The Church and State in Relation to the Law: Enemies or Necessary Partners?

Review of Ruben Alvarado, *Trojan Horse: Natural Rights and America's Founding* (Aalten, Wordbridge Publishing, 2022)

The thesis of this book is that the incorporation of the natural rights doctrine into the fundamental law of the United States through the Declaration of Independence and the 14th amendment to the Constitution is responsible for judicial activism that has enabled Constitutional rights to serve as the bases for whatever the judicial fashion chooses to enact by way of court decree. The larger purpose, however, is to advance an alternative based on a common law tradition with an altogether different foundation for rights, one which is historically rooted and therefore not open to unlimited adaptation as is the natural rights idea. It should be borne in mind that the natural rights doctrines under discussion are those in the theories of Grotius, Hobbes, Locke, Pufendorf, etc., not the much older notion of natural law in previous centuries of theology. In Alvarado's book we are offered these two alternatives, natural rights (responsible for our civilization's ills) or common law (the one salvation). In this essay we will seek to open things up much wider, arguing that the real picture is much more varied, and look at other alternatives that have been proposed, and also arguments against the common law perspective as being a less than sufficient option.

The Older Alternative: Two Kingdom Theology

The leading alternative to the common law proposal is one that was once thought to be the obvious and, in America, the almost universally accepted one among Christians, and that is the Two Kingdoms idea. This view was advanced and defended by J. Marcellus Kik in his 1963 book *Church & State: The Story of Two Kingdoms*. Known today for his formulation of the classic Reformed version of postmillennialism, Kik was also concerned with church and state issues and the impact of liberal ecumenism, which to him were really the same thing. The liberal churches and their ecumenical associations were intruding in the area of the state by advocating extensive social programs to be instituted by the state and, in the other direction, inviting the state into church affairs by state funding of church social programs. Kik saw the struggle between church and state as central to the history of western civilization. He quotes von Ranke "The whole life and character of Western Civilization consists of the incessant action and counteraction of Church and State." Kik's book is mostly his history of this conflict from the days of Paul to the 1960s. For Kik "The vexing problem seemed solved on American soil with the establishment of a free Church in a free State", which was ended, however, by a reversal of attitude seen in the "dramatic impact by the Supreme Court decision to eliminate prayer from public school life." (p. vii) The solution referred to was called "the American idea of religious liberty" by church historian Philip Schaff who described it as "It is a free church in a free state, or a self-supporting and self-governing Christianity in independent but friendly relation to civil government." Kik defends it as the two kingdom idea.

> After some centuries of this deadly struggle [between Church and State], the two powerful Kingdoms found in the newly independent United States of America a chance for their own independence and peaceful coexistence. The doctrine of "a free Church in a free State" was a new tenet in statecraft, as were various other ideas of the Founding Fathers: an experiment pure and simple. But the experiment proved successful; separation of Church and State became *fait accompli* in this country and has endured for nearly 200 years. Problems and tensions have arisen during the interim, of course, as one Kingdom or the other has sought to invade the domain of the other. Nonetheless, the principle of the separation of Church and State is still an actuality in our national life.
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> We could easily be lulled into believing that peaceful and happy coexistence will continue without any earnest and sacrificial vigilance on our part. But with increasing Roman Catholic influence in politics, and the desire of even some Protestant church leaders to dominate the State, we as Christian citizens should be ever on our guard, lest in our indifference we allow a precious heritage to slip away. (pp. 1-2)

Despite the Court ruling on prayer, in Kik's mind the threat to the American idea was still mainly from the side of the church, with the two vectors of attack being Romanism which had never accepted the America idea of a free Church in a free State, and the ecumenical liberals, who wanted to wield power through the state by uniting Church and State in their favorite programs.

What are the two kingdoms? Clearly they are the Church and the State, but how does he describe them theologically? Kik is not helpful in the way we would expect from a theologian; we have to assemble quotations to see the contrasts that he constructs.

> The sword belongs to Caesar's kingdom and it cannot be used to advance the cause of Christ. These two Kingdoms operate in different spheres and employ different means. (p. 16)
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> The narrative of the Gospels gives us a preview of the history of the struggle between the two Kingdoms. When a secular kingdom is animated by Satan, it will seek to crush the spiritual Kingdom by force, even as Herod sought to crush the Christ Child. Worldly kingdoms will be employed by religious hierarchies to crucify true believers, even as Pilate was used by the Jewish authorities to crucify Christ. …
> However, one must not assume that secular kingdoms are inherently evil. The State is a divine institution created by God for the purpose of upholding moral law and punishing sin. He has created it to further the welfare and happiness of mankind. But Satan often thwarts God's benevolent purpose, so that nations have become persecutors of those who belong to Christ's Kingdom. … But when the State keeps to its God-given jurisdiction, it can be a power for good, as indeed it was in the period of the Church's first expansion. (p. 17)
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> Liberty and peace, as history reveals, are the precious fruits that emanate when both the secular Kingdom and the spiritual Kingdom properly fulfill their God-given functions. (p. 18)

> During the three centuries of persecution, the Church demonstrated to the State that spiritual force is more powerful and lasting than physical force. The Kingdom of Christ cannot be destroyed by material weapons. Carnal power can never vanquish moral power. (p. 37)

One Kingdom then is the Church. It is the Kingdom of Christ, its sphere spiritual, its power moral. The other Kingdom is the State, its sphere earthly and secular, its power physical coercion. Although created by God it is the Kingdom of Caesar, the Kingdom of man. On its face, this Two Kingdom theology is more radical than the more recent Radical Two-Kingdom Theology, for which at least Christ is king of both kingdoms. Also Kik mentions that the state should govern by God's laws.

Arriving at the point of his history where he describes Calvin's work in Geneva, Kik sees the main outlines of the free Church in the Free state being put into place.

> Calvin, therefore, drew a clear line of distinction between the civil magistrate, whose authority was confined to the secular realm, and the ruling elder, whose sphere was spiritual. He firmly maintained that the Church had no power to use the sword, to punish, nor to coerce. (p. 81)

> By adhering to the principles laid down by Christ and the twelve apostles, Calvin labored to keep separate the God-given jurisdictions of Church and State and thus laid the foundation for a free Church in a free State. (p. 85)

For Kik, the significance of the Westminster Assembly is that it put a stop to Erasianism, represented by John Selden, and opposed by George Gillespie. If Kik were to say something about natural rights theories this would have been a good place to do it, because Selden was part of the Tew Circle in which Thomas Hobbes sometimes participated, and he was also engaged in modifying the theories of Grotius. Selden believed that natural rights had been created by divine command after Noah, but before the existence of political community. It was, he thought, the only way natural rights could come into existence. Civil government, however, came about by man's ability to enter into contracts, and moral obligation came from the coercive power of the State to administer punishments. As the Church did not have this coercive power, it must be under the State in order for moral obligation to exist in the Church. The power of the State was limited because of the terms of particular contracts that made up the constitution of the state, and which the modern population had inherited.[1] For Kik, however, natural rights do not come into the question, and he constructs his entire theory without them.

Kik considers the great step forward to be the Bill of Rights in Constitution of the United States which forbade the federal establishment of religion. Or rather, it forbade Congress to interfere, as it can be read as protecting the state religious establishments from Congress. Kik does not notice this. But, he says: "*The wall of separation is legal, we repeat, not moral or spiritual.* There is no reason, under the Constitution of the United States, why the principles of Christianity cannot pervade the laws and institutions of the United States of America." (p. 116)

1 See the review of Richard Tuck, *Natural Rights Theories* for the background to and discussion of Selden's views. Contra-mundum.org/index_htm_files/Tuck_NaturalRights.pdf

Where does the idea of equality come from? “The Scriptures teach that all men are equal in the sight of God, and the understanding of this teaching eventually led men to acknowledge that all citizens are equal in the eyes of the law.” (p. 105) And finally, Kik’s postmillennialism enters his theory.

> We see clearly that the concept of a “Christian nation” is a biblical one. It becomes so, however, not by virtue of either Church or clergy preempting or even directing any functions peculiar to the civil government. Rather do nations become the disciples of Christ through the medium of Christian personalities. The influence of redeemed men, who deem themselves responsible to Christ for all their actions, radiates in many directions and gradually transforms the whole of society—politically, economically, and socially. … The Great Commission indicates the objective: Christianizing all of the nations—it indicates also the means of accomplishing that objective: the preaching of repentance and remission of sins. (p. 121)

We can see at this point a difference from the naked public square concept—that Christians must withdraw their religion from public policy—which Alvarado’s discussion will get to in due course.[2]

Why give all this space to the two kingdom theory? Because it was a theory that gained dominance in the 19th century, and in the 20th century up through the 1960s it was held not only by conservative members of mainline denominations, such as Kik who was a member of the Reformed Church in America, but by Presbyterians and by Evangelicals in general. Everyone I met in the churches, growing up, held to this two kingdom idea to the extent that they thought about the issue at all. It is also a perfect fit for the Spirituality of the Church idea, that was the view of the Southern Presbyterians, but also the tacit Evangelical theology. By the time Kik published his book in 1963, however, liberals Protestants, secularists, Roman Catholics, etc. did not think in these terms, and they were the ones who controlled the institutions. By the arrival of the 1970s, however, all the Christian young people knew that this theory was dead. First they thought that the teaching of the church could not ignore all the social issues of the day, and second they could see that no one who mattered in the world thought in terms of the two kingdom theology anymore. Finally, they had all been educated in terms of natural rights language, which was supposed to be an endowment by the Creator, and so it appeared to be a Christian concept, so why complicate things with a theory of different kingdoms?[3] Men like Kik fell silent. Church leaders of the older generation who wanted to remain “relevant” to the youth searched their Bibles for anything on social morality that they could insert into their pronouncements.[4] They could always fall back on the claim that an endowment of natural rights had to be based on the Christian doctrine of creation and so was the fruit of Christian influence on culture.[5]

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2 For example, Michael Novak, *The Spirit of Democratic Capitalism* (Madison Books, 1990) and responses such as Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (W.B. Eerdmans Pub. Co, 1984).

3 There was also a deep suspicion of theology by these young people, to whom theories like the two kingdoms looked to be concocted, rather than biblical.

4 There was also a theological challenge to the old perspective, which is a complicated story, and in some ways hard to reconstruct today, which we leave out of this present discussion.

5 If natural rights were an endowment by God, then they would not arise out of a social contract or from primitive economic activity as depicted in the natural rights theories. One of the difficulties of natural rights theories is that the story of the original state of nature and of the making of the social contract sounds so silly and so contrived to us today. Thus political philosophers are disposed to amend it and make it a thought experiment about the nature of the political

The courts and politicians spoke of natural rights, and used it as a fig leaf to advance their causes. But the real thought of the day was not natural rights theory either. The operative political theory from the 1960s on was voluntarism, the triumph of the will in the political struggle with the legacy dead historical past, and the dull masses that still clung to it. As there was no God, at least not for practical purposes, the only will that mattered was that of man. Bringing this all to bear on the topic of the review, Alvarado is offering the alternatives of Natural Law theory and his common law view as the two contending theories. But Natural Law died among non Christians just as two kingdom theology died among liberal Christians. (In spite of what Grotius said, neither can exist without a transcendent God.) Natural Law talk has only continued as a sort of pantomime, so that all the politicians don't sound like Hitler.

Politics

Alvarado explores the impact of natural law thinking in several areas, the first of which is politics. Natural rights places the source of law in human nature. This gives rise to a problem of the interpretation of rights. "If natural rights are the source of law, then laws ultimately will be subjected to the philosophical opinions of the judge." (p. 9.) This does not mean that law should ignore human nature "but it must be done properly", that is, in "man's creation in the image of God, stemming from his capacity to reason and choose, his capacity for ethical activity." (p. 11) The specific content, he says, must come from positive law. The Christian concept of the fall puts authority prior to liberty, and under this understanding a system of liberties grew up during the middle ages related to a hierarchical order of authority in relation to which each person had "a bundle of rights, with corresponding duties." (p. 13) This system, mainly through economic change, grew into a network of contracts.

> These are the theoretical underpinnings of the genealogy of liberty. The praxis was hashed out in an ever-increasing number of proclamations, charters of rights and liberties, and simple prescription, arduously attained over the centuries by subjects from masters, vassals from lords, estates from monarchs, asymptotically approaching the limit of the status/contract curve. (p. 17)[6]

Why does this sound familiar? It is the idea described and critiqued by Frederick Nymeyer in 1955 writing about Guillaume Groen van Prinsterer.

> Groen defends in Chapters III and IV of his famous book the idea that the "state" was naturally *patrimonial*, that is, was developed out of the hereditary land holdings of a dynasty. In later revisions or this book he retreated from this position. However, he did not retreat enough to alter the original text, but only to add amending footnotes. … Of course, no American can be sympathetic to ideas which stamp with approval the hereditary title of

order rather than an historical claim, even to the point that some suggest that the original theories might be read this way. But the idea of the state of nature and a subsequent establishment of a social order was older than the natural rights theories, as can be seen, for example, in Richard Hooker's *Of the Laws of Ecclesiastical Polity* (1593). The natural rights theories only had to substitute a different account of the establishment of a social order onto an existing state of nature narrative, and of course introduce the natural rights concept into the account. The natural rights theories supervened on a view of early history that people thought of as the Christian view.

6 We recall at this point John Selden's argument that this system of charters and liberties existed in the state, but not in church, which had no government and which therefore must be under the state in his view.

kings and princes as if ordinary men are natural subjects. Groen held the idea that hereditary rulers had a pipe line of power from God. [7]

Groen escapes a fatal error by a peculiar device. He believed that a ruler did have "power from God." But over a period of time, the wretched people, crouching beneath the ruler, wrested rights, by blood and agony, from the rulers. Those "acquired" rights became contractual and inviolable. Because those rights had been obtained and existed, the old historical order appeared far better to Groen than the Revolutionary order (that of the French Revolution). Groen saw that the Revolution had wiped away not only the hereditary monarchy *but also the acquired rights of the subjects*. He was against the Revolution because it destroyed the monarchical system, but even more so because it destroyed the *historical rights of subjects.* Both the old monarchical system and the new French Republic basically claimed *unrestrained* power over individuals. Groen did not attack *that basic error.* He accepted it, because he misinterpreted Romans 13. What he really objected to was that the Revolution *also* swept away *ancient privileges*. These he did not consider to be *original* rights but only *acquired* rights. ….

Groen does not entirely ignore the great law that we must obey God rather than men. Groen admits that under this law rebellion is permissible, but only under one set of circumstances, namely, the rebellion may be only to establish freedom of conscience, not to correct earthly injustices (see page 116 of his *Ongeloof en Revolutie*.) … That means that a Calvinist should obey God rather than men in matters of the First Table of the Law, but not necessarily in matters of the Second Table of the Law. … Groen's idea on the range of proper rebellion we consider narrow and un-biblical and impractical. ….

Groen believed in a pipe line of power from God to a government. And how did he "correct" for that basic error? He resorted not to Scripture nor to logic but to history. In the *historical process* subjects had *acquired* rights. Those rights were contractual, and valid and sacred. But those rights had been developed, liberty had been developed. But liberty was not something *original* with men; it was *derived*, acquired by historical process — by the very rebellions to which Groen objected!

Governments which violate the law of neighborly love (thou shalt love they neighbor as thyself, as defined by Second Table of the Law) need to be resisted legally and constitutionally if such opportunities exist, and if not, they must be resisted by force. We must obey God rather than men — ALWAYS.[8]

Nymeyer did not propose to build freedom on natural law either. He based it on the law of God. Dutchman that he was, he believed this was the Ten Commandments, not the moral equity of the rest of the law, but he saw enough in the Ten Commandments to support freedom, as long as this law applied to all, that is to the state as well as to individuals.

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7 To understand this language of "pipe line of power" see Nymeyer's previous articles against Kuyper's sphere sovereignty.

8 Frederick Nymeyer, "We Must Obey God Rather Than Men", *Progressive Calvinism*, Vol. I, No. 9, September 1955, pp. 257-265. contra-mundum.org/index_htm_files/PC1-09.pdf

Today we are faced with a government that does not believe in natural law. The power is held by transhumanists who believe that man is a hackable mechanism that can be reprogrammed. The whole collection of charters and rights can also be wiped clean by fiat. “You will own nothing—that includes rights—and be happy.” Those charters and rights are “white privilege” which must go away along with the people who heritage they are.

Alvarado’s chapter on politics continues with a history of the development of common law. But then he says that “A shift came about beginning in 1774, a shift away from chartered liberties—liberty as inheritance, within the Augustinian framework—and toward the law of nature and inalienable natural rights—liberty as man’s natural condition, as if no fall had ever occurred…” (p. 21) The Declaration of Independence appealed to “the inalienable rights of man”. This opened up a conflict between this natural law conception of rights and the common law system of “rights as inheritance”. But he wants to emphasize that this idea comes with a context.

> Now it is not to be denied that this common-law system emphasizes the role of positive law and civil institutions as the pillars of liberty, rather than allotting that role to supposed pre-existing rights. But the corollary to this system of positive law and rights is not an absolute law-creating sovereignty. Instead, the corollary to this form of civil liberty is limited sovereignty, a sovereignty which discovers law rather than creates it. (p. 25)

Here we could make a distinction. There is an issue of the authority of law and the body that enforces it, and there is the matter of giving content to the law. For providing the content there are severe limitations on appealing to divine authority (e.g. the law of Moses), as many particulars have to be worked out to deal with local situations and evolving practices and institutions. Even if the common law cannot justify its authority as law by recounting its history, it can show the reasons for the particulars, as they arose to solve real problems, thus showing itself as a good provider of content.

There is, however, another history of law besides the one related by Alvarado, and that is the history of the development of divine right absolutism, and of a bottom up type of government that tried to create an alternative. This story can wait for the review of Alvarado’s third chapter on religion, because the problem began in the church. For now we can note two things. First it was in the context of the struggle with that absolutism, when it was in its final period, that the natural rights theories were put forward as the solution. But they were used both to oppose (Locke) and to support (Hobbes) absolutism. Some other versions were ambiguous about absolutism. Second there is considerable question of what the real target of the natural rights theories was all along. Pierre Manent thinks they were created against the Catholic Church. See the review of his book for a variant interpretation of this idea.[9]

Economics

The historical conflict between the Natural Law tradition and common law has been “mainly at the level of economics.” (p. 27) Alvarado says that there is something that he calls “State of Nature

9 See review of Pierre Manent, *An Intellectual History of Liberalism*, “The Manent Thesis That Natural Rights Political Theories Were Created Against Christianity”. Contra-mundum.org/index_htm_files/Manent_Liberalism.pdf

Economics." This is classical economics, associated most notable with Adam Smith. Smith opposed the prevailing mercantilist view of national prosperity that emphasized a preponderance of exports over imports of produced goods, so that the balance would be paid by gold and silver, which in turn could be accumulated within the country. This amounted to an increase of national wealth in the mercantilist view. Smith's proposal was "the primacy of consumption over production" such that what was in view in an economic evaluation was the benefit that accrued to the consumer. The point of production, for Smith, was so that the consumer could have the goods. Alvarado objects that this is an illusion, as "consumption and production are two sides of the same relation."

Smith's next mistake was to make the value of a good to be the labor the purchaser saved by getting the good from someone else. This was supposed to equal the value of the labor that went in to produce the good. This seems to be the point of a passage Alvarado quotes from Smith, but why the two should be assumed to be the same, just because an exchange took place, it not there explained by Smith. In exchanges, money is thought to represent the value of the labor. Alvarado next notes the connection to John Locke who based the claim to own property on the labor invested in it. Even picking fruit off a tree in the primeval forest was for Locke a sufficient amount of labor to create ownership.

Alvarado next considers neoclassical economics, which "exchanged the objective approach, in which value is considered to inhere in labor, for the subjective approach, in which the appraisal of economic actors is made the source of value." (p. 33) Let us take another glance at the passage quoted from Smith. "[Money or goods] contain the value of a certain quantity of labour which we exchange for what is supposed at the time to contain the value of an equal quantity." Notice the "supposed at the time". Supposing is appraisal. As soon as we are one step away from production and into exchange, we are in the subjective approach of appraisal. So the difference between the two theories must be in their explanation of what is being supposed. Smith's idea is that the buyer is looking at the labor he is being saved by getting the good from someone else, and which illogically is equated to the labor in production of the good. If we think about it, once we get away from primitive society in which everyone understands all the modes of production being done, no one really knows the amount of labor that goes into most goods. In fact, division of labor meant efficient production, and the benefit gained was that the labor to produce a good was much less than the labor saved by the buyer, hence the profit in production for sale and simultaneous benefit for the buyer.

For the neoclassical approach, value is in the need-satisfaction of the good. That is, the buyer does not need to think about labor, but on how much satisfaction he will get from the good, versus what he trades for it. Alvarado characterizes this as the idea that "true economic science involved getting behind the 'veil of money' to the reach substrate of economic goods." (p. 34)

From here, Alvarado's account turns on the challenge to neoclassical economics by a new approach that made economics to about about exchange of rights rather then of physical goods, and the defense put up against this by Böhm-Bawerk who thought there was some sort of cheating going on in the rights idea, in that it amounted, he thought, to a double counting of first the value of the thing, and then the value of the right to it. The new theory (put forward by Henry Dunning Macleod), though, was

attempting the consistent replacement of goods with rights “as the material of exchange and thus of economics”, and so not counting them each way, but always as rights. (p. 37)

This was made a pressing issue by banking practices. Following the work of James Steuart, Alvarado tells the story of the creation of private credit banking.

> Such banks were formed by associations of “men of property,” each of whom contributed to form the original stock, something “consisting indifferently of any species of property … engaged to all the creditors of the company, as a security for the notes they propose to issue.” This original stock is not the money base; it is not the basis upon which banknotes are issued. Rather, it is merely a guarantee of the good faith of the company. (p. 45)

The money base for the notes the banks issues was the securities that borrowers pledged to the banks in order to get loans. These securities were land, houses or other properties which the bank could take over in the event of the nonpayment of the loans. In the mean time, though, the borrowers could keep these possessions—they might be part of the source of income counted on to generate the income to repay a loan—and while retaining this property the borrower also had the use of the money borrowed. “If money is issued against good security, it represents that security. It does not represent the bank’s property, but the borrowers.” (p. 47)

The bank, on the basis of the pledged securities, issued bank notes, that is, spendable currency. These days only central banks, having a unique authorization from the state can issue bank notes. In the United States it is the Federal Reserve Bank and it issues Federal Reserve Notes. The older banking system where a group of businessmen could simply start to issue currency, as long as people trusted them enough, seems strange to us. Why would you trust such an operation?

To see the advantages such a system offers, consider the case of my fourth great grandfather Gilbert Tompkins of Hyde Park, New York. In his will he gives a bequest of two hundred dollars to each of three daughters, but the money is “to be put out for land security” going to them “with the interest thereon at their becoming of lawful age or marriage.” In other words, the executors had to get into the private mortgage business in order to carry out the instructions in the will. Another will of the period referred to money put out at interest by a private lender in New York City, which meant that the executors would have to get the money back from the money lender, probably waiting until the terms of the loans he had made was over. A bank, with multiple partners and who had pledged their own assets as security, offered much more safety for investing, not just borrowing, than did such private arrangements.

But the big advantage of banking is that it made a liquid form of credit available in large quantity for investment in new business, thus making possible for the first time rapid economic expansion.

Alvarado treats the issue of this credit as the issue of money. “Valuation as a market function is part and parcel of this same money-issuing, credit-generating process.” “The property put up as collateral receives its valuation in the credit contract through which money is obtained.”

> Contemporary goods-based theory, viewing money as the most marketable commodity, usually views the precious metals, preeminently gold, as the standard by which to value everything else. (p. 48)

> To summarize, credit and debt is to be the stuff of economic activity at its most basic level, with exchange of goods and services erected atop that basis. The common law provides the forms and institutions enabling expanding economic activity. (p. 49)

Alvarado seems to think that the alternative to his view is the commodity view of money, which he seems to think lies behind the gold standard. There are only a couple of passing references to this, so it is not possible to attribute too much to his views about this commodity idea of money and valuation.

What we can do is look at an analysis of money put forward by Alasdair Macleod, Head of Research at Goldmoney, where he posts a regular commentary, as well as contributing to King World News.[10] Starting with his article on "Legal definitions of money and credit" (LDMC) in which he sets out to "trace the legal history of the relationship between money and its credit substitutes from antiquity to the current day," he begins with a common law doctrine of money and makes the point that

> As a medium of exchange, the function of money is to adjust the ratios of goods and services, one to another. Thus, the price expressed is always for the goods, money being entirely neutral. It is therefore an error to think of money as having a price. This should be borne in mind in the relationship between legal money, which is habitually given a price nowadays in fiat currencies, and the fiat currencies themselves which, given the status of legal tender, are erroneously assumed to have the status of money. The magnitude of this error becomes clear with understanding what legally is money, and what is currency. And this understanding starts with Roman law. (LDMC)

We will skip the long historical account, which readers can easily consult online. But what was established in Roman law was a distinction between two types of deposits.

> Clearly, the precedent in the *Digest* is that money is always metallic. While anything can be deposited into another's custody, it is the treatment of fungible goods, particularly money, which is the subject of these legal rulings. It is only through an irregular deposit that the depositor becomes a creditor. By laying down the difference between a regular and irregular deposit, the distinction is made between what has always been regarded as money from ancient times and a promise to repay the same amount, which we know today as credit and debt. (LDMC)

In English law the final anomaly from Roman law was removed "when the Court of Chancery merged with common law by Act of Parliament in November 1875. Since then, the status of money and credit in English law has conformed in every respect with Justinian's Pandects."

10 We will be drawing on his articles at Goldmoney: "Legal definitions of money and credit", Nov. 9. 2022, https://www.goldmoney.com/research/legal-definitions-of-money-and-credit; "Imploding credit — the consequences" Oct. 2, 2022 https://www.goldmoney.com/research/imploding-credit-the-consequences; and "The problem with bitcoin as money. — The debate between gold and bitcoin in 2023", Dec. 7, 2022 https://www.goldmoney.com/research/the-debate-between-gold-and-bitcoin-in-2023.

Macleod indicates that there is "the legal difference, which is of overriding importance because it was founded on the principal that there is a clear distinction between metallic money and a duty to pay. Money is permanent while credit is not. Money has no counterparty risk, whereas credit does. By way of contrast with money, we can define credit: *credit is anything which is of no direct use but is taken in exchange for something else in the belief or confidence in the right to exchange it away again*." He is interested here in the form of credit which circulates within the banking system.

> This credit comes in two forms. There is currency in the form of bank notes, which today is only issued by central banks. Currency represents a right of action against the issuer in bearer form to pay in gold coin. Today, it is the matching duty to pay which has been reneged upon by central banks as agents for the state. Clearly, bank notes are credit matched by a debt obligation, as any examination of central bank balance sheets will show. Then there is commercial bank credit in the form of customer deposits. Banks are dealers in credit, and again, there is no doubt that customer deposits are a credit in favour of the customer, and a debt to the bank. ….
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> The key to a successful system of credit is in its foundation. It must be credibly linked to money if depositors are not to be defrauded and the certainties of price stability to be maintained. If depositors are confident that possessing credit is similar to possessing money, then the record shows that the purchasing power of credit is broadly secured and is not dependent on the quantity of credit in circulation, so long as credit expansion is not sufficient to destabilise its relationship with money. (LDMC)
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> The old mechanism was to link bank notes to gold and require commercial banks to offer to discharge their debt obligations to depositors by exchanging them for bank notes or coined money. And the note issuer would be required to maintain liquidity reserves of coined money to meet any public demands for the encashment of its banknote obligations into money. (LDMC)

The difference between credit and money can be further explored by examining bitcoin.

> It is bitcoin which is currently promoted as the private sector replacement for government currencies. But even to talk of bitcoin as a currency is to mislabel it. A currency is a form of credit, where there is a counterparty risk. This risk is absent when a bitcoin is both owned and possessed by a person or business. It is therefore a competing form of money, which legally is physical gold and silver coin, the international legal position for which is laid out in the Appendix to this article. If it is anything, then bitcoin is not currency but a competing form of money. ("The problem with bitcoin as money.") (PBM)

Thus the status of bitcoin is that it can be held without counterparty risk, like money can be. However, "as opposed to the legal position, it is not up to an economist to choose what is money. Ultimately, it is the public that decides. Undoubtedly, for some enthusiasts, bitcoin might be money to be hoarded, and spent as a last resort. This is precisely the established role which gold coin fulfills. But there is good reason to believe that the majority of devotees are in it for speculative profits." That is, the holders do not intent to use bitcoin as money, holding it to spend later, but to exchange it for

currency at a profit, like credit. Further, unlike the metals, it is not recognized under "the established international legal definitions of money."

> Where this is a particular problem is in the different property rights accorded to money and currency from other forms of property. In criminal law, if, say, a painting is stolen from you and you manage to trace it to a new owner, you can reclaim it as your property, even if the current possessor acquired it in good faith. This is what allows Jewish families to recover artwork stolen from them in the Second World War.
>
> If, however, someone steals money, currency, or access to your bank account and transfers your property in them to another party, so long as that party was not acting in concert with the criminals, you cannot reclaim this form of property. But when we consider the case of bitcoin, it does not appear to fall into the categories of money and credit for the purpose of the law. Through the blockchain, the trail of previous owners is recorded pseudonymously, so property rights can be established. (PBM)

That is, there is a long common law tradition about money which does not match the economic reality of money, in that the common law only accepts the metals, and not other things that act like money.

In Macleod's view the two economic views competing with his are neo-Keynesianism and monetarism. The neo-Keynesians "tell us that macroeconomics is a separate science from microeconomics, microeconomics being the old, discarded Says law version; and the monetarists, who can only imagine a mechanical relationship between the quantity of money (by which they mean credit) and its purchasing power."

Macleod sees the problem today as the debasement of credit. "Once the debasement of credit is considered, most of the apparent wealth in the economy is just that: apparent and also a delusion. We have shown that since the Bretton Woods agreement was suspended, the dollar has lost 98% of its purchasing power measured in money, and sterling 99%. But in common with other currencies, priced in them financial and property assets have soared." (LDMC)

> The key to understanding why prices can continue to rise in a recession requires a fuller understanding of the role of credit in an economy and what it represents. Its role is far greater than commonly thought, with considerably more than several quadrillions of dollar equivalents outstanding. All economic activity and wealth are credit. This article sketches out the various types of credit, and how credit equates to our collective wealth. ("Imploding credit — the consequences", ICC)
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> Everything is bought and sold on credit. Legally, money is only gold coin, with silver and copper coin in secondary roles. They have been expunged from general circulation — even coins are now debased tokens — so no money is involved in transactions today.
>
> Banknotes issued by the central bank are credit, debts of the issuer in favour of the bearer. From the days when banknotes were exchangeable for gold coin at the holder's option, we

> regarded notes as money, or more correctly money substitutes. And most of us still do. But in a world of fiat currencies, they are only credit and must not be confused with money.
>
> We know that added to banknotes, deposit accounts held at a bank are also credit, credit given by the depositor to the bank in return *for a right of action* against the bank. The bank owes the money to the depositor. And always, the other side of credit is debt. In accordance with double-entry bookkeeping, the amount of currency and credit in any country is the sum of all the debts due to every individual and business in it. If there is no debt, there is no currency. Debt is therefore synonymous with wealth because all credit is wealth. (ICC)
>
> As stated above, there is a clear distinction between credit and money, the latter only being metallic gold, and formally metallic silver and metallic copper as well. However, money and credit used to be of the same nature. What has changed is the absence of money. Credit is no longer anchored to money by being exchangeable for it. Being no longer anchored to money, credit is now anchored to currency, a form of credit still judged to be superior to bank credit. (ICC)

This gives rise to a hierarchy of credit which Macloed outlines in the article. He notes that "it is an error to think of credit as simply being comprised of currency and bank credit. These two categories are merely circulating credit, part of total global credit exceeding quadrillions of dollars equivalent. All this credit is capable of being measured or realised in fiat currencies and is dependent on their stability. Loss of a currency's stability has considerable consequences, not just for the foreign exchanges or the stability of bank deposits, but undermines the very basis of human existence." (LCC)

James Rickards in various books and many online interviews has discussed how this credit risk is being handled. Recognizing that the quadrillions of dollar equivalent of credit on their books represents a risk, as an assent is someone's liability, and is only good if there is a credible prospect of eventual payment, the banks have attempted to distribute the risk as a form of stabilization and insurance. Credit derivative contracts, much of it dealing with national currency exchanges, are balanced with counter contracts with other banks to cover in case the derivative performance goes seriously wrong.[11] Thus if bank A ends up owing an unexpectedly large amount to bank B, it can recover much of the loss from a balancing contract with bank C. Bank C, in turn, has protected itself with a balancing derivative deal with bank D, and so on. Rickards' criticism of this practice is that instead eliminating the risk, it expands it exponentially. In the event of the failure of a major credit partner, the chain of liabilities from bank to bank have to be resolved in order to settle the debts, otherwise the intermediate banks in the chain will go down also. But the network of contracts covering the quadrillions in dollar equivalent derivative instruments would take decades of court time to straighten out. Thus the protection offered by the counter contracts is only notional and not realizable.

Alvarado's economics, which also does not distinguish between credit and money because an anchor to a physical medium of money is "state of nature economics", therefore shares in this contemporary

11 Many of these contracts are either to be settled in US dollars, or they are intended to assure the availability of dollars that will be needed for future settlements. The volume of dollar related and future oriented contracts (not just clearance of current payments) in the banking sector accounts for the continuing strong role of the dollar as the reserve currency past the point where certain critics expected its demise.

problem of constantly expanding and constantly less stable credit. According to the critics, the whole edifice of credit held by banks can disappear over a weekend. As the economy runs on credit, there would be no way to pay for the daily economic transactions that are the economy. With the collapse of credit, money would still remain, but the quantity of money held by the pubic that is distributed and spendable is so small that it could not keep things going. The irony is that, in economics, common law which distinguishes money from credit is against Alvarado.

Religion

Alvarado's final topic is State of Nature Religion. It is actually mostly about law. Natural religion arose from Grotius's need to found law on something. As he was replacing confessional religion as the basis of authority, the alternative was something common to everybody, "the institutions of private law: property and contract." (p. 51) This had to be given a religious aspect so an equally common base had to be provided for that, which was natural law. Grotius started with the autonomous individual and made subjective right the basis of the legal order.

> [T]he natural-rights philosophers in fact reversed one of the pillars of Christian civilization: the understanding that man was fallen, and that the institutions of society did not derive from him but were instituted over and around him, to hedge him in, as it were. (p. 52)

The effect of this was to eliminate "the associations and institutions in society which relied not on consent but on pre-existing authority." What was provided by such institutions, such as welfare support, now became the territory of state action.

Next comes a more obscure section on the need for judicial theology. The social order needs to be based on atonement because justice in society can never satisfy strict justice, so the action of justice must be within a larger context that does satisfy strict justice. This leaves room for common law associations to develop. "The distinctive and characteristic associationalism of Western civilization developed within the context of church and state exercising separate yet coordinating jurisdictions." (pp. 59-60)

This happy story, though, is at best only part of what was going on. The church had early tried to step into the place of the fading Roman Empire in the west. The papacy took on administrative tasks and titles left vacant. It associated itself with the cult of the martyrs, gathering the various relics, centralizing the monuments and putting them into new building projects that echoed as far as possible the feats of the Caesars. A bureaucracy was created, one of whose tasks was to create an official history of the Roman church, representing it in the way most useful to Roman power, and disseminating this new history to the new Germanic kingdoms, where in the absence of other records, it was accepted as official history. There was also an effort to standardize Christian practice in accord with the Roman model so as everywhere to bring the western world under Roman Church authority.[12]

12 Much of the early history can be found in *Rome and the Invention of the Papacy: The Liber Pontificalis*, by Rosamond McKitterick (Cambridge University Press, 2020).

Further centuries saw the effort to bring ecclesiastical appointments, which were an essential part of early European government administration and revenue generation, under the control of Rome. The generation of canon law became the basis for church administration but also of combating legal claims by the monarchies. A parallel empire of church lands developed, not contiguous but Europe wide, on which the residents were under canon law, not the king's law. The papacy had acquired a kingdom in Italy, but began to claim that it was absolutely necessary for salvation for the rulers of other kingdoms to be subject to the pope. The church had elevated itself to supreme political as well as spiritual power. Divine right absolutism had appeared in Europe. The place of the secular rulers was to do the dirty work that the clerical orders did not want to handle.

Of course there was opposition, from the Holy Roman Emperors as well as from powerful monarchies. The state had meanwhile developed its own curias in imitation of the church. The powerful church model had caused the state to evolve as an institution mirroring the church, made up of what was left after the church defined its sphere. In the early days there has been kings managing the affairs of their territory, which included seeing to the well ordering of the church in their borders. Now there was something new, a defined area of jurisdiction that came to be called the state.

But in addition to the external resistance to papal absolutism, there was opposition from within in the form of a theory of and attempts toward a bottom up government, in which the central executive authority of the pope was to operate under legal restraints. The story of this Conciliar Moment is told by Francis Oakley in *The Conciliarist Tradition: Constitutionalism in the Catholic Church 1300-1870* (Oxford University Press, 2004). While the Conciliarists' effort at constitutional government of the church was eventually beaten back, in the meantime the rise of powerful monarchies had constrained papal authority from the outside, and also took over the claim to absolute divine right rule. The theories of representative government, constitutionalism and executive administration subject to law that had been developed against the absolutist claims of the papacy where now directed against the absolutist state by the monarchomachs. Some Presbyterian writers would have you think that this was the creation of the Reformation and of Calvinists in particular, but it was theory already centuries old.

Roman Catholic absolute monarchs shared a divine right ideology with the Pope, and only differed over how much authority each had. They could make deals. On the Protestant side, the churches were not willing to give up the essential link between church membership, controlled by the church, and standing in the state, including right to rule.[13] But if the state had grown up as a mirror of the Church, now the church took on the form of the State with competing and hostile territorial jurisdictions. Not only was there the problem of war tearing up Europe, but internal to each state there was the problem of church intolerance. Under these conditions dissidents had to look for another solution that could be universal enough to solve both problems. The churches had shown that they could not produce a solution because it meant giving up a degree of control that they still considered to be essential. It should not be a surprise that others resorted to inventing a solution in the form of natural rights, nor that as a contrivance it did not actually work well over time.

13 For a discussion of this problem see "Pufendorf On Civil Religion and the Church as a Mere Association". Contra-mundum.org/index_htm_files/Pufendorf_ChurchAssociation.pdf

Returning to Alvarado's account, his next section is on the "empty public square" type of thinking that in the later twentieth century called for the abandonment by religious groups of a central position in the public order, because only if the space was vacant of religious claims could everyone exist in harmony. Of course that could not work because a social order cannot function without values, and something must provide the values, and it will be whoever controls the state. This leads to Alvarado's concluding point in the chapter, which is that the Belgic Confession's Article 36—that the civil magistrate must remove and prevent all false worship and idolatry—describes a function that the state will inevitably perform on behalf of some interest, and that if it is not engaged in removing false worship and idolatry it will be removing Christianity.

The chapter is supplemented by an appendix called "Constantinianism and Article 36." After summing up what Abraham Kuyper had to say against Constantiniamism, Alvarado responds:

> Now then: These two positions – that Article 36 demands a single church institute such as is manifested in a state church, and that it mandates the persecution of heretics – constitute its supposed "Constantiniamism."
>
> There is nothing to either of these charges. (p. 79)

Rather, the Reformed Church "never embraced the entire population and never attempted to." "Other churches were tolerated, other faiths were allowed a private existence…" (p. 79) Well, they couldn't control the entire population. In other writings Alvarado complains about this weakness, about how the church was kept under restrictions by the Dutch authorities who were of Arminian sympathies, and how the church was blocked in its function as a church. There follows a discussion on how the removal of idolatry and false religion does not involve the removal of various Christian sects. What about Roman Catholicism and the idolatry of the mass? Isn't that what was in view? He also argues that the recognition of the Reformed church as the representative of the true religion and giving it support is not the same as its establishment. Here he can quote various authorities, to the effect, for example, that the Dutch church was never established in the sense of the Anglican in England. But then the Anglican had the king as its head who was also the head of the state, uniting them in a unique way. When he argues that today's political correctness and cancel culture is simply Article 36 in reverse, it hardly establishes that Article 36 is tolerant!

Anyway, the church in the Netherlands eventually became apostate. If it was still established in the same way in the public square what would it have done then? We know what happened in Scotland. Once the Presbyterian church came under the control of clergy influenced by the Enlightenment, calling themselves the Moderates, they began to persecute the real Presbyterians who spoke out against false religion. Of course it was cast in a different light as fining slanderers. This is what happened to John Witherspoon, and after coming to America he was ready to take steps to assure that it did not happen again, namely the revision of the Westminster Confession, which revision Alvarado deplores.[14]

14 For an overview of John Witherspoon see Roger Schultz, "Covenanting in America: The Political Philosophy of John Witherspoon," *The Journal of Christian Reconstruction,* 2:1 (1988).

Conclusion

Alvarado does not provide a sufficient basis for his common law order. An historical narrative of its development is not the same thing as showing its binding permanent legitimacy. In several places he links it to a general Christian world view and an idea of sovereignty granted by God, but this is always so vague as not to provide confidence that these Christian ideas authenticate the authority of the common law. Beyond that, though, his use of the common law order and legal concepts does give unifying concepts to the whole of the book, and allows politics, economics and ecclesiology to be understood in an integrated way.

Alvarado draws on the thinking of Groen van Prinsterer for his idea of the organic development of liberties, or perhaps we should say their development through the constant violent struggle of interests in European history. He also has some echos of Abraham Kuyper in his thought. Yet the common law order is a far different thing from Kuyper and his sphere sovereignty. For Kuyper every association of whatever sort developed a sphere sovereignty complete with its own transcendent authentication. Even if some neighborhood kids get together to play marbles, they generate a sphere sovereignty. In as much a Kuyper saw even the Devil as a channel of common grace, which had to flow through all the powers, we must recognize the implication that even criminal gangs have sphere sovereignty. Once the full horror of this theory sinks in, it is apparent that it could only appeal to a Dutchman. The common law does not expand in such an automatic fashion, but only when there is need for it as manifested by people taking matters to court, where a novel situation can create a precedent in law.

Over on the other extreme, there is a view bandied about by some theonomists that there are only three sovereign spheres, the state, the church and the family, and that this is Kuyperianism. The Kuyperian principle, for them, is that each of the three spheres is confined in its operation to a restricted area, and the spheres are really boundaries of sovereignty. Of course they would like to see the operation of the state defined by Biblical law. They seem to envision this as a code, although nobody has come up with one anywhere close to suiting the needs of modern society. Functionally, common law does much more for the state that this does, without the speculative theory. What they envision for the church, beyond the usual horror story of old boy's networks of elders running amuck, is hard to say. The mention of cannon law seems to horrify Presbyterians, but as soon as they organize a denomination they create a convoluted set of church order rules, boards, commissions, and what not, which are run either by autocratic church bureaucrats or else by what amounts to a sort of cannon law. The ordinary church member, however, is at the mercy of the elders, and of an ineffective appeals system which no one can get through without expert advice, i.e. someone who effectively is a cannon lawyer. So why not either acknowledge the reality, or throw out the institutional model that generates the situation? We are back to the problem posed by John Selden: how can the church be an independent institution without a government—in the full sense of a functional judiciary?[15]

15 For Selden the issue was that coercion is necessary for there to be a government. The issue raised here is that it must be able to function judicially in an effective and credible manner to be a government and run is own affairs. If it can't run its own affairs then the state must step in. In creating the PCA they wrote the rules to allow congregations to secede at will so that the state would not be called in to settle property claims. That is, they saw apostasy as an inevitable prospect to be planned for in denominational constitutions, by leaving necessary measures outside the boundaries of denominational action.

This brings us back to the question of which organization would be chosen as the church that enters into the establishment of Christianity? Kuyper said that the magistrate has to choose which church to establish. Alvarado says that is not a problem, because all the magistrate has to do is to choose which organization will be recognized as the representative of the Christian religion, and thus can speak for Christianity in the public square. I don't see the difference, but in any case, which clown circus would you choose? The denominations can't manage a fair and effective self-government, so why would you trust any one of them to choose trustworthy spokesmen on public policy? This leads up the point that the problem of establishment of Christianity, if it involves a church institution in any way, requires that the problem of ecclesiology be solved first. But then, why does it take an ecclesiastical official to spak for the Christian truth in the public square?

Alvarado's common law view of historical development is incomplete, leaving out other lines of historical development in which the Roman imperial model was perpetuated as an ideal of absolutism, first in the church, making use of canon law as a major instrument, and then copied in the development of the state, as a sort of mirror of the church ruling what could be kept away or wrested from the church, and embodying a Roman institutional ideal, vestiges of which still live on in some form in various denominational ideas of the church institution. The hegemony of an absolutist church was opposed from without by the rival power of the state, such as the Holy Roman Emperors or powerful monarchies as in France, and from within by an opposing bottom up model of government, that was supported by a political ideology built up for this need including representative institutions, and government under law which would end the administrative autonomy of the executive power (the pope). This latter effort, the Conciliar Movement failed, but by then the monarchies were well on the way to contain the power of the church, and all the Conciliar ideology of government was then redirected against royal absolutism, now claiming the divine right to rule that the popes had pretended to. This has to be set along side the story of common law.

One final irony is that in his Introduction, as the "scare story" to demonstrate the severity of the problem that Natural Rights politics creates, Alvarado points out that if as the Declaration of Independence declares, the pursuit of Happiness is a natural right, then under fundamental America law the flood of immigrants into the United States cannot be excluded as what brings them in is the universal human right to the pursuit of Happiness. But Gary North in his *Political Polytheism* had argued for the same result. Despite having as his target the same Natural Law order, and the same church disestablishment as does Alvarado, according to North, under Christian covenantalism everyone has a right to immigration. North wanted Christianity to be established, but that meant that as soon as one of the immigrants joined a trinitarian church, he could vote and hold office as well. Of course all those immigrants who were already Roman Catholics would not even have to wait to vote. Christian covenantalism means, in the Tyler Reconstruction view anyway, that there is no place for nations as peoples or a right to preserve a national culture. I get the feeling that, deep down, many of the Reconstructionists hate America as much as the left does.

If Alvarado really wants to offer an alternative, he needs to broaden out his target. It is not just Natural Rights theory that is the problem, but also the older two kingdom theology, which dominated

Christian thinking in America up though the 1960s, but which was not based on Natural Rights, as well as the proposed replacements such as Christian Reconstruction (at least the Tyler type), and other covenantal political theories that model their idea of the state on the church.[16] Then he needs to show how his common law order will not inevitably pick up the same ideas from the Christian base that he thinks common law order requires. Functionally the common law order has so much to offer that it would be good to see more convincing support for its authority, and also its integrity. If it evolved from pagan Roman law, once the Christian consensus goes why would it not become equally pagan again?

16 For a discussion of Gary North's program see the review of *Political Polytheism* at contra-mundum.org/index_htm_files/rstw_polytheism.pdf

There is another type of two kingdom theology being offered as a replacement for the old one. This is called Radical Two Kingdom Theology. It is being resisted energetically, however, and Wordbridge Publishing also has a forthcoming book about it, *Saved to be Warriors* by Bret McAtee.