



The Law of Contracts: A Place to Start

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Foundations of Our Current Context

LOVE, as the Scriptures teach, is the touchstone of Christian ethics.¹ And Christian ethics should inform a Christian view of law. Indeed, law can be understood as a subset of ethics. As Oliver O'Donovan has observed, "[l]ove is the overall shape of Christian ethics, the form of human participation in the created order."² There is no reason to think that the social practice of contracting should be excluded from the obligation of love; after all, if we are to love our enemies,³ it follows that we should also love our contract parties.⁴ But love must be understood biblically. The Scriptures do not limit love to a particular emotion; rather, mirroring God's benevolence toward his creatures, human love aims to integrate the mind and the will into an affection that is appropriate to the worth of its objects. Biblical love discriminates and is ordered according to value, not subjective desire.

JUSTICE, including principles of law, is real. Law is not simply a human social construct but bears a relationship to a transcendent moral order grounded in the character, will, and reason of God—and God's creation of the universe and the human conscience. God's creation cannot help but reflect his moral nature. Such an embedded moral order entails recognition of the inherent worth of its constituents and an alignment of our thoughts, affections, and actions in a manner consistent with

that worth.⁵ Moreover, because we are created in the image of God, all human beings can and do know something about this embedded moral order and thus must live in obedience or disobedience to it. Human beings either recognize the inherent worth—including rights—of others or they don't. This is the sense of primary human rights: the right to the respect due the worth of one created in the image of God. Before the return of Christ in judgment and blessing, this embedded moral order will not be identical with any contemporary legal order. The extent of the gap between morality and law and our response to it are matters over which Christians disagree.

SIN is also real. While various Christian traditions define sin in different ways,⁶ there is widespread acknowledgement of the breadth and depth of sin in human nature and history. As I have observed elsewhere, "[s]in is original; the Scriptural record traces it to the beginning of human history. Sin is radical; it affects all aspects of human existence."⁷ Recognition of the reality of sin is particularly important in the study of law because it accounts for the recognition of secondary rights. Justice demands respect of worth or, in other words, recognition of primary rights. But what if a primary right is denied? In such a case justice further demands recognition of secondary rights or rights of rectification. Rights of rectification range from giving one who has denied a primary right the cold shoulder to civil vindication in a judicial proceeding.

History's Dynamic Direction

Christianity is not only a series of timeless truths. It is also a narrative; it is a story with a beginning, a middle, and an end. The Christian story begins with the kingdom of God in the creation of the heavens, the earth, and humanity in original righteousness. The story quickly progresses to a fall into sin which continues as a powerful indwelling force

¹ See, e.g., *Matthew* 22:35–39: "And one of them, a lawyer, asked him a question to test him.³⁶ Teacher, which is the great commandment in the Law?"³⁷ And he said to him, "You shall love the Lord your God with all your heart and with all your soul and with all your mind."³⁸ This is the great and first commandment.³⁹ And a second is like it: You shall love your neighbor as yourself."

² OLIVER O'DONOVAN, *RESURRECTION AND MORAL ORDER: AN OUTLINE FOR EVANGELICAL ETHICS* 25 (2nd ed. 1994).

³ *Matthew* 5:43–44 ("You have heard that it was said, 'You shall love your neighbor and hate your enemy.'⁴⁴ But I say to you, Love your enemies . . .").

⁴ See, e.g., JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 2.8.45: "Now there are many kinds of thefts. . . another lies in a more concealed craftiness, when a man's goods are snatched from him by seemingly legal means. . . Let us remember that all those arts whereby we acquire the possessions and money of our neighbors—when such devices depart from sincere affection to a desire to cheat or in some manner to harm—are to be considered as thefts." (Emphasis added.)

⁵ See NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* 10–11 (2008).

⁶ Compare WESTMINSTER LARGER CATECHISM Q&A 24 (1648) with CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1849–1851 (1984).

⁷ C. Scott Pryor, *Principled Pluralism and Contract Remedies*, 40 *MCGEORGE L. REV.* 723, 745 (2009).

in all persons and as a prevailing curse on the earth. The Christian story also includes the restoration of the kingdom by God's work of recreation of a new humanity and a new earth in and through the person and work of Jesus Christ. The restored kingdom of God was inaugurated in the work of Jesus on earth and continues with his work from heaven through the Church, and awaits its consummation upon his return to earth from heaven.

The Christian story therefore justifies using history and other empirical sciences as tools for identifying the appropriate legal order. God created the earth and providentially maintains it.⁸ We can thus account for the success of various branches of study in coming to greater depths of insight into the created order. God created human beings and maintains his law on their hearts.⁹ Taken together, these aspects of God's work can be called general revelation because they are generally available to all human beings. God has also revealed himself in the scriptural record. Not everyone has access to this aspect of God's revelation or takes it as such; thus, it is commonly known as special revelation.

All too often well-intentioned Christians give too little attention either to one or the other of God's two means of revelation: general and special. Some tend to select among the great variety of biblical material to support whatever legal or political position suits their immediate need. Others fall into the opposite extreme of relegating the biblical record to "spiritual" matters or personal piety, and leave policy analysis to economics, sociology or some amalgam of various secular theories of history. On the one hand, the Bible is not a magician's box out of which we may pluck a wand to solve a legal problem. Rather, it is a coherent account of the history (past, present, and future) of God's work of creation, the Fall, redemption, and consummation. It also describes the restored order of things. The Bible tells us *how* God is restoring the original form of his rule over creation and describes *what* that restored rule should look like. The gospel is cosmic in scope.¹⁰ On the other hand, the Bible itself also directs us to both the world

around us and to experience in history as sources of valid criteria for judging the wisdom of various forms of human activity. The Wisdom Literature, particularly Proverbs, makes this clear.¹¹ Even the Pentateuchal Law was not given against a blank slate. There was a "common law" of the Ancient Near East that formed the backdrop of the Mosaic Torah (instruction, teaching, law).¹² Attentiveness to the context of biblical law, awareness of the history of our legal institutions, and knowledge about the insights of modern scientific analysis are each important to helping us think critically about the law of contracts. Ignoring any of these elements can only lead to distortions of the law as we seek to understand and ultimately apply it.

Given these foundations—love, justice, and sin—and historical direction—creation, fall, redemption, and consummation—what is the best approach to the law of contracts? Most casebooks on Contracts start with a very brief historical review and proceed directly to cases. Some start with the formation of contracts; others begin with remedies for breach of contract. Sprinkled throughout most casebooks are some discussions of why people create contracts and why the civil government should provide a forum for rectification when contracts are breached, usually in the form of notes following cases or short excerpts from law review articles. Even these discussions, however, rarely deal with questions of the worldview that justifies the social practice of contracting and authorizes coercive State enforcement of remedies for contract breaches.

These comments attempt to "back up" to these fundamental questions to set a foundation for

⁸ See *Colossian* 1:15-17.

⁹ See *Romans* 2:15.

¹⁰ See Herman Bavinck, *Christian Principles and Social Relationships*, in *ESSAYS ON RELIGION, SCIENCE AND SOCIETY* 143 (2008): "It [the gospel] considers everything from a moral point of view, from the angle in which all those circumstances and relationships are connected with the moral principles that God has instituted for all of life. Precisely because the gospel only opposes sin, it opposes it always and everywhere in the heart and the head, in the eye and in the hand, in family and society, in science and art, in government and subjects, in rich and poor, for *all* sin is unrighteousness, trespassing of God's law, and corruption of nature. But by liberating all social circumstances and relationships from sin, the gospel tries to restore them all according to the will of God and make them fulfill their own nature."

¹¹ The Hebrew Scriptures also exemplify the use of non-canonical wisdom by their adaptation of portions of the Egyptian Instruction of Amenemopet into what became the canonical book of Proverbs. The scholarly consensus has concluded that the "sayings of the wise" (*Proverbs* 22:17-24:34) integrated an earlier Egyptian source into Proverbs. See, e.g., RAYMOND B. DILLARD & TREPPEY LONGMAN, III AN INTRODUCTION TO THE OLD TESTAMENT 240-241 (1994); DEREK KIDNER, *THE WISDOM OF PROVERBS, JOB, AND ECCLESIASTES* 44-45 (1985).

¹² See JAMES B. JORDAN, *THE LAW OF THE COVENANT* 45 (1984): "The mixing of God's law with local customary law is called 'common law,' and considering that at the outset, right after the Flood, God's law was the only law, it is reasonable to assume that at this point in history [i.e., the Exodus] there was still a strong common law. The law codes of the ancient world are at many places quite similar to the laws recorded in the Pentateuch—again evidence of a common source (Noah, and behind him, God)." See also H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 87 (2000) ("It is not likely that the revelation of God's word to Moses, on Sinai in the thirteenth century BCE, completely changed the existing law of Jewish people."); Niels Peter Lemche, *The Development of Law in the Ancient Near East: Justice in Western Asia in Antiquity, or; Why No Laws Were Needed!*, 70 *CHI-KENT L. REV.* 1695, 1699 (1995). ("The judges of that society [early Mesopotamia] must have had some source of knowledge about how to judge. This source would be . . . [the] unwritten law tradition.")

further thinking on specific issues in the law of contracts in light of these first principles. This piece will approach the fundamental issues in light of the truth (and truths) of the historic Christian faith.¹³

Four Doctrines underlie a Christian understanding of human activity of any sort.¹⁴ While these Four Doctrines are general enough to be relevant to whatever we do, I will discuss them here in terms that will be particularly useful to the law of contracts. We will then move to a discussion of Three Perspectives that will help to connect the Four Doctrines to contracting and the law of contracts. The truths of the Four Doctrines simply are too big to apply easily to legal issues, so the Three Perspectives will help us examine the law of contracts. I do not here lay out additional principles of the law under which particular rules of contracts can be arrayed, but I have begun to do so elsewhere, as have others. None of the principles is sacrosanct; the rules of the law of contracts can be arranged in many ways. Nevertheless, these principles should help connect the multifarious rules to the Four Doctrines through the Three Perspectives.

THE FOUR DOCTRINES

DOCTRINE #1 –

THE CREATOR-CREATURE DISTINCTION

“God is God and we’re not,” is an oft-quoted refrain. But what does it mean? Like many slogans this one leaves out a great deal of important information: What is “God?” How do we know if God “is?” Even if God exists, what difference does it make? What does it mean to say, “we’re not” God? And so on. Biblically elaborated, this catch phrase suggests that it is God (through his Word) who sets the standards for what is true and just, not our experience or rationality. In theological parlance, God possesses aseity¹⁵. “Aseity” describes God’s self-existence: “He has the ground of His existence in Himself.”¹⁶ Or, in plain English, God is *independent*: “He does not need us or the rest of creation for anything. . . .”¹⁷ As the Apostle Paul proclaimed to the skeptical Greek philosophers on Mars Hill: “The

God who made the world and all things in it, since He is Lord of heaven and earth, does not dwell in temples made with hands; neither is He served by human hands, as though He needed anything, since He Himself gives to all life and breath and all things.”¹⁸

If God the creator is *independent*, it follows that created human beings are *dependent*. We are dependent regardless of whether we like it or acknowledge it.¹⁹ Our dependence is not only physical, it is cognitive. Human beings ultimately rely on God for their ability to know as well as the contents of their knowledge. Human perception, cognition, and reasoning are equally as dependent on God as are the number of the hairs on our heads.²⁰ In other words, what we believe we know about justice in general and the law of contracts in particular is dependent on what God knows about justice and contracts. Anything we say about these topics is subject to what God says about them. The dependent character of knowing is entailed by the biblical account of creation *ex nihilo* (creation “from nothing”).²¹ If God originally created and now maintains²² all that exists, then creation and providence include human faculties such as perception, cognition, and reasoning as well as the subjects of human investigation like the law (of contracts). Thus the combination of divine aseity and human dependence account for Scripture’s reference to “knowledge” in a lengthy list of *ethical*

¹⁸ Acts 17:24-25 (all Scriptural quotes are taken from THE NEW AMERICAN STANDARD BIBLE (1977) unless otherwise noted).

¹⁹ Of course, if the Scriptural record is correct, then all human beings at some level *know* that there is a God to whom they are accountable: “For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men, who suppress the truth in unrighteousness, because that which is known about God is evident within them; for God made it evident to them.” *Romans* 1:18-19.

²⁰ “Are not two sparrows sold for a cent? And yet not one of them will fall to the ground apart from your Father. But the very hairs of your head are all numbered. Therefore do not fear; you are of more value than many sparrows.” *Matthew* 10:29-31. As John Frame elaborates: “Knowing is a process that itself is *subject* to God’s lordship. Like all other processes, human knowledge is under God’s control, subject to His authority, and exposed to His presence. Thus God is involved in our knowing, just as He is involved in the things know about. The process of knowing itself, apart from any information gained by it, is a revelation of God.” JOHN M. FRAME, THE DOCTRINE OF THE KNOWLEDGE OF GOD 41-42 (1987) [hereinafter, FRAME, DKG].

²¹ “By faith we understand that the worlds were prepared by the word of God, so that what is seen was not made out of things which are visible.” *Hebrews* 11:3.

²² Theologians refer to God’s continued maintenance of all that he created as *providence*: “And He [Christ] is the radiance of His [God’s] glory and the exact representation of His nature, and upholds all things by the word of His power.” *Hebrews* 1:3. (Emphasis added.)

¹³ Just what constitutes the content of the historic Christian faith can be a matter of disagreement. For purposes of this piece I am assuming it includes the following: the conclusion of the first four ecumenical councils (Nicea (325), Constantinople (381), Ephesus I (431), and Chalcedon (451)), and the system of doctrine explicated in the Westminster Standards (1648).

¹⁴ There are, of course, more than four doctrines of the Christian faith. In fact, there are more than four that are relevant to the law of contracts. I have chosen these four, however, because I believe they are both the most comprehensive as well as the most applicable to the study of the law.

¹⁵ From the Latin preposition *a*[*b*] (meaning “from”) and *se* (the third person reflexive pronoun meaning “himself”).

¹⁶ LOUIS BERKHOF, SYSTEMATIC THEOLOGY 58 (1939).

¹⁷ WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 160 (1994).

categories.²³ Atheism in Scripture is not described as an abstract concept; it is the practical matter of ignoring God in connection with our life (and practice of law).²⁴ To think and act as if the law of contracts were unrelated to God denies his aseity, asserts our independence, and amounts to a practical atheism.²⁵ Our insights into the structures of created reality are not neutral; they are obedient or disobedient, righteous or unrighteous.

We must seek knowledge in an obedient way. In the quest to know the law—including the law of contracts—we must acknowledge our dependence and recognize that all knowledge is under authority. Our search for the correct rules and their accurate applications is not *autonomous* but rather is subject to the God whose will is revealed in creation, providence, conscience, and Scripture (*heteronomous*). The Scriptures not only reveal God as the creator and sustainer of all that exists, they also disclose God as absolute personality. God is not some impersonal force pervading the universe or a set of abstract rules of logic suspended above the world. God exists in absolutely personal relationship as Trinity.²⁶ As creatures made in God's image,²⁷ human beings cannot help but be personal and relational as well.²⁸ Our relationships to God and to each other are volitional and emotional as well as intellectual. We are apt to forget this point in the law school experience and the practice of law with

their emphasis on academic comprehension and successful competition. Our dependence on God extends to the whole of our persons and cannot be allowed to be truncated to scholarly or professional pursuits. The nature of that personal relationship will be discussed in the next section.

DOCTRINE #2 –

THE COVENANTAL STRUCTURE OF UNDERSTANDING

If we are dependent on a personal God, what form does our relationship to him take? In other words, what is the structure of the bond between God and humanity? The brief answer is *covenant*. The biblical use of the word covenant is not easy to sum up. At the most basic, a covenant means an agreement between two parties.²⁹ As used in Scripture, a covenant may refer to a pact between two equals or a type of a relationship between a lord (or suzerain) and his servants. Divine-human covenants are, of course, of the later type. By way of specific examples, God has frequently explicitly entered into covenant with particular people such as Noah,³⁰ Abraham,³¹ Israel,³² and David.³³ Jeremiah prophesied the coming of a new covenant,³⁴ Jesus spoke of the last supper in covenantal language,³⁵ and the author of the *Epistle to the Hebrews* identified the completed work of Christ as the fulfillment of the new covenant promised by God in *Jeremiah*.³⁶

The concept of covenant is even more all-encompassing in Scripture than the particular examples noted above. It is one of the most pervasive, large-scale descriptions of humanity's

²³ As the Apostle Peter wrote: "Now for this very reason also, applying all diligence, in your faith supply moral excellence, and in your moral excellence, knowledge; and in your knowledge, self-control, and in your self-control, perseverance, and in your perseverance, godliness; and in your godliness, brotherly kindness, and in your brotherly kindness, love. For if these qualities are yours and are increasing, they render you neither useless nor unfruitful in the true knowledge of our Lord Jesus Christ." 2 *Peter* 1:5-8. (Emphasis added.)

²⁴ "The wicked, in the haughtiness of his countenance, does not seek *Him*. All his thoughts are, 'There is no God.'" *Psalms* 10:4. See also *Psalms* 17. See generally ALEXANDER SCHMEMMANN, *FOR THE LIFE OF THE WORLD: SACRAMENTS AND ORTHODOXY* 124 (1973).

²⁵ An atheist (or, speaking of those who do not wish to assume this title expressly, a secularist) is one who views the world as containing its meaning within itself. The principles of knowledge (epistemology) and action (ethics) are wholly immanent and have no transcendent referent to a self-contained God. Any connections between law and morality are the arbitrary products of human activity and can be deconstructed and reconstructed as we wish. Outside the realm of personal piety and a few hot-button social issues, most evangelical Christians fall into this category.

²⁶ The doctrine of the Triune nature of God and the doctrine of *perichoresis* (divine interpersonal interpenetration) of the members of the Godhead cannot be set forth through the citation of a couple of verses. A helpful discussion can be found in HERMAN BAVINCK, *THE DOCTRINE OF GOD* 304-317 (reprinted 1977) (1915).

²⁷ "Then God said, 'Let Us make man in Our image, according to Our likeness.'" *Genesis* 1:26.

²⁸ E.g., marriage, family, and social organizations.

²⁹ See, e.g., O. PALMER ROBERTSON, *THE CHRIST OF THE COVENANTS* 15 (1980) ("A covenant is a bond in blood sovereignly administered"). See also 1 *NEW INTERNATIONAL DICTIONARY OF OLD TESTAMENT THEOLOGY AND EXEGESIS* 747-755 (1997) (hereinafter, NIDOTTE).

³⁰ "But I will establish My covenant with you; and you shall enter the ark—you and your sons and your wife, and your sons' wives with you." *Genesis* 6:18.

³¹ "On that day the LORD made a covenant with Abram, saying, 'To your descendants I have given this land, From the river of Egypt as far as the great river, the river Euphrates: the Kenite and the Kenizzite and the Kadmonite and the Hittite and the Perizzite and the Rephaim and the Amorite and the Canaanite and the Girgashite and the Jebusite.'" *Genesis* 15:8-21.

³² "So Moses took the blood and sprinkled it on the people, and said, 'Behold the blood of the covenant, which the LORD has made with you in accordance with all these words.'" *Exodus* 24:8.

³³ "I have made a covenant with My chosen; I have sworn to David My servant, I will establish your seed forever, And build up your throne to all generations." *Psalms* 89:3.

³⁴ "Behold, days are coming," declares the LORD, "when I will make a new covenant with the house of Israel and with the house of Judah . . ." *Jeremiah* 31:31.

³⁵ "And in the same way He took the cup after they had eaten, saying, 'This cup which is poured out for you is the new covenant in My blood.'" *Luke* 22:20.

³⁶ *Hebrews* 8:1-13.

relationship to God.³⁷ The very structure of creation is covenantal,³⁸ including the original commands to Adam and Eve to populate the earth, to rule over the earth and its creatures, and subdue the creation.³⁹ If the cosmic scope of the obligations assigned to our original parents was embedded in a covenantal relationship, then our work as their descendants is also embedded in that covenant of creation.

The conclusion that all of humanity's relationship to God is covenantal is not simply an exercise in biblical exegesis or historical analysis. The covenantal connection answers two questions and entails at least three significant conclusions. First, if all humankind is not covenantally related to God, then what are its responsibilities in the world? Or, to put it another way, if only the redeemed stand in covenant with God, then there would be neither a basis on which to hold those outside the covenant community responsible for failing to observe the stipulations of the covenant of creation nor justification for imposing sanctions on them for their failure to do so.⁴⁰ Second, the structural covenantal relationship renders even those who have not heard the gospel of Jesus Christ responsible for their sins.⁴¹ Those who have never heard the message of redemption in Christ are not condemned for not believing in him but rather for their failure to live according to the law they acknowledge.⁴²

Our universal human relationship to God through the covenant of creation entails the conclusion that there is no airtight division between sacred and secular; all of the life of every human being is embedded in covenantal relationship (including

the law of contracts).⁴³ The covenant of creation also relates the extended Scriptural analogies of covenant and kingdom: if the suzerain king rules his vassal people by a covenant, then we should see all our activities as taking place in God's kingdom. God's kingdom (the sphere over which he rules covenantally) is not limited to his redemptive work (i.e., the Church). The practice of law is kingdom service, not merely a platform for kingdom service.⁴⁴ Finally, creation understood in terms of covenant entails that the cosmos is subject to God's kingship. If the whole creation is God's covenant kingdom and if God is the king of creation, then God is king over that sphere of life called "law." Neither the law nor lawyering are neutral, secular activities; we cannot rightly understand either the law that we study or our practice of the law without reference to God and his covenantal administration.

Human law is ultimately grounded in the divine character; the law of contracts is dependent. Human law is administered on earth; the social practice of contracting as well as the law of contracts flourishes in God's Kingdom. Human law is dispensed by human beings; the law of contracts is subject to God's kingship. In short, all human knowledge, including knowledge of the law of contracts, is servant knowledge, and the Christian's concern should be to discover what the LORD thinks about this law, to agree with that judgment, and to carry it out in loving obedience.

DOCTRINE #3 – THE LAW OF GOD

In view of the preceding discussion, one might conclude that the first place to begin a study of the law of contracts would be the inscripturated Word of God. Such a conclusion would not necessarily be incorrect. Nevertheless, it might reveal an insufficiently broad understanding of the law of God. The law of God is more than the Ten Commandments, their adumbration in the Pentateuch, or even their elaboration throughout the rest of Scripture. Law is every word by which

³⁷ Other Scriptural divine-human relational analogies include father-child, shepherd-sheep, king-subject, mother-child, and warrior-vanquished.

³⁸ See, e.g., *Jeremiah* 33:20-21 ("Thus says the LORD, 'If you can break My covenant for the day, and My covenant for the night, so that day and night will not be at their appointed time, then My covenant may also be broken with David'"); *Jeremiah* 33:25-26 ("Thus says the LORD, 'If My covenant for day and night stand not, and the fixed patterns of heaven and earth I have not established, then I would reject the descendants of Jacob and David My servant'"); *Hosea* 6:7 ("But like Adam they have transgressed the covenant; There they have dealt treacherously against Me.").

³⁹ "And God blessed them; and God said to them, 'Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth.'" *Genesis* 1:28.

⁴⁰ See, e.g., the Apostle Paul's prosecution of a "covenant of creation" lawsuit against the philosophers at Mars Hill recorded at *Acts* 17:22-31 and the record of the charges of the prophet Amos against the gentile nations in *Amos* 1:2-3:8.

⁴¹ See *Romans* 1:18, 19 *supra* note 9.

⁴² See *Romans* 2:12-14.

⁴³ That most people do not consciously recognize their covenantal relationship to God is immaterial; it is built into our very humanity. As the Apostle Paul wrote: "For all who have sinned without the Law will also perish without the Law; and all who have sinned under the Law will be judged by the Law; for not the hearers of the Law are just before God, but the doers of the Law will be justified. For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law written in their hearts." *Romans* 2:12-15a.

⁴⁴ In contrast to the world-flight mentality of mid-twentieth century fundamentalism, God intended human history to be developmental. In contrast to much of contemporary evangelicalism, the kingdom of God cannot be reduced to saving souls. In contrast to theological liberalism, the presence of the kingdom of God is by the decisive intervention of God in human history, not the result of progressive human development.

God subjects his creation to his will. Law may therefore be discovered from the full range of God's revelation including the world around us,⁴⁵ our consciences,⁴⁶ and human experience⁴⁷ as well as the Bible.⁴⁸

The Scriptures relate generally to the study of law in three ways. As God's inspired, infallible, and inerrant Word, the Bible is the "best evidence" of God's will on any topic it addresses.⁴⁹ The Scriptures also provide the standard against which all other truth claims must be evaluated because God's Word is his Word of truth.⁵⁰ Last, the Bible justifies other means by which the truth about the law of contracts can be discovered. Notwithstanding the primary authority of the Scriptures, we may also have confidence that we can discover God's norms for the law of contracts from sources other than the Bible. God did not abandon the world after the Fall. God the king continues his covenantal rule over his creation. Correctly interpreted, the testimony of the human conscience, the results of trial and error throughout history, and the empirical sciences such as economics can also reveal the mind of God on the law of contracts.

DOCTRINE #4 – SIN

The doctrine of sin is fundamental to understanding contract law, particularly the law of remedies for breach of contract. Human cooperation would have occurred even had Adam not fallen into sin. Mutual love as well as love of God and his commands would have led to human cooperation in implementing the covenant of creation. Seeking and respecting the good of the other would have displayed recognition of primary justice by a sinless humanity. Sin, however, in the forms of over-reaching, over-promising, under-

performing, and opportunism, leads to contract breaches and raises the need for secondary or rectifying justice: "[t]he doctrine of sin is relevant to contract law because, whatever the morality of contract performance may be, a propensity toward wrongful opportunism supports state-enforced limits on contract enforcement and sanctions for contract breach."⁵¹

Sin's pervasive effects distort human response to each of the preceding doctrines. Sin elides the creator-creature distinction and leads human beings to attempt to know and act independently. Sin erodes the covenantal nature of understanding and seeks to limit God's claims to less than the entirety of human life. And sin certainly clouds correct understanding of the law of God. The effects of sin find the meaning of the world and principles of action solely within the world order. Its effects lead to an approach to the law that fails to acknowledge the existence of an independent God who rules a dependent humanity through a covenant of his determination. Ultimately, it concludes that there is no real connection between law and morality. Morality is reduced to emotivism⁵² and the law is diminished to the exercise of power. Rather than seeking to frame the law in terms of an objective criterion of justice, the effects of sin cause people see the law as a means by which his or her personal or group interests may be advantaged at the expense of someone else.⁵³ Thus, for most people in the modern legal academy any connections between law and morality are little more than arbitrary products of human activity. Effective lawyering becomes simply a tool to enhance the client's interests; the notion of *love* as the impetus to contracting and *justice* as the form of law become foreign concepts.⁵⁴

⁴⁵ See, e.g., *Psalm* 19.

⁴⁶ See *Romans* 2:12-15.

⁴⁷ See, e.g., *Deuteronomy* 17:6; 19:15. The New Testament Scriptures also acknowledge the use of non-scriptural data in the process of applying canonical truth to particular states of affairs. See, e.g., *Matthew* 18:16 (quoting *Deuteronomy* 19:15); *1 Thessalonians* 5:21a; *1 Timothy* 5:19; *1 John* 4:1ff.

⁴⁸ See, e.g., *Deuteronomy* 8:3 ("And He humbled you and let you be hungry, and fed you with manna which you did not know, nor did your fathers know, that He might make you understand that man does not live by bread alone, but man lives by everything that proceeds out of the mouth of the LORD.")

⁴⁹ As the authors of the Chicago Statement on Biblical Inerrancy put it, Holy Scripture, being God's own Word, written by men prepared and superintended by His Spirit, is of infallible divine authority in all matters upon which it touches: it is to be believed, as God's instruction, in all that it affirms; obeyed, as God's command, in all that it requires; embraced, as God's pledge, in all that it promises. The Chicago Statement on Biblical Inerrancy (1978) reprinted in GRUDEM, SYSTEMATIC THEOLOGY, *supra* note 17, at 1204.

⁵⁰ *John* 17:17 ("Sanctify them in the truth; Thy word is truth.").

⁵¹ See *supra* Pryor, note 7 at 745. There may have been a need for secondary rights even in an unfallen world. Human finitude, potential for error, and lack of knowledge of the future might have led to violations of primary rights even absent the effects of sin. *Id.* at 745-46. Were that the case, however, human society would not have required a coercive legal system to vindicate a secondary right to rectification.

⁵² See ALASDAIR MACINTYRE, AFTER VIRTUE 24 (1981): "an emotivist is one who see[s] in the social world nothing but a meeting place for individual wills, each with its own set of attitudes and preferences and who understand that world solely as an arena for the achievement of their own satisfaction, who interpret reality as a series of opportunities for their enjoyment . . ."

⁵³ See generally MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES (1982) for evidence of the vast number of government programs whose function is to redistribute income to politically powerful interest groups.

⁵⁴ As Professor Michael Schutt puts it, "the law [has become] a tool for social engineering, and the bench and bar constituted the primary social engineers." Michael P. Schutt, *Oliver Wendell Holmes and the Decline of the American Lawyer: Social Engineering, Religion, and the Search for Professional Identity*, 30 RUT. L. REV. 143, 158 (1998).

Bases For Legal Action: The Three Perspectives

So far, we have established Four Doctrines relevant to a correct understanding of any topic including the law of contracts. In order to understand anything accurately we must acknowledge our utter dependence on God; apprehend the personal, covenantal relationship between humanity and God; submit to the authority of God's law disclosed in special and general revelation; and take into account the corrupting, pervasive presence of human sinfulness. We are now prepared to apply these limiting concepts to the justification of law as a human enterprise.

We must ultimately relate the many "parts" of the law of contracts to the underlying whole described in the Four Doctrines. This is a big job, to say the least. For example, just how does the creator-creature distinction relate to the "mailbox rule,"⁵⁵ or what does the covenantal structure of understanding have to do with the Statute of Frauds?⁵⁶ Multiperspectivalism describes the way of relating the various aspects of a system to each other and ultimately relating them to the whole (described in the Four Doctrines). Each element of the system of the law of contracts is perspectively related to another *and* to the whole. The Three Perspectives can be summarized in several ways. We could call them the starting point, the method, and the conclusion, or law, object, and subject. Alternatively, we could identify them (as this work does) as the normative, the situational and the existential.⁵⁷ First, all human activity is "normed" by the law of God but the law is not simply "out there;" it is part of the covenantal constitution between the personal independent God and personal dependent human beings. Second, every human application of the law of God must take place in a particular setting; situations differ and provide differing *fora* or jurisdictions in which to apply the correct norm. Last, the law is applied in a particular situation by and to human beings. All human beings exist equally as image-bearers of God. Yet, not all humans

are identical. Our relative abilities to reason, form intentions, exercise our wills, feel emotions, achieve ends, and the like do not provide reasons to apply the law relatively. Yet these common capabilities suggest something about the nature of the law common to each person, not the least of which is that all are equal before the law.

Perspective #1 – The Normative (Dominion)⁵⁸

God's original mandate to human beings was to rule the earth,⁵⁹ commonly called the dominion mandate.⁶⁰ The obligation to rule entails two fundamental corollaries. First, obedient dominion requires covenantal acknowledgment of God's *independent* regal authority and humanity's *dependent* duty to rule as his vicegerents.⁶¹ Second, the divine directive to subdue the earth justifies the exercise of human authority (and hence its legitimacy) *prior to* the Fall.⁶² The exercise of human authority by some people is a legitimate means by which others should make a decision or undertake an action apart from

⁵⁵ The common law "mailbox rule" provides that a written acceptance of an offer is effective when it is put out of the offeree's possession (e.g., placed in the mailbox), even if it ultimately never gets to the offeror.

⁵⁶ The Statute of Frauds provides that certain contracts are unenforceable unless there is a sufficient written memorandum thereof that it has been signed by the person against whom enforcement is sought.

⁵⁷ The Trinity is the root of perspectivalism: "Father, Son, and Spirit are 'mutually involved,' without losing their distinctness. Each embodies the complete divine essence, so each is God from a particular perspective. Lest we embrace modalism, of course, it is also important for us to say that the perspectives represent genuine eternal distinctions within the one Godhead, not just the subjective viewpoints of those who come to know God. Since the Trinity is perspectival, the world is also." JOHN FRAME, CORNELIUS VAN TIL: AN ANALYSIS OF HIS THOUGHT 170 (1995).

⁵⁸ Even the normative perspective on human activity can be summarized from another perspective. We could start with the Apostle Paul's injunction that "love therefore is the fulfillment of the law." *Romans* 13:10b. Or we could move down one level of abstraction to Jesus' two-pronged summary: "[a]nd He said to him [the lawyer who had asked which is the greatest commandment], 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and foremost commandment. The second is like it, You shall love your neighbor as yourself.'" *Matthew* 22:37-39. Ultimately, however, we should see that the exercise of dominion is one of the fundamental means by which we carry out the love command. See generally Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gifts*, 46 UCLA L. REV. 815 (1999).

⁵⁹ *Genesis* 1:26-30: "Then God said, 'Let Us make man in Our image, according to Our likeness; and let them rule over the fish of the sea and over the birds of the sky and over the cattle and over all the earth, and over every creeping thing that creeps on the earth.'" And God created man in His own image, in the image of God He created him; male and female He created them. And God blessed them; and God said to them, "Be fruitful and multiply, and fill the earth, and subdue it; and rule over the fish of the sea and over the birds of the sky, and over every living thing that moves on the earth." Then God said, "Behold, I have given you every plant yielding seed that is on the surface of all the earth, and every tree which has fruit yielding seed; it shall be food for you; and to every beast of the earth and to every bird of the sky and to every thing that moves on the earth which has life, I have given every green plant for food;" and it was so."

⁶⁰ See Pryor, *supra* note 7, at 743 ("While the word 'dominion' is used in the Genesis text mandating cultural development, the cultural mandate should not be understood as domination or as satisfaction of subjective wants.>").

⁶¹ *Romans* 9:20-21 ("On the contrary, who are you, O man, who answers back to God? The thing molded will not say to the molder, 'Why did you make me like this,' will it? Or does not the potter have a right over the clay, to make from the same lump one vessel for honorable use, and another for common use?").

⁶² The Apostle Paul confirms that authority as such is legitimate in *Romans* 13:1 ("Let every person be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God.>").

reasons of their own.⁶³ Authority, therefore, (unlike persuasion) provides its own ground for action for one over whom the authority is exercised. Perhaps a familial example will help make this distinction clear. Parents have the authority to tell their young child to go to bed at nine o'clock. They may issue such a directive without providing reasons sufficient to persuade the child that it is in her interests to go to bed at nine o'clock. Conversely, persuasion works by offering reasons for action by which the child (or anyone else) may make a personal judgment whether to undertake a particular action without fear of punishment. The creation account admits the exercise of human authority.

Some might question the legitimacy of the exercise of authority after the Fall. Did the rebellion of our first parents work a forfeiture of their authority? No, for two reasons. First, God confirmed the authority he had delegated to Adam and Eve to Noah for the postdiluvian age.⁶⁴ Second, the early patriarchs of Israel clearly exercised authority, as did the nation of Israel itself. The ability to misuse authority, however, represents a significant change from the prelapsarian age. We must take into account the reality of sin. On the one hand, the legitimacy of the continuing exercise of authority—including State authority—is confirmed by the Apostle Paul in his epistle to the *Romans* where he comments that “for it [the Roman state] is a *minister* of God to you for good. But if you do what is evil, be afraid; for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath upon the one who practices evil.”⁶⁵ On the other hand, the legitimate authority wielded by the State can be perverted as described in the vision of the Apostle John recorded in the thirteenth chapter of

the *Revelation*.⁶⁶ While the doctrine of sin accounts generally for the misuse of authority, we can account more specifically for all of its perversions in terms of failing to observe the creator-creature distinction, indifference to the covenantal structure of reality, and/or disregard of the law of God. Notwithstanding the potential for deformation, we must continue to acknowledge that the dominion mandate continues as part of our human covenantal responsibility.

God granted human beings authority as a means by which we are to exercise dominion or, to put it another way, to be his co-creators:

The first recorded Word of God addressed to mankind (Genesis 1:28–30) has come to be known as the cultural mandate. Within the unfolding drama of the Genesis narratives it assumes the form of a *creatio tertia*. *Creatio prima* refers to God's primordial act of creating the universe out of nothing. This is followed by God's ordering process, called *creatio secunda*. Then, as a tertiary, ongoing phase in the life of creation, God mandates mankind, as his “junior partners,” to join him as coworkers in carrying on the work of the world.⁶⁷

This “work of the world” was and is to move the creation (including us) to the rest into which God entered on the seventh day of creation. Human beings were created for “rest.” How was the original goal for creation to have been accomplished? Had Adam and Eve not eaten from the tree of the knowledge of good and evil, they ultimately would have been allowed to eat from the tree of life. The tree of life was the preredemptive sacramental sign and seal of *life*,⁶⁸ that is, that permanent rest of God

⁶³ “A person treats something as authoritative, when he treats it as . . . a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 234 (1980).

⁶⁴ *Genesis* 9:1 (“And God blessed Noah and his sons and said to them, ‘Be fruitful and multiply, and fill the earth.’”).

⁶⁵ *Romans* 13:4 (emphasis added). The Greek word here translated as “minister” (*diavkonos*, *diakonos*) is the root of the English word “deacon.” See generally *NEW INTERNATIONAL DICTIONARY OF NEW TESTAMENT THEOLOGY* 544–549 (1986) (hereinafter, *NIDNTT*).

⁶⁶ *Revelation* 13:1–7: ¹And he stood on the sand of the seashore. And I saw a beast coming up out of the sea, having ten horns and seven heads, and on his horns were ten diadems, and on his heads were blasphemous names. ²And the beast which I saw was like a leopard, and his feet were like those of a bear, and his mouth like the mouth of a lion. And the dragon gave him his power and his throne and great authority. ³And I saw one of his heads as if it had been slain, and his fatal wound was healed. And the whole earth was amazed and followed after the beast; ⁴and they worshiped the dragon, because he gave his authority to the beast; and they worshiped the beast, saying, “Who is like the beast, and who is able to wage war with him?” ⁵And there was given to him a mouth speaking arrogant words and blasphemies; and authority to act for forty-two months was given to him. ⁶And he opened his mouth in blasphemies against God, to blaspheme His name and His tabernacle, that is, those who dwell in heaven. ⁷And it was given to him to make war with the saints and to overcome them; and authority over every tribe and people and tongue and nation was given to him.

⁶⁷ GORDON SPYKMAN, *REFORMATIONAL THEOLOGY: A NEW PARADIGM FOR DOING DOGMATICS* 256 (1992).

⁶⁸ Consider that the Apostle John's description of the blessing of a right relationship with God as “eternal life.” See, e.g., *John* 3:16; *1 John* 5:11.

into which Adam could have entered but did not.⁶⁹

With the Fall, humanity lost its power to reach the goal of rest but not its mandate to do so. God graciously took upon himself not only the provision of the tools by which we could have reached our goal but also provided the very way by which we make it to our end in the person and work of Jesus Christ. Moreover, we will see on the return of Christ the perfect exercise of the norm of dominion granted to humanity.⁷⁰ We again perceive that there should be no dichotomy between the sacred and the secular: the norm for human activity is the dependent exercise of dominion, in the context of covenant, and in terms of the law—all motivated by love.

The relationship between the normative perspective of the dominion mandate and contracts is straightforward: contracts are a means by which human beings exercise dominion.

Perspective #2 – The Situational (Office and Rights)

The next two perspectives can be described more briefly. We have already observed that the grant of dominion to human beings entails the legitimacy of the exercise of authority. The concept of office expresses the means by which this authority is implemented and makes it clear that humans can exercise authority over other human beings, not only over the non-human creation. Office necessitates service in a particular task and thus the right to perform it. The biblical expression “servant of the LORD” implies the concept of office⁷¹ and suggests the limits on the offices any one person may occupy. God’s authority is universal and total; human authority is circumscribed and limited. God limits the exercise of human authority and hence suggests spheres of dominion through various offices such as parents, civil rulers, church elders, and contract parties.⁷²

⁶⁹ The second Adam, Jesus Christ, has entered this rest. See *Hebrews* 4:10 (“For the one who has entered His rest has himself also rested from his works, as God did from His.”).

⁷⁰ *Philippians* 2:9–11 (“Therefore also God highly exalted Him, and bestowed on Him the name which is above every name, that at the name of Jesus every knee should bow, of those who are in heaven, and on earth, and under the earth, and that every tongue should confess that Jesus Christ is Lord, to the glory of God the Father.”).

⁷¹ The Hebrew word *‘ebed*, (slave/servant/subordinate) has a wide semantic range but nearly one-fourth of its occurrences in the Old Testament describe the relationship between kings and subordinates. In fact, it was an honor to be a servant of the king. See generally 4 NIDOTTE, *supra* note 29 at 1183–98.

⁷² The first three offices correspond to the jurisdictions of the family, the state and the church. The last office is characteristic of all those jurisdictions within the rubric of voluntary associations. See generally *Ephesians* 6:1–9 (parents and employers); *1 Peter* 2:13 ff. (rulers and parents); and *Titus* 1:5 ff. (elders).

God has created the various offices and will hold their bearers responsible according to the terms of the covenant for effecting the norm of dominion appropriate to the exercise of that office.⁷³ God has delegated to each office-holder the authority and thus the right to carry out that office; hence, the holder of an office has the *duty* to do so. Correlatively, the holder of an office has a *right* to exercise the authority of that office without unlawful interference. By way of contrast, the prevalent Enlightenment version of rights understands them as subjective properties simply attaching to personhood. Classical liberals (today’s conservatives and libertarians) assert that human beings have such subjective rights simply by virtue of their humanity.⁷⁴ Similarly, more contemporary thinkers continue to ignore the covenantal basis for rights and place the genesis of rights with political society. The State creates or destroys rights among its citizens to achieve some overarching goal.⁷⁵ Neither the classical nor modern liberal view of the nature of rights grounds them in an office created by God, following the terms of his covenant, and under his law.⁷⁶ The kingdom of the world is substituted for the Kingdom of God, and the dominion of the family, the Church, and even voluntary associations is ever reduced.

⁷³ See, e.g., God’s warning to Ezekiel about the duties and dangers of the prophetic office: “‘And the word of the LORD came to me saying, ‘‘Son of man, speak to the sons of your people, and say to them, ‘If I bring a sword upon a land, and the people of the land take one man from among them and make him their watchman; and he sees the sword coming upon the land, and he blows on the trumpet and warns the people, ‘then he who hears the sound of the trumpet and does not take warning, and a sword comes and takes him away, his blood will be on his own head. ‘‘He heard the sound of the trumpet, but did not take warning; his blood will be on himself. But had he taken warning, he would have delivered his life. ‘‘But if the watchman sees the sword coming and does not blow the trumpet, and the people are not warned, and a sword comes and takes a person from them, he is taken away in his iniquity; but his blood I will require from the watchman’s hand.’”

⁷⁴ “Now as for you, son of man, I have appointed you a watchman for the house of Israel; so you will hear a message from My mouth, and give them warning from Me. ‘‘When I say to the wicked, ‘O wicked man, you shall surely die,’ and you do not speak to warn the wicked from his way, that wicked man shall die in his iniquity, but his blood I will require from your hand. ‘‘But if you on your part warn a wicked man to turn from his way, and he does not turn from his way, he will die in his iniquity; but you have delivered your life.” *Ezekiel* 33:1–9. See also Jesus’ parable of the talents (*Matthew* 25:14 ff.)

⁷⁵ See, e.g., HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* (1986).

⁷⁶ The circularity of such a formula for the origin of rights is apparent. If political society is the source of rights, what is the source of the right to create a political society?

⁷⁶ For an accounting for human rights from a Christian perspective see C. Scott Pryor, *Looking for Bedrock: Accounting for Human Rights in Classical Liberalism, Modern Secularism, and the Christian Tradition*, 33 *CAMPBELL UNIV. L. REV.* 609 (2011).

The correlation between rights on the one hand and covenant and law on the other should be apparent. God has independently structured all of life under his covenantal regime. The stipulations of the covenant can be known from the Scriptures and, to a limited extent, from general revelation. The primary stipulation—dominion—applies to everyone. Specific application of the dominion mandate requires understanding of the particular situation. Only those with the appropriate office, however, have the earthly authority to enforce that stipulation as it comes to expression in various spheres of life.

The situational perspective of office suggests two useful insights on the social practice of contracting and contract law. First, the universal dominion mandate legitimates a universal opportunity to contract. Dominion is a stipulation of God's covenant with humanity; thus, all human beings are authorized to enter into contracts to the extent they are existentially capable and situationally justified. Second, office more narrowly understood defines who may provide a remedy for breach of contract. Simply because someone has the primary duty to perform a contractual obligation does not mean that God has delegated to every human being the office of rectifying its breach. The question of jurisdiction, then, is an important one, answering addressing who has the authority to rectify breach of contract and for which contracts civil government should provide a remedy.

Perspective #3 – The Existential (The Image of God)

A discussion of the significance of the image of God on the law of contracts brings us full circle. Only those who are made in the image of God *can* exercise dominion because dominion is an attribute of God.⁷⁷ Only those who are made in the image of God *may* fill an office because each human office (parent, judge, elder, employer, or contract-party) reflects an aspect of God's sovereignty.⁷⁸ Human beings may contract because they, like God, may make promises and because God has charged them to subdue the earth. Contracting thus creates a primary right to contract performance. The dominion mandate is part of the created status of human beings. Authority to participate in ruling

creation is not derived from a person's redemptive status; therefore every human being may exercise dominion by contracting. Breach of contract entails the secondary right of rectification, and human beings may also occupy an office in which breaches of certain contracts are adjudicated and temporarily sanctioned.

In short, God's nature is orderly, and the various human offices reflect God's orderly nature and are to be used to extend this order over all creation. Human beings created in the image of God are uniquely equipped to develop this order. Grounded in the Four Doctrines seen through the prism of the Three Perspectives, the Christian lawyer is oriented toward the task at hand. With the illuminating power of the Holy Spirit we can stand against the deforming powers of contract law and lovingly begin to bring it into conformity with the justice of God.

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⁷⁷Theologians typically speak of God's attribute of dominion under the topic of his sovereignty. Scripture attests to God's right to exercise power over his creation. See, e.g., 2 Corinthians 6:18 (referring to God as "Lord Almighty").

⁷⁸See, e.g., Ephesians 5:22 ff. (the Apostle Paul's extended discussion of the parallel between the office of husband and the relationship between God the Father and the Son).