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CONSIDERATION IN THE COMMON LAW OF CONTRACTS: A BIBLICAL–THEOLOGICAL CRITIQUE

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INTRODUCTION

An approach to the study of the law of contracts must start somewhere. Some casebooks on contracts start with a very brief historical review and proceed directly to cases.¹ A number start with the formation of contracts;² others begin with remedies for breach of contract.³ One even begins with consideration.⁴ Sprinkled throughout most casebooks are some discussions of why contracts should be enforced, 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 legitimates coercive state enforcement of contracts. And to my knowledge, none discuss questions of theology in relation to the law of contracts.

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¹ See, e.g., CHARLES L. KNAPP, ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 2-15 (5th ed. 2003); STEWART MACAULAY, ET AL., CONTRACTS: LAW IN ACTION 1-40 (2nd ed. 2003); JOHN EDWARD MURRAY, JR., CONTRACTS: CASES AND MATERIALS 1-15 (5th ed. 2001); EDWARD J. MURPHY, ET AL., STUDIES IN CONTRACT LAW 1-13 (6th ed. 2003); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 2-21 (4th ed. 2001).

² See, e.g., STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW (2nd ed. 2001); JOHN D. CALAMARI, ET AL., CASES AND PROBLEMS ON CONTRACTS (4th ed. 2004).

³ See, e.g., JOHN P. DAWSON, ET AL., CONTRACTS: CASES AND COMMENT (8th ed. 2003); E. ALLAN FARNSWORTH, CONTRACTS: CASES AND MATERIALS (6th ed. 2001).

⁴ See LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW (7th ed. 2001).

This article will discuss one aspect of contracts law—consideration—in light of biblical criteria. Such a move requires some preliminary groundwork. Application of biblical teachings requires more than citing a series of proof-texts. And application of biblical doctrine includes more than the Bible.⁵ I will thus begin by describing three Christian doctrines that are particularly relevant to legal analysis. I will then follow with three perspectives that demonstrate how to apply the doctrines as tools for legal criticism. With these foundations, I will then move on to address consideration in two parts: What purpose does it serve? And how should courts draw its boundaries? I will cite very few cases. This is primarily a work of critique; I am certainly not trying to plot a curve on the scattershot of judicial decisions. But there is also some theory here; I believe Christianity has something to say about what the law should be.⁶

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⁵ See generally C. Scott Pryor, *Mission Possible: A Paradigm for Analysis of Contractual Impossibility at Regent University*, 74 ST. JOHN'S L. REV. 691 (2000) (discussing how the Bible can be used responsibly in legal scholarship). As a confessional Christian (i.e., one who has subscribed to certain sixteenth and seventeenth century confessions of the Protestant churches), I have assented to certain ecclesiastical doctrines about the nature of God as Trinity and the Bible as God's revelation. For purposes of this article these and other doctrines I will assume rather than argue for the truth of these teachings.

⁶ William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1727 (2003) (“[I]nstead of looking for the Christian theory of contracts or criminal law or anything else, we ought to be looking for the Christian lines of critique, the sin-induced tendencies that run through all legal fields and all legal forms.”).

I. BIBLICAL–THEOLOGICAL FOUNDATIONS

A. *The Three Doctrines*

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 is, 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 aseity.⁷ “Aseity” describes God’s self-existence: “He has the ground of His existence in Himself.”⁸ Or, in plain English, God is *independent*: “[He] does not need us or the rest of creation for anything”⁹ 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 things¹⁰

If God the creator is *independent*, it follows that all creation, including human beings, are *dependent*. We are dependent regardless of whether we like it or acknowledge it.¹¹ Our dependence is not only physical, it is cognitive. Human beings ultimately rely on God for their ability to know as well as for the contents of their knowledge. Human perception, cognition, and reason are equally as dependent on God as

⁷ From the Latin preposition *a*[*b*] (meaning “from”) and *se* (the third person reflexive pronoun meaning “himself”). CASSELL’S NEW COMPACT LATIN DICTIONARY 1, 200 (1963).

⁸ LOUIS BERKHOF, SYSTEMATIC THEOLOGY 58 (4th ed. 1941).

⁹ WAYNE GRUDEM, SYSTEMATIC THEOLOGY: AN INTRODUCTION TO BIBLICAL DOCTRINE 160 (1994) (emphasis omitted).

¹⁰ *Acts* 17:24-25 (citing scriptural quotes from THE NEW AMERICAN STANDARD BIBLE, unless otherwise noted).

¹¹ 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.

are the number of the hairs on our heads.¹² In other words, what we believe we know about justice in general and the law of contracts in particular is dependent on what God thinks 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”).¹³ If God originally created and now maintains¹⁴ all that exists, then creation and providence include human object qualities such as perception, cognition, and reasoning as well as the subjects of human investigation like the law (of contracts). Divine aseity and human dependence account for Scripture’s reference to “knowledge” in a lengthy list of ethical categories.¹⁵ Neither reason nor experience has ever ultimately

¹² *Matthew* 10:29-31. “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.” *Id.* 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 we 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). For a book-length analysis of the necessity of divine revelation for human knowledge, see ROBERT L. REYMOND, *THE JUSTIFICATION OF KNOWLEDGE* (1976).

¹³ *Hebrews* 11:3 (“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.”).

¹⁴ 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.). See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I, Q. 22, art. 1 (Fathers of the English Dominican Province trans., 1947) (1270) (“This good of order existing in things created, is itself created by God. Since, however, God is the cause of all things by His intellect, and thus it behooves that the type of every effect should pre-exist in him . . .”); see also BERKHOF, *supra* note 8, at 166 (“Providence may be defined as that continued exercise of the divine energy whereby the Creator preserves all His creatures, is operative in all that comes to pass in the world, and directs all things to their appointed end.”); GRUDEM, *supra* note 9, at 316 (“Both verses [*Hebrews* 1:3 and *Colossians* 1:17] indicate that if Christ were to cease his continuing activity of sustaining all things in the universe, then all except the triune God would instantly cease to exist.”).

¹⁵ 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).

justified human ethical knowledge (although both are means by which ethical knowledge is acquired). Dependence on divine revelation characterized the prelapsarian ethical injunction not to eat of the fruit of a particular tree.¹⁶ God through His Word provides the rule for all aspects of human life, not merely worship, evangelism, and personal ethics: “Whether, then, you eat or drink or whatever you do, do all to the glory of God.”¹⁷

Atheism in Scripture is not described as an abstract concept; it is the practical matter of ignoring God in connection with daily life (including academic studies).¹⁸ 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.¹⁹ Our insights into the structures of created reality are not neutral; they are obedient or disobedient, righteous or unrighteous. As the Apostle Paul notes, “[W]e are taking every thought captive to the obedience of Christ”²⁰

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

¹⁶ Compare *Genesis* 1:29 (“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’”) with *Genesis* 2:16-17 (“And the LORD God commanded the man, saying, ‘From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat’”). As Greg Bahnsen notes:

Even when man’s life was untainted by sin, his moral consciousness was not ultimate, but derivative; Adam was receptively reconstructive of God’s word, that is, he thought God’s thoughts after Him on a creaturely level. Adam did not look to himself for moral steering; rather, he lived by supernatural, positive revelation.

GREG L. BAHNSEN, *THEONOMY IN CHRISTIAN ETHICS* 280 (2d ed. 1984).

¹⁷ 1 *Corinthians* 10:31.

¹⁸ *Psalms* 10:4 (“The wicked, in the haughtiness of his countenance, does not seek Him. All his thoughts are, ‘There is no God.’”) (emphasis in original). See also *Psalms* 17. See generally Thomas C. Folsom, *The Restatement of the Obvious: Or What’s Right Got to Do with It? Reflections on a Business Ethic for Our Times*, 16 REGENT U. L. REV. 301, 315 (2003-2004) (“Moral realism [the opposite of practical atheism] has three foundational principles: (1) there is an objective reality, (2) human beings can know something about it, and (3) there are some things that everyone can, and some things that everyone ought to do in response to what they know.”).

¹⁹ 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.

²⁰ 2 *Corinthians* 10:5.

autonomous but rather is subject to the God whose will is revealed in Scripture (*heteronomous*).

The Scriptures not only reveal God as the creator and sustainer of all that exists, they also disclose God as the 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 an absolutely personal relationship as Trinity.²¹ As creatures made in God's image,²² human beings cannot help but be personal and relational as well.²³ Our relationships to God and to each other are volitional and emotional as well as intellectual; in other words, persons relate to each other through a variety of perspectives. The form of that personal relationship will be discussed in the next section.

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 answer in brief 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.²⁴ As used in Scripture, a covenant may refer to a negotiated pact between two equals or a unilaterally imposed relationship between a conqueror and his vassals. Divine-human covenants are, of course, of the later type. By way of specific examples, God has explicitly entered into covenant with Noah,²⁵ Abraham,²⁶ the nation of Israel,²⁷ and David.²⁸ Jeremiah

²¹ 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* 304-17 (William Hendriksen ed. & trans., The Banner of Truth Trust 1977) (1951).

²² *Genesis* 1:26 ("Then God said, 'Let Us make man in Our image, according to Our likeness . . .'").

²³ For example, marriage, family, and social organizations.

²⁴ 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* 747-55 (Willem A. VanGemeren ed., 1997) [hereinafter, NIDOTTE].

²⁵ *Genesis* 6:18 ("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.").

²⁶ *Genesis* 15:18-21

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."

²⁷ *Exodus* 24:8 ("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.'").

prophesied the coming of a new covenant,²⁹ Jesus spoke of the last supper in covenantal language,³⁰ 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*.³¹

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 relationship to God.³² The very structure of creation is covenantal,³³ including the original commands to Adam and Eve to populate the earth, to rule over the world, and to subdue the creation.³⁴ If the cosmic scope of the obligations assigned to our original parents was embedded in a covenantal relationship, then our work as their descendents is also embedded in covenant.

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 at least one question and entails at least three significant conclusions. 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 Church stands 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 creation nor justification for imposing sanctions on them for their failure to do so.³⁵

²⁸ *Psalms* 89:3-4 ("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.").

²⁹ *Jeremiah* 31:31 ("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 . . .").

³⁰ *Luke* 22:20 ("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.'").

³¹ *Hebrews* 8:1-13.

³² Other scriptural divine-human relational analogies include father-child, shepherd-sheep, king-subject, mother-child, and warrior-vanquished.

³³ 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.").

³⁴ *Genesis* 1:28 ("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.'").

³⁵ See, for example, the Apostle Paul's prosecution of a "covenant of creation" lawsuit against the philosophers at Mars Hill recorded at *Acts* 17:22-31 and charges of various prophets against the gentile nations at *Amos* 1:3-2:3.

Our universal human relationship to God through the covenant of creation also entails the conclusion that there is no division between sacred and secular; all of the life of every human being is embedded in covenantal relationship (including the law of contracts).³⁶ 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 Christians should see *all* their 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.³⁷

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 is a neutral, secular activity. A Christian analysis, critique, and theory of the law should not take place without reference to God and His covenantal administration.

A practical atheist finds the meaning of the world and principles of action solely within the world order. A secular approach to the law cannot acknowledge the existence of an independent God who rules a dependent humanity through a covenant of His determination. Ultimately, a secular approach to the law concludes that there is no real connection between law and morality. Morality is reduced to emotivism,³⁸ 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, most people see the law as a means by which his or her

³⁶ 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.

³⁷ 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.

³⁸ According to Alasdair MacIntyre:

[An emotivist] [s]ee[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

ALASDAIR MACINTYRE, *AFTER VIRTUE* 24 (1981).

personal or group interests may be advantaged at the expense of someone else.³⁹ For many today any connections between law and morality are little more than arbitrary products of human activity. If effective lawyering becomes simply a tool to enhance the client's interests, the notion of *justice* as morality may become a foreign concept.⁴⁰

Human law is ultimately grounded in the divine character; the law of contracts is dependent. Human law is administered on earth; the law of contracts flourishes in God's Kingdom. Human beings dispense human law; 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.

3. The Law of God

In view of the preceding discussion, one might conclude that the first place to begin a Christian analysis 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 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,⁴¹ our consciences,⁴² and human experience⁴³ as well as the Bible.⁴⁴

³⁹ See generally MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982) (demonstrating evidence of the vast number of government programs whose function is to redistribute income to politically powerful interest groups).

⁴⁰ As Professor Michael Schutt puts it, "the law [has become] a tool for social engineering, and the bench and bar [constitute] 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 RUTGERS L.J. 143, 158-59 (1998).

⁴¹ See, e.g., *Psalm* 19.

⁴² See *Romans* 2:12-15, *supra* note 36.

⁴³ See, e.g., *Deuteronomy* 17:6, 19:15. The New Testament scriptures also justify 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 *Timothy* 5:19.

⁴⁴ 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

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.⁴⁵ The Scriptures also provide the standard against which all other truth claims must be evaluated because God's Word is His Word of truth.⁴⁶ Last, the Bible justifies other means by which the truth about the law of contracts can be discovered. Notwithstanding the primary authority of the Scripture, we may also have confidence that we can discover God's norms for the law of contracts from sources other than the Bible.⁴⁷ Non-biblical sources of divine norms are frequently labeled as general revelation.⁴⁸ God did not abandon the world after the Fall. God the King continues His covenantal rule over His creation. Correctly interpreted, general revelation in the forms of 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.

that man does not live by bread alone, but man lives by everything that proceeds out of the mouth of the LORD.

Id.

⁴⁵ The Chicago Statement on Biblical Inerrancy (1978), reprinted in GRUDEM, *supra* note 9, at 1204.

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.

Id.

⁴⁶ *John* 17:17 ("Sanctify them in the truth; Thy word is truth.").

⁴⁷ As Gordon Spykman put it, "[S]cripture does not close the doors to other forms of revelation. Rather, it serves as our open window on the full cosmic dimensions of our Father's world." GORDON J. SPYKMAN, REFORMATIONAL THEOLOGY: A NEW PARADIGM FOR DOING DOGMATICS 78 (1992); *see also* JOHN M. FRAME, PERSPECTIVES ON THE WORD OF GOD: AN INTRODUCTION TO CHRISTIAN ETHICS 6 (1990) (footnote omitted).

God himself is the ultimate criterion of truth, and therefore his word to us, his revelation, is the standard by which all truth claims must be judged. It is true, however, that we *apprehend* God's revelation by means of human reason, human sense-experience, and the whole range of hard-to-define intuitions, feelings, and consciousnesses we call "subjectivity." None of these, in itself, gives absolute knowledge. If it did, we would not need God's word. But these human faculties work together, in mutual dependence, to lead us toward that truth which is absolute and final, God's word to us.

Id.

⁴⁸ *See, e.g.*, BERKHOF, *supra* note 8, at 36 ("The Bible testifies to a twofold revelation of God: a revelation in nature round us, in human consciousness, and in the providential government of the world; and a revelation embodied in the Bible . . ."); FRAME, *supra* note 12, at 144-49; GRUDEM, *supra* note 9, at 122-23 ("General revelation comes through observing nature, through seeing God's directing influence in history, and through an inner sense of God's existence and his laws that he has placed inside every person."); SPYKMAN, *supra* note 47, at 80-81.

B. *The Three Perspectives*

I have described three doctrines that I believe are relevant to a Christian understanding of 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; and submit to the authority of God's law disclosed in special and general revelation. I am 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 three doctrines. This is a big job, to say the least. For example, just how does the creator-creature distinction relate to the "mailbox rule," or what does the covenantal structure of understanding have to do with the Statute of Frauds? 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 three doctrines). Each element of the system of the law of contracts is perspectivally related to another *and* to the whole. These 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 I do) as the normative, the situational, and the existential.⁴⁹ 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 spheres 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 passionate 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.

⁴⁹ 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 M. FRAME, CORNELIUS VAN TIL: AN ANALYSIS OF HIS THOUGHT 170 (1995).

1. Perspective #1—The Normative (Dominion)⁵⁰

God's original mandate to human beings was to rule the earth.⁵¹ 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.⁵² Second, the divine directive to subdue the earth justifies the exercise of human authority (and hence its legitimacy) *prior to* the Fall.⁵³ 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 reasons of their own.⁵⁴ Authority, therefore,

⁵⁰ 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* 13:10. 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).

⁵¹ *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.

Id.

⁵² *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?

Id.

⁵³ 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.").

⁵⁴ *See* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 234 (1980) ("[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 . . .").

(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 to Noah for the postdiluvian age the authority that he had originally delegated to Adam and Eve.⁵⁵ 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. On the one hand, the legitimacy of the continuing exercise of authority—including civil 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.⁵⁶

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 *Revelation*.⁵⁷ We can account for all

⁵⁵ *Genesis* 9:1 (“And God blessed Noah and his sons and said to them, ‘Be fruitful and multiply, and fill the earth.’”).

⁵⁶ *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 (Colin Brown ed., 1986) [hereinafter, NIDNTT].

⁵⁷ *Revelation* 13:1-7.

And 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. And 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. And 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; and 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?” And there was given to him a mouth speaking arrogant words and blasphemies; and authority to act for forty-two months was given to him. And he opened his mouth in blasphemies against God, to blaspheme His name and His tabernacle, that is, those who dwell in heaven.

perversions of authority 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.⁵⁸

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*,⁵⁹ which is the permanent rest of God into which Adam could have entered but did not.⁶⁰

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

And 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. *Id.* Understanding the beast from the sea as State oppression of the Church is commonplace. *See, e.g.*, G. K. BEALE, *THE BOOK OF REVELATION: A COMMENTARY ON THE GREEK TEXT 680-700* (1999).

⁵⁸ SPYKMAN, *supra* note 47, at 256.

⁵⁹ GEERHARDUS VOS, *BIBLICAL THEOLOGY: OLD AND NEW TESTAMENTS* 38 (1948). 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.

From the significance of the tree in general its specific use may be distinguished. It appears from Gen. 3:22, that man previous to his probation had not eaten of it, while yet nothing is recorded concerning any prohibition which seems to point to the understanding that the use of the tree was reserved for the future, quite in agreement with the eschatological significance attributed to it later. The tree was associated with the higher, the unchangeable, the eternal life to be secured through the probation.

1 *John* 5:11.

⁶⁰ 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.").

provision of the tools by which we could have reached our goal but also provided the very way by which humanity could make it to its 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.⁶¹ Thus 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.

The relationship between the normative perspective of the dominion mandate and contracts is straightforward: contracts are a means by which human beings exercise dominion. Dominion can be distorted and become oppressive. Contractual oppression occurs when contracts become not a means for modeling God's independent work of creation, but a tool for self-aggrandizement. Failure to locate a contract in its larger covenantal context leads to oppression. Oppression typically ignores one or both of the following perspectives.

2. Perspective #2—The Situational (Office and Rights)

The next two perspectives can be described more briefly. I have already observed that the grant of dominion to human beings entails the legitimacy of the general exercise of authority. The concept of office expresses the means by which this authority is implemented and makes it clear that human beings 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 office⁶² and suggests the limits on the various offices any person occupies. 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, ecclesiastical leaders, and employers.⁶³

⁶¹ *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.

Id.

⁶² The Hebrew word עֶבֶד (*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 4 NIDOTTE, *supra* note 24, at 1183-98.

⁶³ 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 (rulers and parents); and *Titus* 1:5 (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.⁶⁴ God has delegated to each office-holder the authority to carry out that office; hence, the holder of an office has the *duty* to do so. The law's recognition of such a duty corresponds to what is commonly described as a *right*. In other words, a promisee does not have an independent right to require a promisor to perform; rather, the promisor has a duty to perform, a duty that may be enforced in a judicial forum. By way of contrast, the prevalent Enlightenment version of rights understands them as subjective properties attaching to personhood. Classical liberals assert that human beings have such subjective rights simply by virtue of their humanity.⁶⁵ Similarly, some contemporary thinkers associate rights exclusively with the political order and continue to ignore the covenantal basis for rights and place the genesis of rights with political society. The State thus creates or eliminates rights among its citizens to achieve some overarching vision of the good.⁶⁶ Neither the classical nor modern liberal view of the nature of rights grounds them in an office created by God, embedded in His covenant,

⁶⁴ See, for example, God's warning to Ezekiel about the duties and dangers of the prophetic office:

¹And the word of the LORD came to me saying, ²"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; ³and he sees the sword coming upon the land, and he blows on the trumpet and warns the people, ⁴then 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. ⁵He 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. ⁶But 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.' ⁷"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. ⁸"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. ⁹"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).

⁶⁵ See, e.g., HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* ix-x (1986) (where the author notes that he presupposes the Enlightenment common sense realism of Thomas Reid in his discussion of the purpose of human society).

⁶⁶ 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?

and under His law. The kingdom of the world is substituted for the Kingdom of God, and the spheres of the family, the Church, and even voluntary associations are ever reduced.

A biblical notion of rights is not limited to desert.⁶⁷ God frequently requires of an office-holder a duty with respect to another person. The duty-based system of justice is exemplified in the negative form in which God revealed most of the Ten Commandments and the restitutionary form in which the largest part of the judgments of the Book of the Covenant (*Exodus* 21:1–23:19) are given. Our duties are ultimately owed to the LORD,⁶⁸ although God may penultimately delegate enforcement of that duty to another office-bearer.⁶⁹ As Christopher J.H. Wright puts it:

To say that B has certain rights is simply the entailment of saying that God holds A responsible to do certain things in respect of B. B has rights under God, because God is as concerned with how B is treated as with how A acts. The two are correlatives of the single will of God regarding the well-being of God's human creatures.⁷⁰

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 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 authority to enforce that stipulation as it comes to expression in various spheres of life. For example, only those entrusted by God

⁶⁷ Rights may, of course, also arise as a matter of desert. *See, e.g., Leviticus* 19:13 (“You shall not oppress your neighbor, nor rob him. The wages of a hired man are not to remain with you all night until morning.”); *1 Timothy* 5:18 (“For the Scripture says, ‘You shall not muzzle the ox while he is threshing,’ and ‘The laborer is worthy of his wages.’”).

⁶⁸ *Genesis* 4:9 (“Then the LORD said to Cain, ‘Where is Abel your brother?’ And he said, ‘I do not know. Am I my brother’s keeper?’”). The setting of Cain’s rhetorical question and God’s punishment suggests that we are to understand that Cain was indeed his brother’s keeper.

⁶⁹ *Genesis* 9:6 (“Whoever sheds man’s blood, by man his blood shall be shed, for in the image of God He made man.”); *Romans* 13:1-7.

⁷⁰ CHRISTOPHER WRIGHT, *WALKING IN THE WAYS OF THE LORD: THE ETHICAL AUTHORITY OF THE OLD TESTAMENT* 253 (1995).

Talmudic law is aware of the concept of rights, as an element on the periphery of its base of information. The tradition itself did not enunciate a doctrine of individual entitlement but rather a doctrine of individual obligation, or *mitzvah*. Yet, the argument goes, if you look at obligation from the perspective of the person to whom it is owed, you have rights . . .

H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 112 (2000); *see generally* DAVID NOVAK, *COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY* (2000).

with ownership of an object may contract to sell it. The purchaser's right to the object arises out of desert.

The situational perspective of office suggests two useful insights on the law of contracts. 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 covenantal duty to perform a contract does not mean that God has delegated to every human being the office of enforcing that contract upon its breach. Generally, only those occupying the office of a civil judge have the authority to mete out State-sponsored sanctions for breach of contract. A plaintiff's right to justice is not a matter of desert but is nonetheless real and is grounded in the office-bearers duty to reflect the divine judge and to ensure that the purchaser gets what is deserved.

3. 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.⁷¹ Only those who are made in the image of God *may* fill an office because each human office (parent, judge, ecclesiastical officer, or employer) reflects an aspect of God's sovereignty.⁷² Human beings may contract because they, like God, may make promises. Moreover, human beings should perform their contractual obligations because they are in God's image, and God keeps His Word.⁷³ 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 and may occupy an office in which breaches of contracts are adjudicated.

C. Conclusion

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

⁷¹ Theologians 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").

⁷² *See, e.g., Ephesians 5:22* (discussing the parallel between the office of husband to the relationship between God the Father and the Son).

⁷³ *Deuteronomy 7:9* ("Know therefore that the LORD your God, He is God, the faithful God, who keeps His covenant and His lovingkindness to a thousandth generation with those who love Him and keep His commandments . . .").

creation. Human beings created in the image of God are uniquely equipped to develop this order. The relationship among the perspectives can be diagrammed as follows:

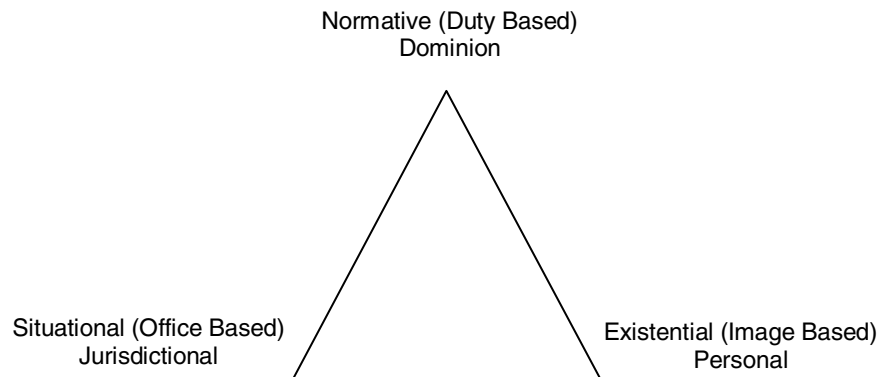


FIGURE 1. THE PERSPECTIVAL TRIANGLE

II. THE LIBERTY PRINCIPLE

God created human beings in His image and with liberty to exercise dominion by making certain promises enforceable at law when they communicate decisions to act or refrain from acting in some definite way in the future, subject to other stipulations of His covenant(s).

The Liberty Principle is the first principle under which we will analyze the law of contracts. Generally speaking, the implications of each principle will be considered in light of each of the three perspectives described above. Then any relevant scriptural resources will be examined. Finally, I will conclude each section with a summary of what the law is and what it should be in terms of the principle.

A. Introduction

One of the first questions that might occur to someone about to study the law of contracts concerns the nature of a contract: just what is a “contract”? *Restatement (Second) of Contracts*⁷⁴ defines (or rather

⁷⁴ The American Law Institute (“ALI”) promulgates various “restatements” of the common law. The ALI was founded in 1923 to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work. *Restatement (Second) of Contracts* was published in 1981 and has had an enormous impact on judicial application of the law of contracts.

describes) the subject as follows: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”⁷⁵ However, this definition largely begs the question of what a contract *is*. While the authors of the *Restatement* affirm that promising is the presupposition of any contract, they frame the range of promises that rise to the level of contract in terms of what the law will enforce. Yet how does the law *know* which promises to enforce? Moreover, what justifies legal enforcement of *any* promises? At these points, the *Restatement* is agnostic.

Although the *Restatement* refrains from providing a noncircular definition of a contract or a normative basis for contract enforcement, many legal scholars have attempted to fill these gaps. While contemporary writers about the law of contracts ignore the three doctrines, their answers to these questions can be categorized in terms of one of the three perspectives. In other words, the current discussions of the foundations of contracts emphasize the normative, the situational, or the existential. Some of the proponents of contemporary analyses of contract law fail to appreciate that their answers are only perspectives on contract law that need to be unified. Others, while acknowledging the perspectival nature of legal theories, fail to ground them in a transcendent order of reality.⁷⁶ The neglect of present-day studies of the law of contracts to come to grips with necessary truths does not render them useless. Each of them reveals valuable insights (as well as omissions) that can be related to the truths of the three doctrines. The format of the balance of this piece will examine what a legal scholar or scholars have said about the common law doctrine of consideration within the framework of the three perspectives. Following each of their expositions, I will address some critical biblical comments. Then, after having viewed the topic from each perspective, I will summarize what I believe is the biblical perspective.

B. *The Normative Perspective—Pacta Sunt Servanda*⁷⁷

The principle that promises should be kept strikes most people as intuitively true. Many Christian thinkers have advocated something

⁷⁵ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

⁷⁶ See, e.g., MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1997).

⁷⁷ The Latin phrase *pacta sunt servanda* is usually translated as “promises must be kept.” It is currently a principle of civil law (the form of law that is employed in most of Western Europe (except England)) that derives from the canon law and natural law traditions. See generally RUBEN ALVARADO, *A COMMON LAW: THE LAW OF NATIONS AND WESTERN CIVILIZATION* (1999); Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 VA. J. INT’L L. 405 (1994).

like the maxim of *pacta sunt servanda*.⁷⁸ Samuel Pufendorf, a seventeenth century Lutheran natural law scholar (1632–1694),⁷⁹ first used the maxim in this particular form in 1688.⁸⁰ And the principle of *pacta sunt servanda* underlies the civil law today.⁸¹ By way of contrast, the common law of contracts has never taken the position that all promises (or even all agreements) should be legally enforced. Prior to the middle of the sixteenth century, the common law courts enforced only those agreements that took a particular form. Written agreements executed with the formality of a seal received judicial sanction through the writ of *covenant*. By means of the writ of *debt*, the common law courts enforced agreements where services had been performed or goods sold if the only remaining obligation was payment of money. If a secured party did not return goods pledged to her as collateral after the loan had been repaid, the owner could seek their recovery through the writ of *replevin*. Finally, a party who sought the return of goods stored with another could sue under the writ of *detinue*.⁸²

Most parties found the formalities of the writ of covenant too cumbersome for everyday transactions. While the writs of debt and detinue did not require the formalities of covenant, they did not provide relief in two important situations. First, neither debt nor detinue could

⁷⁸ See, e.g., Hyland, *supra* note 77, at 416 (quoting Henricus de Segusia (Cardinal Hostiensis), *Lectura in quinque libros decretalium gregorianarum*, I, *de arbitris* 9.6 Venice 1581) (“Therefore care must be taken by whoever consents, because pacts, however naked, according to the Scriptures, must be kept.”).

⁷⁹ See generally Samuel Pufendorf, *De jure naturae et gentium libri octo* (James Brown Scott ed., C. & W. Oldfather trans., photo. Reprint 1934) (1688).

⁸⁰ Hyland, *supra* note 77, at 424-25.

⁸¹ *Id.* at 428.

⁸² See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 451 (1996) for an extended discussion of the English common law of contracts from 1200 to 1600.

In establishing, in 1178, the Court of Common Pleas as the first permanent professional English royal court, Henry II had limited its civil jurisdiction to the types of complaints for which the chancellor would issue a writ. At first, these were chiefly complaints that alleged certain types of “trespasses” (as they came to be called) against the rights of possession of land and chattels, as well as against the bodily security of the person. Later, the chancellor also granted writs of “debt” for the payment of money that the plaintiff claimed belonged to him, writs of “detinue” to recover damages for the wrongful detention of the plaintiff’s chattels, writs of “replevin” for the return of chattels pledged for an obligation that had been fulfilled, writs of “covenant” for a breach of a sealed instrument containing a promise, and various others. By the year 1300 there were dozens of different types of such “forms of action” commenced by a royal writ issued to local royal officials (sheriffs), ordering them to have the defendant before the judges of Common Pleas or King’s Bench to answer the charges stated in the writ.

Id. See generally A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975).

be employed where both parties had remaining obligations to perform: these writs could be used only where one of the parties had completely performed her obligations. Second, neither debt nor detinue (nor even covenant) provided a form of relief for misfeasance: the common law court could only impose an all or nothing remedy. Thus, for example, an owner had no clear form of action against a contractor who performed a shoddy job of carrying out a contract to build a house.⁸³ Most importantly from the normative perspective, however, was the fact that a broken promise in itself was not actionable. The common law provided relief for only a few, very specific types of broken promises.

Beginning in the early 1500s and culminating in *Slade's Case* in 1602,⁸⁴ the common law courts began to use the writ of *assumpsit*, a form of action initially reserved for tort-like wrongs, to enforce executory contracts. The following section will discuss sixteenth century developments in more detail. Although plaintiffs could seek legal redress for a broader class of broken promises after both King's Bench and Common Pleas courts acquiesced in the expansion of *assumpsit*, in no sense were promises treated as sacred by the common law. With only some hyperbole, Oliver Wendell Holmes described the common law of contracts as follows: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves [the promisor] free . . . to break [the] contract if [he] chooses."⁸⁵

⁸³ This is not to say that a dissatisfied owner had no recourse. Throughout the early history of the common law, there were systems of justice in addition to the common law. These alternate judicial systems would have included the ecclesiastical courts, local manorial courts, royal prerogative courts, and the Court of Chancery. The jurisdictions of these courts ultimately gave way to the common law courts throughout the history of the English struggles to centralize political authority, first in the King, then in Parliament, and ultimately in the Commons (where it resides today).

⁸⁴ 4 Coke's Rep. 92b (Eng. 1602). Every executory agreement imported an *assumpsit*; in other words, *assumpsit* meant that an agreement to act in a certain way created an obligation to act. Mere gratuitous promises, however, would still not be enforced; there must still be a "consideration." See *Manwood and Burston's Case*, 74 Eng. Rep. 479 (1587); see generally C. Scott Pryor & Glenn M. Hoshauer, *Puritan Revolution and the Law of Contracts*, 11 TEX. WESLEYAN L. REV. 291, 341-45 (2005) (discussing the rise of the writ of *assumpsit* to vindicate informal contract claims).

⁸⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 236 (M. Howe ed., 1963) (1881). Holmes would have been more accurate if he had limited his aphorism to *legal* consequences. A party who breaches a contract also suffers significant non-legal repercussions when attempting to enter into contracts in the future. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963) (quoting a businessman: "[C]ustomers had better not rely on legal rights or threaten to bring a breach of contract law suit against [him] since he 'would be not treated like a criminal' and would fight back with every means available.").

If the common law traditionally had an amoral approach to promise-keeping, where did the idea of *pacta sunt servanda* come from? Samuel Pufendorf first coined the expression drawing on the long tradition of broadly catholic natural law writers.⁸⁶ As Calamari and Perillo note, the roots of *pacta sunt servanda* derive historically from Christian thought:

Although the Enlightenment concept of natural law was the natural law concept that had the most direct impact upon Anglo-American courts, it was preceded by canon law and rabbinical thinking about the sanctity of a promise. According to the canon lawyers and rabbinical scholars of the late middle ages and the Renaissance, promises were binding in natural law as well as in morality because failure to perform a promise made by a free act of the will was an offense against the Deity.⁸⁷

There is much about the divine normativity underlying *pacta sunt servanda* that is useful to a Christian analysis of the law of contracts. Unlike either of the representatives of the two perspectives that follow, *pacta sunt servanda* at least historically lays claim to a foundation in the biblical record. Neither of the other perspectives that will be considered leaves an express opening for biblical truth. The Scriptures have much to say about promise-keeping, and their revelation will be treated as normative.

The change in worldviews from late medieval writers to Samuel Pufendorf is, however, significant. In the canon law tradition, the normativity of promise-keeping was founded upon a transcendent referent—God. By the time of Pufendorf, following the Thirty Years War,⁸⁸ the value of a religious ground for a legal principal had waned. Thus, Pufendorf's principal basis for the maxim lay not in the transcendent but in immanent human nature.⁸⁹ An immanentistic

⁸⁶ See *supra* note 80.

⁸⁷ JOSEPH PERILLO, CALAMARI & PERILLO ON CONTRACTS 8 (5th ed. 2003).

⁸⁸ The Thirty Years War (1618-1648), largely between Roman Catholic countries on one side and Protestant countries on the other, exhausted much of Continental Europe's post-Reformation religious fervor. The English Civil War (1649-1652) had much the same effect in Great Britain. Subsequent efforts to rebuild civil society were deliberately constructed on non-religious bases in the hope that this would avoid future sectarian violence.

⁸⁹ Pufendorf believed that human beings were by nature sociable and that law—including the private law of contracts—enabled humans to realize that nature.

"Pufendorf ultimately managed to unseat theological conception of natural law, such as those viewing it as a remnant of our prelapsarian knowledge of God, and replace them with his secular derivation of natural law from the *socialitas* that is innate in human nature." Hyland, *supra* note 77, at 424.

This is not to suggest that God was not the ultimate ground of obligation for Pufendorf but rather that he developed his theory of contracts on the mediate concept of human *socialitas* rather than the ultimate ground of God and his nature:

approach to contracts runs afoul of the three doctrines, especially the creator–creature distinction and the covenantal structure of understanding. A perspective on the law, even one that emphasizes the normative, will inevitably distort the law unless it retains its moorings in the full range of biblical principles.

*C. The Situational Perspective—The Efficiency Principle
Or The Dominion Mandate?*

Richard Posner

Richard Posner has written numerous articles as well as several books, the most significant of which is *Economic Analysis of Law*, first published in 1973.⁹⁰ His express goal was to explain and evaluate legal rules in economic terms. Beginning with the axiom that “man [is] a rational maximizer of his self interest,”⁹¹ Posner goes on to analyze the choices humans make in allocating scarce resources among more plentiful human wants.⁹² For Posner, efficiency is “the main thing that students of public policy do or should worry about.”⁹³ Contracts are especially well-suited to economic analysis because people frequently consciously use contracts for the purpose of satisfying their wants among a plethora of available competing resources by the efficient transfer of value.

To the extent Posner’s goal is simply descriptive it is certainly unobjectionable. To examine how the law of contracts effects resource allocation and contributes to efficiency as economically understood is a warranted human activity. However, an *Economic Analysis of Law*

[S]ince the foundation of natural law is a social life, and the nature of man’s mind shows clearly enough that among a great number of men, who are undertaking to advance life by various arts, a quiet and decorous society cannot exist without distinct dominions of things, therefore, such were introduced in accordance with the proper requirements of human affairs, and with the aim of natural law.

PUFENDORF, *supra* note 80, at 555. The gradual weakening of natural law’s Christian-theistic roots is certainly a factor in its marginalization today. See generally PAULINE WESTERMAN, *THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS* (1998).

⁹⁰ A sixth edition of *Economic Analysis of Law* was published in 2003. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW 3-4* (6th ed., Aspen 2003)(1973).

⁹¹ *Id.* at 4. One should observe that self-interest is not equivalent to selfishness. One’s self interest could just as easily be in feeding the poor as finding a starting job that pays \$125,000. In economic terms, self-interest simply means that ultimately people do what they want to do. *Why* we want to do one thing rather than another is outside the scope of economics.

⁹² *Id.* at 3-4. To be fair, I should note that Posner also states that “[e]fficiency or wealth maximization is an important thread in the ethical tapestry, but it is not the only one.” *Id.* at 286. Posner is not very clear, however, on what the other threads are.

⁹³ *Id.* at 13.

implicitly suggests a normative vision for the law as well: because human beings are by nature maximizers of self-interest, then the law of contracts *should* advance the goal of efficient allocation of resources. Human societies are obliged, in Posner's view, to create legal systems by which individuals can make judicially enforceable promises simply because doing so will lead to the most efficient satisfaction of human wants. Posner's purported duty to enhance efficiency runs aground for two reasons. First, he commits the naturalistic fallacy: one cannot simply reason from the *is* to the *ought*.⁹⁴ Second, assuming there is a social duty to maximize efficiency, then why should society not seek out and enforce the efficient result regardless of what particular individuals have consented to do? In other words, why should efficiency be limited to voluntary transactions (like contracts) and involuntary transactions (like torts)? If efficiency is the *summum bonum* of social life, why should society not affirmatively enforce an efficient reallocation of resources whenever possible without regard to the consent of the parties involved?⁹⁵

Posner's analysis has positive implications considered in light of the three doctrines and the three perspectives. An explanation of the law of contracts justified by reference to efficient allocation of resources fits most comfortably within the Normative and Situational Perspectives. As God's vicegerents, human beings are subject to the dominion mandate that entails the use, development, and allocation of resources. Moreover, all people occupy some office, which means they have authority over certain resources, even if those resources are only their own time and effort. Posner fails, however, to provide a warrant for even his accurate observation of the human desire to maximize self-interest, and economic analysis certainly provides no guidance on what human interests *should* be. A reduction of social goals to increasing efficiency ignores the broader covenantal context in which human beings are created, which includes duties for which no immediately self-interested rationale can be adduced.⁹⁶ Finally, Posner's refusal to ground his conclusions about efficiency in the law of God leaves him without a *transcendent* foundation for his proposals.

An economic analysis provides many insights into how legal rules operate and many of the rules of the law of contracts are efficient.

⁹⁴ FRAME, *supra* note 12, at 118 ("Statements about sensible facts do not imply anything about ethical goodness or badness, right or wrong, or obligation or prohibition.").

⁹⁵ Posner's answer to this challenge is that society cannot be nearly as certain of the efficient allocation of resources in a nonconsensual transaction. While this is undoubtedly true, it is not the case that society *never* knows of efficient transactions that particular parties do not recognize or undertake themselves.

⁹⁶ See, e.g., *Leviticus* 19:9-10 (the gleaning laws).

Given the commercial setting of most contractual transactions, these findings should not be surprising. In light of the three doctrines, however, I hope to establish an ontological and moral underpinning for the offices associated with the dominion mandate. In addition, with the three perspectives (rather than Posner's one perspective), I will try to orient the office of vicegerent in the broader covenantal context.

*D. The Existential Perspective—The Autonomy
Principle Or The Imago Dei?*

Charles Fried

Charles Fried authored *Contracts as Promise: A Theory of Contractual Obligations* in 1981. Fried's book advanced two goals. First, he sought to overcome the claim that there was no such concept as "contract law" as it has been commonly understood. Fried took this apparently unusual position because in the 1970s Grant Gilmore had concluded that there was no such thing as the law of "contract."⁹⁷ Gilmore began with the commonplace observation that the imposition of judicial liability is a community act enforcing community sanctions.⁹⁸ From this uncontroversial premise he supposed that a judgment by a court in favor of one party to a broken contract actually represents the imposition of community values of fairness or justice, in other words, a tort.⁹⁹ Then he reached the conclusion that *contract law* had little to do with the vindication of a particular obligation undertaken by the breaching party. If a society's goals are fairness and justice, Gilmore reasoned, then State-imposed rules actually governed most of what had been covered by "contract law."¹⁰⁰ Courts and commentators had for centuries, however, discussed contract law under the rubric of consent or promise, notwithstanding what these scholars took to be the correct understanding of the law.¹⁰¹ Fried therefore felt compelled to take issue

⁹⁷ GRANT GILMORE, *THE DEATH OF CONTRACT* 3 (1974) ("We are told that Contract, like God, is dead. And so it is." (footnote omitted)).

⁹⁸ *Id.* at 73-74 ("More adventurous courts have turned to the idea of a 'contract implied in law,' a 'quasi-contract'—not really a contract, a legal fiction necessary to promote the ends of justice and, in particular, to prevent 'unjust enrichment.'").

⁹⁹ *Id.* at 88 ("We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.").

¹⁰⁰ *Id.* at 92 (discussing developments in California which Gilmore believed meant that "ex delicto seems to be well on the way toward swallowing up ex contractu.").

¹⁰¹ Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941) (footnote omitted).

Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply

with those like Gilmore who reduced promise to an appendage and inserted communitarian rules in the place of the parties' autonomy.¹⁰² Contract, under such approach, would have been subsumed into tort.¹⁰³

Second, Fried set forth a positive theory of contract based on the morality of promising:

The obligation to keep a promise is grounded . . . in respect for individual autonomy and in trust An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. To renege is to abuse a confidence he was free to invite or not, and which he intentionally did invite. To abuse that confidence now is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust.

. . . .
The moralist of duty . . . sees *promising* as a device that free, moral individuals have fashioned on the premise of mutual trust, and which gathers its moral force from that premise. The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case But since a contract is first of all a promise, the contract must be kept because a promise must be kept.

To summarize: There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.¹⁰⁴

At the outset, Fried's perspective may seem to exemplify the normative rather than existential perspective. This observation is correct to a certain extent. However, at the level of justification for promise-keeping, Fried's arguments rest on a particular view of human freedom rather than divine warrant. Autonomy in the Enlightenment tradition of Immanuel Kant, not the three doctrines, forms the foundation for Fried's account of the morality of promise-keeping. Kant argued that the essence of being human is the power to make free moral choices. The unconstrained will is the only "good" will. In

means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. . . . When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself.

Id.

¹⁰² See, e.g., Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43 (1993).

¹⁰³ See, e.g., GILMORE, *supra* note 97, at 92.

¹⁰⁴ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16-17 (1981) (footnotes omitted).

addition, the free will is determined by reason that can direct the will independently of any empirical considerations. The only appropriate limit on the freedom of one human being is the recognition that all other human beings are likewise free. Respect for the freedom of others is, therefore, also a “good” (what Kant called practical reason).

Fried took Kant’s insights in human freedom and applied them to the law of contracts. Fried noted that human beings are embedded in time; they cannot presently act freely in the future. In order to maximize one’s temporally limited freedom; one may make a promise to do something for someone else in the future in return for either their action in the present or a comparable promise to do something for the initial promisor in the future.¹⁰⁵ Enforcing promises to limit one’s actions in the future, thus, has the somewhat paradoxical effect of increasing one’s freedom in the present.

Fried’s analysis has much to offer. Yet I conclude that it fails at two crucial points: standing alone it cannot justify human freedom, and it is ultimately contradictory. From psychological behaviorists to economic determinists, many would deny that human beings are free in Fried’s sense of the word. If humans do not have libertarian freedom, then a theory of contract premised on freedom is a waste of time at best and self-deceptive at worst. Similarly, Fried’s Kantian notion of morality based on pure freedom (for myself and others) undercuts itself in due course. Pure freedom, unconstrained by any outside sources (except the obligation to recognize the freedom of others), means that there are ultimately no good or bad purposes from which to choose: only the unconstrained will to choose among various ends freely can be considered “good.” But to exercise the will, even in a free fashion, represents the actor’s choice among *some* purposes. If, however, the choice among those purposes is without any moral significance, then even the idea of respecting one’s own or another’s freedom seems meaningless. As Franklin Gamwell puts it:

Independently of an affirmation of or some positive relation to some state of affairs . . . there simply is no freedom and, therefore, no self to be understood. Thus, if the truth about practical reason were that there is no moral distinction among possible purposes, the moral worth of understanding oneself in this way would not imply that *no* state of affairs identifies the moral law but rather that *all* states of affairs do so. Since a constitutive choice in accord with this truth [that all freely chosen ends are equally moral] would be morally

¹⁰⁵ For example, in an exercise of my free will, I determine that I want your car. For anyone to tell me that I may not have your car is a limit on my freedom. Yet, for me simply to take your car is an infringement on your freedom (to keep your car). To enhance my immediate freedom (to possess your car), I may make a promise to pay you \$1,000 for it next week. If promises were not enforced, you would be unwilling to deliver your car to me and, hence, my freedom to have your car in the present would be limited.

prescribed [required], it would follow that all possible purposes are equally good, so that any possible purpose is morally permissible. Independently of all purposes, however, there simply is no will at all that could be called good without qualification. . . . [I]f the unqualified goodness of a good will is independent of any state of affairs to be pursued, one cannot affirm another's pursuit of ends as morally good and, therefore, respect for her or his freedom is meaningless.¹⁰⁶

Kant's (and hence Fried's) account of the morality of promise-keeping ultimately fails. If personal freedom is the *only* good, then any purpose one chooses is equally valid. Such a conclusion entails the utter randomness of human decision making: no purpose is good in and of itself (or, stated another way, every purpose is equally good). And, if no particular purpose is good, then how can it be asserted that even respect for another's free will is good? After all, the other's free choice among various ends is equally random. Thus, to the extent that promise-keeping is anchored only on a purported duty to respect the autonomy of the other, its foundation is made of sand.

Fried's analysis, however, has merit if it is reconsidered in terms of the three doctrines and three perspectives. On the one hand, a law of contracts founded upon human autonomy fits comfortably in the doctrine of the law of God. As we shall discover, God's law places a great premium on keeping promises and performing agreements. This should not be surprising because the LORD is a promise-keeping God, and human beings are created in His image. On the other hand, Fried's weaknesses are most apparent when we observe how he collapses humanity's moral freedom into the only source for the norm of promise-keeping. His failure to acknowledge humanity's existence as images of God deprives him of the ontological basis for our freedom. His apparent reluctance to recognize the transcendent norm of God's law leaves him without a basis for asserting that recognition of another's freedom is a moral good. At this point, a diagram of the competing vision of the justification for the social practice of contracting may be helpful:

¹⁰⁶ FRANKLIN GAMWELL, *THE DIVINE GOOD: MODERN MORAL THEORY AND THE NECESSITY OF GOD* 49-50 (1990).

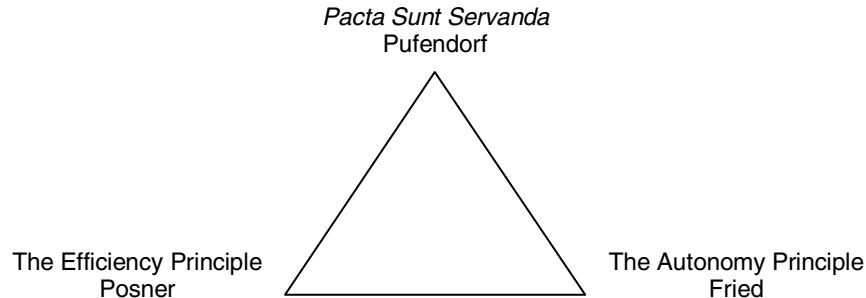


FIGURE 2. THE SECULAR JUSTIFICATION TRIANGLE

E. Scriptural Resources

The three doctrines supply us with the basis for believing the Christian Scriptures will be relevant to the task of justifying the social practice of contracting. The doctrines of covenant and law, in particular, are pertinent to the law of contracts. Even divine-human covenants have contractual aspects: there are two parties who are bound to undertake actions in the future and sanctions for default. Each of these elements is also found in an ordinary contract. A word of caution is in order, however. The Bible contains virtually no substantive references to executory contracts. While the Scriptures describe and regulate transactions corresponding to agreements enforceable by the writs of covenant,¹⁰⁷ debt,¹⁰⁸ replevin,¹⁰⁹ and detinue,¹¹⁰ the early biblical economy had apparently not progressed to the point of significant use of executory agreements (agreements where both parties have remaining unperformed obligations). Care must thus be taken when drawing inferences from both the prescriptive and descriptive revelatory data in order to critique the law of contracts as it exists today.

1. The Normative Perspective

The normative perspective can be examined from three scriptural directions: God as our model, specific biblical teachings, and relevant biblical examples. Each of these “perspectives” on the normative will justify the social practice of contracting and, ultimately, its legal enforcement.

¹⁰⁷ See, e.g., *Genesis* 31:44 and *infra* text accompanying notes 116-17 regarding vows.

¹⁰⁸ See generally *Leviticus* 25:25ff.; *Deuteronomy* 15:1-6.

¹⁰⁹ See, e.g., *Deuteronomy* 24:10-13; *Ezekiel* 18:12, 16.

¹¹⁰ See generally *Exodus* 22:7-8, 10-13.

i. God as the Model

We can start with the scriptural revelation about the character of God. From the Apostle Paul's *Epistle to Titus*, we observe that promising is something that takes place within the Godhead: "God, who cannot lie, *promised before time began . . .*"¹¹¹ If God is the promisor, to whom did he make this promise "before time began"? The answer can only be Himself: the Father made the promise to the Son.¹¹²

If making promises is part of the nature of God, does the Bible reveal any information about whether God keeps His promises? The answer is an unqualified "yes." One of the most well known examples is from chapter twenty-three of the book of *Numbers* where Balaam, in his second oracle about the future of the people of Israel, says:

¹⁶ The LORD met Balaam, put a word into his mouth, and said, "Return to Balak, and this is what you shall say."¹⁷ When he came to him, he was standing beside his burnt offerings with the officials of Moab. Balak said to him, "What has the LORD said?"¹⁸ Then Balaam uttered his oracle, saying:

"Rise, Balak, and hear;

listen to me, O son of Zippor:

¹⁹ God is not a human being, that he should lie [fail],
or a mortal, that he should change his mind.

Has he promised, and will he not do it?

Has he spoken, and will he not fulfill it?¹¹³

Other references to the nature of God to keep His promises are too numerous to quote.¹¹⁴ The performing of promises by the independent Creator–God serves as a model for created and dependent humanity.

ii. Scriptural Precepts

Promise-keeping by human beings is specifically prescribed in Scripture. Although the Scriptures have little to say directly regarding the social practice of contracting, there are many references to a particular class of promises called *vows*. Vows are promises in the name of God to God. Vows are distinguished from ordinary contracts in

¹¹¹ *Titus* 1:1-2 (New King James) (emphasis added).

¹¹² See also *2 Timothy* 1:9 (stating that God "called us with a holy calling, not according to our works, but according to His own purpose and grace which was *granted us in Christ Jesus from all eternity*." (emphasis added)).

¹¹³ *Numbers* 23:16-19 (New Revised Standard). The Hebrew word נִכְזֵב (wikkazzēb) is a jussive (a verb form that is used to express the speaker's desire, wish or command) and is better translated "fail." God's purposes are reliable and his nature does not disappoint or fail, as is often the case with human beings. See TIMOTHY R. ASHLEY, *THE BOOK OF NUMBERS* 477 (1993); see also *Hebrews* 6:13-18 ("[I]t is impossible for God to lie . . .").

¹¹⁴ See, e.g., *Isaiah* 40:8, 55:11; *James* 1:17; *Malachi* 3:6.

two respects: they have the significance of an oath (“promises in the name of God”)¹¹⁵ and the promisee is God (“promises . . . to God”).¹¹⁶ Individuals typically made vows in the biblical record, although they were sometimes offered on behalf of the nation as a whole.¹¹⁷ Vows in the Hebrew Scriptures were typically offerings or gifts promised to the LORD for His assistance; when God’s aid had been secured, what had been promised was to be promptly offered to Him in thanksgiving. Several biblical texts contain stern reminders that vows were binding and were not to be made rashly or in an ill-considered way. For example, in *Deuteronomy 23* Moses tells the people of Israel that:

When you make a vow to the LORD your God, you shall not delay to pay it, for it would be sin in you, and the LORD your God will surely require it of you. However, if you refrain from vowing, it would not be sin in you. You shall be careful to perform what goes out from your lips, just as you have voluntarily vowed to the LORD your God, what you have promised.¹¹⁸

Although one cannot simply apply the rules concerning vows to ordinary contracts, the normative significance of keeping one’s promises cannot be ignored. Promise-keeping, a fundamental aspect of the law of contracts, is clearly the biblical rule.

iii. Scriptural Examples

Not only does God model promise-keeping, promising represents a practice into which God entered with human beings such as Adam, Noah, Abraham, and numerous others.¹¹⁹ Moreover, the Bible contains references to the practice of contracting with apparent approval, such as the agreement between Abraham and Abimelech over water rights,¹²⁰ and Esau’s sale of his birthright to Jacob.¹²¹ Finally, the Apostle Paul acknowledged the significance of contracting (at least obliquely) when he compared the absolute certainty of God’s promise with a human covenant: “Brethren, I speak in terms of human

¹¹⁵ 4 NIDOTTE, *supra* note 24 at 32 (“OT oaths consist of a *promise* that is strengthened by the addition of a *curse*, with an appeal to a deity (or even a human king) who could stand as the power behind the curse.”).

¹¹⁶ With only one exception (*Jeremiah 44:25*), vows by Israelites in the Old Testament were made to the LORD. *See, e.g., Genesis 28:20-22; Psalms 132:2-5; 2 Samuel 15:7-12; see generally* 3 NIDOTTE, *supra* note 24 at 38.

¹¹⁷ *See, e.g., Psalms 65:1* (calling the people to perform vows in thanksgiving for a good harvest).

¹¹⁸ *Deuteronomy 23:21-23; see also Ecclesiastes 5:4-5; Proverbs 20:25.*

¹¹⁹ *See supra* notes 25-31 and accompanying text.

¹²⁰ *Genesis 21:25-27.*

¹²¹ *Genesis 25:31-33.*

relations: even though it is *only* a man's covenant, yet when it has been ratified, no one sets it aside or adds conditions to it."¹²²

The normative basis for promising and, by extension, contracting is established by Scripture. The Scriptures reveal that promising is a characteristic of God within Himself; that God made promises to people; that God's law mandates performance of vows; and that people made binding contracts with each other. Therefore, while the maxim *pacta sunt servanda* will turn out to be insufficient to explain the common law of contracts, it is a biblically justifiable presumption from which to start.

2. The Situational Perspective

What does the perspective of office disclose regarding the justification of the social practice of contracting? As we have noted, God endowed humanity with a creational mandate of dominion.¹²³ The Scriptures do not explicitly identify the practice of contracting as a means by which to exercise dominion. Yet, examples of contracting in connection with the production of wealth justify the conclusion that human beings can legitimately occupy the office of a contracting party.¹²⁴ Furthermore, the biblical promise to Israel of economic prosperity tied to commercial lending, a practice based upon contracting, demonstrates that God intended the use of contracts as a means by which to produce wealth and exercise dominion.¹²⁵

The biblical description of division of labor following the creation account also implies that some contractual arrangements were necessary to obtain property or services. Adam is presented as the general handyman of creation, but the biblical record indicates that many of his descendants developed a particular trade or occupation.¹²⁶ As persons with particular talents and interests exercised dominion over different aspects of creation, they would have to engage in barter to obtain other items necessary for survival. By the time of the Exodus,

¹²² *Galatians* 3:15.

¹²³ See *supra* notes 50-58, 62-63 and accompanying text.

¹²⁴ See, e.g., *2 Chronicles* 1:16-17 (describing Solomon's successful commercial trading practices); *Deuteronomy* 15:3 (exception to the generally applicable debt release law for transactions with foreigners, presumably for commercial purposes); *Genesis* 21:25 (narrating Abraham's agreement with Abimelech regarding access to water for livestock grazing); *Genesis* 30:28-34 (the account of the bargain between Laban and Jacob for the raising of sheep); see also *Ephesians* 4:28 (blessing wealth acquisition through employment, which is primarily a contractual relationship).

¹²⁵ *Deuteronomy* 15:6 ("For the LORD your God shall bless you as He has promised you, and you will lend to many nations, but you will not borrow; and you will rule over many nations, but they will not rule over you.")

¹²⁶ See, e.g., *Genesis* 4:2 (Cain as agriculturist); *Genesis* 4:2 (Abel as livestock keeper); *Genesis* 4:21 (Jubal as musician); *Genesis* 4:22 (Tubal-Cain as metal-worker).

the use of money in lieu of barter had become so widespread that it could be used to redeem that which was promised to God as part of a vow.¹²⁷ It is only a few steps to proceed from the use of money to the extension of credit for purchasing goods and then to the exchange of promises, which constitutes the core of modern contracts.

The value of the insights of an economic analysis of law should be apparent. Human beings are not merely rational maximizers of self-interest. They are God's image-bearers who are charged with the covenantal duty to exercise dominion by developing the latent potential of creation. To the extent an economic analysis enhances evaluation of the efficiency of the rules of contract law, it enhances the exercise of dominion. Dominion, however, is not a stand-alone concept; it is part of the covenantal relationship between God and humanity. Efficiency is therefore not the *sole* arbiter of appropriate dominion; all of God's law must be consulted. With the establishment of contracting as a means of exercising dominion, it follows that human beings have a right to insist on the performance of the unexecuted portions of contracts. The biblical precepts and examples cited above further justify this conclusion.

3. The Existential Perspective

Even if human beings were truly autonomous, human freedom alone would be an insufficient foundation on which to build ethics or law.¹²⁸ Persons are able to make promises as image-bearers of the God who makes promises. They are to keep promises because the God in whose image they were created keeps His promises. These fundamental truths have an ontological basis in the narrative of the biblical creation account and carry epistemological weight as the prescriptions of God's law. The Kantian ethic based on the sole good of the free will is rescued from its own contradiction. There are also several legitimate implications for the law of contracts drawn from humanity's creation in the image of God.

Positively, imaging God justifies human cooperation in the exercise of the dominion mandate. The inter-Trinitarian covenant of redemption¹²⁹ involved the cooperation of the Father and Son in the accomplishment of salvation. Reasoning from the greater to the lesser, it follows that human beings can also cooperate through contracts to carry out their goals.

Creation in the image of God suggests three additional implications. First, although human freedom in carrying out the dominion mandate is quite extensive, it is not unlimited. The

¹²⁷ See *Leviticus* 27.

¹²⁸ See *supra* notes 104-06 and accompanying text.

¹²⁹ See *supra* notes 111-12111 and accompanying text.

covenantal relationship with God and His laws both exemplify and put limits on human freedom. While human beings are made in the image of the absolutely sovereign God, no humans individually (nor even groups of human beings collectively) are totally sovereign. The very power to contract—authorized and prescribed by the Bible—greatly limits the legitimate office of the State to bind its citizens to a particular form of dominion.

Second, the biblical concept of freedom of contract is not self-centered; it is covenant enmeshed and circumscribed by the law of God. The fact that the other party to the contract is also a member of the human covenant community constrains the ends to which contracts can be used. Not even Samuel Pufendorf was willing to extend the maxim of *pacta sunt servanda* to the enforcement of a contract to commit a crime.¹³⁰

Finally, the fact that others are created in the image of God has a third implication for the law of contracts: the other party to an agreement must be freely acting as an image bearer in order to contract. Thus, those who are incompetent due to age or disability, or who have been the victims of fraud or coercion, have remedies that may involve the cancellation of the contract into which they entered.

F. Conclusion

Taking the three perspectives in reverse order, we see that the ability to freely make promises is part of created human nature. We also observe that promising is a means by which human beings carry out the covenantal dominion mandate. Finally, we observe that keeping promises accords with God's normative standards. This analysis is consistent with human dependence: this understanding of the liberty of contract is based upon the foundation of the independent Creator—God. These conclusions are embedded in humanity's covenantal relationship with God. With this foundation, we can examine a specific doctrine under which the law of contracts is formulated in the common law tradition, the doctrine of consideration.

III. THE JURISDICTION PRINCIPLE

God has delegated to the State the authority to provide remedies for agreements that concern a person's interests in life, liberty or property, subject to other stipulations of his covenant(s).

A. Introduction

No legal system has ever sought to enforce all agreements. The law refuses to provide a remedy for some promises even where there

¹³⁰ PUFENDORF *Supra* note 79, at 436.

has been mutual consent.¹³¹ The question of which agreements to enforce particularly concerned the common law over the course of the sixteenth century. Then and now, the common law courts have named the fact necessary to turn an agreement into a legally enforceable contract “consideration.”¹³² Unfortunately, courts have not been as consistent in defining what constitutes consideration.

Consideration: An Historical Excursus

From shortly after the Norman Conquest until early in the nineteenth century, all suits at common law in England had to fit one of the prescribed forms of action. As noted above, for many years the only writs available for contract-like actions were covenant and debt.¹³³ Assumpsit was one of the last forms of action created by the common law judges, probably in the mid-1300s.¹³⁴ Assumpsit was a “residual form of action in which wrongs could be alleged and remedied that were not covered by other forms”.¹³⁵

In the fourteenth and fifteenth centuries . . . very few new types of writs were issued, although one of them, “trespass-on-the-case,” was of great importance, because it gave a legal remedy for certain types of harm to persons or property caused “indirectly” and also for certain types of harm caused by failure to perform an act that the defendant had specially undertaken to perform “special assumpsit”. In the 1530s and 1540s, a new form of trespass-on-the-case called *indebitatus assumpsit* gave a remedy for breach of certain types of obligations for which there was no express undertaking but one could be implied because the defendant was “indebted,” as when the defendant had received something of value from the plaintiff and, in the absence of an agreement on the price, would not pay for the benefit he obtained.¹³⁶

Assumpsit was not a freestanding writ by which courts could right every wrong brought before them. The plaintiff had to plead the existence of an obligation (*indebitatus*), a subsequent promise (*assumpsit*), a breach of the promise, and that the promise was

¹³¹ See, e.g., ARTHUR LINTON CORBIN, CORBIN ON Contracts 2 (1952) (“The law does not attempt the realization of every expectation that has been induced by a promise”); E. ALLAN FARNSWORTH, CONTRACTS 11 (3d ed. 1999) (“No legal system has ever been foolish enough to make all promises enforceable.”); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 172 (5th ed. 2003) (“Apparently no legal system has ever enforced all promises.”).

¹³² See generally Pryor and Hoshauer *supra* note 84.

¹³³ See *supra* text accompanying note 822.

¹³⁴ See Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 101 n9 (2000) (“Promise enforcement actually began in assumpsit in the mid-fourteenth century.”).

¹³⁵ *Id.*

¹³⁶ Berman & Reid, *supra* note 82, at 451-52 (footnotes omitted).

actionable. It was the last element of the action of assumpsit that judges in the 1500s called consideration. Even 500 years ago, consideration included what today would be called a bargain.¹³⁷ However, the early uses of consideration included far more than bargains, too. In fact, judges of the sixteenth century “[b]lent or disregarded the consideration/exchange requirement to enforce promises that we now enforce as promissory estoppel (gratuitous promises unfairly inducing detriment), moral obligation, and quasi-contract/unjust enrichment. . . . Finally, in some cases, courts granted relief on the basis of mutual assent *without* any consideration”¹³⁸

By the early part of the twentieth century, however, through the influence of Oliver Wendell Holmes, Jr., most courts had limited consideration to cases of the bargained-for exchange.¹³⁹ Today, consideration is still required as an element of a contract.¹⁴⁰ And it is the narrow Holmesian view of consideration that holds sway in section 71 of the *Restatement (Second) of Contracts*:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

The promise to make a gift is the paradigmatic case of the common law court’s refusal to enforce a promise.¹⁴¹ A gift promise by definition is not the result of a bargain; thus, it cannot fit the bargained-for exchange model of a contract according to the *Restatement (Second) of Contracts*.¹⁴² It is not the case, however, that unbargained-for promises are always the result of the promisor’s altruism. Many promisors make promises to influence a promisee’s attitude and, the promisor hopes, the promisee’s actions in the future. Reciprocal gift-giving is a conventional social practice in many cultures.¹⁴³ Thus, “gift” promises

¹³⁷ See David J. Ibbetson, *Consideration and the Theory of Contract in Sixteenth Century Common Law*, in *TOWARDS A GENERAL LAW OF CONTRACT* 67, 69 (John Barton ed., 1990). The court in *Manwood and Burston’s Case*, 74 Eng. Rep. 479, 480 (1587) laid down the three types of consideration: “1. A debt precedent, 2. where he to whom such a promise is made, is damnified by doing any thing, or spends his labor at the instance of the promiser [sic] . . . 3. Or there is a present consideration” *Nichols v. Raynbred*, 80 Eng. Rep. 238, 238 (1615) expressly held that a mere promise would constitute a present consideration.

¹³⁸ Ricks, *supra* note 134, at 104.

¹³⁹ See generally GILMORE, *supra* note 977, at 35-53.

¹⁴⁰ See RESTATEMENT § 71.

¹⁴¹ See, e.g., LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 9-13 (7th ed. 2001).

¹⁴² Restatement § 17.

¹⁴³ See, e.g., Tim Alan Garrison, *Review Essay: Recent Works on the History of U.S. Indian Policy*, 36 *TULSA L.J.* 415, 421 (2000) (discussing significance of reciprocal gift-

should be understood to include all promises that are not the product of a conventional bargain. Had the common law adopted a purely promissory basis for contracting, virtually every promise to make a gift would be enforceable. Before turning to the Scriptures to see if they provide any insight about civil enforcement of unbargained-for agreements, the views of several writers will be considered to better understand the insights afforded by the three perspectives on this issue.

*B. The Normative Perspective—Civil Jurisdiction
Over All Promises*

Samuel Pufendorf would agree that promises to make gifts are as enforceable as any other promise:

For if a man . . . has ordered me to expect some free gift from him, that I may thereafter have some reason to love and cultivate him, why should I not trust him? . . . [W]hy did he command me to base my plans upon his word, if he was not ready to be fully obligated thereby?¹⁴⁴

Notwithstanding the second sentence quoted above, Pufendorf does not limit the enforceability of gift promises to cases where the promisee has relied to his detriment on the promise.¹⁴⁵ Rather than grounding legal enforceability of promises on a promisee's reliance, Pufendorf asserts that human nature and the need to preserve the structure of society provide the necessary foundation for legal enforcement of all promises:

[S]urely there is enough opportunity for liberality in offering [promising] a man the right to demand of you what you could perfectly well deny him. And since so many promises pass between men from their standing in need of each other's assistance, it is more to the interest of human affairs that men keep their word

But it is a dangerous thing to admit the following conclusion: When you are no worse off from my non-fulfilment [sic] of my promise than you would have been had I made no promise at all, therefore I shall have the right to recall it [I]f you have bound yourself in a special way to such an act, to repent of it for the sole reason that the other person will receive no harm therefrom, would

giving in Native American culture); Timothy L. Fort & James J. Noone, *Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia*, 33 *Cornell Int'l L.J.* 515, 554 (2000) (noting that reciprocal gift-giving is a more sophisticated social practice than monetary transactions).

¹⁴⁴ Pufendorf, *supra* note 80, at 398.

¹⁴⁵ Pufendorf later cites the expectation interest and reiterates the importance of the reliance interest: "those promises which bid a person to expect some certain and definite thing from us must necessarily be fulfilled, because the man has put faith in us, and made his plans according to our word" *Id.* at 399.

make it seem that the bettering of our neighbour's condition is beneath our notice.¹⁴⁶

Pufendorf was quite aware, however, that the law did not measure up to his high standards, and no legal system in his day provided a remedy for all broken promises. Nonetheless, the jurisdiction of a legal system emphasizing only the Normative Perspective would be as broad as promising itself. The promise itself, and neither the presence of a bargain nor the reliance of the promisee, would give rise to civil liability. Courts in Pufendorf's view would certainly have jurisdiction to enforce a promise to make a gift.

A Christian view of contracting acknowledges the importance of the norm of promise-keeping. The obligation to keep one's promises, however, does not equate to availability of civil sanctions for the failure to do so. First, the Existential Perspective discloses that a promisor should not keep certain promises. Promises to act inconsistently with the promisor's very existence (e.g., to sell one's heart) should never receive legal sanction. This set of promises pertains to what are called inalienable rights.¹⁴⁷ Second, the Existential Perspective also teaches that a promisor need not keep certain promises. Promises induced by actions inconsistent with the image of God of the promisor (e.g., "your money or your life") should not receive legal sanction over the promisor's objection. Finally, the Situational Perspective reminds us that the authority of the office of judge is circumscribed. No human judge has jurisdiction to mete out sanctions for breaches of every promise.

C. The Existential Perspective—Civil Jurisdiction Over (Almost) All Promises

Charles Fried, the proponent of the Existential Perspective, finds the common law's requirement of consideration as useless as Pufendorf would have had he written 300 years later.¹⁴⁸ If the basis of contract law is the power of the individual to bind herself autonomously, then there are few reasons not to provide legal resources for enforcement of the promise. It is primarily grounds that interfere with the autonomy

¹⁴⁶ *Id.* at 400-01.

¹⁴⁷ See generally RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998) (classifying inalienable rights under the rubrics of several property, freedom of contract, self-defense, first possession, and restitution).

¹⁴⁸ FRIED, *supra* note 104, at 37-38.

I conclude that the life of contract is indeed promise, but this conclusion is not exactly a statement of positive law. There are too many gaps in the common law enforcement of promises to permit so bold a statement. My conclusion is rather that the doctrine of consideration offers no coherent alternative basis for the force of contracts, while still treating promise as necessary to it.

Id.

of the decision-making process that should limit judicial enforcement of promises, although he admits there are other reasons for nonenforcement as well.¹⁴⁹ Like Pufendorf, Fried believes:

[T]here simply are no grounds for not extending that conclusion [that making gifts serves individual liberty] to *promises* to make gifts. I make a gift because it pleases me to do so. I promise to make a gift because I cannot or will not make a present transfer, but still wish to give you a (morally and legally) secure expectation.¹⁵⁰

Fried's focus on the promisor's autonomy highlights those defenses to judicial enforcement that are centered in the promisor's existence as the image of God. His theory does not explain other reasons for nonenforcement of promises equally well. As Fried works his way out from the center of autonomy, he begins to import explanations based on arguments other than autonomy. We see again why examining legal principles from all three perspectives balances the analysis of a legal rule.

*D. The Situational Perspective—Civil Jurisdiction
Over the Bargained-for Exchange, Plus . . .*

It is peculiar that the epitome of the Situational Perspective on jurisdiction—the doctrine of consideration set forth in sections 17 and 71 of the *Restatement (Second) of Contracts*—has few scholarly advocates today. Richard Posner comments:

The doctrine that a promise, to be legally enforceable, must be supported by consideration may seem at first glance a logical corollary of the idea that the role of contract law is to facilitate the movement of resources, by voluntary exchange, into their most valuable uses. If the promise is entirely one-sided [e.g., a promise of a gift], it cannot be part of the exchange process. But *it is not true that the only promises worth enforcing are those incidental to an exchange*.¹⁵¹

Grant Gilmore was even more dismissive of the theory of consideration.¹⁵² Yet, consideration—understood as the bargained-for

¹⁴⁹ *Id.* at 38 (footnote omitted).

The promise must be freely made and not unfair. . . . The promisor must have been serious enough that subsequent legal enforcement was an aspect of what he should have contemplated at the time he promised. Finally, certain promises, particularly those affecting the situation and expectations of various family members, may require substantive regulation because of the legitimate interests of third parties.

Id.

¹⁵⁰ *Id.* at 37 (emphasis in original).

¹⁵¹ POSNER, *supra* note 90, at 99 (emphasis added).

¹⁵² GILMORE, *supra* note 97, at 76 (footnote omitted).

Classical theory used consideration as the touchstone for such curious deductions as that offers expressed to be irrevocable were nevertheless

exchange—remains firmly ensconced as a fundamental plank of the law of contracts.

Several arguments have been advanced for why something like consideration is appropriate to mark the boundary between those agreements that are legally enforceable contracts and those that must look to another forum for redress. Professor Lon Fuller's 1941 article, *Consideration and Form*,¹⁵³ remains the standard account of the purpose for consideration. Fuller's analysis breaks the doctrine of consideration into two components: substance and form. With respect to the element of form, Fuller observes that consideration serves three valuable functions. The first is evidentiary: "The most obvious function of a legal formality is . . . that of providing 'evidence of the existence and purport of the contract . . .'"¹⁵⁴ Second, consideration serves a cautionary role "by acting as a check against inconsiderate action."¹⁵⁵ Finally, the doctrine of consideration serves to channel agreements by which parties desire to be bound into easily recognizable forms:

The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. . . . [F]orm offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.¹⁵⁶

Fuller's observations about the purpose for the doctrine of consideration ring true.¹⁵⁷ The law should certainly be concerned about the reliability of the evidence of an agreement's existence. The law also has an interest in enhancing the purposefulness of the parties' deliberations. Lastly, a judicial system has an interest in encouraging contracting parties to use a form that demonstrates their consent (or lack thereof) to the use of the civil authority to vindicate their agreement. Yet, it is hardly the case that only bargained-for exchanges

revocable until accepted, that certain modifications of ongoing contracts are ineffective and that discharge of debtors on payment of less than full amount of the debt are not binding on creditors. Each of these propositions, it should be noted, almost immediately generated an almost infinite number of exceptions . . .

Id.

¹⁵³ See *supra* note 101.

¹⁵⁴ Fuller, *supra* note 101, at 800 (quoting 2 JOHN AUSTIN, *Fragments—On Contracts*, in LECTURES ON JURISPRUDENCE (4th ed. 1879)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 801.

¹⁵⁷ Even Samuel Pufendorf acknowledges that Roman law limited enforcement of promises to those made in certain forms to encourage deliberation (cautionary function) and enhance clarity (evidentiary and channeling functions). PUFENDORF, *supra* note 80, at 401.

meet Fuller's criteria for legally enforceable promises, a point which Fuller acknowledges.¹⁵⁸

The law would be better off if it were to address directly issues of detrimental reliance, illusory promises, mutuality of obligation, the rule that past and/or moral "consideration" is not consideration, the need for separate consideration for an option, and the pre-existing duty rule. Instead of resolving all these questions with the blunt tool of consideration, the law would be healthier if it developed appropriate rules for each set of issues.¹⁵⁹ Nonetheless, the doctrine of consideration could be considered as a rough surrogate for the fundamental question of jurisdiction: For what sorts of agreements *should* the civil government provide a remedy? Perhaps consideration will one day be reformulated on a principled basis to provide a scalpel by which courts can determine which promises fall within the sphere of civil enforcement. The following analysis may point to the direction of that reformulation.

E. Scriptural Resources

1. The Normative Perspective

The Normative Perspective on *civil enforcement* of agreements is not founded simply on the promise. With few exceptions promises should be kept. God will ultimately judge all breaches of promises; as Jesus said: "[E]very careless word that men shall speak, they shall render account for it in the day of judgment."¹⁶⁰ Nonetheless, just as the norm of promise-keeping has biblical justification, so too the Normative Perspective on civil enforcement of agreements must be grounded in the Word of God.

No passage in Scripture answers directly the question of which agreements are subject to enforcement by the civil government. The Bible does, however, clearly identify the State as an authorized agent of the vindication of the presently existing rights to life (and liberty) and property.¹⁶¹ The Sixth and Eighth Commandments¹⁶² provide that

¹⁵⁸ Fuller freely grants that promises inducing injury (detrimental reliance) and promises in response to a moral obligation (unjust enrichment) should also be enforced. Fuller, *supra* note 101, at 810-13.

¹⁵⁹ See generally Mark B. Wessman, *Retaining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996); Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993).

¹⁶⁰ *Matthew* 12:36.

¹⁶¹ The Mosaic covenantal administration also sanctioned violations of several other commandments including worshipping false gods, the use of idols, misusing God's name, and desecrating the Sabbath. For reasons beyond the scope of this work, these obligations are not subject to State sanction today. See generally Craig A. Stern, *Things*

“[Y]ou shall not murder”¹⁶³ and “[Y]ou shall not steal.”¹⁶⁴ Immediately after the revelation of the Ten Commandments on Mount Sinai, God went on to provide for judicial remedies for killing (and associated deprivations of liberty) and theft in the Book of the Covenant.¹⁶⁵ Forty years later, Moses spelled out more details regarding the sanctions for interfering with these standing rights in his second address to the people of Israel on the Plains of Moab.¹⁶⁶

The presence of State-enforced remedies for violations of the rights of life and property opens the door to judicial vindication of *agreements* founded on these rights. On the one hand, if civil government has no jurisdiction over the subject of an agreement, couching the subject in promissory form should not change the legitimate reach of the State. For example, since modern states cannot compel the worship of any god, they should not be able to enforce an agreement to worship a particular god.¹⁶⁷ On the other hand, even if civil government has jurisdiction over an agreement’s subject matter, it does not necessarily follow that it has jurisdiction over a promise relating to that subject matter. However, if no promises received judicial protection then the insights of the three perspectives would be diluted. The Normative Perspective on promise-keeping at least suggests some civil sanction for breach; the usefulness of promises as a tool of dominion (the Situational Perspective) would be seriously undermined if no promise received judicial enforcement; and the failure to provide state protection for all promises would undercut the Existential Perspective on human beings as images of God. It is thus reasonable to start with the proposition that all agreements relating to the subject matter of

Not Nice: An Essay on Civil Government, 8 REGENT U. L. REV. 1 (1997). The Ten Commandments additionally provide that “[Y]ou shall not commit adultery.” *Deuteronomy* 5:18; *Exodus* 20:14. Enforcement of this commandment also received civil sanction in the Book of the Covenant. While I believe the protection of marriage is also within the jurisdiction of the state, I will not separately develop the implications of this jurisdictional grant at this time.

¹⁶² Given my confessional tradition, I use the numbering of the Ten Commandments common to most Protestant and Orthodox Churches. The difference in numbering of the Ten Commandments from the Roman Catholic and Lutheran Churches is immaterial to my analysis.

¹⁶³ *Deuteronomy* 5:17; *Exodus* 20:13.

¹⁶⁴ *Deuteronomy* 5:19; *Exodus* 20:15.

¹⁶⁵ *Exodus* 21:12, 14 (giving remedies for murder); *Exodus* 21:16 (giving remedies for deprivation of liberty/kidnapping); *Exodus* 22:1, 4 (giving remedies for theft).

¹⁶⁶ See generally *Deuteronomy* 4:44-28:68.

¹⁶⁷ Other entities, however, may have jurisdiction over such a promise. The church, for example, has ecclesiastical jurisdiction over all sins. The civil magistrate does not have jurisdiction over love and affection: “The same rule holds true today: love and affection are not consideration.” Ricks, *supra* note 134, at 111.

civil jurisdiction are *prima facie* also within the scope of civil jurisdiction.

i. Agreements About Property

Contracts concerning sales of goods, conveyances of real estate, and licenses of intellectual property make up a large portion of all contracts. The question of whether promises relating to property should receive judicial sanction depends in the first place on whether private property itself deserves civil protection. If all property were the common possession (or available for common use) of humanity, then the civil government should not enforce contracts treating property as something over which the parties have dominion. Yet the fundamental right to own property is biblical:

The Ten Commandments sanction private property implicitly and explicitly. God forbids stealing, indeed even coveting, the house, land or animals of one's neighbors (Exod. 20:15, 17; Deut. 5:19, 21; *see also* Deut. 27:17; Prov. 22:28). Apparently Jesus likewise assumed the legitimacy of private property. His disciple Simon Peter owned a house that Jesus frequented (Mark 1:29). Jesus commanded his followers to give to the poor (Matt. 6:2-4) and loan money even when there was no reasonable hope of repayment (Matt. 6:24; 5:42; Luke 6:34-35). Such advice would have made little sense if Jesus had not also assumed that the possession of property and money was legitimate so that one could make loans. . . . [N]ot even the dramatic economic sharing in the first Jerusalem church led to a rejection of private ownership. Throughout biblical revelation the legitimacy of private property is constantly affirmed.¹⁶⁸

Not only is private property a fundamental biblical right, the passages cited above demonstrate that civil governments should protect it.¹⁶⁹ Thus, given the presumption of judicial enforcement where the subject of an agreement is within the civil jurisdiction, parties to agreements for sale, conveyance or license are entitled to seek the power of the State to vindicate the expectations to property arising under an agreement.

¹⁶⁸ RONALD J. SIDER, RICH CHRISTIANS IN AN AGE OF HUNGER 86 (1990) (footnotes omitted).

The earth is indeed the Lord's, as is all dominion, but God has chosen to give dominion over the earth to man, subject to His law-word, and property is a central aspect of that dominion. The absolute and transcendental title to property is the Lord's; the present and historical title to property is man's. ROUSAS J. RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 451 (1973).

¹⁶⁹ *See supra* text accompanying note 164.

ii. Agreements About Services

Agreements for services ranging from painting a house to teaching at a law school make up another large portion of modern contracts. Rooting civil jurisdiction over service contracts in the commandment “you shall not murder,” however, may not be self-evident. Consider, however, that a positive restatement of the prohibition of murder is the vindication of life.¹⁷⁰ According to John Calvin, we vindicate life when we:

Study faithfully to defend the life of [my] neighbor, and practically to declare that it is dear to [me]; for in that summary [*Leviticus* 19:18] no mere negative phrase is used, but the words expressly set forth that [my] neighbors are to be loved.¹⁷¹

Life is a prerequisite to the exercise of dominion.¹⁷² In turn, the goal of dominion is to enhance life. Consistent with the foregoing paragraph, the life enhanced through the exercise of dominion should include not only our own but also that of our neighbor. Given the division of labor inherent in the unfolding of the exercise of dominion,¹⁷³ the provision of services between persons becomes necessary for the preservation of life. Thus, there is a fundamental and legally enforceable biblical duty to perform agreements to supply and receive services.

There is also a biblical basis for civil jurisdiction over exchanges of services. The texts cited above, granting civil government the authority to punish wrongful deprivations of life and liberty, provide a general

¹⁷⁰ *Matthew* 22:34-40.

³⁴But when the Pharisees heard that He [Jesus] had put the Sadducees to silence, they gathered themselves together. ³⁵And one of them, a lawyer, asked Him a question, testing Him, ³⁶“Teacher, which is the great commandment in the Law?” ³⁷And 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 foremost commandment. ³⁹“The second is like it, ‘YOU SHALL LOVE YOUR NEIGHBOR AS YOURSELF.’ ⁴⁰“On these two commandments depend the whole Law and the Prophets.”

Id.

¹⁷¹ JOHN CALVIN, COMMENTARIES ON THE FOUR LAST BOOKS OF MOSES 3:21 (Charles William Bingham trans., (1852), (reprinted 1950) (1563). *See also* THE HEIDELBERG CATECHISM (1563), *reprinted in* THE HEIDELBERG CATECHISM WESTMINSTER SHORTER 50 (CRC Publ’g 1990) (stating that, “God requires us to love our neighbor as ourselves, to show patience, peace, meekness, mercy, and kindness towards him, and, so far as we have power, to prevent his hurt; also, to do good even unto our enemies.”); THE WESTMINSTER SHORTER CATECHISM (1647), *reprinted in* THE HEIDELBERG CATECHISM WESTMINSTER SHORTER (CRC Publ’g 1990) (stating that “[T]he sixth commandment requireth all lawful endeavors to preserve our own life, and the life of others.”).

¹⁷² *See supra* note 59 and accompanying text.

¹⁷³ *See supra* note 126 and accompanying text.

basis for judicial enforcement of agreements relating to services.¹⁷⁴ The previous discussion dealing with judicial protection of promises relating to property is also relevant because services are most often promised in exchange for property (e.g., money). Nonetheless, there are also specific Scriptural prescriptions relevant to this topic. *Deuteronomy 24:14-15* provides:

You shall not oppress a hired servant who is poor and needy, whether he is one of your countrymen or one of your aliens who is in your land in your towns. ¹⁵You shall give him his wages on his day before the sun sets, for he is poor and sets his heart on it; so that he may not cry against you to the LORD and it become sin in you.

Moses expressly authorizes the exchange of services for pay, and provision is made for performance of the promised payment.¹⁷⁵ Similarly, Jesus remarks, “[T]he laborer is worthy of his wages.”¹⁷⁶ And Paul expressly provides that “to the one who works, his wage is not reckoned as a favor, but as what is due.”¹⁷⁷ Not only are the fundamental rights to life and the liberty of the use of one’s services in exchange for payment biblically based, civil government should protect those rights as part of its mandate under the Sixth Commandment.¹⁷⁸ The general presumption is that judicial enforcement is appropriate where the subject of an agreement is within the civil jurisdiction. In the case of service contracts, there is also a clear scriptural implication that a party providing services pursuant to an agreement is entitled to seek the power of the State to vindicate her expectation to payment. Together, these biblical norms lead to the conclusion that agreements for services are civilly enforceable contracts.

2. The Situational Perspective

The Bible is replete with examples of the use of agreements for the transfer of property. Beginning with Abraham, there are accounts of purchases and conveyances as tools of dominion.¹⁷⁹ For example, Abraham purchased real estate in which to bury Sarah in *Genesis 23*, and Esau sold his birthright in *Genesis 25*. Service contracts receive their first mention in the lengthy account of Jacob and Laban in

¹⁷⁴ See *supra* note 165 and accompanying text.

¹⁷⁵ See also *Leviticus 19:13*; *Malachi 3:5*.

¹⁷⁶ *Luke 10:7*.

¹⁷⁷ *Romans 4:4*.

¹⁷⁸ The Hebrew root of the verb translated “oppress” (קָרַע, §‘q cry out, raise a cry of wailing, summon, call together), is used in other contexts where the presence of civil jurisdiction is even more obvious. See, e.g., *Hosea 12:7*; *Leviticus 19:13*.

¹⁷⁹ Abraham is the first person whom the Bible mentions as having “possessions.” See *Genesis 12:5*.

Genesis 29-30.¹⁸⁰ In the New Testament, the legitimacy of the power to convey property is assumed,¹⁸¹ and Paul gives very high status indeed to the inviolability of contracts in *Galatians* 3:15.¹⁸² The Bible thus provides examples of valid transfers of property and services. It also ratifies the importance of promising. These two points combined with the mandate of dominion provide ample support for the conclusion that agreements relating to property and services are judicially enforceable contracts.

God has ordained the State, *inter alia*, to protect the lives and property of its residents. In turn, the State commissions particular individuals to an office to carry out its mandate. Among those offices is the judge. While judges in Hebrew society had a broader range of activity than modern judges,¹⁸³ among the tasks that Moses assigned the Israelite judge was to preside over trials.¹⁸⁴ Thus the biblical concepts of office and service¹⁸⁵ are consistent with and fortify the conclusion that God's structure for society includes persons with the specific charge of deciding cases and that the coercive power of the civil authority extends to the results of those decisions.

3. The Existential Perspective

The biblical perspective on humans as images of God is consistent with promising. The scriptural examples of promise and assent confirm the validity of inter-human agreements. And the biblical norms related

¹⁸⁰ Some interesting service contracts mentioned in the Bible include service as a family priest, see *Judges* 17:10, and consultation with a prophet, see *1 Samuel* 9:7-8.

¹⁸¹ *Acts* 4:32-5:11.

¹⁸² See *supra* text accompanying note 122.

¹⁸³ 4 NIDOTTE, *supra* note 24, at 214.

[The Hebrew verb for judge] [d]escribes a range of actions that restore or preserve order in society, so that justice, especially social justice, is guaranteed. Whether achieved by God (ca. 40 percent of the occurrences) or by a human agent (ca. the other 60 percent), as a continuous activity it can be translated as rule, govern; as a specific activity it can be translated as deliver, rescue, or judge.

Id.

¹⁸⁴ *Deuteronomy* 16:18-20

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

Id. See also *Deuteronomy* 17:2-13.

¹⁸⁵ See *supra* text accompanying notes 62-64.

to human liberty and the right to property demonstrate that freedom to contract is in harmony with our creation in God's image.

F. Conclusion

So far, the discussion has emphasized biblical insights on the substantive/jurisdictional aspect of the common law doctrine of consideration. Yet, the formal/prudential concerns of Lon Fuller should not be ignored.¹⁸⁶ It is a relatively straightforward matter for the State to protect present interests in liberty and property. It is more difficult to evaluate claims to *promises* relating to them. A claim arising out of deprivation of a person's possession of property involves judicial evaluation of an existing state of affairs. Such a claim easily falls within the jurisdiction of civil authority as a violation of the prohibition of theft. A claim, however, which arises out of deprivation of a person's *expectation* of possession of property is more difficult to establish. The defendant will still have possession of the property, and the aggrieved party will need to convince the court that the defendant promised possession to her. Promises are generally more ephemeral than possession, and a promise can more easily be made without the thoughtfulness that typically accompanies surrender of possession. Finally, it may also be the case that a promisor does not appreciate that a breach of her promise will subject her to legal liability. Thus, Fuller's analysis of the form of consideration in terms of its evidentiary, cautionary, and channeling functions is properly part of the law of contracts.¹⁸⁷ The common law has conflated the jurisdictional and formal aspects of consideration. While these features should be analyzed separately, the law must, nonetheless, account for both. The relationship between the substantive and formal aspects of contracts can be diagrammed as a truth table as follows:

¹⁸⁶ See *supra* text accompanying notes 153-56.

¹⁸⁷ Even Pufendorf agreed that positive law may properly limit enforcement of agreements only to those that meet cautionary, evidentiary, and channeling criteria:

[T]he reason why the Romans allowed an action only on those promises which were made by stipulation or agreement was not because the law of nature did not hold serious promises binding, but with the object that, by the use of set formulae, men would be made carefully to consider whether it was to their advantage to promise what could not later be recalled. And also that what was promised might be expressed more clearly, for fear some obscurity in their terms might open the way to disagreements.

PUFENDORF, *supra* note 80, at 401; see also *id.* at 700.

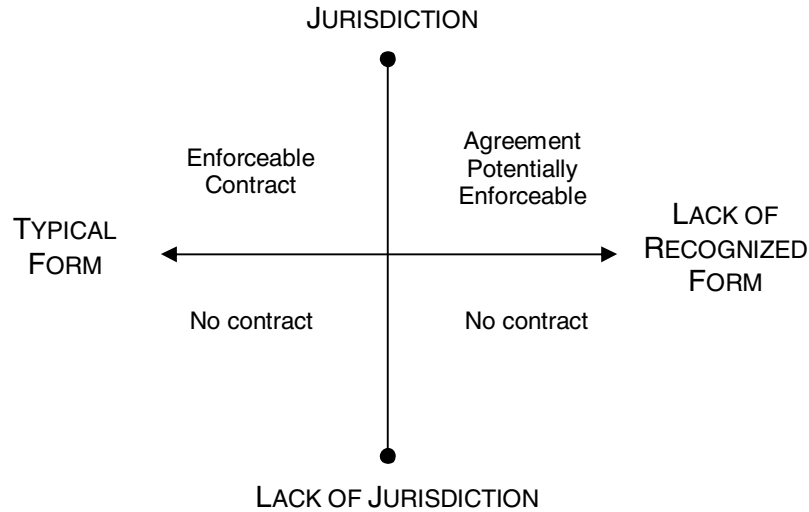


FIGURE 3. THE CONSIDERATION TABLE

Note that the axis representing civil jurisdiction is closed-ended. The norm of civil jurisdiction should not expand or contract. Contractual formalities, however, are grounded in historical situations and, to a lesser extent, tacit individual understandings. Thus, the axis representing the formal aspect of consideration is open-ended.

The question that must next be considered is what form or forms *should* the law require in order to insure that an agreement within the civil jurisdiction receives judicial sanction. The bargained-for exchange currently provides the only manner certain to obtain the protection of the State. Yet, there is no clear reason why this particular form of agreement should be the only one that is privileged *prima facie* as a contract. Agreements for which there are other means by which to meet the evidentiary, cautionary, and channeling functions should receive judicial enforcement equally with bargained-for agreements.

Oliver Wendell Holmes did not develop the modern definition of consideration as only the bargained-for exchange until the late nineteenth century.¹⁸⁸ Limiting consideration to a conventional exchange was not the case in the early days of the common law. In the sixteenth and seventeenth centuries English courts of Common Pleas and the King's Bench enforced many agreements where the consideration was *not* the bargained-for exchange.¹⁸⁹ A broader

¹⁸⁸ See Frederick Pollock, Book Review, 30 L.Q. Rev. 128, 129 (1914).

¹⁸⁹ These early English decisions enforced agreements based on promissory estoppel, moral obligations, executors' promises to pay the debts of the decedent, and

definition of “consideration” in terms of jurisdiction and form has historical antecedents as well as theological legs on which to stand. Such a broader understanding would permit modern courts to enforce agreements without subterfuge¹⁹⁰ and make the doctrine of consideration more coherent. At the very least, perhaps as many as a dozen sections of the current *Restatement (Second) of Contracts*¹⁹¹ relating to enforceability could be replaced by as few as two under a clearer regime of jurisdiction and form.¹⁹²

[HYPOTHETICAL] RESTATEMENT (THIRD) OF CONTRACTS

§ 71. Enforceability of Agreements

Agreements relating to a transfer of an interest in property or provision of services are legally enforceable

- (1) if the agreement is the result of a bargained-for exchange; or
- (2) if the agreement is accompanied by a formality that manifests an intention to be legally bound, such as:
 - (a) a seal; or
 - (b) the recital of a nominal consideration; or
 - (c) an expression of intention to be legally bound; or
 - (d) copies of a writing sent to both the promisor and the promisee bearing the signatures of both parties;
- (3) unless the agreement was made under such circumstances that the promisee knew or had reason to know that the promisor did not intend the agreement to be legally enforceable.¹⁹³

other cases where assent was clear but an exchange was not. *See Ricks, supra* note 135, at 113-33.

¹⁹⁰ *See* Wessman, *supra* note 159.

¹⁹¹ *See, e.g.*, RESTATEMENT §§ 73 (Performance of Legal Duty); 74 (Settlement of Claims); 77 (Illusory and Alternative Promises); 79 (Adequacy of Consideration; Mutuality of Obligation); 82 (Promise to Pay Indebtedness; Effect on the Statute of Limitations); 83 (Promise to Pay Indebtedness Discharged in Bankruptcy); 84 (Promise to Perform a Duty in Spite of Non-occurrence of a Condition); 85 (Promise to Perform a Voidable Duty); 86 (Promise for Benefit Received); 87 (Option Contract); 88 (Guaranty); 89 (Modification of Executory Contract); 90 (Promise Reasonably Inducing Action or Forbearance); 95 (Requirements for Sealed Contract or Written Contract or Instrument).

¹⁹² The following suggested principles are taken with modifications from RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 904-15 (1995) and RANDY E. BARNETT, *CONTRACTS: CASES AND DOCTRINE* 871-72 (2d ed. 1999).

¹⁹³ Samuel Pufendorf would agree with this exclusion from enforceability. *See PUFENDORF, supra* note 80, at 393.

§ 90. Enforceability of Promises

A promise is binding if, with the knowledge of the promisor, a promise has induced reliance on the part of the promisee

- (1) that is so substantial that it would be unlikely in the absence of the grounds set forth in Section 71; and
- (2) the promisee expects the promise to be enforceable and is aware that the promisor has knowledge of the promisee's reliance; and
- (3) the promisor remains silent concerning the promisee's reliance.

Should an agreement to make a gift¹⁹⁴ be enforceable under this scenario? The answer depends on two factors. First, is the promise of a gift for property or services? A promise of "love and affection" lies entirely outside the civil jurisdiction but a donative promise of a Honda Accord does not. Second, the questions raised by Lon Fuller's analysis of the the formal aspects of the doctrine of consideration must also be considered. The presence of a seal, the recitation of nominal consideration, an expression of intent to be legally bound, or the creation of a writing signed by both promisor and promisee should be sufficient to verify the evidentiary, cautionary and channeling functions of consideration. In the absence of such forms, however, the State should be unwilling to lend its coercive powers to enforcement of a promise to make a gift, unless there has been such reliance to confirm the consideration functions indirectly.¹⁹⁵ Until the law recharacterizes this doctrine, to be judicially enforceable a contract will continue to require consideration (understood as the bargained-for exchange) or one of the numerous consideration substitutes. Understanding the doctrine of consideration in terms of jurisdiction and form can nonetheless orient further critique and inform legal theory about the question of the reach of the civil authority over promises.

¹⁹⁴ An agreement to make a gift may seem peculiar. Yet the common law of property holds that a gift is not completed until it has been accepted. RESTATEMENT (THIRD) OF PROPERTY § 6.1(b) (2003).

¹⁹⁵ See generally Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979) (arguing that while there are substantive reasons for enforcing simple donative promises, the general principle of non-enforcement is justified because the process-based problems of enforcement (problems of proof and deliberateness) outweigh the substantive advantages).