THE NAKED COURT

Understanding & Resisting a Damnable United States Supreme Court

DAVID FOWLER ESQ.

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The Words of God About Adam and Eve
Genesis 2:25; 3:7-7

"And they were both naked, the man and his wife, and were not ashamed. . . . And when the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise, she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat.
And the eyes of them both were opened, and they knew that they were naked."

The Words of the Prophet Isaiah to Those Who Oppose God
Isaiah Chapter 47:1, 3

"Come down and sit in the dust, O virgin daughter of Babylon; Sit on the ground without a throne, O daughter of the Chaldeans! For you shall no longer be called tender and delicate.
Your nakedness will be uncovered, your shame also be exposed; I will take vengeance and will not spare a man."

The Words of the Prophet Ezekiel to Those Who Identify as God's People
Ezekiel 16:35-36

'Now then, O harlot, hear the word of the Lord! 'Thus says the Lord God: "Because your filthiness was poured out and your nakedness uncovered in your harlotry with your lovers, . . . I am going to gather all your lovers whom you pleased, all those whom you loved as well as all those whom you hated.
So I will gather them against you . . . and expose your nakedness to them so that they may see all your nakedness."

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by David Fowler

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PREFACE

The following is a distillation and consolidation of commentaries published by the Family Action Council of Tennessee (www.FACTennessee.org) on behalf of and for Alliance for Law and Liberty. It is not intended to be a scholarly work for academic publication, but one by which non-lawyers can understand the kind of damnation the United States Supreme Court has created for itself. Consequently, quotations will be formatted simply for authentication purposes and theological thoughts will be supported only by a citation or two.

I do not use the word "damnable" pejoratively; rather, I believe it is descriptive of the Supreme Court's understanding of law in God's sight. In saying this, I recognize the only thing our culture considers truly damnable is, ironically, the person who calls anything damnable. That person, in this case me, is deemed an arrogant know-it-all. In a very real sense, I have been, and if you think that of me, you might want to read the Epilogue first.

I also use that word because it is the profane term many will use to describe future decisions by the Court on abortion, marriage, parental rights, and most likely, the religion clauses in the United States Constitution.

The Court's damnable understanding of law I describe on the following pages gave rise to legislation that poses in a most clear and absolute way the most fundamental worldview question Tennessee's legislators will ever face apart from abortion, the Marital Contract Recording Act (currently pending as Senate Bill 562/House Bill 233): What do you believe about God?

The Act, based on long-standing United States Supreme Court precedents, provides a means by which a competent[1] man and woman and only a man and woman can make a public record of the fact that they have made

a marital commitment to each other, as opposed to, for example, a commitment to a cost-sharing contractual agreement ala the Three's Company television show.

If the Act becomes law and litigation over it reaches the United States Supreme Court, the Court will be in a position in which it will either continue to damn itself before God or be damned in the profane sense of that term by others.

If for no other reason, the Act should be approved just to watch the justices try to wiggle their way out of the mess created by the Court's same-sex marriage decision, *Obergefell v. Hodges* (2015).

It is difficult to speak of legal concepts and Supreme Court opinions in a way that is easy for non-lawyers to consume. Consequently, I thought it might be helpful to provide a bit of a roadmap.

Part 1 explains why something is damnable in the sight of the God of the Bible and what the United States Supreme Court has said about the relevance of that God to law. One need not be a lawyer to understand Part 1. However, without Part I, the rest of the book will rightly be understood by some as nothing but hateful.

Part 2 is directed to explaining how the United States Supreme Court got it so wrong in *Obergefell* and why it cannot be precedent for holding the Marital Contract Recording Act (MCRA) unconstitutional. It also explains why the Court will make itself damnable in a profane sense; the Court will be perceived as playing politics no matter what it does about the MCRA (or, for that matter, on any number of other issues coming up).

If you take delight in seeing others hoisted on their own petard, working through the long-standing precedents the Court will have to jettison to hold the MCRA unconstitutional will make Chapter 6 in Part 2 worth the effort. Otherwise, skip it if you bog down.

Part 3 is designed to help those who believe in the God of the Bible not feel so cowed by those who think Christians are stupid or by those who say relying on Christian beliefs in connection with public policy is a violation of the Establishment Clause.

Part 4 explains why, without belief in the God of the Bible, support or opposition to the MCRA is really a matter of preference.

Finally, the Epilogue explains why I believe much of my policy work over two decades has been nothing more that "filthy rags" in the sight of God. You might want to read the Epilogue first.

PART I

CHAPTER 1

What Makes Something "Damnable"?

It is always best, when possible, to define one's terms, and that is especially true when every current cultural norm decries calling something damnable other than the person who publicly says something is damnable. So let me get this out of the way: I have no authority *in and of myself* to call anything damnable.

However, as a Christian who takes all that the Bible says seriously, I believe what makes something damnable in any real and true sense is whether that something stands in a right relation to God. To be "out of whack" in relation to God must be damnable or God is not righteous. If God allows out of whack thinking to bring harm to what He has created, He is not just.

However, that assessment is true only if one believes in a God who is both the Creator of everything (Psalm 19, 24:1) and is Triune in His Being (Matthew 28:19). Any other supposed God can, in good conscience, be disregarded as irrelevant for reasons that will become apparent.

I believe in the Triune Creator God. It is only from that fundamental belief that I write.

If you do not believe in that God, then I hope you will keep reading. I think that belief provides a beautifully harmonious and rational explanation for so many things that we otherwise have trouble harmonizing and explaining.

CHAPTER 2

What Belief in the Triune Creator God Necessarily Means

If God is the creator described in the Bible, then all of creation reveals something about the glory of God. It could not be otherwise, or God would have created something less than or contrary to His own eternal, infinite perfections summed up in the words, "the glory of God." It would be "beneath God" to do that.

Not surprisingly, creation is described throughout the Bible as revealing the glory of God (Isaiah 6:3, Psalm 94:9, 97:6, Romans 1:20-23).

But what this belief in a creator God means is that "everything was created with a nature of its own and rests in ordinances established by God" and "their distinctive natures [are] in keeping with their own increated energies and laws."[2] Scientists operate on this understanding all the time (think of unleashing the energy "in" an atom), and there is a good reason we say you can't get blood from a turnip.

Moreover, because the God of the Bible is one in essence (there is only one God) but distinct in Persons (Father, Son, and Holy Spirit), there is a unity in God that does not destroy, but rather maintains and makes valuable, all the diversity we see.

Consequently, a Christian would believe that all aspects of creation relate to each other and influence each other reciprocally. Even the qualities of a rock influence how one can use it. Creation is diverse with God-given distinctions yet a unified whole, giving importance and value to the function each part plays relative to the others and to the whole.

Therefore, all things from the distinction between man and woman to the individual and society, to art and science, to liberty and law, though distinct, are not cordoned off from one another when understood in relation to the Triune Creator God. This means no aspect of creation, including our lives and our relation to the rest of creation, is hermetically sealed off from any other aspect. God's creation reveals His triune nature.

Adherence to this belief and the assertion of it by Christians is the *only true and real* reason unborn human beings should not be killed in the womb, biological boys should not compete in sports against biological girls, and the nature of marriage and the parent-child relationship should not be redefined.

In sum, if I did not believe in the God of the Bible, I would not express another opinion ever again about anything being truly right or wrong. I would have no absolute or concrete basis for saying what I believe or prefer is truly better than what anyone else believes or prefers. I could only express my personal preference.

If there is no *given* fixity to what it means to be human and the relationships that exist between humans, then those with the power of the sword are free to and will begin to redefine what it means to be human. They will begin to play God.

If you haven't noticed, that is what they are doing. Just ask the biological females who swim for Yale and Penn. In fact, at its root, what is now happening in college swimming pools has been happening in the Supreme Court for years. After all, the very first sentence in *Obergefell* (2015) asserts that "[t]he Constitution promises liberty to all within its reach . . . to define and express their identity."

CHAPTER 3

What Belief in the God of the Bible Necessarily Means for Civil Government

The preceding belief about God is also the only true and real barrier between *civil* government and *totalitarian* government.

A Christian who believes in a Triune Creator God believes God transcends all things, not in terms of distance or even quality, but in terms of being or essence. There is none like God. This means we can't play God.

We learn even more about this differentiation in being from the Incarnation, the second person of the Triune God, the Son of God, taking on an unspoiled human nature in the person of Jesus.

The Incarnation means the human known as Jesus did not turn into God or into the Second Person of the Trinity. It also means God or the Second Person of the Trinity did not turn into a human being. Had either happened, God's transcendence in terms of being would have been abolished along with any distinction of being or essence between a creator and that of the beings He created. All real and true boundaries and distinctions respecting created beings would also disappear except those on which we can agree, hopefully without bloodshed.[3]

If these things about God are true, then we would say God's authority is transcendent, meaning of a different order or kind than we can possess. Thus, a Christian believes that all authority is found in God, and civil government can only have a delegated authority. (Romans 13:1). In our country's form of government, that means God's *transcendent* authority over all things is mediated to civil officials *for distinct and God-given civil law purposes* through the votes of the people. It is a limited authority with a limited jurisdiction.

However, as the transcendent Creator, God's authority and jurisdiction is always absolute and universal in all respects. If God "loses" or gives up in any real sense any of His authority or jurisdiction, God ceases to be God. In that event, one of us, some of us (e.g., the Supreme Court), or all of us will clamor to take His place.

If that is who God is, then when it comes to something like a specific kind of relationship between a man and woman known as a marital relationship, a Christian would say civil government *can have no authority* to forbid a competent man and woman from knowingly and freely entering a *God-defined* marital relationship. The Christian would also say that civil government *can have no authority* to condone any relationship *as a marital relationship* that is contrary to God's given, creational design of male and female and the purpose for which He established their union as husband and wife (as opposed to mere friendship). *If God gave civil government the authority to reinterpret His creation, then He would be contradicting Himself!*

What God has joined together no person can divide asunder (Mark 10:9). But when civil government asserts sole and absolute authority over what God has created, thinks it can redefine the marital relationship, and, *by that redefinition and its license requirement, exclude*[4] *any recognition of marriage according to God's design of and purpose for it*, civil government has done just that. It has taken the place of God, and God damns any such arrogance. Isaiah 47:1, 3, 10, 15.

If human beings think they are free to be God over what exists and think they can interpret what exists contrary to God's interpretative word—the delusion suffered by Eve who thought the "facts" she observed about the forbidden fruit made it edible despite what God said—then watch out, when some of them get power and act like it.

And that is what brings me to the United States Supreme Court.

CHAPTER 4

The U.S. Supreme Court Damns Itself

In our legal tradition, this transcendent law of God provides a fundamental law for human beings and our relationships. That fundamental law was worked out by us and applied to our disputes with each other in what we call common law.

Common law is a form of law derived from the study of history, tradition, and experience, *but prior to 1938, was clarified and confirmed by the revealed law, i.e., Scripture.*[5] Judges sought to discern the fundamental law and determine how its precepts applied to legal disputes between parties. According to the United States Supreme Court, legislators did the same thing, but that is covered in the next chapter.

The Supreme Court Damns Itself Before God by Repudiating Transcendent Law.

In 1938, in *Erie R.R. Co. v. Tompkins*, the United States Supreme Court repudiated "the assumption[6] that there is 'a *transcendental* body of law outside of any particular State but obligatory within it unless and until changed by statute'" (emphasis added). If creation by God's fiat and the Incarnation are true, then to deny the existence of a transcendent body of law is damnable in God's sight.

But what does the banishment of God and transcendent law mean for common law that is based on it. Did it just go away?

No, the Court knew there still had to be some overarching authority somewhere for common law to exist. Not surprisingly, then, it said, "law in

the sense in which courts speak of it today *does not exist* without some definite authority behind it."

That is obviously true, but it begs the question, "What or who is the 'definite authority' behind the law?"

So, to avoid the appearance of having abolished common law, the Court changed its foundation. "The common law so far as it is enforced in a State, . . . *exist[s] by the authority of that State* . . . ." The damnable conclusion? "[T]he authority and only authority is the State."

The God of the Bible is totally irrelevant to the United States Supreme Court, and, according to the Bible, that is damnable in God's sight.

The Supreme Court Damns Itself by Endorsing Polytheism.

But notice this: Beyond just repudiating any transcendent law and the transcendent God behind it, the Court said there was no transcendent authority for common law *even at the state level*. According to the Court, what gives the common law its authority is the authority of the state.

In other words, contrary to the historical understanding of what common law is—judges "finding" or "discovering" the transcendent and antecedent law of God woven into His creation and then applying its precepts to resolve disputes between parties—the Supreme Court presumes that the state, not God, is *creating fundamental* law in the first instance.

Because the Supreme Court really knows there must be a transcendent source of authority somewhere—God will not let us ignore Him—the Court filled the void left by its repudiation of a transcendent God by saying the 50 states each have transcendent authority over the transcendent God behind the common law.

The Court made each state God. Sociologists and theologians would call this polytheism.

What Gives Each State Its Authority?

But what gives each state its authority? If you said, "The people through their state Constitution," then either you did not fully understand the preceding chapters, or you do not believe in the God of the Bible. If you

are in the latter group, then you and I disagree about something more fundamental than what constitutes a marital relationship or even more basic, what it means to be human, but I will come back to your religious belief (yes, Mr. Atheist, you have one) in Chapter 9.

Conclusion.

At least *Erie Railroad* means states are free to disagree with the Court about the nature of their common law. Thus, a state is free to decide that its common law is grounded in a transcendent law that precedes civil law. Regardless of what the state decides in that regard, when it comes to common law matters, states should tell the Supreme Court, "Bug off!"

But the temptation to be God is always strong. Thus, once the Court concluded there is no such God as the God of the Bible, we should have known some of the justices would eventually want to be God over the states, too, which leads to the next chapter in this saga of the United States Supreme Court's inevitable damnation, *Obergefell v. Hodges.*

CHAPTER 5

The U.S. Supreme Court Plays God Over the States

In *Obergefell v. Hodges* (2015) the Court's banishment of God from law and government came to full flower. Multi-state polytheism was no longer okay. The Court wanted to play God over everyone! Job was right, God—whoever or whatever that is in one's society—gives and can take away. (Job 1:21)

But to see the true depth of this God-like usurpation of authority over everything clearly one needs to appreciate this about statutory law: The concept of transcendent antecedent, and therefore, fundamental law distilled and applied by courts to resolve disputes between parties and explained in its opinions—the concept behind common law—carried over to and formed the basis for statutes enacted by legislative bodies.

William Blackstone, who has been described by the United States Supreme Court as "the preeminent authority on English law for the founding generation" (*Alden v. Maine*, 1999), said, "Statutes . . . are either *declaratory* of the common law, or *remedial* of some defects therein."[7]

The United States Supreme Court agreed. In *Munn v. Illinois* (1877) it said the same thing, "[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In other words, common law forms the basis upon which legislative bodies decide what written laws should be enacted. Statutes *and* constitutions[8] are not just things made up out of our heads; they rest on the common

law which rests on the existence of an antecedent fundamental law "written" by the God described in Chapter 1.

For example, we do not have child support statutes because we dreamed that idea up out of thin air. The duty on which these statutes are based is real because that duty is consistent with the unified order of all things described in Chapter 1. Child support laws are based on an antecedent "law" recognizing both the distinction between parent and child as persons and the unity between them that arises from procreation.

Recognizing this unity and the order of being and dependence within that unity meant that a father had to have a duty of support. *That* is why the common law, prior to any enacted statutory law, said a father owed a duty of support to his minor child. *The policy preceded the enacted statute.*

How the Common Law and Statutory Law Worked Together Regarding Marriage.

This interplay between antecedent fundamental law, common law, and statutory law can also be seen in connection with marriage.

The common law acknowledged that as to "things *in themselves* indifferent, [they] become either right or wrong, just or unjust, duties or misdemeanors (sic), according as the municipal legislator sees proper, *for promoting the welfare of the society, and more effectually carrying on the purposes of civil life.*" Blackstone's *Commentaries* (emphasis added).

"Thus," said Blackstone, "our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband." This property arrangement *within a marital relationship*, and which *did not create* a marital relationship, was known as coverture.

As various aspects of civil life developed, legislative bodies determined, by statute, to abolish the concept of coverture articulated by judges *as an adjunct* to marriage. *But neither courts nor legislators would have considered the fundamental nature of human beings as male and female and the marital relationship as that between a male and female as husband and wife "a thing in itself indifferent."*

Man, woman, and the marital relation, *as "things" God created according to an eternal law conforming to His will and purpose*, could not have been a thing about which *civil* law could be indifferent, unlike property arrangements between the married man and woman. Property arrangements were never seen as *creating* a marriage, only the promises of permanent fidelity made between a man and woman.

Obergefell Gets the Common Law Wrong.

The Supreme Court, having repudiated true transcendence and placing it in civil government, could not logically continue to have an historically right and true conception of the common law or, consequently, its relation to statutory law. And that became apparent in the majority opinion issued by the Supreme Court in *Obergefell*.

This is how the Court reasoned to its assertion that marriage is no longer an institution *normed* by the existence of two *distinct* biological sexes of a complementarian nature forming yet another *unique unity* by virtue of a *socially unique* commitment of permanent fidelity to each other in all relations and respects:

> As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, *the law of coverture was abandoned*. (emphasis added)

Having no knowledge of fundamental law because of its "hubris,"[9] the Court concluded:

> *These* and other developments were *not* mere superficial changes. Rather, they worked deep transformations *in its structure*, affecting aspects of marriage long viewed by many as *essential*. (emphasis added)

To those familiar with the common law and Blackstone's *Commentaries*, the conclusion that the abolition of coverture or anything else the

common law considered non-essential to the nature of marriage "transform[ed] its structure" is nothing but a mile high pile of excrement produced by large solid-hoofed herbivorous ungulate mammals!

The Court Gets the Statutory Law Wrong.

Because the Court got the foundation for the common law wrong in 1938, it got the relationship between state marriage statutes and common law wrong too. The Court said the statutes were "enacting" marital *policy* rather than providing a statutory means of providing "*evidence* by which marriages may be proved," which is what the Court said over 100 years earlier in *Meister v Moore*. More on this in Chapter 6.

How embarrassing to be a United States Supreme Court justice and be wrong about the nature of law and forgetful of the Court's prior precedents on fundamental points of law.

The only thing worse would be the possibility the *Obergefell* majority intentionally misrepresented the law and overlooked some of its precedents to achieve a desired result. Surely the Court would not have done that after the majority said in *Planned Parenthood v. Casey* (1992), an abortion decision affirming *Roe v. Wade* (1973), it should never "retreat from interpreting the full meaning of the covenant [Constitution] in light of *all of our precedents*." (emphasis added)

What the Supreme Court's Obergefell Decision Means for States

What the *Obergefell* decision did as a practical matter was transfer the concept of transcendence in relation to our being as male and female and the nature of the marital relationship *from* the states, where it had been since *Erie Railroad* in 1938, back to itself.

It was damnable enough in God's sight for the Court to repudiate *true* transcendence and transfer it to the states, but in *Obergefell*, the temptation to be God for everybody in the nation was too great. The majority of the Court took it back from the states and sought to impose its "sovereign" will ("will" being a legislative function, not a judicial one!) on the entire nation.

As a former state senator, I am confounded as to why elected officials in so many states have been so content with the emasculation of their supposed transcendent authority.[10]

PART II

CHAPTER 6

Will the Supreme Court Be Run Over By or Run Over Its Long-standing Precedents?

This is the Chapter I do not want non-lawyers to bog down in. If that starts to happen, meet me either at Chapter 7 or Chapter 8, which summarizes Chapters 6 and 7.

In this chapter I cover three precedents relied on in the Marital Contract Recording Act that the Supreme Court will have to deal with. Together they form a unified interpretative whole.

This should create a jurisprudential nightmare for jurists willing to be honest about the law and the conflict between long-standing Court precedents not considered in *Obergefell* and the God-denying jurisprudential innovations of the last seventy plus years reflected in that decision.

The Eerie Specter Created by Erie Railroad.

Erie Railroad (Chapter 4) stands for the proposition that if Tennessee has a common law understanding of the marital relationship, then it would be "unconstitutional" for a federal court to develop its own understanding of what common law marriage is and force it on the states.

Unfortunately for the Supreme Court, the common law understanding of the marital relationship is mandated in Tennessee under Article XI, section 18 of its Constitution:

> The *historical institution* and *legal contract* solemnizing the relationship of one man and one woman shall be the only legally recognized *marital contract* in this state. Any policy or

> law or judicial interpretation, purporting to define marriage as anything other than the *historical institution* and *legal contract* between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. (emphasis added)

The italicized words can only be interpreted as consistent with the common law understanding of marriage, namely, a "contract" denominated "marital" *because*, as previously noted, the common law said the "marital contract" involves *certain kinds of promises* between *certain kinds of parties*, one man and one woman.

Under *Erie Railroad*, it is unconstitutional for the Supreme Court to tell a state it cannot recognize marriage as a common law institution and recognize it in the way it was recognized at common law.

So, if the Supreme Court wants to hold the MCRA unconstitutional, it will have to run over—reject— the rationale employed in *Erie Railroad*. Otherwise, *Erie Railroad* will run over any attempt by the Court to extend *Obergefell* to the MCRA.

The Court Can't Be Mum About *Munn*.

Taking the foregoing a step further, it can credibly be argued that the state's marriage licensing statutes, as they exist, referring to the "male and female" licensees as "contracting parties," T.C.A. 36-3-104(a), *must* be interpreted as codifying—putting into statute the common law understanding of the marital relationship and the marital policy already articulated therein.

Why? Because that interpretation is mandated by Tennessee's Constitution: "Any . . . judicial decision …. purporting to define marriage as anything other than the *historical institution* and *legal contract* between one man and one woman, is contrary to the public policy of this state and *shall be void and unenforceable.*"

Let me explain. The Tennessee Constitution is saying the institution of male-female marriage preceded the words in the Constitution. It is not creating the male-female marital relationship but recognizing it. Since

statutes rest on the Constitution and must be interpreted consistent with the Constitution, then only a common law interpretation of the marriage licensing statute is consistent with the language in the Tennessee Constitution. To do otherwise again divorces common law and statutory law. But this interpretation of Tennessee statutes creates additional problems for the Court.

In *Obergefell*, the Court forgot what it had said in *Munn v. Illinois* (1877) about the relationship between common law and statutes: "[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

As discussed in Chapter 5, *Obergefell* mangled its analysis of the relationship between statutes and the common law on which statutes are based, but if *Munn* is correct, then *Obergefell* was wrong when it said that state statutes were creating "public policy" regarding marriage.

In other words, a state's policy about marriage, like that of child support, did not spring into existence out of thin air when marriage statutes were first enacted by state legislatures. If *Munn* is correct, then those state statutes were either making clear the policy already reflected in that state's common law or they were clearing up a "defect" in the common law policy that had become apparent, such as statutes did with the abolition of coverture.

This kind of argument was not made in *Obergefell* and, therefore, it was not squarely presented to the Court for resolution.

MCRA rests on this kind of argument. Therefore, the rationale in *Munn* will have to go or it will create a huge problem with the next Supreme Court precedent.

Will *Meister* Master *Obergefell* or Vice Versa?

In *Meister v. Moore* (1878), the Supreme Court specifically addressed the relationship between common law marriage and state marriage licensing statutes. Did the *Meister* Court say state marriage statutes were creating marriage? No!

Speaking of those state statutes, the Court said their "provisions may be construed as merely directory, instead of being treated as destructive of a **common-law** right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage." (Remember this "right" language; it is very important.)

In other words, *Munn* was saying that the state statutes were not creating marriage but remediating a "defect" created by "changes of time and circumstances." And what was the defect? It was the difficulty that arose when the existence of a marriage had to be proved, and perhaps proved in a hurry because of questions about who would inherit the deceased person's property.

Prior to the existence of licenses, the marital relationship had to be proved *in court* by producing enough facts about a man and woman's relationship to prove to a judge or jury that they intended to be married. Having to wait on a trial to find out if the person claiming a right to inherit the family farm was a surviving spouse or just living in sin with the deceased could be a nightmare.

The *Meister* Court said what I am saying, "In most cases, the leading purpose is to *secure a registration* of marriages, and *evidence* by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry."

In other words, as society became more complicated and more matters of contract and property right depended on whether a marital relationship existed, statutes made it easier for couples to prove they were married ("evidence") and for others to find out quickly if a person was married ('registration").

As *Meister* said, marriage is not a situation "where a statute *creates* a right." But that is exactly what the Supreme Court in *Obergefell* thought the states' statutes were doing, creating a right to marry! *Obergefell's* justices appear to have suffered from the same humanistic God-is-not-relevant defect in their legal training about fundamental law, the common law, and their relationship to statutory law as did I.

If the purpose of a state's marriage laws is to reflect the common law (which is what Tennessee's Constitution does), and that is exactly the purpose of the Marital Contract Recording Act, then the Supreme Court will have to repudiate the rationale in *Meister* (corresponding to that in *Munn*) to hold the MCRA unconstitutional.

What *Munn* and *Meister* Mean for Tennessee's Constitution.

Given *Munn* and *Meister*, the language in Tennessee's Constitution (quoted on page 25) should be clear: The people were telling their government officials what marriage is *and* what its statutes, *if any*,[11] were to accomplish, namely, "recognize" the husband-wife marital relationship.

Moreover, the *constitutional* language in no way implies that the legislature could withhold, by licensure requirements, the recognition of a marital relationship defined in terms of a man and woman. The "historical institution" was one of "right" according to the fundamental law of the Creator and common law, *at least according to the bold font "common-law rights" language in Meister quoted above.* That also seems to be true according to Tennessee's Constitution.

CHAPTER 7

Do We Enumerate Rights or Create Them?

Finally, the Marital Contract Recording Act asserts as authority the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

This is the first question the Amendment should provoke: How does one enumerate what does not already exist and is not known to exist?

Perhaps this will help you answer my question. Can you list (enumerate) just two of the different kinds of *deceitium crystalia*? I hope not, because there is no such thing. I hope it is crystal clear I was trying to deceive you about its existence!

Similarly, the answer to my question about the Ninth Amendment is, "No. No one can enumerate rights that don't already exist." Only that which exists *and is known to exist* can be enumerated.

Therefore, a plain, common sense reading of the Amendment's words must mean our rights pre-existed the enumeration of them in the *enacted* law of the Constitution (consistent with *Munn*). The fact that there are "others" means that the enumerated rights are not exhaustive of the rights we possess.

Where would those other rights be found? The common law, of course. Rights at common law that were not enumerated were "retained by the people" according to the Ninth Amendment. And jurisdiction to protect those rights was expressly given by the Tenth Amendment "to the states, respectively, or to the people."

The Ninth and Tenth Amendments go together like love[12] *and marriage—the Ninth is about rights and the Tenth Amendment is about who has jurisdictional authority*[13] *to the protect those other rights.*[14]

Moreover, the Ninth Amendment says the enumerated rights cannot be "construed to deny or disparage" our other common law rights. In other words, the enumerated rights must be understood in relation to a whole—another beautiful reminder of the recurring issue of unity and diversity and the necessity of having a basis upon which to resolve the tension between them.

The Ninth Amendment means the enumerated right to procedural due process in the Fourteenth Amendment *cannot constitutionally* be "construed" to do away with other pre-existing rights retained by the people.

Since *Meister* described marriage as a "common-law right," then both the Ninth Amendment and *Erie Railroad* assure us that the United States Supreme Court cannot tell a state that the U.S. Constitution prohibits states from recognizing the "historical institution" and "marital contract" that is defined exclusively and exhaustively as "one man and one woman."

To ignore the language of the Ninth Amendment, to treat it as "an ink blot," as once described by the late Robert Bork, the Court will have to violate the principle laid down in its most famous decision, *Marbury v. Madison* (1803), "It cannot be presumed that any clause in the constitution is intended to be without effect."

Finally, since the Supreme Court did not consider the meaning and effect of the Ninth Amendment in Obergefell, that decision is not controlling precedent for the MCRA.

CHAPTER 8

Damned If It Does and Damned If It Doesn't

The Marital Contract Recording Act simply reminds the Court of what it has already said and reminds the Court that if *stare decisis* means long-standing precedents should not be overturned lightly, then it cannot hold the Act unconstitutional.

The Court will look bad in the eyes of many, especially from a *stare decisis* perspective, if it overturns its long-standing precedents about common law, state jurisdiction over common law matters, and the relationship between statutes and common law to hold the MCRA unconstitutional. It will also look bad if it bolsters that conclusion by holding that the Ninth Amendment is meaningless. That means our founding generation did a vain and useless act by the Ninth Amendment.

On the other hand, the Court will look bad in the eyes of liberals and the LGBTQ community in particular if it holds that states can distinguish between 1) a marriage rooted in a transcendent, pre-existing law grounded in a certain understanding of what it means to be human as male and female and 2) a relationship *created* by "enacted" law that legislators decided to call a "marriage" instead of a civil union (Holding MCRA constitutional does not necessarily require the Court to overrule its judgment in *Obergefell* nor would that holding constitutionally prohibit states from giving their approval to any kind of relationship and calling it marriage.)

The Court has put itself in a position in which its precious reputation regarding institutional integrity will be damned in the eyes of its lovers. Its position is well deserved; it is of its own making.

PART III

CHAPTER 9

Everyone Pushes Their Religion in the Legislature

Discussing the Marital Contract Recording Act in terms of religious beliefs will cause apoplexy among opponents of the legislation and even some Christians. But logically they cannot use those beliefs as a reason the Act must be rejected.

The fundamental reason this objection cannot be used, as opposed to the *supposed* constitutional objections covered in the next chapter, was expressed in a commentary I wrote in 2018. That year the United States Supreme Court held that the state of Colorado had engaged in religious discrimination against a baker of custom wedding cakes. The baker had refused to design a wedding cake for a reception following a wedding between two men. I wrote,

> To hold that faith commitments based on God are not acceptable and faith commitments based on the denial of God are acceptable is the essence of discrimination against religion.

After writing that, I received an email from a person I did not know, but now consider a friend even though our beliefs about God and public policy are poles apart. The email said, "You make people think. I've been thinking about what you wrote all day."

Facing the Religious Issue Head On.

What I said in that 2018 commentary is true. But the fundamental point is not really one of discrimination, because every viewpoint "discriminates" against a different one.

No viewpoint is ever neutral about the belief most fundamental to that viewpoint. And this leads to why it is logically wrong to use the religious beliefs expressed by some supporters of the Act as a reason to attack the Marital Contract Recording Act: *Every argument for and against the Marital Contract Recording Act is predicated on an underlying faith commitment formulated in terms of the existence of God.*

Some, if not many, will protest and deny this statement, but only because they have not been challenged by Christians to think through the assumption on which their objection to "religious reasoning" rests. It is to that I now turn.

Literally Everyone Brings Their Religion to the Legislature.

Abraham Kuyper, the late 19th Century theologian and entrepreneur turned Prime Minister of The Netherlands, put the argument this way:

> If it is true that every general development form of life [a worldview] must find its starting point in a peculiar interpretation of our relation to God, – how then do you explain the fact that Modernism [i.e., atheism] also has led to such a general conception, *notwithstanding* it sprang from the French Revolution, *which on principle broke with* ***all*** *religion.* (emphasis added)

In other words, those who oppose even the slightest intimation that a religious belief could lie behind the Marital Contract Recording Act will say, "Fowler, you can't claim that an atheist's viewpoint is religious, because the

atheist denies the existence of God! How can you say the atheist's perspective is religious?"

To this Kuyper simply and rightly said:

> The question answers itself. If you exclude from your conceptions [i.e., worldview] all reckoning with the Living God just as is implied in the cry, "no God no master," you certainly bring to the front a sharply defined interpretation of your own for our relation to God.

Conclusion.

Atheism is a belief system *defined in terms of theism*. I find that rather telling. The atheist just cannot escape God[15] and the sense of the eternal that God has placed in the human heart.[16]

That is not to say the atheist will not try to suppress that truth (Romans 1:18) or hide it from others. The atheist may insist that the word "humanist" or "secular humanist" be used, but it is the same thing—a belief that humans are free from any demands, commands, or laws (moral or physical) that originate in a transcendent Creator God (Pantheism is okay because that god is really irrelevant to how we interpret the world—the world just is what it is and all you need is a stiff upper lip to get on with things).

Thus, what I wrote in 2018 is true, "To hold that faith commitments based on God are not acceptable and faith commitments based on the denial of God are acceptable is the essence of discrimination against religion." And we all discriminate in one direction or the other.

Debate over the MCRA by state legislators (and the response to it by the governor) will soon reveal which view of God and faith commitment they really hold: 1) God is relevant to all things and provides us His own interpretation of them in the Bible, 2) God is relevant only to some things and

may or may not provide an interpretation of anything (which is not much of a God), or 3) God or the concept of God is not relevant to anything.

Of course, these state officials will also find out what those who fill Christian churches really believe by how active they are in support of the bill.

CHAPTER 10

Demanding that Legislators Be "Practical Atheists" Is Unconstitutional

Opponents of the Marital Contract Recording Act who do not want to tangle with the point made in the preceding chapter will undoubtedly say it is immaterial. They will say the U.S. Constitution requires that religious beliefs be excluded from consideration. Here is why they are wrong again.

To say that the Establishment Clause means only faith commitments grounded in the denial of God and the consequent belief in the autonomy of human beings from any God can be considered in making public policy is to say that the clause was intended by the Framers to establish atheism. This is humorous given the history of our nation. America was not simply a French Revolution on a different continent.

But it is also humorous because this purported establishment of unbelief in God violates its controlling principle, namely, that the Constitution forbids consideration of beliefs about God. The atheist asserts a belief about God to justify excluding all beliefs about God!

However, laying aside this contradiction in principle, this interpretation is contrary to everything we know about history and the purpose of the Clause. The argument for the constitutional establishment of atheism not only rests on a fundamental misunderstanding of religion (that anyone can be neutral on matters of religion), but a faulty view of the history behind *the three religion clauses* in the Constitution that must be read as a unified whole, another reminder of the importance of keeping parts and the whole in mind.[17] That is covered in the next two chapters.

CHAPTER 11

Arguing Against the Act on Religious Grounds Violates the Establishment Clause

When a proponent of an atheistic Establishment Clause points to Thomas Jefferson's famous "wall of separation" letter to the Danbury Baptists, I will point them and, in due turn, the U.S. Supreme Court to this interpretation of the Establishment Clause proffered by highly esteemed Supreme Court Justice and Dane Professor of Constitutional Law at Harvard, Joseph Story:

> An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[18]

If original public meaning and original intent mean anything to the six current Supreme Court justices who say they hold to that principle of interpretation, then the justices and the Act's "religious opponents" will have to contend with Story's interpretation.

Ironically, those opponents will be asking the court system not only to "countenance" but to "advance . . . infidelity," which was then defined as

"disbelief of the inspiration of the Scriptures, or the divine original of Christianity; unbelief."[19]

In my opinion, it is time for Christians to tell the Supreme Court to stop "prostrating Christianity" so that atheism can "advance." As said in the preceding Chapter, there is no religious neutrality in relation to God. God just does not give us or the Court that option.

What Is "an Establishment" of Religion?

The key to the Establishment Clause should be the original public meaning of the words, "an establishment" of religion, wrongly misquoted by the Supreme Court in 1947 as "the establishment" of religion.[20] There is a huge difference between "an" and "the" in relation to the noun "establishment."

This difference is made clear by another observation by Justice Story about the Establishment Clause: "It was impossible, that there should not arise perpetual strife, and perpetual jealousy on the subject of *ecclesiastical ascendancy* if the national government were left free to create *a religious establishment*.[21] The only security was in extirpating the power."

The italicized words are key to understanding that "an establishment" was not about religious views informing policy decisions but about creating what Story said in the previous quote, a "national ecclesiastical establishment" that would gain "ascendency" to a position from which it would receive the "exclusive patronage" of the federal government.

Thomas Jefferson Weighs in on My Side

I will also offer fans of Jefferson's Danbury Baptist letter another of Jefferson's letters (Sep. 23. 1800) to corroborate Justice Story's interpretation of the Establishment Clause. This letter was to Dr. Benjamin Rush during his campaign for President. To appreciate this letter, you need to remember that Congregationalists, with their theology and form of church polity (ecclesiology) was the established form of Christianity in Connecticut.

> "The clause of the Constitution which … covered … the freedom of religion [note, not the Establishment Clause] **had given to the clergy a very favorite hope of obtaining *an establishment of a particular form of Christianity*** through the United States … *especially* the Episcopalians and ***Congregationalists***. … And they believe that **any portion of power confided to me will be exerted in opposition to their schemes.** And they believe rightly."[22]

The possibility of the kind of establishment Story was describing and Jefferson's campaign promise to oppose it is why the Baptists in Connecticut wrote Jefferson in the first place!

In the Association's January 1, 1802, letter to Jefferson, it expressed concern that "what religious privileges we enjoy" from the *Congregationalist Church established in Connecticut*, "we enjoy as favors granted, and not as inalienable rights; and these favors we receive at the expense of such degrading acknowledgements as are inconsistent with the rights of freemen."

In other words, the Congregationalist form of Christianity existing at that time was a form of Puritan Calvinism and its beliefs and polity had the "exclusive patronage" of Connecticut's government. Other forms of Christianity, e.g., Baptist, and other forms of ecclesiastical polity, e.g., episcopal, got only what Connecticut's government would allow to them.

In sum, Jefferson was simply confirming to the Danbury Baptist Association what he had earlier said to Dr. Rush in his presidential campaign—he would oppose any effort by Congregationalists to obtain for its form of Christian theology and ecclesiology the "exclusive patronage" of the national government. Obtaining this patronage was "an establishment of religion," not a citizenry having policy views informed by their religion.

If the Supreme Court wants to use one letter from Thomas Jefferson to aid its interpretation of the Establishment Clause, it should also use his contemporaneous letter to Dr. Rush on the same subject, which illuminates the political history surrounding the Danbury Baptist correspondence. To do otherwise is dishonest in my view.

CHAPTER 12

The Anti-God Forces Violate the "No Religious Test" Clause

Finally, Justice Story did not leave his understanding of the Establishment Clause hanging in the proverbial breeze, in isolation from the rest of the Constitution, waiting for an atheist to come along and warp its meaning.

That clause, part of the Bill of Rights, must be interpreted according to the purpose for the Bill of Rights as a whole. According to its preamble, the provisions in the Bill of Rights were developed "to prevent misconstruction or abuse of [the federal government's] powers" found in the Constitution's existing text. They were "*further* declaratory and restrictive" provisions with respect to what *already* existed.

With that as context, Story said the Framers knew the Establishment Clause "alone would have been an imperfect security, if it had not been followed up by [1] a declaration of the right of the free exercise of religion, and [2] a prohibition … of all religious tests."

Consistent with the purpose for the Bill of Rights stated in its preamble, the First Amendment was to make clearer what was intended by the "no religious test" provision in Article VI of the Constitution. In other words, the three religion clauses must be understood as a unified whole, and that explains why Story summed up the First Amendment as follows: "[T]he Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship."

Those who argue that the Establishment Clause requires the Constitution, law, and public policy be considered only from a purely atheistic viewpoint and requires exclusion of Christian considerations are doing precisely what the three religion clauses are designed to prohibit—exclude people like me and my beliefs about law and government from law and government.

I trust elected officials will not allow the many in their state who believe as I do to be excluded from discussing and supporting the MCRA simply because we are not atheists. That would be unconstitutional.

PART IV

CHAPTER 13

The Worldview Question That Will Be Answered

The most fundamental worldview question in the world is posed by the Marital Contract Recording Act: What do you make of God? It is the same question God, in the person of Jesus, asked Peter, "Who do you say that I am?" (Mark 8:27-29). In the final analysis, the good or ill of the legislation rests on what one believes about God.

Based *strictly* on my belief in the God described in Chapter 1, I assert that it is *truly* good. MCRA is consistent with an assertion that male and female, and the marital relationship belong to God, that they are pre-defined by the God according to His will and purpose, and that the marital relation was God's gift to a man and woman in the context of creation.

Because I believe in the Triune Creator God no "fact" about male and female and the differences between them stands in isolation from or contradicts any other fact. The Act represents a wonderful picture of a unity of value (both are made in the image of God) in the context of diversity of persons (male and female) that I believe is true of God.

If there is no such God, then I cannot say the legislation is truly any better or worse than what Tennessee now has; there is no absolute standard by which I can judge any opinion or preference as better than my own. With this worldview, all I can really say is time may show that my opinion or preference, if enacted, worked out okay enough for most people not to complain too much.

The foregoing does not mean only those who believe in the God of the Bible can support the MCRA. As was often said when I was in office, "You can support my legislation for the reason of your choice!"

So, for example, some may want to support the Act because it means a man and a woman are *telling the government* what they have done (that God gave them the right to do), not *the government telling them* what rights they have and what they can do. Telling the government where to get off has increasing currency in our culture. I personally appreciate that sentiment.

Still others, perhaps hard-core libertarians, could support the Act simply because they think marriage is a private matter and, under the Act, state government is not "interfering" in a private marriage between two people, at least not to the extent that it already does with its "permitting" process. For them there would be nothing more wrong about the MCRA than anything else.

Finally, others may support the Act on the ground that it simply reflects the common law or is consistent with what the people of Tennessee voted to put in their state Constitution. Or they may want to oppose or check the expansive powers of the Supreme Court, defend the value of dual sovereigns, or look conservative, Republican, or Christian to those whose opinions matter to them.

Because a Christian cannot require that only a Christian reason be asserted or relied on as anyone's rationale for supporting the Act, supporting or voting for the Act for the reason I offer is not the creation of a "Christian theocracy" or, when rightly understood, "an establishment of religion" (Chapters 11 and 12).

Here, though is the point: If reason uninformed by God's Word *about who God is* is all we are going to trust in, it can just as easily be reasoned that all those arguments should give way to something others may, for their own good reasons, deem more fundamental or important, for example, the rights and dignity of same-sex couples.

So, at bottom, the only thing that makes support for the Act something more than a matter of preference is the transcendent authority of God over what He created—the meaning of male and female and the meaning of that distinction to a marital relationship—and over civil government.

If that underlying worldview belief is false, support or oppose the Act for the reason(s) of your choice. After all, you are as much God as those who seek to play that role on the United States Supreme Court, and you should be god enough to tell them so.

But in the end, I will say this about our political future:

> If our state elected officials choose to reject the Act (or simply not act on it) *and* the people of Tennessee let them, then we will know that we are on a superhighway headed straight to civil government tyranny—the United State Supreme Court's transfer of transcendent authority to itself is okay with us.

CHAPTER 14

This Is Really Serious Business to God

The foregoing is serious business in God's sight. First, because everything is God's by virtue of creation (Exodus 19:5, Psalm 24:1, Acts 17:24), Second, because everything must[23] reveal His glory (Psalm 19:1). Third, God says He will not give His glory to another (Isaiah 42:8, 48:11). That should give us pause.

Two examples from Scripture should suffice to prove how seriously God takes His glory, and they both come from the sphere of government:

- Nebuchadnezzar's sovereignty *and* sanity were taken from him when he thought his rule was by the "might of his power and the glory of his majesty" (Daniel 4:30-33), and
- Herod's sovereignty was taken by his immediate death because he allowed the glory belonging only to God to be ascribed to him by the people without disabusing them of that notion by publicly "giv[ing] the glory to God" (Acts 12:21-23).

The Supreme Court's claim to a transcendent authority over what God has created and over the meaning and purpose He ascribed to what He created is a *defining* aspect of the glory of God. God will not allow the usurpation of His glory by civil government (or anyone, for that matter) to stand forever, even if the adjective used by the people to describe the Court is "Supreme." Those two stories should remind the Court that if there is a God, then its hubris will not go unnoticed.

If God is true to Himself and to His Word, the Supreme Court justices who continue to reject God's truth claims, as well as the Court itself, must be under the judgment of God. What has been true of other rulers and entire nations over the course of history will be true here as well. *Where is their glory now, the poetical figure Ozymandias would have us ask?*

If the majority of the justices do not in some way repent of their pride before God in their works, then, in time, the wrath of God will be revealed from Heaven against that institution (Romans 1:18). But do not make the mistake of looking for fire falling from Heaven on the Supreme Court building and, in the absence of that, think God's judgment did not fall. Institutionally, God's judgment may be simply removing from the eyes of the people the Court's institutional integrity.

The Court depends on its perceived integrity for its judgments to be respected by the people and the other branches of government. Under the Constitution, the Court's only "power" is the respect we hold for its decisions. For the Court, loss of credibility *is* loss of power, and the justices know that.

It was fear of how its integrity would be perceived by some people that caused the Court in *Planned Parenthood v. Casey* (1972) to sustain the murderous holocaust it unleashed on unborn persons by *Roe v. Wade* (1973). Its integrity is again at stake in another state abortion case, *Dobbs v. Jackson* Women's Health Center (decision expected by June 2022). During oral argument in Dobbs, some justices made it clear that the Court's institutional integrity was the decisive issue.

Regardless of what form it takes, the Court's damnation for its abortion decisions is inevitable. In a Holy sense, damnation will rest on the Court for murder if it does not reverse *Roe* and *Casey* (See 1 Kings 21:17-19 and 1 Samuel 22:22 for examples of governmental culpability for murder and indirect culpability for murder by others, respectively).

In a profane sense, political and jurisprudential liberals will damn the Court if it reverses *Roe* and *Casey*. On the other hand, political and jurisprudential conservatives will damn the Court for disregarding the text of

the Constitution and allowing something not in the Constitution to remain a "constitutional right."

What About Christians?

I have had strong words about the Court for sure, but do strong words apply only to the Court? Based on my reading of the Bible, the answer is "No."

While a person who is in truth a Christian is no longer under condemnation (Romans 8:1) and the Body of Christ cannot be under condemnation because that would put under condemnation the resurrected Christ to whom Christians are joined, that does not mean that Christians, individually and as part of the Body, are not subject to God's corrective discipline (Proverbs 3:11, Hebrews 12:5, Revelation 3:19).

I believe God's righteous and corrective discipline must come upon the visible church if Christians who say they believe in the God of the Bible remain complacent in the face of a Supreme Court that has denied the transcendent God.

One way that complacency is demonstrated is by submitting to judgments by the Supreme Court, posing as law, that reinterpret what it means to be human without exercising any of the multiple means of resistance that are available.[24] Those judgments arise from "arguments" by a Court that has "exalted" itself "against the knowledge of God." Consequently, the heart and mind of a Christian should be bent by its affection for and knowledge of the "glory of God in the face of Christ (2 Corinthians 4:6)[25] toward "casting down [such] arguments" for the sake of bringing "every thought into captivity to the obedience of Christ" (2 Corinthians 10:5).

The choice now before for Christians is to defend and support what they say they believe or capitulate.

I pray Christians will not, as a practical matter, join themselves to a United States Supreme Court that has denied God by remaining silent and accepting its reasoning and decrees.

To find out more about the Act go to www.FACTennessee.org

EPILOGUE

Confession, Repentance, and Request for Forgiveness

The Words of the Prophet Isaiah to Me

Isaiah 64:6

"But we are all like an unclean thing, and all our righteousnesses are like filthy rags."

In recent years, God, in His great mercy, began to "shine in my heart the knowledge of the glory of God *in the face of Christ*" (2 Corinthians 4:6, emphasis added). As that searing light continued to rise and penetrate my heart (my affections), the more I began to see, believe, and then apprehend more of those perfections of the eternal, infinite Creator of all things described, in sum, as the glory of God.

In other words, I began to appreciate what the Psalmist said, "In your light we see light" (Psalm 36:9). Without it, I was walking in deep darkness (Isaiah 9:2, 59:9).

In God's perfect light, all things become exposed (Isaiah 47; Ezekiel 16). One stands, as it were, naked before Him.

One of the things exposed about me was that most of my work in politics, at least in public, and that some might consider "righteous deeds," were nothing but "filthy rags" in God's sight (Isaiah 64:6).

The Futility of My Political Work Before God.

I have come to believe that much of what I have done politically was futile *in God's sight* (a type of filthy rag) because the way I argued for various public policies did not honor God as God or glorify God as God.

Why My Efforts Were Futile Before God.

At bottom, I did not yet understand the full import of the Apostle Paul's assertion that "no one can lay a foundation other than the one which is laid, which is Jesus Christ" (1 Corinthians 3:11).

I wrongly limited the meaning of that verse to matters of salvation and did not apply it to everything. I did so because I had no true understanding of the height, depth, width, and breadth of the glory of God revealed in Jesus Christ. I did not understand that in the "knowledge of the mystery of God, both of the Father and of Christ," are "hidden *all* the treasures of wisdom and knowledge" (Colossians 2:2-3, emphasis added).

Had I been able to grasp the full import of what Paul said about the only true foundation in 1 Corinthians 3:11 and its relevance to true wisdom and knowledge, I would have better understood that if what I was working on was not rightly built on that foundation then that "work is burned up" (1 Corinthians 3:15, NASB) either in this life or on judgment day.

As I considered and prayed over those verses in recent years, I thought about the two "signature" achievements of my political engagement, the marriage amendment to the Tennessee Constitution and the "Equal Access to Intrastate Commerce Act", Public Chapter 278, 107th General Assembly. Both have been largely swept away, the former by Justices Anthony Kennedy in *Obergefell v. Hodges* and the latter by Justice Neil Gorsuch in *Bostock v. Clayton County, Georgia* (2020).

As best I can tell, the enduring political value of those legislative efforts is no greater than those of my larger, nationally known, and more "glorious" predecessors in Christian public policy, Jerry's Falwell's Moral Majority[26] and Pat Robertson's Christian Coalition, and for what I believe to be the same reason.

Thankfully, having come to some understanding of the glory of God, I also know for a certainty that God is greater than my failures. He has and will continue to direct them to His own good purposes and ends (Romans 11:36), even as He did with those who crucified Jesus (Acts 4:27-28). My only consolation about past work is found in God, not what I have done.

My Offense Against Others.

Another thing I must confess is a particular terrible effect of my past political work. Had that work been built rightly on that one true foundation, I would not have offended and wronged so many in my political endeavors *by the odiousness of my filthy rags*. I still would have offended many and made enemies, but at least it would have been because the gospel itself is an offense (Mark 6:3, 1 Peter 2:7-8).

The Filthy Rags I Wore.

The "filthy rags" with which I covered much of my public political life consisted of making my case for public policy based on an assumption the Bible says is false. I made my case on the assumption that all human beings are fully capable, without *God having* "shone in [their] hearts to *give* the light of the knowledge of the glory of God in the face of Christ" (2 Corinthians 4:6), to evaluate various facts and interpret them as God intended. I worked on the premise that if I presented the facts in a logical and compelling manner, then others, as a matter of logical reasoning, would agree with my interpretation of them.

Some may not see the error in that, but I now see that my assumption was "out of whack" in relation to the glory of God and human poverty in all regards, including my own. Specifically, it was wrong in God's sight for me to think and to insist that others think my thoughts were *truly* right without regard to what the Word of God says about who God is and how our *natural* way of thinking is hostile to God and foolish in His sight. (Romans 3:9-18, 1 Corinthians 1:21, 2:14). I *said* I believed the Word of God, but then I *acted*—presented *my* case, not God's case—as though I did not.

Why This Was Odious.

Because I was operating in the policy realm on a wrong assumption about the power of human reason and thinking apart from God's revelation, I can now understand why that kind of argument would seem hateful. I was agreeing with the assumption of non-Christians that human beings can reason for themselves to true conclusions about facts without reference to God or His Word and His merciful work in their hearts and minds. Then, I was insisting that they reason to *my* conclusion.

Those who reached a different conclusion had every right to be put off and offended. The way I was going about things I was really asserting what could only be a preference, and matters of mere preference, like chocolate or vanilla, are not compelling.

Divorced from who God is, my argument was *purely* a moralistic preference, and surely it came off that way to those who do not believe in the God of the Bible. Certainly, no sense of the gospel good news—that God has made Himself known to us and the importance of that knowledge—was even remotely associated with what I said or how I reasoned. Better to be hated for the latter gospel approach than the moralistic one.

Moreover, based on my assumption, I had no right to be angry and condemn anyone who did not agree with *my* preferred conclusion. That attitude came across far too often.

But it was more than anger. God exposed the fact that my anger was often a cloak for covering deep-down unbelief in the God I said I believed in. From God's perspective, my anger meant I did not believe He was good and did not know what He was doing because He did not use His superintending authority over all things to direct the results of my work to the ends *I had envisioned*.

Holy passion is a good thing; when it cloaks unbelief and self-righteousness that is quite another. By virtue of my natural temperament, I constantly must ask God to help me be content in Him and trust Him in *all* His works. I need to ask His help more often than I already do.

Having confessed this to God, I now confess it to all those I offended, and I ask for your forgiveness. Public wrongs require public confession.

An Analogy—Peter Lives Contrary to the Gospel.

What I have said about the way I made my case for public policies came home to me recently when I re-read the Apostle Paul's condemnation of the Apostle Peter in the book of Galatians. When Peter, after previously eating with the Gentiles, separated from them after his fellow Jews showed up, Paul stood in front of *everyone* and said:

> But when I saw that they were not straightforward about the truth of the gospel, I said to Peter before them all, "If you, being a Jew, live in the manner of Gentiles and not as the Jews, why do you compel Gentiles to live as Jews? (Galatians 2:14)

The gospel was at stake because Peter was giving in to the old way of Jewish thinking—to be holy in God's sight, the old distinctions between Jew and Gentile had to be maintained.

Why, Paul was saying, are you being inconsistent Peter? Get your "preaching" and your "living" in line with one another and stop making other people live contrary to the gospel you are preaching.

Similarly, I was "preaching" public policy like a non-Christian but expecting everyone to be Christian in their conclusions and actions. Here is my paraphrase of what Paul said to Peter:

> David, if you, being a Christian, are going to agree to think and reason "in the manner of" the non-Christian—reasoning from facts isolated from any concrete absolute truth about Me in my Word and then drawing conclusions—then why do you want to "compel" them to think and to live as a Christian? You are not being straightforward.

I was saying to non-Christians I would *think* with them about public policy according to the principle of autonomous human reasoning, but then saying they had to *live* according to what the Bible says.

Some may think I am crazy for admitting these things publicly, because, if nothing else, it might undermine any effort to have the Marital Contract Recording Act enacted into law or put a case before the Supreme Court in which each justice will have to decide what God, if any, he or she believes in.

However, I have come to believe that pitting political success (whatever God thinks that is) against publically bearing witness to how the God in whom I believe connects to a particular public policy is a form of dualism. I do not think it has to be an either/or proposition if I am not deciding for God what "political success" is. I can easily be deceived into substituting a political or legal outcome for bearing witness to the glory of God that He, in pure mercy, chose to reveal to me and why it is relevant to all things.

To "keep God out of it" also raises the question why "conservative" Christians even preach from the Bible. If non-Christians are not going to believe the Bible and cannot be influenced by the Bible's teaching in the public square, then I don't see why it becomes more powerful than a two-edged sword (Hebrews 4:12) when used in a church building.

Finally, I believe what lies behind this kind of thinking is a belief that God is powerless to overcome what I do, that His will is at all times subject to me. That doesn't mean I am not responsible to God for what I do and that discernment, wisdom, and prudence are irrelevant, but simply means that God is greater than what I do (Acts 4:27-28).

In sum, I now believe the truth that follows, and I am doing that which I think best demonstrates that truth:

> Let no one deceive himself. *If anyone among you seems to be wise in this age, let him become a fool that he may become wise*. For the wisdom of this world is foolishness with God. For it is written, "He catches the wise in their own craftiness;" and again, "The Lord knows the thoughts of the wise, that they are futile." Therefore let no one boast in men.
>
> 1 Corinthians 3:18-21 (emphasis added)

END NOTES

1 As with all contracts, a marital contract is only valid if the parties are capable of or competent to give informed consent and the consent was mutual and voluntary. These same common law concepts regarding contracts are found in T.C.A. 36-3-106, - 108, and- 109. This is consistent with the principle laid down in *Munn* that statutes either reflect or correct defects in the pre-existing common law.

2 Herman Bavinck, *Reformed Dogmatics,* Vol. 2, "God and Creation," chapter 8. Cf Isaiah 28:23-29; Jeremiah 8:7, Acts 14:17

3 For an excellent analysis of this proposition, read *Pantheism's Destruction of Boundaries* by Abraham Kuyper.

4 If you think defining the marital relationship as any two human beings instead of only male and female did not abolish the Biblical definition of marriage, then let me ask: What do you call a triangle when its definition is "expanded" to include the possibility of more than three sides?" Whatever it is, we all know it is no longer a triangle. Triangles as we have known them—defined exclusively and exhaustively as a geometric figure with only three sides—no longer exist.

5 *See* William Blackstone, *Commentaries on the Laws of England* ("[E]very man now finds . . . that his reason is corrupt, and his understanding full of ignorance and error. This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures.")

6 Atheists also assume what they cannot *prove*—the universal negative of the non-existence of God. To prove a universal negative, one would have to have knowledge of all things (be omniscient) and be everywhere simultaneously that God might be found (be omnipresent). In other words, the atheist must *be* the God

of the Bible to *prove* absolutely there is no God. Probabilities in their presumed world of chance are meaningless; probability only means one could be wrong Therefore, atheists make their own assumption about transcendence. For them to call believers in the God of the Bible fools for believing in what they cannot prove is nothing more than the pot calling the kettle black. The God of the Bible calls them fools (Psalm 14:1, 53:1, 92).

7 1 William Blackstone, *Commentaries on the Laws of England*.

8 Even after adoption of the Fourteenth Amendment, the Supreme Court has acknowledged the relevance of common law to the interpretation of the Constitution. See *Smith v. Alabama*, 124 U.S. 465, 478 (1888) ("The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."); *Minor v. Happersett*, 88 U.S. 162, 167 (1875) (saying common law was "the nomenclature of which the framers of the Constitution were familiar.").

9 *Obergefell* (Scalia, J., dissenting). The Court's "hubris" was not just in thinking it could redefine marriage or impose its view of marriage on the states but was the natural result of a hubris rooted in the institution's earlier rejection of the transcendent God.

10 The answer is not the Supremacy Clause in the U.S. Constitution. If Court essays providing a rationale for its judgments are equal to the Constitution, then "separate but equal" (*Plessy v. Ferguson*, 1896) would still be constitutional law and same sex marriage would still not involve a federal question the Court could have resolved (*Baker v. Nelson*, 1972). Constitutional amendments would have been required to "change" the Constitution following those decisions, not new decisions in *Brown v. Board of Education* (1954) and *Obergefell v. Hodges* (2015), respectively. Moreover, who could in good conscience take an oath to uphold an unknown future Supreme Court essay as law no matter how preposterous its reasoning and conclusion? The idea of judicial supremacy is a modern myth created by the U.S. Supreme Court in *Cooper v. Aaron* (1958).

11 By the way, the judicial power cannot compel a legislative body to enact any statute. That would be a violation of the separation of powers and mean the branches of government are no longer equal and independent. That is why Tennessee's "male and female" requirement could not have been changed by anything in the Court's *Obergefell* decision. That Justices Roberts, Alito, and Thomas thought the Court's decision "required" states to issue marriage licenses to same-sex couples means they do not understand the separation of powers or the purpose of the division of powers between dual sovereigns; the Supreme Court makes "law" for the nation, including the states! The Court cannot require a state to license anything!

12 "Love is love" is a vacuous slogan unless we know what love is. The Bible says "God is love (1 John 4:10). *If that is true*, then not to know God as He is means we do not to know what love is. And if a Triune God doesn't exist, then God cannot be love without something else existing for God to love, which is the intellectual problem with Islam and Judaism. God had to create, otherwise love would be a vacuous word. *God is not love in Himself if He needed something outside of Himself for love to exist; how pathetic is* ***that*** *God!* Of course, if the Triune God doesn't exist, each of us, as little godlets, can make love mean whatever we want. It is nothing more than a matter of preference.

13 Some legal scholars fear use of the Ninth Amendment will become a new source from which the Supreme Court's justices will invent new rights and then use those rights to restrict the state and federal legislative branches. This fear is misplaced because the Ninth Amendment cannot be interpreted in isolation from the Tenth Amendment, which says jurisdiction to protect those other rights rests with the states or the people, not the federal judiciary or even the federal government. To think otherwise is to overlook the preamble to the Bill of Rights declaring that its individual provisions be construed as a whole, limiting the jurisdiction of the federal government. Moreover, fear that the Court will not apply a common law understanding of the Ninth Amendment is no worse than what the Court is now doing, making up "liberty rights" under the Fourteenth Amendment's Due Process Clause that are totally divorced from the common law meaning of "liberty."

14 Making "state's rights" arguments based *only* on the Tenth Amendment doesn't make sense to me unless the state can first explain what is under its jurisdic-

tion and why. The Bill of Rights, by its terms and according to its preamble, along with the Ninth and Tenth Amendments, puts jurisdiction to protect all common law rights in the hands of the states or the people. The Fourteenth Amendment's Due Process and Equal Protection Clauses did not change that; rather they only put protective limits on how the state went about securing common law rights.

15 Psalm 139:7-10, "Where can I go from Your Spirit? Or where can I flee from Your presence? If I ascend into heaven, You are there; If I make my bed in hell, behold, You are there. If I take the wings of the morning, and dwell in the uttermost parts of the sea, even there Your hand shall lead me, and Your right hand shall hold me."

16 Ecclesiastes 3:11, "He has put eternity in the hearts."

17 In my view, Christians have acquiesced to this self-contradicting and non-historical subterfuge about the Establishment Clause long enough. Arguing that religious symbols and prayers are okay so long as they are void of any real, on-going religious meaning or that they are okay as a matter of historical tradition cannot be a long-term solution. Despite good intentions, God is not honored by erecting or protecting "alters to an unknown God" (Acts 17:23). This approach may well buy Christians some time in the culture wars, and for that we can be grateful. But it is hard for me to see how this approach honors God as God and, consequently, why He would, over the long haul, honor it. Not every tree that bears blossoms bears fruit (Isaiah 17:11).

18 Joseph Story, *Commentaries on the Constitution*, § 1871 and 1873.

19 Webster's 1828 Dictionary.

20 The United States Supreme Court began to get the meaning of the Establishment Clause wrong in 1947. That year, in *Everson v. Board of Education*, Justice Hugo Black, through his opinion, took it upon himself to change the phrase in the Constitution from "an establishment of religion" into "the establishment of religion." This dramatically altered the meaning of the clause.

21 Interestingly, one of the definitions of "establishment" in Webster's 1828 Dictionary is "the episcopal form of religion, so called in England."

22 From Thomas Jefferson to Benjamin Rush, 23 September 1800.

23 Saying every created thing must, in some way, reveal God's glory may sound strange to some Christians. But if there is some aspect of creation that does not reveal God's glory, then the non-Christian can rightly say to God, "You cannot say I fall short of the glory of God because what is known about You is evident in creation." In other words, a non-Christian can justly claim that whatever did not reveal God's glory was the key piece of evidence for him or her! Paul's whole argument in Romans 1:18-32 and his conclusion in Romans 3:23 that we all fall short of the glory of God falls apart if there is some place in the universe to which we can escape and not find God. That is precisely where we will go and think we can hide ourselves from God. Psalm 139: 7-8 say that is impossible: "Where can I go from Your Spirit? Or where can I flee from Your presence? If I ascend into heaven, You are there: if I make my bed in hell, behold, You are there."

24 I understand that in some states enacting the MCRA is currently impossible. On the other hand, simply filing it could provide a platform for talking about a Court and state government that is, at bottom, tyrannical because they think they are God. I also understand that any number of other things are "going wrong" and "we can't do everything." But I have identified what I believe the Bible says is at the root of them all: a people who have at every level of society and place in society have rejected God as their fundamental interpretative principle. Until the axe is laid at that root in a manner that makes clear to policy makers and onlookers the root problem, the problem one prioritizes today as more important than marriage will not be solved long-term. Today's prevailing preferences regarding matters about which God cannot be indifferent and presented on the basis of a rootless view of reality and the power of autonomous human reason to rightly interpret "facts" will be out of fashion tomorrow. The compelling "facts" of today will be re-interpreted out of existence tomorrow.

25 It should be noted that 2 Corinthians 4:6 speaks to an act of God in re-creation like that of the initial creation that reaches the heart and the mind. "For it

is the God who commanded light to shine out of darkness, who has shone in our *hearts* to give the light of the *knowledge* of the glory of God in the face of Jesus Christ." (emphasis added)

26 Dr. Jerry Falwell said, "Moral Majority is a political organization and *is not based on theological considerations.*" *Moral Majority Report*, Vol. I, No. 13 (Oct 15, 1980), p. 4 (emphasis added). This is outright dualism. It separates God from an aspect of His creation—ethics, law, and civil government—repudiating Psalm 24:1, "The earth is the Lord's and all its fullness, the world and those who dwell therein." Falwell also said, "we are mobilized, we are effective, and, we are not going away." Interview with John Rees, Review of the News, Vol. 17, No. 18 (May 6, 1981), p. 2. This is the arrogance about which James wrote (James 3:13-16) and the poetical figure Ozymandias bears witness. I have been guilty as well.