

1984

## American Constitutional History Study Guide

Steven Alan Samson

*Liberty University*, [ssamson@liberty.edu](mailto:ssamson@liberty.edu)

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## I. Sifirski: Jurisprudence in the Old Testament

### A. Covenant as a system of legal philosophy

1. legal rules are not emphasized

### B. State contract of the Old Testament

#### 1. Theocracy

a. God's sign is the monarch

b. title derived from covenant of grace

#### 2. State Contract - basis of nation, monotheism

### C. Mosaic Covenant

1. God appears as absolute ruler who places himself under moral obligation never again to destroy all life - covenant represents a grant of grace but it is concluded through a bilateral act (sacrifice?)

### D. Mosaic Covenant

1. Functional in nature - violation of terms is a breach of contract carrying sanctions - violator is cut off

2. Original sin - Sifirski thinks man becomes good through the law

3. Freedom is under the law

4. Tribal authority transformed into one state or nation

a. Roman law - sanctioning agent; law applies to violator & alien

5. National citizenship (entitlement to a portion of governed land) not quite true

### E. Concept of Law

1. Divine in origin but <sup>statutes</sup> enacted at specific dates. (not necessarily)

2. legal edicts through proclamation - universal, indeterminate time repetitive (cf. the tablet)

3. Case law supplements statutory law

4. System of classification (Berman fails to note this) - statutes vs. judgments

Ps. 119

### F. Constitutional Concepts

1. Independent judgment in a trial - no punishment for voting against the majority (Rousseau's general will?)
2. Criticism of government action permitted - institutionalized in the person of the people?
3. Due process - right to hearings, bias prohibited, proof requires testimony, witnesses must agree, investigation of charges (penalties for false witness)
4. Equal taxation for all - <sup>1701</sup>head tax (tax on the soul) reflects this
5. Cruel and unusual punishment forbidden - guilty are not to be degraded

6. Decisions by acclamation or consensus
7. Voting by acclamation or unanimous disapproval

#### C. Kings

1. King's demand for a king seen as a rejection of God's will
2. God insists on constitutional monarchy

#### H. Fact-Finding and Psychological Factors

1. Reason (Eternity in their hearts)
2. Difficulties of fact-finding acknowledged
3. Legal formalism <sup>implicitly</sup> criticized (Mabot's vineyard) - (Disagree)
4. Role of cross-examination of the evidence (cf. Bentham's scientific approach)
5. Employment of psychological factors - deterrence
6. Manslaughter distinguishes bad from murder on basis of intent

### II. Millon's Origins of Magna Carta

A. Principle of the rule of law - formalization of state intervention into human state by reference to law rather than by sheer force - rule of law

1. Principle tenets:
  - a. Liberty may be restricted except by law for judgment of peers or by the law of the land

b. There is no crime and no penalty without the law

2. Hypothesis: The great charters guaranteeing these principles are derived from religious ideologies

3. Liberalism and egalitarian implications of these charters - controversy over limited

### III Burrows's Origins of Western Legal Science

#### A. Scholastic Innovations

1. Apodictic and dialectical reasoning conflated
2. Written natural law taken together with Bible, patristic writings, and canon law; higher law (see Corwin)

#### B. Law as the first modern western science

1. Methodological characteristics (p. 931)
2. Value premises
3. Sociological criteria  
a. scholarly scientific communities formed (see Paul Goodman)

### IV Behrens's Introduction to Cotton's Abstract

#### A. Calvinist Model

1. Expression of the kingdom of God in society, as well as in private life
2. Self-governing commonwealth
3. Authority of scripture — no dispensational antagonism between law and grace

#### B. Anti-Applications

1. Absoluting validity of the law — function of law is to restrain sin  
(minister appointed as an avenger of God's wrath)  
a. Civil magistrates are required to enforce the penal commandments of the law
2. Law is to be used as a social restraint on crime as well as a guidance in holy living (covenant theology)

#### C. John Cotton

1. Theocratic government, but separation of church and state
2. Distinguished between civic (ceremonial) and moral laws
3. Quotes Lev 23:22 at end