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Calvinist Natural Law and Constitutionalism

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I. Abstract

The continuity between Calvinist natural law and the constitutional tradition of limited government is often overlooked. This article aims to engage with Calvin's natural law theory on its own terms to explore what authority it can provide for modern constitutionalism. The article begins by exploring some important points of distinction between Calvinist and Thomist approaches to the idea of natural law. I then contend that the focus of modern constitutionalism on subjecting government power to the 'rule of law' is continuous with Calvinist natural law concepts of human depravity and God's sovereignty. The article is structured broadly into three main parts. The first section engages with the concept and history of Christian natural law, framing them by reference to the Two Kingdoms doctrine. The second section discusses the central tenets of Calvinist natural law theory, namely the sovereignty of God, the doctrine of humanity's total depravity and the Two Kingdoms doctrine as a unified concept. The final section then applies Calvinist natural law to three sites of modern constitutionalism — the rule of law, the separation of powers, and modern federalism.

II. Introduction

Few states in the world wish to be perceived as *unconstitutional*.¹ If a constitutional government is one that pursues constitutionalism in the philosophical sense then it is safe to say that constitutionalism characteristically concerns the division and limitation of institutional powers.² Constitutionalism posits that limits be placed on the 'powers of rulers by subordinating them to enduring rules that they themselves cannot

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¹ Augusto Zimmermann, 'The Christian Foundations of the Rule of Law in the West: a Legacy of Liberty and Resistance against Tyranny' (2005) 19(2) *Journal of Creation* 67, 68; Suri Ratnapala, 'The Idea of a Constitution and Why Constitutions Matter' [Summer 1999/2000] *Policy Magazine* 1, 3.

² Ratnapala, above n 1.

abrogate'.³ In short, constitutionalism recognises the need for constitutional restraints on arbitrary power.⁴ Rulers ought to be subject to a 'higher power' that is itself immune from abuse.⁵ In this way, the concept of constitutionalism cannot be untwined from the ideal of the 'rule of law' which declares that there is no person above the law.⁶ What the rule of law⁷ aims to ensure in practice is that people's rights in respect to liberty, life and property are not threatened by the arbitrary whim or fancy of governing officials.

Constitutionalism and the rule of law are further supported by other constitutional doctrines, such as the separation of powers and federalism. The institutional divisions imposed on government powers which create separate arms and different levels of government provide a complex system of formal and informal checks and balances that safeguards the rule of law.⁸ The structure of the constitutional text in Australia, for example, clearly evidences recognition of and respect for the separation of powers concept. The first three chapters of the Australian Constitution are set out to reflect the three arms of government with the implication that each functions critically towards and independently of the others.⁹ James Madison and Alexander Hamilton, leading drafters of the United States Constitution, expressed respect for the same concept in the *Federalist Papers* some 100 years prior to the Australian Constitution in 1901.¹⁰

Federalism ensures that legislative power balance is not polarised in favour of the centre by establishing a system that divides¹¹ the power between the states and the central polity. The Preamble to the Australian Constitution expressly notes the federal division of powers between the states and the Commonwealth. Several sections of the Constitution expressly or impliedly support a strong federal model. For example, the Constitution expressly limits the Commonwealth's powers to the fields specified in s

³ Jonathan Crowe and Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3rd ed, 2012) 3.

⁴ Ibid 3.

⁵ Ibid 3-4.

⁶ Lon Fuller, *The Morality of Law* (Yale University Press, revised ed, 1965) Ch. 2.

⁷ *Entick v Carrington & Ors* [1765] EWHC KB J98.

⁸ Crowe and Ratnapala, above n 3, 12-13.

⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10.

¹⁰ James Madison, *The Federalist Papers no. 51 and no. 47* (1788).

¹¹ Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) 4. Here, Nicholas Aroney provides a comprehensive historical summary of federalism as conceptualised in Australia and questions whether the idea of sovereignty was at the core of federalist concerns. He questions the value of the approach where federalism is viewed essentially to preserve 'a division of powers' according to the views of A.V. Dicey, James Bryce and K.C. Wheare. Unlike other instances, the Australian model of federalism arose not out of a nation needing to be divided up but rather separate states coming together and deciding to unite under the Commonwealth banner.

51 and other provisions.¹² The concept of intergovernmental immunities, developed by the High Court in decisions like *Melbourne Corporation v Commonwealth*,¹³ arose from ss. 106 and 107 of the Constitution.¹⁴ The *Engineers Case*¹⁵ reconfigured the balance of federal powers significantly in favour of the Commonwealth,¹⁶ but the High Court has subsequently revised the *Engineers* doctrine in some respects in an effort to rebuild the federalist structure in Australia.¹⁷

This essay examines the philosophical foundations for the notion of constitutionalism and its supporting doctrines of the rule of law, the separation of powers and federalism. It does so by exploring the framework of Christian natural law set out in the writings of John Calvin.

Calvin's view of positive law is inextricably linked to his belief in the necessity of civil government in the context of humankind's 'total depravity'.¹⁸ This reality also provides the foundation for Calvin's natural law position. Calvin's firm belief in the corrupt nature of human beings explains his demand for limits to be placed on the civil government, requiring that all laws flowing from it are to be subject to a higher morality. On this view, the existence of a transcendent moral norm is necessary to protect individuals from an ever-present tyranny. Calvin finds this higher morality in his uncompromising belief in a sovereign God. His revisions to the Two Kingdoms

¹² For example, s 109 (provides for the resolution of conflict between State and Cth laws, the Cth law prevails), s 90 (confers exclusive power to the Cth legislature in regard to excise and customs duties), s 52 (lists subject matters in the exclusive control of the Cth parliament) etc.

¹³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

¹⁴ *D'Emden v Pedder* (1904) 1 CLR 91; See Griffith J's argument that s 107 manifests an intention by the framers' of the Australian Constitution to adopt the US doctrine of intergovernmental immunities.

¹⁵ *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 CLR 129.

¹⁶ Greg Craven, 'Cracks in the Façade of Literalism: Is there an Engineer in the House?' (1992) 18 *University of Melbourne Law Review* 540.

¹⁷ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

¹⁸ The depravity doctrine refers to the common Reformed Christian doctrine that establishes universal human fallibility as the descriptive position for its natural law. This doctrine as envisaged by Calvin becomes the basis for the modern concept of *social contract theory*. Calvin's doctrine of human fallibility had strong influence on modern liberal philosophers like John Locke. For example, John Locke premises his idea of social contract theory on what he considered the axiom of human will and its inherent depravity. Locke stated that individuals are conferred differing degrees of power which, by their conscience, they must utilise in a way that is most consistent with the natural law ('God's measure'). His emphasis therefore lies on the duty that is begotten by individual freedoms. Further, the need for a social contract between fallible individuals and the state, which is itself composed of fallible individuals, finds support in Calvin's account of human fallibility. See John Locke, *Two Treatises of Government*, Ch. 2, § 4-8.

doctrine¹⁹ render it to mean that both spiritual and civil laws are subject to God's ultimate authority, and this constitutes the universality of accountability and entitlement that is the cornerstone of natural law. Any human being, whether subject or ruler, who falls short of this higher morality which is embodied in a perfect God is adjudged by a transcendent measure. It is thus evident that Calvin's natural law cannot be untwined from his theology. However, my exploration of his theology, for the most part, is done in the hope of distilling the principles underlying his natural law position. In this way, I hope to demonstrate the congruence between Christian natural law and the ideal of constitutionalism thus, confirming the continuing relevance of natural law jurisprudence to today's world.

This paper aims to engage with Calvin's natural law theory on its own terms to explore what support it can provide for modern constitutionalism. The paper is divided into three parts. The first section explores the concept and history of Christian natural law framed in terms of the Two Kingdoms doctrine. The second section discusses the central tenets of Calvinist natural law theory namely, the sovereignty of God, the doctrine of humanity's total depravity and the Two Kingdoms as a unified concept. The third section will then go on to apply Calvinist natural law to three sites of modern constitutionalism – the rule of law, the separation of powers, and modern federalism.

III. A History of Christian Natural Law

The influence of natural law theories on modern legal and political philosophical design is rarely disputed. However, the subtle distinctions between different versions of natural law thought are frequently overlooked. In particular, a distinctively Protestant development of natural law is largely lacking. Contemporary discussions of natural law tend to focus strongly on the work of John Finnis since he (and the other 'new natural law theorists') has developed detailed analyses of the implications of natural law for specific legal and political questions.²⁰ However, he does so from within a Catholic and Thomist perspective.²¹ The fact that modern theologians, especially those espousing the Protestant faith, have on the whole been wary of developing a distinctively Protestant account of natural law has left a rich source fallow.²²

¹⁹ The Two Kingdoms doctrine refers to Reformed Christian tradition that distinguishes between the heavenly realm and the earthly realm, aiming to show the two-fold manner in which God governs the world. See Diarmaid MacCulloch, *The Reformation: A History* (Penguin, 2003).

²⁰ John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011).

²¹ The natural law jurisprudence of Finnis classified substantially the same as that of the Catholic Church. See Peter M. Cicchino, 'Reason and the Rule of Law: Should Bare Assertions of 'Public Morality' Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?' (1998) 87(1) *Georgetown Law Journal* 139, 139, 157, 162, 164.

²² Jean Porter, *Natural & Divine Law: Reclaiming the Tradition for Christian Ethics* (Wm. B. Eerdmans Publishing Co., 1999) Ch. 1.

This section places Protestant natural law thought within a broader historical and philosophical context in order to make clear its distinctive contribution. It is useful to begin by exploring the basic concept of a Christian natural law theory. First, the ‘natural’ component of the concept alludes to natural law’s scope of influence. The recognition of the universality of the ‘unwritten law’ on the hearts of humans²³ holds all humans to account for their actions. In other words, there is a binding moral duty on all humans by virtue of their inherent humanity. It follows that such a moral imperative as dictated by human conscience is universal.²⁴ No person is exempt from such a moral duty.²⁵ Second, the ‘law’ part of the term signifies the transcendent and binding character of natural law.²⁶ Natural law is distinguishable from positive law in that it is the higher standard by which the former is to be adjudged in order to determine whether it is law in the true sense.²⁷ Christian jurists claim that natural law is the embodiment of principles of morality and justice which are applicable regardless of time and condition.²⁸ For Finnis and Grisez,²⁹ for example, the normative force of natural law comes ultimately from its divine origins, even though they sometimes present their views in secular form.³⁰

From a Christian perspective, natural law is continuous with what God has done in creation.³¹ This continuity between natural law and creation has three further consequences. First, natural law exhibits continuity with the laws of gravity that bind all beasts and humans alike through the practical order of causality.³² Second, it constitutes epistemological precepts and prepositions that are not contrary to human logic or reason. Third, it is the ordinances of a divine lawgiver and, therefore, it does not contradict the word of God.³³ These tenets of the Christian natural law definition are significant. For example, the first expounds on what it means to be ‘human’ by suggesting that humans are the only entities capable of evil. Beasts do not sin because

²³ Russell Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World*, (ISI Books, 2007) xiii.

²⁴ Edward S. Corwin, *The Higher Law: Background of American Constitutional Law* (Cornell University Press, 1955) 45.

²⁵ *English Standard Version* Psalm 19; Romans 2:12.

²⁶ ‘The ‘lex’ in the term ‘lex naturalis’ is derived from the term ‘ligare’ to bind or to oblige. ‘See eg Aquinas, above n 26, I-II q.90 a.1; Hittinger, above n 23, Ch. 2.

²⁷ Ibid.

²⁸ Zimmermann, above n 28, 12.

²⁹ Germain Grisez, ‘The First Principle of Practical Reason: a Commentary on the Summa Theologiae, I-II Question 94, a.2’ (1965) 10 *Natural Law Forum* 192-193.

³⁰ J. Budziszewski, *Written on the Heart: The Case for Natural Law* (Intervarsity Press, 1997) 196.

³¹ Jonathan Burnside, *God, Justice and Society: Aspects of Law and Legality in the Bible* (Oxford University Press, 2011) 69; Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009).

³² Hittinger, above n 23, 4.

³² ‘Participatio legis aeternae in rationali creatura’. See Aquinas, above n 26, I-II, q. 91, a.2.

³³ Hittinger, above n 23, 4.

they are naturally subject to the laws of God.³⁴ The second facet — the claim that every human possesses the capacity to distinguish evil from good — reinforces the idea that natural law is universally accessible to human beings by virtue of their consciences,³⁵ calling all humans (Christians and non-Christians) to account for their actions.³⁶ Thirdly, though the law of God as imprinted on human hearts can serve as a compass to the moral life, Christian natural law elevates the Scriptures as the immutable, eternal and paramount truth.³⁷

A. THE QUESTION OF THE TWO KINGDOMS

It can be strongly argued that the modern natural law tradition originated in (or at least was heavily shaped by) Christian philosophy, through the influence of Augustine, Aquinas, Grotius and others.³⁸ The above definition is framed in such a way as to encapsulate the common ground of both the Thomist and Reformed accounts of Christian natural law. However, I will now seek to draw out the more subtle differences between them. One useful way of framing the distinction is through the doctrine of the Two Kingdoms.

Discussion of the Two Kingdoms doctrine so intersperses early Reformed natural law thought that the development of the two cannot be entirely separated. In affirming this doctrine, traditional Christian jurists constructed natural law upon the principle of God's supremacy over both heavenly (spiritual) and earthly (civil) kingdoms. For our present purposes, the Two Kingdoms idea will be treated as the primary lens through which Christian natural law tradition is reviewed. Despite the vast and vibrant array of Christian natural-law approaches that have emerged over the ages, the Two Kingdoms doctrine remains a core doctrine that threads the diverse theories together. Furthermore, the different forms of the doctrine in Thomist and Reformed natural law theories provide a useful way of distinguishing the two traditions.

In contemporary scholarship, the Two Kingdoms doctrine has fallen from favour with adherents of Reformed Christianity.³⁹ The marginalisation of the Two Kingdoms doctrine in this manner has consigned Christian natural law to a purely spiritual dimension of Reformed Christian thought. By viewing the Two Kingdoms in

³⁴ Anton-Herman Chroust, 'Natural Law and 'According to Nature' in Ancient Philosophy' (1978) 23(1) *American Journal of Jurisprudence* 73; More accurately, it can be said that humans are the only entities capable of sinning because they are the only ones endowed with free-will.

³⁵ Aquinas, above n 26, I-II, q.94, a.2.

³⁶ Ibid.

³⁷ Anton-Herman Chroust, 'The Fundamental Ideas in St. Augustine's Philosophy of Law' (1973) 18 *American Journal of Jurisprudence* 57, 69.

³⁸ J. Daryl Charles, *Retrieving the Natural Law: A Return to Moral First Things* (Wm. B. Eerdmans Publishing, 2008) 103.

³⁹ David VanDrunen, *Natural Law and the Two Kingdoms* (Wm. B. Eerdmans Publishing Co., 2010) 1-3.

terms of the sharp separation between Church and state, the didactic value of this doctrine has lost considerable effectiveness. In this context, it is part of the purpose of my present research to reclaim and revise the Two Kingdoms doctrine as an important building block to Christian natural law. This involves, firstly, revisiting and recognising the significance of the Two Kingdoms doctrine for the development of a Reformist account of natural law; and, secondly, framing the relationship of the Two Kingdoms in such a way as to align them with the most robust version of that tradition.

To this end, I will suggest that the Two Kingdoms doctrine is a misnomer.⁴⁰ To suggest that the heavenly kingdom and the earthly kingdom are two separate realms is to give rise to the inference that they hold equivalent status. Such an inference necessarily undermines the idea that natural law is a transcendent and external moral standard for life in the civil kingdom. The historical overview that follows seeks to draw out the conclusion that one of the most potent distinctions between Thomist and Reformed accounts of Christian natural law is sourced in their answers to this precise question. I hope to reclaim the original vision of the doctrine found in Augustine, where the heavenly kingdom is the only authoritative kingdom and is the framework within which the fallen state of humanity as represented by the earthly kingdom is contrasted and adjudged. Augustine's theory, by emphasising God's supremacy, gives rise to one overarching source of natural law. Through its affirmation, original Reformed theorists were able to root political and cultural life securely in God's work of providence (rather than his work of grace through Jesus Christ) thereby holding both believers and non-believers universally to account. This emphasis on the true, authoritative kingdom has been obscured in more recent theological approaches.

B. PRE-REFORMATION CHRISTIAN NATURAL LAW

1. AUGUSTINE OF HIPPO (354-430)

Saint Augustine of Hippo's contribution to Christian natural law is foundational.⁴¹ As the founder of the idea that theological considerations constitute the only sound Church recognises his theology as the premise for true law and true jurisprudence. No doubt he facilitated a once secular-theistic discipline of jurisprudence which became firmly rooted in a theological framework.⁴² Augustine's central focus lies in the 'sovereignty of God'.⁴³ Though he was inspired by pagan philosophers, particularly the works of

⁴⁰ Renowned Theologians like D.A. Carson represent the popular modern Reformist dismissal of the Two Kingdoms doctrine as a purely Lutheran construct. See eg D.A. Carson, *Christ & Culture Revisited* (Grand Rapids: Eerdmans, 2008) 218.

⁴¹ John Piper, *The legacy of Sovereign Joy* (Good News Publishers, 2005) 44. The irony is that Augustine's work appealed to oppositional forces. The Roman Catholic Church consulted him and venerated him as a Saint but the Protestant Reformation (the Catholic counter-revolution) ultimately derived their force from his texts.

⁴² Zimmermann, above n 28, 12.

⁴³ Piper, above n 41, 57-62. Note eg Pelagius (Augustine's lifelong opponent) quotes Augustine's book *On the Freedom of the Will* against him as he is appalled when he reads in Augustine's confession, an apparent contradiction 'Give me the grace [O Lord] to do as you command, and command me to do what you will!'. See

Cicero and later Plato and Aristotle,⁴⁴ he employs these theories within clear limits. Divine Providence, he states, has allowed both believers and non-believers alike to access speculative reasoning abilities (*summa ratio*)⁴⁵ and, in this way, he consolidates the thesis that natural law is applicable equally to all humans. It is the *universality* characterising his natural law approach which effectively distinguishes him from his Hellenistic and Stoic predecessors.⁴⁶

It is when Augustine discovers Apostle Paul's gospel through Bishop Ambrose⁴⁷ that he sees the limits besieging human reason and emphatically⁴⁸ notes that humans must necessarily appeal to the Scriptures as the *paramount* source of moral guidance:⁴⁹

I thrilled with love and dread alike. I realized that I was far away from you . . . and, far off, I heard your voice saying I am the God who IS. I heard your voice, as we hear voices that speak to our hearts, and at once I had no cause to doubt.⁵⁰

This transcendence of divine will characterising Augustine's natural law outlook grounds the medieval natural law tradition upon two fundamental principles. Firstly, that *unity* is derived from God and involves one faith, one Church and one empire.⁵¹ And, secondly, the supremacy of the law which is not a human creation but rather conceived as part of the unity of the universe. In *The City of God*,⁵² Augustine formulates the Two Kingdoms doctrine where he draws a sharp separation between temporal law (*lex temporalis*) and the divine law (*lex aeterna*),⁵³ elevating the latter above the former. The implication of the clear separation between positive and divine

Augustine, *Confessions*, (Ch. X, 31) 236. Augustine saw that we cannot choose what we find delight in. He saw God as a self-evident good that left us no choice but to find delight in nothing other than Him alone. Note that *freedom* is redefined so as to mean the ability to gain so much spiritual discernment regarding God's beauty and so in love with God that one is able to transcend the place where we rate God as a parallel to any other alternative choice.

⁴⁴ Chroust, above n 37, 57, 69.

⁴⁵ H.L.A Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 183f. The appeal of natural law lies in the fact that it is divorceable from theological considerations? Human law can be separated from divine law? This is challengeable. See eg Zimmermann, above n 28, 12.

⁴⁶ Chroust, above n 37, 57, 69.

⁴⁷ Piper, above n 41, 49; St. Augustine, *Confessions*, V:16.

⁴⁸ St. Augustine, *The Confessions*, VII:10.

⁴⁹ St. Augustine, above n 49, XII:2; Exodus 3:14.

⁵⁰ Augustine's call to delight in God for his sake alone, in other words, worshipping God as the self-evident good. See St. Augustine, *The Confessions*, VII:10.

⁵¹ St. Augustine, *Writings Against the Manichaeans and against the Donatists*, XII:18; Ephesians 4:5.

⁵² St. Augustine, above n 49, V:15-17.

⁵³ St Augustine, *On the Free Choice of the Will*, I:6; Chroust, above n 37, 57, 68.

laws as Augustine famously stated is that ‘an unjust law would seem to be no law at all’.⁵⁴

Accordingly, where positive laws flout natural law, the law ‘so-called’ loses its legal validity. By this, Augustine warns us of the inherent ethical danger of conflating positive law with natural justice.⁵⁵ The notion that natural law is grounded in the Scriptures and, correlatively, that only human reason that is congruent with the divine law as revealed through the Scriptures ought to have normative force has rendered theology inseparable from legal and political considerations.⁵⁶

As noted above, Augustine’s emphasis on the supremacy of divine law makes the ‘Two Kingdoms doctrine’ something of a misnomer. It is clear that, for him, there is only one true kingdom constituted by divine law. The temporal or civil law found in the earthly kingdom enjoys authority only insofar as it is consistent with the divine will. Augustine therefore emphasises that the earthly kingdom that disregards divine will is no true kingdom at all.⁵⁷

Anyone ambitious enough to attempt a summary of Augustine’s influence is bound to ‘disclaim thoroughness’.⁵⁸ Traces of his work trickle through politics, psychology, philosophy, poetry and literature⁵⁹ but course through theology (as a precursor to both Catholic and Reformed thought) and natural law theories. As such, Augustine’s version of the Two Kingdoms doctrine provides the basic scaffolding for subsequent natural law development sixteen centuries later. His texts, therefore, remain the most apt starting point for an overview of Christian natural law tradition.

2. THOMAS AQUINAS (1225-1274)

It is, however, Thomas Aquinas’ account of natural law that has claimed most influential to jurists in the last seven centuries.⁶⁰ Considered paradigmatic of Christian natural law,⁶¹ it has been upheld as the official natural law doctrine of the Catholic Church and, therefore, deserves closer inspection. The compelling nature of Aquinas’ version of natural law can be attributed to his success in synthesising Augustinian theology with Aristotelian philosophy.⁶²

In his *Summa Theologica*, Aquinas subtly diluted Augustine’s Two Kingdoms doctrine by placing positive law in the broader context of natural law as part of God’s

⁵⁴ St Augustine, *On the Free Choice of the Will*, I:5:11:33.

⁵⁵ St. Augustine, above n 49, IV:1-4.

⁵⁶ Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Wm. B. Eerdmans Publishing co., 2005) 12.

⁵⁷ St. Augustine, *On Order*, II.7.21; Chroust, above n 37, 63-64.

⁵⁸ Piper, above n 41, 45.

⁵⁹ *Ibid* 25, 44.

⁶⁰ VanDrunen, above n 39, 43.

⁶¹ Zimmermann, above n 28, (Butterworths, 2012) 13.

⁶² *Ibid* 13.

overall design for the universe.⁶³ Augustine's strict separation between the kingdom of God and the kingdom of humans, the external and internal order of things, and the transcendence of the former above the latter are all relatively weakened. Instead, Aquinas defines human law as 'an ordinance of reason for the common good, made by him who has care of the community, and promulgated'.⁶⁴

Aquinas identifies four types of law: eternal, natural, human and divine. *Eternal law* reflects the timelessness of God and therefore represents the will of God concerning all creation. Eternal law is comprised of both scientific laws, including laws of physics, mathematics and logic as well as the practical and moral laws that govern human conduct.⁶⁵ Aquinas goes on to develop Augustine's theory by dividing *eternal law* into two sub-categories: *divine law* and *natural law*. By *divine law*, he refers to that part of eternal law attained through divine revelation through the Scriptures, which he then differentiates from natural law: the part of eternal law discoverable by human reason alone.⁶⁶ *Human law* is then able to be derived from natural law through the exercise of what he calls practical reason.⁶⁷ The derivation of human laws from precepts of natural law is accomplished in two ways: logical deduction and specification.⁶⁸ In so doing, Aquinas substantially weakens the separation between *natural law* and *human laws*. If the role of human laws is to effectively supplement and specify natural laws, the necessary implication is that they are working symbiotically and the transcendence of one above the other is significantly downplayed.

Aquinas agrees with Augustine that a human law that contradicts the 'ordinance of reason' cannot enforce compliance. However, he introduces a caveat in cases where the risks of disobedience amount to undermining the whole legal order (and therefore the common good). In this sense, Aquinas subscribes to the 'weak natural law thesis' as Mark C. Murphy calls it.⁶⁹ Finnis, a natural law theorist who largely elaborated on Aquinas's theory for modern use, also identifies with the weak natural law thesis. Finnis states that laws that fall short of moral standards are precluded from being a law in the technical sense. Immoral laws are still laws; they are just 'defective laws'.⁷⁰ Furthermore, if disobedience to a defective or unjust law of the kind just mentioned means injury to the legal system as a whole, it ought to be obeyed.⁷¹

⁶³ Aquinas, above n 26, I-II, Q 93, art 3.

⁶⁴ Ibid I-II, Q 90, art 4.

⁶⁵ Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2nd ed, 2013) 26.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Mark C. Murphy, 'The Explanatory Role of the Weak Natural Law Thesis', in Will Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (Oxford University Press, 2013) Ch.1.

⁷⁰ Finnis, above n 20, 363-366.

⁷¹ Plato describing the last days of Socrates' life in the *Phaedo* recounts the nature of Socrates' death under an unjust law. When offered a chance to escape with his life,

The effect of elevating the *common good* over divine law is perhaps a logical consequence of integrating positive law into the framework of divine law. Practical reason (as imprinted on all human consciences) leads us to comply with natural law allowing us to discern right from wrong. Aquinas holds that, as rational creatures, human beings ‘participate’ with God’s eternal laws⁷² ‘in a most excellent way.’⁷³ As such, he conceives natural law as encompassing both physical laws and normative rules of human conduct.⁷⁴ By emphasising the ‘God-given natural faculty of the human mind’,⁷⁵ Aquinas strives to demonstrate the intrinsic correlation of natural law (reason) to divine law (revelation).⁷⁶ Humans, for Aquinas, have an inherent capacity to attain knowledge of natural law and shape their human laws accordingly. The earthly kingdom therefore takes on its own form of legitimacy, rather than being clearly subordinate.

C. REFORMED CHRISTIAN NATURAL LAW

1. LUTHERANISM

At the outset, it may be prudent to distinguish Luther, the man, from *Lutheranism*, the movement. German theologian Martin Luther’s (1483-1546) influence was revolutionary. On the theological front, his teachings served as the impetus to the Protestant Reformation of the sixteenth century. On the political front, Lutheranism, the movement, became the counter-revolutionary force that deposed the authority of the Catholic Church by challenging the medieval Christian teachings it used to centralise political power in Rome for almost four centuries.⁷⁷

The value of Luther as a transitional force cannot be underestimated. Luther believed that the total depravity of humankind, its inherent self-interestedness, imbued every thought, every action and every want.⁷⁸ Thus, he believed that salvation could only be achieved by grace through faith alone. To this end, mediation by a priesthood is both unnecessary and useless as Christ alone can make the impossible possible through the Scriptures.⁷⁹ The cornerstone of the Reformation was therefore, a return to the external Word.⁸⁰ In so doing, Luther definitively laid to waste the notion that the Pope and the Church were the only authoritative repositories of Divine Will,

Socrates decides to obey the ‘unjust law’ out of, what he considers, a duty under the ‘voluntary contract’ he committed to with the State. See Crowe, above n 65,15.

⁷² Aquinas, above n 26, I-II, Q 91, art 2.

⁷³ Ibid I-II, Q 91, art 2.

⁷⁴ Aquinas’ formulation downplays the distinction between conscience and synderesis. See eg VanDrunen, above n 39, 44.

⁷⁵ Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Harvard University Press, 2003) 242.

⁷⁶ Zimmermann, above n 28, (Butterworths, 2012) 14.

⁷⁷ Berman, ‘The Lutheran Reformation and Western Legal Tradition’ (1987) 5:1 *Journal of Law and Religion* 177, 177-179.

⁷⁸ Piper, above n 41, 80.

⁷⁹ Ibid.

⁸⁰ Ibid.

effectively categorising them as secondary and fallible to the sovereign and infallible character of God's external Word.⁸¹

Accordingly, Luther's theory of natural law is best viewed as a reaction to the papacy that existed at the time and which concentrated the legal and political power in ecclesiastical authority.⁸² Pre-Luther, the world was wedded to the church placing authority in a single entity.⁸³ The most marked feature of Luther's theory of natural law is therefore the sharp rending of the church entirely from the state.⁸⁴ Luther replaced the Gregorian *Two Swords doctrine*, which facilitated the church's 'character as a sword-wielding entity — a visible, hierarchical, political and legal community',⁸⁵ with his 'Two Governments' theory thus effectively, relegating the church to a purely private realm.⁸⁶

On a superficial level, the distinction between Luther's and Augustine's versions of the Two Kingdoms doctrine is only subtle. However, the implications flowing from this distinction are worth considering. In order to resolve the central dilemma between humankind's wicked nature and temporal authority as ordained by God, Augustine's Two Kingdoms doctrine reinforces the absolute sovereignty and transcendence of God's heavenly kingdom.⁸⁷ In contrast, Luther resolves this dilemma, in part, by introducing his theory on the 'uses of the law' in which he posits that temporal authority, in addition to moral law, is just another means of making individuals 'conscious of their obligations and hence, repentant of their sins'.⁸⁸

Luther's strained efforts to utterly reject the Thomist tendency to value human efforts over God's grace⁸⁹ renders his doctrine more amenable to mandating

⁸¹ Martin Luther, *Luther's Works (LW)*, 36:248.

⁸² Berman, above n 77, 177-182.

⁸³ VanDrunen, above n 39, 2.

⁸⁴ Berman, above n 77, 177-178.

⁸⁵ Ibid 180.

⁸⁶ Zimmermann, above n 28 (Butterworths, 2012) 14.

⁸⁷ Note, some view this as a misnomer as essentially, there is only one Kingdom, the Kingdom of God; however, a better understanding of what Augustine defines as Christian freedom may resolve this. He describes true freedom as spiritual discernment to see the Beauty of God and love God more fully; what logically flows from this is a desire to do God's will. Whether a believer or non-believer, the truth therefore remains unchanged that God is self-evidently good and therefore, worth pursuing for His own sake. Whether we choose to pursue this joy or not is left to us. Note C.S. Lewis' reflection on free will, 'For you will certainly carry out God's purpose, however you act, but it makes a difference to you whether you serve like Judas or like John.' See C.S. Lewis, *The Problem of Pain* (Harper Collins, 2002); St. Augustine, above n 49, V: 7.

⁸⁸ Berman, above n 77, 177-178.

⁸⁹ 'The temporal power is but a very small matter in the sight of God, and too slightly regarded by Him for us to resist, disobey, or become quarrelsome on its account, no matter whether the state does right or wrong. But on the other hand the spiritual power is an exceedingly great blessing and much too precious in his sight for the very

individuals' compliance with civil laws on the basis that temporal laws have been ordained by God.⁹⁰ Therefore, underlying Luther's theory of the 'uses of the law' in the temporal realm is his rather convenient and potentially loaded assumption that the princes (or rulers) are Christians themselves.⁹¹ By separating the heavenly and earthly kingdoms, Luther seems to relegate natural law to the shadows of temporal law. Hence, through Luther's version of the Two Kingdoms doctrine the connection between religion and law is able to be later preserved in the prince.⁹² This contrasts sharply with Augustine's version of the doctrine, as discussed above.

Unfortunately, the practical implication of Luther's natural law theory is that Lutheranism did not facilitate a complete break from the Roman Catholic tradition of positing legal and political authority in a human lawmaker.⁹³ Instead, by assuming and thereby elevating the conscience and integrity of the ruler whilst simultaneously stressing the depravity of the subjects to be ruled, authority was concentrated in a single human lawmaker or an exclusive group of lawmakers.⁹⁴ Lutherans like Johann Oldendorp (1486-1567) traced all laws for ordering the earthly kingdom⁹⁵ to the Fourth Commandment ('Honor thy father and mother' – the prince being the parent).⁹⁶ Thus, it is the way that Lutherans framed 'God-ordained legal authority' which appears conducive to German legal positivism which was to rear its head in successive years.⁹⁷ The Lutheran Reformation therefore not only enhanced immeasurably the authority of the prince but also of the prince's official retinue, the *Obrigkeit*.⁹⁸ In short, the legal reformation in 1500s in Germany may have partly facilitated the transference of authority from the Holy Roman Empire to the German Emperor, importing Nationalistic fervour along the way. Though this transfer post-dated the Lutheran movement, it cannot be entirely divorced from Lutheranism.⁹⁹ It is a paradox therefore that through its tendency for 'systematic legal codification' as well as its inherently 'utilitarian' view of law, Lutheranism may be viewed as being largely congenial to modern legal positivism.¹⁰⁰

least of Christian men to suffer silently when it deviates one hairsbreadth from its proper function.' See Martin Luther, *Treatise on Good Works* [1520] LW 44:93.

90

Ibid.

91

Berman, above n 77, 177-178.

92

Ibid 187.

93

'Emphasis is on the direct duty imposed on all human rulers by divine will 'to maintain discipline, judgment, and peace in accordance with the divine commandments and rational laws of the land.' The logical deduction from this is that all humans should be subject to the rule of the Prince. See Philip Melancthon, *Compendaria Dialectices Ration* (1520), XX: 615.

94

Berman, above n 75, 65.

95

Weltliches Regiment, 'the secular regime'.

96

Berman, above n 77, 192.

97

Ibid 188.

98

Ibid 187.

99

William J. Wright, *Martin Luther's Understanding of God's Two Kingdoms* (Baker Academic, 2010) 31.

100

Berman, above n 77, 187.

2 JOHN CALVIN (1509-1564)

By general consensus, Calvin (1509-1564) is recognised as a ‘one of the greatest but also, one of the most controversial Christian leaders who ever lived’.¹⁰¹ Calvin’s works extensively tailored the Protestant Reformed teachings, capitalising on the momentum initiated by his Reformist predecessors – most notably, Luther. His works, including his *Institutes of Christian Religion*, continue to be required reading for ministers and his commentaries continue to be the most read after the New Testament writers.¹⁰² Calvin was not valued for originality as was Augustine, Aquinas or Luther; nevertheless, no one individual can be considered his equal in lending clarity and coherence to the Christian message.¹⁰³ It is in this respect that Calvin’s works emerge as possibly the richest and most comprehensive source of Reformed Christian natural law theory.

The ‘absoluteness or sovereignty of God’ was central to Calvin’s theology. ‘Nothing mattered more to Calvin than the supremacy of God over all things’.¹⁰⁴ This idea was not new. His predecessors all shared it. However, it was Calvin who successfully refined and systemised the theology. Equipped by his constancy and ‘unremitting zeal’, as well as his outstanding intellectual and reasoning abilities, Calvin made his theology workable.¹⁰⁵ Calvin made his loyalty public in 1539, in a scathing response to Cardinal Sadolet, who had written to the leaders in Geneva with the objective of winning them back to the Catholic Church. Upon reading Calvin’s letter, Luther said, ‘Here is a writing which has hands and feet. I rejoice that God raises up such men.’¹⁰⁶ Calvin’s interaction with Sadolet is significant because it reveals the root of Calvin’s opposition to the Catholic Church. He is not preoccupied with the usual ‘sticking points’ of the Protestant Reformation (its attack of the Catholic Church’s priestly abuses, papal authority, selling of indulgences and so on). Calvin goes straight to the heart of the issue: God must be supremely glorified in all things. He argued that even Sadolet’s attempts to reinvigorate the people’s ‘zeal for the eternal’, virtuous and just as they appeared, effectively worked to displace God’s rightful position as the object of all glory.¹⁰⁷

This ‘supremacy of God’ concept translates faithfully into Calvin’s theory of natural law. Prior to becoming a theologian and a reformer, Calvin was a law graduate from the University of Bourges in 1528.¹⁰⁸ As a legal scholar and lawyer, Calvin was a

¹⁰¹ John Piper, *John Calvin and his Passion for the Majesty of God* (Crossway Books, 2009) 7.

¹⁰² Ibid 8.

¹⁰³ Ibid.

¹⁰⁴ Piper, above n 41, 115.

¹⁰⁵ Ibid.

¹⁰⁶ Henry F. Henderson, *Calvin in his Letters* (J. M. Dent and Co., 1909) 68.

¹⁰⁷ John Calvin, ‘Reply by John Calvin to Letter by Cardinal Sadolet to the Senate and People of Geneva in *Tracts, Part I*, vole. 1 of *John Calvin: Tracts and Letters*, ed. and trans. Henry Beveridge (Calvin Translation Society, 1844) 25-68.

¹⁰⁸ Zimmermann, above n 28 (Butterworths, 2012) 19.

proponent of the idea that natural law would constitute absolute principles that ought to be universally and enduringly applied all society and individuals. Like his predecessors, Calvin believed that natural law had been written on the hearts of all humankind by God in the form of their consciences, although full comprehension was inaccessible in our fallen states.¹⁰⁹ Calvin concluded that in order to resolve this problem, God made the most important precepts of natural law accessible through the written Word of God to teach us more fully and more perfectly about natural law.¹¹⁰ Like Luther before him, Calvin believed in the role of the law to ‘exhort’ both believers and non-believers alike to ongoing obedience. However, he did so within clear limits.

Calvinism advances the idea that power cannot be centralised in a single entity without risk of abuse.¹¹¹ However, Calvin’s separation of temporal and heavenly realms does not translate to a neat separation between God and state.¹¹² Thus, Calvin’s ‘reluctant’ involvement in the killing of Michael Servetus does not constitute a documented lapse in his theology. Rather, Calvin’s theological affinity with Augustine — his emphasis on the ‘supremacy of God’ — upholds the transcendence of the laws of the eternal kingdom above temporal laws thereby subjecting human laws to the laws of God for their validation. Therefore, Calvin’s philosophy represents a move back towards an Augustinian version of the Two Kingdoms doctrine, with its strong emphasis on divine authority, and away from the emphasis on the inherent authority of civil law found in both Aquinas and Luther.¹¹³

IV. The tenets of Calvinist natural law

What then are the distinctive features of a ‘Calvinist’ account of natural law? This question involves exploring both what Calvin’s particular account of natural law entails and its significance to his overarching theology.¹¹⁴ At this point, it is useful to map out the divergent interpretive routes that have originated from Calvin’s natural law theory as noted by scholars of reformed social thought, such as David VanDrunen. VanDrunen mentions the emergence of two principal strands of Calvinist natural law

¹⁰⁹ John Calvin, *Institutes of the Christian Religion*, II.ii.12 & 1.3.

¹¹⁰ *Ibid* 8.1.

¹¹¹ Zimmermann, above n 28 (Butterworths, 2012) 18.

¹¹² John W. de Gruchy, *John Calvin: Christian Humanist and Evangelical Reformer* (Wipf and Stock Publishers, 2013) 107-111.

¹¹³ Aquinas and Luther both had their own political philosophies providing for limited government. However, this article specifically concerns the constitutional ideals that may be derived from or that bear semblance with Calvin’s theological position. A full discussion of Aquinas’ and Luther’s positions is therefore beyond the scope of this article.

¹¹⁴ Richard A. Muller, *The Unaccommodated Calvin: Studies in the Foundation of a Theological Tradition* (Oxford University Press, 2000); Susan E. Schreiner, ‘Calvin’s Use of Natural Law’, in Michael Cromartie (ed), *A Preserving Grace: Protestants, Catholics and Natural Law* (Wm. B. Eerdmans Publishing, 1997).

theory.¹¹⁵ Proponents of the first strand typically view Calvin's natural law theory as being peripheral to and possibly inconsistent with his larger theology. They highlight the apparent discontinuities between Calvin's natural law theory and the theory of both his Thomist predecessors and his Reformed successors. Proponents of the other strand of interpretation espouse the continuity of Calvin's natural law theory with both medieval scholarship and the Reformation, upholding it as crucial to Calvin's larger theology.¹¹⁶

In order to understand Calvin's natural law theory, we must understand the complex design of theological concepts that inform his epistemic position.¹¹⁷ It is also necessary to place Calvin's theory in a wider historical context. The mission of lending clarity to Calvinist natural law is therefore a perilous one, raising deeper contextual questions.¹¹⁸ For instance, even regarding a simple concept like humankind's ability to access natural revelation, Calvin appears at first glance to contradict himself. While Calvin speaks negatively of humans' knowledge of natural law as irremediably obscured by sin, he remains openly optimistic that every human being has access to natural laws as 'engraved upon their hearts'.¹¹⁹ How are such apparently contradictory remarks to be reconciled? Calvin does this simply and elegantly. Every seeming discrepancy is unravelled by his confidence in the supremacy of God. However, the devil lies in the details.

A. THE SOVEREIGNTY OF GOD

One thing is common to all of Calvin's formulations of natural law, namely, the sovereignty of God. This recurring emphasis on God's ultimate sovereignty places Calvin in a line of thought stretching back to Augustine. The way in which divine sovereignty is expressed in Calvin's theory also serves to distinguish him from Aquinas. T. H. L. Parker notes the 'complete intellectual reversal necessary before [Calvin] could confidently and joyfully understand the knowledge of the relationship between subject and object ... and that the intellect, far from moulding the object, is itself formed to the capacity of the knowledge of the object by the object itself.'¹²⁰

However fragmented or inconsistent Calvin's statements may appear in isolation, a closer examination of the theological context in which they were made reveals that Calvinist natural law finds sense in this emphasis on God's sovereignty.¹²¹ It is the self-evident goodness of God's character that brings cohesion to all forms of

¹¹⁵ VanDrunen, above n 39, 94.

¹¹⁶ Larry D. Sharp, 'The Doctrine of Grace in Calvin and Augustine' [1980] 52 *The Evangelical Quarterly* 84, 94.

¹¹⁷ Pryor, above n 117, 225, 241.

¹¹⁸ Schreiner, above n 118, 77.

¹¹⁹ Calvin's Commentaries on Romans 2:14-15; Jeremiah 31:33.

¹²⁰ T.H.L. Parker, *John Calvin: Biography* (J.M. Dent & Sons Ltd, 1975) 12.

¹²¹ Pryor, above n 117, 225, 241.

wisdom.¹²² Flag-bearers of the Thomist tradition of natural law — including Aquinas and his modern successors, most notably Finnis — are guilty of both downplaying and overlooking this aspect of Christian natural law.¹²³ It is not that Aquinas and his followers deny God’s ultimate sovereignty, but the way the Thomist tradition divides the normative realm into distinct fields contrasts with the unity Augustine and Calvin derive from God’s supremacy as the source of all transcendent norms.¹²⁴ This principle therefore represents the great divide between Thomist and Calvinist interpretations of natural law.

1. A Matter of Emphasis: Basic Goods or The Ultimate Good?

Aquinas lays down as the absolutely first principle for his theory on practical reason, ‘Good is to be done and pursued, and bad avoided’.¹²⁵ Each of the basic forms of good characterising Aquinas’ natural law possess this ‘primariness’ which Aquinas refers to as ‘basic’ (*primum*).¹²⁶ The first principles of practical reason identified by Aquinas are marked by both self-evidence (*per se notum*)¹²⁷ and undeducibility (*indemonstrable*).¹²⁸ Aquinas’ theory aligns with Augustine in the extent to which it emphasises the universality of human goods. However, whereas Augustine emphasises the divine origin of the goods, Aquinas emphasises their self-evidence from the standpoint of human reason. Aquinas’ theory therefore has an inherent disposition to foreground human understanding of the ‘good’ rather than its transcendent origins.

Aquinas further notes both that humans may differ in their understanding of the good and that they may participate in the good in quite different ways. This does not mean that the ‘good’ is normatively subjective rather than objective. It is not that some goods are more self-evident than others, but it may allow the latitude to suggest that different people may have different ways of participating in the goods, notwithstanding their self-evident nature.¹²⁹ This point provides a further illustration of how Aquinas emphasises human understanding of the goods as opposed to the ultimate unity of purpose reflected in their transcendent origins.

2. Calvin’s First Principles

Aquinas’ focus on the human understanding of the ‘basic goods’ shifts the emphasis from the ultimate good to the limited and often flawed human understanding of the

¹²² William F. Keesecker, *The Law in John Calvin’s Ethics in Calvin and Christian Ethics* (Peter De Klerk ed., Calvin Study Society, 1987) 19,20.

¹²³ Aquinas, above n 26, I, q. 79, a.12-13; Irena Backus, ‘Calvin’s Concept of Natural and Roman Law’ [2003] 38 *Calvin Theological Journal* 7, 12.

¹²⁴ Jean Bethke Elshtain, *Sovereignty: God, State, and Self* (Basic Books, 2008) 8, 17, 87-90; St. Augustine, above n 49, XIX; Calvin, above n 109, IV:xx.

¹²⁵ Aquinas, above n 26, I-II, q. 94, a. 2.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid* I-II, q. 94, a.3; R.S. Clark, ‘Calvin on the Lex Naturalis’ (1998) 6(1-2) *Stulos Theological Journal* 1, 4.

¹²⁹ Aquinas, above n 26, I-II, q. 91, a. 3.

good. This is not to say that the Thomist approach refutes the idea of God as the ultimate source of the good, but rather that it has the unavoidable implication of elevating the role that human beings play in the determination of what subject matter constitutes natural law. In contrast, Calvin begins *The Institutes of the Christian Religion* with the confident declaration that ‘nearly all wisdom we possess, that is to say, true and sound wisdom, consists of two parts: the knowledge of God and of ourselves.’¹³⁰ At first glance, the difference may appear trivial. But like isolated organisms that multiply at an exponential rate in their habitat, the subtle differences between Calvin and Thomist interpretations of natural law leave lasting impressions when applied in context.

First of all, the obvious difference between the two approaches lies in *the order*. To Aquinas, God is the end of human participation, whereas for Calvin God is the starting point. Where Aquinas sees God as the ‘unity of all goods’, Calvin sees God as the ‘transcendent good’, the normative means and the ideal end for which we strive. Following from this then is Calvin’s ‘first principle’ of natural law: that everything is derived from a single and paramount ‘good’ which is God Himself.¹³¹ The second component, inextricably related to the first, is that this ‘good’ is sourced in the unity of God’s nature.¹³² Based on this emphasis then is the fundamental natural law idea that all other human laws are necessarily derivatives from a transcendent moral source. According to Calvin, the first component of Christian natural law, that everything is derived from God, asserts God’s omnipotence, while the second component asserts God’s righteousness.

In dealing with the first component, Calvin gives prominence to the will of God. This emphasis is reflected in his theological doctrines of *predestination* and *election*. Calvin wrote that ‘[God’s] will is, and rightly ought to be, the cause of all things that are. For if it has any cause, something must precede it [and] this is unlawful to imagine.’¹³³ Here, Calvin is asserting the eternal character of God. A sovereign God transcends the limits of time and as such, has no beginning and no end. The name Yahweh by which God makes Himself known to Moses¹³⁴ translates in Hebrew to mean ‘I am who I am’¹³⁵ and represents the transcendence marking the character of

¹³⁰ Calvin, above n 109, I.i.1.

¹³¹ William F. Keesecker, *The Law in John Calvin’s Ethics*, in *Calvin and Christian Ethics* (Peter De Klerk ed, Calvin Study Society, 1987) 19, 20.

¹³² ‘Therefore since God claims to Himself the right of governing the world, a right unknown to us, let it be our law of modesty and soberness to acquiesce in his supreme authority, regarding his will as our only rule of justice, and the most perfect cause of all things, - not that absolute will, indeed, of which sophists prate, when by a profane and impious divorce, they separate his justice from his power, but that universal overruling Providence from which nothing flows that is not right, though the reasons thereof may be concealed.’ See Calvin, above n 109, I.xvii.2.

¹³³ Ibid III.xiv.21.

¹³⁴ Ibid IV.xx.15.

¹³⁵ Exodus 3:14.

God.¹³⁶ What does this mean for natural law? It means that there is an objective, external standard by which all human beings are to be held accountable. This standard is atemporal, self-evidently powerful and ‘good’ in and of itself.

Aquinas’ conception of realism differs importantly from Calvin’s. The difference in their conceptions is most clearly manifested in Aquinas’ position on the ‘nature of the good’. Aquinas borrowed Aristotle’s ‘nomenclatures of causality’ to argue that the end for which a thing exists is the purpose for which it was built. In other words, everything has been created by God with an in-built *telos* so that, once created, God cannot further redefine ‘what is good for the thing’.¹³⁷ The assumption inherent in this idea is that God’s will for something corresponds with the real nature of the thing. By this categorisation, the Thomist tradition was able to assert a rational universe in which everything possesses the means to realise its own perfection. The ultimate source of moral values is the natural state of the good as opposed to the will of God as existing independently of the good.¹³⁸

On this point, C. S. Lewis¹³⁹ suggests that some goods are self-evident by virtue of the ‘Tao’, functionally equivalent to Aquinas’ first principles. In his words, any attempt to ‘debunk’ the ‘basic goods’ requires the assumption that the critics are speaking from a position itself immune from the ‘debunking’ process. The inquirers are thus in no better a position to argue than those they are opposing. What is backgrounded in the process of overstating the contention between the parties is notable. The transcendent good loses its status and is reduced to a mere by-product of human reason. Aquinas’ exaggeration of the role of humans in their participation with the ‘basic goods’ bears the potential of shifting the focus from the transcendent good to human participants.

Once again, the significance is in the order. Aquinas’ view upholds God’s character as the goal which humans may discover by observing the *telos* of everything else. Augustine and Calvin stand at odds with this position by maintaining that God’s will is not discoverable by its conformity to the rational ‘ecosystem of natures’ but rather exists as an independent and transcendent standard by which the good of everything else may be judged. In essence, Calvin’s rejection of Thomist realism is

¹³⁶ See John Calvin, *Commentary on the Gospel According to John 11-21* (1553) where Calvin writes with respect to Augustine’s realistic epistemology, ‘Augustine, who is excessively addicted to the philosophy of Plato, is carried along, according to custom, to the doctrine of ideas; that before God made the world, he had the form of the whole building conceived in his mind; and so the life of those things which did not yet exist was in Christ, because the creation of the world was appointed in Him. But how widely different this is from the intention of the Evangelist we shall immediately see’.

¹³⁷ Charles Taylor, *A Secular Age* (Stanford University Press, 2001) 773.

¹³⁸ Bemoaning the loss of the ‘sacramental perspective’ in the modern world, the idea that created objects find their reality and identity in God’s word. See Hans Boersma, *Heavenly Participation* (Wm. B. Eerdmans Publishing, 2011) 7.

¹³⁹ C.S. Lewis, *The Abolition of Man* (Harper Collins Books, 1971) Ch. 1.

because it contradicts the *logos* doctrine as revealed in the gospel of John, ‘In the beginning, there was the word and the word was with God and the word was God.’¹⁴⁰

According to this passage, Christ is not only a divine revelation of God’s grace but the *self-evident* embodiment of God’s communication to humanity — His logic, reason, clarity, order, definitions and concepts.¹⁴¹ Reason is therefore God given and divinely inspired, rather than representing a human path to understanding God and humanity’s own nature. In this way, while the Thomistic synthesis places heavy emphasis on the ‘proper good’, Augustinian scholars promote the *transcendence* of divine will as sourced in God’s righteous character. Rather than ascribing something to God’s will because it is ‘good’, Calvin sees God’s will and actions as existing independent of an *immanent* standard of ‘good’ and flowing from the goodness of His *eternal* character.¹⁴²

With this background in mind, Calvin’s account of natural law stands at odds with at least two main features characterising Aquinas’ thought. Firstly, Calvin does not identify natural law with human reason’s participation in God’s eternal law.¹⁴³ Aquinas, in his eagerness to systemise Augustinian thought, maintained that the deliverances of reason and divine revelation were consistent¹⁴⁴ and therefore frames the relationship between humans and God as one of metaphysical participation. However, according to Calvin, natural law is not the ‘semi-autonomous mediator’ between God and humanity in general¹⁴⁵ but rather it is the embodiment of God’s merciful character and an example of common grace provided to all human beings.

3. *The Unity of God*

A second tension between the Thomist and Calvinist conceptions of natural law flows on from the first. Calvin’s natural law does not see divine revelation as the fruit of the faculty of reason.¹⁴⁶ It is this component of Calvin’s natural law theory — the source of the good in God’s unified transcendence — which explains the difference in emphasis discussed above. It is by God’s merciful nature that we humans may access natural laws as ‘written on our hearts’¹⁴⁷ regardless of our faith in Christ’s salvation. As we will see in more depth in the following section, the natural consequence of sin was to impair human reason. Nonetheless, by God’s mercy, shown through common grace, humanity is *given* the freedom to access natural law to some extent.

¹⁴⁰ Calvin, above n 134; John 1:1.

¹⁴¹ ‘Every good gift and every perfect gift is from above, coming down from the Father of lights with whom there is no variation or shadow due to change’. See James 1:17; Chroust, above n 37, 57.

¹⁴² See generally C.S Lewis, above n 87.

¹⁴³ Aquinas, above n 26, I-II, q. 91, a. 3-5.

¹⁴⁴ Pryor, above n 117, 225, 225.

¹⁴⁵ Backus, above n 123, 12.

¹⁴⁶ Paul Helm, *John Calvin’s Ideas* (Oxford University Press, 2004) 117.

¹⁴⁷ John Calvin, *Commentaries on Romans* II:14-15.

By the same token, this freedom of choice holds humankind accountable to the transcendent laws of God. In this way, by starting with and emphasising God as the supreme source, Calvin's account of natural law reinforces the universal accountability of humans to a transcendent moral standard. This emphasis on the transcendent nature of normativity also informs Calvin's conception of God's nature and, in particular, his rejection of voluntarism. It is impossible for God to act without rule or reason according to the unity of His nature. This inner unity is what ensures that the natural law is consistent not only with the divine will but also with divine wisdom.¹⁴⁸

The unity of God finds expression in the natural law inscribed on the hearts of humans. This transcendent source of natural law inspires the workings of conscience and human reason. Reason is not the starting point to grasping the natural law, but represents a mechanism which God's common grace grants individuals in order to access natural law. Calvin's rejection of human participation as a model for human understanding of the good is therefore sourced in the notion that God's 'power is always conjoined to His justice'.¹⁴⁹ Calvin maintains in this regard, 'It is easier to dis sever the light of the sun from its heat, or for that matter its heat from fire, than to separate God's power from His righteousness.'¹⁵⁰ It is the omnipotence of God's will reconciled to His righteousness that become the bedrock for His providence.

Aquinas' emphasis on 'practical reason' and 'the nature of the good' leads him to focus on the good in human nature.¹⁵¹ This effectively marginalises the role of God in determining the content of natural law. On the other hand, Calvin's natural law theory begins with the transcendent character of God and asserts His supremacy. This means that regardless of the disfigurement to human nature as a consequence of the fall, by God's providence alone we are able to state that human nature remains sufficiently intact to allow for the flourishing of human society.¹⁵² By virtue of this formulation, Calvin is able to maintain the transcendence of an independent moral standard whilst remaining confident about its universal application to all humans at any point in time.

B. HUMANITY'S TOTAL DEPRAVITY

We have seen that Calvin's emphasis on the supremacy of God is fundamental to his understanding of natural law. We now embark on examining the reason for natural law's paramountcy. Like two sides of the same coin, on the flipside of the notion of the supremacy of God is the fact that nature does not possess ontological independence but is always dependent on God's will. This is the critical point at which Calvin departs from the doctrine of his Thomist predecessors. The Thomist notion of *analogical entis* (the 'analogy of being') assumes that inherent good remains common to both God and

¹⁴⁸ Calvin carefully maintained that in God's superiority to natural law his power is always conjoined with his justice. See Schreiner, above n 118, 78.

¹⁴⁹ Ibid.

¹⁵⁰ John Calvin, *Concerning the Eternal Predestination of God* (1552) X.12.

¹⁵¹ Aquinas, above n 26, I-II, q.91; Pryor, above n 117, 225, 236.

¹⁵² Pryor, above n 117, 225, 245.

humanity.¹⁵³ In contrast, Calvin's emphasis on God's supremacy for his natural law invariably foregrounds the contingent reality of the depravity of human nature.

Although, in the beginning, God created all things to be good, harmonious and orderly, the result of original sin was to render nature at all times thereafter, in whichever state, irreparably corrupted.¹⁵⁴ Natural law cannot be derived from human standards but is completely measured by and constituted in God's divine character.¹⁵⁵ This is the state of affairs on the kingdom of earth. And this is precisely the reason that human nature and reason in their fallen state *ought not* to be conflated with the perfect will of God.¹⁵⁶ By following closely in Augustine's footsteps, humanity's total depravity has become the cornerstone for Calvin's natural law theory.

1. *The Source of Natural Law*

Calvin situated his natural law in the broader context of God's sovereignty. He identified natural law with both God's divine will and God's divine character. Up to this point, Calvinist and Thomist natural law bear substantive semblance. Both appear to have insisted on the inseparability of divine will and divine character. We might call this the *unity principle*.¹⁵⁷

Calvin's natural law thesis is fundamentally characterised by the doctrine of total depravity based on Romans 3:10-12: 'None is righteous, no, not one: no one understands; no one seeks for God. All have turned aside; together they have become worthless, no one does good, not even one.' Calvin makes clear that the depravity of humanity is extensive, even total in the sense that we are entirely incapable of self-redemption. There are severe limitations on the 'human ability to correctly interpret natural events and human history'.¹⁵⁸ In conceiving human culpability and divine sovereignty as congruent, Calvin openly prefers *divine revelation* over *human reason* as the basis for his *lex naturalis*. This means that Calvin, like John Locke,¹⁵⁹ F. A.

¹⁵³ Aquinas, above n 26, I-II, q.25, a.3; *Ibid* 237.

¹⁵⁴ Calvin, above n 109, II.viii.1.

¹⁵⁵ Keesecker, above n 122, 19, 20.

¹⁵⁶ See Susan E. Schreiner, *The Theatre of His Glory: Nature and Natural Order in the Thought of John Calvin* (Labyrinth Press, 1991) 78.

¹⁵⁷ 'Therefore since God claims to Himself the right of governing the world, a right unknown to us, let it be our law of modesty and soberness to acquiesce in his supreme authority, regarding his will as our only rule of justice, and the most perfect cause of all things, - not that absolute will, indeed, of which sophists prate, when by a profane and impious divorce, they separate his justice from his power, but that universal overruling Providence from which nothing flows that is not right, though the reasons thereof may be concealed.' See Calvin above n 109, I.xvii.2

¹⁵⁸ Pryor, above n 117, 225, 245.

¹⁵⁹ John Locke, *An Essay Concerning Human Understanding* (1989).

Hayek,¹⁶⁰ and many other jurists who succeeded him, accepts the severely limited character of human reason as the basic reality shaping legal and political institutions.

In contrast, Aquinas retains confidence in the natural abilities of humans to be rational beings with a ‘natural inclination to do good’ (*incinatio ad bonum*) which he claims to be a proper human attribute. According to Aquinas, humanity’s natural tendency to act according to reason as tethered to the ‘common precepts’ which guide them to virtue together encompass the natural law. The doctrine of imputed righteousness which is foundational to Calvin’s theology is largely missing from Aquinas’ natural law¹⁶¹. Inherent to Calvin and Luther’s epistemology was the recognition that humanity could only ever become righteous through imputation because righteousness could only emanate from the ultimate ‘perfect good’, that is, God Himself. In contrast, the Thomist notion that all human beings have access to eternal law, naturally, by virtue of their rationality, toys with the risk of conflating the descriptive and normative dimensions of natural law. This conflation may, in turn, culminate in the danger of confusing human reasonableness with transcendent morality.

Although Thomist and Calvinist approaches to natural law all assert that humans possess consciences by virtue of our nature — ‘the divine law is etched upon human hearts’¹⁶² — Calvin’s commitment to the depravity doctrine means that he even attributes ‘limited human conscience’ to God’s grace. The discontinuity between Thomist and Calvinist approaches to natural law is therefore a matter of degree regarding humanity’s potential to capitalise on our natural awareness and understand the precise content of transcendent moral norms. Nonetheless, this slight difference has far-reaching implications.

2. *Human Nature and Natural Law*

Calvin attributes our residual capacities to *know* and *act upon* the truth by exploring our consciences to God’s divine character expressed through common grace.¹⁶³ By emphasising God’s divine character as the source of our consciences, Calvin views the conscience as a means of keeping us universally and ultimately accountable to God. How, then, does Calvin deploy the concept of natural law?

Calvin premises the foundation of natural law on two grounds. Firstly, Calvin asserts that natural law exists naturally. It is derived from human nature as part of God’s creation. In deriving natural law from human nature, as afforded to us by God, Calvin does not consider the contingent fact of human sociability as directly relevant to

¹⁶⁰ See Frederick A. Hayek, ‘The Use of Knowledge in Society’ (1945) 35 *American Economic Review* 519.

¹⁶¹ Charles Raith III, ‘Theology and Interpretation: The Case of Aquinas and Calvin on Romans’ (2011) *International Journal of Systematic Theology* 13-17.

¹⁶² Calvin, above n 109, II.iii.6; See Budziszewski, above n 30, 184-186.

¹⁶³ Calvin, above n 109, II.ii.16; See John Hesselink, *Calvin’s Concept of Natural Law* (Pickwick Publications, 1992) 70-71.

the substance of the natural law. Calvin admits the obvious fact that humans are social beings, but he does not accept the notion that humans can be credited with the creation of natural law simply because they are social. Instead, he declares that God has engraved the natural law upon the hearts of all humans, albeit to an imperfect extent. This aspect of Calvin's theory therefore contrasts with jurists like Samuel Pufendorf and Lon Fuller who view natural law mainly as a response to the challenge of social coordination.¹⁶⁴

Second, natural law is not merely an order in the human mind, but reflects the overall condition of fallen human nature. Rather than restricting natural law to the faculty of human reason, Calvin makes it 'part and parcel' with human nature in its entirety.¹⁶⁵ In other words, Calvinist natural law alludes to a state in which all human beings find themselves. Not only was human reason corrupted when humans fell from grace, but the whole natural order suffered as a result of the fall. 'Nature suffers the disordering effects of sin and, while reason remains common to all people, it is corrupted... the results of even correct judgments are vitiated by a corrupt will.'¹⁶⁶ Calvin therefore identifies the navigational core of human existence primarily with the exercise of the will rather than with the human mind's participation in divine reason.

Calvin's emphasis on humanity's fall from grace leads him to conclude that even where corrupt will results in correct judgment for a single matter, its concupiscence overflows. Natural law for Calvin ultimately functions as God's bridle for humankind, to curb our descent into bestiality.¹⁶⁷ According to this postulation, the role of natural law is (loosely) twofold:

- To restrain humans from descent into bestiality; and,
- To inspire humans to strive for the transcendent good.

Calvin's primary emphasis therefore falls upon the pursuit of the ultimate transcendent good, whereas all other subsidiary goods are enjoyed incidentally to this process. This contrasts with Aquinas' view, whereby human participation in the several discrete modes of good enables us to progressively develop our understanding of God through the exercise of our natural capacity for reason.

3. Descriptive and Normative Functions Of Natural Law

¹⁶⁴ Samuel Pufendorf, *De jure Naturae et gentium libri octo* (Clarendon Press, 1934) 205; Fuller, above n 6.

¹⁶⁵ Calvin appears to identify the heart more closely with the will. Not only does this mean that natural law encompasses the sentimental capacity of human beings but it also upholds it on equal terms with human rationality (Unlike Aquinas' emphasis only on human reason). See generally Lewis, above n 137.

¹⁶⁶ Gunther H. Haas, *The concept of Equity in Calvin's Ethics* (Wilfrid Laurier University Press, 1997) 70.

¹⁶⁷ Pryor, above n 117, 225, 251; Calvin, above n 109, II.iii.3.

The emphasis on the total depravity of humans in Calvin's natural law theory renders humility the only appropriate response.¹⁶⁸ Calvin, quoting Augustine, concludes that '[b]ecause we do not know all the things which God in the best possible order does concerning us, we act solely in good will according to the law'.¹⁶⁹ Even before addressing the full implications of the fall for the order of the human mind, we can see Calvin turn his attention to the need for God's revealed law. Due to God's common grace, by divine design, a minimal level of order has been provided to the world. Luther inspired Calvin to a significant degree in this regard. Luther places 'rather more emphasis on the extent to which man understands natural law was darkened by the fall' and he 'tends in particular to emphasise the identity between natural law and Decalogue or the two commandments of Christ'. Commenting on Romans 2.12 (*sine lege peribunt*),¹⁷⁰ Luther said

Natural law is impressed upon all people, Jews and Gentiles, and to this law, all people are bound. Therefore the Lord says in Matthew 7:12, 'Whatever you wish that men do to you, do so to them: for this is the Law and the Prophets.' You see, the whole transmitted law is nothing but the natural law, which cannot be unknown to anyone and on account of which no one can be excused.¹⁷¹

Flowing from this descriptive analysis are three interdependent and critical components of natural law:

Universal knowledge of right and wrong (conscience);

Universal inexcusability of every human (universal accountability);

Through free will, God has equipped humans with the basic means to pursue natural law and natural justice and this pursuit can, in turn, only be illuminated fully by God through revelation (ie faith).

Calvin defines natural law by its purpose. He draws a clear separation between the descriptive and normative components of natural law. 'The purpose of natural law is to render men inexcusable. This would not be a bad definition: natural law is that apprehension of conscience which distinguishes between the just and unjust, and which deprives men of the excuse of ignorance, while it proves them guilty by their own testimony'.¹⁷² The conscience is not the standard by which right and wrong is adjudged but, rather, the instrument by which we may know and pursue justice and the basis which renders all inexcusable from accountability.

¹⁶⁸ Calvin, above n 109, II.ii.11.

¹⁶⁹ Ibid I.xiii.2.

¹⁷⁰ 'For all who have sinned without the law will also perish without the law and all who have sinned under the law will be judged by the law.' See Romans 2:12.

¹⁷¹ Martin Luther, above n 81, 25:180; Clark, above n 128, 11-12.

¹⁷² Calvin, above n 109, II.ii.22.

This emphasis on a transcendent norm presupposes human limitation and therefore properly warrants our humility. Instead of placing emphasis on individual rights, Calvin's analysis acknowledges the eminence of individual responsibility. Calvin's evaluation of the extent of corruption of human's natural capacities reveals that human minds and abilities to reason are not completely incapacitated, but if left unchecked are inclined to invariably go awry. '[E]ven though something of understanding and judgment remains... we shall not call a mind whole and sound that is both weak and plunged into deep darkness.'¹⁷³ According to Calvin, sin renders the human mind significantly incapacitated. By virtue of our inherent humanity, this line of reasoning places emphasis on our duties to others before God, over an unhealthy fixation on our own rights by means of self-justification.

4. The Extent of Impairment: Common Grace and Divine Grace

Calvin holds that the human will is extensively impaired but not to the extent that it is reduced to less than animals.¹⁷⁴ Though he emphasises the limits of humans' truth-identifying capacity in general, the degree varies significantly with the object of consideration.¹⁷⁵ With respect to heavenly things, the impact of sin on human reason becomes more pronounced than in regards to earthly things.¹⁷⁶ The symptom of degenerate human reason is erroneous judgments, but this propensity to error is not the primary reason for futility. Rather, impiety is the main basis of reason's futility.¹⁷⁷ Depraved consciences when they reason invariably 'divert reason's power of judgment from its divinely appointed end'.¹⁷⁸ The inherent fallibility of human reason is due to the fallibility of humans themselves and not merely to defects in their reasoning processes. Human reason therefore can only achieve an imperfect understanding of the good.

Calvin, although remaining realistic about the limitations of natural law absent the recognition of God's 'divine grace',¹⁷⁹ does not preclude the role of natural law based on common grace.¹⁸⁰ Though commentators like Hittinger lament the limited force of natural law outside a Christian theological discourse,¹⁸¹ this is not necessarily true. A closer look at Calvin's jurisprudence should reveal that civil laws are required to bridle humanity's inherent depravity. Civil laws are thus grounded in natural law in a descriptive sense. This is because civil laws ought to only be valid insofar as they are consistent with the moral requirements of natural law.

¹⁷³ Ibid II.ii.12.

¹⁷⁴ Ibid II.ii.17.

¹⁷⁵ Ibid II.ii.13.

¹⁷⁶ Ibid II.ii.18.

¹⁷⁷ Pryor, above n 117, 245.

¹⁷⁸ Ibid 245; Calvin, above n 109, II.ii.25.

¹⁷⁹ Calvin, above n 109, II.ii.24.

¹⁸⁰ Clark, above n 128, 1-22.

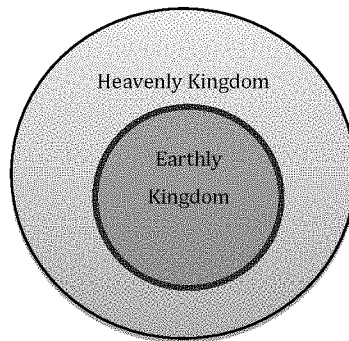
¹⁸¹ 'Premises or conclusions even remotely theological (natural or revealed) are unacceptable for public purposes.' See Hittinger, above n 23, xvii-xviii.

The idea of common grace further distinguishes Calvin's natural law tradition from the Thomist tradition. 'God by his providence bridles perversity of nature that it may not break forth into action; but he does not purge it within.'¹⁸² What Calvin means by this is that the redemptive nature of common grace is subject to obvious limits.¹⁸³ Without paying homage to God, the human instinct of self-preservation is not sufficient to enable us to reach moral perfection.¹⁸⁴ In other words, God's common grace governs the worst of human corruption, acts as the minimal check on human arbitrariness, but does no more. Positive laws, unless they appeal to a higher law, cannot expect to remain morally sound. In this context, natural law has a critical role to play.

C. THE UNITY OF THE TWO KINGDOMS

Augustine emphasises that we must always affirm the supremacy of the heavenly kingdom over the earthly kingdom, reflecting the ultimate supremacy of divine authority over all forms of earthly authority.¹⁸⁵ The earthly authority, in this sense, always owes its force to the extent to which it is based on divine will. It is important to bear in mind that the distinction between the heavenly and earthly kingdoms is quite different from the separation of church and state.¹⁸⁶ Church and state are both human institutions with a role to play in governing human communities. Ultimately, however, both church and state are elements of the earthly kingdom and must be conceived as limited and directed by conformity with a transcendent moral norm. Calvin postulated that God is sovereign: he rules both church and state and in this sense both are entities predicated upon His authority. The earthly kingdom, thus conceived, falls under God's transcendent authority and therefore lies within the broader heavenly kingdom (as illustrated by fig. 1).

Fig. 1



¹⁸² Calvin, above n 109, II.iii.3.

¹⁸³ For more comprehensive discussion of Calvin's views on 'common grace' see Herman Kuiper, *Calvin and Common Grace* (Smitten Book co., 1928).

¹⁸⁴ Calvin, above n 109, II.ii.24.

¹⁸⁵ St. Augustine, above n 49, XIV:28.

¹⁸⁶ VanDrunen, above n 39, 113.

The distinction Calvin emphasises most strongly in this context is a distinction between spiritual and natural laws. His separation of the Two Kingdoms is significant mainly in explaining the theological requirement for conscientious living in a fallen world, all the while keeping the concerns of the heavenly kingdom at the fore of one's mind. In this sense, the partition between the Two Kingdoms is not spatial or even temporal. Rather, they often exhibit fluidity in transition and are definitely not mutually exclusive.¹⁸⁷ For one thing, the post-Eden state of the world not only encompasses the fall of human beings, but alludes to the state of an entire natural order. In this sense, natural laws encompass the reality of a fallen state, as well as moral laws pertaining to this order.

In Romans 8:22, Paul states, 'For we know that the whole creation has been groaning together in the pains of childbirth until now'.¹⁸⁸ This demonstrates that the fallen state of humankind extends to the whole of 'creation'. By comparison, spiritual laws represent Christ's work of redemption through which the pursuit of the kingdom of heaven is made possible. The phrase 'until now' in the verse demonstrates that redemption is in a state of flux. In this way, Calvin's natural law can be seen as characterised by a forward-moving motion. Fixing our eyes on the kingdom of heaven, believers are encouraged to run 'forward' mindful of the 'author' and 'perfector' of our faith.¹⁸⁹ A sharp antithesis between the Two Kingdoms fails to encapsulate the forward-moving character or continuum inherent in Calvin's natural law as well as the role he envisages for it in the present.

Thus, the 'Two Kingdoms' language employed by both Calvin and Augustine does not so much refer to two separate realms in spatial terms¹⁹⁰ but alludes to the 'twofold form of governance' by God over the conduct of believers in whom the two jurisdictions co-exist.¹⁹¹ Reformist scholars like VanDrunen may have mistakenly interpreted Calvin's 'Two Kingdoms' doctrine in terms of the inward and external dichotomy.¹⁹² The internal and external dichotomy has been used by some scholars of the Two Kingdoms theory to discriminate between the inward spiritual obedience of believers to God and the external obedience by them to the civil government. However, this dichotomy is misleading.

¹⁸⁷ G. Joseph Gatis, 'The Political theory of John Calvin' in Timothy J. Denny and Gary P. Stewart (eds), *Politics and Public Policy: A Christian Response* (Kregel Publications, 2000) 97, 97-98.

¹⁸⁸ ESV Romans 8:22.

¹⁸⁹ ESV Hebrews 12:2.

¹⁹⁰ Cornel Venema, 'The Restoration of All Things to Proper Order: An Assessment of the "Two Kingdoms/Natural Law" Interpretation of Calvin's Public Theology' in Ryan C. McIlhenny (ed), *Kingdoms Apart: Engaging in Two Kingdoms Perspective* (P&R Publishing, 2012) 3, 13-14.

¹⁹¹ Calvin, above n 109, III.xix.15.

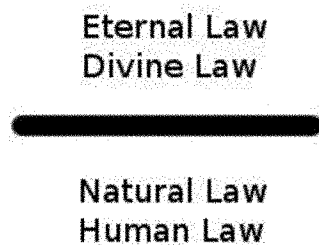
¹⁹² '[I]t is immediately evident that this twofold jurisdiction cannot be neatly divided, as VanDrunen maintains, between two comprehensive realms, the institutional church on the one hand, and other institutions and aspects of human life and culture, especially the state, on the other.' See Venema, above n 187, 3, 14.

The Two Kingdoms doctrine is better understood in terms of the difference between natural and spiritual laws with God at their helm — believers are subject to both the laws of fallen nature and the laws of Christ’s redemptive grace. The difference is that God governs these two spheres differently.¹⁹³ Insofar as this separation goes, the ‘Two Kingdoms’ terminology is a misnomer. By distinguishing between spiritual and natural laws, Calvin is acknowledging the unavoidable overlap between the external and internal spheres under the unity of God’s transcendent authority (what I described above as the ‘unity principle’).¹⁹⁴

1. Aquinas’ Grace-Nature Structure

Aquinas’ separation of eternal law, divine law, natural law and human law fails to capture the multi-dimensional nature of the relationship between the Two Kingdoms as explained above. Aquinas seems to understand the distinction between the divine realm (governed by God’s will) and the human realm (governed by reason) in terms of a division and hierarchy (fig. 2).

Fig.2



For example, Aquinas defines eternal laws in terms of ‘God’s providence and wisdom’¹⁹⁵ and the participation of all creatures with it in a way that is befitting their nature. In this way, some of Aquinas’ statements regarding the eternal law make his version of natural law appear exclusively about reason¹⁹⁶ in which grace plays no part. The separation of the ‘Two Kingdoms’ into a ‘grace-nature’ structure involves a degree of arbitrariness. The differences in Calvin’s and Aquinas’ views on the separation between natural and spiritual laws¹⁹⁷ have far-reaching implications for their natural law positions. An effective example is the different relationship of love and

¹⁹³ Calvin, above n 109, II.x.2.

¹⁹⁴ See above n 157.

¹⁹⁵ David VanDrunen, ‘Medieval Natural Law and the Reformation: A Comparison of Aquinas and Calvin’ (2006) 80(1) *American Catholic Philosophical Quarterly* 77, 91.

¹⁹⁶ Helm, above n 144, 372; Aquinas, above n 26, I-II, q. 90, a. 1.

¹⁹⁷ David VanDrunen, above n 191, 77, 96.

natural law as accepted by the two theologians.¹⁹⁸ To Aquinas, love, unlike human reason, is an essentially supernatural virtue which is attainable not by nature, but only through revelation by grace. In his view, the natural law includes reason while spiritual laws are primarily associated with the heavenly life (where virtues such as ‘love’ belong).

In this way, Aquinas overstates humans’ capacity to ‘reason’ at the expense of highlighting individuals’ dependency on and accountability to God. Calvin, on the other hand, upholds love as being prescriptive to his natural law, sourced in the unity of a perfect God. Further, the primacy of the relationship between God and individuals means that all humanity ought to be pursuing as well as presently engaging with this virtue.¹⁹⁹ Calvin’s focus on spiritual and natural laws, in this context, provides for a more accurate picture of the oscillating role of natural law between the descriptive and normative standards. In this sense, contrary to first impressions, Calvin’s Two Kingdoms doctrine renders his natural law substantively richer than Aquinas’ more rigid grace-nature structure.

2 *The Concept of ‘Authority’*

Calvin’s version of the Two Kingdoms doctrine is usefully understood in terms of a distinction between *power* and *authority* (or *de facto* and *legitimate* authority). If ‘power’ is defined as strength relative to another entity, then ‘authority’ is power legitimated by a valid source. In practice, ‘authority’ serves to limit the power to the bounds of what is legitimate. A power that is bereft of authority is merely *de facto*. According to the second passage in the *Institutes* 4.20.1, Calvin states:

Whoever knows how to distinguish between body and soul, between this present fleeting life and that future eternal life, will without difficulty know that Christ’s spiritual Kingdom and the civil jurisdiction are things completely distinct. Since, then, it is a Jewish vanity to seek and enclose Christ’s Kingdom within the elements of this world, let us rather ponder that what Scripture clearly teaches is a spiritual fruit, which we gather from Christ’s grace; and let us remember to keep within its own limits all that freedom which is promised and offered to us in him.²⁰⁰

When Calvin speaks of ‘Jewish vanity’ in this context, he points to the error committed by religious leaders who conflate ‘earthly’ power with ‘spiritual authority’. The spiritual fruit necessary to enter into the kingdom of heaven is only possible through faith in Christ’s redemptive power. In this sense, the heavenly kingdom represents the ideal ends for which the whole world ought to be striving but attainment of which is only possible through God.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Calvin, above n 109, IV.xx.1.

Accordingly, as the only true source of power is God, the exercise of power is ‘authorised’ only insofar as it is consistent with the spiritual laws. Calvin seeks to restore all things to their proper order through the idea of the sovereignty of God. Jesus’ famous riposte to the Pharisees’ question as to whose ‘authority’ they ought to obey, ‘Render to Caesar what is Caesar’s, and to God what is God’s’,²⁰¹ can be understood in this light. Calvin interprets Jesus as emphasising that believers have a legitimate obligation to obey the civil magistrates, but only out of reverence to a sovereign God who appointed them in the first place. In other words, ‘earthly laws’ are only legitimate insofar as they are in line with the ‘divine laws’, emphasising once again that all things stand by God’s sovereign will alone.

As Paul puts it, ‘Do not conform to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God’s will is – his good, pleasing and perfect will’.²⁰² Such verses capture the dimensions of Calvin’s natural law and give sense to his ‘Two Kingdoms’ doctrine. Civil magistrates have the task of ensuring that both tables of the law — the first table dealing with the service and worship of God and the second table addressing the mutual service of all human beings to each other — are honoured and obeyed.²⁰³ In this way, Calvin’s natural law prescribes that both ‘earthly’ and ‘heavenly’ powers, both church and state, both the internal and the external are all subject to God’s transcendent authority. Calvin limits the authority of the civil magistrate in recognition of the risk that it may usurp the distinctive prerogatives of the spiritual kingdom.

V. Implications for constitutionalism

This section aims to show how the normative foundations of Calvin’s natural law position provide support for constitutionalism. We noted above that the vexed question of abuse of power may be a result of conflating power, in the sense of strength, with the separate concept of authority, a legitimating force which in turn presupposes a transcendent norm. Calvin resolves this issue by depositing a transcendence and moral validity in the ‘sovereignty of God’, thereby neatly reconciling the alleged ‘discrepancy’ characterising his natural law thesis — the simultaneous insistence on the depravity of all humanity and the universal human accountability to a superior moral norm. Similarly, the philosophy of constitutionalism demands that the ‘powers’ of rulers be subject to limits. Another way to see this is that there is a requirement that the powers themselves must derive their authority from ‘enduring laws which the

²⁰¹ Mark 12:17; Matthew 22:21; Also see John Calvin, *Calvin’s Commentaries on Mark 12:17* xxi, where he says, ‘It lays down a clear distinction between spiritual and civil government, in order to inform us that outward subjection does not prevent us from having within us a conscience free in the sight of God.’

²⁰² NIV Romans 12:2.

²⁰³ Venema, above n 187, 3, 17.

rulers themselves cannot abrogate'.²⁰⁴ As such, 'constitutionalism is inextricably associated with the ideal of the Rule of Law'.²⁰⁵

A. THE RULE OF LAW

In one sense, the 'Rule of Law' refers to the existence of an authoritative legal standard which is used to determine the validity of all positive laws and, ultimately, constrain the behaviour of lawmakers and their subjects.²⁰⁶ In another sense, it refers to substantive requirements to which the power of all lawmakers and the laws they are credited with drafting are subject.²⁰⁷ In this way, the rule of law covers two primary conceptions: firstly, a formalist or 'thin' definition focusing on procedural limitations; and, secondly, a substantive or 'thick' definition importing notions of rights or justice.

Fuller's 'internal morality of law' is a useful starting point for a working definition of the rule of law. Although some have disputed the exhaustive nature of Fuller's formal requirements for law, there seems to be a general consensus that his 'eight principles of legality' successfully capture the essence of the Rule of Law,²⁰⁸ at least in the formal sense. Fuller identifies these eight requirements of the rule of law in his work, *The Morality of Law*,²⁰⁹ through the allegory of King Rex by illustrating the eight ways one can fail to make law. The internal morality of law is comprised of 'generality', 'promulgation', 'prospectivity', 'clarity', 'consistency', 'observability', 'constancy' and 'congruence'. Fuller argues that these requirements constitute the internal morality of law, absent which the law in question cannot be properly deemed valid.²¹⁰ As each one of these requirements is considered integral to the concept of law itself, a failure with respect to any one of them results in a complete failure to make law.²¹¹

Critics argue that the 'eight requirements of law' do not require that the substance of the law be morally sound.²¹² In other words, a morally repugnant law may potentially satisfy the 'internal morality of law' and may thus, be recognised as a valid law. Fuller further sub-divides the internal morality of law into moralities of duty and aspiration.²¹³ His morality of duty represents the minimum formal requirements

²⁰⁴ Ratnapala, above n 1, 1, 5.

²⁰⁵ Ibid.

²⁰⁶ Frederick A. Hayek, *The Road to Serfdom* (University of Chicago Press, first published 1944, 1994) 112.

²⁰⁷ A.V. Dicey who popularised the phrase 'rule of law' in the 19th century. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and co., 6th ed, 1902) 179.

²⁰⁸ Colleen Murphy 'Lon Fuller and the Moral Value of the Rule of Law', (2005) 24 *Law and Philosophy* 239, 242.

²⁰⁹ Fuller, above n 6, 39.

²¹⁰ Crowe, above n 65, 68.

²¹¹ Ibid 68-69.

²¹² H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 627-629.

²¹³ Fuller, above n 6, 5.

governing the process of lawmaking.²¹⁴ Conforming to the morality of duty does not attract praise; however, a failure to conform will result in criticism and potentially legal invalidity.²¹⁵ On the other hand, the morality of aspiration represents the higher ideals towards which legislators ought to aspire. They represent normative aims, achievement of which results in praise, while failures do not generally lead to criticisms.

Calvin's natural law theory is compatible with both the broader and narrower conceptions of the rule of law. Not only does the core of Calvin's natural law embody the sovereignty of God which subjects all humans to the same transcendent standard, but it also includes the Two Kingdoms doctrine which recognises as valid only those earthly laws that maintain consistency with spiritual laws. In the formal sense, the rule of law represents a set of requirements that subjects the power of lawmakers and the laws that they make to external scrutiny. This narrow conception of the rule of law is perfectly compatible with Calvin's natural law. It is given normative support by Calvin's strong emphasis on the fallibility of human rulers and the need to subject them to limits in accordance with the conditional nature of their authority.²¹⁶

The formal rule of law requirements therefore correspond to Calvin's natural law in the mutual acknowledgement of the need for an independent measure by which every power should be assessed. Both the rule of law and Calvin's natural law are measures that are independent of human power. The reason for this independence, as noted above, is anchored in the shared doctrine of human limitations. James Madison, one of the founding fathers of the United States Constitution, borrows the words of Calvin in declaring the principles for establishing a federal government, 'If men were angels, no government would be necessary'.²¹⁷ It is useful then to hypothesise that if humans were infallible, neither the governed nor the governors would need to be checked. However, as things stand, humanity requires transcendent and independent measures like the rule of law. That the rule of law is part of political philosophy in constitutional democracies today largely confirms the acceptance of the doctrine of human fallibility which is integral to Calvin's natural law, although contemporary authors may not give the idea a theological basis.

Further, the transcendence characterising natural law authority would require it to surpass the formal requirements of the rule of law and contain within it, a normative force. The forward-looking momentum of Calvin's natural law both in time and substance bears this normative character. It embodies the 'external morality of law' that Fuller describes but upon which he fell short of elaborating. Calvin's natural law fills in this gap. The human obligation of mutual service and support in the sight of God becomes the starting point for 'national public policy in any given period and

²¹⁴ Crowe, above n 65, 68.

²¹⁵ Fuller, above n 6, 30.

²¹⁶ Hans Baron, 'Calvinist Republicanism and its Historical Roots' (1939) 8 *Church History* 30, 39.

²¹⁷ Madison, above n 10, No. 51.

culture'.²¹⁸ Both Calvin and Luther held that the substance of the law or 'scheme of equity' built into the Mosaic Law is reflective of universal human morality.²¹⁹ The substance of the Mosaic Law acts as a useful guide to the norms of equity that remain common to all legal systems at all times. 'Hence, this equity, alone must be the goal and rule and limit of all laws'.²²⁰ Calvin's natural law, therefore, provides the moral compass that we have been afforded by common grace and our consciences to bind us equally together toward a shared conception of justice.

B. THE SEPARATION OF POWERS

Calvin's natural law theory also evidences strong support for the second pillar of constitutionalism introduced at the beginning of this paper: namely, the separation of powers. We can understand the Calvinist foundations of this idea by drawing on F.A. Hayek's theory of 'spontaneous order'. In Hayek's work on law and economics in particular, there are remarkable echoes of Calvin's natural law themes, especially with regard to the doctrine of human fallibility and its implications for constitutional design. Hayek pointed to limited capacity of humans to know and therefore organise the world around them. Calvin, on the other hand, stressed moral depravity.²²¹ Nonetheless, the stress on human weakness led both to argue for limited government in similar ways. Hayek opens his influential article, 'The Use of Knowledge in Society, with the following conditional statements:

*If we possess all the relevant information, if we can start out from a given system of preferences and if we command complete knowledge of available means, the problem which remains is purely one of logic.*²²²

He was observing that the economic problem was *not* one sensibly resolvable by deliberate and rational planning but, rather, a problem arising from the impossibility of any human being achieving perfect knowledge.

Economics, for Hayek, is a 'spontaneous order'. As such, the iterative process integral to 'spontaneous orders' of this kind necessitates a presumption that any capacity of individuals to access knowledge is severely limited. Contrary to the pervasive dogma that scientific knowledge *is* the 'sum of all knowledge', Hayek insists that 'the knowledge of the particular circumstances, of time and place' cannot be mastered by a single individual. Rather than crediting humans with the capacity to determine the most efficient allocation of resources, Hayek defers to the spontaneous forces of the market for the answer to economic efficiency.

²¹⁸ Mark W. Karlberg, 'Reformation Politics: The Relevance of OT Ethics in Calvinist Political Theory', (1986) 29(2) *Journal of the Evangelical Theological Society* 179, 191.

²¹⁹ *Ibid* I-II, q. 94, a.3; Clark, above n 128,10-12.

²²⁰ Calvin, above n 109 IV.xx.16.

²²¹ *Ibid*, II.ii.11-12.

²²² Hayek, above n 157, 519.

Hayek acknowledges what I would call the *positivist seduction*²²³ — the idea that humans want to believe that they have an unrealistic degree of control. If we were interested in pursuing a real solution to social problems, we would first need to acknowledge the impossibility of obtaining perfect knowledge in any engineered sort of way. A single person at a single point in time cannot conceivably know exactly where goods are to be allocated for maximum efficiency. In fact, the more knowledge that is concentrated in a few means greater risk of abuse. According to Hayek, then, without acknowledging the reality of human limitations, we cannot hope to strive for a more efficient allocation of resources.

Calvin in his *Sermons on Galatians* hypothesises:

*If we were like angels, blamelessly and freely able to exercise perfect self-control, we would not need rules or regulations. Why then, do we have so many laws and statutes? Because of man's wickedness, for he is constantly overflowing with evil; this is why a remedy is required.*²²⁴

In a similar way to Hayek (albeit for different reasons), Calvin sees the descriptive position of the law and everything else as being one of limited individual capacity. The fall was responsible not only for corrupting the whole natural order but also for impairing the human conscience and mind. If we, by succumbing to the 'positivist seduction', refuse to admit our realistic limitations, how can we then hope to architect a proper moral and legal system? Calvin therefore presupposes the depravity of humanity and mounts this as the descriptive foundation for the normative trajectory of his natural law.

Similar to his economic theory, Hayek's account of the common law method also acknowledges the limitation of a few individual lawmakers at any single point in time. Hayek advocates a 'grassroots' approach to social change, captured in his notion of law as a form of *cosmos* or evolved social order. In his view, the *cosmos* approach is better facilitated by the common law rather than legislation which characteristically takes the form of a *taxis* or regulations imposed from the 'top down'.²²⁵ Conferring power to a few individuals to deliberately solve potential problems sits uncomfortably with the notion that humans are inherently fallible. On the other hand, the common law evolves by 'subsuming the perceptions and interpretations contemporaneous at that

²²³ Calvin, above n 109 II.ii.11 affirming the words of St. Augustine, 'If you ask me [what is the first, second, and third precept] of the Christian religion, I will answer, first, second and third, humility... By humility', Calvin writes, '[Augustine] means not when a man, with a consciousness of some virtue refrains from pride, but when he truly feels that he has no refuge but in humility'.

²²⁴ John Calvin, *Sermon on Galatians 3:19-20: "The Many Functions of God's Law"* (1558).

²²⁵ Crowe, above n 65,111.

time into every judgment in the long series of precedents'.²²⁶ In the common law, judges are restricted to responding to individual cases rather than attempting preemptive solutions to potential problems. They are limited, not only to the cases that come before them, but to building on the long line of examples that precede them. The doctrine of *stare decisis* therefore represents judge-made law as being a 'product of human action but not of human design'.²²⁷ In this way, Hayek indirectly alerts us to the inherent risks involved in concentrating power in a few. The common law is based on the recognition that the knowledge available to individuals at any one point in time is substantially limited.²²⁸

Like Hayek, Calvin's emphasis on checks and balances stems from his recognition of human limitations. His depravity of humanity doctrine is the building block for his safeguard against tyranny — the separation of powers. Calvin viewed tyranny as the 'demon that stalks the state, seeking to possess it'.²²⁹ He believed tyranny was made possible by the corrupted nature of humanity and he abhorred it because it reflected a desire to usurp the sovereignty of God. The idea of checks and balances riddles Calvin's works. In Calvin's thinking, a mechanism of 'fraternal correction' which allowed mutual admonition, thereby providing checks and balances against individual 'indulgences'²³⁰ (which he derived from 2 Thessalonians 3:15) was so valuable that he had it incorporated into the Constitution of the Church of Geneva. In his words:

Men's inadequacies and vices make it safer and better that the many hold sway. In this way rulers may help each other, teach and admonish one another, and if one asserts himself unfairly, they may act in concert to censure, repressing his wilfulness (libido).²³¹

God uses the conscience, extensively impaired as it were, to bridle humanity's perpetual lust for power. In this way, we see the foundational semblances between Calvin's depravity of humanity doctrine and Hayek's belief in individual limitations. This is not the same as saying that Calvin would accept the evolutionary theory underpinning Hayek's philosophy. Calvin himself acknowledges the correctness of some contributions made by secular philosophers, but caveats this wisdom, drawing a distinction between the 'correctness' of their precepts and the normativity of their

²²⁶ Jonathan Crowe and Constance Lee, 'Law as Memory' (Paper presented the Law and Literature Conference, Department of Law, Australian National University, 4 December 2013) 6-7.

²²⁷ See Frederick A. Hayek, *Law, Legislation and Liberty* (University of Chicago Press, 1973) 81.

²²⁸ Judges are therefore rightly confined to a pattern of consistency in which they contribute to the law in the light of previous wisdom. See Hayek, above n 223, 81.

²²⁹ George J. Gatgounis II, *The Political Theory of John Calvin* (1996) 153(612) *Bibliotheca Sacra* 60, 63; Calvin, above n 109, IV.xx.25; IV.xx.24, IV.xx.7; IV.xx.8.

²³⁰ John Calvin, 'Commentaries on Daniel' on *God and Political Duty* (Bobbs-Merrill, 1956) 94.

²³¹ Calvin, above n 109, IV.xx.8.

conclusions.²³² In the same way, we may utilise Hayek's philosophy in regards to 'human limitations' without need for a wholesale acceptance of its methodological underpinnings. To the extent that both recognise as reality the fact that humans are entities subject to 'limitations', the support Hayek's philosophy provides for Calvinist natural law is significant.

C. FEDERALISM

In addition to the separation of powers that distributes power horizontally between the separate arms of government, federalism ensures that legislative power is also vertically distributed between the regional and federal governments. Continuous with both Calvin and Hayek's descriptive position regarding human limitations, federalism was designed to further disperse power to combat the foreseeable tyranny characterising 'top-down' systems of government.

Modern federalism, including Australian federalism, traces an unbroken line from the Reformation back to the ancient Jewish system of covenant.²³³ The covenant form of government, sourced in divine revelation, was unique to the Jewish people.²³⁴ The linguistic origin of the term 'federal' comes from the Latin *foedus* meaning covenant.²³⁵ In turn, the term covenant is derived from the Hebrew word meaning 'to sever'.²³⁶ Thus, federalism is basically a contract between a lesser and greater power, pursuant to which the sovereignty of the lesser power is preserved, a system of 'self-rule plus shared rule'.²³⁷ The founders of the United States Constitution referred to federalism as a 'confederacy' or 'a league of friendship'.²³⁸ 'A covenantal politics, then, is directed simultaneously toward linking people and communities as partners in common tasks and allowing them space in which to be free'.²³⁹ Thus, in the Ancient Jewish constitutional practice, both covenant and federal theology were designed to increase the security through confederation and simultaneously facilitate the liberty of humankind.

In respect of the federal model, the congruence between Calvin's theology and constitutionalism is even more pronounced. Calvin sees the institution of 'fraternal correction [as] vital in the context of human depravity, to check and balance humans'

²³² Ibid II.ii.15.

²³³ Daniel J. Elazar, *The Covenant Connection: From Federal Theology to Modern Federalism* (Lexington Books, 2000) Ch. 1.

²³⁴ Paul R. Williamson, *Sealed with an Oath: Covenant in God's Unfolding Purpose* (Intervarsity Press, 2007) 20-21.

²³⁵ Elazar, above n 229, 24.

²³⁶ Ibid 260.

²³⁷ Daniel J. Elazar, *Exploring Federalism* (University of Alabama Press, 1991) 28, 29.

²³⁸ Jean Yarbrough, 'Federalism and Rights in the American Founding' in Ellis Katz and G. Alan Tarr (eds), *Federalism & Rights* (Rowan and Littlefield Publishing Group Inc., 2nd ed, 1996) Ch. 4.

²³⁹ Daniel J. Elazar, *Covenant & Polity in Biblical Israel: Biblical Foundations & Jewish Expressions* (Transaction Publishers, 1995) 43.

arrogance'.²⁴⁰ Federalism basically involves a 'contractual linkage' between the state and the Commonwealth which provides for a vertical decentralisation of power. This linkage is characterised by a sense of permanence. In other words, the federal arrangement is one that is ideally 'unchangeable' and 'irremovable'. This subverts the potential of indulgences by a fallible sovereign entity against its subjects. On this note, Calvin remarks:

In as much as God had given them the use of the franchise, the best way to preserve their liberty for ever was by maintaining a condition of rough equality, lest a few persons of immense wealth should oppress the general body.²⁴¹

Calvin further recognised the value of self-rule and local governance in emphasising individual conscience over the exercise of centralised power. His preference for decentralised modes of church governance reflected his theological stance on the direct relationship between God and individual humans.²⁴²

In Australia, federalist concerns are both implicitly²⁴³ and explicitly enshrined in a written constitution. Notwithstanding Isaacs J's insistence of 'parliamentary sovereignty' in the *Engineers* decision, federalism was not completely extinguished. The clear federal division of powers that the framers envisaged for Australia is structurally represented in the Constitution itself. For example, s 51 lists areas of legislative power which are to be concurrently exercised by both state and Commonwealth governments and, in the event that the laws conflict, a provision in s 109 resolves the conflict in favour of the Commonwealth law. The remaining powers not allocated to the Commonwealth are retained by the states pursuant to s 107.

Furthermore, the High Court continues to recognise the doctrine of intergovernmental immunities (albeit in a weaker form than in the early years of the High Court)²⁴⁴ as an in-built constitutional limitation on the Commonwealth Parliament. This doctrine serves to invalidate any Commonwealth laws which in effect or on their face discriminate against a state or between states or otherwise²⁴⁵ impose a burden that impairs the states' ability to function as autonomous governments.²⁴⁶

²⁴⁰ John T. McNeill 'Calvin and Civil Government' *Readings in Calvin's Theology* Donald McKim (ed) (Baker Publishing Group, 1984) 272.

²⁴¹ John Calvin, *Harmony of Moses* (Calvin Translation Society, 1843-59) III:154.

²⁴² John T. McNeill, 'The Democratic Element in Calvin's Thought' (1949) 18(3) *American Society of Church History* 153, 167.

²⁴³ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

²⁴⁴ *D'Emden v Pedder* (1904) 1 CLR 91.

²⁴⁵ The discrimination limb of the intergovernmental immunities test may have been subsumed in the 'structural integrity' limb. See *Austin v Commonwealth* (2003) 215 CLR 185.

²⁴⁶ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

The Convention debates in Australia show that its Constitution was greatly influenced by those of the United States and Switzerland.²⁴⁷ The notion of federalism is an American import.²⁴⁸ Madison, who is considered one of the most influential founding fathers of the United States Constitution, appears to have relied on Calvinist theology to lend support to the foundational notions of the separation of powers and the rule of law. In the *Federalist Papers*, Madison echoes Calvin insofar as he contends:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.²⁴⁹

Madison also attempts to draw the contours around federal and state relations:

The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation [sic], and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.²⁵⁰

The implied doctrine of reserved powers in Australia (insisted upon by the early High Court, but overridden by the *Engineers* decision) is derived from passages such as this. However, the claim that fundamental doctrines of Calvinist natural law underpin the architecture of the American and Australian Constitutions is different from claiming that the Constitutions are established upon Calvinist natural law or indeed any other one philosophy. Even stripped of its original biblical federal covenant definitions, modern federalism's congruence with Calvin's natural law theory arises out of humankind's need to enter into some sort of covenant as consequence of humanity's fallible and limited character. Thus, despite the Enlightenment and its emphasis on the potential of human reason,²⁵¹ concepts like federalism continue to

²⁴⁷ Aroney, above n 11, 28.

²⁴⁸ *Ibid.*

²⁴⁹ Madison, above n 10, *No.51* (1788).

²⁵⁰ Madison, above n 10, *No.45* (1788).

²⁵¹ Stephen Strehle, *The Egalitarian Spirit of Christianity: The sacred roots of American and British Government* (Transaction Publishers, 2012) 154.

mandate by their very substance that every society ‘be knit together by some covenant, either express or implied’.²⁵²

VI. Conclusion

We have seen that Aquinas defines natural law in a metaphysical sense as an objective set of precepts given by God that humans can then enunciate and apply to individual actions as a result of reason.²⁵³ His painstaking endeavour to furnish the precise contents of natural law contrasts sharply with Calvin’s project.²⁵⁴ Rather than pursuing a formulaic exposition, Calvin expends his energies in defining the role of natural law. Accordingly, natural law is a standard God places on human conscience. This order emphasises accountability and inexcusability in relation to God. Underlying this accountability is every human’s dependence on God.²⁵⁵

Calvin’s natural law is consistent with the view that urges moderation on a sovereign. Humanity’s vices make it safer that power be distributed between many rather than concentrated in a few. Calvin’s staunch conviction in the total depravity of humankind provides a descriptive foundation for his natural law that maintains congruence with the presuppositions accepted by the likes of Augustine, Montesquieu, Madison, Fuller, Locke and Hayek.

To Calvin, both civil and spiritual laws are subject to the ultimate sovereignty of God. Calvin returns to Augustine’s notion of the transcendence of God over all things and the universality of human accountability in the light of the law written on our hearts. All laws — whether positive or natural, civil or spiritual — derive from God and are subject to his authority. Any power bereft of God’s transcendent authority fails to be a law in the moral sense. Rather than God being the unity of all basic goods, He is the ultimate good from which all things are derived. Calvin does not vacillate or compromise on this point in order that humans are without excuse.

It is curious that despite modern secularism’s rejection of theological considerations, the Calvinist division between spiritual and civil laws continues to provide the foundation for current constitutional norms. Calvin’s theology may appear outmoded to some, but as an examination of the three pillars of constitutionalism — the separation of powers, federalism and the rule of law — has demonstrated, his natural law theory remains congruent with, if not central to, modern constitutional practice.

More fundamentally, the transcendent and forward-looking character of Calvinist natural law emphasises the higher morality that rulers ought always to

²⁵² John Winthrop, ‘A Model of Christian Charity’ (Presented on board the *Arbella*, 1603).

²⁵³ Aquinas, above n 26, I-II, q.91, a.1.

²⁵⁴ *Ibid* I-II, q.90, a.1.

²⁵⁵ Elshstain, above n 124, 87.

pursue. This emphasis on transcendent norms gives Calvinist natural law an important role in jurisprudence and constitutionalism. It is a reminder that the power of human rulers is not self-validating and should always be viewed as pursuing a higher aim.