covet your neighbor's wife or his male servant or his female servant or his ox or his donkey or anything that belongs to your neighbor." [Ex. 20:17.]

But do not let immorality or any impurity or greed even be named among you, as is proper among saints; and there must be no filthiness and silly talk, or coarse jesting, which are not fitting, but rather giving of thanks. For this you know with certainty, that no immoral or impure person or covetous man, who is an idolater, has an inheritance in the kingdom of Christ and God. [Eph. 5:3-5.]

"You have heard that the ancients were told, 'You shall not commit murder' and 'Whoever commits murder shall be liable to the court.' But I say to you that everyone who is angry with his brother shall be guilty before the court; and whoever shall say to his brother, 'Raca,' shall be guilty before the supreme court; and whoever shall say, 'You fool,' shall be guilty enough to go into the fiery hell. [Mat. 5:21-22.]

EDUCATION AND CHARITY

Jurisdiction over the mind.

Freedom of the mind. God's authority over the mind is virtually indistinguishable from His authority over the heart. He alone can peer into the mind and read our thoughts. Not only that, He judges our thoughts and requires that our thoughts be inclined towards Him.

> *For who among men knows the thoughts of a man except the spirit of the man, which is in him? Even so the thoughts of God no one knows except the Spirit of God.* [1 Cor. 2:11.]

> *And He said to him, "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind."* [Mat. 22:37.]

This sets up another instance for the application of the ***Rule of Accountability***. That is, *accountability runs exclusively in the direction of the source of our authority*. For example, our minds are given to us by the Creator, who alone retains the right to command the allegiance of our thoughts, and therefore our accountability for our minds belongs solely to Him. At no time in the course of following our mind or conscience does civil government have the right to intrude - whether to monitor our thoughts, judge our thoughts, or command the allegiance of our minds. Consequently, our mind and our thoughts are wholly exempt from the cognizance of civil society, most especially civil government.

Which is to say, in terms of God's basic principles of authority, that accountability runs solely to the source of delegation. Since no aspect of our minds comes from (or is delegated by) civil society, then civil government has no business attempting to exercise authority or jurisdiction over our thoughts. This principle was clearly recognized by Thomas Jefferson when he wrote his *Bill for Establishing Religious Freedom* (1779), which opens with these words:

> *Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, have established and maintained false religions over the greatest part of the world, and through all time... .*

Notice how Jefferson applies his argument to faith, religion and religious opinions, but his reasoning is based entirely on the freedom of the *mind*, not the *heart*. That's because, as the scriptures clearly show, God's authority over the heart and mind are indistinguishable. Further, the lack of authority of civil government over both is the same. Consequently, to the same extent that religion and faith

are wholly exempt from social recognition (via legislation, regulation and enforcement, etc.), then men (not just civil rulers or public officials, but all people) lack the authority to read our minds, judge our thoughts, or command the allegiance of our minds.

I'm talking about *education*, people. To the same extent we have an inalienable or God-given right to religious liberty, we have an inalienable right to educational freedom, which principally means that all education is wholly exempt from civil interference. In other words, civil government should not be in the business of education, and the phrase *public education* is an oxymoron. Freedom of religion and freedom of the mind have the same origin (being equally derived from the Creator), both are part of God's reserved jurisdiction and not man's jurisdiction, and accountability for both runs exclusively to God. So why don't we, as a society, treat education as sacrosanct as religion?

The limited authority to teach. In the face of the general denial of human authority over the hearts and minds of others and the recognition of God's reserved authority, a strong presumption exists that no one has the right to instruct the heart or mind of another unless it has been expressly given by God. The biblical record indicates there are two such express delegations of the authority to teach. The first, of course, is the natural authority of parents to teach their own children.

> *"And these words, which I am commanding you today, shall be on your heart; and you shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up."* [Deut. 6:6-7.] *And, fathers, do not provoke your children to anger; but bring them up in the discipline and instruction of the Lord.* [Eph. 6:4.]

Second, Jesus declared that the realm of truth was under His kingdom, and that He expected His disciples to "bear witness to the truth" and so to teach others about the truth.

> *"Go therefore and make disciples of all the nations . . . teaching them to observe all that I commanded you."* [Mat. 28:19-20.] *"For this I have been born, and for this I have come into the world, to bear witness to the truth. Everyone who is of the truth hears My voice."* [Jn. 18:37.]

Coupled with the jurisdictional limitations described above, the authority to teach may be understood as the right to submit ideas for the consideration of the student, but that each student retains the authority to decide for himself whether to accept or reject the submitted ideas. Thus, the teacher has authority to select the ideas a student will be exposed to, but the student retains the right to determine what will be learned. So powerful is the right to compel a student to be exposed to certain ideas, however, that even this jurisdiction over the heart and mind is limited to those instances where God has expressly authorized it.

Again, notice how the same arguments can be made about religion as education. Who are the only people expressly authorized by God to propagate religion in society? Parents and the Church. The jurisdiction of both religion and education in society are the same.

Establishments of religion and education. Here's another coincidence for you. In historic terms, there were two principal aspects of religious freedom: the first was religious liberty (freedom in personal faith and practice); and the second was a prohibition of religious establishments. But what was - historically (never mind the warped modern view) - an *establishment of religion*? Historically, a religious establishment had four key components. In other words, these are the four attributes that made a church an establishment of religion for legal purposes.

1. *State approved teachers*. Typically, this was achieved by requiring people to get a state-granted license to preach. Don't let the terminology confuse you - we think of it today as licensing preachers or ministers, but at the time they were called *teachers*.
2. *State approved curriculum*. Yes, states would actually (by law) designate what was officially approved religious doctrine, and what texts could be used by religious teachers. The *Common Book of Prayer*, for example, was not simply commonly used, but was required to be used as a matter of law in England, and was similarly mandated in some American colonies, such as Virginia.
3. *Mandatory attendance*. Failure to attend regular church services - not just any church services, but only the services of an approved church - was punished as a violation of law.
4. *Supported by public taxes*. Establishments of religion were either funded directly by distributions from the public treasury, or via enforcement of a *tithables tax*, where taxpayers were required by law to make payments directly to the church (often *in kind*, that is, in a form other than typical money, such as in tobacco leaves).

By the strangest coincidence (how on earth did this happen?), the same four attributes perfectly describe every public school in America today:

1. *State approved teachers*. All public school teachers have to be licensed to teach by the state.
2. *State approved curriculum*. All public school curricula must be approved by the state's Board of Education.
3. *Mandatory attendance*. Ever hear of truancy laws? Yep - mandatory attendance.
4. *Supported by public taxes*. All public schools are funded by tax revenues, whether by income taxes or property taxes (what does it matter?).

So, yes, what I'm saying is exactly what it looks like I'm saying. All public schools are, *by definition*, state establishments of religion. So why, again, exactly do we treat education and freedom of the mind so differently compared to religion and religious liberty? I tell you, it's positively schizophrenic. And absolutely inexcusable.

Jurisdiction over acts of love.

Apart from the limited jurisdiction to teach others, human jurisdiction is limited to the realm of actions, or deeds. However, even human jurisdiction over actions is limited, that is, there are some deeds which human agencies have no authority to judge. The actions which are moral in character (incapable of human enforcement) are generally governed by the law of love.

The law of love. The reason why acts of love are part of God's reserved jurisdiction is that matters of the heart cannot be humanly enforced.

The biblical record plainly indicates that love originates from the heart.

> *But the goal of our instruction is love from a pure heart and a good conscience and a sincere faith.* [1 Tim. 1:5.]

> *Since you have in obedience to the truth purified your souls for a sincere love of the brethren, fervently love one another from the heart.* [1 Pet. 1:22.]

Since the heart is reserved for God alone to judge, actions which are governed exclusively by motivations of the heart are also reserved for God alone to judge.

A chief duty of the law of love is to love your neighbor as yourself.

> *". . . you shall love your neighbor as yourself; I am the LORD."* [Lev. 19:18.]

> *And he answered and said, "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself."* [Lu. 10:27.]

The duty to love one's neighbor is owed directly to God, and only indirectly to the recipient. That is, love must come from the heart of a person freely; love cannot be either claimed as a right, earned (merited) by the recipient, or coerced. Thus, when God shows love toward us, it is evidenced by a gift which no one can merit or claim as of right. In other words, love is a matter of *grace*, not *works* (or merit).

> *For by grace you have been saved through faith; and that not of yourselves,* it is *the gift of God; not as a result of works, that no one should boast.* [Eph. 2:8-9.]

The jurisdiction of love. Love (as is equity) in a sense is the purpose of all laws. Yet, there are some areas of life where love has exclusive jurisdiction.

In a sense, love undergirds all of God's law.

> *Owe nothing to anyone except to love one another; for he who loves his neighbor has fulfilled the law. For this, "You shall not commit adultery, You shall not murder, You shall not steal, You shall not covet," and if there is any other commandment, it is summed up in this saying, "You shall love your neighbor as yourself." Love does no wrong to a neighbor; love therefore is the fulfillment of the law.* [Rom. 13:8-10. *See also*, Mat. 22:37-40.]

However, love also governs some areas of human conduct exclusively. This is demonstrated by the fact that some obligations under God's law have no provision for human enforcement. Such duties

are strictly moral in character.

For example, the gleaning laws of the Old Testament commended the Jews to be charitable to their neighbor, but no human sanctions were attached to a failure to do so. [*See,* Lev. 19:9-10.] Similarly, no individual penalty was prescribed for failing to help a poor man in need, [*See,* Lev. 25:35] nor for failing to rescue a neighbor's animal in distress [*See,* Ex. 23:4-5]. Even the Levitical tithe was not enforceable, that is, the Levites could not compel anyone to give tithes by penalty or sanction. [*See,* Num. 18:21.]

God, in exercising His jurisdiction over people, does not compel people to be charitable or to make gifts.

> *Let each one do just as he has purposed in his heart; not grudgingly or under compulsion; for God loves a cheerful giver.* [2 Cor. 9:7.]

Charity and gifts. Any act of charity, such as a gift (*charity* is another word for *love*) is among the actions governed exclusively by the law of love.

People are to meet their neighbor's need from heartfelt compassion, not a sense of civilly enforced justice. In discussing the parable of the Good Samaritan, Jesus asked,

> *"Which of these three do you think proved to be a neighbor to the man who fell into the robbers' hands?" And he said, "The one who showed mercy toward him." And Jesus said to him, "Go and do the same."* [Lu. 10:36-37.]

Any gift or act of love ("grace") must be voluntary and undeserved (not a matter of "works"), or it is not love at all.

> *But if it is by grace, it is no longer on the basis of works, otherwise grace is no longer grace.* [Rom. 11:6.]

Charity which is either claimed as a matter of right or merited is not given freely out of a sincere motivation of the heart. Therefore, love cannot be compelled, nor can the failure to love be punished by men. Civil government cannot compel a person to do what by definition must be voluntary. Neither can government determine which people deserve to receive something which is undeserved. Such matters are governed exclusively by the law of love, over which civil rulers have no jurisdiction.

Common law recognition of acts governed by love. There are a number of matters in which the common law recognized that the law of love had exclusive jurisdiction, that is, where man's moral duty to love his neighbor could not be civilly enforced or punished. For example, the common law recognized no duty to rescue a person (or neighbor) in distress unless a "special relationship" going beyond mere neighbor status had been established between the parties. Similarly, the common law held that an undelivered gift was not enforceable, recognizing that an unfulfilled promise to make

a gift was bound only by the law of love and therefore civilly unenforceable. Further, the early patriots realized that the duty of citizens to exhibit love and charity towards each other was a mutual duty motivated by love which was moral in nature, and unenforceable.

> *[A]ll 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 toward each other.* [VIRGINIA BILL OF RIGHTS, §16.]

WHERE NO MAN MAY TREAD

Two systems of justice.

The jurisdictional distinctions between God and mankind are reflected in the historical separation of the "temporal" justice system (the common law courts) from the "spiritual" justice system (the ecclesiastical, or canon law, courts).

> *But though consisting of the same units, church and state were not one; each had its laws, its legislature, its courts of justice, its proper sphere of action. . . . [T]hrough several centuries there is a constant border warfare going on between the temporal and ecclesiastical courts as to the exact limits of their several domains.* [F. W. Maitland, CONST. HISTORY OF ENGLAND, 507.]

The ecclesiastical courts had exclusive jurisdiction over a wide variety of legal matters, such as discipline of the clergy, all testamentary causes, all matrimonial causes, immoral offenses such as fornication and incest, and the religious offenses such as blasphemy, heresy and schism. [*See,* F. W. Maitland, CONST. HISTORY OF ENGLAND, 508ff.] Similarly, the common law courts had exclusive jurisdiction over other legal matters.

> *[I]t has long been considered an established principle that the ecclesiastical courts were not to try men for temporal offences, i.e., offences punishable in the king's courts.* [F. W. Maitland, CONST. HISTORY OF ENGLAND, 523.]

Requirement of a guilty act.

The common law of crimes reflected jurisdictional principles in the Latin phrase *actus reus* (meaning guilty act). That is, criminal intent without a criminal act was generally not punishable. An act of wrongdoing was necessary to enable the civil courts to assume jurisdiction. Thus, Blackstone defined a crime in terms of "an act committed, or ommitted, in violation of a public law," and as an "unlawful act." [*See,* Blackstone, IV COMMENTARIES, *5,6.]

Some cases do exist, however, where a defendant was punished for committing a lawful act with wrongful intent, which, although an act was done, would seem to be a punishment of the motivation only.

> *There are respectable authorities in this country which support the view that malice makes that actionable which would otherwise not be so. . . . "Thus the civil law recognizes the moral law . . . [which] imposes upon every man the duty of doing unto others as he would that they should do to him."* [Barger v. Barringer, 66 S.E. 439 (1909).]

Common law offenses of the heart and mind.

The common law included a number of criminal offenses which required little more than that the defendant verbalize a forbidden idea.

High treason. Thus Blackstone, in describing the capital offense of high treason, lists the first species of such crime to be *"When a man doth compass or imagine the death of our lord the king, or our lady his queen, or of their eldest son and heir."* [Blackstone, IV COMMENTARIES, *76.]

Offenses against God and religion. The common law also embraced a variety of criminal offenses against God and religion. This practice was approved by John Calvin, who believed that the jurisdiction of civil government included religious concerns.

> [The object of civil government] *is, that no idolatry, no blasphemy against the name of God, no calumnies against his truth, nor other offences to religion, break out and be disseminated among the people; . . . in short, that a public form of religion may exist among Christians, and humanity among men. Let no one be surprised that I now attribute the task of constituting religion aright to human polity . . .. The duty of magistrates . . . extends to both tables of the law. . . . Thus all have confessed that no polity can be successfully established unless piety be its first care, and that those laws are absurd which disregard the rights of God, and consult only for men.* [Calvin, IV INSTITUTES, ch. XX.]

Blackstone enumerated the following offenses against God and religion: *apostasy* (a believer's total renunciation of Christianity, by embracing either a false religion or no religion at all), *heresy* (the public and obstinate denial of Christianity's essential doctrines), *offenses against the established Church of England* (by reviling its ordinances or by failing to conform to its form of worship), *blasphemy* (the public exposure of God or Christianity to contempt and ridicule), *profane and common swearing or cursing*, *witchcraft or sorcery* (a commerce with evil spirits), *religious impostors* (falsely pretending an extraordinary commission from heaven), *simony* (the corrupt purchase of an ecclesiastical office), and *profaning the Lord's day* (permitting secular business to be publicly transacted on Sundays). [*See,* Blackstone, 4 COMMENTARIES *41-64.]

Blackstone justified the offenses against God and religion on the basis that such offenses, "*by openly transgressing the precepts of religion either natural or revealed . . . constitutes that guilt in the action, which human tribunals are to censure,*" and also that "*christianity is part of the laws of England.*" [Blackstone, 4 COMMENTARIES *43, 59.]

Several of these common law offenses appeared in the early statutes of some of the original thirteen colonies. For example, both heresy and blasphemy were listed as capital offenses in the 1641

Massachusetts Body of Liberties.

> *1. If any man after legal conviction shall have or worship any other god, but the lord god, he shall be put to death. Dut. 13:6,10. Dut. 17:2,6. Ex. 22:20. 2. If any man or woman be a witch, (that has or consults with a familiar spirit,) They shall be put to death. Ex. 22:18. Lev. 20:27. Dut. 18:10. 3. If any man shall Blaspheme the name of god, the father, Son or Holy ghost, with direct, express, presumptuous or high handed blasphemy, or shall curse god in the like manner, he shall be put to death. Lev. 24:15,16.* MASSACHUSETTS BODY OF LIBERTIES (1641).

No civil jurisdiction over religion.

However, the historic view which eventually predominated American legal thought rejected the idea that civil government had jurisdiction over matters of religion.

> *In things that prejudice the tranquility, or security of the state, secret actions are subject to human jurisdiction. But in those which offend the deity, where there is no public action, there can be no criminal matter; the whole passes betwixt man and God, who knows the measure and time of his vengeance.* [Montesquieu, SPIRIT OF LAWS, b. 12, c.4.]

> *. . . religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only and not opinions . . ..* [Thomas Jefferson, Letter to the Danbury Baptist Association, January 1, 1802.]

Modernly, the nature and extent of authority over the heart and mind and acts of love and charity have been polarized between two false alternatives. Namely, that such matters should be governed by either civil or ecclesiastical authorities. However, both alternatives assume that some human institution, other than the individual conscience, has jurisdiction over these matters. It is this common assumption that Jefferson and Madison attack, because to them, such matters are part of the jurisdiction God has reserved for Himself without having been delegated to anyone else.

> *We hold it for a `fundamental and undeniable truth' 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. This right is, in its nature, an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men; it is unalienable, also, because what is here a right towards men, is a duty towards the creator. It is the duty of every man to render the creator such homage, and such only as he believes to be acceptable to him; this duty is precedent both in order of time and degree of obligation to the claims of civil society. ... If this freedom be abused, it is an offense against God, not against man. To God therefore, not to man, must an account be rendered.* [James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785)]

CHAPTER 7

Legal Institutions

INTRODUCTION

Having examined the extent to which God has reserved jurisdiction for Himself over human affairs, attention must now be paid to the division of jurisdiction among all human authorities. At the outset, we may note that this jurisdictional inquiry is not simply one concerning the distinctions between church and state. Rather, the present task is to look at the totality of society to determine the fundamental jurisdictional units which make up society, and the legal nature of each.

THE LEGAL STRUCTURE OF SOCIETY

The biblical record indicates that human society is not merely the result of happenstance, nor is it solely the creation of men, however intended or occasioned. Rather, society has been designed and ordered by God in a specific fashion to suit His purposes. That structure reflects the jurisdictional framework of limited and diffuse authority among the legal institutions created by God and the voluntary associations created by men.

Kinds of government.

Human society is made up of many various components, such as families, schools, clubs, corporations, businesses, churches, government agencies, etc. which are distinct in some ways and overlapping in others. The present inquiry will not attempt to reckon with all the various forms of social interaction, but will focus on determining those which are the most basic, or elemental, from a legal standpoint. There are two distinct types of social unit or government in a strictly legal sense, namely, *institutions* and *associations*.

Institutions. *Institutions* are those social relationships which: 1) are created by God; 2) are a condition into which a person is born (or born subject to); 3) are governed by covenant; and 4) have a pre-defined legal relationship. The biblical record indicates that only four such institutions exist, and no others: 1) individuals; 2) families; 3) nations; and 4) the body of Christ (the universal Church). Each of these has a corresponding type of governmental structure associated with it, namely, self-government, family government, civil government, and church government.

Associations. *Associations* are those social relationships which are: 1) created by people; 2) governed by common assent; 3) have a self-defined legal relationship; and 4) a relationship which a person voluntarily joins. Associations include all social relationships other than the legal institutions, such as schools, clubs, employment, businesses, charities, unions, political parties, etc.

Interaction. Associations may assist the legal institutions in carrying out their purposes, but associations may not usurp, or exercise authority over, the jurisdiction of any institution. Since all human authority is derived from God (and not the reverse), the legal authority of human creations

is always subservient to the jurisdiction of God's creations.

Individuals

The most basic legal institution is that of individual self-government. Without the institution of the individual, none of the others would exist. You may think I'm speaking in merely physical terms, but actually I'm talking *governmentally*. Without the underlying foundation of individual *self-government*, then family government, national (or civil) government, and church government would not be possible. What makes family members love, respect and honor each other, and function together as a unit for the benefit of everyone? Individual self-government. If self-government is absent, then family government will fail.

The same argument obviously applies to church government and civil government as well. Why do churches have member discipline issues and staff behavioral issues? Because the individuals in churches aren't governing themselves properly. Why do nations and states have crime problems and criminal populations that only seem to get worse? Because individual members of society aren't governing themselves properly. Everything starts with the individual - and ends with the individual, too. Leave a consideration of self-government out of the picture, and you've missed the whole thing.

Created by God. Every individual person is a creation of God. When parents give birth to a child it is not referred to as an act of creation, but of *procreation*. This latter term denotes that it is God who actually creates human life, not people. Thus, every person who has ever been born can equally claim to have been made in the image of God as a unique creation of God.

> *And God created man in His own image, in the image of God He created him; male and female He created them.* [Gen. 1:27.]

An institution one is born into. Every person since Adam and Eve has entered this world the same way - by being born. Birth is the exclusive means by which God has provided for the human race to be propagated.

> *For as the woman originates from the man, so also the man has his birth through the woman; and all things originate from God.* [1 Cor. 11:12.]

Governed by covenant. The essential rights and duties of every individual are governed by covenant, specifically, the Adamic and Noahic covenants.

Adamic and Noahic covenants. The Adamic and Noahic covenants apply to every individual born since the flood, because everyone born since then is a descendant of both Adam and Noah. The primary duties flowing from those covenants relate to the taking of earthly dominion and the exercise of individual moral responsibility before God.

The mission of the individual. The mission of the individual, or purpose for existence, is twofold:

1) to love God (in fulfillment of the duty to exercise moral responsibility); and 2) to love your neighbor as yourself (in fulfillment of the duty to exercise responsible dominion).

> *And He said to him, "'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.' This is the great and foremost commandment. The second is like it, 'You shall love your neighbor as yourself.'"* [Mat. 22:37-39.]

Pre-defined relationship. The relationship of each person with God and other people (solely in their capacity as individuals) is pre-defined. With respect to God, every person is born into sin, that is, separated from God. With respect to other people (as individuals), every person is born equally free and independent (that is, equally made in the image of God).

> *. . . just as through one man sin entered into the world, and death through sin, and so death spread to all men, because all sinned . . ..* [Rom. 5:12.]

Jurisdiction over others. No person, merely in their individual capacity (that is, by the mere fact of having been born), has the right, or jurisdiction, to rule over any other person. The only jurisdiction people have over others in their individual capacities must arise by consent, such as through a contract or promise.

> *That all men are by nature equally free and independent . . ..* [VIRGINIA CONST. BILL OF RIGHTS, Sec. 1.]

Families

Every person born as an individual is also born into a family, thus, the second legal institution is as pervasive as the first. History testifies to the fact that the ethnic and political nations of the world originated in family units dispersed from the tower of Babel [*See,* Gen. 10:32-11:9.], and that the strength and welfare of any nation depends on the strength and welfare of its member families.

Created by God. Saying that God created the family institution does not mean that He pre-ordains every marriage relationship - that is, no suggestion is made whether God does or does not choose whom people should marry. Rather, the present focus is on the institution, or legal character, of marriage that has been created by God. Thus, the family is not an invention of people to serve a useful or convenient purpose, but a relation imposed by God as part of His design for human society.

> *Then the LORD God said, "It is not good for the man to be alone; I will make him a helper suitable for him." . . . So the LORD God caused a deep sleep to fall upon the man, and he slept; then He took one of his ribs, and closed up the flesh at that place. And the LORD God fashioned into a woman the rib which He had taken from the man, and brought her to the man. And the man said, "This is now bone of my bones, And flesh of my flesh; She shall be called Woman, Because she was taken out of Man." For this cause a man shall leave his father and his mother, and shall cleave to his wife; and they shall become one flesh.* [Gen. 2:18,21-24.]

An institution one is born into. Just as every person is born as an individual, so every person is necessarily born into a parent-child relationship which is peculiar to the family institution. (No suggestion is made that a person is born into a marriage relationship.)

Governed by covenant. The family institution is governed by covenant in two senses. First, the authority of the family institution is prescribed by the Adamic and Noahic covenants. Second, the marital relation is governed by the marriage covenant made between a husband and wife.

The Adamic and Noahic covenants. Both the Adamic and Noahic covenants commend mankind to "be fruitful and multiply," that is, to reproduce through the bearing of children. Parents are also presumed to have a natural authority to provide and care for their children, and to discipline them. That the raising of children is to be done exclusively within the context of the family institution is inferred by the fact that each time God commanded people to be fruitful and multiply, He spoke to those living in a lawful marriage relationship [*see,* Gen. 1:28; 9:1,7].

The marriage covenant. The marriage covenant governs the relationship between each husband and wife.

> *Then the Lord God said, "It is not good that the man should be alone; I will make him a helper fit for him." ... Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh.* [Gen. 2:18, 24.]

The mission of the family. The mission of the family, or purpose for existence, is twofold: 1) to be fruitful and multiply (to bear children); and 2) to subdue and rule over the earth (to exercise earthly dominion), and to rule over the animal kingdom.

> *And God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth."* [Gen. 1:28.]

Pre-defined relationship. The relationship of family members to each other as husband and wife, or as parent and child, is pre-defined. God has determined the parameters of authority each person may exercise in the family, not leaving the nature, limits and scope of authority to individual determination.

Husband-Wife. As between a husband and wife, there exists a duty of mutual fidelity, which conforms to the prohibition of committing adultery. Further, the husband is to sacrificially love his wife, and the wife is to submit to her husband.

> *Wives, be subject to your own husbands, as to the Lord. For the husband is the head of the wife, as Christ also is the head of the church, He Himself being the Savior of the body. . . . Husbands, love your wives, just as Christ also loved the church and gave Himself up for her . . ..* [Eph. 5:22-23,25. *See also,* 1 Pet 3:1-7.]

"You shall not commit adultery." [Exodus 20:14.]

Parent-Child. Children owe their parents honor or respect and obedience. Parents owe their children the duty to provide for their welfare.

"Honor your father and your mother, that your days may be prolonged in the land which the LORD your God gives you." [Exodus 20:12.]

Children, obey your parents in the Lord, for this is right. Honor your father and mother (which is the first commandment with a promise), that it may be well with you, and that you may live long on the earth. [Eph. 6:1-3.]

But if any one does not provide for his own, and especially for those of his own household, he has denied the faith, and is worse than an unbeliever. [1 Tim. 5:8.]

Jurisdiction over others. Within the family institution there exists an authority structure ordained by God for the better ordering and preservation of the family.

Husband is the head of the wife. The role of each husband is to be the head of his wife and the head of his household.

But I want you to understand that Christ is the head of every man, and the man is the head of a woman, and God is the head of Christ. [1 Cor. 11:3. *See also,* Num. 1:4.]

Parents are to teach and discipline children. Parents, especially fathers (as the head of the household), have the original jurisdiction to train, educate and discipline their children. This authority is often referred to as the power of "**the Rod**."

And, fathers, do not provoke your children to anger; but bring them up in the discipline and instruction of the Lord. [Eph. 6:4.]

He who spares his rod hates his son, But he who loves him disciplines him diligently. [Prov. 13:24.] *Train up a child in the way he should go, Even when he is old he will not depart from it.* [Prov. 22:6.]

It is for discipline that you endure; God deals with you as with sons; for what son is there whom his father does not discipline? But if you are without discipline, of which all have become partakers, then you are illegitimate children and not sons. [Heb. 12:7-8.]

Nations

A nation and its civil government are not the same thing. One is an institution, the other is an association. Simply put, **God creates nations, and men make civil governments**. This is what is meant by the phrase in the *Declaration of Independence* that "governments are instituted among

men." Don't let the word *instituted* throw you - in that context it means *formed by human consent* (as an association), not *imposed by divine will*.

Think of it as a division of labor between God and people. God grants and defines the nature of civil power, and the laws which constrain all civil governments. He also forms the nations, as noted above. People, on the other hand, determine the form of civil government, what documents will establish that government, what powers may be exercised in what ways, and the manner of succession. God never interferes with man's discretion in such matters. God does His part, and He leaves government formation to the people. Whether they choose wisely or poorly is on their own heads.

Created by God. Following the Tower of Babel incident, God scattered the people of the earth by confusing their languages - not randomly, but by family group. These family groups, separated by language barriers, became the first nations. The nations so formed are listed in the Table of Nations of Gen. 10. This separation was not founded on the directives of any human leader, the consent of any committee, or the result of a natural evolutionary process. It was entirely God's idea - imposed on people without their consent as a divine judgment.

Scripture confirms the Most High gave to the nations their inheritance. [Deut. 32:8.] God made from one man every nation of mankind to live on all the face of the earth. [Acts 17:26.] But when God did this, He gave none of them a form of government. God never delegated civil authority to particular individuals to rule over others - there is no divine right of kings. Neither does He prescribe the form of government which any specific nation must embrace as the best or most lawful form of polity. Rather, God has vested everyone (*i.e.*, "the people"), through the Noahic covenant, with civil authority, which the people may then delegate to their rulers.

God does not dictate, endow, or impose any particular form of civil government on any people. However, He has seen fit to allow people to participate in the establishment of civil government. This was true even in ancient Israel, where God Himself was the civil ruler of that nation. God proposed to make Israel a holy nation, but before He could do that, the people first had to consent. [Exo. 19:5-8.] Then, after the Ten Commandments had been delivered, the people had to give their consent again, to make it effective. [Exo. 24:7-8.]

Changes in the form of government are likewise left to men. When Israel changed from a judgeship to a monarchy, it was the will of the people, not God's idea. God told Samuel (the last judge) to listen to the people. God neither forced a monarchy upon them, nor did He veto a change in the form of government the people wanted. He merely warned them what it would look like, and let them decide.

> *"When you enter the land which the LORD your God gives you, and you possess it and live in it, and you say, 'I will set a king over me like all the nations who are around me,' you shall surely set a king over you whom the LORD your God chooses . . .. Now it shall come about when he sits on the throne of his kingdom, he shall write for himself a copy of this law on a scroll in the presence of the Levitical priests. And it shall be with him, and he shall read it*

> *all the days of his life, that he may learn to fear the LORD his God, by carefully observing all the words of this law and these statutes."* [Deut. 17:14-15,18-19.]
>
> *Then all the elders of Israel gathered together and came to Samuel at Ramah; and they said to him, "Behold, you have grown old, and your sons do not walk in your ways. Now appoint a king for us to judge us like all the nations."* [1 Sam. 8:4-5.]

Israel's sin was limited to rejecting God's direct rule and asking for a lawless king. No sin was occasioned by the mere establishment of a new form of civil government, *i.e.*, a monarchy, for the people had that inalienable right. If the request for a monarch had been itself lawless, God would not have consented to its institution.

> *And the LORD said to Samuel, "Listen to the voice of the people in regard to all that they say to you, for they have not rejected you, but they have rejected Me from being king over them. . . . Now then, listen to their voice; however, you shall solemnly warn them and tell them of the procedure of the king who will reign over them." So Samuel spoke all the words of the LORD to the people who had asked of him a king. . . . Nevertheless, the people refused to listen to the voice of Samuel, and they said, "No, but there shall be a king over us . . .." Now after Samuel had heard all the words of the people, he repeated them in the LORD's hearing. And the LORD said to Samuel, "Listen to their voice, and appoint them a king."* [1 Sam. 8:7,9-10,19,21-22.]

True, God did anoint the kings over Israel. *But this made none of them actually king*. For example, Saul did not become king until the people consented.

> *Thereafter Samuel called the people together to the LORD at Mizpah . . .. And Samuel said to all the people, "Do you see him whom the LORD has chosen? Surely there is no one like him among all the people." So all the people shouted and said, "Long live the king!"* [1 Sam. 10:17,24.]

The repeated pattern throughout scripture is that civil rulers merely have the authority to *propose* changes in the form of civil government. Such changes have no legal effect until they have been *ratified* by the people. The whole people acting as a community have the inalienable right to institute their own government, not their civil rulers.

Thus, David was anointed to be Israel's next king by God [*see,* 1 Sam. 16:1-13], but he did not take office until he was confirmed by the people. If merely anointing David had actually made him king (while Saul was still alive), then Israel would have had two kings at once. This point is underscored by the fact that David was initially confirmed as king only over two tribes of Israel, and did not rule over the other ten tribes until they had separately consented to his rule seven years later.

> *And David brought up his men who were with him, each with his household; and they lived in the cities of Hebron. Then the men of Judah came and there anointed David king over the house of Judah. . . . So all the elders of Israel came to the king at Hebron, and King David*

> *made a covenant with them before the LORD at Hebron; then they anointed David king over Israel. David was thirty years old when he became king, and he reigned forty years. At Hebron he reigned over Judah seven years and six months, and in Jerusalem he reigned thirty-three years over all Israel and Judah.* [2 Samuel 2:3-4; 5:3-5.]

Similarly, even when people sin by submitting to a lawless civil ruler, God waits for them to act lawfully - He does not usurp the authority of the people. This is illustrated in the case of Athaliah, the mother of Ahaziah, king of Judah. [See, 2 Chr. 22:10-23:21.] When he died, she ordered all of his sons to be slain so she could rule as queen in their place. Of course, the sons of Ahaziah were the rightful rulers of Israel by virtue of the Davidic covenant. [*See,* 2 Sam. 7:1-29.]

However, the baby Joash, son of Ahaziah, was rescued from the slaughter by an aunt, and was hid in the house of the Lord for six years. At the age of seven, Joash was installed as the lawful king of Judah, and Athaliah was killed. Yet, Joash did not ascend the throne until after being confirmed by the people.

> *Then they brought out the king's son and put the crown on him, and gave him the testimony, and made him king. And Jehoiada and his sons anointed him and said, "Long live the king!" . . . Then Jehoiada made a covenant between himself and all the people and the king, that they should be the LORD's people.* [2 Chr. 23:11,16.]

An institution one is born into or subject to. Ever since Babel, every person has been born into a *nationality* (*i.e.*, an ethnic group), and is born subject to the capital punishment requirement of the Noahic covenant [Gen. 9:6]. If one is also born into a *political* nation, he is also born subject to whatever national covenant (*i.e.*, constitution) governs that nation. The rights of each citizen with respect to civil government are pre-defined. However, the only rights conferred by the laws of nature and nature's God are the inalienable rights granted by God, not any political rights granted by men.

We see this reflected in the laws of the United States, where a person born within the nation's territorial boundaries is considered a natural-born citizen. This pattern is also variously reflected in biblical examples. Thus, the descendants of Jacob were each born a member of the national polity (a "citizen") of Israel.

> *And God said to him, "Your name is Jacob; You shall no longer be called Jacob, But Israel shall be your name." Thus He called him Israel. God also said to him, "I am God Almighty; Be fruitful and multiply; A nation and a company of nations shall come from you, And kings shall come forth from you."* [Gen. 35:10-11.]

The pattern was also followed by Rome. For example, Paul was born a Roman citizen.

> *And the commander came and said to him, "Tell me, are you a Roman?" And he said, "Yes." And the commander answered, "I acquired this citizenship with a large sum of money." And Paul said, "But I was actually born a citizen."* [Acts 22:27-28.]

Governed by covenant. The original grant of civil authority to all people was made by God in the Noahic covenant, when he first authorized people to execute murderers. In terms of actual civil polity, however, the governing instrument will be whatever form of civil covenant, or constitution, has been assented to by the people.

The civil covenant. The hallmark of civil rule by covenant in the history of Anglo-American jurisprudence is the principle of the ***consent of the governed***. Thus, a civil covenant, as any other covenant, must be assented to by the parties before it can be binding upon them.

Samuel Rutherford stated that kings ruled not by divine right, but by the consent of the people.

> *We hold that the covenant is made betwixt the king and the people, betwixt mortal men; but they both bind themselves before God to each other.* [Samuel Rutherford, LEX REX (1644).]

John Locke made the same claim:

> *Men, being, as has been said, by nature all free, equal and independent, no one can be put out of this estate and subjected to the political power of another without his own consent. The only way whereby anyone divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it.* [John Locke, SECOND TREATISE ON GOVERNMENT (1698).]

Similarly, the Declaration of Independence states:

> *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. That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.*

The mission of civil government. The mission of civil government, or its purpose for existence, is two-fold: 1) to punish wrongdoers; and 2) to commend what is right. Although the following scripture is not part of any specific civil covenant, or constitution, it is descriptive of God's law pertaining to civil authority.

> *Submit yourselves for the Lord's sake to every human institution, whether to a king as the one in authority, or to governors as sent by him for the punishment of evildoers and the praise of those who do right.* [1 Pet. 2:13-14.]

Pre-defined relationship. The relationship and rights of each citizen and subject with respect to civil government are pre-defined. However, this principle only applies to inalienable rights granted by God, not to political rights granted by men. Thus, all people have the right to expect, and civil

rulers have a duty to perform, the punishment of wrongdoers according to the dictates of the laws of nature and the Bible, and the administration of the law according to true principles of justice. Further, civil rulers are to commend what is right by securing individual rights and by protecting individual liberties. In all cases, questions of what things are lawful, just, right or matters of liberty are to be determined by the law of God.

> *"You shall appoint for yourself judges and officers in all your towns which the LORD your God is giving you, according to your tribes, and they shall judge the people with righteous judgment. You shall not distort justice; you shall not be partial, and you shall not take a bribe, for a bribe blinds the eyes of the wise and perverts the words of the righteous. Justice, and only justice, you shall pursue, that you may live and possess the land which the LORD your God is giving you."* [Deut. 16:18-20.]

Jurisdiction over others. When people covenant together to form a political or civil community, part of the necessary delegation of authority to civil rulers is the power to punish wrongdoers, even to the point of death in certain cases. This authority is often referred to as the power of "**the Sword**."

> *"Whoever sheds man's blood, By man his blood shall be shed, For in the image of God He made man."* [Gen. 9:6.]

> *For rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good, and you will have praise from the same; for it is a minister of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath upon the one who practices evil.* [Rom. 13:3-4.]

Even though God does not create any civil governments, nonetheless, He places constraints on the nature of national (or civil) authority. Thus, the nature of civil authority is established by (or, originates from) God. Further, civil rulers are ministers of God to do His will in civil matters with civil power. By implication, civil authority is also subject to certain limitations prescribed by God.

> *Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore he who resists authority has opposed the ordinance of God; and they who have opposed will receive condemnation upon themselves.* [Rom. 13:1-2.]

The Church

Here, we need to make the same basic caveat for the Church as we did for nations. Namely, that all visible churches are associations created by people, not institutions created by God. When it is said the Church was created by God, it means only that the invisible Church (*i.e.*, the body of Christ), purely as a spiritual entity, is God-made. Whether a person is a member of the spiritual Church only goes to the question of whether that person is a Christian or not - and it is a question that God alone

can answer. Whether a person is Catholic, Protestant or Orthodox, or a Baptist, Presbyterian or Methodist, etc. is entirely a separate issue. There are no denominations in the spiritual (or heavenly) Church. All such identifications are entirely man-made, not God instituted.

Created by God. The universal Church, or body of Christ, was not invented by any man. Rather, the community of faith was ordained by God to serve the purposes of its head, Jesus Christ, to advance His mission in the world.

> *For by one Spirit we were all baptized into one body, whether Jews or Greeks, whether slaves or free, and we were all made to drink of one Spirit. . . . But now God has placed the members, each one of them, in the body, just as He desired. . . . But God has* so *composed the body . . .. Now you are Christ's body, and individually members of it. And God has appointed in the church, first apostles, second prophets, third teachers, then miracles, then gifts of healings, helps, administrations, various kinds of tongues.* [1 Cor. 12:13,18,24,27-28.]

An institution one is born into. Unlike the physical birth which characterizes the other legal institutions, birth into the Church is spiritual in nature. This spiritual rebirth is often referred to as being "born again."

> *Jesus answered and said to him, "Truly, truly, I say to you, unless one is born again, he cannot see the kingdom of God." Nicodemus said to Him, "How can a man be born when he is old? He cannot enter a second time into his mother's womb and be born, can he?" Jesus answered, "Truly, truly, I say to you, unless one is born of water and the Spirit, he cannot enter into the kingdom of God. That which is born of the flesh is flesh, and that which is born of the Spirit is spirit. Do not marvel that I said to you, 'You must be born again.'"* [Jn. 3:3-7.]

Governed by covenant. The universal Church is governed by the Church covenant.

The Church covenant. By His death and resurrection, Christ Jesus inaugurated a new covenant for all those who believe in Him.

> *But now He has obtained a more excellent ministry, by as much as He is also the mediator of a better covenant, which has been enacted on better promises.* [Heb. 8:6.]

The mission of the Church. The mission of the Church, or purpose for existence, is twofold: 1) to evangelize (gain converts in every nation); and 2) to disciple (teach everything that Christ commanded).

> *And Jesus came up and spoke to them, saying, "All authority has been given to Me in heaven and on earth. Go therefore and make disciples of all the nations, baptizing them in the name of the Father and the Son and the Holy Spirit, teaching them to observe all that I commanded you; and lo, I am with you always, even to the end of the age."* [Mat. 28:18-20.]

Pre-defined relationship. Upon becoming a Christian, a person's relationship with God is pre-defined. Previously alienated from God and born separated from Him, each Christian becomes legally adopted as a son of God and is recognized as a fellow heir with Christ.

> *For you have not received a spirit of slavery leading to fear again, but you have received a spirit of adoption as sons by which we cry out, "Abba! Father!" The Spirit Himself bears witness with our spirit that we are children of God, and if children, heirs also, heirs of God and fellow heirs with Christ, if indeed we suffer with Him in order that we may also be glorified with Him.* [Rom. 8:15-17; *See also,* Gal. 4:4-7.]

Jurisdiction over others. The invisible Church is governed exclusively by Christ as its head. [Eph. 4:15; 5:23.] This is evident from the lack of any priestly class in the Church, in the equality all believers share with respect to access to God, and the lack of any authority structure described in scripture. Which is to say, God simply has not delegated any discernable authority to anyone to rule over others with respect to *things which are merely spiritual*. I therefore conclude the invisible Church has no governmental structure, as far as men are concerned. Spiritual things fall under God's exclusive jurisdiction. As a spiritual entity, the universal Church has no jurisdiction except to carry out the terms of the Great Commission, and to extend love or charity to others. And none of these constitute *ruling over others*.

To the extent men have any authority to rule, it is confined to the visible church. Thus, a local church has jurisdiction over its own members to judge disputes between them, and to discipline them (by censure) for wrongs done against the body. As a last resort, a visible church may fully dissociate from (or "excommunicate") an unrepentant offender. This authority is often called the power of "the staff," or "the keys." However, under no circumstances whatsoever, does dissociation from a visible church have any impact on a person's status as a member of the body of Christ.

> *"And if your brother sins, go and reprove him in private; if he listens to you, you have won your brother. But if he does not listen to you, take one or two more with you, so that by the mouth of two or three witnesses every fact may be confirmed. And if he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, let him be to you as a Gentile and a tax-gatherer."* [Mat. 18:15-17.]

> *But actually, I wrote to you not to associate with any so-called brother if he should be an immoral person, or covetous, or an idolater, or a reviler, or a drunkard, or a swindler - not even to eat with such a one. For what have I to do with judging outsiders? Do you not judge those who are within the church? But those who are outside, God judges. Remove the wicked man from among yourselves. Does any one of you, when he has a case against his neighbor, dare to go to law before the unrighteous, and not before the saints? Or do you not know that the saints will judge the world? And if the world is judged by you, are you not competent to constitute the smallest law courts? Do you not know that we shall judge angels? How much more, matters of this life?* [1 Cor. 5:11-6:3.]

Voluntary Associations.

Voluntary associations are all the social relationships other than the legal institutions described above. Associations are non-institutional in character because they are 1) created by people; 2) governed by common assent; 3) have a self-defined legal relationship; and 4) a relationship which a person voluntarily joins. An association, in its own right, has no jurisdiction over anyone except its members, who have voluntarily submitted to its governing instruments by choosing to associate. The only jurisdiction an association may have over non-members must arise by consent, such as through a contract or promise.

INSTITUTIONAL INTERRELATIONSHIPS

Having examined the nature and extent of the jurisdiction of the four basic legal institutions, some conclusions may now be logically deduced as to how these institutions interrelate with each other.

The institutions are factually concurrent. In practical terms, the legal institutions are concurrent. That is, the institutions are capable of existing, and do exist, at the same time.

A person may be, and usually is, governed by multiple legal institutions at the same time. Thus, a person may be an individual, a family member, a member of the Church, a citizen and a member of any number of voluntary associations, all at the same time.

Conversely, a person cannot generally be a member of any one legal institution to the complete exclusion of all the others. It is theoretically possible, of course, for a person whose family has died, who is not a member of the Church, who lives on an uncharted desert island and who has no associates, to be purely "an individual." However, any person living in civil society will necessarily be subject to multiple legal institutions at the same time. No one has the right to declare himself free of all institutional attachments merely by virtue of a self-declaration. Thus, the jurisdictional view examined above does *not* "fractionalize" society into distinct groups of people, some of whom are "the family," or "the Church," or "the state," or individual "freemen."

The institutions are legally discrete. Notwithstanding the foregoing factual overlap among the institutions, they are legally discrete. This is an important distinction to make as it relates to the legal authority, purpose, or jurisdiction of the institutions.

God did not give the same authority to more than one legal institution at the same time. Thus, the authority to bear children and take dominion was not given to the Church or to civil government, but solely to the family (individual family members are able to exercise dominion, however). The authority to evangelize and disciple people was not given to the family (which can teach and discipline its children, but not other people) or to civil government, but solely to the Church. The authority to punish (kill) wrongdoers and to commend what is right (a just administration of the law) was not given to the family (which can punish its children, but not to the point of death) or to the Church (which can only excommunicate its members), but solely to the civil polity.

Accordingly, people who rule over others for one purpose may be ruled by others for another purpose. An individual's authority depends not on who he or she is, but the ***purpose*** for which their authority is given. In other words, a father cannot claim paternal authority as a basis for ruling over others in the Church. A church elder cannot claim ecclesiastical authority as a basis for ruling over others in the nation. And a public official cannot claim civil authority as a basis for ruling over the members of a family. No one can claim that his status as a father, elder or official exempts him from being ruled over by others according to the jurisdictional authority they have.

God's design has no legal conflicts. In constituting the legal institutions the way he did, God did not create any inherent jurisdictional conflicts. That is, the social order God has designed, like the world itself when He had finished creating it, is "very good." The fact that people have perverted God's system does not make His system flawed.

Among the legal institutions, none is superior compared to the others. Each is equally accountable directly to God, and each of the social relations (family, church and civil polity) are equally accountable to the people who consent to them. The idea that civil polity is the highest attainment of humanity, or that it is legally paramount to the other legal institutions, is biblically insupportable.

Similarly, God never delegated legal authority to any institution to enforce His law concerning any other institution. That is, God never authorized the church or civil polity to superintend the activities of the family, nor the civil polity to superintend the church. For that matter, none of the other institutions has any right to infringe the jurisdiction (or, rights) of the individual. If two institutions claim authority over the same people for the same purposes, one of them is a jurisdictional usurper and is legally in the wrong. The protection of each of the institutions from jurisdictional usurpation is the very essence of liberty.

JURISDICTIONAL IMMUNITY

These concepts of jurisdictional interrelationship among the legal institutions are important in understanding various claims of legal immunity. Of particular historical importance is the claim made by some religious traditions that the Church, its members or its leaders, are immune from civil authority. Certainly this was the basis for the historic separation of canon law and common law courts in England, as well as the "benefit of clergy," by which clerics were immune from many civil laws based solely on who they were.

Common immunity arguments.

Some of the historic arguments for civil immunity of the Church are as follows:

Immunity based on institutional separation. Perhaps the most widely advanced concept of immunity is based on the idea of institutional separation. According to this view, since the Church and civil polities are legally discrete, jurisdictionally equal, and each directly accountable to God rather than to each other, the Church is immune from civil regulation. This argument, though appealing, is flawed.

It is true that the Church and civil polities are legally discrete, jurisdictionally equal, and each directly accountable to God rather than to each other. However, the immunity argument fails to account for the fact that people who rule over others for a religious purpose (i.e., church leaders) may be ruled by others (i.e., public officials) for a valid civil purpose. The immunity argument also tends to portray church leaders or members as belonging to the Church institution to the exclusion of civil institutions. In other words, the immunity argument ignores the fact that the Church and civil institutions are overlapping (concurrent) as to persons, and attempt to make them factually discrete as well as legally discrete.

Another flaw is based on a misreading of Luke 20:25, *"Then render to Caesar the things that are Caesar's, and to God the things that are God's."* This is sometimes taken to mean that there are two primary institutions in society, the Church and the State. However, in this scripture, "Caesar" does not equal "State" and "God" does not equal "Church." The jurisdictional distinction made by Jesus is not between **human institutions**, but between God and humanity. In other words, the jurisdictional distinction being referred to is between **morality** and **law**, or God's reserved jurisdiction vs. man's delegated jurisdiction.

Further, there are ***four*** co-equal legal institutions, not just two. If members of the Church are legally immune from civil regulation, then there is no legal reason why members of every family institution would not be equally immune from civil regulation. The same is true for every member of an "individual institution." Consequently, the logical result of the immunity argument is not civil immunity, but civil anarchy.

CAVEAT: The argument advanced here is not to be pressed too far, that is, it does not argue against the existence of a right of civil disobedience. The above argument essentially holds that a person cannot rightfully claim to defeat the *legitimate* exercise of civil authority by exercising legitimate Church authority. It is possible that civil government may take actions inconsistent with, or beyond the scope of, its legitimate authority, in which case civil disobedience may be proper. However, strictly speaking, this is not a case of legal or jurisdictional "immunity." The better way to view legitimate disobedience is to say that civil government has *usurped* the rightful jurisdiction of the Church (or individuals or families), rather than to talk in terms of immunity. Immunity implies that a general rule which would otherwise legitimately apply requires a special exception for certain people or groups. Disobedience, on the other hand, implies that the rule itself is illegitimate for *all* people.

Immunity based on religious belief. Another argument for immunity which undergirds conscientious objector status and certain exemptions from employment taxes, among other laws, is based on religious belief. This argument posits that because individuals have freedom of thought and religion based on God's reserved jurisdiction over the heart and mind, that some conduct motivated by a sincerely held religious belief is immune from civil regulation.

The basic flaw with this argument is that "religion" and the matters which come under its jurisdiction are not subjectively defined. Rather, religion is, as stated in the VIRGINIA CONST. BILL OF RIGHTS [§16], defined as *the duty which we owe to our Creator and the manner of discharging*

it. This is an objective, not a subjective, legal test. Whether specific conduct is religious or not does not depend on what the actor believes - if that were the case, every form of deviant or criminal behavior could be claimed to be "religious" by someone. Rather, what constitutes religion is defined by the duties we owe to the Creator, which duties are in turn objectively defined by the revealed law of God (who is the Creator).

Additionally, "religious" beliefs are no more or less a part of God's reserved jurisdiction over the heart and mind than "non-religious" beliefs. The essence of freedom of the mind is that *all* thoughts are equally immune from civil regulation. To carve out certain thoughts for protection that other thoughts do not enjoy is antithetical to the very nature of the jurisdictional claim of freedom of the mind.

Consequently, just as the beliefs of everyone (whether "religious" or not) are truly beyond the authority of civil government to regulate, so the deeds of everyone are subject to some form of human regulation, whether by the family, Church or civil polity. The only deeds which are truly immune from all human regulation (other than by the exercise of individual self-government) are those deeds which are governed exclusively by the law of love. However, even in this case, the exclusion of such conduct from civil regulation exists irrespective of subjective belief.

Immunity based on citizenship. Another argument for immunity is based on the idea of citizenship. According to this hypothesis, heavenly citizenship [*see,* Phil. 3:20] provides a legal means by which a person may be immunized from certain civil regulation.

However, this argument ignores the fact that just as a person cannot be a member of any one legal institution to the complete exclusion of all other institutions, so a person need not be a citizen of one kingdom to the exclusion of all other kingdoms. In the American federal system, people are citizens of the nation and of the state in which they reside: these are two separate citizenships existing concurrently. In this there is no conflict - why must earthly citizenship and heavenly citizenship conflict? Indeed, "heavenly" citizenship is nothing more than participation in the new covenant in Jesus Christ, that is, membership in the universal Church. And as noted earlier, it is quite possible for membership in the Church and civil citizenship to apply to the same person.

Also, heavenly citizenship does not "erase" our earthly citizenship. The biblical record is quite clear that all people start out as, and end up as, citizens of earth regardless of whether they also become members of the Church. The proof is as follows: a) all people originate on the earth [*see,* Gen. 2:7]; b) all people shall return to the earth [*see,* Gen. 3:19 and Ecc. 12:5-7]; and c) what we call "heaven" is really a new city to be placed on the new earth [*see,* Rev. 21:1-2,23-24].

Moreover, earthly citizenship is a tool for the gospel, as demonstrated in the life of Paul, who used his Roman citizenship as a means of bringing the gospel to Caesar's household. [See, Acts 22:25,29; 23:11.] Thus, there is no inherent incompatability between earthly and heavenly citizenship.

There is one law.

Many of the arguments in favor of church immunity from civil laws impliedly posit the existence of two sets of laws: one which governs the Church as an institution and/or its members individually, and another set of laws governing everyone else. However, there are a number of reasons why this is simply not true:

There is only one law of nature, and it applies to all people without exception.

Among the divine covenants revealed in the Bible, the Adamic and Noahic covenants apply to all people irrespective of individual belief, group affiliation, or participation in the Church covenant. Israel's covenant and the Davidic covenant apply exclusively to the Jews, as does much of the Abrahamic covenant.

Although participation in the Church covenant (and the "spiritual" aspects of the Abrahamic covenant to which it relates) apply solely to Christians, this fact has no legal significance insofar as civil government is concerned. The only matters to which these covenants relate are citizenship in God's kingdom (which is a matter of God's reserved jurisdiction over the heart) and the authority to proclaim the true gospel of God (which relates to freedom of the mind). However, it cannot be claimed on this basis that religious freedom applies only to Christians and not to others.

The proclamation of religious truth is within the jurisdiction of the heart and mind to which every person owes account solely to God. For this reason, civil rulers cannot lawfully regulate the transmission of ideas - but this applies to "heathen" as well as Christians, and to error as well as truth. Civil officials cannot proclaim some religious ideas "true," and others "false." Neither can civil officials legally determine who is a Christian and who is not. Therefore, as far as civil laws are concerned, both Christians and non-Christians have the same freedom of religion legally (they are under the same law of religious freedom, not two different laws), irrespective of participation in the Church or Abrahamic covenants.

Other jurisdictional problems with Church immunity.

Morality jurisdiction. Since membership in the universal Church is a matter of the heart which is within the reserved jurisdiction of God, no civil law or public official has the jurisdiction to determine who is or is not a Christian. In essence, this removes the possibility that any civil law or public official can define what is a "church," because they have no jurisdiction to determine who the members of the Church are. Consequently, if the law cannot define what a "church" is, how can the law regard the Church as immune from its operation?

Law of equality. An attribute of the law of nature is that all laws are to be *uniform* (applicable to all people alike). Indeed, the non-uniform administration of law (partiality) is a hallmark of injustice. The civil ruler must therefore treat all people equally, that is, without partiality based on membership in any other legal institution. This includes individuals, families and churches. For any civil ruler to apply one law to the Christian and another law to non-Christians would violate the law

of the nature of equality and be an injustice. In essence, a civil ruler has no jurisdiction to be partial in the administration of law.

Authority delegation. It is sometimes contended that the Church as a corporate body enjoys legal immunity that would otherwise not apply to members of the Church in their individual or familial capacities. But from where is such immunity derived? All human authority, as we have seen, is delegated, not inherent. As respects the corporate Church, any delegation of authority must come either from the individual members of the Church or directly from God.

Although individual Church members may covenant with each other for the better ordering of their affairs, they cannot delegate to the corporate body more than what they themselves possess. In other words, if the individual Church members and their families have no legal immunity, how can they delegate it to another body? For that matter, every temporal church is a voluntary association of individuals - but no voluntary association (a creation of men) can usurp the jurisdiction of any legal institution (a creation of God), such as civil government.

As for God, He has delegated all authority in the Church via the Church covenant. But, there is no authority granted by the terms of that covenant in which each individual Christian fails to share. In other words, there is no covenantal delegation to the corporate body which is greater than what is given to each of its members. So then, Christians in voluntary association have no more rights as a group than each individual Christian already has. Further, there are no "corporate rights" possessed by the Church which can defeat the legitimate jurisdiction of civil government.

Conclusion. Although the jurisdiction of civil government is limited, where that jurisdiction is legitimate, no one is immune by reason of their membership in any other legal institution.

CHAPTER 8

The Bible As Law

INTRODUCTION

Having examined a number of basic legal inferences which may be derived from a reading of the Bible, the next task is to inquire as to the general use of the Bible as a basis for deriving substantive rules of law. This examination will begin by looking into whether the Bible is exclusively a religious book or speaks solely to spiritual matters, and whether the Bible has any laws of universal applicability today. Specific attention will also be given to the extent which the Mosaic law is a basis for substantive legal rules today.

A BIBLICAL PERSPECTIVE OF LAW

A biblical perspective of law encompasses the whole revelation of God with respect to law. Thus, it includes rules of morality and religion, as well as those of civil conduct. Yet, as the preceding discussion of jurisdictional law indicates, the rules of morality and religion (which are not humanly enforceable) can be legally distinguished from the rules of individual conduct which human institutions can enforce. The ability to separate religious law from civil law is a great benefit to any perspective of law.

A biblical view of law is not merely religious.

One of the benefits of jurisdictional law is that it lays the foundation for religious and intellectual freedom. Another great benefit of jurisdictional law is that an exposition of biblical perspective of law can be compartmentalized. That is, an inquiry of biblical law can be focused on either religious or civil law. In this work, for example, no attempt is made to examine the laws of internal governance of the Church, regulations of redemption and worship, or to detail the laws of religious faith and doctrine. These things are capable of being done from a legal perspective, but they are not for any reason *necessarily* involved in an examination of law from a biblical perspective. These matters are simply one aspect of the subject of biblical law, not its genesis or point of origin. Consequently, there is no basis for concluding that all law from a biblical perspective is necessarily religiously grounded, that it is more religious than any other legal philosophy, or dependent upon religious belief.

God as Creator, Sustainer and Redeemer. One of the familiar "trinities" concerning God is that He is the great Creator, Sustainer and Redeemer of mankind. These attributes of God are relevant to an understanding of the distinction between laws of the Bible directed toward redemption (religion) and those of creation (civil application).

God as Creator. God is the Creator of all that exists, including the physical world, all humanity, and the laws which govern them all.

In the beginning God created the heavens and the earth. [Gen. 1:1.]

For by Him all things were created, both in the heavens and on earth, visible and invisible, whether thrones or dominions or rulers or authorities - all things have been created by Him and for Him. [Col. 1:16.]

God as Sustainer. God did not merely create the world, give mankind life, and then forever detach Himself from His creation. Rather, the existence of the earth and the continuation of life utterly depend on God's sustaining power, without which life would cease. In a sense, ***law*** is the sustaining power of God, because it governs the entire creation, holding it together as a continuing reflection of God's will.

And He is before all things, and in Him all things hold together. [Col. 1:17.]

"Surely, God will not act wickedly, And the Almighty will not pervert justice. Who gave Him authority over the earth? And who has laid on Him the whole world? If He should determine to do so, If He should gather to Himself His spirit and His breath, All flesh would perish together, And man would return to dust." [Job 34:14-15.]

God as Redeemer. The Bible portrays God as the great Redeemer of mankind since the creation of the world.

Thus says the LORD, your Redeemer, and the one who formed you from the womb, "I, the LORD, am the maker of all things, Stretching out the heavens by Myself, And spreading out the earth all alone." [Isa. 44:24.]

For the grace of God has appeared, bringing salvation to all men . . . looking for the blessed hope and the appearing of the glory of our great God and Savior, Christ Jesus; who gave Himself for us, that He might redeem us from every lawless deed and purify for Himself a people for His own possession, zealous for good deeds. [Titus 2:11,13-14.]

Redemption law defined. Not all laws in the Bible pertain to religion. Even though a biblical perspective of law is entirely founded on the existence of God, the belief that a Creator God exists is itself not a religious belief. In other words, mere belief in the existence of God will not bring any person into covenant relationship with the Savior or effect their personal redemption or salvation. The demons (fallen angels) believe in God, but this does not redeem them. Further, all men know of God's existence through what has been made, but this knowledge does not save them either.

You believe that God is one. You do well; the demons also believe, and shudder. [Ja. 2:19.]

For even though they knew God, they did not honor Him as God, or give thanks; but they became futile in their speculations, and their foolish heart was darkened. [Rom. 1:21.]

"Redemption law," as used herein, refers to the law which governs the redemption of sin, personal

salvation, individual piety, and the fellowship of believers within the Church. In other words, redemption law is that part of the law revealed in the Bible which pertains peculiarly to God in His redemptive capacity or to people in response to God as Redeemer. Redemption law is therefore inherently religious, because it pertains to matters of the heart and mind, and those acts which are governed exclusively by the law of love.

> *If anyone thinks himself to be religious, and yet does not bridle his tongue but deceives his own heart, this man's religion is worthless. This is pure and undefiled religion in the sight of our God and Father, to visit orphans and widows in their distress, and to keep oneself unstained by the world.* [Ja. 1:26-27.]

Redemption law applies to the areas of life covered by God's reserved jurisdiction. That is, redemption law is not part of the law enforceable by people, but governs those duties owed solely to God, which He alone can enforce.

> *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.* [VIRGINIA BILL OF RIGHTS, Sec. 16.]

Creation law defined. "Creation law," on the other hand, is not religious or sectarian, and since this is the case, it applies to everyone, not just the religiously faithful. The basis for this assertion is simple: not all people are redeemed by God, but all people are created by God whether they believe it or not. Accordingly, all people are governed by the laws of God which apply to all of creation and His laws which apply to all of the creatures we call human beings.

The definition of creation law (as used herein) is not limited to the law of nature, or the will of God impressed upon the creation, however. It also includes those covenantal law frameworks which apply to every person on the face of the earth.

The law of nature. The law of nature, of course, applies to every person simply because every person is a creature of the Creator whose conduct must conform to the Creator's will.

The divine covenants of universal applicability. Of the covenants which are part of the divine law revealed in the Bible, two are applicable to every person today, namely, the Adamic covenant and the Noahic covenant. This conclusion of law rests on certain assumptions of biblical anthropology, namely: 1) Noah and his three sons were all descendants of Adam [*See,* Gen. 5:1-32]; 2) the great flood of the earth resulted in the death of every person in the world except for Noah and his family (8 persons) [*See,* Gen. 7:21-23]; and 3) everyone on the earth today is a descendant of Noah and his three sons. Since the terms of the Adamic covenant applied to Noah and his sons as descendants of Adam, the terms of both the Adamic and Noahic covenants apply to every person who has lived since the time of the great flood, including everyone alive today.

Creation law, therefore, applies to every human being. Acknowledgment of, assenting to, or compliance with, creation law is not a pre-condition to its applicability. Law is mandatorily imposed

by God, not volitionally adopted by man. Covenants may be binding on us as descendants whether we personally assent to them or not. Hence, to recognize the legal effect of such law and covenants is nothing more than acknowledging reality for what it is. And, to do so is not a religious act, or an exercise of religious faith.

The Law of Religious Tests.

This distinction between redemption law and creation law is an important one in the history of the United States. For a time in our nation, particularly in the several states, redemption law was made civilly enforceable after the pattern of England. These civil laws were eventually repealed, but in so doing, the biblical foundation of law in America was not thereby removed. In other words, America was founded on the creation laws revealed in the Bible, and to some extent, on the biblical redemption laws as well. When the latter were removed from our laws, the former remained unaffected.

Early American documents. In the early settlement and founding of America, it was common for the colonies/states to provide, in their governing documents, for the civil recognition of various aspects of redemption law. Thus, it was often provided that the holding of public offices was contingent on the professing of specified religious tenets.

> *It is ordered, sentenced and decreed . . . that the Governor be always a member of some approved congregation.* [FUND. ORDERS OF CONNECTICUT (1639), Sec. 4.]

> *AND that all Persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively.* [PENN. CHARTER OF PRIVILEGES (1701).]

> *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.* [CONST. OF MARYLAND, November 3, 1776, art. XXXV.]

U.S. Constitution. The U.S. Constitution, in contrast to the then existing state constitutions, prohibited the use of religious tests as a pre-condition to holding public office. It further prohibited Congress from making laws respecting an establishment of religion (laws pertaining to the governance of religious adherents in their capacity as such) or the free exercise of religion (laws pertaining to God's reserved jurisdiction). In essence, the U.S. Constitution eliminated redemption law (or religion) as a basis for federal laws.

> *[N]o religious test shall ever be required as a qualification to any office or public trust under the United States.* [U.S. CONST., ART. VI., CL. 3.]

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.* [U.S. CONST., AMEND I.]

The federal constitutional clauses have been judicially applied to the states in such a way that religious tests are now forbidden at the state level as well. [*See,* Torcaso v. Watkins, 367 U.S. 488 (1961), and McDaniel v. Paty, 435 U.S. 618 (1978).]

Significantly, art. VI, cl. 3, which contains the above prohibition of religious tests, contains a requirement that all public officers at the state and federal levels, "*shall be bound by oath or affirmation, to support this constitution*." Thus, the swearing of an oath, which presumes acknowledgement by the swearer of the existence of God, must not be legally equivalent to a religious test. Rather, imploring the deity in swearing an oath must be viewed as an aspect of creation law, otherwise, it would be "religious." In this way, too, the constitution evidences that it is possible to eliminate redemption law as a basis for civil laws, yet retain God's creation law as a basis for those same civil laws.

The religious dilemma. The law of religious tests presents a dilemma for those who maintain either that a biblical perspective of law is inherently religious, or that the Bible is a book which speaks exclusively to religious and sectarian matters.

Modernly, there is a uniform expression of law regarding religious tests at the state and federal levels. Religious tests cannot lawfully be used as a basis for participation in civil affairs, nor can civil laws pertain to the governance of religious adherents in their capacity as such or to matters within God's reserved jurisdiction. That is, our nation has rejected *religion* as the basis for our system of government and its laws.

One could respond by arguing that the law of religious tests, etc. expressed in the U.S. Constitution and/or by the U.S. Supreme Court is wrong, but one need not make this argument to show the relevance of the Bible to America's legal affairs. The rejection of religion as a basis for civil law is not "anti-biblical" if it is understood to mean solely that our laws are not based on *redemption law*.

Whether the religious laws of the Bible are a proper basis for civil laws today raises the question of whether the United States is, or should be, a theocracy or have an established religion. This issue is examined in the next chapter. At this point, it is enough to note that it is possible to argue for the laws of the Bible as a basis for modern civil laws without advocating that America is or should be a theocracy or have an established religion.

The Bible as a legal textbook.

The Bible is not merely a religious book, because not all things in the Bible pertain to redemption law. This is demonstrated by the fact that the Bible contains legal rules of universal applicability respecting such things as the nature of law, the rights of individuals and families, limitations on civil powers, the jurisdiction of civil laws, the legal relation of social institutions, etc. Consequently, the Bible is a source book of fundamental law and, as it were, a legal textbook. Furthermore, the Bible is competent legal authority in America as part of our organic laws.

UNIVERSAL BIBLICAL LAWS

Having established that the creation law of the Bible applies to all people, it now remains to discover the terms of that law. Since the discussion in preceding chapters relating to the nature of law, covenants and jurisdiction is primarily an exposition of the law of nature, those rules will not be further reviewed here. Rather, the present purpose is to examine more closely the covenantal provisions of law which have universal applicability to all people.

Interpretational Framework.

First, it will be helpful to establish an interpretational framework for all of the divine covenants, which can then be applied to interpreting the Adamic and Noahic covenants specifically. Thus, these two covenants are not to be interpreted by any methodology unique to them alone, but consistently with all the other covenants. The divine covenants may apply to different people, but this does not color the legal analysis. A proper interpretation of each divine covenant requires a uniform interpretational framework for them all.

Rules of Interpretation. The basic interpretational rules for all divine covenants are:

1. To the extent a principle or rule of law is rooted in the biblical account of creation, it is a part of the law of nature and applies to all mankind, because it reflects the will of God impressed upon all creation, of which mankind is a part.

2. To the extent a legal principle or rule is *not* a part of the law of nature (*i.e.*, rooted in the biblical account of creation), its applicability is limited by the covenant of which it is a part. According to the law of nature concerning covenants, a covenant can be binding only on the actual parties to the covenant and their descendants.

3. To the extent a specific provision in any divine covenant verbalizes some aspect of the law of nature it is binding on all people, not necessarily because the covenant is binding on all people, but because the law of nature applies to everyone even without the covenant. A divine covenant may verbalize rules from the law of nature, but this neither limits the application of those principles to the parties bound by the covenant, nor expands the applicability of the covenant to anyone other than the parties and their descendants. It simply restates them.

A principled approach. Consequently, a single covenantal provision may embody multiple legal principles or rules, some rooted in creation, some applicable by virtue of the covenant itself, and others which are no longer applicable. There is no legal or logical rule which requires any given verse of scripture to exclusively state a principle reflective of the law of nature, or applicable only to people bound by the covenant, without allowing for the possibility that it may contain elements of both. The job of sorting these elements out and the task of interpretation is quintessentially a legal exercise.

The Adamic covenant.

When God created Adam and Eve, He related to them verbally, speaking to them in the garden of Eden. During that time in Eden, Adam and Eve received authorization to carry out a dominion of the earth according to God's plan.

Adam and Eve were empowered to act as God's vice-regents in ruling over the earth, in what is commonly known as the "Dominion Mandate." The Dominion Mandate is actually a grant of authority to carry out dominion of the earth in two principal ways: 1) the bearing of children; and 2) ruling over and subduing the earth (including animals).

> *And God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth."* [Gen. 1:28.]

God also authorized mankind to eat from the vegetation of the earth.

> *Then God said, "Behold, I have given you every plant yielding seed that is on the surface of all the earth, and every tree which has fruit yielding seed; it shall be food for you."* [Gen. 1:29.]

After the Fall, God modified the means by which mankind would exercise dominion by cursing the ground, but this did not revoke the dominion authority. However, the curse did add a new element to man's existence: death.

> *Then to Adam He said, "Because you have listened to the voice of your wife, and have eaten from the tree about which I commanded you, saying, `You shall not eat from it'; Cursed is the ground because of you; In toil you shall eat of it All the days of your life. Both thorns and thistles it shall grow for you; And you shall eat the plants of the field; By the sweat of your face You shall eat bread, Till you return to the ground, Because from it you were taken; For you are dust, And to dust you shall return."* [Gen 3:17-19.]

The Noahic covenant.

After the flood receded and Noah, his family and all the animals had left the ark, God covenanted with Noah and his family. This covenant contains one promise and three grants of authority.

One of the most well known promises of the Bible is that God would never flood the earth again. This promise and its sign, the rainbow, were part of the Noahic covenant.

> *"And I establish My covenant with you; and all flesh shall never again be cut off by the water of the flood, neither shall there again be a flood to destroy the earth. . . . I set My bow in the cloud, and it shall be for a sign of a covenant between Me and the earth."* [Gen. 9:11,13.]

The first grant of authority was a restatement of the portion of the dominion mandate relating to bearing children. After God had killed every one else on the earth because of their wickedness, Noah and his family may have needed a reminder to repopulate the earth, notwithstanding that their descendants may fall into the same kinds of wickedness that prevailed before the flood.

> *And God blessed Noah and his sons and said to them, "Be fruitful and multiply, and fill the earth. . . . And as for you, be fruitful and multiply; Populate the earth abundantly and multiply in it."* [Gen. 9:1,7.]

The second grant of authority related to the eating of meat. Before the flood, people were authorized to eat only plants yielding seed and fruit bearing trees [*See,* Gen. 1:29.]

> *"And the fear of you and the terror of you shall be on every beast of the earth and on every bird of the sky; with everything that creeps on the ground, and all the fish of the sea, into your hand they are given. Every moving thing that is alive shall be food for you; I give all to you, as I gave the green plant. Only you shall not eat flesh with its life, that is, its blood."* [Gen. 9:2-4.]

The third grant of authority related to capital punishment. Prior to the flood, no one was authorized to inflict capital punishment [*See,* Gen. 4:15.].

> *"And surely I will require your lifeblood; from every beast I will require it. And from every man, from every man's brother I will require the life of man. Whoever sheds man's blood, By man his blood shall be shed, For in the image of God He made man."* [Gen. 9:5-6.]

APPLICABILITY OF THE MOSAIC LAW

One of the most thorny issues confronting anyone developing a biblical perspective of law is how to discern the applicability of the Mosaic law. The present effort will employ the legal rules and interpretive principles explained earlier in an attempt to chart a methodical course through this difficult area.

Interpretational schemes.

The most significant feature of the Mosaic law is the fact it was enacted as the legal code to implement God's divine covenant with ancient Israel. The Ten Commandments are commonly understood to be the Constitution (or legal framework) for ancient Israel under this covenant. Thus, it is impossible to separate the Mosaic law from its context as the legal code of a specific nation designed to implement a real world national government. When interpreting the Mosaic law, we must always keep in mind that it was never intended to be, nor actually was, a law given for all people or nations.

Some traditional approaches. We are not without precedent in endeavoring to discern the applicability of the Mosaic law, of course. Many scholars and commentators have gone before us

in examining this subject. However, many modern efforts at interpretation have not approached the matter as primarily a legal inquiry, treating the whole question as a matter of *theology*. This is a mistake. The nature of the Mosaic law is that it is a *legal code*, therefore, its interpretation is quintessentially a matter of legal interpretation.

The Mosaic law is simply not applicable. Legal writers - I am speaking now of historic writers, not necessarily contemporary folks - are fairly uniform, when they address the subject. As you can see from the dates of writing, this is not exactly recent news.

> *For no positive law whatsoever can oblige any people but those to whom it is given. "Hear, O Israel," sufficiently restrains the obligations of the law of Moses only to that people.* John Locke, A LETTER CONCERNING TOLERATION (1689).

> *Among all peoples there is one to which God vouchsafed to give laws in a special manner; that is the Jewish people, which Moses thus addresses* [quoting Deut. 4:7]. *Similar are the words of the psalmist* [quoting Ps. 147:19-20]. ... *An ordinance, in fact, is not binding upon those to whom it has not been given. But in the case under consideration the ordinance itself declares to whom it was given, in the words: 'Hear, O Israel,' and everywhere the covenant is spoken of as made with the Jews, and they themselves are said to be chosen as the peculiar people of God.* Hugo Grotius, THE LAW OF WAR AND PEACE, Bk. 1, Ch. 1 (1625).

Thus, when the authors of the MASSACHUSETTS BODY OF LIBERTIES (1641) did import wholesale many of the capital punishment provisions of the Mosaic law into the law of that colony, it was a colossal mistake. Their desire to conform their government to the will of God was no substitute for a proper interpretation of the scriptures, again proving the rule that "the road to hell is paved with good intentions."

Still, I confess being left unsatisfied with the historic legal response, for it fails to ask whether there is anything yet to be learned from the Mosaic law which would benefit the non-Jewish peoples of the world. It also fails to address, though it can hardly have been even a potential matter of concern back in the 17th century, the question of how the Mosaic law still applies to Messianic Jews (*i.e.*, Christ following Jews) today. Granted, the Mosaic law does not apply to Gentiles, but what about our Jewish friends? Is there not the least bit of curiosity as to the extent they should obey that ancient law?

The Mosaic law has ended. One approach to the matter is to say that the Mosaic law has simply terminated, in whole or in part. This approach often posits that the Church covenant superseded or repealed the Mosaic law - if not entirely, then at least the *ceremonial law*. Still others hold that the Mosaic law terminated (wholly or partially) when the temple in Jerusalem was destroyed in AD 70. However, this approach fails to recognize that each of the divine covenants is irrevocable and perpetual, including Israel's covenant. Thus, the Mosaic law has some continuing covenantal applicability. In addition, it also continues to reflect many enduring principles of the law of nature. It helps to keep in mind that the Bible never expressly says the Mosaic law has ended, and all interpretations that lead to such a conclusion are based solely on inferences.

The Mosaic law has been merged. A second approach argues for the existence of "continuity" between Israel's covenant and the Church covenant. This view assumes the Church covenant fulfilled or *subsumed* the Mosaic law. It is based on the premise that the Church has replaced Israel as the chosen people of God going forward. The end result is that most adherents regard the ceremonial law as having been obsoleted by the high priesthood of Christ. However, this approach ignores the legal rule that a covenant, even a divine one, is binding only on the parties who assented to it and their physical descendants. And, the fact is, the Mosaic law was never given either to Gentiles or to the Church. In other words, Israel's covenant and the Church covenant can never be merged. Neither can Israel as a nation be merged with the Church - they are two completely different kinds of entities.

The Mosaic law has been modified. A third approach regards the applicability of the Mosaic law as depending on the degree to which various laws are mentioned in the New Testament. This approach is based more on expediency, than any legal or covenantal principle. One common approach is the "repealed unless repeated" (R&R) scheme, in which the provisions of the Mosaic law are presumed repealed unless expressly repeated in the New Testament scriptures. Another common scheme is known as "mandatory unless modified" (M&M), which presumes that the specific provisions of the Mosaic law are presently binding unless expressly modified in the New Testament.

This approach completely disregards the manner in which covenants and laws originate, and how they are altered. Divine laws and covenants only arise when God speaks in a legislative capacity, using direct words like, "This shall be a statute for you throughout your generations." To alter any statute of this nature would require God to use similar direct words announcing, "This statute shall be changed as follows." However, God never uttered words of amendment.

Further, the Mosaic covenant was specifically consented to by the people of Israel three times. In order for the covenant to be amended in any way, it would also require the Jews - as a whole - to consent to the changes. Again, this has never yet occurred. Divine laws and covenants can only be changed the same way human laws and covenants can be changed. You can't change laws and covenants based merely on circumstances, or on the way future writers comment on them.

An interpretive framework proposal. First and foremost, it is my intention to propose an interpretational scheme which reflects: 1) the Mosaic law was only ever given to (and binding upon) the Jews; and 2) the Mosaic law is tied to a divine covenant which is eternal, not temporary. Secondarily, I wish to determine the extent to which any universal principles may be gleaned from the Mosaic law, which well may apply to all nations.

The Mosaic covenant is often regarded as having three legal components, which have been recognized for centuries by a wide variety of biblical and legal commentators.

> *[T]he well known division which distributes the whole law of God, as promulgated by Moses, into the moral, the ceremonial, and the judicial law . . ..* [Calvin, IV INSTITUTES, ch. XX, ¶14.]

Note: Although Calvin is quoted here, he is not cited for the purpose of constructing a "Calvinistic" interpretive framework. Rather, his views are illustrative of views widely held. As Calvin said, these divisions were "well known" even in his time - he did not invent them (actually, they came from Aquinas). Thus, the interpretive framework which is here proposed is not merely that which Calvin stated, but rather the "legal rule" which follows each of his statements.

The moral law. According to Calvin, the moral law is the law which commends us to love God and to mutually love one another.

> *The moral law . . . is the true and eternal rule of righteousness prescribed to the men of all nations and of all times, who would frame their life agreeably to the will of God. . . . [I]t is evident that the law of God which we call moral, is nothing else than the testimony of natural law, and of that conscience which God has engraven on the minds of men . . ..* [Calvin, IV INSTITUTES, ch. XX.]

Legal rule. The eternal moral law is none other than the *law of nature* applicable to all men today. Many of the Mosaic laws were simply applications of the law of nature to specific situations. To the extent these laws are rooted in the nature of the creation, they still apply to everyone today.

Ceremonial Law. Calvin regarded the ceremonial law as the tutelage of Israel which foreshadowed Christ.

> *The ceremonial law of the Jews was a tutelage by which the Lord was pleased to exercise, as it were the childhood of that people, until the fullness of the time should come when he was fully to manifest his wisdom to the world, and exhibit the reality of those things which were then adumbrated by figures.* [Calvin, IV INSTITUTES, ch. XX.]

Legal rule. The ceremonial law is primarily *the law pertaining to the Levitical priesthood* and the system of sacrifices and religious rituals it administered. The ceremonial law never has applied to any Gentile people or nations, as the covenant by which it was delivered applied solely to the nation of Israel. As to whether it has any continuing viability for Jews today, see the discussion below.

Judicial law. The judicial law was described by Calvin as certain forms of justice and equity delivered to the polity of Israel.

> *The judicial law, given them as a kind of polity, delivered certain forms of equity and justice, by which they might live together innocently and quietly.* [Calvin, IV INSTITUTES, ch. XX.]

Legal rule. The judicial law is *the law peculiar to the national polity of Israel as a theocracy.* A legal theocracy is where God is the civil head of the nation and an actual party to the civil covenant. No other nation in history has been a theocracy in this sense. Thus, the theocratic laws of ancient Israel do not apply to Gentile nations.

Not wedded to a three-fold division. I don't want you to conclude from this discussion that these

three divisions of the Mosaic law are etched in stone by the hand of God. I can just as easily argue for a five-fold division of the law: 1) ceremonial (laws pertaining to sacrifices and offerings, and atonement); 2) priesthood (ordinances for the regulation of the priests, Levites, and the temple or tabernacle); 3) theocracy (laws pertaining to Israel as a separate nation, its polity and land divisions, and later on the throne of David); 4) common laws (laws pertaining to contracts, private and public wrongs (torts and crimes) and how to love one's neighbor); and 5) moral laws (those which are founded in creation and are eternal, including religious laws such as idolatry and blasphemy). Then we still have to sort out the kosher food (dietary) laws, the feast days and sabbaths, and sanitation laws to see if they fit in any of the previous categories, or whether they are separate additional categories.

But the fact is, to a very large extent, these divisions are artificial and irrelevant. It doesn't matter how many sub-categories we divide the Mosaic law into, all we really want to know are: 1) whether the Mosaic law as a whole applies to Gentile nations (answer: no); 2) what aspects of the Mosaic law are rooted in creation and therefore indicate eternal principles binding on all people and nations; 3) what parts of the Mosaic law are peculiar solely to national Israel; and 4) for the benefit of our Messianic friends, what obligations to the law of Moses they are still bound to observe as Jews.

Subdividing the Mosaic law for analytical purposes is merely a tool to help answer these questions - the actual subdivisions are not really that important. Covenantally speaking, the Mosaic law is a unitary whole, without subdivisions. God never divided His laws for Israel into separate categories. Which is yet another reason why it is impossible for anyone to say with confidence that the ceremonial law (as an example) has been obsoleted. The ceremonial law, as such, is not really a separate body of laws - so how can it be split off from the rest and declared to be terminated?

The Covenantal Applicability of the Mosaic Law.

The Mosaic law, as a matter of covenant, was never obligatory upon any nation other than ancient Israel. This is because a covenant is binding only on the parties who assented to it and their physical descendants. Since the original parties to Israel's covenant were the Israelites, only Jewish descendants could ever have been covenantally bound by the Mosaic law. All Gentile people today, by definition, are not descendants of the ancient Israelites. However, this does not mean that the Mosaic law is legally irrelevant to modern nations. It merely means that in construing the terms of the law, we must look for those rules rooted in creation, which are part of the law of nature applicable to all people.

Historically, commentators have recognized that the Mosaic law is not binding on the gentiles as a matter of covenant obligation. Here, I remind you of the quote from John Locke's A LETTER CONCERNING TOLERATION quoted a few pages back. And let us also consider Calvin:

> *The allegation, that insult is offered to the law of God enacted by Moses, where it is abrogated, and other new laws are preferred to it, is most absurd. . . . [T]hose things are abrogated which were never enacted for us. The Lord did not deliver it by the hand of Moses to be promulgated in all countries, and to be everywhere enforced; but having taken*

> *the Jewish nation under his special care, patronage, and guardianship, he was pleased to be specially its legislator, and as became a wise legislator, he had special regard to it in enacting laws.* [Calvin, IV INSTITUTES, ch. XX.]

In addition to his earlier quoted remarks, Hugo Grotius wrote:

> *[W]e conclude that we are bound by no part of the Hebraic law, so far as this is law of a special kind. For, outside of the law of nature, the binding force of law comes from the will of him who makes the law; and it is not possible to discover, from any indication, that God willed that others than Israelites should be bound by that law. There is, then, no need of proof that in respect to ourselves this law has been abrogated; for a law cannot be abrogated in respect to those on whom it has never been binding. But for the Israelites its binding force was abrogated in respect to rituals, at least, the moment the law of the Gospel began to be promulgated, as was clearly revealed to the chief of the Apostles (Acts 10:15). It was abrogated also in regard to other things, after the Jewish people, th[r]ough the fall and devastation of their city, which was destroyed without hope of restoration, ceased to be a nation.* [Grotius, LAW OF WAR, at 33-50.]

> Thomas Jefferson referred to the book of Exodus as "*laws made for the Jews alone.*" [T. Jefferson, Letter to Thomas Cooper, Esq., January 10, 1814.]

Though the non-applicability of the Mosaic law to Gentiles is clear, I must admit to having recently adjusted my position on the continuing viability (or non-viability) of the Mosaic law *insofar as it relates to the Jewish people*. My position for many years was this: 1) the moral law is eternal and binding; 2) the theocratic law is suspended until such time as Jesus returns to sit on the throne of David and the kingdom of Israel is restored in the promised land; and 3) the ceremonial law is abolished. I claimed Heb. 7:12 as the basis for regarding the ceremonial law as abolished: "For when there is a change in the priesthood, there is necessarily a change in the law as well."

However, subsequent investigation led me to realize that per Ezekiel 43 & 44, the altar, priests, Levites and animal sacrifices will be reinstituted in the Millennial era - again solely for Israel and not for any of the Gentiles. Plus, I ran into a number of scriptures suggesting rather strongly that certain elements of the Mosaic law - even some aspects that can be considered ceremonial in nature - are eternal and therefore could not have been abolished.

Thus, Israel is to observe the Sabbaths in perpetuity. Exo. 31:16; Lev. 24:8. The land promised to Abraham is to be Israel's possession forever. 1 Chr. 16:15-18; Ps 105:7-11. The throne of David will never end. 2 Sam 7:16; 2 Chr 21:7. Israel is God's chosen people forever. Exo 19:5-6; Deu. 7:6-10. Even the priesthood and the priestly portion are eternal. Num. 18:19; 25:12-13.

As far as the Gentiles are concerned, Heb. 7:12 is to the same effect - the introduction of the priesthood of Melchizedek through Christ barred any part of the Levitical system from becoming part of the Church or the new covenant in Christ. But for the Jews, the ceremonial laws are eternal - though they are suspended in part until such time as the Temple in Jerusalem is rebuilt. Further,

when these ceremonial laws are revived in the Millennium, they will be modified somewhat.

The Mosaic law as a "broken covenant." Here I must address the claim that the Mosaic law has ended because it is a *broken covenant*. Let me first concede that the Mosaic covenant has indeed been broken.

> "Behold, the days are coming, declares the Lord, when I will make a new covenant with the house of Israel and the house of Judah, not like the covenant that I made with their fathers on the day when I took them by the hand to bring them out of the land of Egypt, *my covenant that they broke*, though I was their husband, declares the Lord." Jer. 31:31-32.

But what is the significance of this broken covenant? When a persons "breaks" a law, what does that mean? Say you drive over the speed limit and get a speeding ticket. You have broken the law, and now you must pay a fine. But what happens to the traffic law *itself*? Because you have broken (*i.e., violated*) the law, is the law itself now altered, suspended or terminated? No, of course not. It continues unchanged. The operation of the traffic laws do not depend on whether you keep (obey) them, or break (violate) them. Your actions of non-compliance do nothing to the existence of the traffic laws.

So to say that the Mosaic law is a "broken covenant" is to say nothing more than Israel, as a nation, has *violated* the terms of the covenant. But what of the covenant itself? Has it been altered, suspended or terminated? No - it continues unchanged. Israel can do nothing, by its own conduct or volition, to alter, suspend or terminate God's covenant with them. The covenant is eternal, notwithstanding Israel's non-compliance. Israel's compliance is, in fact, *irrelevant* to the question of the *status of the covenant*.

So what things actually change the status of a law? As for traffic laws, only the actions of the legislature - not individual drivers - can actually change the laws. Similarly, as for the Mosaic covenant, only the *lawgiver of the nation* (*i.e.*, God, as per Isa 33:22) can change the covenant. So the covenant continues unchanged unless God acts legislatively to change it. And, I suggest, there is nothing in scripture to suggest that God has acted legislatively to change the Mosaic law. Just the opposite, in fact - all the evidence points to an eternal duration, not a temporary one.

> *"Thus says the Lord: If you can break my covenant with the day and my covenant with the night, so that day and night will not come at their appointed time, then also my covenant with David my servant may be broken, so that he shall not have a son to reign on his throne, and my covenant with the Levitical priests my ministers."* Jer. 33:20-21.

Thus, when Zechariah recites that, "And I took my staff Favor, and I broke it, *annulling the covenant that I had made with all the peoples*" (Zec 11:10), this cannot possibly be taken as a reference to the Mosaic covenant. After all, the Mosaic covenant was not made with "all the peoples."

Moral law - Examples. That is, the *law of nature* applicable to all men today. First up - the Ten Commandments.

Other gods. *"You shall have no other gods before Me."* [Ex. 20:3.] This commandment is rooted in creation because there is only one Creator of the universe, hence, there is only one God. All gods other than the Creator are false.

Idols. *"You shall not make for yourself an idol."* [Ex. 20:4.] God made people, and people make things. Here is the law of nature: nothing can be created which is either equal to or greater than its creator. Thus, men will never become gods, much less can anything made by men be a god. Only the uncreated Creator is God.

God's name. *"You shall not take the name of the LORD your God in vain."* [Ex. 20:7.] The right of naming something belongs to its creator. Since God is uncreated, only He can name Himself. That means His name is holy and all people are to respect that name, to neither profane it nor utter it in vain.

Sabbath day. *"Remember the sabbath day, to keep it holy."* [Ex. 20:8,11.] The law of the sabbath is rooted in the creation of the world in six days, and God's resting on the seventh day. Clearly, the sabbath was not invented for the first time at Mt. Sinai.

Honor parents. *"Honor your father and your mother."* [Ex. 20:12.] Contemporaneous with man's creation, God commanded man to be fruitful and multiply. Parents have a natural right to command those children which they have procreated. To honor one's parents is merely to honor the family order instituted by the Creator.

Murder. *"You shall not murder."* [Ex. 20:13.] The law of murder must have pre-existed the Ten Commandments. Otherwise, Cain would not have been guilty of murdering Abel, and God would not have told Noah to execute future murderers. Thus, the law of murder must be part of the law of nature (*i.e.*, pre-dating Cain and Abel).

Adultery. *"You shall not commit adultery."* [Ex. 20:14.] God made man male and female, and also instituted the marriage relation at the time of creation. To avoid adultery honors the marital relation instituted by God.

Stealing. *"You shall not steal."* [Ex. 20:15.] The Dominion Mandate, issued contemporaneously with man's creation, includes authority to "subdue the earth." But God never intended this authority to be exercised communally - rather, He gives to men their own property. Stealing dishonors the dominion God has given to someone else.

False witness. *"You shall not bear false witness against your neighbor."* [Ex. 20:16.] Accusations spoken falsely dishonors a fellow vice-regent of God, whom God has made equal. A false accusation is an attempt to exercise unwarranted dominion over a fellow human being.

Coveting. *"You shall not covet."* [Ex. 20:17.] Coveting concerns a person's heart attitude respecting property and possessions belonging to others. It is the antecedent of murder, adultery and stealing - improperly desiring (or despising) the life, spouse or property God has given to another.

Other examples of the eternal moral law.

Sexual immorality. See, Lev. 18:6-23.
Authority within the family. See, 1 Cor. 11:2-16.
Even the Gospel is revealed in nature. See, Rom. 10:17-20, citing Ps. 19:4.

Ceremonial law - Examples. The controlling rule is this: the priesthood of Melchizedek through Christ barred any part of the Levitical system from becoming part of the Church or the new covenant in Christ. The following are examples of ceremonial laws under the Mosaic covenant:

Human Priesthood. The Church covenant was inaugurated by Jesus' death on the cross and the veil of the temple was torn from top to bottom. [*See,* Mat. 27:50-51.] This had the legal effect of opening access to God directly through Christ, thereby bypassing the Levitical priesthood and every other potential human priesthood (or *gatekeepers*). Thus, for the Church, the priesthood of Melchizedek via Christ operates exclusively, eliminating all forms of human priesthoods, whether descendants of Levi, Peter or anyone else. [See, Heb. 7:12; 8:1-13; 10:8-10.]

Trappings of the Levitical priesthood. All the essential elements of the Levitical priesthood are also rendered completely inapplicable to the Church and to Gentiles, including without limitation: any class of persons set aside for full-time religious work; any positions in the Church being tied to genealogy or physical ancestry; animal sacrifices; physical rituals intended to produce atonement or a covering for sins; prohibiting any religious workers from owning property; exempting any religious workers from general laws applicable to everyone else (*i.e.*, benefits of clergy); a physical temple, house of worship or house of God; temple structures including an inner sanctum, a narthex and an altar; special clothes that can only be worn by certain persons; tools and instruments that can only be used by certain persons; ceremonies that can only be performed by certain persons; and so on. All these things are part and parcel of the ceremonial law of Israel.

The Levitical tithe. Tithing under the Mosaic law was inextricably bound to the nature and existence of the Levitical priesthood: 1) But for the animal sacrifice system, there would have been no Aaronic priesthood; 2) But for the Aaronic priesthood, the Levites would not have been set apart to assist the priests; and 3) But for the Levites being set apart, no tithes would have been instituted. [*See,* Num. 18:1-7,21-24.] Consequently, apart from the Levitical priesthood, tithing cannot exist, and does not exist in the Church or for Gentiles.

Judicial law - Examples. I earlier noted that the judicial law is that aspect of the Mosaic law related to Israel as a theocratic polity. I regard the judicial law of Israel as having these primary components:

"Non-mixing" laws by which Israel was to be a people set apart.

Intermarriage. The command not to intermarry with the Gentiles living in or near the land of Israel, nor to follow after the gods worshiped by those people. [*See,* Deut. 7:1-8. *Also see*, Josh 23:7.]

Mixing fabrics, etc. The command not to wear clothing made of two materials is symbolic of the ethnic and spiritual purity which the Israelites were to maintain. [*See,* Lev. 19:19 and Deut. 22:11.] Similarly, the Jewish custom not to eat milk (or cheese) and meat together in the same meal, based on the command not to boil a goat in it's mother's milk. [Exo. 23:19; 34:26; Deu 14:21.]

Religious crimes. The infliction of capital punishment for offenses against God was unique to Israel, because only in that nation would an offense against God also be an offense against the civil ruler. [*See,* Ex. 31:14-15 (profaning the sabbath); Ex. 19:12-13 (profaning the tabernacle); Lev. 24:16 (blasphemy); Deut. 17:2-7, Ex. 22:20 (idolatry); and Lev. 20:27, Ex. 22:18 (spiritism and occult practices)].

Israel's throne. Laws relating to the throne of Israel, including the Davidic covenant. [*See,* Deut. 17:14-15; 2 Sam 7:1-29.]

Land of Israel. Laws relating to the land of Israel which was promised through Abraham, confirmed through Isaac and Jacob, and anticipated in the Mosaic law. [*See,* Gen. 17:7-8; Num. 34:1-12.] This land, as the unique possession of Israel, reflected the fact that Israel was the unique possession of God. Thus, the land laws of the Mosaic law reflect the theocratic nature of the nation, including the command that the land could not be permanently sold [Lev. 25:23], the law of the Jubilee [Lev. 25:8-17], and the command that the land could not be transferred from one tribe of Israel to another [Num. 36:7-9].

Sabbath laws. Although the Sabbath principle of observing a week of seven days and resting on one day each week is a universal precept, the punishment of offenses for violating the Sabbath is unique to the polity of Israel.

Implications for Messianic Jews.

Moral laws. Moral laws, being the eternal laws of nature, still apply to the Jews because such laws apply to all men.

Ceremonial laws. To the extent ceremonial laws are tied to the temple in Jerusalem, such laws are *suspended* until such time as the temple is rebuilt and restored. In other words, the animal sacrifices and many of the grain and other offerings under the Mosaic law were specifically directed to be carried out in the tabernacle or temple located in Jerusalem. The Jews are not commanded, nor are they free, to offer sacrifices elsewhere. Failing the existence of a temple in Jerusalem, such rituals simply cannot be carried out.

Admittedly, ceremonial rituals not required to be performed on the Temple Mount in Jerusalem are to some extent capable of being observed by Jews today. Thus, for example, many Messianic Jews still observe Sabbaths, feast days and rituals, and the like. Whether these observances are actually required outside the land of Israel however, is another question.

Judicial laws. The Davidic covenant is perpetual, but until the throne is restored by Christ at His coming, it is not currently in operation. We know this aspect of the law was suspended because Jesus, as the Son of David, is the sole heir of David eligible to sit on the throne (*i.e.*, he terminated the lineage of David for purposes of the throne). Mat. 1:1. Plus, currently Jesus is sitting at the right hand of the Father, rather than sitting on David's throne. Heb. 1:2-3.

All laws dependent on the theocratic polity of Israel are also suspended, such as the land laws (ownership parceled out by tribe - which divisions were obliterated long ago), the Sabbath Year, the year of Jubilee, cities of refuge, and very likely the laws of criminal punishment, including all capital laws. These laws were designed solely for the Jewish homeland, and until the throne of David is re-established in that homeland, they are of no effect for Jews living elsewhere in the world. They also do not yet apply to the modern state of Israel, which by no means has restored either the theocracy nor the monarchy. [See. Lev. 25.]

I see no impediment to the continued observation of the anti-mixing laws. However, the capital punishment laws of the Mosaic covenant in particular, and even perhaps the criminal punishment laws in general, probably require the reinstitution of the monarchy before they can be fully implemented again.

Nevertheless, those aspects of the judicial law relating to the traditional common law subjects of contracts, property (except for the land laws), torts and crimes, all hold great promise for real usefulness in Gentile nations today. I say this with two caveats in mind. *First*, the key is to find those laws and legal principles based on natural equity or justice, which is to say, laws which can be traced back to creation and the law of nature. *Second*, while the law of nature tells us what behaviors are right or wrong, it does not specify any punishments. Therefore, the judicial laws of ancient Israel may be instructive in showing us what things are right or wrong, but the punishments attached to the Mosaic laws are to be disregarded, for the most part.

The judicial laws are also fertile grounds for illustrating various principles of constitutional law, such as the nature of a constitution, the separation of powers, the law of enumerated powers, principles of federalism, etc. The judicial laws are also instructive as to the general limits on civil authority, the nature of republican government, and changes to the form of government. We must be careful not to throw the baby out with the bath water. Just because many of the Mosaic laws never were, and never could be, applicable to Gentile nations, does not mean there is little or nothing to be learned by studying them.

What about other aspects of the Mosaic law?

Kosher food laws. I regard the dietary laws (See Lev. 11:1-47) as part of the "make the people of Israel set apart" laws, and an aspect of being "God's own possession." However, these laws, as opposed to laws concerning the throne and the monarchy, are not incapable of keeping at the present time. For many modern Jews it is customary to observe these dietary restrictions, and I see no downside in their observance.

Note: for Gentiles, we are under the general dietary constraints of Gen 1:29 (plants yielding seed and tree fruit with seed), as well as Gen. 9:3-4 (every moving thing, but consume no blood).

Feast days and observances. The feast days (See, Lev. 23:1-44) are in many respects inextricably tied to either the physical altar (which does not exist) or to being present in the Promised Land, and are therefore (I would argue) not required to be observed by Jews today. Nevertheless, many Jews observe the feast days, and this is even common among Messianic Jews.

However, from a legal perspective, we must ask whether there is such a thing as *substantial compliance* as far as the laws of God are concerned? How can the feast days be kept *in part*, and have that count as *obedience*? For example, the Feast of Firstfruits is expressly predicated on the condition that "When you come into the land that I give you and reap its harvest ...." (Lev. 23:10). How can this feast possibly apply in Europe or America? Or take the Feast of Booths, where God commanded that "All native Israelites shall dwell in booths." (Lev. 23:42.) Who is a *native* Israelite (except a Jew living in the land of Israel), and why would non-native Jews feel bound by such a command?

The Mosaic covenant *is perpetual*. I would be remiss if I did not point out that several aspects of the Mosaic law, including some ceremonial components of it, are expressly declared to be eternal.

Examples. Exo. 31:16; [*Cf.* Lev. 24:8] (Sabbaths); 1 Chr. 16:15-18; Ps 105:7-11 (the land promised to Abraham); 2 Sam 7:16; 2 Chr 21:7 (throne of David); Exo 19:5-6; Deu. 7:6-10 (Israel's as God's chosen possession).

Levitical Priesthood. Even the Levitical priesthood is perpetual. Num. 18:19; 25:12-13. See, Eze. 44:9-14 regarding the Levites generally, and Eze. 44:15-31 re: the Levitical priests specifically, and the religious (sacrificial & ceremonial) services each will render in the Millennium.

CHAPTER 9

The Bible In Legal History

INTRODUCTION

The use of the Bible in Anglo-American jurisprudence should not be underestimated. In structuring a society to secure the greatest liberty and promote the greatest happiness, the Bible was viewed not only as relevant, but also as authoritative guidance for the task. The present chapter will focus on how biblical principles of law and the Bible itself were used and acknowledged in the documentary history of England and America. Three sets of documents will be examined: 1) organic English documents; 2) American colonial documents; and 3) early state constitutions.

ORGANIC ENGLISH DOCUMENTS

The English constitution is often referred to as an "unwritten" constitution. This is because some key aspects of English social structure, government and laws are rooted in tradition rather than documents. And, no single document embodies the entire constitution of the nation. Nonetheless, there are certain documents which are organic English law and are revered above all others. Some of these organic documents are discussed below.

Magna Carta (June 15, 1215).

Magna Carta ("great charter") is perhaps the preeminent legal document in English history, established at about the same time the modern era of English common law began. It is significant for American history as well, since it governed the colonies in America until independence from Britain was declared in 1776.

Magna Carta acknowledges, and pledges submission of its parties to, God's governance of mankind. The English king is said to rule by the grace of God. A major purpose of the document was to bring honor to God.

> *John, by the grace of God, king of England . . .. Know that by the inspiration of God and for the good of our soul and those of all our predecessors and of our heirs, to the honor of God and the exaltation of holy church, and the improvement of our kingdom . . .* [Opening ¶.]

God was not claimed to be a party to the charter after the manner of ancient Israel, but He was nonetheless called to witness, and to some extent enforce, the charter.

> *In the first place, we have granted to God, and by this our present charter confirmed, for us and for our heirs forever, that the English church shall be free . . ..* [¶ 1.]

The charter acknowledges the existence of God and intends to be consistent with God's will.

> *Since, moreover, for the sake of God, and for the improvement of our kingdom . . . we have made all these concessions . . .* [¶ 61.]

Magna Carta follows the biblical pattern of government by covenant: 1) the authority of the charter is based on honoring God; 2) mutuality is indicated by the assent of both king and barons; 3) the community of relationship is referred to as "our kingdom"; 4) irrevocability is shown by extensive use of the word, "forever"; 5) the purposes of the charter have never been modified; 6) the charter is binding on future generations - indicated by the term "for us and our heirs"; and 7) the charter continues to serve as a framework for the administration of English laws today.

Confirmatio Cartarum (November 5, 1297).

The primary purpose of the Confirmatio Cartarum ("confirming charter") was to confirm Magna Carta. It also modified the means of enforcing Magna Carta by replacing the feudal assembly of 25 barons (Ch. 61), which was never used, with Parliament.

Like Magna Carta, the Confirmatio acknowledges God's existence and that rulers rule by His grace and for His honor.

> *EDWARD, by the grace of God, King of England . . .. Know ye that we, to the honour of God and of Holy Church, and to the profit of our realm . . ..* [¶ 1.]

Magna Carta and the Confirmatio applied to the church as well as to everyone else.

> *Moreover we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy church . . ..* [¶ 6.]

Bill of Rights (December 16, 1689).

The Bill of Rights came about during the Glorious Revolution in England and the accession of William and Mary to the throne. It is also a direct ancestor to many American bills of rights, including the first ten amendments to the U.S. Constitution.

The Bill of Rights acknowledged Christianity as a part of England's legal heritage and claimed that the protestant religion is an integral part of its national identity.

> *WHEREAS the late King James the Second . . . did endeavour to subvert and extirpate the protestant religion . . ..* [Second Whereas ¶.] *And thereupon their Majesties were pleased [to] . . . make effectual provision for the settlement of the religion, laws and liberties of this kingdom . . ..* [¶ V.]
>
> *And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this protestant kingdom, to be governed by a popish prince, or by any King or Queen marrying a papist . . ..* [¶ IX.]

The Bill of Rights claims that God raised up the new civil rulers of England. Implicit is a submission to God's governance of mankind and a recognition of divine intervention in civil affairs.

> *[T]he throne being thereby vacant, his highness the prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) . . ..*
>
> *And the said lords spiritual and temporal, and commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties royal persons most happily to reign over us upon the throne of their ancestors . . ..* [¶ VII.]

England is acknowledged to be a nation under God.

> *[F]or preserving a certainty in the succession [of the throne], in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend . . ..* [¶ VIII.]

AMERICAN COLONIAL DOCUMENTS

The American continent was colonized by English emigrants who were looking for the opportunity to establish a society based on the laws of God. This intention is manifested in the terms of the colonial charters by which the colonists were authorized to settle in the new world.

First Charter of Virginia (April 10, 1606).

The charter served to grant the king's permission for the colonial enterprise. But, the colonists viewed it as more, since by it they claimed the rights of Englishmen 170 years later.

The charter acknowledges that the English king ruled by the grace of God and that it is proper for a civil ruler to be a minister of God to do His will.

> *James, by the grace of God, King of England . . . Defender of the Faith.* [Opening ¶.]

The charter recognizes that a purpose of civil government is to honor God. Two primary purposes of colonization are stated to be: 1) the religious conversion of the native peoples to Christianity; and 2) the establishment of a settled and quiet government. In essence, the colonists viewed their undertaking as being authorized by Christ's Great Commission.

> *We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled*

and quiet Government . . .. [3rd ¶.]

Inhabitants of the colony were guaranteed the privileges, immunities, and rights of Englishmen.

[A]ll and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions. [15th ¶.]

Ordinances for Virginia (November 28, 1618).

Among other things, the Ordinances introduced the legislative assembly to the colonial government in Virgina.

The Ordinances acknowledge God's governance of mankind and the divine intention to assist in the establishment of civil government.

. . . intending, by the Divine Assistance, to settle . . . a Form of Government there. [Preamble.]

The purpose of civil government is to: 1) advance the kingdom of God; 2) establish lawful civil authority; and 3) maintain public virtue, in that order of priority.

THE COUNCIL OF STATE . . . [shall] bend their Care and Endeavours to assist the said Governor; first and principally, in the Advancement of the Honour and Service of God, and the Enlargement of his Kingdom amongst the Heathen People; and next, in erecting of the said Colony in due obedience to his Majesty, and all lawful Authority from his Majesty's Directions; and lastly, in maintaining the said People in Justice and Christian Conversation amongst themselves, and in Strength and Ability to withstand their Enemies. [Par. III.]

The colony's laws and customs were to conform, to the extent convenient or appropriate, to the common law of England.

WHEREAS in all other Things, we require the said General Assembly, as also the said Council of State, to imitate and follow the Policy of the Form of Government, Laws, Customs, and Manner of Trial, and other Administration of Justice, used in the Realm of England . . .. [¶ V.]

Mayflower Compact (November 11, 1620).

The Mayflower Compact was drawn up after the Pilgrims had arrived in America, but before they set foot on dry land. They were apparently unwilling to leave the ship until the matter of their

government had been resolved.

The compact acknowledges that the English king ruled by the grace of God and that it is proper for a civil ruler to be a minister of God to do His will.

> *IN THE NAME OF GOD, AMEN. . . . King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith . . ..*

The twin purposes of colonization by the Pilgrims were said to be: 1) advancement of the Christian faith; and 2) establishment of a civil government. The overall goal of colonization was to bring glory to God.

> *Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country . . . [we] combine ourselves together into a civil Body Politick."*

The compact, though very short, expresses and implies a covenantal character: 1) authority for the compact is based on "the Glory of God, and Advancement of the Christian Faith;" 2) mutuality is indicated by "We, whose names are underwritten . . . mutually . . . covenant"; 3) a new legal relationship is evidenced by the words, "combine ourselves into a civil Body Politick"; 4) perpetuity is implied in "for our . . . Preservation"; 5) limited modifiability is implied in "we promise all due Submission and Obedience"; 6) binding on future generations is evidenced in "for the general Good of the Colony"; and 7) a legal framework is indicated by the words, "do enact, constitute and frame."

> *The document represents the application to the affairs of civil government of the philosophy of the church covenant which was the basis of Puritan theology. This theology found in the Scriptures the right of men to associate and covenant to form a church and civil government and to choose their own officers to administer both religious and civil affairs.* [Perry, SOURCES at 57.]

The Charter of Massachusetts Bay (March 4, 1629).

The Massachusetts charter was obtained at a time when the English government was undergoing an intense power struggle. In 1629, king Charles I dissolved the Parliament and began an eleven year reign of tyranny. Against this backdrop, the religious Nonconformists went to America to reclaim a godly form of civil government by establishing it anew in Massachusetts.

> *The men of the company were Nonconformists, and their goal was to found a state based on the principles of the Bible and governed by the laws of God.* [Perry, SOURCES at 77.]

The principal purpose of colonization was to spread the Christian gospel. The lack of a Christian government gave rise to a presumption that the colonists had authority to establish a colony in Massachusetts.

> *. . . for the planting, ruling, ordering, and governing of New England in America . . . PROVIDED always, That the said Islands, or any the premises by the said Letters-patents intended and meant to be granted, were not then actually possessed or inhabited, by any other Christian Prince or State.* [Opening ¶.]

> *. . . whereby our said people, inhabitants there, may be so religiously, peaceably, and civilly governed, as their good life and orderly conversation, may win and incite the natives of country, to the knowledge and obedience of the only true God and Savior of mankind, and the Christian faith, which in our royal intention, and the adventurers free profession, is the principal end of this Plantation.* [11th ¶.]

The inhabitants of Massachusetts were guaranteed the privileges, immunities, and rights of Englishmen.

> *That all and every the subjects of us, our heirs or successors . . . shall have and enjoy all liberties and immunities of free and natural subjects within any of the dominions of us, our heires or successors, to all intents, constructions, and purposes whatsoever, as if they and every of them were born within the Realm of England.* [11th ¶.]

The Charter of Maryland (June 20, 1632).

The Maryland colony was one of the first colonies where significant religious diversity and toleration was the rule, not the exception.

The purposes of colonization were primarily to extend the Christian religion, and secondarily to extend the British Empire.

> *Whereas our . . . Baron of Baltimore . . . being animated with a laudable, and pious Zeal for extending the Christian Religion, and also the Territories of our Empire, hath humbly besought Leave of us, that he may transport . . . a numerous Colony of the English Nation, to a certain Region . . . in the Parts of America. and partly occupied by Savages, having no knowledge of the Divine Being.* [Opening ¶.]

The colonial laws and customs were to conform, to the extent convenient or appropriate, to the common law of England. By implication, the colonists desired to adopt those general laws which were founded on the law of nature and the Bible.

> *. . . that the Laws aforesaid be consonant to Reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England.* [¶ VII.]

Inhabitants of Maryland were guaranteed the privileges, immunities, and rights of Englishmen.

> *. . . all and singular the Subjects . . . transplanted, or hereafter to be transplanted into the*

> *Province aforesaid, and the Children of them, and of others their Descendants, whether already born there, or hereafter to be born, be and shall be Natives and Liege-Men of Us . . . of our Kingdom of England and Ireland; and in all Things shall be held, treated, reputed, and esteemed as the faithful Liege-Men of Us . . . born within our Kingdom of England; . . . and likewise all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peaceably to have and possess, and the same may use and enjoy in the same manner as our Liege-Men born, or to be born within our said Kingdom of England.* [¶ X.]

The charter was not to be interpreted in such a way as to diminish the religious rights of the colonists.

> *Provided always, that no Interpretation [of this charter] be made, whereby God's holy and true Christian Religion, or the Allegiance due to Us, our Heirs and Successors, may in any wise suffer by Change, Prejudice, or Diminution.* [¶ XXII.]

Fundamental Orders of Connecticut (January 14, 1639).

The Fundamental Orders of Connecticut is often referred to as the first truly political constitution in America because it expressly defines the organs of political government in that colony.

The charter acknowledged God's governance of mankind and His active participation in human affairs of state.

> *FORASMUCH as it has pleased the Almighty God by the wise disposition of his divine providence so to order and dispose of things . . ..* [Preamble.]

The charter not only acknowledged the Bible as part of the colonial heritage, but recognized it as authoritative in governing human affairs.

> *And well knowing where a people are gathered together the word of God requires that to maintain the peace and union of such a people there should be an orderly and decent government established according to God. . .* [Preamble.]

Although religious diversity existed in Maryland, Christianity was still acknowledged to be an integral part of the colonial identity. Thus, a chief purpose of the colonial government was to maintain and preserve the Christian gospel.

> *[We] enter into combination and confederation together, to maintain and preserve the liberty and purity of the gospel of our Lord Jesus which we now profess, as also the discipline of the Churches, which according to the truth of the said gospel is now practiced among us . . ..* [Preamble.]

Like many of its colonial predecessors, this "first American constitution" was structured consistently

with a biblical covenant framework: 1) authority for the document is found in "Forasmuch as it hath pleased Allmighty God"; 2) mutuality is shown by, "we the inhabitants ... now cohabiting and dwelling"; 3) community is indicated by, "conjoin ourselves to be as one public state"; 4) irrevocability and binding on future generations are both indicated by the words, "for ourselves and our successors"; 5) No provision is made for amendment, indicating a limited modifiability; and 6) that the document was intended to serve as a framework for future laws is evidenced by, "to order and dispose of the affairs of the people."

The Orders acknowledged that the laws of God control the laws of the colony. The Bible is not only competent legal authority to declare civil justice, but God's help is implored to assist in public service.

> *I . . . do swear by the great and dreadful name of the everliving God, to promote the public good and peace . . . and will further the execution of justice according to the rule of God's word; so help me God, in the name of the Lord Jesus Christ.* [Oath of the Governor]

> *I . . . do swear by the great and dreadful name of the everliving God, to promote the public good and peace . . . and will further the execution of justice for the time aforesaid according to the righteous rule of God's word; so help me God.* [Oath of a Magistrate]

Massachusetts Body of Liberties (December 10, 1641).

The Massachusetts Body of Liberties represents an attempt to add the principles of Puritan theology to the colonists' rights as Englishmen to frame a government uniquely based on God's divine law.

The Body of Liberties follows a biblical covenant framework; 1) its authority is based on "humanitie, Civilitie, and Christianitie"; 2) mutuality is shown by "our solemn consent"; 3) the new legal relationship is said to be the "stability of Churches and Commonwealths"; 4) irrevocability is indicated by "enjoyed and observed throughout our Jurisdiction for ever"; 5) limited modifiability is implied by the fact that "these rights and liberties, shall be audibly read and deliberately weighed at every General Court that should be held"; 6) binding on future generations is demonstrated by referring to "our posterity after us"; amd 7) a framework for the administration of law is shown by reference to "the further establishing of this Government."

The Body of Liberties acknowledged that the laws of God controlled the laws of the colony. The Bible was competent legal and judicial authority to declare civil justice, and the court had proper non-ecclesiastical jurisdiction to make judgments based on the Bible.

> [No one could be deprived of life, liberty or property,] *unless it be by virtue or equity of some express law . . . warranting the same, established by a General Court and sufficiently published, or in case of the defect of a law in any particular case by the word of God. And in capital cases, or in cases concerning dismembring or banishment, according to that word to be judged by the General Court.* [Sec. 1.]

The enumeration of capital crimes followed the pattern of the Mosaic law, including biblical citations of authority for each offense. Thus, the Bible was viewed as a legitimate source for legal and statutory authority.

> *If any man after legall conviction shall have or worship any other god, but the lord god, he shall be put to death. Dut. 13:6, 10. Dut. 17:2, 6. Ex. 22:20. . . . If any man shall Blaspheme the name of god, the father, Sonne or Holie ghost, with direct, expresse, presumptuous or high handed blasphemie, or shall curse god in the like manner, he shall be put to death. Lev. 24:15, 16.* [Sec. 94, "Capitall Laws."]

Religious liberties of the colonists were declared to be given by the Lord Jesus. Consequently, such liberties were understood to be given by God, not men, and therefore were inalienable.

> *2. Every Church hath full libertie to exercise all the ordinances of god, according to the rules of scripture. . . . 6. Every Church of Christ hath freedome to celebrate days of fasting and prayer, and of thanksgiving according to the word of god.* [95. "A Declaration of the Liberties the Lord Jesus hath given to the Churches."]

The structure of the Body of Liberties as a document evidences a social order structure built upon the legal institutions. The enumerated liberties were grouped in a way which reflects God's social order. Individual rights were referred to as the rights of "free men" and "foreigners and strangers." Familial or household rights were reflected in the rights of "Woemen," "Children," and "Servants." Ecclesiastical rights were recognized as the rights of "the Churches." And, the "Capitall Laws" recognized the civil state as a minister of God to do His justice.

> *Liberties more peculiarlie concerning the free men.* [Sec. 58-78.] *Liberties of Woemen.* [Sec. 79-80.] *Liberties of Children.* [Sec. 81-84.] *Liberties of Servants.* [Sec. 85-88.] *Liberties of Foreigners and Strangers.* [Sec. 89-91.] *Capitall Laws* [Sec. 94.] *A Declaration of the Liberties the Lord Jesus hath given to the Churches.* [Sec. 95.]

Charter of Rhode Island (July 8, 1663).

Rhode Island was founded primarily by Roger Williams, who objected to the exercise of both religious and civil authority by the magistrates in other colonies. Williams also declared that public officials had no right to punish offenses against the "first table" of the Mosaic law. Thus, religious freedom was a predominant theme in the laws of Rhode Island.

The colony, the full name of which is Rhode Island and Providence Plantations, took its name from the providence of God, acknowledging God's active participation in human civil affairs.

> *. . . by the good Providence of God, from whom the Plantations have taken their name.* [Preamble.]

The purposes of the Rhode Island colony were: 1) religious conversion of the native peoples; and

2) establishment of a corporate polity.

> *. . . they, pursuing, with peaceable and loyal minds, their sober, serious and religious intentions, of godly edifying themselves, and one another, in the holy Christian faith and worship as they were persuaded; together with the gaining over and conversion of the poor ignorant Indian natives, in those parts of America, to the sincere profession and obedience of the same faith and worship.* [Preamble.]

The laws and customs of Rhode Island were to conform, to the extent convenient or appropriate, to the common law of England, and the inhabitants were guaranteed the privileges, immunities, and rights of Englishmen. [¶ 5 and ¶ 10.]

Concessions and Agreements of West New Jersey (March 13, 1677).

The West New Jersey Concessions reflected the theology of the Quakers, and probably were drafted by William Penn.

The Concessions acknowledged God's reserved jurisdiction over the human mind.

> *THAT no men, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matters.* [Chap. XVI.]

According to the Concessions, good government depends on divine assistance.

> *. . . that justice may not be done in a corner nor in any covert manner, being intended and resolved, by the help of the Lord, and by these our Concessions and Fundamentals, that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery.* [Chap. XXIII.]

Frame of Government of Pennsylvania (April 25, 1682).

The Frame of Government of Pennsylvania was also authored by William Penn. It offers one of the most explicit statements and defenses of the use of the Bible as competent legal authority in ordering public life.

The document acknowledged the Creator God and his laws of creation, and further recognized man as God's vice-regent to rule the earth. The document also acknowledged God's law of nature as being within our hearts.

> *When the great and wise God had made the world, of all his creatures, it pleased him to chuse man his Deputy to rule it; . . . the precept of divine love and truth, in his bosom, was the guide and keeper of his innocency. But lust prevailing against duty, made a lamentable breach upon it; . . . and his disobedient posterity . . . would not live comformable to the holy law within . . ..* [Preface ¶ 1.]

The Frame of Government acknowledged the Bible as competent legal authority for constituting and ordering civil government.

> *This the Apostle teaches in divers of his epistles:* [here William Penn quotes Gal. 3:19, 1 Tim. 1:9-10 and Rom. 13:1-5 in full.] [Preface ¶2.]

The document acknowledged, and submitted to, God's governance of mankind. It recognized that civil government is an authority and an institution established by God, the purpose of which is to punish evildoers and to praise what is right. Public officials are said to be ministers of God to do His will, and the need for civil government will continue even after Jesus comes to establish His earthly kingdom.

> *This settles the divine right of government beyond exception, and that for two ends: first, to terrify evil doers: secondly, to cherish those that do well . . .. So that government seems to me a part of religion itself, a thing sacred in its institution and end. For, if it does not directly remove the cause, it crushes the effects of evil, and is as such, (though a lower, yet) an emanation of the same Divine Power, that is both author and object of pure religion . . .. [D]aily experience tells us, that the care and regulation of many other affairs . . . make up much of the greatest part of government . . . and will continue among men, on earth, under the highest attainments they may arrive at, by the coming of the blessed Second Adam, the Lord from heaven.* [Preface ¶ 3.]

The biblical creation account is understood to be an accurate history and has legal significance. Further, the ordinances of God as revealed in the Bible are to be observed in public affairs.

> *That, as often as any day of the month, mentioned in any article of this charter, shall fall upon the first day of the week, commonly called the Lord's Day, the business appointed for that day shall be deferred till the next day, unless in case of emergency.* [Art. XXII.]

> *That, according to the good example of the primitive Christians, and the case of the creation, every first day of the week, called the Lord's day, people shall abstain from their common daily labour, that they may the better dispose themselves to worship God according to their understandings.* [Art. XXXVI.]

According to the Frame of Government, acknowledgement of the Creator God is a pre-condition to the exercise of full and true liberty.

> *That all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world . . . shall, in no ways, be molested or prejudiced for their religious persuasion . . ..* [Art. XXXV.]

Pennsylvania Charter of Privileges (October 28, 1701).

The Charter of Privileges replaced the earlier Frame of Government in Pennsylvania to more

explicitly secure the liberties of the people.

The Charter of Privileges acknowledged God's reserved jurisdiction over morality, the heart and mind of man. The Charter also provided that acknowledgement of the Creator God is a pre-condition to the exercise of full and true liberty.

> *And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World . . . shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice . . ..* ["FIRST" ¶ 1.]

Under the Charter, Christian belief was a pre-condition to the holding of any public office. However, the required Christian belief was non-sectarian, or general Christianity. The document also presumes that civil citizenship and professing allegiance to civil authorities is in no way inconsistent with Christian citizenship or the Christian religion.

> *AND that all Persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, Allegiance to the King as Sovereign, and Fidelity to the Proprietary and Governor . . ..* ["FIRST" ¶ 2.]

EARLY STATE CONSTITUTIONS

Beginning in 1776, the American colonies began formally preparing for self-government independent of the various colonial charters and compacts which had tied them to England. In other words, each of the colonies had to replace their prior charter documents with a state constitution. Although breaking from the British constitution as a basis for their laws, these state constitutions continued the legal tradition of a jurisprudence based on the laws of God and the Bible.

Virginia Bill of Rights (June 12, 1776).

The Virginia Constitution, of which the Virginia Bill of Rights is a part, was agreed upon less than one month before the Declaration of Independence was drafted.

The Bill of Rights acknowledged the Creator God and his laws of creation. It also recognized God's reserved jurisdiction over morality, the hearts and minds of men. Section 16 of the Bill of Rights states what is probably the best available legal definition of religion: "the duty which we owe to our Creator," necessarily implying that such duties are not owed to any man.

> *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 that it is the mutual duty of all to practise Christian forbearance love, and charity towards each other. [§16.]

Constitution of Pennsylvania (August 16, 1776).

The Constitution of Pennsylvania continued the biblical legal tradition of the earlier organic documents of Pennsylvania.

The Constitution acknowledged God's reserved jurisdiction over morality, the heart and mind of man. Like the Charter of Privileges, the new Constitution provided that acknowledgement of the Creator God is a pre-condition to the exercise of full and true liberty.

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . .. 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 . . .. [Art. II.]

The framers submitted to God's governance of mankind and his laws of creation, and acknowledged that the laws of civil government come from God.

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) . . .. [Preamble.]

Similar to the Frame of Government of 1682, the Constitution is structured according to a biblical covenant framework: 1) the authority of the document is based on the "inherent and inalienable rights" of the people; 2) mutual assent is present because the document is adopted by "common consent"; 3) the new legal community is indicated by the creation of self-government in Pennsylvania independent of the prior charters; 4) irrevocability is shown by "permanent . . . government"; 5) limited modifiability is indicated by the fact that future officials are to be guided by "a frequent recurrence to fundamental principles"; 6) binding on future generations is demonstrated by its applicability to "future society"; and 7) that the constitution was intended to serve as a framework for law is shown by the accountability public officals have to enact laws consistent with the constitution.

Delaware Declaration of Rights (September 11, 1776).

A civil covenant is not merely convenient, but absolutely necessary as a means of exercising civil rule.

That all government of right originates from the people, is founded in compact only, and

instituted solely for the good of the whole. [§1.]

The Declaration acknowledged God's reserved jurisdiction over morality, the heart and mind of man, and affirmed that inalienable rights were derived from God.

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . .. [§2.]

According to the Declaration, acknowledgement of the Creator God is a pre-condition to the exercise of full and true liberty. The document recognized that Christian belief confers no civil immunity upon any person.

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. [§3.]

Constitution of Maryland (November 3, 1776).

A civil covenant is not merely convenient, but absolutely necessary as a means of exercising civil rule.

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

The Maryland Constitution provided that the form of a civil oath may be modified to match the swearer's religious beliefs.

That the manner of administering an oath to any person, ought to be such, as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. [Art. XXXVI.]

Constitution of Vermont (July 8, 1777).

The Constitution of Vermont affirmed that the ordinances of God as revealed in the Bible are to be observed in public affairs.

That all men have a natural and unalienable right to worship ALMIGHTY GOD, according to the dictates of their own consciences and understanding, regulated by the word of GOD; . . . nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of GOD. [Art. III.]

Constitution of Massachusetts (October 25, 1780).

A civil covenant is not merely convenient, but absolutely necessary as a means of exercising civil rule.

> *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.* [Preamble.]

The Massachusetts Constitution acknowledged the Creator God and his laws of creation as governing mankind, and that the ordinances of God as revealed in the Bible are to be observed in public affairs.

> *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 . . . of entering into . . . solemn compact with each other; and . . . devoutly imploring His direction . . ..* [Preamble.]
>
> *It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe.* [Art. II.]

CHAPTER 10

A Christian Nation?

INTRODUCTION

The question is often asked whether England or America either have been, or are now, a "Christian nation." To answer this, it must first be determined, "What is a Christian nation?" This inquiry necessarily involves consideration of a variety of legal factors, for the religious character of a nation is inextricably bound up in its institutions and laws. Accordingly, behind the religious question lurks a jurisprudential issue: "To what extent, and in what sense, should the laws of any nation reflect Christian values?" These are the questions to be explored in this chapter, with particular attention paid to how they were resolved in the American experience.

Biblical record.

The scriptures contain a number of admonitions for the people of a nation to turn toward God and remain faithful to Him. Faithfulness toward God is often portrayed as the means by which people achieve economic prosperity or national healing.

> *[If] My people who are called by My name humble themselves and pray, and seek My face and turn from their wicked ways, then I will hear from heaven, will forgive their sin, and will heal their land.* [2 Chr. 7:14.]

> *Blessed is the nation whose God is the Lord, The people whom He has chosen for His own inheritance.* [Ps. 33:12.]

However, many questions arise from a generalized interpretation of the above scriptures. Textually, references to "My people" or "the people whom He has chosen" apply strictly to ancient Israel. Are these scriptures applicable to modern nations, and if so, how? The Bible tells us the manner in which Israel was to observe its covenant with God, but other nations do not have this covenant relationship with the Creator. How, then, are other nations supposed to indicate faithfulness toward God? Is it enough for Christians in a nation to be faithful toward God to enjoy His blessings, or must the nation as a whole evidence a faithfulness toward God? If the latter, what form does this national faithfulness take? Can a "Christian nation" openly tolerate non-Christians?

> *"Therefore I say to you, the kingdom of God will be taken away from you, and be given to a nation producing the fruit of it."* [Mat. 21:43.]

Apparently, nations other than ancient Israel can evidence faithfulness toward God, but the form this may take remains to be explored.

Historic understanding.

In Anglo-American jurisprudential history, there exist various assertions that England and America each are, or were, a Christian nation. However, again, there is little in these assertions which define the form or substance of what it means to be a Christian or a religious nation.

> *Christianity is part of the laws of England.* [Blackstone, 4 COMMENTARIES *59.]

> *[N]o purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. . . . There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speakthe voice of the entire people.* [Holy Trinity Church v. U.S., 143 U.S. 457 (1892) at 470.]

TYPES OF A GODLY ("CHRISTIAN") NATION

An examination of history reveals essentially four possible types of religious national identity: 1) democracy; 2) theocracy; 3) establishment; and 4) republic. As will become evident, these definitions are not mutually exclusive. For example, ancient Israel satisfied all four definitions for a time. And, England and America have each satisfied as many as three of the definitions at one time.

Democracy.

A *democracy*, for the present purposes, refers not to the way the people exercise civil rule over each other, but simply to the fact that a majority of the population happens to profess the same religious faith as a matter of individual choice. In other words, a nation could be said to be a Christian nation in a democratic sense if a majority of the population are Christians. Of course, the religious majority may cause certain laws respecting religion to be enacted and enforced, but this is not now in view.

Certainly there was a time in America, as well as England, when a majority of the population professed Christian religious beliefs.

> *The people of this state, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice; . . . the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors.* [People v. Ruggles, 8 Johns. 290, 294, 295 (NY).]

However, a Christian nation which depends on the existence of popular concensus is an elusive thing. Such a definition of "Christian nation" is entirely political, not legally based. That is, popular

opinion is not a matter of legal prescription. There is little or no legal stability or security because popular concensus can change at any time.

If a Christian nation is defined solely in demographic, or "democratic," terms, it must be admitted that neither England nor the United States are good candidates for "Christian nation" status at present. Plus, a merely demographic definition of a Christian nation has little to commend itself either as to jurisprudence or as a legacy for future generations.

Theocracy.

Historically, some people viewed America as God's "new Israel," suggesting that it was intended to be a Christian nation in a theocratic sense. Some people have suggested that ancient Israel's theocratic form of government is the model for all modern nations. However, here we must be careful to distinguish a *theocracy* (or, the rule of God) from a *theonomy* (the rule of God's law). The definition of a theocracy is such that ancient Israel is the only nation in the history of the world so far which can claim to be a theocracy in the legal sense.

Definition of theocracy. A theocracy, in the legal sense, is a nation where: 1) God personally rules national affairs as the supreme civil head of state; and 2) God is an actual party to the nation's civil covenant, or constitution.

The "rule of God" means that civil affairs are governed by God personally as supreme civil head of state.

God was king (the supreme civil head of state) over ancient Israel. This is evidenced in the fact that when the Israelites asked for a human monarchy, it wasviewed by God as a rejection of His direct civil rule.

> *For the Lord is our judge, The Lord is our lawgiver, The Lord is our king; He will save us--*
> [Isa. 33:22.]

> *And the Lord said to Samuel, "Listen to the voice of the people in regard to all that they say to you, for they have not rejected you, but they have rejected Me from being king over them."*
> [1 Sam. 8:7.]

However, the institution of the monarchy in ancient Israel did not terminate the theocracy. All that was effected was a change in the *form* of government. Israel's constitution (the Ten Commandments) was not amended, nor were its laws. Further, God retained ultimate civil authority in Israel, which is shown by His retention of the right to determine who could lawfully sit on Israel's throne under the monarchy. This right to appoint the monarch was reserved in advance of entering the Promised Land, and was exercised in the appointments of Saul, David, and the terms of the Davidic covenant.

> *"When you enter the land which the Lord your God gives you, and you possess it and live in it, and you say, 'I will set a king over me like all the nations who are around me,' you shall*

surely set a king over you whom the Lord your God chooses . . .." [Deut. 17:14-15.]

"And your house and your kingdom shall endure before Me forever; your throne shall be established forever." [2 Sam. 7:16.]

Jesus has the eternal right (in fulfillment of the Davidic covenant) to rule as king of Israel as a personal, civil head of the nation.

"And behold, you will conceive in your womb, and bear a son, and you shall name Him Jesus. He will be great, and will be called the Son of the Most High; and the Lord God will give Him the throne of His father David; and He will reign over the house of Jacob forever; and His kingdom will have no end." [Lu. 1:31-33.]

Not only did God exercise direct rule over Israel as its supreme head of state, but He was an actual party to Israel's civil covenant, or constitution.

So Moses took the blood and sprinkled it on the people, and said, "Behold the blood of the covenant, which the Lord has made with you in accordance with all these words." [Ex. 24:8.]

He has remembered His covenant forever, The word which He commanded to a thousand generations, The covenant which He made with Abraham, And His oath to Isaac. Then He confirmed it to Jacob for a statute, To Israel as an everlasting covenant. [Ps. 105:8-10.]

Israel's uniqueness. Ancient Israel was unique - God has not exercised direct rule over any other nation as its supreme civil head of state, nor has He been an actual party to any other nation's civil covenant. Indeed, the Bible states that Israel is a unique nation among all of the nations of the world.

"`Now then, if you will indeed obey My voice and keep My covenant, then you shall be My own possession among all the peoples, for all the earth is Mine; and you shall be to Me a kingdom of priests and a holy nation.' These are the words that you shall speak to the sons of Israel." [Ex. 19:5-6.]

He declares His words to Jacob, His statutes and His ordinances to Israel. He has not dealt thus with any nation; And as for His ordinances, they have not known them. Praise the Lord! [Ps. 147:19-20.]

"For you are a holy people to the Lord your God; the Lord your God has chosen you to be a people for His own possession out of all the peoples who are on the face of the earth." [Deut. 7:6. *See also*, Deut. 14:2.]

Consequently, neither England nor America have ever been a theocracy in this legal sense. If it is possible for the United States to be a Christian nation, we must look elsewhere.

Establishment.

Both England and America have a history of religious establishments. Thus, if having Christianity as the established religion is the test for being a Christian nation, both nations have qualified as such for part of their history.

Definition of establishment. The definition of an *establishment* for present purposes is where a nation legally prescribes, either legislatively or constitutionally, matters of redemption law. This legal prescription is often referred to as making a particular religion (Christianity) the official national religion, but in fact it may take a variety of forms, any number of which may be used in combination with each other. Some examples (not an exhaustive list) follow:

The nation has a legally prescribed religious faith, that is, civil law prescribes what people must believe about God. This was certainly the case in ancient Israel.

> *"You shall have no other gods before Me. You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth. You shall not worship them or serve them; for I, the Lord your God, am a jealous God, visiting the iniquity of the fathers on the children, on the third and the fourth generations of those who hate Me, but showing lovingkindness to thousands, to those who love Me and keep My commandments."* [Ex. 20:3-6.]

This model was followed in some early state constitutions in America, such as the one in South Carolina.

> *That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. . . . And that whenever fifteen or more male persons, not under twenty-one years of age, professing the Christian Protestant religion, and agreeing to unite themselves in a society for the purposes of religious worship, they shall, (on complying with the terms herein after mentioned,) be, and 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.* [So.Carolina Const. of March 19, 1778, art. XXXVIII.]

The vitality of the nation (or state) is said to depend on the maintenance and preservation of a particular religious faith. Again, this form of establishment was modeled in ancient Israel.

> *"Now it shall be, if you will diligently obey the Lord your God, being careful to do all His commandments which I command you today, the Lord your God will set you high above all the nations of the earth. And all these blessings shall come upon you and overtake you, if you will obey the Lord your God. . . . But it shall come about, if you will not obey the Lord your God, to observe to do all His commandments and His statutes with which I charge you*

> *today, that all these curses shall come upon you and overtake you."* [Deut. 28:1-2,15.]

This model was followed in some early state constitutions. The Massachusetts Constitution of 1780, for example, disclaimed establishment as to any particular sect or denomination of Christians, but at the same time clearly "established," through tax revenues, the state's support of generic Protestant Christianity.

> *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 . . . the legislature shall, from time to time, authorize . . . the support and maintenance of public Protestant teachers of piety, religion, and morality . . .. And every denomination of Christians . . . shall be equally under the protection of the law: and no . . . one sect or denomination . . . shall ever be established by law.* [Const. of Massachusetts (October 25, 1780), Art. III.]

In England, this pattern was followed in the negative, that is, the law prescribed what religious faith a monarch was prohibited from following.

> *And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this protestant kingdom, to be governed by a popish prince, or by any King or Queen marrying a papist . . ..* [Bill of Rights (1689), ¶ IX.]

Civil privileges are accorded to citizens professing a specific redemptive faith, but denied to others. Thus, in Israel, a person who defiled a sacrifice to God would be "cut off" from the people, that is, excluded from civil participation in the nation.

> *"For whoever eats the fat of the animal from which an offering by fire is offered to the Lord, even the person who eats shall be cut off from his people."* [Lev. 7:25.]

After a similar fashion, some colonial and state governments provided that a condition of holding selected public offices was having an approved religious affiliation or taking a religious oath.

> *It is ordered, sentenced and decreed . . . that the Governor be always a member of some approved congregation.* [Fund. Orders of Connecticut, Sec. 4.]

> Form of oath: *I,, do profess faith in God the Father, and in Jesus Christ, His onlySon, and in the Holy Ghost, one God blessed forevermore; and I do acknowledge the Holy Scriptures in the Old and New Testament to be given by divine inspiration.* [Delaware Declaration of Rights (September 11, 1776).]

A fourth kind of establishment is where the nation or state has a jurisdictional merging of church and civil spheres. In other words, civil punishments are meted out for religious offenses. Again, this was the case in ancient Israel.

> *"Now a man or a woman who is a medium or a spiritist shall surely be put to death. They shall be stoned with stones, their bloodguiltiness is upon them."* [Lev. 20:27.] *"Moreover, the one who blasphemes the name of the Lord shall surely be put to death; all the congregation shall certainly stone him. The alien as well as the native, when he blasphemes the Name, shall be put to death."* [Lev. 24:16.] [*See also,* Deut. 17:2-5 (false religious worship).]

The practice of civilly punishing religious offenses was carried out both in England ["Offenses against God and religion"] and in some of the American colonies.

> *If any man after legall conviction shall have or worship any other god, but the lord god, he shall be put to death. Dut. 13:6, 10. Dut. 17:2, 6. Ex. 22:20. . . . If any man shall Blaspheme the name of god, the father, Sonne or Holie ghost, with direct, expresse, presumptuous or high handed blasphemie, or shall curse god in the like manner, he shall be put to death. Lev. 24:15, 16.* [Massachusetts Body of Liberties (1641), Sec. 94, "Capitall Laws."]

Present legal status. Of course, the main problem with legal establishments of religion in America is that they have been utterly rejected as a means of promoting public virtue. Thus, all of the states which formerly had established religions abandoned them by the 1830's. Further, the First Amendment to the U.S. Constitution (which has been interpreted as applying to each of the states as well) expressly denies that Congress may make any law "respecting an establishment of religion." This position is consistent with the idea that civil government has no jurisdiction over matters of the heart and mind. Consequently, if we are to find any continuing legal legacy of what it means to be a Christian nation, we cannot find it by returning to the religious establishment motif.

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ..* [U.S. Const., amend. I.]

Republic.

A *republic* may be defined as a consensual form of government in which there is "a government of laws, and not of men." This latter phrase is intended to denote a government in which law itself rules the nation, every person is under the law, and the law is that which conforms to the objective legal order created by God. A republic, then, is the form of government which is intended to institute a theonomy (rule of God's law) via the consent of the governed.

> *"Yet they seek Me day by day, and delight to know My ways, As a nation that has done righteousness, And has not forsaken the ordinance of their God. They ask Me* for *just decisions, They delight in the nearness of God."* [Isa. 58:2.]

> *[T]he religion which has introduced civil liberty, is the religion of Christ and His apostles .. .. This is genuine Christianity, and to this we owe our free constitutions of government . . . the moral principles and precepts contained in the Scripture ought to form the basis of all of our civil constitutions and laws.* [Noah Webster (1833).]

The hallmark of a republic (apart from political concerns about representative government) is the consensual adoption of a legal framework consistent with the law of nature and God's law as revealed in the Bible. This does *not* mean that the nation or state is attempting to reinstitute the Mosaic law, but that its laws and institutions presuppose the laws of the Creator which apply to all people.

> *[W]e are a religious people and our institutions presuppose a Supreme Being. . . .* [Zorach v. Clauson, 343 US 307, 313 (1952).]

> *Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church and tithes and spiritual courts, but Christianity with liberty of conscience to all men.* [Updegraph v. Com., 11 Serg. & R. 394, 400.]

> *Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship.* [Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1851).]

A republican form of government is the operative legal model in the United States.

> *The United States shall guarantee to every state in this union a Republican form of government . . ..* [U.S. Const., art. IV, §4.]

> *The government of the United States has been emphatically termed a government of laws, and not of men.* [Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), at 163. *See also*, Const. of Massachussetts, October 25, 1780, Art. XXX.]

LEGAL BASIS FOR A REVOLUTION

Fortunately, in determining whether the United States has ever consented to be ruled by the law of nature and the laws of God in the Bible, we are not left with mere inferences. Rather, the documentary history of our nation reveals that the biblical basis of law was explicitly recognized and adopted as the nation's operative legal framework. In addition to the English, colonial and state documents examined above [chap. IX], this intention was manifested in the documentary records leading up to the formation of the United States as a legal entity.

Resolutions of the Stamp Act Congress, October 19, 1765.

The Resolutions of the Stamp Act Congress were adopted by the American colonies in response to the Stamp Act, a tax enacted by Parliament on March 22, 1765.

Form. In form, the Resolutions were merely a petition for a redress of grievances.

The Americans declared their continued allegiance to the English crown and Parliament.
1st. That his majesty's subjects in these colonies, owe the same allegiance to the crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body, the parliament of Great Britain.

The Resolutions, after defining the problems created by the Stamp Act, asserted that the colonists had the right to petition the English government for a repeal of the Stamp Act.

> *13th. That it is the right of the British subjects in these colonies, to petition the king or either house of parliament. . . . to procure the repeal of the act for granting and applying certain stamp duties . . ..*

The action of the Congress was analogous to the response of Peter and the apostles when they had been told not to speak or teach in the name of Jesus by the Jewish Council. The apostles differed with the Council, but let the Council "be the judge."

> *And when they had summoned them, they commanded them not to speak or teach at all in the name of Jesus. But Peter and John answered and said to them, "Whether it is right in the sight of God to give heed to you rather than to God, you be the judge; for we cannot stop speaking what we have seen and heard."* [Acts 4:18-20.]

Legal basis. The Resolutions, having affirmed the colonists' allegiance to Great Britain, regarded the colonists as Englishmen. Thus, the legal basis of the document was founded entirely on British law: the rights of Englishmen and the British constitution.

> *2d. That his majesty's liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born subjects within the kingdom of Great Britain.*
>
> *6th. That all supplies to the crown, being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great Britain to grant to his majesty the property of the colonists.*

Declaration and Resolves of the First Continental Congress, October 14, 1774.

Following the repeal of the Stamp Act in 1766, England reasserted its authority to legislate for the American colonies. The colonists viewed these new acts as oppressive, and gradually came to realize that the problems of individual colonies were the problems with all. The First Continental Congress was convened in 1774 to address these problems confronted by the colonies.

Form. In form, the Declarations and Resolves were a refusal to submit to the authority asserted by the English government over the colonies.

After listing various grievances against England and citing the fact that prior petitions for redress "have been repeatedly treated with contempt," the document asserts that the colonists have certain

rights which England must respect. To the extent that England violated the colonists' rights by its exercise of power, the authors refused to submit to such exercise, although only peaceable resistance was to be made.

> *To these grievous acts and measures, Americans cannot submit, but in hopes their fellow subjects in Great Britain will, on a revision of them, restore us to that state, in which both countries found happiness and prosperity, we have for the present, only resolved to pursue the following peaceable measures . . ..*

Again, the authors regarded themselves as still being Englishmen, and in so doing, affirmed the covenantal nature of the British constitution and its applicability to them. This understanding is indicated by the reliance on the rights of the original settlers in America and the application of those rights to the colonists as their descendants.

> *Resolved, N.C.D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and naturalborn subjects, within the realm of England.*
>
> *Resolved, N.C.D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.*

The action of the Continental Congress was analogous to the response of Peter and the apostles when they were called before the Jewish Council a second time. Instead of leaving judgment to the Council, they refused to submit to its orders not to teach.

> *And when they had brought them, they stood them before the Council. And the high priest questioned them, saying, "We gave you strict orders not to continue teaching in this name, and behold, you have filled Jerusalem with your teaching, and intend to bring this man's blood upon us." But Peter and the apostles answered and said, "We must obey God rather than men."* [Acts 5:27-29.]

Legal basis. The First Continental Congress, like the Stamp Act Congress, viewed the colonists as still being Englishmen. For that reason, the English constitution and the colonial charters and compacts (having been obtained from the English crown) were continued to be relied upon for the rights asserted. However, a new legal basis was added this time, namely, the immutable laws of nature.

> *That the inhabitants of the English colonies in NorthAmerica, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:*

The question of whether to rely on the law of nature as a legal basis for the document was one of the

central issues debated within the Congress.

> *The two points which labored most were: 1. Whether we should recur to the law of nature, as well as to the British constitution, and our American charters and grants. . . . 2. The other great question was, what authority we should concede to Parliament . . ..* [John Adams (1802).]

In relying on the laws of nature, the Congress made a conscious choice to adopt a legal framework based on the revealed laws of God, since the connection between the laws of nature and God's law were well known at that time.

> *To say the Parliament is absolute and arbitrary is a contradiction. The Parliament cannot make 2 and 2, 5; Omnipotency cannot do it. . . . Parliaments are in all cases to declare what is for the good of the whole; but it is not the declaration of Parliamemnt that makes it so: There must be in every instance a higher authority, viz. God. Should an Act of Parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity, and justice, and consequently void.* [James Otis, The Rights of the British Colonies Asserted and Proved (1764).]

Declaration of the Causes and Necessity of Taking up Arms, July 6, 1775.

Armed conflict broke out between the colonists and British troops at Lexington on April 19, 1775. Even so, many colonists still hoped for a peaceful settlement of their differences with England. The Second Continental Congress was assembled to obtain a redress of grievances from, and restore harmony with, Great Britain. Although the purpose of the Declaration was to seek reconciliation, not independence, it approved the use of armed resistance to secure the colonists' rights.

Form. In form, the Declaration was a final warning and offer of peace before war is formally declared.

Once again, grievances against Great Britain are listed, and the Declaration notes that many prior petitions and entreaties made by the colonists were fruitless. The Declaration then issues a stern warning that the colonists will fight for liberty in spite of all hazards, and that they would rather die as freemen than live as slaves. In issuing this warning, the Congress calls the Creator God as witness to the Declaration and makes a request for His divine providence to protect them through the conflict.

> *We gratefully acknowledge, as signal instances of the Divine favour towards us, that his Providence would not permit us to be called into this severe controversy, until we were grown up to our present strength, had been previously exercised in warlike operation, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, declare, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every*

hazard, with unabating firmness and perseverence, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live slaves.

The Declaration closes with a reminder that the colonists will fight until aggression ceases, and makes a final appeal for peace and reconciliation. In so doing, the Congress implores the mercies of God to "relieve the empire from the calamities of civil war."

We shall lay [arms] down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before. With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

The conduct of the Second Continental Congress was analogous to what God expected of the ancient Israelites when they approached an enemy city, namely, to offer terms of peace before declaring war.

"When you approach a city to fight against it, you shall offer it terms of peace. And it shall come about, if it agrees to make peace with you and opens to you, then it shall be that all the people who are found in it shall become your forced labor and shall serve you. However, if it does not make peace with you, but makes war against you, then you shall besiege it." [Deut. 20:10-12.]

Legal basis. The Declaration, in contrast to prior documents, regarded the Continental Congress as "Representatives of the United Colonies," implying that they were beginning to see themselves as Americans more than Englishmen. This is reflected in the choice of legal bases used to support the Declaration.

The Congress, by declaring that Parliament had exercised power unjustified by the British constitution, essentially held the English government to be in breach of that constitution.

The legislature of GreatBritain, however, stimulated by an inordinate passion for a power not only unjustifiable, but which they know to be peculiarly reprobated by the very constitution of that kingdom . . ..

The Declaration does not rely upon the British constitution or the colonial charters to justify taking up arms, but instead relies on general principles derived from theCreator, common sense and the nature of humanity, in short, the law of nature.

But a reverence for our great Creator, principles of humanity, and the dictates of common sense, must convince all those who reflect upon the subject, that government was instituted to promote the welfare of mankind, and ought to be administered for the attainment of that end.

Although the colonial charters are recited as authorizing the colonial legislatures, the Congress viewed the legislatures themselves as perfect, not the charters.

> *Societies or governments, vested with perfect legislatures, were formed under charters from the crown . . ..*

TO CHARTER A CHRISTIAN REPUBLIC

Modern scholarship commonly regards the ***Declaration of Independence*** as a document of mere expediency which was used to justify a political revolution. However, the Declaration is a document of immense legal importance to the United States, for it chartered a new nation, established the national legal context, and has continuing legal importance. Even the structure of the Declaration reflects the structure of a legal brief: it has an opening statement, followed by a presentation of evidence, and concluded with a brief closing argument.

The United States National Charter.

The primary legal significance of the Declaration lies in the fact that it is the document which chartered the United States of America as a separate nation. The Declaration was the means by which the United States achieved its independent legal status.

New legal status. Prior to the Declaration, America was governed by the Magna Carta and the rest of the British constitution. The colonial charters and compacts, as well as the rights of Englishmen, were all predicated on the existence of the British constitution and its applicability to the colonies. In asserting independence from Great Britain, the Declaration claimed not only political independence, but legal independence as well. In other words, the legal effect of the Declaration was to declare that the British constitution and all of the laws, charters and compacts under it were of no further legal validity in America.

> *We, therefore . . . in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.*

A redress for breach of covenant. In form, the Declaration of Independence is a redress for breaches of covenant, *i.e.*, the British constitution. In essence, the recognition of repeated breaches of covenant gives rise to a presumption that the British constitutional covenant, though irrevocable, is no longer applicable to America by reason of a forfeiture by the English government.

> *The History of the present King of Great Britain is a history of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these*

> *States. . . . Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. . . . We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace, Friends.*

Affirmed in the U.S. Constitution. The fact that the Declaration chartered the United States is confirmed by the language of the U.S. Constitution.

The Constitution requires representatives in Congress to have been a U.S. citizen for seven years, and Senators to have been a citizen for nine years. The framers of the Constitution drafted the document in such a way that it would be possible to qualify for office immediately upon ratification. In other words, no one could have qualified to be elected to Congress unless it were possible to have been a citizen for at least seven years by the time ratification was completed. Thus, the nation could not have been chartered by the Constitution itself - a document antecedent to the Constitution would have had to accomplish that result.

> *No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States.* [Art I, §2, Cl. 2.]

> *No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States.* [Art. I, §3, Cl. 3.]

The requirement that the President must have been a *resident*, rather than a *citizen*, of the United States for fourteen years is consistent with the fact that the Declaration preceded the drafting of the Constitution by only eleven years and two months. Thus, no one could have been a citizen of the United States for fourteen years in 1787, or even upon ratification in 1789. Yet, it would have been possible for people to have resided within the territorial boundaries of the United States for that period of time.

> *[N]either shall any person be eligible to that office* [of President] *who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.* [Art. II, §1, Cl. 5.]

The final paragraph of the Constitution attaches significance to the date of America's independence, implicitly recognizing that the Declaration, rather than the Constitution, chartered the nation.

> *Done in Convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth.* [Final paragraph.]

The Legal Context for the Nation.

The Declaration not only created a new nation, butexplained the legal basis for doing so.

Accordingly, the national charter established the legal context for not only the founding, but the continuance, of the nation.

The national legal context. The Declaration justified the political and legal separation of the United States from Great Britain on the basis of ***the laws of nature and of nature's* God**. In so doing, the Declaration established the laws of nature and of nature's God as the express legal context for the nation. That is, the independence of the nation and its claim to legal validity depend on the existence of this legal context and its applicability to America. By implication, so long as the United States exists, this legal context governs its institutions and laws.

> *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, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.*

The Declaration relies exclusively on the laws of nature and of nature's God for its legal justification. This is a significant departure from prior documents, which relied on the British Constitution, the rights of Englishmen, and/or the various colonial charters and compacts. In discarding these other legal bases, the Declaration makes it clear that the former legal bases no longer apply to the United States.

The laws of nature and nature's God. The "laws of nature and of nature's God" was not a new or novel legal concept. Rather, it was a short-hand phrase for the *law of nature* (as defined by Blackstone, Grotius, and others), and the *law of nature's God* (historically referred to as the divine law, the revealed law, or the law of God). In other words, the Declaration expressly incorporated God's will impressed upon the creation and the law of God as revealed in the Bible into the legal context of the United States, and made these the basis of all our laws.

> *The highest glory of the American Revolution was this: it connected, in one indissoluble bond, the principles of civil government with the principles of Christianity. "From the day of the Declaration . . . they (the American people) were bound by the laws of God, which they all, and by the laws of The Gospel, which they nearly all, acknowledged as the rules of their conduct.* [John Quincy Adams (July 4, 1821).]

The nature of the legal system. The nature of the legal system embraced by the Declaration is one that: 1) acknowledges the Creator God, as well as His laws of creation; 2) affirms the general tenets of God's law, to wit, that all men are created equal and have certain inalienable rights; and 3) recognizes that the form of government is a function of the consent of the governed to be "instituted among men," not endowed by God.

> *We hold these Truths to be selfevident, 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. That to secure these Rights, Governments are instituted among Men,*

deriving their just Powers from the Consent of the Governed.

The Declaration also acknowledges that God is the supreme Lawgiver (man's legal rights are endowed by the Creator and nations are governed by the laws of nature's God), that God is the supreme Governor (implied in the Declaration's appeal to the Protection of Divine Providence), and that God is the supreme Judge of men and nations.

We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions . . . 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.

Binding On Nation And States.

Once the Declaration was signed, it defined the non-negotiable principles essential to the lawful formation of any civil government in the United States.

If the Declaration of Independence is not obligatory, our entire political facbric has lost its magna carta, and is without any solid foundation. But if it is the basis of our form of government, it is the true expositor of the principles and terms we have employed. [J. Taylor, New Views of the Constitution of the United States (1823).]

Foundation for the U.S. Constitution. The Declaration, inasmuch as it chartered the nation, established the legal context upon which any federal government, including the U.S. Constitution, would necessarily be dependent. In this respect, the Constitution may be viewed as the bylaws of the nation which implemented the purposes of its charter.

This was the platform upon which the Constitution of the United States had been erected. Its VIRTUES, its republican character, consisted in its conformity to the principles proclaimed in the Declaration of Independence, and . . . its stability and duration . . . was to depend upon the stability and duration in the hearts and minds of the people of that virtue, or in other words, of those principles, proclaimed in the Declaration of Independence, and embodied in the Constitution of the United States. [John Quincy Adams (April 30, 1839).]

Binding on all the states. The legal context of the Declaration applied to the original thirteen states and their governments by virtue of the fact that they each signed the Declaration, agreeing to be bound by its terms. All subsequent states have been admitted on the basis of an "equal footing" or "same footing" as the original states. This is made evident by the admission statutes of each of the states, as well as such laws as the Northwest Ordinance. In other words, the legal context and fundamental law of the United States applicable to the original states is also applicable to all the states.

And whenever any of the said States shall have sixty thousand free inhabitants therein, such

> *State shall be admitted by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever.* [Northwest Ordinance (July 13, 1787).]

The cornerstone of liberty in America. The Declaration, having established a uniform legal context throughout the United States based on the laws of nature and of nature'sGod, is the cornerstone of liberty for the nation. By it, the laws of God and the attendant liberty they bring are made a part of the legal fabric of the nation and all of its component parts. By virtue of the Declaration, the Bible (the law of nature's God) is made a competent legal authority in the United States, sufficient to guide and inform the workings of government, the framing of laws and the pronouncement of judgment. By it, the United States has the legal heritage of a republic founded on biblical principles of law. By virtue of the Declaration, the United States can truly claim to have been founded as a Christian nation.

> *The laws of the Christian system, as embraced by The Bible, must be respected as of high authority in all our courts and it cannot be thought improper for the officers of such government to acknowledge their obligation to be governed by its rule . . .. [Our government] originating in the voluntary compact of a people who in that very instrument profess the Christian religion, it may be considered not as republic Rome was, a Pagan, but a Christian republic.* [Judge Nathaniel Freeman (1802).]

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