The Bible and the Constitution

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PART I.  INTRODUCTION

Is the United States Constitution consistent with the Holy Bible?\(^1\)

For many people today, and especially for most lawyers, legal scholars and judges, the question is both irrelevant and silly. Their answer would be a simple, “Who cares?” Legal thought is dominated today, as it has been for much of the last century, by legal realism\(^2\) and its progeny, including law and economics,\(^3\) critical legal studies,\(^4\) and critical race theory.\(^5\) All of these are man-centered theories and worldviews; they assume that the positive law is whatever we humans make it to be, and that there is no external, divine standard by which to evaluate human law.\(^6\) In the words of the late Francis Schaeffer, one of the most renowned Christian thinkers of the twentieth century, American legal thinking has shifted “away from a world view

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\(^1\) Unless otherwise noted, all Scripture quotes in this article are from the Holy Bible, New International Version, \textcopyright 1973, 1978, 1984 International Bible Society. All rights reserved throughout the world. Used by permission of International Bible Society.


\(^6\) “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,” Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
that was at least vaguely Christian in people’s memory (even if they were not individually Christian) toward something completely different – toward a world view based on the idea that the final reality is impersonal matter or energy shaped into its present form by impersonal chance.”

Yet there are still some of us for whom the question matters very much. If you are a Christian; if you believe that God is not only the creator of everything that exists but also the supreme lord and master of the universe; and if you are a lawyer or a citizen concerned about


8 Many people and religious groups with widely differing beliefs self-identify as “Christians.” As I use the term “Christian,” it means the following: One who believes that all human beings are sinful (Romans 3:23) and therefore incapable of pleasing God by our efforts to be good (Isaiah 64:6); that all of us deserve death and eternal damnation for our wrongdoing (Romans 6:23); and that God Himself took on human form, Jesus of Nazareth (John 1:1-5, 29-34), lived a perfect life (Hebrews 7:26-28), and died a most horrific death that He did not deserve (Matthew 27:26-54), paying the penalty for the sins of all humanity (Romans 5:8), and returning from death to life (Acts 2:24; Revelation 1:18) so that all those who place their faith in Him can be forgiven, have a right relationship with God, and spend eternity with God (John 3:16). Christianity is based on the conviction that the Bible is God’s written word, containing no error, and authoritative in all that it teaches; 2 Timothy 3:16 (“All Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness”).

9 “Then the Lord answered Job out of the storm. He said: . . . ‘Where were you when I laid the earth’s foundation? Tell me, if you understand. Who marked off its dimensions? Surely you know! Who stretched a measuring line across it? On what were its footings set, or who laid its cornerstone – while the morning stars sang together and all the angels shouted for joy?’” Job 38:1, 4-7.

10 Scripture gives this description of Jesus’ power and authority:

I saw heaven standing open and there before me was a white horse, whose rider is called Faithful and True. With justice he judges and makes war. His eyes are like blazing fire, and on his head are many crowns. He has a name written on him that no one knows but he himself. He is dressed in a robe dipped in blood, and his name is the Word of God. The armies of heaven were following him, riding on white horses and dressed in fine linen, white and clean. Out of his mouth comes a sharp sword with which to strike down the nations. “He will rule them with an iron scepter.” He treads the winepress of the fury of the wrath of God Almighty. On his robe and on his thigh he has this name written: KING OF KINGS AND LORD OF LORDS. (Revelation 19:11-16.)
matters of law and government, then the question of whether our human laws – including particularly the United States Constitution, the fundamental basis of all American positive law – are consistent with God’s perfect will is neither irrelevant nor silly. It is, in fact, an enormously important question.

A. GOD’S LAW AND HUMAN LAW

Throughout history, Christian legal scholars have agreed that if human positive law is inconsistent with God’s divine law, there is a serious problem.\textsuperscript{11}

In his historic \textit{Summa Theologica}, St. Thomas Aquinas defined “natural law” as the “participation of the eternal law [i.e., the law of God] in the rational creature [man].”\textsuperscript{12} He believed that true human reason is the imprint of God’s truth on human beings, resulting in our ability to seek and understand God’s natural law through divinely-focused human reason,\textsuperscript{13} and he equated this true law of reason to “justice.”\textsuperscript{14} Concerning the relationship between human laws and the natural law of God, Aquinas has this to say:

\textit{That which is not just seems to be no law at all; wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature . . . . Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.}\textsuperscript{15}

\textsuperscript{11} Whether such ungodly human laws deserve any respect or obedience, simply because they are positive laws, is a more difficult question, and one that goes beyond the scope of this article as a general matter.

\textsuperscript{12} \textsc{Thomas Aquinas}, \textit{Quest. 91: Of the Various Kinds of Law, in Treatise on Law} 15 (Gateway Ed. 1960).

\textsuperscript{13} \textit{Id.} at 15-16 ("[T]he light of natural reason, whereby we discern what is good and what is evil, is nothing else than an imprint on us of the Divine light.")

\textsuperscript{14} \textit{Id.} at 15.

\textsuperscript{15} \textsc{Thomas Aquinas}, \textit{Question 95, Of Human Law, in Treatise on Law, supra} note 12, at 78.
At other points in the *Summa*, Aquinas states that a “tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law,”" and that human law, “in so far as it deviates from reason, it is called an unjust law, and has the nature, not of law but of violence.”’

So in the thinking of Thomas Aquinas, still revered today as one of history’s greatest theological scholars on issues of law and government, if a human law (including, presumably, a constitution) is inconsistent with the principles of God’s true reason and justice that come from the eternal law and are perceived through the natural law, it is not a law, but a “violence” and a “perversion of law.”

Thomas Aquinas may not have been at the forefront of colonial legal thinking at the time of the American Revolution, but there is no doubt that William Blackstone was. Blackstone’s *Commentaries on the Laws of England* were the principal tool for training American lawyers in the late colonial and revolutionary periods, and would continue to fill that role until well into the Nineteenth Century. Blackstone, like Aquinas, believed firmly that there is a perfect, eternal law written by God (the “Law of Nature”), and that the validity of human laws depends on their conformance with that higher law. He said that as “man depends absolutely upon his maker for


17 THOMAS AQUINAS, *Question 93, Of the Eternal Law, in Treatise on Law*, supra note 12, at 44.


everything, it is necessary that he should in all points conform to his maker’s will.”

Specifically with regard to human laws that do not conform to God’s standards, Blackstone had this to say:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligations to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediatly or immediately, from this original.

Many other scholars could be cited; perhaps the point is self-obvious. If one believes that the universe has an omniscient, omnipotent Creator who has written laws for human conduct, it would not make much sense to say that the divine standard is irrelevant in evaluating human laws. One of the greatest recent proponents of this position, Dr. Martin Luther King, Jr., said it this way:

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court’s decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: “How can you advocate breaking some laws and obeying others?” The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that “an unjust law is no law at all.” Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal law and natural law.

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20 Id. at 39.

21 I.e., as old as the human race.

22 BLACKSTONE, supra note 19, at 41.

23 Pastor and leader of the American civil rights movement; born in 1929, assassinated in 1968.

24 Martin Luther King, Jr., Letter From Birmingham Jail, in JEFFREY A. BRAUCH, A
B. CONSTITUTIONAL IMPLICATIONS

Under the American system of government, the United States Constitution is the supreme law of the land. Federal and state judges and executive officers, members of Congress, and members of the state legislatures are all required to take an oath or make an affirmation to support the Constitution. It is universally accepted in American constitutional law that all government officials, including Supreme Court Justices and other federal judges, must follow the Constitution above all else.

Where would this leave the faithful Christian who serves, let’s say, as a Justice on the United States Supreme Court? He knows as a constitutional scholar that the text of the Constitution must reign supreme over all other sources on questions of American law. But he also knows from reading Aquinas, Blackstone and King that any human law not consistent with God’s true, higher law is invalid, violence, a perversion of law, and arguably not to be obeyed. What should he do?

Indeed, before our faithful Christian could even make it to the United States Supreme Court.

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25 U.S. CONST. art. VI, cl. 2.

26 U.S. CONST. art. VI, cl. 3. Only the President of the United States takes a different, more detailed oath, promising that he or she “will to the best of my ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 8.


28 For simplicity, masculine pronouns will be used in the old-fashioned, gender neutral sense. Obviously, Supreme Court Justices and other federal judges can be either female or male.

29 Bradley P. Jacob, Back to Basics: Constitutional Meaning and “Tradition,” 39 TEX. TECH L. REV. 261, 264-74 (2007); see also infra notes 149-163 and accompanying text.
Court, this issue might cause him serious problems. A federal judicial appointment leads the candidate through Senate Judiciary Committee hearings on the way to a decision by the Senate whether to give its “advice and consent”\(^{30}\) to the appointment. To get a sense of how Christian thinking could cause problems for a judicial nominee during the confirmation process, consider the following discussion of “natural law” from the opening statement of then-Senator and Chairman of the Senate Judiciary Committee, now Vice President, Joseph Biden at the committee confirmation hearing for Justice Clarence Thomas on September 10, 1991:

This committee begins its sixth set of Supreme Court confirmation hearings held in the past five years, a rate of change at the Supreme Court unequaled in recent times. If you are confirmed, Judge Thomas, you will come to a Supreme Court in the midst of this vast change. In four years, Justices Powell, Brennan and Marshall will have been replaced by Justices Kennedy, Souter and Thomas. Because of these changes, many of the most basic principles of constitutional interpretation – of the meaning that the Supreme Court gives to our Constitution – are being debated in this country in a manner unlike anything we have seen since the New-Deal era. In this time of change, fundamental constitutional rights which have been protected by the Supreme Court for decades are being called into question. In this time of change, the Supreme Court’s self-restraint from interference in fundamental social decisions about regulation of our health care, environment and economy is also being called into question.

Judge Thomas, you come before this Committee, in this time of change, with a philosophy different from that which we have seen in any Supreme Court nominee during my 19 years in the Senate, for, as has been widely discussed and debated, you are an adherent of the view that “natural-law” philosophy should inform the Constitution. Finding out what you mean when you say you would apply a “natural-law” philosophy to the Constitution is, in my view, the most important task of these hearings. This is particularly true because of the period of vast constitutional change in which your nomination comes before us.

To explain why this is such an important question, we need only look at three types of natural-law thinking which have in fact been adopted by the Supreme Court in the past – and which are being discussed by constitutional scholars today. The first of these views sees natural law as a “moral code” – a set of rules saying what is right and what is wrong – which the Supreme Court should impose upon the country. In this view, personal freedom to make moral choices about how we live our own lives should be replaced by a morality imposed on the conduct of our private and family lives by the Court. The Supreme Court actually took this

\(^{30}\) U.S. CONST. art. II, § 2, cl. 2.
approach in the past, holding in 1873, for example, that women could not become lawyers because it was not, as the Court put it, “in their nature.”

Now, no one wants to go back that far today, but there are natural-law advocates who extol a 20th-century version of this philosophy, for they believe that it is the job of the courts to judge the morality of all of our activities, wherever they occur – paying no respect to the privacy of our homes and bedrooms. They believe that courts should forbid any activities contrary to their view of morality or natural law. Those who subscribe to this “moral-code” view of natural law call into question a wide range of our personal and family rights – from reproductive freedom, to each individual’s choice over procreation, to the very private decision we now make about what is or is not a family. They want to see the government make these choices for us, by applying their “values and norms” – or by judges applying natural law. Needless to say, Judge Thomas, this sort of natural-law philosophy is one the Nation can not accept.

But it is not the only radical natural-law philosophy that is being debated by scholars, for there is another group that wants to re-invigorate another period in the Supreme Court’s past, when that Court used natural law to strike down a whole series of Government actions aimed at making this nation a better place for all Americans. Those natural-law rulings struck down child labor laws, minimum wage laws, and laws that required safe working conditions. They held that the natural-law “freedom of contract” and “right to property” created rights for businesses and corporations that rose above our efforts to prevent such ills. That put these so-called “economic rights” into a zone of protection so high that even reasonable laws aimed a curbing corporate excesses were struck down.

Now, again, no one is proposing to take us all the way back to that era, but there are those who wish to employ the same reasoning that was used in that era. Today’s natural-law proponents of what they term “new economic rights” and “new property rights” have called into question many of the most important laws enacted in this century:

* protection of the environment, our air and water;
* regulation of child-care and senior citizen facilities;
* even the constitutionality of social Security.

Now, Judge Thomas, you have made it clear that you do not subscribe to the most extreme of these views, but you have said that you find some of these views “attractive” and that you support the idea of an “activist Supreme Court that would strike down laws regulating economic rights.” And again, this is a vision of natural law that we have moved beyond and that most Americans have no desire to return to.

There is a third type of natural law – it is the one that mirrors how the Supreme Court has understood our Constitution for the bulk of this century, and it is the one that I subscribe to. In this view of natural law, the Constitution should protect personal rights falling within the zone of privacy, speech and religion most zealously. These personal freedoms should not be restricted by a moral code imposed on us by the Supreme Court, or by unjust laws passed by legislatures. Indeed, the Supreme Court has protected these freedoms by striking down laws that would:
* prohibit married couples from using contraception;
* deny the right of people to marry whomever they wish;
* tell parents they cannot teach their children a second language or send them to private schools.

But while recognizing that natural law and our Constitution protect these rights, the Court has also recognized that government must act to protect us from many dangers of modern life – the government should stop polluters from polluting, stop businesses from creating unsafe working conditions, and so on. Yes, these government actions do limit freedoms – the “freedom to pollute”; or as we saw in North Carolina recently, the “freedom” of a factory owner to lock his employees into his building, where 25 of them perished in a fire. But this is the kind of balanced liberty we expect our government to provide. This is the balance that the framers of our Constitution enshrined in that great Document. They wanted, to use their words, an “energetic government” – but they also wanted that government to protect fundamental personal freedoms. Today, we have achieved that balance by having the Supreme Court extend great protection to personal freedoms, while declining to block laws that reasonably regulate our economy or society. Adopting a natural-law philosophy that upsets that balance –
* either by lessening the protections given to rights falling within the zone of personal and family privacy, speech and religion
* or by lessening our power to protect the environment, to regulate corporate excesses, or to create institutions like Social Security

– would be a grave and serious mistake. Judge Thomas, there are signs in your writings and speeches that you accept this balance. But there are also signs that you would apply natural law to effect changes in this balance –
* to replace our freedom to make personal and family choices with a government-imposed moral code,
* and to thrust the Court into economic and regulatory disputes that it now stays out of.

If this committee is to endorse your confirmation, we must know with certainty that neither of these radical constitutional departures is what you have in mind when you talk about natural law. So, Judge, over the course of these hearings, I will be asking you about how your natural-law philosophy applies in each of these areas – both to our personal freedoms and to economic issues. It will take some time to cover it all, but it is important and we will cover it carefully.

In closing, Judge Thomas, I want to return to where I started – the importance of your nomination. Some people say that the Supreme Court is already “conservative,” and they ask what difference the addition of one more conservative can make to the Court. I reject this argument. First, I do not deny the right of the President to nominate a conservative – I fully expect him to do so. And so I fully expect the Supreme Court to be a more conservative body after Justice Marshall’s successor is confirmed than it was before he resigned. But such an additional move to the right, which I expect, pales in comparison to the radical change in direction that some are urging on the Court under the banner of natural law.

Thus, we are not seeking here to learn if you are a conservative – we expect no
less. Instead, what we must find out is what sort of natural-law philosophy you would employ as a Justice of the Supreme Court, for that Court is in transition and if you are confirmed, you will play a large role in determining what direction it will take in the future. Because of your youth, Judge Thomas, you would be the first Supreme Court Justice approved by this committee who will probably decide more cases in the 21st century than you will in the 20th century. To acknowledge that fact alone is to recognize the unique significance of your nomination and the care with which this Committee must consider it.\(^{31}\)

So our faithful Christian who is nominated to the Supreme Court will not only have to wrestle with his own convictions concerning the impact of God’s law on human law, but also with ways to express those convictions that will not be viewed as a lack of commitment to the Constitution and the rule of law.

A correct understanding of the Bible/Constitution relationship is neither easy nor self-obvious, and the application of that relationship in the professional life of a God-fearing judge raises more difficult questions. Consider the different approaches of two brilliant legal scholars, who also happen to be the two most outspoken Catholic Christians on the current Supreme Court: Antonin Scalia and Clarence Thomas.

As referenced by Senator Biden during the confirmation hearings, Justice Thomas has made comments suggesting that principles of natural law – God’s eternal law as written on the human heart\(^{32}\) – are relevant in thinking about positive American law. Just a few years before his nomination to the Supreme Court, he wrote that

\[\text{[t]here is more to governance than a mere distribution of property and wealth.}\]

\(^{31}\) Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearing 102-1048 Part 1 Before the S. Comm. on the Judiciary, 102d Cong. 1-5 (1991) (opening statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary), available at http://www.gpoaccess.gov/congress/senate/judiciary/sh102-1084pt1/1-5.pdf. This dialogue over natural law was the first impediment to Justice Thomas’ confirmation to the Supreme Court, although Professor Anita Hill’s allegations of sexual harassment, which came later in the process, would be the best remembered aspect of those hearings.

\(^{32}\) See supra Part I-A.
After all, Americans venerate the Constitution not only because it is efficient but also because it is inspiring. This is the powerful element of the American political tradition President Reagan appeals to in his frequent quotation of the political theorist and pamphleteer Tom Paine: “We have it within our power to begin the world over again.” Paine captured well the revolutionary meaning of basing a particular nation on a universal truth, the truth of human equality. Edward S. Corwin described this many years ago as the “higher law background” of the Constitution. And Martin Luther King, Jr., brought out the contemporary significance of “higher law” well, in his famous “Letter from Birmingham Jail.” Paraphrasing St. Thomas Aquinas, King declared “A just law is a man-made code that squares with the moral law or the law of God . . . . An unjust law is a human law that is not rooted in eternal law and natural law.”

And since his confirmation to the Court, Justice Thomas has written in opinions that the Declaration of Independence – firmly based on principles of God’s natural law – is relevant to the Supreme Court in interpreting the Constitution:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence (“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”).


34 “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. 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.” The DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776) (emphasis added).

Justice Scalia, although he has publicly associated himself with historic Christian


doctrine in the Catholic tradition as much as has Justice Thomas, takes a very different position


on the use of God’s law by an American judge. Consider the following:


In my view, a right of parents to direct the upbringing of their children is among


the “unalienable Rights” with which the Declaration of Independence proclaims


“all Men . . . are endowed by their Creator.” And in my view that right is also


among the “other [rights] retained by the people” which the Ninth Amendment


says the Constitution’s enumeration of rights “shall not be construed to deny or


disparage.” The Declaration of Independence, however, is not a legal prescription


conferring powers upon the courts; and the Constitution’s refusal to “deny or


disparage” other rights is far removed from affirming any one of them, and even


farther removed from authorizing judges to identify what they might be, and to


enforce the judges’ list against laws duly enacted by the people. Consequently,


while I would think it entirely compatible with the commitment to representative
democracy set forth in the founding documents to argue, in legislative chambers
or in electoral campaigns, that the state has no power to interfere with parents’
authority over the rearing of their children, I do not believe that the power which
the Constitution confers upon me as a judge entitles me to deny legal effect to
laws that (in my view) infringe upon what is (in my view) that unenumerated
right. 36


At an international seminar in Italy in May of 1996, Justice Scalia was asked, “is it
possible that some common, fundamental ethics can give something to the positive law?” – a
reference to natural law or divine principles. His response was clear:


Yes, of course, and it must. But that process is achieved not within the context of
government, but outside the context of government, with free men and women
persuading one another and then adopting a governmental system that embodies
those Christian precepts. I am not saying that the American Constitution did not
embody moral values that were central to Christianity. Of course. My court has
said that. But once the Constitution was put in place, it is the Constitution that
governs my actions. And it is that that must be amended, and it is amended to
conform more closely to natural law, if you wish. But do it by persuading me, I’m
a worldly judge. I just do what the Constitution tells me to do. 37


original).

37 Antonin Scalia, Of Democracy, Morality, and the Majority, 26 ORIGINS 81, 90 (1996),
reprinted in DOUGLAS W. KMIEC ET AL., THE AMERICAN CONSTITUTIONAL ORDER: HISTORY,
These two faithful Christian Supreme Court Justices, Antonin Scalia and Clarence Thomas, both believe that God and His law are real, but they have very different views on the relevance of God’s law on their work as judges. Justices Thomas seems to believe that higher law principles, whether perceived directly or through the Declaration of Independence, are applicable when the Constitution deviates from them. Justice Scalia believes that higher law principles are for the people and the legislature to apply when making positive law, but that his job as a judge is to apply that positive law – specifically the United States Constitution – regardless of whether it seems to him to violate God’s principles of law. At the 1996 seminar mentioned above, he specifically rejected any use of the Declaration as a back-door approach to natural law principles:

Well, unfortunately, or to my mind fortunately, the Supreme Court of the United States, no federal court to my knowledge, in 220 years has ever decided a case on the basis of the Declaration of Independence. It is not part of our law. It expresses the underlying sentiment which gave rise to the creation of this Constitution. But it is the Constitution that is the document that governs us.38

Who is right – Scalia or Thomas? Is a judge bound to follow principles of God’s law when they conflict with the positive law, including perhaps “overruling” the Constitution of the United States? Or is the job of the judge or Justice simply to apply the Constitution and other positive law before him, leaving questions of eternal truth for legislative policy makers? If two brilliant, theologically astute legal minds such as Antonin Scalia and Clarence Thomas cannot agree, it seems unlikely that a consensus decision can be reached on that point.

This is the reason for this article. It would appear that the only way out of this dilemma will be if the Constitution itself is consistent with the principles of God’s higher law. If this is
true, then the judge who believes that the Constitution is supreme as a matter of positive law and the judge who believes that the Constitution must yield to God’s law when there is a conflict will end up in the same place. If there is no conflict – if everything in the Constitution is consistent with the requirements of God’s law – then our faithful Christian judge can apply the Constitution continually and in good conscience. This article is an attempt to determine whether the two are indeed consistent.

There are several ways to attempt to discern the mind and will of God, including His will with respect to human law. God speaks to the human heart through His Holy Spirit;\(^{39}\) He speaks through the human conscience;\(^{40}\) He speaks through our best human reason, when we seek Him sincerely, because of the image of God in every person;\(^{41}\) and He speaks through His written word, the Bible.\(^{42}\) Most of these raise significant evidentiary difficulties; I may be convinced that the Holy Spirit has spoken some truth into my mind or my heart, but I will have a difficult time convincing most readers of that assertion. In addition, although Natural Law has raised much intellectual debate over the centuries, there is strong agreement among scholars that the

\(^{38}\) *Id.*

\(^{39}\) *Mark* 13:11 (“Whenever you are arrested and brought to trial, do not worry beforehand about what to say. Just say whatever is given you at the time, for it is not you speaking, but the Holy Spirit”); *Romans* 9:1 (“I speak the truth in Christ — I am not lying, my conscience confirms it in the Holy Spirit”).

\(^{40}\) *Romans* 2:15 (“they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them”).

\(^{41}\) This is generally referred to as the Natural Law; see AQUINAS, *supra* note 12, at 14-16.

\(^{42}\) *2 Timothy* 3:16 (“All Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness”); *Psalm* 119: 97-98 (“Oh, how I love your law! I meditate on it all day long. Your commands make me wiser than my enemies, for they are ever with me.”).
written word of Scripture is the surest and clearest statement of God’s truth. For example, Thomas Aquinas said:

Even as regards those truths about God which human reason could have discovered, it was necessary that man should be taught by a divine revelation; because the truth about God such as reason could discover, would only be known by a few, and that after a long time, and with the admixture of many errors. Whereas man’s whole salvation, which is in God, depends upon the knowledge of this truth. Therefore, in order that the salvation of men might be brought about more fitly and more surely, it was necessary that they should be taught divine truths by divine revelation. It was therefore necessary that, besides philosophical science built up by reason there should be a sacred science learned through revelation.\(^{43}\)

Blackstone confirmed this conviction about the Bible as the primary and most trustworthy revelation of God’s will, including His perfect law:

Yet undoubtedly the revealed law is (humanly speaking) of infinitely more authority than 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.\(^{44}\)

So rather than trying to answer the broad question, “Is the United States Constitution consistent with the perfect will of God?” we will keep our focus on the narrower and more answerable question, “Is the Constitution consistent with the Bible?”

**PART II. GOD-MANDATED CONSTITUTIONAL GOVERNMENT?**

The first question to ask is whether the Bible gives any direct, explicit instruction concerning God’s preferred model for constitutional government, or government in general. If God has clearly ordained representative democracy with three branches, or monarchy, or communism, or any other governmental/legal structure, then that decision will be determinative.

Unfortunately, one searches in vain for any clear biblical mandate for a system of law and government.

Divine authorization for human government begins with the “dominion mandate” of Genesis 1:

So God created man in his own image, in the image of God he created him; male and female he created them. God blessed them and said to them, “Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish of the sea and the birds of the air and over every living creature that moves on the ground.”

God gives human beings authority, and a command, to subdue the earth, but no specifics on how to rule it. After sin entered the world, and after almost all of humanity was destroyed by flood, the regrowing human race attempted to unite in one place with a common culture and, presumably, government. God frustrated this effort, and scattered humanity around the earth with different languages and cultures, thereby rendering impossible any global system of law and government.

The legal and governmental systems mentioned in the Bible are almost entirely variations on monarchy – ultimate authority in the hands of one individual. “Nations” are described as an outgrowth of families, descendants of a single man, with governing authority apparently passed

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44 BLACKSTONE, supra note 19, at 42.


46 Genesis 3.

47 Genesis 6-8.


49 Genesis 11:5-9.

50 1 Samuel 8:5b (“now appoint a king to lead us, such as all the other nations have”) (emphasis added).
down through a patriarchal system. By the time of Abraham, there were already nations with kings. The patriarchs Abraham, Isaac, and Jacob all interacted with the kings of nations.

Egypt was ruled by Pharaoh, a king, whose draconian stubbornness in the face of God’s demands to release the people of Israel resulted in the multiple plagues, the death of all firstborn sons, and the destruction of a large Egyptian army.

In spite of Pharaoh’s best efforts, God’s chosen nation of Israel successfully overthrew slavery under the Egyptians and moved into the Promised Land, becoming a geo-political nation as well as a familial one. The legal and governmental systems of Old Testament Israel

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51 See, e.g., *Genesis* 10:32 (“These are the clans of Noah’s sons, according to their lines of descent, within their nations. From these the nations spread out over the earth after the flood”); *Genesis* 12:1-2a (“The Lord had said to Abram, “Leave your country, your people and your father’s household and go to the land I will show you. I will make you into a great nation and I will bless you”).

52 See, e.g., *Genesis* 14:8-9 (“Then the king of Sodom, the king of Gomorrah, the king of Admah, the king of Zeboiim and the king of Bela (that is, Zoar) marched out and drew up their battle lines in the Valley of Siddim against Kedorlaomer king of Elam, Tidal king of Goiim, Amraphel king of Shinar and Arioch king of Ellasar — four kings against five”).

53 See, e.g., *Genesis* 20; *Genesis* 26:1-16.

54 *Exodus* 7-10.

55 *Exodus* 11-12.


57 1 *Chronicles* 16:13 (“O descendants of Israel his servant, O sons of Jacob, his chosen ones”); *Psalm* 135:4 (“For the Lord has chosen Jacob to be his own, Israel to be his treasured possession”); *Isaiah* 41:8-9 (“But you, O Israel, my servant, Jacob, whom I have chosen, you descendants of Abraham my friend, I took you from the ends of the earth, from its farthest corners I called you. I said, ‘You are my servant’; I have chosen you and have not rejected you”).

58 *Exodus* 33:1-3a (“Then the Lord said to Moses, ‘Leave this place, you and the people you brought up out of Egypt, and go up to the land I promised on oath to Abraham, Isaac and Jacob, saying, “I will give it to your descendants.” I will send an angel before you and drive out the Canaanites, Amorites, Hittites, Perizzites, Hivites and Jebusites. Go up to the land flowing with milk and honey’”).
deserve special attention because no other country in human history has ever had, or ever will have, a particular relationship with God like that of Israel before the coming of the Messiah.\textsuperscript{59}

In the books of Exodus through Joshua, Israel was led first by Moses, then by Joshua. Each of these men was simply referred to as the leader,\textsuperscript{60} chosen by God.\textsuperscript{61} They appear to have led Israel militarily, politically, and to some extent spiritually, but we are given no description of any governmental structures. Scripture does suggest that leadership of Israel included a judicial function, deciding legal disputes among the people.\textsuperscript{62}

After the conquest of Canaan and the death of Joshua, the leaderless people of Israel were unfaithful to God and began to worship idols. Because of this, God allowed raiders and invaders

\begin{footnotesize}
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\item \textsuperscript{59} Since the death and resurrection of Christ, Israel no longer functions as God’s unique chosen people; rather, God’s people are the followers of Jesus in all nations. Ephesians 3:6 (“through the gospel the Gentiles are heirs together with Israel, members together of one body, and sharers together in the promise in Christ Jesus”); 1 Peter 2:9-10 (“But you [referring to Christians] are a chosen people, a royal priesthood, a holy nation, a people belonging to God, that you may declare the praises of him who called you out of darkness into his wonderful light. Once you were not a people, but now you are the people of God; once you had not received mercy, but now you have received mercy”).
\item \textsuperscript{60} Micah 6:4 (“I brought you up out of Egypt and redeemed you from the land of slavery. I sent Moses to lead you”); Deuteronomy 1:38 (“But your assistant, Joshua son of Nun, will enter [the Promised Land]. Encourage him, because he will lead Israel to inherit it”).
\item \textsuperscript{61} Exodus 3:7, 9-10 (“The Lord said [to Moses] . . . ‘now the cry of the Israelites has reached me, and I have seen the way the Egyptians are oppressing them. So now, go. I am sending you to Pharaoh to bring my people the Israelites out of Egypt’“); Joshua 1:1, 5-6 (“After the death of Moses the servant of the Lord, the Lord said to Joshua son of Nun, Moses’ aide: . . . ‘No one will be able to stand up against you all the days of your life. As I was with Moses, so I will be with you; I will never leave you nor forsake you. Be strong and courageous, because you will lead these people to inherit the land I swore to their forefathers to give them’“).
\item \textsuperscript{62} Exodus 18:13-16 (“The next day Moses took his seat to serve as judge for the people, and they stood around him from morning till evening. When his father-in-law saw all that Moses was doing for the people, he said, ‘What is this you are doing for the people? Why do you alone sit as judge, while all these people stand around you from morning till evening?’ Moses answered him, ‘Because the people come to me to seek God’s will. Whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God’s decrees and laws’“).
\end{itemize}
\end{footnotesize}
to enter the land, plunder the Israelites, and defeat them in battle. 63

Then the Lord raised up judges, who saved them out of the hands of these raiders. Yet they would not listen to their judges but prostituted themselves to other gods and worshiped them. Unlike their fathers, they quickly turned from the way in which their fathers had walked, the way of obedience to the Lord’s commands. Whenever the Lord raised up a judge for them, he was with the judge and saved them out of the hands of their enemies as long as the judge lived; for the Lord had compassion on them as they groaned under those who oppressed and afflicted them. But when the judge died, the people returned to ways even more corrupt than those of their fathers, following other gods and serving and worshiping them. They refused to give up their evil practices and stubborn ways. 64

During this period, Israel was a theocracy – God ruled the nation in a direct way, 65 and when He saw a need He raised up a human judge as an intermediary. These judges – who included a number of familiar Bible story characters such as Deborah, 66 Gideon, 67 and Samson 68 – were primarily military leaders for Israel, 69 but also performed some functions of civilian government. 70

Eventually, the people of Israel began to clamor for a human king, like the leaders of

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63 Judges 2:8-15.

64 Judges 2:16-19.

65 Derek H. Davis, Law & The Sacred: Competing Notions of Law in American Civil Religion, 5 LTC 265, 275 (“Numerous societies, inspired by the covenantal relationship between God and Old Testament Israel, have sought to install theocratic frameworks that would make them God’s most faithful servant and witness”); ROUSAS J. RUSHDOONY, INSTITUTES OF BIBLICAL LAW 281 (1973), reprinted in HERBERT W. TITUS, GOD, MAN AND LAW: THE BIBLICAL PRINCIPLES 265 (1994) (“God as King of Israel ruled from His throne room in the tabernacle”).


67 Judges 6:11-8:32.


69 Judges 2:16.

70 See, e.g., Judges 4:4-5.
other nations:

So all the elders of Israel gathered together and came to Samuel at Ramah. They said to him, “You are old, and your sons do not walk in your ways; now appoint a king to lead us, such as all the other nations have.”

The prophet Samuel resisted this suggestion, but God told him, “Listen to all that the people are saying to you; it is not you they have rejected, but they have rejected me as their king . . . . Listen to them and give them a king.” The Israeli monarchy lasted as long as Israel survived as a free people, first with Saul, David, and Solomon ruling over a unified nation, and then with the division into the Kingdom of Israel and the Kingdom of Judah, each under a series of kings. These monarchies came to an end when the northern kingdom of Israel was conquered by Assyria and the southern kingdom of Judah was conquered by Babylon. For the remainder of the Old Testament period, Israel and Judah remained under the control of Assyria, Babylon, and later the Persian Empire, although the Jewish people were allowed to

71 1 Samuel 8:4-5.
72 1 Samuel 8:6.
73 1 Samuel 8:7, 22.
74 Saul reigned c. 1040-1017 B.C. John Roberts Dummelow, A Commentary on the Holy Bible 181 (1920).
75 David reigned c. 1017-970 B.C. Id.
77 2 Kings 17:3-6; this occurred c. 722 B.C. Hutton Webster, Ancient History 57 (1913).
78 2 Kings 25; this occurred c. 586 B.C. Id. at 60.
79 2 Chronicles 36:20.
resettle Jerusalem and Judah under the Persians.\textsuperscript{80}

For the entire New Testament time period, much of the world – including the lands known as Israel and Judah – were under the control of the Roman Empire, ruled by kings or emperors with the title “Caesar.”\textsuperscript{81} The local governing authorities in the days of Jesus and the early church, including Herod the Great,\textsuperscript{82} Herod Antipas,\textsuperscript{83} and Governor Pontius Pilate,\textsuperscript{84} held their offices under the authority of the Roman Caesar.

Throughout all of these biblical era governments, mostly variations on monarchy, the Bible is silent on any questions of comparative government and constitutional law. No particular form of human constitution is held up as ideal, nor is any form criticized.

In this context, it is worth noting one historical misuse of Scripture. Before the American revolution, one of the arguments raised by some of those advocating separation from England was that monarchy was rejected by God in the Bible, and was therefore an inappropriate form of human government. This was argued as a justification for the American Revolution, to throw off an ungodly monarchy and replace it with representative democracy, which was presumably approved by God. The primary Scripture text is from 1 Samuel 8, where the people of Israel began their requests that would eventually lead to the anointing of Saul as the first king of Israel.

Samuel told all the words of the Lord to the people who were asking him for a king. He said, “This is what the king who will reign over you will do: He will take

\textsuperscript{80} See, e.g., 2 Chronicles 36:22-23; Ezra; Nehemiah; Haggai.

\textsuperscript{81} See, e.g., John 19:15 (“But they shouted, ‘Take him away! Take him away! Crucify him!’ ‘Shall I crucify your king?’ Pilate asked. ‘We have no king but Caesar,’ the chief priests answered”).

\textsuperscript{82} Luke 1:5.


\textsuperscript{84} Luke 3:1.
your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties, and others to plow his ground and reap his harvest, and still others to make weapons of war and equipment for his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive groves and give them to his attendants. He will take a tenth of your grain and of your vintage and give it to his officials and attendants. Your menservants and maidservants and the best of your cattle and donkeys he will take for his own use. He will take a tenth of your flocks, and you yourselves will become his slaves. When that day comes, you will cry out for relief from the king you have chosen, and the Lord will not answer you in that day.”

Also mentioned was the passage in Judges 8 where the people of Israel asked Gideon to rule over them after he led an impressive military victory over the Midianites. Gideon responded, “I will not rule over you, nor will my son rule over you. The Lord will rule over you.”

One of the leading proponents of the “God hates kings” position was Thomas Paine. It is hard to avoid the sense that Paine was being somewhat cynical and manipulative in making this case, because in other contexts his Deist views led him to deny vehemently that the Bible was a trustworthy, authoritative source. Nonetheless, in his famous pro-revolution tract *Common Sense*, Paine had this to say:

Government by kings was first introduced into the world by the Heathens, from whom the children of Israel copied the custom. It was the most prosperous invention the Devil ever set on foot for the promotion of idolatry. The Heathens paid divine honors to their deceased kings, and the Christian world hath improved on the plan by doing the same to their living ones. How impious is the title of sacred majesty applied to a worm, who in the midst of his splendor is crumbling into dust!

As the exalting one man so greatly above the rest cannot be justified on the equal

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85 1 Samuel 8:10-18.

86 Judges 8:23.

rights of nature, so neither can it be defended on the authority of scripture; for the will of the Almighty, as declared by Gideon and the prophet Samuel, expressly disapproves of government by kings. All anti-monarchial parts of scripture have been very smoothly glossed over in monarchial governments, but they undoubtedly merit the attention of countries which have their governments yet to form. Render unto Caesar the things which are Caesar’s is the scriptural doctrine of courts, yet it is no support of monarchial government, for the Jews at that time were without a king, and in a state of vassalage to the Romans.

Near three thousand years passed away from the Mosaic account of the creation, till the Jews under a national delusion requested a king. Till then their form of government (except in extraordinary cases, where the Almighty interposed) was a kind of republic administered by a judge and the elders of the tribes. Kings they had none, and it was held sinful to acknowledge any being under that title but the Lords of Hosts. And when a man seriously reflects on the idolatrous homage which is paid to the persons of kings he need not wonder, that the Almighty, ever jealous of his honor, should disapprove of a form of government which so impiously invades the prerogative of heaven.

Monarchy is ranked in scripture as one of the sins of the Jews, for which a curse in reserve is denounced against them. The history of that transaction is worth attending to.

The children of Israel being oppressed by the Midianites, Gideon marched against them with a small army, and victory, through the divine interposition, decided in his favor. The Jews elate with success, and attributing it to the generalship of Gideon, proposed making him a king, saying, Rule thou over us, thou and thy son and thy son’s son. Here was temptation in its fullest extent; not a kingdom only, but an hereditary one, but Gideon in the piety of his soul replied, I will not rule over you, neither shall my son rule over you, THE LORD SHALL RULE OVER YOU. Words need not be more explicit; Gideon doth not decline the honor but denieth their right to give it; neither doth be compliment them with invented declarations of his thanks, but in the positive stile of a prophet charges them with disaffection to their proper sovereign, the King of Heaven.

About one hundred and thirty years after this, they fell again into the same error. The hankering which the Jews had for the idolatrous customs of the Heathens, is something exceedingly unaccountable; but so it was, that laying hold of the misconduct of Samuel’s two sons, who were entrusted with some secular concerns, they came in an abrupt and clamorous manner to Samuel, saying, Behold thou art old and thy sons walk not in thy ways, now make us a king to judge us like all the other nations. And here we cannot but observe that their motives were bad, viz., that they might be like unto other nations, i.e., the Heathen, whereas their true glory laid in being as much unlike them as possible. But the thing displeased Samuel when they said, give us a king to judge us; and Samuel prayed unto the Lord, and the Lord said unto Samuel, Hearken unto the
voice of the people in all that they say unto thee, for they have not rejected thee, but they have rejected me, THEN I SHOULD NOT REIGN OVER THEM.

According to all the works which have done since the day; wherewith they brought them up out of Egypt, even unto this day; wherewith they have forsaken me and served other Gods; so do they also unto thee. Now therefore hearken unto their voice, howbeit, protest solemnly unto them and show them the manner of the king that shall reign over them, i.e., not of any particular king, but the general manner of the kings of the earth, whom Israel was so eagerly copying after. And notwithstanding the great distance of time and difference of manners, the character is still in fashion. [The excerpt continues with 1 Samuel 8:10-18 in the King James Version of the Bible.] This accounts for the continuation of monarchy; neither do the characters of the few good kings which have lived since, either sanctify the title, or blot out the sinfulness of the origin; the high encomium given of David takes no notice of him officially as a king, but only as a man after God’s own heart. Nevertheless the People refused to obey the voice of Samuel, and they said, Nay, but we will have a king over us, that we may be like all the nations, and that our king may judge us, and go out before us and fight our battles. Samuel continued to reason with them, but to no purpose; he set before them their ingratitude, but all would not avail; and seeing them fully bent on their folly, he cried out, I will call unto the Lord, and he shall send thunder and rain (which then was a punishment, being the time of wheat harvest) that ye may perceive and see that your wickedness is great which ye have done in the sight of the Lord, IN ASKING YOU A KING. So Samuel called unto the Lord, and the Lord sent thunder and rain that day, and all the people greatly feared the Lord and Samuel And all the people said unto Samuel, Pray for thy servants unto the Lord thy God that we die not, for WE HAVE ADDED UNTO OUR SINS THIS EVIL, TO ASK A KING. These portions of scripture are direct and positive. They admit of no equivocal construction. That the Almighty hath here entered his protest against monarchial government is true, or the scripture is false. And a man hath good reason to believe that there is as much of kingcraft, as priestcraft in withholding the scripture from the public in Popish countries. For monarchy in every instance is the Popery of government.89

It does not require an advanced degree in theology to see the weaknesses of these arguments. Gideon was asked to “rule” over the people – the word “king” was not used – and he declined because “the Lord will rule over you.”90 This was during the period of Theocracy,

88 1 Samuel, supra note 85.


90 Judges 8:22-23.
during which God was directly ruling Israel and using judges as intermediaries when needed. Gideon merely says that God’s direct rule should not be replaced by human rule. Similarly, in 1 Samuel 8, God responds to the request that a human king should take His place as ruler of Israel. His list of the dangers of “kings” is nothing more than the threats to liberty that come from human political power – no different at their core than Lord Acton’s famous adage that “power tends to corrupt, and absolute power corrupts absolutely.” It could just as easily be a list of the dangers of “Presidents,” “Prime Ministers,” or “Supreme Court Justices.”

The point of all this is that there is no sense of comparative constitutions or comparative governments in either the Gideon story or the Samuel/Saul story in the Bible. God never says, “Kings are bad. You should use representative constitutional democracy instead.”

Representative constitutional democracy was not on the table. The choice confronting the people of Israel was between human rulers and divine rule. Israel would have been wise to stick with God, but in 1 Samuel they chose a human government instead.

Nowhere in the Bible, Old Testament or New Testament, can one find any direct expression of God’s plan for an ideal system of constitutional law and government. To determine whether the United States Constitution is consistent with the Bible, we will have to go one level deeper and look for biblical teachings and biblical principles that can be applied to evaluate a system of law and government. These are standards that can be applied to any human legal/constitutional system, to determine whether that system lives up to God’s standards.

PART III. BIBLICAL PRINCIPLES OF CONSTITUTIONAL LAW

A. THE IMAGE OF GOD

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The story of human beings begins in chapter one of the book of Genesis:

Then God said, “Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground.” So God created man in his own image, in the image of God he created him; male and female he created them.\(^{92}\)

This fundamental concept – that every human being is created in the image of Almighty God – is enormously important when one thinks about government and constitutional law. Theologians can argue about the specific human characteristics, capacities, and traits that make up the Imago Dei.\(^{93}\) Certainly God’s image includes the ability to make moral choices and take individual responsibility, as well as the inherent desire to have a relationship with God\(^ {94}\) and the ability to seek His truth through the Natural Law.\(^ {95}\) It may also involve aspects of rational thought, emotion, and relationships.

For our purposes, the key point is this: if every human being bears the image of the Creator, then every man, woman and child is of inestimable value. Just as a beautiful painting or statue of a person is valuable because it accurately reflects the person’s image, even more so do people hold great value as individuals because they reflect the image of God. Therefore, a biblically-consistent constitution must place a high value on individual human life and liberty.

This principle of individual worth has been ignored much more than it has been followed

\(^{92}\) *Genesis* 1:26-27.


\(^{94}\) Acts 17:26-28 (“From one man He made every nation of men, that they should inhabit the whole earth; and He determined the times set for them and the exact places where they should live. God did this so that men would seek Him and perhaps reach out for Him and find Him, though He is not far from each one of us. ‘For in Him we live and move and have our being.’ As some of your own poets have said, ‘We are His offspring.’“)

\(^{95}\) See supra Part I-A.
throughout human history. From the ancients\textsuperscript{96} to modern history\textsuperscript{97} to today’s world,\textsuperscript{98} nation after nation has treated individuals as expandable in order to pursue “bigger” political and military goals. Human beings, bearing the Imago Dei, are thrown away with little thought in order to protect some collective notion of state sovereignty or misunderstood popular sovereignty.\textsuperscript{99}

Did the American founders recognize the inherent worth and dignity of individual human beings? There is little doubt that they strongly affirmed the concept. Even without direct biblical references, the Genesis 1 principle could hardly be stated more clearly than it was in the Declaration of Independence:

\begin{quote}
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.\textsuperscript{100}
\end{quote}

One could identify a myriad of quotes from the founders that are consistent with the Declaration, and affirm the understanding that all human beings are created by God with great worth and unalienable rights. It seems to have been pretty close to a universally-professed view. And the Declaration was the document that actually initiated the legal existence of the body politic and corporate known as the United States of America.\textsuperscript{101} However, the key question for

\textsuperscript{96} See, e.g., Exodus 1 (oppression of the Israelites by Egypt’s Pharaoh); Matthew 2:16-18 (slaughter of Hebrew baby boys by King Herod).

\textsuperscript{97} E.g., Nazi Germany and the Soviet Union.

\textsuperscript{98} E.g., North Korea and Communist China.

\textsuperscript{99} ABRAHAM KUYPER, Calvinism and Politics, in LECTURES ON CALVINISM 78, 85-90 (Wm. B. Eerdmans Publ’g Co. 1999).

\textsuperscript{100} THE DECLARATION OF INDEPENDENCE, supra note 34, para. 2.

\textsuperscript{101} See Bradley P. Jacob, Back to Basics: Constitutional Meaning and “Tradition,” supra note 29, at 272 n. 68.
our purposes is, “Does the United States Constitution reflect a Genesis 1 understanding of the importance of human life and liberty?”

With respect to the Constitution as written and ratified, the answer to that question is a resounding “no.” The original Constitution, as the result of political compromise deemed essential if the thirteen former English colonies were to stand together as the United States of America, permitted the institution of chattel slavery to continue in the southern states. Although the Constitution never mentioned the word “slavery,” it sanctioned the sub-human treatment of African-American people in several clear ways:

- Article I, Section 2, provided that seats in the House of Representatives will be apportioned among the states based on their population, “which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons.” Those “other persons,” who counted as 60% of a human being for purposes of congressional representation, were, of course, the black slaves.

- Article I, Section 9, provided that “[t]he migration or importation of such persons as any of the states now existing shall think proper to admit [i.e., African slaves], shall not be prohibited by the Congress prior to the year [1808, twenty years after ratification], but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.” Not only was the institution of slavery preserved indefinitely, but the importation of human beings through the slave trade was protected from federal interference for two decades.

102 U.S. CONST. art. I, § 2, cl. 3.

103 U.S. CONST. art. I, § 9, cl. 1.
Article IV, Section 2, said that “[n]o person held to service or labor in one state, under the laws thereof [i.e., a slave], escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.”

The Constitution required fugitive slaves, even those who escaped into free states, to be returned to their “owners.”

There can be no doubt that by permitting human beings to be owned in slavery, the Constitution fell dramatically short of the Declaration’s self-evident truth, and was therefore inconsistent with the Genesis 1 “image of God” principle. However, this failure has been fixed. The Civil War and the constitutional amendments that were passed in its wake removed slavery from our constitutional scheme.

With slavery out of the way, the amended Constitution is quite strong on the issue of human significance and the rights to life and liberty. The body of the original Constitution contained few explicit protections for individual rights because many of its Federalist supporters believed that the addition of a Bill of Rights would be unnecessary and perhaps counter-productive. These supporters relied (mistakenly, as is clear today with the advantage of more than two centuries of hindsight) on the limited nature of the national government,

104 See U.S. CONST. art. IV, § 2, cl. 3.

105 U.S. CONST. amend. XIII (abolishing slavery), amend. XIV (granting citizenship and legal protections to the freed African-American former slaves), and amend. XV (affirming the right to vote regardless of skin color or ethnicity).

106 U.S. CONST. art. I, § 9 (protecting some rights from federal interference) and art. I, § 10 (protecting some rights from state interference).

107 See, e.g., THE FEDERALIST NO. 84 (Alexander Hamilton).
assuming that it would never have sufficient power to violate individual rights.\textsuperscript{108} Strong opposition by Anti-Federalists, notably Patrick Henry and George Mason, led to the addition of the Bill of Rights\textsuperscript{109} by the first Congress. These amendments, plus the 14th, together create substantial protection for human life and liberty under the Constitution. There is, however, one remaining problem.

Just as slavery constituted a huge contradiction to the Declaration of Independence, Genesis 1, and the principle of human liberty when the Constitution was ratified, so the issue of abortion presents such a contradiction today.\textsuperscript{110} According to the Supreme Court, every pregnant woman has a constitutional right to end the life of her baby boy or girl before the date of the child’s birth.\textsuperscript{111} The fact that unborn children are human beings, created in the image of God, is established not only by the Bible,\textsuperscript{112} but also by science and natural law.\textsuperscript{113} To allow one human being to be killed at the request of another, without any crime having been committed, is a clear violation of the Genesis 1 principle of the image of God.

\textsuperscript{108} Id. at 445 (Liberty Fund Gideon Edition 2001) (“But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns.”).

\textsuperscript{109} U.S. CONST. amends. I-X.

\textsuperscript{110} There are strong parallels between the slavery and abortion issues. In each case, some governing elites have decided that a group of individuals who bear all measurable indicia of humanity are nonetheless sub-human and subject to being treated as objects rather than people. Human slaves were owned as property because of their skin color; human babies are subject to extermination because of their pre-birth status.


\textsuperscript{112} See, e.g., Psalm 139:13-16; Isaiah 49:1-6; Jeremiah 1:4-5; Luke 1:41-44.

In fairness to the Constitution, however, one has to concede that there is no defensible argument that this abortion right comes from the Constitution. The text contains nothing that remotely suggests a right to kill other people, whether before or after their birth. “Abortion rights” are purely a judicial creation, and not part of any plausible reading of the Constitution itself. 114 Indeed, given the total lack of evidence that the unborn child is anything other than a human being, with human DNA, generated through the reproductive act of two human parents, 115 if the Constitution has anything to say relating to abortion, it would be “nor shall any state deprive any person of life, liberty, or property, without due process of law” 116 – with “any person” including “any baby.”

If one accepts the fairly obvious conclusion that the Constitution, reasonably interpreted, cannot be understood to create a “right to abortion,” it appears that the document is thoroughly consistent with the priority on individual rights found in the Genesis 1 “image of God” principle.

B. THE FALL OF MAN

Just two chapters after the Genesis 1 creation story, we find one of the most important events in human history:

Now the serpent was more crafty than any of the wild animals the Lord God had made. He said to the woman, “Did God really say, ‘You must not eat from any tree in the garden’?” The woman said to the serpent, “We may eat fruit from the trees in the garden, but God did say, ‘You must not eat fruit from the tree that is in the middle of the garden, and you must not touch it, or you will die.’” “‘You will not surely die,’” the serpent said to the woman. “For God knows that when you eat of it your eyes will be opened, and you will be like God, knowing good and evil.” When the woman saw that the fruit of the tree was good for food and pleasing to the eye, and also desirable for gaining wisdom, she took some and ate it. She also


116 U.S. CONST. amend. XIV, § 1.
gave some to her husband, who was with her, and he ate it. Then the eyes of both of them were opened, and they realized they were naked; so they sewed fig leaves together and made coverings for themselves. Then the man and his wife heard the sound of the Lord God as he was walking in the garden in the cool of the day, and they hid from the Lord God among the trees of the garden. But the Lord God called to the man, “Where are you?” He answered, “I heard you in the garden, and I was afraid because I was naked; so I hid.” And he said, “Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?” The man said, “The woman you put here with me – she gave me some fruit from the tree, and I ate it.” Then the Lord God said to the woman, “What is this you have done?” The woman said, “The serpent deceived me, and I ate.” . . . To the woman he said, “I will greatly increase your pains in childbirth; with pain you will give birth to children. Your desire will be for your husband, and he will rule over you.” To Adam he said, “Because you listened to your wife and ate from the tree about which I commanded you, ‘You must not eat of it,’ “Cursed is the ground because of you; through painful toil you will eat of it all the days of your life. It will produce thorns and thistles for you, and you will eat the plants of the field. By the sweat of your brow you will eat your food until you return to the ground, since from it you were taken; for dust you are and to dust you will return.”

In Genesis 3, the human race falls into sin. From that day forward, every human being has been under the curse of evil and depravity. This does not mean that people can never do good; but it does mean that you cannot count on people to be consistently good. Sin is a part of our being. As the Apostle Paul put it:

What shall we conclude then? Are we any better? Not at all! We have already made the charge that Jews and Gentiles alike are all under sin. As it is written: “There is no one righteous, not even one; there is no one who understands, no one who seeks God. All have turned away, they have together become worthless; there is no one who does good, not even one.” “Their throats are open graves; their tongues practice deceit.” “The poison of vipers is on their lips.” “Their mouths are full of cursing and bitterness.” “Their feet are swift to shed blood; ruin and misery mark their ways, and the way of peace they do not know.” “There is no fear of God before their eyes” . . . For all have sinned and fall short of the glory of God.


118 Every human being save one, that is. Jesus of Nazareth, born fully divine after the Holy Spirit impregnated a human woman, was the only person who never sinned. 2 Corinthians 5:21.

119 Romans 3:9-18, 23.
And the Prophet Isaiah said more succinctly:

All of us have become like one who is unclean, and all our righteous acts are like filthy rags; we all shrivel up like a leaf, and like the wind our sins sweep us away. 120

What are the consequences of the Fall for constitutional law and government? All human beings are tainted by sin, which means that even the most apparently noble people cannot be trusted to be consistently good. This includes those who serve in government. People who achieve political power will have strong temptation to abuse that power for their own self-gain, financial or otherwise. In the famous words of Lord Acton, “Power tends to corrupt, and absolute power corrupts absolutely.”121 Therefore, a biblically consistent constitution must not place its trust in the good will of those who govern, but must establish structural limitations on power, and tensions between the ambitions of different leaders, in order to prevent tyranny.

The American founders knew this as well. While it is unlikely that all of them were biblically-orthodox Christians, most seemed to have a clear understanding of human sin, selfishness, and depravity. One of the major philosophical influences on the founding generation was Thomas Hobbs, whose descriptions of the human “state of nature” left no room for nobility and altruism:

Hereby it is manifest that, during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man. . . . In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and, which is worst of all, continual fear and danger of

120 Isaiah 64:6.

121 JOHN EMERICH EDWARD DALBERG-ACTON, ESSAYS ON FREEDOM AND POWER 364 (1949).
violent death; and the life of man solitary, poor, nasty, brutish, and short.\textsuperscript{122}

No less an American constitutional father than James Madison had this to say about the impact of human depravity on government:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.\textsuperscript{123}

Because of the founders’ strong understanding of human imperfection, they built into the Constitution strong protections against the accumulation of power by one individual or one part of the government. A full discussion of these safeguards would require a full textbook; we refer to them generally as separation of powers, checks and balances, and federalism. Here are a few of the most significant examples:

\begin{itemize}
  \item The power of the House of Representatives to bring impeachment charges against officials in the executive and judicial branches,\textsuperscript{124} and the power of the Senate to try all impeachments.\textsuperscript{125}
  \item The ban on any person holding simultaneously executive office and a seat in Congress.\textsuperscript{126}
  \item The President’s power to approve or veto legislation, and the power of Congress to
\end{itemize}


\textsuperscript{124} U.S. CONST. art. I, § 2, cl. 5.

\textsuperscript{125} U.S. CONST. art. I, § 3, cl. 6.

\textsuperscript{126} U.S. CONST. art. I, § 6, cl. 2.
override a veto by supermajority.\footnote{U.S. CONST. art. I, § 7, cl. 2.}

- The powers to tax, spend, and declare war being given exclusively to Congress, not the executive.\footnote{U.S. CONST. art. I, § 8, cl. 1 and 11.}

- The power of Congress to establish lower federal courts,\footnote{U.S. CONST. art. I, § 8, cl. 9, and art. III, § 2.} and to control the appellate jurisdiction of the Supreme Court.\footnote{U.S. CONST. art. III, § 3, cl. 2.}

- The power of the Senate to approve or reject treaties and executive appointments.\footnote{U.S. CONST. art. III, § 3, cl. 2.}

- The power of the Supreme Court to declare unconstitutional legislation passed by Congress and executive actions taken by the President.\footnote{Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).}

- The requirement of supermajorities in the House, the Senate, and the states in order to amend the Constitution.\footnote{U.S. CONST. art. V.}

The founders dealt with the danger of tyranny by setting up triangles of power. The power of the national government is divided horizontally into three branches – legislative, executive and judicial – and vertically into three sources – the nation, the states, and the people. The horizontal division is made clear in Articles I, II, and III. The vertical dimension is seen in the composition of the branches: the President and the Supreme Court represent a national constituency; the House of Representatives is selected directly by the people in local districts,
and the members of the Senate were chosen by the various state legislatures in order to directly represent the interests of state governments in national policy-making.\textsuperscript{134}

Triangles make sense. If there are three sources or branches of power, and one of them tries to increase its own power, the other two will have a strong incentive to work together to fight against the attempted tyranny.

On the other hand, if there are only two sources or branches of power, the \textit{triangle} collapses to a single line. If one side begins to increase its own power, it may be able to overrun the other, with tyranny as the outcome.

On the whole, the founders’ vision for vertical and horizontal separations and tensions of power has worked pretty well, and seems consistent with the Genesis 3 principle of the Fall. The vertical dimension of federalism was significantly weakened with the ratification of the 17th Amendment in 1913, which removed the selection of U.S. Senators from the state legislatures and gave that power directly to the people by popular vote.\textsuperscript{135} This removed the unique voice of

\begin{footnotesize}
\begin{enumerate}
\item U.S. CONST. art. I, § 3, cl. 1.
\item U.S. CONST. amend. XVII, § 1.
\end{enumerate}
\end{footnotesize}
the state governments from the federal law-making process, making the Senators directly accountable to the people, much like members of the House but with bigger districts in most cases.

The loss of a voice of the states in national policy-making, coupled with the greatly expanded scope of federal governing authority under a nontextual understanding of the commerce power,\(^{136}\) has raised doubts about whether federalism and dual sovereignty are still effective restraints against an overreaching national government. The Supreme Court has made some attempt to create back-door protections for state sovereignty to replace the loss of state control over the Senate:

- first creating,\(^ {137}\) and then rejecting,\(^ {138}\) an immunity from federal regulatory authority for the “traditional functions” of state government;
- ruling that the national government may not “commandeer” state legislative or executive officials and force them to do the work of the national government,\(^ {139}\) and
- protecting state sovereign immunity under a rather strained application of the Eleventh Amendment.\(^ {140}\)

None of these efforts has proven nearly as effective at maintaining a federalism balance as the founders’ plan of allowing a state voice in the national legislative body. Today, the

\(^{136}\) U.S. CONST. art. I, § 8, cl. 3; see Wickard v. Filburn, 317 U.S. 111 (1942); Gonzales v. Raich, 545 U.S. 1 (2005).


potential for governmental tyranny seems greatly increased as the national government regulates human behavior in ways that would have seemed impossible to anyone living before the 1930s. Nevertheless, there are still significant procedural protections built into our constitutional system, and if vertical federalism may have mostly collapsed into a “national government v. the people” straight line, the horizontal triangle of three branches is still viable. On the whole, one would have to say that our Constitution remains consistent with the Genesis 3 principle that requires protection against the sinfulness of fallen people.

C. GOD’S WAY IS ORDER, NOT CHAOS

Another clear biblical principle with constitutional implications is found in the nature of God Himself: He is a God of order, not chaos. The order principle can first be seen in Genesis 1, where God creates the entire universe in six sequential days, with the repeated interjection, “and God saw that it was good.” The process ends with “God saw all that he had made, and it was very good.” Scripture affirms in other places that God has built order into His creation:

- God is not a God of disorder but of peace . . . . everything should be done in a fitting and orderly way.
- When a country is rebellious, it has many rulers, but a man of understanding and knowledge maintains order.

Christian thought throughout history has recognized the need for order and predictability

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142 *Genesis* 1:4, 10, 12, 18, 21, 25.

143 *Genesis* 1:31.

144 *1 Corinthians* 14:33, 40.

145 *Proverbs* 28:2.
in the law. Thomas Aquinas pointed out that the law must be known and communicated to those whom it governs:

[A] law is imposed on others by way of a rule and measure. Now a rule or measure is imposed by being applied to those who are to be ruled and measured by it. Wherefore, in order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation.146

The rule of law – the idea that the law is a fixed set of rules that apply to everyone, even rulers, rather than an unpredictable tool used by those in power for their own ends – has been one of the foremost contributions of Christian thinking to Anglo-American jurisprudence.147 As Russell Kirk described the rule of law principle in common law history:

[I]f the common law was the foundation of order, also it was the foundation of freedom. The high claim of the old commentators on the common law was this: no man, not even the king, was above or beyond the law. “The king himself,” Bracton wrote, “ought not to be under man but under God, and under the Law, because the Law makes the king. Therefore, let the king render back to the Law what the Law gives to him, namely, dominion and power; for there is no king where will, and not Law, wields dominion.” The Law is a bridle upon the king. Though the king may not be sued, he may be petitioned; if he will not do justice upon receiving a reasonable petition, the king’s own Great Council, or the barons and the people, then may restrain his power. Just that had been done to King John, less than half a century before Bracton wrote, and would be done to later kings who tried to set themselves above the Law. Here are the beginnings of the principle of a government of laws, not of men.

By the reign of Edward I, in the last quarter of the thirteenth century, the common law was so well entrenched that no king could defy it, whatever else he might aspire to . . . . Even the Tudors, monarchs virtually absolute otherwise in the sixteenth century, would not think of tampering banefully with the common law; indeed, Henry VIII would profess himself the champion of the common law against Roman and canon law. By such jurists as Sir Edward Coke and Sir Matthew Hale, in the seventeenth century, the common law would be exalted still higher. And in the eighteenth century, Sir William Blackstone’s Commentaries on

146 THOMAS AQUINAS, Quest. 90: Of the Essence of Law, in TREATISE ON LAW 10 (Gateway Ed. 1960).

the Laws of England, permeated with common-law doctrine, would exert a stronger attraction in America than in England.

As chastened and corrected by equity, the common law of medieval times was an instrument for social improvement, as well as for the conserving of old rights. It maintained the continuity of law, while itself amenable to correction by appeal to Chancery or to clarification by parliamentary statute. More than any juridical system on the Continent, it protected the subject from oppression by powerful individuals, through its writs, its court procedures, and its national enforcement. Its high value would not be seriously challenged until early in the nineteenth century, when Jeremy Bentham and his disciples would attempt to overthrow the common law for the sake of codified statutory law, on abstract principles of justice.\textsuperscript{148}

The United States Constitution grew out of the English common law system as the ultimate expression of predictability, the rule of law, and godly order in government. Its very purpose was to constrain governing majorities, to make sure that certain prescribed boundaries were not crossed by the government, no matter what circumstances might arise. This was the great genius of America’s constitutional founders.\textsuperscript{149}

Unfortunately, since the mid-twentieth century, legal thinking in the courts and in the academy has been increasingly dominated by “living Constitution” thinking.\textsuperscript{150} Under this approach, the text and original meaning of the Constitution no longer matter; instead, the Supreme Court looks for constitutional “principles” and applies them any way it wants to:

Ronald Dworkin, who teaches at New York University and Oxford University, is a leading proponent of a moral reading of the Constitution.\textsuperscript{151} He insists that the

\begin{footnotesize}
\begin{enumerate}
\item R\textsc{ussell} K\textsc{irk}, T\textsc{he} R\textsc{oots} of A\textsc{merican} O\textsc{rder} 190-91 (2004).
\item See Bradley P. Jacob, B\textit{ack to Basics: Constitutional Meaning and “Tradition,” supr}a note 29, at 271-74.
\item E\textsc{ric} R. Claeys, T\textsc{he} L\textsc{i}ving C\textsc{ommerce} Clause: F\textit{ederalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison}, 11 W\textit{m. & Mary} B\textit{ill of Rts. J.} 403, 415-416 (2002)
\item R\textsc{onald} D\textsc{workin}, F\textit{reedom’s Law: The Moral Reading of the American Constitution} (1996).
\end{enumerate}
\end{footnotesize}
value-laden discourse of constitutional law, on the part of “liberals” and “conservatives” alike, takes place within a moral context of political decency and ultimate justice. Nothing else would be true to the rule of law. The Framers meant the Constitution to codify and enact general principles – what he calls “concepts” of right and wrong – but they did not intend for subsequent generations to adhere to their particular views on specific issues, or their “conceptions” of specific policies. This is the only way to avoid the Scylla and Charybdis of majoritarianism and being ruled by the dead hand of the past. Wake Forest’s Michael Perry would go even further and embrace the indeterminacy of moral reasoning as the ultimate justification for judging, i.e., that judges exercise discernment and judgment to interpret the Constitution and decide cases. He would welcome and celebrate a judge’s reliance on the judge’s own personal beliefs. Consequently, both of these scholars would place a great emphasis on the importance of judicial selection to vet and choose judges who are wise and fair and principled members of the elite interpretive community.

One of the many negative consequences of “living Constitution” thinking is wild unpredictability. If the Constitution no longer means what it says, but rather what the Supreme Court wants it to say, then its meaning can change in a moment at the whim of five Justices. To give just a few examples:

• On January 21, 1973, the states were free, as they had always been, to protect the lives of children both before and after birth. On January 22, the Supreme Court discovered a woman’s “right” to abortion that is nowhere found in the text of the Constitution.

• On April 16, 1990, the right to free exercise of religion was vigorously protected by “strict scrutiny” under the First and Fourteenth Amendments. On April 17, the


154 With the Supreme Court as ideologically divided as it today, it generally requires only the whim of Anthony Kennedy.

155 Roe v. Wade, supra note 111.

Supreme Court completely changed the meaning of the free exercise clause, removing most of the protection of individual liberty from government interference.157

- The legal standard for capital punishment in the United States, including the question of whether the death penalty is ever permissible and the rules for its administration, has changed dramatically over the years as the Supreme Court has decided that the Constitution’s meaning has changed.158

- On June 25, 2003, the States were free, as they had always been, to regulate and even criminalize immoral sexual practices.159 On June 26, the Supreme Court discovered a previously-unknown constitutional right to engage in homosexual sodomy.160

- From 1976 until 1985, the Supreme Court held that constitutional principles of federalism prevented the national government from regulating the employment conditions of state employees performing “traditional governmental functions.”161 On February 19, 1985, the Court decided that the Constitution no longer required this deference to state governmental operations.162

The criticism here is not of the Supreme Court’s failure to follow stare decisis. It is unconstitutional, and a violation of the Justices’ oath of office, for the Supreme Court to apply

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_**stare decisis**_ in a constitutional case.\(^{163}\) If the Supreme Court overruled a prior decision because it admitted that the prior decision had incorrectly applied the Constitution, well and good. The problem is the Court’s willingness to suggest, “Well, the Constitution used to mean ‘X,’ but now it means ‘Y.’”

The very nature of our written Constitution and its constraints on the legislative, executive, and judicial branches of government are ringing affirmations of the common law “rule of law” tradition and the biblical principle of order and predictability. However, if the “Constitution” is fluid and judicially-created, it brings chaos and unpredictability rather than order. The “living” Constitution is a clear violation of the biblical standard.

**D. JUSTICE**

One of the most consistent themes of the Bible is that of justice. Clearly, God is very concerned that every human being, created in His image, is treated justly. There are many references; consider just a few:

> Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy.\(^{164}\)

> He has showed you, O man, what is good. And what does the Lord require of you? To act justly and to love mercy and to walk humbly with your God.\(^{165}\)

> Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your spices — mint, dill and cummin. But you have neglected the more important matters of the law — justice, mercy and faithfulness. You should have practiced the latter, without neglecting the former. You blind guides! You strain out a gnat but swallow a camel.\(^{166}\)

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\(^{164}\) *Proverbs* 31:8-9.

\(^{165}\) *Micah* 6:8.

Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.\textsuperscript{167}

In addition, there is the biblical assertion that all people are equal, without regard to such characteristics as ethnicity and sex:

You are all sons of God through faith in Christ Jesus, for all of you who were baptized into Christ have clothed yourselves with Christ. There is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus.\textsuperscript{168}

These are only a few examples – Scripture is filled with references to the mandate to do justice, especially for those who are weak and powerless (epitomized by widows and orphans, who had no husband/father to guard their interests in patriarchal Bible times). Clearly, constitutional law cannot be biblically consistent unless it has a strong focus on providing justice for everyone, without regard to station, power, wealth, sex, and race, and with special regard for those weakest members of society who are unable to protect their own interests.

In addition, there are many Scripture passages that establish procedural protections to achieve justice in criminal matters, such as the need for impartiality,\textsuperscript{169} the requirement of careful investigation and evidence/proof,\textsuperscript{170} and the requirement of two witnesses to a crime for

\begin{itemize}
\item\textsuperscript{167} \textit{James} 1:27.
\item\textsuperscript{168} \textit{Galatians} 3:26-28.
\item\textsuperscript{169} \textit{Deuteronomy} 10:17 (“For the Lord your God is God of gods and Lord of lords, the great God, mighty and awesome, who shows no partiality and accepts no bribes”).
\item\textsuperscript{170} \textit{Deuteronomy} 13:14-15 (“then you must inquire, probe and investigate it thoroughly. And if it is true and it has been proved that this detestable thing has been done among you, you must certainly put to the sword all who live in that town”); \textit{Deuteronomy} 17:4-5 (“you must investigate it thoroughly. If it is true and it has been proved that this detestable thing has been done in Israel, take the man or woman who has done this evil deed to your city gate and stone that person to death”).
\end{itemize}
Because human courts and judges are not God (who knows everything perfectly), we must be concerned not only with reaching just outcomes, but also with just procedures that increase our likelihood of reaching just outcomes.

Is the United States Constitution consistent with God’s concern for justice and impartiality?

Several aspects of this question have already been addressed. In protecting the image of God in every human being, the post-slavery Constitution works to preserve justice for all. The “right to abortion” allows abominable injustice to be done to innocent pre-birth children; but, as noted above, this “right” is a judicial creation not found in the Constitution itself. The vertical and horizontal structural protections of federalism, separation of powers and checks and balances act to prevent tyranny and injustice. In addition, justice for all is promoted by:

- the presumption of innocence and high burden of proof in matters of criminal law, carried over from the common law as part of our constitutional system of justice;
- specific constitutional protections against bills of attainder, ex post facto laws,

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171 Deuteronomy 19:15 (“One witness is not enough to convict a man accused of any crime or offense he may have committed. A matter must be established by the testimony of two or three witnesses”).

172 Supra, Part III-A.


174 Supra, Part III-B.

175 I.e., beyond a reasonable doubt.

176 U.S. CONST. art. I, § 9, cl. 3 and art. I, § 10, cl. 1.

177 Id.
unreasonable and warrantless searches and seizures,\textsuperscript{178} double jeopardy, self-incrimination and takings of private property,\textsuperscript{179} excessive bail, excessive fines, and cruel and unusual punishments,\textsuperscript{180} and preserving the rights to the writ of habeus corpus,\textsuperscript{181} freedom of religion, speech, press, assembly and petition,\textsuperscript{182} grand jury indictment,\textsuperscript{183} speedy trials, impartial juries, specification of charges, confrontation of witnesses, compulsory process, and assistance of counsel;\textsuperscript{184}

\begin{itemize}
  \item the specific protections of due process of law, applied against all levels of government;\textsuperscript{185}
  \item specific protection for the privileges and immunities of citizenship\textsuperscript{186} (although the Article Four “privileges and immunities” clause has a fairly limited reach,\textsuperscript{187} and the intended protections of the Fourteenth Amendment “privileges or immunities” clause was eviscerated by the Supreme Court\textsuperscript{188}); and
  \item the requirement that the government provide equal protection of the laws,\textsuperscript{189} meaning that
\end{itemize}

\textsuperscript{178} U.S. CONST. amend. IV.
\textsuperscript{179} U.S. CONST. amend. V.
\textsuperscript{180} U.S. CONST. amend. VIII.
\textsuperscript{181} U.S. CONST. art. I, § 9, cl. 2 and art. I, § 10, cl. 1.
\textsuperscript{182} U.S. CONST. amend. I.
\textsuperscript{183} U.S. CONST. amend. V.
\textsuperscript{184} U.S. CONST. amend. VI.
\textsuperscript{185} U.S. CONST. amend. V and amend. XIV, § 1.
\textsuperscript{186} U.S. CONST. art. IV, § 2, cl. 1 and amend. XIV, § 1.
\textsuperscript{187} Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).
\textsuperscript{188} Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{189} U.S. CONST. amend. XIV, § 1. There is no specific equal protection clause that
similarly-situated individuals must be treated similarly by the law, regardless of race and other irrelevant categories.

On the whole, it seems clear that the Constitution contains very strong provisions promoting individual justice for all people and is generally consistent with the biblical justice mandate, even though those principles have not always been uniformly applied. 190

E. INSTITUTIONAL SEPARATION OF CHURCH AND STATE

The Bible makes it clear that God intends for governmental institutions and religious institutions to be organizationally separate. Until the second coming of Christ, 191 He does not want political and religious power to be under joint control:

Then the Pharisees went out and laid plans to trap him in his words. They sent their disciples to him along with the Herodians. “Teacher,” they said, “we know you are a man of integrity and that you teach the way of God in accordance with the truth. You aren’t swayed by men, because you pay no attention to who they are. Tell us then, what is your opinion? Is it right to pay taxes to Caesar or not?” But Jesus, knowing their evil intent, said, “You hypocrites, why are you trying to trap me? Show me the coin used for paying the tax.” They brought him a denarius, and he asked them, “Whose portrait is this? And whose inscription?” “Caesar’s,” they replied. Then he said to them, “Give to Caesar what is Caesar’s, and to God what is God’s.” 192

Pilate then went back inside the palace, summoned Jesus and asked him, “Are you the king of the Jews?” “Is that your own idea,” Jesus asked, “or did others talk to you about me?” “Am I a Jew?” Pilate replied. “It was your people and your chief priests who handed you over to me. What is it you have done?” Jesus said, “My kingdom is not of this world. If it were, my servants would fight to prevent my

applies to the federal government, but the Supreme Court (in defiance of ordinary rules of textual interpretation) has found that the Fifth Amendment due process clause contains an “equal protection component.” Bolling v. Sharpe, 347 U.S. 497 (1954).

190 See, e.g., Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); Korematsu v. United States, 323 U.S. 214 (1944); Roe v. Wade, supra note 111.


arrest by the Jews. But now my kingdom is from another place.”

Look at what happened to Saul, first king of the unified nation of Israel, and Uzziah, later king of Judah, when each took it onto himself to perform priestly duties:

Saul remained at Gilgal, and all the troops with him were quaking with fear. He waited seven days, the time set by Samuel; but Samuel did not come to Gilgal, and Saul’s men began to scatter. So he said, “Bring me the burnt offering and the fellowship offerings.” And Saul offered up the burnt offering. Just as he finished making the offering, Samuel arrived, and Saul went out to greet him. “What have you done?” asked Samuel. Saul replied, “When I saw that the men were scattering, and that you did not come at the set time, and that the Philistines were assembling at Micmash, I thought, ‘Now the Philistines will come down against me at Gilgal, and I have not sought the LORD’s favor.’ So I felt compelled to offer the burnt offering.” “You acted foolishly,” Samuel said. “You have not kept the command the LORD your God gave you; if you had, he would have established your kingdom over Israel for all time. But now your kingdom will not endure; the LORD has sought out a man after his own heart and appointed him leader of his people, because you have not kept the LORD’s command.”

But after Uzziah became powerful, his pride led to his downfall. He was unfaithful to the LORD his God, and entered the temple of the LORD to burn incense on the altar of incense. Azariah the priest with eighty other courageous priests of the LORD followed him in. They confronted him and said, “It is not right for you, Uzziah, to burn incense to the LORD. That is for the priests, the descendants of Aaron, who have been consecrated to burn incense. Leave the sanctuary, for you have been unfaithful; and you will not be honored by the LORD God.” Uzziah, who had a censer in his hand ready to burn incense, became angry. While he was raging at the priests in their presence before the incense altar in the LORD’s temple, leprosy broke out on his forehead. When Azariah the chief priest and all the other priests looked at him, they saw that he had leprosy on his forehead, so they hurried him out. Indeed, he himself was eager to leave, because the LORD had afflicted him. King Uzziah had leprosy until the day he died. He lived in a separate house – leprous, and excluded from the temple of the LORD. Jotham his son had charge of the palace and governed the people of the land.

The Kingdom of Heaven and the governments of earth are separate. Jesus never instructed His followers to turn human government into an arm of the church, or to submit the

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193 John 18:33-36.
195 II Chronicles 26:21.
church to the control of the civil state. His focus was always on eternity and the salvation of men, women, and children, not on controlling human government. The institutional church and the institutional state should be separate, with neither controlling the other.

The Constitution’s religion provisions – including the ban on religious tests for public office, the ban on national established churches, and the protection for individual religious exercise – are consistent with this biblical principle. Although many of the Constitution’s framers were devout Christians, and most or all were at least theists, in establishing the new American government they followed biblical teaching and did not attempt to establish a theocracy or theonomy. Instead, they created a government with religious liberty, the freedom to choose or reject God’s truth, at the heart of the constitutional order. Even though Christian religious belief dominated American life through most of our nation’s history, religious liberty for all has generally been protected. The biblical principle is upheld by the Constitution.

It is worth noting that this institutional separation of the instruments of religion from the power of the state is completely different than the unbiblical, unconstitutional “high wall of separation between church and state” idea that influenced Supreme Court opinions beginning in

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196 U.S. CONST. art. VI, cl. 3.
197 U.S. CONST. amend. I.
198 Id.
199 “We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).
the 1940s and was especially dominant in establishment clause jurisprudence in the 1960s and 1970s. Under the “high wall” approach (now generally discarded by the Court), the Supreme Court took on the mission of removing religious views, religious motivations, and openly religious people from most aspects of American public life. Neither the Bible nor the Constitution requires people with religious convictions to keep themselves or their convictions out of the public arena of government, law, and public policy; neither does either suggest that the American people may not symbolically acknowledge their commitment and gratitude to God for His blessings.

F. FEDERALISM

The word “federalism” does not appear in the Bible. However, the book of Exodus contains a fascinating dialogue between Moses, the great law-giver, and his father-in-law Jethro:

The next day Moses took his seat to serve as judge for the people, and they stood around him from morning till evening. When his father-in-law saw all that Moses was doing for the people, he said, “What is this you are doing for the people? Why do you alone sit as judge, while all these people stand around you from morning till evening?” Moses answered him, “Because the people come to me to seek God’s will. Whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God’s decrees and laws.” Moses’ father-in-law replied, “What you are doing is not good. You and these people who come to you will only wear yourselves out. The work is too heavy for you; you cannot handle it alone. Listen now to me and I will give you some advice, and may God be with you. You must be the people’s representative before God and bring their disputes to him. Teach them the decrees and laws, and show them the way to live and the duties they are to perform. But select capable men from all the people — men who fear God, trustworthy men who hate dishonest gain — and appoint them

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200 Everson v. Board of Education, 330 U.S. 1, 16 (1947) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State’“).


as officials over thousands, hundreds, fifties and tens. Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves. That will make your load lighter, because they will share it with you. If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied.” Moses listened to his father-in-law and did everything he said. He chose capable men from all Israel and made them leaders of the people, officials over thousands, hundreds, fifties and tens. They served as judges for the people at all times. The difficult cases they brought to Moses, but the simple ones they decided themselves.\(^{204}\)

As Jethro wisely observed, Moses was trying to carry much of the weight of governance (especially the judicial function) on himself as the central governing authority. Jethro instructed him that lower officials should be appointed to handle as much of the load as possible at a level closer to the people. This had the primary function of saving the central government (Moses) from overwork and burn-out.\(^{205}\) It had the additional benefit of moving the bulk of judicial and governmental functions to a local level within tribes or families, where those making the decisions would have the best knowledge of the parties and circumstances, and would therefore be in the best position to reach just conclusions. Only cases that could not be resolved locally would be moved up to the central authority.

A constitution that is consistent with this biblical principle will contain a structure that keeps as much governmental function as possible at a local or regional level, only involving the national government in those problems that cannot be resolved at a lower level.

The original United States Constitution, with its focus on dual-sovereign federalism, was an excellent implementation of this biblical principle. The Founders delegated to the national government only a limited number of functions\(^{206}\) whose nature made them a bad fit for local

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\(^{204}\) Exodus 18:13-26.

\(^{205}\) Id. at verse 18.

\(^{206}\) See U.S. Const. art. I, § 8.
government.207 Everything else belonged to the sovereignty of state and local government.

As discussed in Part III-B above (“The Fall of Man”), the 17th Amendment has significantly weakened the federalism balance of dual sovereignty, and the Supreme Court’s attempts to maintain some areas of state sovereignty do not appear to have been particularly successful.208 Although the original Constitution seems to have been very effective in following the Exodus 18 principle, there is significant doubt as to whether this is still true today.

G. THREE FUNCTIONS (BRANCHES) OF GOVERNMENT

Isaiah chapter 33 contains a little verse that is fascinating for the Christian constitutional theorist:

For the LORD is our judge, the LORD is our lawgiver, the LORD is our king; it is he who will save us.209

God is described in Isaiah 33:22 as fulfilling three governmental functions: legislative (“our lawgiver”), executive (“our king”), and judicial (“our judge”). These are the three functions that our Constitution assigns (i) to Congress as the legislative branch,210 (ii) to the President as possessing all executive power,211 and (iii) to the Supreme Court as the head of the judicial branch.212 This was a change from the first United States governing system under the Articles of Confederation, which contained no national executive branch (the “President” was

207 E.g., maintaining the military, establishing a monetary system, and regulating the commercial transport of goods across state lines. Id.

208 Supra notes 135-141 and accompanying text.

209 Isaiah 33:22.


211 U.S. CONST. art. II, § 1, cl. 1.

212 U.S. CONST. art. III, § 1.
simply the presiding officer of Congress)\textsuperscript{213} and no federal judiciary.

It is hard to know how much constitutional law to find in Isaiah 33:22. Is God mandating legislative, executive and judicial functions/branches of government? Or are those three functions natural, inherent, and self-evident in any governmental system? Or are we reading too much into a verse that simply describes some aspects of God’s nature?

In any event, if God does want government to perform these functions, our Constitution is in full compliance. Of course, God can perform all three roles without separation of powers or checks and balances, because he is sinless and incapable of corruption. When human beings are running the government, the principle of the fall comes into play, and we must separate power in order to protect against tyranny.\textsuperscript{214}

\section*{PART IV. CONCLUSION}

We began this excursion into the intersection of law and theology by asking whether it matters which Supreme Court Justice is correct in his understanding of the connection between God’s law and the Constitution:

- Justice Clarence Thomas, who has suggested that a judge’s rulings might have to deviate from the Constitution if that document conflicts with higher law; or

- Justice Antonin Scalia, who has said that he believes in higher law to guide legislators, but that his role as a judge is simply to apply the positive law of the Constitution.

If the Constitution is, in fact consistent with God’s eternal principles of law and justice, then the distinction in views between Justice Scalia and Justice Thomas probably makes no difference.

\textsuperscript{213} U.S. ART. OF CONFEDERATION art. IX.

\textsuperscript{214} Supra Part III-B.
The first question was whether the Bible specifies any particular form of human government and law, constitutional or otherwise. The answer to that question is “no.”

Next, we examined a number of biblical principles that appear to have application to human law and government, including:

- the Genesis 1 image of God in individual human beings;
- the Genesis 3 fall of humanity into sin;
- God’s mandate for order, not chaos;
- God’s mandate for justice, especially for the powerless;
- institutional separation of church and state;
- federalism, or the performance of most governmental functions at levels closest to the governed; and
- the possible mandate of three governmental functions in Isaiah 33.

It is doubtful that this is an exhaustive list of divine principles that apply to constitutional law. Others can add to the list.

Of the principles studied, there is a very high level of consistency between the biblical guidelines and the United States Constitution. The toleration of chattel slavery was a major point of inconsistency in the original Constitution, but that problem was solved by the Civil War and related constitutional amendments. Some of the remaining points where contemporary understandings on constitutional law are inconsistent with God’s principles of justice are not contained in the Constitution at all, but are the product of aberrant, non-textual judicial interpretations:

- the idea that the Constitution is not a written legal document with a fixed meaning, but rather a set of nebulous, aspirational, “living” ideals whose meaning can be changed at
will by a small group of judges with no accountability; and

- the requirement that the lives of some human beings – specifically, pre-born babies – be terminated at the choice of another person.

The one area where the current Constitution itself may be inconsistent with biblical principles may be in the damage to federalism that was done by the 17th Amendment, and the consequent loss of structural protection for dual sovereignty. This collapse of ultimate power into the hands of the national government seems to ignore the possible of resulting tyranny without state sovereignty as a protective element.

That exception aside, it appears that a Justice who looks to principles of God’s law as ultimate authority and a Justice who believes himself bound by the positive law of the Constitution will have few, if any, occasions to reach different conclusions. This may explain why Justices Scalia and Thomas, in spite of a significant disagreement on a fundamental piece of judicial philosophy, find themselves so frequently in accord.

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