

CHURCH AND STATE IN THE EARLY REPUBLIC: THE COVENANTERS' RADICAL CRITIQUE

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INTRODUCTION

Constitutional scholars pay particular attention to the historical context of the First Amendment, to the relationship between the state and religion in the early republic.¹ Missing from this academic examination of church-state history, however, is any serious consideration of the views of the Reformed Presbyterian Church, popularly known as the Covenanters, views that challenged the fundamental presuppositions of the United States Constitution, both as established in the early national period and as applied today. A typical modern American, citizen or scholar, cannot help but be startled by a coherent, closely reasoned body of doctrine that trenchantly criticizes such fundamental American assumptions as government by consent of the governed or the free exercise of religion. Covenanter criticism of the church-state relations not only presents a model of church and state radically different from today's conventional American theories, but also throws light on the American paradigm as it existed during its developmental period. Reformed Presbyterians of the early republic criticized the federal Constitution from a world view so radically different from that of the founders that their criticisms highlight aspects of the generally accepted constitutional regime in ways that conventional constitutional scholars have scarcely considered.

I. SCOTTISH BACKGROUND OF THE AMERICAN COVENANTERS

The Reformed Presbyterian position developed in the course of long struggle between two principles of church and state relations in Scottish history, lasting from the Reformation in the 1560s through, and beyond, the Glorious Revolution of 1688. On one side, radical Presbyterians asserted the doctrine of the "two kingdoms": the equality

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1. For a recent survey of the literature, see *Symposium: the (Re)Turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006).

and mutual independence of church and state, with each acting in a coordinated capacity to further divine mandates of Christ Jesus, king of both church and state alike. On the other, Stuart kings asserted their divine right to rule over not only the state but also over an erastian church, subordinate to the royal will.²

The Reformed Presbyterian Church descended from those Scottish Presbyterians who steadfastly advocated a reformed, presbyterian church as the only true church mandated in scripture, coordinate with a nation covenanted to divine ends.³ Their foundational documents were two. The first was the Scottish National Covenant of 1638, which pledged support for the Presbyterian Church of Scotland against the Stuart kings' efforts to subject it to royal control and Anglican liturgy.⁴ The National Covenant was an assertion of the doctrine of the "two kingdoms": a forceful rejection of Stuart absolutism in church and state, and an equally forceful assertion of the co-ordinate independence of the Presbyterian Church, as the only church recognized by divine law in Scotland.⁵ The second document was the Solemn League and Covenant, entered into in 1643, in the midst of the English Civil War.⁶ By the Solemn League, Scotland pledged military force to intervene in the war on the side of the English Parliament against the King; and Parliament in return pledged to establish a uniform reformed church, on the Scottish model, as the only recognized church in the kingdoms of England and Ireland.⁷

The restoration of the Stuart monarchy in 1660, and the coordinate reestablishment of episcopacy in English and Scottish churches alike, would seem to have made both the National Covenant and the Solemn League dead letters, historical relics.⁸ For the strict Covenanters, however, the National Covenant and the Solemn League were not merely human agreements, to be abrogated as circumstances dictated, but rather covenants entered into with God, like those of the ancient

2. The above statements are truisms of Scottish history. For a convenient summary, see JOHN D. MACKIE, *A HISTORY OF SCOTLAND* chs. 7, 10-14 (2d ed., Dorsett Press 1978).

3. For a good overview of covenanter history and ideals, see JOHANNES GEERHARDUS VOS, *THE SCOTTISH COVENANTERS: THEIR ORIGINS, HISTORY, AND DISTINCTIVE DOCTRINES* (Blue Banner Productions 1998).

4. For the text of the National Covenant, see JAMES KING HEWISON, *THE COVENANTERS: A HISTORY OF THE CHURCH IN SCOTLAND FROM THE REFORMATION TO THE REVOLUTION* vol. 1, 472 (J. Smith 1913).

5. MACKIE, *supra* note 2, at 201-05.

6. For the text of the Solemn League, see HEWISON, *supra* note 4, at 479.

7. MACKIE, *supra* note 2, at 211-15.

8. EDWARD VALLANCE, *REVOLUTIONARY ENGLAND AND THE NATIONAL COVENANT: STATE OATHS, PROTESTANTISM AND THE POLITICAL NATION, 1553-1682*, at 108 (Boydell Press 2005).

Israelites in the Bible, and as such eternally binding on future generations.⁹ As one covenanting martyr put it, "those that were unborn are engaged to it, and . . . it passes the power of any under heaven to absolve a man from the oath of God."¹⁰ The Covenanters held true to the covenants during the "killing times" of the 1680s, when the Stuart monarchs again tried to force an episcopal church on Scotland.¹¹ Even after the Glorious Revolution, when a national Presbyterian Church was reestablished in Scotland, this group (often nicknamed "Cameronians" after Richard Cameron, their martyred leading minister) held aloof.¹² For them, a presbyterian church established in Scotland only, subject to erastian influence and doctrinal laxity, fell far short of the Solemn League's vision of three kingdoms covenanted to defend one, orthodox Presbyterian Church. As a result, in 1743, the Cameronian Covenanters established a separate denomination, the Reformed Presbyterian Church.¹³

Covenanter immigrants to America carried with them the presupposition of the "descending obligation of the covenants," and with it, the conviction that the American colonies, as dependencies of Great Britain, were themselves bound by the covenants just as the mother country was.¹⁴ Only in the 1790s, however, did covenanter ministers, driven from Northern Ireland for their involvement with the revolutionary United Irishmen,¹⁵ organize a branch of the Reformed Presbyterian Church in the United States.¹⁶ One of these immigrant ministers, Samuel B. Wylie, restated for the newly organized church the doctrine of the "two kingdoms" of church and state implicit in the old covenants, but adapted to the context of the newly established United States.¹⁷ His brief treatise, *The Two Sons of Oil* (published in 1803), provided a trenchant critique of the federal and state constitutions from

9. *Id.* at 183-84.

10. VOS, *supra* note 3, at 194.

11. *Id.* at 134-35.

12. *Id.* at 143-47.

13. *Id.* at 138-69.

14. DAVID M. CARSON, *TRANSPLANTED TO AMERICA: A POPULAR HISTORY OF THE AMERICAN COVENANTERS TO 1871*, at 9-10 (Crown & Covenant Publications n.d.).

15. For the covenanting zeal, millenarian expectation, and anti-monarchical conviction that motivated covenanter involvement in the Irish Rebellion of 1798, see IAN R. MCBRIDE, *SCRIPTURE POLITICS: ULSTER PRESBYTERIANS AND IRISH RADICALISM IN THE LATE EIGHTEENTH CENTURY* 79-83, 201 (Oxford Univ. Press 1998).

16. CARSON, *supra* note 14, at 17-19.

17. In doing so, Wylie drew on the ideas of a fellow refugee, the Rev. James McKinney: *id.* at 17-19. The writings of a number of Wylie's other colleagues, such as Alexander McLeod, amplified his exposition.

the viewpoint of a radical outsider.¹⁸

II. PRESUPPOSITIONS OF THE REFORMED PRESBYTERIAN POSITION

A. Two Preliminary Presuppositions: Collective Responsibility and Biblical Rule

Three central covenanter presuppositions, strange to the modern constitutional scholar, must be known if the Reformed Presbyterian argument is to be understood. The first presupposition was that *the state was a moral being*, not merely a collection of individuals organized under a sovereign government. It was a "responsible moral subject," collectively owing duties and capable of acting rightly or wrongly, just as a human being did.¹⁹ While this personification of the state might seem almost platonic, a concept of idealist philosophy,²⁰ it was instead a product of the second presupposition: that the *Bible was "a perfect rule for our direction in all the duties of life,"*²¹ itself a central doctrine of the Reformation held by all orthodox Protestants.²² The Bible dealt with states as if they were individuals: Israel, as a nation, was punished for national sins and blessed for national righteousness as prescribed by the Bible.²³ The Reformed Presbyterians, the most straightly orthodox of all reformed denominations, could not do otherwise.

B. The Third, Central Presupposition: Christ's Mediatorial Dominion Over the Nations

Given the mandatory authority of scripture, a third presupposition followed, one central to the Reformed Presbyterian position. The Bible declared Jesus Christ, the divine mediator, to be "the Prince of the kings of the earth," that "all people, nations, and languages should serve him."²⁴ For the Covenanters, the scripture meant what it said.²⁵ The

18. The reprint of Wylie's work used here is REV. SAMUEL B. WYLIE, A.M., *THE TWO SONS OF OIL; OR, THE FAITHFUL WITNESS FOR MAGISTRACY AND MINISTRY UPON A SCRIPTURAL BASIS* (Wm. S. Young 1850). The title is a literal translation of Zech 4:14.

19. WILLIAM SYMINGTON, *MESSIAH THE PRINCE: OR, THE MEDIATORIAL DOMINION OF JESUS CHRIST* 150-51 (Christian Statesman Press 1999) (William Whyte & Co. 1839).

20. Cf., Gottfried Salomon, *Social Organism*, in *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* vol. 14, 138 (Edwin R.A. Seligman & Alvin Johnson eds., Macmillan Co. 1934).

21. REFORMED PRESBYTERIAN CHURCH, *REFORMATION PRINCIPLES EXHIBITED, BEING THE DECLARATION AND TESTIMONY OF THE REFORMED PRESBYTERIAN CHURCH IN NORTH AMERICA* 7 (R. Craighead 1850) (1806) (emphasis added).

22. See the Westminster Confession I, in *The Confession of Faith* 9-10 (Associate-Reformed Church 1799).

23. SYMINGTON, *supra* note 19, at 154-55.

24. Rev 1:5, Dan 7:14.

Reformed Presbyterian Church stood for the "crown rights of Jesus Christ": its slogan was "For Christ's Crown and Covenant." The assertion of *Christ's kingship over all things* was the fundamental doctrine governing the covenanter stance on the relationship between church and state.²⁶ William Symington's *Messiah the Prince* (1838) most fully stated this doctrine through detailed Biblical exegesis.²⁷ That God the Father appointed his son Jesus Christ the head of the church, all Protestant denominations accepted.²⁸ Beyond this principle, however, Symington believed that scripture mandated belief in "the headship of Jesus, as Mediator, over the nations of the world, or the political associations of men."²⁹ The Bible, Symington held, specifically taught that Jehovah, God the Father, delegated to Christ his Son "mediatorial dominion" to rule the nations. The Father did not create and generally rule all nations as a matter of natural law; rather, he specifically "'hath put all things in subjection under his [Christ's] feet,' as respects his right of sovereignty" over human societies.³⁰

This doctrine necessarily imposed certain duties on political states understood as collective moral beings. States as "responsible moral subject[s]" had the duty "to have respect to the glory" of their ruler Christ in all institutions and transactions, to act not merely in the interest of the public good and social order, but in obedience to the commands of their sovereign lord Jesus Christ.³¹ They had to take Christ's law, as set forth in scripture, as their rule of action: this, rather than "human reason, natural conscience, public opinion, or political expediency," was the standard for all public policy and legislation.³² "[T]he Bible is to be our rule . . . in matters of a civil or political nature."³³ In obedience to Christ, states had "to have respect to moral and religious qualifications in those whom they appoint over them."³⁴ In other words, rulers of the

25. SYMINGTON, *supra* note 19, at xi-xii, 126-39.

26. ALEXANDER MCLEOD, *MESSIAH, GOVERNOR OF THE NATIONS OF THE EARTH: A DISCOURSE 7-19* (T. & J. Swords 1803) forcefully states the covenanter position.

27. William Symington (1795-1862), pastor, theology professor, and writer, was the leading Scottish Reformed Presbyterian of his generation; for his life, see *DICTIONARY OF NATIONAL BIOGRAPHY* vol. 19, 270 (Leslie Stephen & Sidney Lee eds., Smith, Elder, & Co. 1885).

28. For Christ as head of the church, see SYMINGTON, *supra* note 19, at 73-125.

29. *Id.* at 126.

30. *Id.* at 138-39.

31. *Id.* at 150-53.

32. *Id.* at 153-54.

33. *Id.* at 153-54. Although not germane to the present discussion, it should be noted that the Covenanters were not "theonomists"; that is, they did not believe that the detailed, judicial rules of mosaic Israel were binding on modern nations. Rather, they, like all other reformed protestants of the time, believed that the "moral law" as implied by the Decalogue was the rule of action for Christians; see *id.* at 156-57.

34. *Id.* at 158.

state, beyond earthly competence and morality, had to display the “fear of God,” the piety that scripture mandated.³⁵ Electors, the citizens who chose rulers, had themselves to display Biblical qualifications; in a state obedient to Christ, the irreligious and immoral could not qualify for the franchise.³⁶ Moreover, citizens owed scripturally-qualified magistrates “conscientious submission” as they themselves submitted to the rule of Christ.³⁷ Citizens were obliged to swear allegiance to them alone, and never to states or magistrates that failed to recognize the kingship of Jesus Christ.³⁸

C. Criticism of the Covenanters’ Central Presupposition

Most Protestants rejected the Reformed Presbyterian assertion of the “mediatorial dominion” of Christ over the nations.³⁹ The conventional reformed view, held by other Presbyterian denominations, was that God the Father created government as a matter of natural law to be an institution for all humanity; and that he did not specifically appoint Christ, as mediator, lord of the state. Therefore, states had no specific duties to the Divine figure of Christ beyond those mandated by natural law and common morality.⁴⁰

In the early republic, the most forceful critic of the covenanter position was William Findley, a prominent Pennsylvania congressman who had himself been a Reformed Presbyterian before his immigration from Northern Ireland in 1763.⁴¹ Findley’s *Observations on “The Two Sons of Oil,”* published in 1811 to refute Samuel Wylie’s 1803 formulation of the covenanter position, strongly asserted the conventional presbyterian view of the relationship of church and state. For Findley, Christ’s kingdom was spiritual, not earthly; Christ did not come to rule the state but to save humanity.⁴² From this fundamental presupposition, Findley derived the conventional reformed

35. *Id.* at 158-60.

36. *Id.* at 162-63. Symington recognized the right of the ruled to choose their rulers, within the limitations of Biblical standards: *id.* at 158.

37. *Id.* at 163.

38. *Id.* at 167.

39. For example, an establishment figure such as the Scottish-born President John Witherspoon of Princeton, signer of the Declaration of Independence and framer of the government of the main American Presbyterian denomination, expressed the conventional American view of church-state relations; see JEFFREY H. MORRISON, JOHN WITHERSPOON AND THE FOUNDING OF THE AMERICAN REPUBLIC 41-42, 120-21 (Univ. Notre Dame Press 2005).

40. CARSON, *supra* note 10, at 15-16, has an excellent discussion of this point.

41. For Findley’s life, see WILLIAM FINDLEY, OBSERVATION ON “THE TWO SONS OF OIL” viii-x (John Caldwell ed., Liberty Fund 2007) (1811).

42. *Id.* at 151-53.

understanding of civil government: a human institution based on the principles of natural law and common morality, resting on consent of the governed, and obliged to recognize freedom of religion.⁴³ The institutions of mosaic Israel, as depicted in the Pentateuch, did not bind modern Christians under the New Testament dispensation of Jesus; neither did Old Testament covenanting set a precedent that modern Christians were required to follow. Modern "covenants," as held by the Reformed Presbyterians, not only were unwarranted by divine law but also could never bind future generations.⁴⁴ Findley essentially stated the conventional view of church and state as understood by modern American Protestants. It was the antithesis of what the Covenanters stood for.

III. COVENANTER CRITICISMS OF AMERICAN CONSTITUTIONALISM

The Reformed Presbyterian criticism of American constitutionalism proceeded on three levels: first, an attack on the foundations of the constitutional order, as assumed by its founders; second, a criticism of the practical effects of these erroneous assumptions, particularly the constitution's toleration of erroneous religious opinion and its sinful recognition of slavery; and third, an exposition of the attitudes Reformed Presbyterians were required to take toward American constitutions, in terms of what the Covenanters called "political dissent."

A. The Foundation of Constitutional Authority

The United States Constitution begins with the words "We the People." It expresses the assumption, basic to American constitutionalism that "ultimate authority, wherever the derivative may be found, resides in the people alone."⁴⁵ The Covenanters met this assumption head on. In Wylie's words, "Civil government does not, as some modern politicians affirm, originate either in the people, as its fountain, or in the vices consequent upon the fall. . . . [I]t is among the *all things* committed to him [Christ] by the donation of the Father."⁴⁶ To state the principle positively, "God, the supreme Governor, is the fountain of all power and authority, and civil magistrates are his deputies."⁴⁷ Fundamental constitutional authority was not in the people;

43. *E.g., id.* at 84, 143-44, 197-98.

44. *Id.* at 164-65, 224-27.

45. Federalist No. 46 (James Madison).

46. WYLIE, *supra* note 18, at 10.

47. REFORMATION PRINCIPLES EXHIBITED, *supra* note 21, at 107.

it was from the divine mediator Jesus Christ, granted "universal dominion" by the Father.⁴⁸ Thus, for the Covenanters, American governments, founded by federal and state constitutions alike, rested upon an erroneous and corrupt principle. From this basic flaw flowed both the Covenanters' criticisms of American constitutional government, and their recommendations of what was necessary to reform the American constitutional system.

B. Fundamental Flaws Flowing from an Erroneous Foundation

The Covenanters' criticism of American constitutions as systems of government based on a fundamentally mistaken assumption went to the core of conventional American civic faith. The basic failure of the federal Constitution "to recognize the existence of God, the *King of Nations*"⁴⁹ was compounded by its failure to acknowledge the divine will as the "supreme law."⁵⁰ God's law was not relegated to the legalistic dictates of the ancient Israelite state.⁵¹ Rather, the "moral law" summarized in the Decalogue contained those basic principles that should inform all legislation.⁵² A related flaw in the Constitution was its failure to impose any religious test for office: "Deists, and even atheists may be chief magistrates."⁵³ These omissions rendered American constitutions unchristian. Wylie pointed out, for instance, that constitutional recognition of "rights of conscience" amounted to a grant of "legal security . . . to gross heresy, blasphemy, and idolatry."⁵⁴ The Decalogue condemned idolaters and blasphemers;⁵⁵ Christ in scripture mandated one true church.⁵⁶ "No man has a right to worship God in any other way than He himself hath prescribed in his law."⁵⁷ To hold otherwise, to grant freedom of religion to all sects whatever their false

48. WYLIE, *supra* note 18, at 9.

49. *Id.* at 34; see also ALEXANDER MCLEOD, *A SCRIPTURAL VIEW OF THE CHARACTER, CAUSES, AND ENDS OF THE PRESENT WAR* 54-55 (1815).

50. WYLIE, *supra* note 18, at 57.

51. As noted in *supra* note 31, the Reformed Presbyterians were not "theonomists"; cf. *West. Conf. XIX:ii-iii*, in *CONFESSION OF FAITH*, *supra* note 20, at 83-84.

52. WYLIE, *supra* note 18, at 41, 45.

53. *Id.* at 43; James R. Willson, *Prince Messiah's Claims to Dominion Over All Governments: and the Disregard of His Authority by the United States*, in *FEDERAL CONSTITUTION* 21-22 (1832).

54. WYLIE, *supra* note 18, at 49. For the Covenanters, human rights were derived and subject to limitation, not inherent: "[a]ll the rights of man are derived from God, and agreeable to His law": ALEXANDER MCLEOD, *NEGRO SLAVERY UNJUSTIFIABLE: A DISCOURSE* 10 (McLeod 1860) (1802).

55. Deut 20:3-8.

56. *REFORMATION PRINCIPLES EXHIBITED*, *supra* note 21, at 79-83.

57. WYLIE, *supra* note 18, at 49.

beliefs, was to arrogate individual error over divine law. In effect, it established a religion, a religion of infidelity.⁵⁸ A fundamentally flawed constitution, issuing in a spurious "right of conscience," could be reduced, simply, to sin.⁵⁹

In 1776, President Witherspoon of Princeton asserted "the singular interposition of Providence" in support of the American Revolution.⁶⁰ This was an early expression of that civic pietism which became America's unofficially established religion: in 1892, for instance, Justice Brewer held the United States to be "a Christian nation";⁶¹ and in 1953, Congress declared the United States to be a nation "under God."⁶² The Reformed Presbyterians dismissed, with summary disdain, all such assertions of the basic Christian (or if one prefers, "Judeo-Christian") nature of America:

The nation has not only rebelled against God, in refusing to recognize the divine law, but has also been aiding and assisting his enemies, by supporting those who are at war with the Almighty. Witness the protection of idolatry and all manner of anti-Christian delusion. For this, God is very jealous—"He will not give his glory to another, nor his praise to graven images."⁶³

The United States was "under God" only in the sense that as a nation, a collective moral entity, it was under God's wrath and judgment for failing to acknowledge His kingship.⁶⁴

C. A Christless Constitution for a Slave Nation

By their fruits ye shall know them. Alexander Hamilton, himself no friend of slavery, once candidly admitted that the federal constitution's three-fifths clause represented an "accommodation" with,

58. *Id.* at 38.

59. "[I]t is certainly true, since Messiah is the Prince of the kings of the earth, that the national constitution is sinful in refusing this allegiance": Willson, *supra* note 53, at 23.

60. THE SELECTED WRITINGS OF JOHN WITHERSPOON 138 (Thomas Miller ed., S. Ill. Univ. Press 1990); this view was often expressed in the early national period: *see, e.g.*, POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805 vol. 2, 1227, 334, 1343-46, 1436-37 (Ellis Sandoz ed., Liberty Fund 1998).

61. *Church of the Holy Trinity v. U.S.*, 143 U.S. 457, 471 (1892); *see also* DAVID J. BREWER, UNITED STATES, A CHRISTIAN NATION (Am. Vision 1996) (J.C. Winston 1905).

62. For use of the phrase "under God," *see* RICHARD J. ELLIS, TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE 124-39 (Univ. Press Kan. 2005).

63. WYLIE, *supra* note 18, at 58. Wylie cited in particular the 1797 treaty with Tripoli (8 Stat. 154), with its famous denial that the United States government is "in any sense founded on the Christian religion": *id.* at 44.

64. *Id.* at 42-44. This is a position Reformed Presbyterians still strongly hold: *see, e.g.*, VOS, *supra* note 3, at 5-7.

an “indulgence” to, Southern slave interests.⁶⁵ One of the principal fruits of a godless constitution was, in covenanter eyes, the approbation of human slavery, that “barbarous traffic” “flatly repugnant” to the Golden Rule.⁶⁶ The Reformed Presbyterians were among the first American religious denominations to condemn slavery;⁶⁷ they were the very first to condemn the constitutionalization of the institution.⁶⁸ It was the “worst of robberies sanctioned by law,” and could only subject the nation, deservedly, to divine judgment.⁶⁹ It showed the essential evil of the American constitutional system, and the sin of the moral nation that had adopted that system.

D. Covenanter Testimony Against a Godless Constitution

As preeminently a “testimony bearing” church,⁷⁰ the Reformed Presbyterians could not, in any way, “homologate”⁷¹ with a godless constitution.⁷² Above all, they could not swear an oath, sacred before God, to support any American constitution, federal or state.⁷³

We have covenanted in our ancestors [by the National Covenant and Solemn League] . . . Dare we pretend to be bound by those covenants, which oblige us to use every lawful endeavour to extirpate heresy, idolatry, and every thing contrary to sound

65. *New York Ratifying Convention Remarks (1788)*, in THE PAPERS OF ALEXANDER HAMILTON. VOL. V, at 24 (Harold Coffin Syrett & Jacob Ernest Cooke eds., Colum. Univ. Press 1962). If anything, Hamilton understated the matter: see GARRY WILLS, *NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER* 5-23, 53-61 (Houghton Mifflin 2003). For covenanter criticism of the three-fifths clause, see MCLEOD, *supra* note 24, at 56-57.

66. WYLIE, *supra* note 18, at 61-62. William Findley, expressing the conventional, mainstream presbyterian position, stated his personal disapproval of slavery while recognizing it as an established, legal institution. See FINDLEY, *supra* note 41, at 152-63.

67. CARSON, *supra* note 10, at 53. In 1800, the Reformed Presbytery ruled that no slaveholder could be a church member; in response, South Carolina Covenanters in one day freed slaves “to the value of 3,000 guineas.” Later Covenanters were active in the abolition movement and in the underground railroad: see *id.* at 53-55; and MICHAEL DUREY, *TRANSATLANTIC RADICALS AND THE EARLY AMERICAN REPUBLIC* 288 (Univ. Press Kan. 1997).

68. They agreed with William Lloyd Garrison: the constitution “is a covenant with death and an agreement with hell” (*cf.* Isa 28:15).

69. MCLEOD, *supra* note 26, at 20-21. The covenanter condemnation of slavery makes an interesting comparison with its defense by the old-school southern Presbyterians: *cf.* SEAN M. LUCAS, *ROBERT LEWIS DABNEY: A SOUTHERN PRESBYTERIAN LIFE* 120-28 (P&R Publ’n 2005).

70. REFORMATION PRINCIPLES EXHIBITED, *supra* note 21, at 121-23.

71. A Scots legal term: “confession or acknowledgment of the right homologated”: JAMES, VISCOUNT STAIR, *THE INSTITUTIONS OF THE LAW OF SCOTLAND* 1010 (Univ. Press Edinburgh & Yale 1981) (1693).

72. REFORMATION PRINCIPLES EXHIBITED, *supra* note 21, at 113. For covenanter exposition of Rom 13:1 (“Let every soul be subject to the higher powers”) and related scriptural passages sometimes cited to justify Christian submission even to an ungodly state, see JAMES M. WILLSON, *CIVIL GOVERNMENT: AN EXPOSITION OF ROMANS XIII 1-7*, at 16-24 (W.S. Young 1853).

73. MCLEOD, *supra* note 26, at 40-43.

doctrine and the power of godliness, and, at the same time, swear another oath which necessarily involves us in their support and protection?⁷⁴

Covenanters could not hold any public office requiring such an oath. Neither could they vote for such officers or serve on juries⁷⁵ or in the militia: all these acts, albeit indirect, had the effect of homologating with the sin of American constitutionalism.⁷⁶ They did pay taxes, but only on the theory that "I may give away part of my property to save the remainder, though the man who demands it has no other right than physical force."⁷⁷ "Political dissent" on this pattern long played a central role in the Reformed Presbyterian testimony.⁷⁸

IV. CHURCH AND STATE UNDER A SCRIPTURAL CONSTITUTION

If Covenanters did not hesitate publicly to dissent from the federal Constitution, neither did they hesitate to declare the proper relationship between church and state under a scriptural constitution.⁷⁹ Christ was king of both church and state.⁸⁰ Under a divinely ordered constitution, the church was an independent entity, subject only to Christ and completely separate from, but co-ordinate with, the state, obeying Christ's commands in preaching the gospel, establishing its own government in accordance with scriptural mandates, and disciplining its members.⁸¹ It could impose ecclesiastical discipline on magistrates in their capacity as church members if they sinned, and it could support the laudable efforts of the state to enforce the divinely mandated moral law

74. WYLIE, *supra* note 18, at 63; Wylie himself fled Ireland because he could not swear allegiance to an uncovenanted king. See MCBRIDE, *supra* note 15, at 78.

75. See *State v. Willson*, 13 S.C.L. (2 McCord) 393 (1823).

76. WYLIE, *supra* note 18, at 47-50. The Covenanters did support the right of the United States to wage defensive war in 1812: MCLEOD, *supra* note 24, at 193-96; and later decided to allow jury and military service under some circumstances: CARSON, *supra* note 10, at 27.

77. WYLIE, *supra* note 18, at 69. The Church's official REFORMATION PRINCIPLES EXHIBITED, *supra* note 21, at 114, stated the principle in a less confrontational way.

78. In 1969, the Reformed Presbyterian Church decided, on Biblical grounds, that oath taking, voting, and office holding were, in some circumstances, permissible. For the Church's present position, see THE WESTMINSTER CONFSSION OF FAITH: THE MODERN LANGUAGE REVISION OF THE WESTMINSTER CONFSSION OF FAITH; & THE TESTIMONY OF THE REFORMED PRESBYTERIAN CHURCH OF NORTH AMERICA 124-51 (Crown & Covenant Publications 2000). The Covenanters, however, still strongly testify to the "crown rights" of Jesus Christ, in both church and state. See FRANK DEAN FRAZER, OUTLINE STUDIES IN THE COVENANT ("Reprinted by order of Synod of 1970"), unpaginated.

79. What follows is a summary of the assertions set forth in the works of WYLIE, *supra* note 18; MCLEOD, *supra* note 24; and Willson, *supra* note 53. For a rather jaundiced running criticism of these assertions, one could not find better than FINDLEY, *supra* note 41.

80. SYMINGTON, *supra* note 19, at 73, 126.

81. WYLIE, *supra* note 18, at 29-32; MCLEOD, *supra* note 26, at 33-34.

in the civil sphere.⁸²

A properly constituted state, acting under a constitution that acknowledged the kingship of Christ and the fundamental authority of the divine moral law, was separate from, but co-ordinate with, the church. Its magistrates, required to swear allegiance to King Jesus, would legislate in accordance with the principles of the moral law as derived from the Ten Commandments and would act in accordance with those principles to support civil liberty and public morality. They could never interfere with the internal economy of the church, divinely inspired, but they would support the standards of the true church, acting in its proper sphere, and could enforce strictures of civil law on church officers and members, in their capacity as members of the commonwealth.⁸³ Christ having in scripture commanded the establishment of one true church, presbyterian in government and reformed in theology, the state had a duty not only to support that church, in its coordinate sphere, but also to suppress all heretical religious views that deviated from the divine standard.⁸⁴ If one objected that this amounted to persecution, to a violation of the basic right of religious freedom, the answer was obvious:

“[W]hat is persecution? Does it consist in executing God’s law? . . . Whatsoever the law of God commands to be punished, ought to be punished. . . Was Elijah a persecutor when he caused the law of God to be executed upon the prophets of Baal?”⁸⁵ In a modernized and Americanized context, this was the doctrine of the “two kingdoms,” such as obtained in Scotland in the 1640s, during the “Second Reformation” when the Covenanters dominated the nation.⁸⁶

SOME CONCLUSIONS

The covenanter critique of American constitutionalism leads to four conclusions: one is disconcerting and two perhaps reassuring to the modern secularist, while the fourth, concerning slavery and the constitution, is a matter of historical debate. The first, most disconcerting conclusion is that a theory of church-state relations, completely different from that developed in the United States, is not only conceivable but also, given the presuppositions from which it

82. See MCLEOD, *supra* note 26, at 15-28, on the right of ministers to comment on public issues and to reprove erring public officers.

83. WYLIE, *supra* note 18, at 18-29; REFORMATION PRINCIPLES EXHIBITED, *supra* note 21, at 110.

84. WYLIE, *supra* note 18, at 37-38.

85. WYLIE, *supra* note 18, at 92.

86. For this period, see VOS, *supra* note 3, at 45-64.

derives, rational. It is not a theory that most Christian conservatives would accept; but it has its defenders;⁸⁷ and it displays an internal consistency and, within its own frame of reference, an intellectual rigor that most fulminations of the so-called religious right lack.⁸⁸

Second, the Covenanter critique supports the thesis that the United States Constitution is essentially a secular, religiously neutral document.⁸⁹ Rigorous covenanter attack on American constitutional presuppositions⁹⁰ undercuts the modern Christian-right assertion that the Constitution is in spirit, if not in letter, fundamentally a Christian instrument.⁹¹ Put Judge Roy Moore, for instance, into the intellectual arena against Samuel Wylie, and it is not difficult to foresee who will be standing at the end of the battle. Wylie stated the obvious: "[t]he federal constitution . . . does not even recognize the existence of God, the *King of Nations* . . . [S]hall a nation act as if independent of the God of the universe, and expect to be guiltless?"⁹²

Third, the Covenanter critique supports the thesis that the framers of the constitution acted not from a Christian frame of reference,⁹³ but under the assumptions of a deistic, enlightenment climate of opinion.⁹⁴ This, again, contradicts the strange claims of some on the religious right, as to orthodox Christian beliefs allegedly held by the principal founders.⁹⁵ The eighteenth-century Enlightenment was the intellectual world view that conditioned all the framers' presuppositions.⁹⁶ Even critics of constitutional development in the early republic, ranging from

87. See generally EXPLICITLY CHRISTIAN POLITICS: THE VISION OF THE NATIONAL REFORM ASSOCIATION (William O. Einwechter ed., Christian Statesman Press 1997).

88. For a good example, see ROY MOORE & JOHN PERRY, SO HELP ME GOD: THE TEN COMMANDMENTS, JUDICIAL TYRANNY, AND THE BATTLE FOR RELIGIOUS FREEDOM 246-61 (Broadman & Holman 2005).

89. ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION; THE CASE AGAINST RELIGIOUS CORRECTNESS 44, 173 (Republic Publ'n Co. 1996).

90. See, e.g., Willson, *supra* note 53, at 25-26. It is interesting that Willson (at 26) refers to "Manuscript Minutes of the Convention" in arguing that any reference to God was intentionally excluded from the federal constitution. Madison's Debates were published only in 1840.

91. For examples of this assertion, see KRAMNICK & MOORE, *supra* note 89, at 22-23, 148-49.

92. WYLIE, *supra* note 18, at 48.

93. A popular assertion of the Christian right; see, e.g., MOORE & PERRY, *supra* note 88, at 45-49.

94. E.g., DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 163 (Oxford Univ. Press 2006); JOHN G. WEST, JR., THE POLITICS OF REVELATION AND REASON: RELIGION AND CIVIC LIFE IN THE NEW NATION 73-78 (Am. Historical Ass'n 1996).

95. For examples of this Christian-right mythology, see KRAMNICK & MOORE, *supra* note 89, at 22-23, 166; cf., <http://www.worldnetdaily.com>, James R. Willson's blunt conclusion that Jefferson "was an avowed infidel, and notoriously addicted to immorality": Willson, *supra* note 53, at 33.

96. The classic dissection of this world is, of course, CARL BECKER, HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS (Yale Univ. Press 1932).

the extreme Federalist Timothy Pickering⁹⁷ to the extreme Republican John Taylor,⁹⁸ were essentially enlightenment figures. None of the leading framers escaped this intellectual box; as one Covenanter bluntly put it, “a biography of the members of that [federal constitutional] convention, as to their *fearing God*, would not, it is believed, add much to the moral honor of our country.”⁹⁹ Atheists and deists dominated the 1787 constitutional convention, according to the Covenanters; the first six presidents were no better.¹⁰⁰ The Reformed Presbyterians, adherents of what their contemporaries could only regard as an utterly archaic world view, untouched in any way by enlightenment presuppositions, were so radically outside the framers’ intellectual world that, in perhaps a paradoxical sense, they could criticize the Constitution, that most characteristic of enlightenment documents, with complete independence, with, one might almost say, complete impartiality. They could see what the constitution actually was, not what contemporaries might assume it to be. In Wylie’s words,

[t]he dispute, then, will not turn upon the point whether religion should be civilly established,—(we take it for granted that Americans think so, seeing they have done it),—but it is concerning what religion ought to be civilly established and protected,—whether the religion of Jesus alone should be countenanced by civil authority? or every blasphemous, heretical, and idolatrous abomination . . . should be put on an equal footing therewith. The former we contend for—the latter we reject. The latter, however, is the plain doctrine of the constitution.¹⁰¹

Fourth, the thesis that slavery was institutionalized in the federal Constitution¹⁰² receives support from the observations of the Reformed Presbyterians, radical outsiders not politically or intellectually party to the practical compromises that produced the document. The Covenanters did not delude themselves with the opinion that the

97. GERARD H. CLARFIELD, *TIMOTHY PICKERING AND THE AMERICAN REPUBLIC* 264 (Univ. Pittsburgh Press 1980).

98. C. WILLIAM HILL, JR., *THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE* 30, 53 (Farleigh Dickinson Univ. Press 1977).

99. Willson, *supra* note 53, at 26.

100. *Id.* at 25-26, 31-33.

101. WYLIE, *supra* note 18, at 38.

102. *E.g.*, PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS; RACE AND LIBERTY IN THE AGE OF JEFFERSON* 1-57 (2d ed., M.E. Sharpe, Inc. 2001) (slavery in the constitutional convention); WILLS, *supra* note 65, at 1-13 (three-fifths clause); DAVID L. LIGHTNER, *SLAVERY AND THE COMMERCE POWER; HOW THE STRUGGLE AGAINST THE INTERSTATE SLAVE TRADE LED TO THE CIVIL WAR* 16-19 (Yale Univ. Press 2006) (slave trade); ALFRED W. & RUTH G. BLUMROSEN, *SLAVE NATION: HOW SLAVERY UNITED THE COLONIES & SPARKED THE AMERICAN REVOLUTION* 235-36 (Sourcebooks, Inc. 2005) (fugitive slave clause).

Constitution's provisions dealing with slavery amounted to nothing more than an uncomfortable recognition of an undesirable, but passing, evil.¹⁰³ They read the Constitution as it was framed;¹⁰⁴ they saw that the document made slavery "one of the pillars of the government."¹⁰⁵ The Reformed Presbyterian testimony forthrightly declared as error: "That it is lawful for civil rulers to authorize the purchase and sale of any part of the human family as slaves. That a constitution of government, which deprives unoffending men of liberty and property, is a moral institution, to be recognised as God's ordinance."¹⁰⁶

One may reject the covenanter prescription for the ills of America without questioning the accuracy, in its own frame of reference, of the covenanter diagnosis.

103. As asserted by DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY* 47 (Oxford Univ. Press 2001).

104. "O America, what has thou to account for on the head of slavery! Thou alone, of all the nations now on earth, didst commission thy delegates, in peace, and in security from the over-awing menaces of a tyrant, or of factions, to form thy Constitution": MCLEOD, *supra* note 24, at 21.

105. Willson, *supra* note 53, at 28.

106. REFORMATION PRINCIPLES EXHIBITED, *supra* note 21, at 112; see also WYLIE, *supra* note 18, at 44-45.