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CONTRACT, COVENANT, CONSTITUTION*

By Loren E. Lomasky

I. Introduction

The authority that states claim for themselves is so sweeping and unaccommodating to challengers that, absent a compelling justificatory account, it verges on despotism. An imaginative story offering a less heavy-handed representation of the state will, therefore, be welcome. In the liberal tradition, the protagonist of that story has usually been *social contract.* There are, of course, numerous variations on the contract narrative, but in each the state is deemed to be not the master but rather the creation of individual citizens. More precisely, to the extent that the state does exercise mastery, it does so in virtue of a status freely conferred on it by those over whom rule is exercised.

The social contract story yields several morals. First, it implies that private citizens are not the mere chattels of their rulers; they are not slaves or unemancipated minors or inferiors by nature. Rather, they are self-determining agents who have exited the state of nature and formed a civil order through an exercise of their own wills. Second, the state is in the service of its citizens. It owes them those performances for the sake of which it was created. Third, the bounds of obedience are not without limit. Should the regime fail to uphold the terms of the social contract, it can justifiably be cashiered.[1] Running through the narrative, then, is a commitment to the dignity of ordinary human beings. The ruled possess a moral status that entitles them to respect even from the most elevated of their rulers (who are, strictly speaking, not rulers but rather those who serve the ruled by exercising power on their behalf). To be a party to the enabling contract is to be an author of one's own political fate; it is to be not merely a subject but a citizen.

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[1] That is so even for Thomas Hobbes, the most absolutist of the contract theorists. Once the state is unable to provide security for its citizens, the obligations they owe to their sovereign are rendered null and void: "The Obligation of Subjects to the Soveraign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by Nature to protect themselves, when none else can protect them, can by no Covenant be relinquished." Thomas Hobbes, *Leviathan,* chap. 21, "The Liberty of Subjects," ed. Richard Tuck (New York: Cambridge University Press, 1991), 153.

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Even beginning philosophy students are aware that the great founding theorists of liberalism differ sharply among themselves concerning the framework of the contract that undergirds the state. I hereby nod at these issues but mostly ignore them in what follows. The essay aims to set out what contract theories share in virtue of being contract theories, not what distinguishes them one from another. In particular, it aims to display the weaknesses of social contract as a basis for grounding a tolerable political order. Five reasons are set out in Section II for maintaining that contractarianism is unable to ground the authority that state institutions are routinely deemed to enjoy. If anarchism is to be avoided, some alternative strategy is needed. Section III resurrects one such strategy: *covenant*. I don't mean covenant as a synonym for contract; that would be too slender a circle to be worth traversing. Rather, I mean covenant as paradigmatically enacted at Sinai between Israel and its god and subsequently reinterpreted for purposes both religious and political. (The "new covenant" of Christianity is one but not the only instance of reinterpretation.) Section IV argues that *constitution* can usefully be understood as something of a hybrid between contract and covenant, and that it thereby acquires some of the advantages of each. Section V sums up. Quite unimaginatively, the constitution that takes pride of place in the discussion is the American constitution drafted in Philadelphia. Is that special pleading? Of course it is. Political justification does not come easily, and not every document that can be identified as a constitution plausibly supplies it. The interesting question is what constitution, at its best, can contribute to strong political foundations.

II. What's Wrong with Contract?

Here is how vintage social contract theory proceeds: In a prepolitical condition, also known as the "state of nature," life is precarious. The sorts of disagreements that regularly present themselves in a world of scarcity and partiality are apt to escalate into rampant violence. Life is hard enough when it is only sabertooth tigers that need to be fended off, let alone one's fellow men, so sooner or later people have the wit to appoint a common judge over themselves in order to secure the peace. If that original compact does not constitute a civil order, then another step or two of institution-creation does. The result is government by the consent of the governed. The story is enormously edifying. It is also dubious.

A. It never was

If I have agreed to supply you with apples in exchange for your oranges, then there is a moral onus on me to be forthcoming with the apples (especially if you have already transferred the oranges). But if we never

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actually agreed to exchange apples for oranges, however appealing that exchange might be in principle, then no such obligation obtains. Contracts that we *could have* made or even those that we *would have* made under various specified circumstances lack the force of promissory performances. Hypothetical consent may have normative significance as a heuristic for ascertaining achievable reciprocal benefit, but what it cannot do is ground obligation in performance.

One liability of contractarianism, then, is that the primordial compact establishing a civil order never occurred. None of the classical theorists of liberalism is of a mind to declare otherwise. At best, they are vague about the particulars of egress from the state of nature. No hypothesis is hazarded concerning the place or date of the epochal transition; the contractors themselves are bathed in anonymity. Once human beings lived without benefit of political institutions, and then in the foggy past of the species, political structures emerged. In the telling of this story, contract is a black box hypothesized to account for the transition. The only indispensable content of the box is that the changeover was *voluntary,* an act of men rather than an act of God or of unthinking nature. So, for example, John Locke argues against Sir Robert Filmer at stupefying length in the *First Treatise of Government* that no divine proclamation subsequent to the creation of Adam establishes any one man as rightful ruler over his fellows. In the *Second Treatise,* Locke observes that human beings are so similar one to another in mind and body that there can be no assumption that they are sorted into exclusive classes of natural rulers and ruled.[2] The only remaining explanation of the fact that people in every civilized realm are united under institutions of government is that states originated as products of free choice.

Perhaps the most noteworthy fact about the inference to contract is its fragility. At least one other potential origin of states presents itself as no less plausible a mechanism: subjugation of the weak by the strong. That is a dynamic that can be observed in the present, in both private and public realms, so only a very gentle extrapolation is needed to make it the founding motif of states. Thomas Hobbes acknowledges that force majeure is often the means by which individuals are made subjects. In his account, however, forceful subjugation is not an alternative to contract but a version of it.[3] Contract so understood includes offers one cannot (reasonably)

[2] "[The state of nature is] a state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection." John Locke, *Second Treatise,* in Locke, *Two Treatises of Government* (1689), ed. Peter Laslett (New York: New American Library, 1963), sec. 4.

[3] "*A Commonwealth by Acquisition* is that, where the Sovereign Power is acquired by Force; And it is acquired by force, when men singly, or many together by plurality of voyces, for fear of death, or bonds, do authorizse all the actions of that Man, or Assembly, that hath their lives and liberty in his Power." Hobbes, *Leviathan,* chap. 20, "Of Dominion Paternall, and Despoticall," 138.

refuse. Not many will want to follow Hobbes down this particular road. It is questionable whether genuine consent can be elicited at the point of a sword, and it is more questionable still whether, once the imminent peril has passed, individuals should consider themselves constrained by terms thereby extracted. Liberals, as opposed to Hobbesian absolutists, will be disinclined to establish political legitimacy on foundations of acquiescence born of intimidation.

B. Terms of consent

Set aside the problem of whether any credence can be given to the story of a founding contract. There remains the question of what it is to which the contractors agreed. The story told by theorists is that the state of nature is intolerable.[4] Because insecurities are everywhere, exit is much to be desired. But exit to what? The indicated answer is: to whatever alternative is achievable. Leaping out of the frying pan is a remarkably attractive idea if there is so much as a lively possibility that one isn't thereby leaping into the fire. To put it another way, even morally mediocre states are preferable to unpredictable anarchy. That is not to maintain that all states offer better prospects to the representative citizen than statelessness. Cambodia under the Khmer Rouge did not. Arguably, neither do contemporary North Korea or Zimbabwe. (I say "arguably" because whether life prospects there are inferior to those, say, in anarchic Somalia[5] is hard to determine.) The point is that a vast range of political forms can reasonably be judged superior to a state of nature and, therefore, contractors would rationally choose any one of these if it was the indicated alternative to anarchy.[6] Even granted the premise that some social contract obtains, that tells us almost nothing about what the terms of the contract are.

Hobbes aside, however, the classical theorists contend that a useful degree of specificity can be attributed to the articles of agreement. In return for citizens' pledges of loyalty and obedience, government is obliged to protect the preexisting natural rights of the ruled. Minimally, government will not itself be a violator of those rights. States that are either ineffectual or predatory lack legitimacy. Additionally, some sort of attentiveness to the will of the governed may be said to be part of the package, including representative institutions and occasions for voting.[7] Hobbes would object that

[4] Jean-Jacques Rousseau is the conspicuous exception.

[5] Those who believe that Somalia's collection of assorted warlords and puppets constitute the government of a state are invited to choose some other example.

[6] That is more or less Hobbes's argument. The choice boils down to Sovereignty or Savagery, and so it is clear-cut. One may be luckier or unluckier with the quality of the rulers and institutions one gets, but that is not relevant to regime legitimacy.

[7] Locke, for example, declares, "For when any number of Men have, by the consent of every individual, made a *Community,* they have thereby made that *Community* one Body, with a Power to Act as one Body, which is only by the will and determination of the *majority.*

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this is wishful thinking, and he would have a strong case. A compromise position is that contract strips justification from especially unresponsive and horrific regime forms but is otherwise open-ended. Because anarchy is almost always more threatening to the well-being of individuals than civil society, contractors will accept whatever state is on offer.

Contract might instead be understood in an idealized form as choice under epistemically favorable conditions of the *best* regime type. I call this "idealized" because the suggestion that any such construction would be feasible with the ravening predators of the state of nature licking at one's heels is far-fetched. Construed as the outcome of an idealized process of deliberative choice, the bargain is far removed from any realizable grounding political scenario. It will instead be posed in the form of a hypothetical choice scenario, so as to do service as a heuristic for eliciting principles of justice that meet demands of impartiality and mutual benefit. This is, of course, the strategy of John Rawls in *A Theory of Justice.*[8] Because the return to fashion of social contract theory is almost entirely due to Rawls's efforts, it would, perhaps, be presumptuous to dismiss the Rawlsian strategy as not being genuinely contractarian. What is clear, though, is that the hypothesized agreement by contractors in the original position to Rawlsian principles of justice does not lend those principles any additional justificatory force beyond their putative status as the uniquely rational solution to choice under extreme uncertainty. Whatever function contract may serve in Rawls's framework, it does not ground obligation on actual freely tendered consent. Thus, if the question at issue is what citizens are obligated to comply with and why, idealized contract of the Rawlsian sort is irrelevant.

C. How stringent are the obligations established by consent?

Even if it is the case that nothing but consent suffices to ground citizens' obligations to obey, it does not follow that those who have given their consent are obligated to anything approaching the extent that classical liberal theory supposes. Without denying that agreement to perform some activity carries normative weight (else the practice of giving and accepting commitments would have no point), we can yet deny that this weight is infinite—or even, in the usual case, especially large.

Suppose you and I have agreed to meet at 2:00 to play tennis. At noon I call you and say, "I'm running behind with the paper I've got to submit this week. Would it be okay if I take a rain check?" The proper response is, "Of course." It would be distinctly odd for anyone who is not either under

For that which acts any Community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the *consent of the majority.*" Locke, *Second Treatise,* sec. 96.

[8] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

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the age of eight or Immanuel Kant to protest instead, "But you *promised!*" Conventions of promising are useless if they carry no binding force, but they are suffocating if they mandate compliance on all occasions. This is something that we all recognize in ordinary life, but theorists often feign that promises are sacrosanct simply in virtue of being promises. A more reasonable approach is to acknowledge that some promises are enormously committal, to be set aside only in the most extreme situations, if at all, while other promises lack stringency altogether. The central question for social contract theory is: On which end of this spectrum does enlistment in a civil order lie?

I don't believe that the answer is clear-cut. On the one hand, the reliance interests of those seeking to exit the state of nature and its concomitant perils can be literally a matter life and death. The perils of anarchy are not to be underestimated. On the other hand, the extent of the demands that states make on the citizenry are so far-reaching that denial of any option of exit from the state is draconian. What if the state should turn out to tax more and provide less security than one had anticipated? What if rulers at some point in the state's history show themselves to be as predatory as the denizens of the state of nature? Doesn't that experience provide one reason to say, "Look, this relationship really isn't working out; I think we should just be friends"?

Hobbes would have one believe that this is an impossibility, that civil dissolution is equivalent to civil war. This is not very plausible. States may be a technology necessary for the maintenance of peace, but it does not follow that all juggling of their components is a mortal threat to security. Whether borders expand or contract does not speak to the issue of whether law is satisfactorily upheld within those borders. Indeed, the existence of lively exit options for citizens is apt to have a salutary influence on the behavior of their governors. Emigration is not an adequate check insofar as it deprives the state only of continued control of one's person but not of one's property. No doubt these are complicated issues, and absent a well-worked-out theory of optimal secession it is impossible to speak confidently on the issue. But that is no less true for those who espouse the orthodox theory of irrevocable social contract than for those who see the attractions of opting out. Locke, for example, maintains that individuals are not obliged to depart from the state of nature and enter a civil order, but that once one has brought his person and property into political society, he may never then withdraw them. Why not? I cannot see that Locke provides any substantive argument for that conclusion. It is question-begging to maintain that the contractors have undertaken a perpetual obligation. Perpetuity is a very long time, and risk-averse persons will be loath to tie themselves down to that extent, especially if they enjoy some prescience concerning the inefficiencies and moral obtuseness that states regularly display. They might very well instead build into the original compact a requirement of periodic reaffirmation. But who knows?

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That is to return to the previous section's examination of the uncertainty of the social contract's terms. It also leads into the next section's examination of consent and future generations.

D. Transgenerational consent

Contract would have value as a *descriptive theory* if there were reasons to believe that states come into the world on the back of consent. Alas, such reasons are scant. Contract has value as a *prescriptive theory* of political obligation if those who have consented (or are deemed to have consented) are held to account as a result of their free assent. That, though, is not the normative significance attributed to contract by the canonical liberal theorists. Rather, *primordial assent* is invoked to justify ascription of duties to *citizens here and now.* It is unclear how this is supposed to work. A fixed point of our moral conceptions is that people can bind themselves via their own free acts, but cannot so bind unrelated others.[9] Allegiances sworn long ago or far away do not travel well.

Locke is acutely aware of this problem and turns to a consent that is ongoing and *tacit* to ground political duties. An extensive literature, much of it highly critical, addresses this aspect of the Lockean theory. Tacit consent as it presents itself in the *Second Treatise* bears an uncomfortably close resemblance to Hobbes's coerced consent. If the only alternative to obedience one has is to flee the sovereign's domain, thereby forfeiting property and valued personal associations, the alleged voluntariness of acquiescence is dubious. There may be ample reasons to comply with governors' commands, but these will be reasons of self-interest under duress.[10] Sometimes, though, one might be able to avoid the reach of the rulers. To get away with evading onerous demands is not the same as faithlessness to a freely assumed loyalty. So-called tacit consent should be understood as the midwife of tacit resistance, not of political duty.

Autonomy is the privilege of every generation. "The earth belongs in usufruct to the living," Thomas Jefferson famously wrote to James Madison in a letter dated September 6, 1789, going on to declare, "Every constitution, then, and every law, naturally expires at the end of nineteen years. If it be enforced longer, it is an act of force and not of right."[11] Practicality was not Jefferson's greatest strength, and as a piece of constructive political engineering, the nineteen-year sunset provision can seem bizarre. (Madison seems to have so regarded it.) No less bizarre, however, is an assumption

[9] I say "unrelated" because liability for debts or specific performances can extend to spouses or business partners. Note that these relationships are themselves voluntarily assumed.

[10] A plausible alternative is that there exists a general moral duty to obey lawful political authorities, but that would render contract theory redundant.

[11] Julian P. Boyd and William H. Gaines, Jr., eds., *The Papers of Thomas Jefferson,* vol. 15 (Princeton, NJ: Princeton University Press, 1958), 392–97.

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that ancestral acts of agreement are transmitted through the national DNA to generation after generation of citizens. If consent is even in the ballpark as an answer to the question of how political obligation is incurred, then it must be *one's own consent* that does the work. Jefferson is simply working out the implications of that moral datum for the new American experiment. Now that the experiment is well into its third century, whatever normative impetus it may have received from voluntary subscription by the former colonists is long used up.

E. Interpreting obligation

Locke is something of an optimist concerning the moral infrastructure of the state of nature. (Of course, compared to Hobbes, it's hard not to seem optimistic.) There is built into the state of nature a natural law that commands self-preservation and requires that one not "harm another in his Life, Health, Liberty, or Possessions."[12] This precept is not the dictate of an artificial sovereign[13] but rather is an imperative of natural reason. That is why constraining oneself so as not to encroach on others is not intrinsically self-sacrificial. The law of nature is not the exclusive precinct of savants or paragons; all men insofar as they are rational enjoy access to it. Most of them can be expected to observe its ordinances most of the time. If my self-restraint with regard to your life, liberty, and property is likely to be met by concomitant restraint on your part rather than predation, then I shall find it both just and prudent to exercise that restraint. Moreover, because everyone in the state of nature possesses an executive right to punish transgressions of natural law, intrusion on the proper domain of others is neither just nor usually prudent. Because states are not needed to invent basic precepts of justice, why does Locke briskly proceed to their contractual derivation?

It is because laws are neither self-enforcing nor self-interpreting. Even if one assumes good will among all interacting persons—an assumption more heroic than prudent—individuals will nonetheless view questions of rights and duties from their own epistemically and morally circumscribed perspectives. You will know circumstances that I do not; I will be partial to various persons and principles that leave you unmoved. The inevitable result will be tensions that often escalate into violence. "I easily grant," says Locke, "that *Civil Government* is the proper Remedy for the Inconveniences of the State of Nature, which must certainly be Great, where Men may be

[12] Locke, *Second Treatise,* sec. 6. Locke appends to this negative admonition the further stricture that one must, when one's own preservation is not in question, act (positively) to preserve the rest of mankind.

[13] It is, though, the product of the absolute Sovereign of Heaven and Earth. Because the theological postulates on which Locke relies have fallen out of favor in contemporary political philosophy, latter-day Lockeans look elsewhere for moral foundations. For example, Robert Nozick, in *Anarchy, State, and Utopia* (New York: Basic Books, 1973), sedulously excises any theological appurtenances from his "Lockean" account of political legitimacy.

Judges in their own Case."[14] States are justified insofar as they constitute a common judge to contain and adjudicate disputes.

Unfortunately, while Lockean contract dampens conflict-generating actions *within the state,* it is of little help with regard to actions *by the state.* Should parliaments overreach or executives oppress, there is no recourse except the "appeal to Heaven." That is because over private individuals and the common judge there stands no meta-common judge. The same binary choice, either to acquiesce or to fight, that one confronts in the state of nature vis-à-vis other individuals presents itself again, but with an antagonist far more formidable. The inconveniences of the state of nature have not been eliminated but merely repositioned.

Political justification takes place on two levels. The ground floor is justification of a state, the campaign against anarchy (and anarchism). The upper level comprises justification of particular actions and omissions by the state. It is the campaign against despotism and corruption. Contractarianism speaks more emphatically to the former than to the latter. That is in part because of the lack of specificity of contract terms discussed above in Section II.B. However, even if it is entirely clear in some particular case that the governors are overstepping the limits of the authority ceded to them, the moral fallout remains unclear. It would be entirely extravagant to maintain that any single failing automatically dissolves the bonds tying rulers to ruled, yet it is supine to acknowledge as justified every policy up to whatever it is that triggers a latent right to revolution. That which is not strictly speaking intolerable may nonetheless be unjustifiable, and a duty to obey the law is not a duty *always* to obey the law. Traditional contract theory is less than helpful in sketching out these distinctions.

III. Covenant

Social contract grounds the legitimacy of authoritative institutions on the consent of the governed. It is not the first theory to do so. Long before Hobbes and Locke began to ply their trade, chroniclers of the polity of ancient Israel also conceived its foundation as crucially incorporating the consent of citizens. The term employed for these primal foundations is *covenant* (in Hebrew, *b'rit*). A covenant is a binding agreement among all parties, so it is linguistically proper to speak of it as "contract." Doing so would, however, be misleading. Not all contracts are created equal, and the one constitutive of the institutional structure of Israel is strikingly unlike those hypothesized by modern liberal theory. Sketching out the differences is the task of this section.

Numerous covenants are adduced in the Hebrew scriptures. God makes a covenant with Noah in the aftermath of the great flood (Genesis 9:9), and with Abram/Abraham (Genesis 17:4–14). The prophet Jeremiah

[14] Locke, *Second Treatise,* sec. 13.

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announces the imminence of a new, improved version, a Covenant 2.0, if you will (Jeremiah 31:31–34). That idea is taken up with gusto by an early Christianity that proclaims possession of its own new covenant, also known as "new testament." As interesting as these many variations on a theme are to students of the concept, the paradigmatic covenant in Israel's self-consciousness, and the one on which its offices and legal structure are grounded, is the covenant enacted at Sinai. Prior to assembling at the mountain, the people who had recently escaped from Egyptian bondage are not exactly in a state of nature—they have in Moses an acknowledged, if not always well-heeded, leader—but they are a rabble without either land or law. Afterward, they still have some decades to wait before taking possession of the land (a possession that remains problematic in the twenty-first century), but they possess the framework of what will become their commonwealth.

The essence of the Sinai story is conveyed in Exodus 19–20. Israel is only two months removed from captivity and has recently been delivered at the Red Sea from what seemed to be well-nigh certain destruction. But yet more momentous events await. God commands Moses to tell the people that he is prepared to offer them his laws on condition that they swear allegiance to his rule: "Moses came and summoned the elders of the people and set before them all these commands which the LORD had laid upon him. The people all answered together, 'Whatever the LORD has said, we will do.' Moses brought this answer back to the LORD."[15] This is the covenant in embryo: the parties to the agreement are identified, the free assent of each is confirmed, and quid pro quos are outlined. The remainder of the Pentateuch is largely given over to specifying in minute detail the legal obligations of the governed and, incidentally, telling some good stories.

There is one obvious difficulty with establishing institutional structures on a covenantal foundation: God might choose not to be as obliging to other would-be partners as he is to the Children of Israel. The extreme of not being obliging is not existing, and for many contemporaries this is the most plausible theological proposition there is. They attach no credibility to a theistically-based social design. (Even a creche in a public building may be seen as too much religion in the public square.) Nonetheless, a brief examination of covenantal theory is worthwhile even for committed secular moderns because it reveals possible avenues of authority via assent that traditional contract theory lacks.

A. Actuality of covenant

A number of tales in scripture are just that: inspiring or hortatory narratives that make no pretense of historical verisimilitude. The book of

[15] Exodus 19:7–8. All scriptural citations are from the New English Bible.

Job is one example. A righteous man who suffers grievously yet endures is a story for every place and time. It is an archetype of which there is an indefinite number of tokens. That is not, however, the way Israel recounts its covenantal origins. Rather, the event is specified as to year and month of its occurrence, the particular mountain in the particular wilderness where it is initiated, and the parties to it—identified en masse (the "house of Jacob," the "seventy elders") and, for the central figures, by name and title (Moses; Aaron the priest; "the LORD your God who brought you out of Egypt, out of the land of slavery"). That it is truly a covenant rather than a unilateral command by a sovereign authority (who is, after all, irresistible) is underscored by the explicit statement that the people one and all freely agree to accept the law that is on offer to them.[16] They have good reason to do so, because of the enormous benefits that are consequent on taking it up. These are spelled out most eloquently in the "blessings" specified in Deuteronomy 28:1–14. These are not to be regarded, however, as unconditional gifts. Deuteronomy 28 goes on to specify in horrific accents the penalties that will befall Israel if it fails to uphold its obligations. The relationship, then, is held to be genuinely mutual, incorporating specific performances from both parties. Moreover, in the immediate aftermath of the initial giving of the law, an example is related (Exodus 32) of a particular transgression by Israel (the molding of the Golden Calf) and the concomitant penalty (three thousand wrongdoers executed).

This could, of course, be a fiction replete with realistic details. It is not my intention here to argue on behalf of the historicity of the scriptural account—or to argue against it. Rather, my intention is to suggest that the biblical authors have little truck with what might be called Hypothetical Covenant Theory. The authority ascribed to the covenant at Sinai[17] is the authority stemming from an actual undertaking by just those parties who are specified in the account and no others. Unlike the contracts of liberal theory, it is not indefinitely repeatable. If it did not happen as related, then no substitute covenant is on offer.

B. Terms of covenant

No one can complain that Torah lacks specificity with regard to the provisions of Israel's covenant with God. The edicts are spelled out in

[16] The question can legitimately be raised concerning just how voluntary an agreement can be with a deity who has just shown his power by drowning the Egyptian hosts under a wall of water. Indeed, the rabbis themselves raise it in the Babylonian Talmud (Tractate Shabbat 88a), where they play on the wording of Exodus 19:17 so as to read it as "Israel stood under the mountain," i.e., God suspended the mountain over their heads and then "offered" them the covenant.

[17] Strictly, the covenantal terms are not presented as being revealed all at once at Sinai but are instead handed down throughout Israel's extended sojourn in the wilderness. "Covenant at Sinai" is a synecdoche. I owe this reminder to Noah Greenfield.

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mind-numbing—others would say mind-elevating—detail throughout the remainder of Exodus and on into Leviticus and Numbers. Just in case that might not provide quite enough information, Deuteronomy repeats the instructions while providing further bits and pieces. The best known of the covenantal requirements are those stipulated in the Ten Commandments, but these do not come close to exhausting the obligations taken on by Israel. The latter are traditionally numbered as 613 distinct laws,[18] but this is somewhat arbitrary as provisions incorporate subprovisions which themselves breed an indefinite range of rules of application.

Nor are the injunctions all of the simple "thou shalt" and "thou shalt not" variety. Rather, some are constitutive of offices and practices that are meant to carry authority in the ongoing political and legal life of the nation. A hereditary *priesthood* is established that will do for Israel roughly what Washington bureaucrats, the Centers for Disease Control, and Oprah Winfrey do for Americans. They are not, however, Israel's only functionaries. *Prophets* play a pivotal role at most of the critical junctures of the nation's history. The office of prophet is not constituted by an enabling act of Torah—various instances of prophecy precede the existence of the nation—but the text does address the issue of how to distinguish between a true prophet and an imposter. Because the former possesses an imposing authority that the nation disregards at its great peril, while false prophets corrupt the people and lead them into sin, the concern is of no little urgency for Israel. A solution of sorts is proffered in Deuteronomy 18.[19] Duties attaching to the office of the *king* are specified even though it will be many generations before one is appointed.[20] And so on. This is clearly a document intent on establishing an authoritative institutional structure for the polity, not simply on preaching ritual and ethics.[21]

C. Stringency of covenant

That many precepts of Israel's covenant are of utmost urgency is not controversial. "Thou shalt not kill" is one example. Its urgency, however, does not arise from being a provision of the covenant; just the reverse. Prohibition of murder is a conclusion of natural human reason that is brought to positive law rather than originating from it. A rule that pork not be eaten is different. It carries no intrinsic normative weight. If there

[18] The origin of the tradition is the Babylonian Talmud (Makkot 23b), where it is disputed. From this emerges an extensive literature to which Maimonides is perhaps the most definitive contributor. I owe this observation to Noah Greenfield.

[19] Subsequent narratives of scripture indicate that Israel's success in employing the criteria is decidedly mixed.

[20] Deuteronomy 17:14–20. Modern biblical scholarship explains this remarkable foresight by suggesting that Deuteronomy reads back into the time in the desert various practices and problems that emerge much later in the history of the nation.

[21] I concede that this conceptual distinction is anachronistic, but I use it to underscore the avowedly political aspirations of the Hebrew scriptures.

is reason to eschew pork, it is because pork happens to be prohibited. That reason will be weighty if the way in which the prohibition takes place generates obligations that are stringent. Israel's understanding of covenant is that all of its permissions, prohibitions, and requirements are highly significant. Violations of some commandments carry heavier penalties than do violations of others, but the mere fact of being a provision of the covenant guarantees a strong incentive to comply. That is so for several reasons.

First, when the other party to the covenant happens to be Master of the Universe, heeding his injunctions presents itself as a very good policy to someone who wishes to stay out of trouble. Torah's narratives display many instances of transgressors against Yahweh meeting a dreadful fate. Fear is not, however, the essence of the driving force of the covenant; almost any two-bit earthly sovereign can unleash a lot of pain on those who displease. A second reason why the precepts of the covenant are authoritative is that they are prescribed under optimal epistemic conditions. No requirement is the product of ignorance, prejudice, lack of imagination, or miscalculation. Those who live under the rules need harbor no concern that they are being led into a cul-de-sac by a deficient commander. Rather, they maintain every confidence that the law incorporates not only power but also wisdom.[22]

Third, the yoke of the law is not onerous—or at least not *only* onerous. Rather, according to scripture, the requirements imposed on Israel are a source of joy and peace.[23] That is, of course, not an impartial viewpoint, but it receives support both from the phenomenology of obedience and from the foundational postulate that Israel's God is loving and merciful. Even if the rationale for some decree is not apparent, even if the penalties consequent on violation seem draconian, there nonetheless is overriding reason to believe that the system of law taken as a whole cannot be improved upon as a structure for human flourishing.

Fourth, the covenant is not in the first instance between God and each individual taken singly but rather between God and the collectivity of

[22] That is not to maintain that in every instance where *p* is commanded, there exists a balance of reasons on behalf of *p* rather than any alternative and, furthermore, that is why God commands *p*. For example, there may be no rationale whatsoever for disallowing pork chops rather than lamb chops. Perhaps, though, it is a useful discipline to have some food or other off-limits, and so the covenantal precepts include a food prohibition that is in itself arbitrary. If so, it is the prohibition that makes eating pork bad and not vice versa. The underlying theological jurisprudence of Torah does not provide a univocal answer to the Euthyphro question. Maimonides' *Guide for the Perplexed* is not the last word on the logic of that jurisprudence, but it is a necessary word.

[23] A representative passage is Psalms 19:7–10: "The law of the LORD is perfect and revives the soul. The LORD's instruction never fails, and makes the simple wise. The precepts of the LORD are right and rejoice the heart. The commandment of the LORD shines clear and gives light to the eyes. The fear of the LORD is pure and abides for ever. The LORD's decrees are true and righteous every one, more to be desired than gold, pure gold in plenty, sweeter than syrup or honey from the comb." No late-night infomercial endorses its product so fulsomely.

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Israel. Not just the nation's well-being but its very existence are a function of the Sinai undertaking. Covenant informs them what to do but also how to be. It means that Israel will thenceforth not only have a collection of biographies but a history. The covenant is a charter for communal achievement. Insofar as individuals have concern not only for their own self-serving ends but also for their kin, their neighbors, and their posterity, they possess additional bases to value that covenant.

Taken together, these constitute compelling reason to observe commands both major and minor. Provenance in covenant is itself reason-conferring. At least that is so when the covenantal partner is of uniquely sterling quality.

D. Transgenerational covenant

The covenant at Sinai was made with the living but clearly was not intended for them alone. Indeed, scripture emphasizes that the generation of those who received the law at the mountain was deficient. They are described as neglectful, rebellious, "stiffnecked." These failings count against their piety quotient. In addition, they exhibit distinctively political shortcomings. In every time and place, people need courage if they are to maintain the institutions of a free polity. The escapees from Egypt, however, are portrayed as excessively timorous. The spies who return from scouting out the land Israel is to occupy are dispiritingly negative, and their interlocutors almost swoon with fear (Numbers 13). Because they lack heart, they are disqualified from entering the land. Only Caleb and Joshua, the two men of courage and conviction, are granted an exception. If the covenant were, then, exclusively or primarily for the living, it would be stillborn. But that does not address the question of how the consent of the original generation can bind those who come later.

Part of the answer, as noted above, is that the covenant is conceived not just as enabling relationships with individuals but also as communal. Israel is a nonderivative party to it, both as beneficiary and giver of commitments.[24] At the very least, this means that the covenant is not rendered null and void by the demise of the last person to have been present at Sinai. So long as the collectivity identified as Israel continues to endure, both it and its members remain bound by a network of privileges and obligations. That, though, pushes the question back: How do those who have not chosen to join with the nation, but are simply born into it, inherit duties they did not voluntarily assume?

[24] The nature and extent of interconnectedness in scripture between individual and communal responsibility pose difficult interpretive problems. In the space of just one chapter God declares to Moses, "I have considered this people, and I see that they are a stubborn people. Now let me alone to vent my anger upon them, so that I may put an end to them," and then, "It is the man who has sinned against me that I will blot out from my book" (Exodus 32:9–10; 33).

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Membership status in Israel is primarily opt-out rather than opt-in. If one is born to parents who are citizens of the nation, then one inherits that status. (If the parents are of mixed citizenship, then, according to most traditions of interpretation, it is the status of the mother that is determinative.) Birth, however, is not destiny. Those who enter the world lacking an Israelite identity can go through a process of naturalization (i.e., conversion) that brings them into the fold. Joining up is difficult, opting out more so. If, however, one knowingly and deliberately forsakes the old covenant for a new covenant, membership in Israel is thereby surrendered.[25] It would be an exaggeration to say that the process is painless and free of recrimination—but sundering loyalties is rarely frictionless.

One problem with the normative standing of opt-out rules is that they often trade on inertia. People who find themselves enrolled in some association without having done anything whatsoever to bring about that connection, perhaps without knowing how they got there or what they would have to do in order to extricate themselves, cannot be said to have *chosen* their status. This is not to say that the status is unmerited—criminals may merit punishment, for example, even though they do not choose it—but whatever justification the status possesses does not derive from consent. Under an opt-out system, genuine voluntariness depends on people being afforded knowledge of the conditions of membership and the location of the exit door. They must also be able to leave without suffering drastic penalties.[26]

For a young Israelite, instruction in the conditions of membership begins shortly after birth, and culminates with coming-of-age in early adolescence, when assumption of the full range of adult duties takes effect.[27] Scripture also mandates public instruction at regular intervals: "At the end of every seven years, at the appointed time for the year of remission, at the pilgrim-feast of Tabernacles, when all Israel comes to enter the presence of the LORD your God in the place which he will choose, you shall read this law [Torah] publicly in the hearing of all Israel" (Deuteronomy 31:10).[28] The last thing that Joshua, the successor of Moses, did after the people had

[25] The paradigmatic example is conversion to Christianity.

[26] An interesting recent examination of the advantages of opt-out over opt-in rules is Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, CT: Yale University Press, 2008).

[27] The ceremonial celebration of *Bar Mitzvah* is of relatively late origin, sometime in the Middle Ages. The female equivalent, *Bat Mitzvah*, is much later still. Because these rites only underscore a change in legal status that occurs independently of the ceremony, they are of no relevance to association membership and are only peripherally relevant to the communication of its significance. See Ivan G. Marcus, *The Jewish Life Cycle: Rites of Passage from Biblical to Modern Times* (Seattle: University of Washington Press, 2004), esp. 84–85 and 106.

[28] To ensure that the requirement is interpreted in the broadest possible way such that no affected party will be able to claim lack of notification, the text goes on to specify: "Assemble the people, men, women, and dependants, together with the aliens who live in your settlements, so that they may listen and learn to fear the LORD your God and observe all these laws with care. Their children, too, who do not know them, shall hear them, and learn to fear the LORD your God" (Deuteronomy 31:12–13).

taken possession of the promised land was to restate the covenant in front of all the people and set up a megalith as a continual reminder of their assent.[29] The law, then, is not to be an antiquarian relic or the arcane possession of a coterie of savants. Rather, it is everyone's possession, everyone's business.

Are individuals afforded permission to withdraw without penalty from the covenant? In a word, no. Great opprobrium is held out for any Israelite who would abandon the yoke of Torah. When Zimri of the tribe of Simeon took up against orders with a foreign woman named Cozbi, they were both neatly skewered on a spear cast by Phinehas, the son of the son of Moses' brother, Aaron. The summary execution was not disavowed; rather, it earned Phinehas great credit (Numbers 25:6–15). The only safe way to resign affiliation was to flee.

From Phinehas to *Fiddler on the Roof*, assent is much applauded, but in one direction only: the covenant may freely be taken on but not cast off. Israel's theory of consent is not liberal. This is not a surprising conclusion.[30]

E. Covenant interpretation

Laws, whether natural or positive, human or divine, are not self-interpreting. Their application in a given situation is a matter of judgment. High stakes often hinge on determinations of legality, so it can be expected that people will not routinely agree concerning whose conduct is innocent and whose is culpable, who owes damages to whom. Absent an authoritative system of adjudication, we remain locked in the "inconveniences" that Locke attributes to the state of nature.

Quite possibly there is no people in the history of the world that has labored under a greater horror of lawlessness or lack of legal uniformity than Israel.[31] Israel not only takes on for itself an intricate and demanding legal code that is held to issue from the highest quarters, but it also includes within that code extended instructions concerning the code's own interpretation. Various offices with power of investigation, adjudication, and punishment are specified in the text of scripture. A remarkably small area of judicial interpretation is handed over to the *king;* much more is reserved for the *priests* and their adjunct functionaries, the *levites.* The *judges* sometimes do operate as judges, but more often in capacities we would identify as distinctly nonjudicial (for examples, see the eponymous biblical book).

[29] Joshua 24:25–28. The text is unclear as to whether the covenant there enacted is identical to the Mosaic one or is revised by Joshua.

[30] The rupture of associational ties paradigmatic for liberalism (insofar as it speaks to the priority of the individual over the community of origin) is the so-called excommunication of Spinoza from the Amsterdam Jewish community. I say "so-called" because it is unclear from the record who dumped whom.

[31] "In those days there was no king in Israel and every man did what was right in his own eyes" (Judges 21:25). There is no libertarian jubilation in the pronouncement.

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Somewhere along the way, *scribes* come on the scene as privileged in virtue of their command of documents. Running through the story and grabbing a prominent role at crucial junctures are *prophets.*

Whenever disputes arose concerning who was the authentic inheritor of covenant, the issue was phrased in terms of competing legal interpretations. Prophets quarreled with priests concerning what was or was not proclaimed by Moses in the wilderness.[32] According to both Josephus and the New Testament book of Acts, Pharisees differed from Sadducees concerning the authority of the Oral Law (and who possesses it). The Dead Sea community at Qumran has left us documents setting out its own legal understandings in opposition to the corrupt establishment in Jerusalem. Nearly all of the post-biblical history of Israel up until the modern era spotlights attempts to establish rabbinic hegemony against competing interpretive tendencies (e.g., Karaites, Sabbatians, and that most obstreperous of offshoots, Christianity). It is not for this essay to offer an opinion concerning how successful these attempts to establish authoritative practices of legal adjudication have been, but it would be hard to deny that covenant displays reflexive self-awareness of its own interpretive dimensions.

IV. Constitution

Constitution, like social contract and covenant, is a mechanism for generating political outcomes on consensual foundations. Variety among constitutions is great. To the confusion of generations of schoolchildren, a few are characterized as unwritten. Some, most notably the Soviet 1936 constitution, are not worth the paper they're written on. Others are worthy but obscure. (I have not read the constitution of Luxembourg and predict that I am unlikely to do so.) But just as the covenant at Sinai is the gold standard of covenants, the Constitution of the United States of America is the gold standard of constitutionalism. In the remainder of this discussion, unless explicitly stipulated otherwise, this is the constitution to which I refer. I believe that some of the results elicited in what follows apply to other constitutions,[33] but that argument will not be pursued here.

Constitutions can evolve as the unintended and unforeseen result of a process of social development (e.g., the constitution of the United Kingdom), but the one that emerged in Philadelphia in September 1787 was as deliberate a product of design as a foundational political charter can be.

[32] For example: "Add whole-offerings to sacrifices and eat the flesh if you will. But when I brought your forefathers out of Egypt, I gave them no commands about whole offerings and sacrifice; I said not a word about them" (Jeremiah 7:21–22).

[33] Australia's constitution would be a good candidate for analysis in this framework, especially because it was largely modeled on the U.S. Constitution, constitutes a new commonwealth, and has had a successful run.

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Its drafting and adoption were preceded by extended debate among the delegates to the Constitutional Convention and prompted heated advocacy and counteradvocacy by federalists and antifederalists, and its provisions were debated anew in ratifying conventions in each of the thirteen sovereign states. On numerous levels and including numerous parties, then, the U.S. Constitution incorporates and derives its authority from acts of consent.

It is not mistaken to think of the constitutional founding as putting flesh on the theoretical bones of contract theory. The Constitution's liberal provenance is undeniable, especially when the Bill of Rights is also taken into account. The Constitution is not, however, the child of only one parent. In important respects it also descends from covenant theory. That other heritage goes a long way toward explaining, I believe, both its sturdiness and the esteem in which it continues to be held.

In one respect, the American Constitution is the antithesis of Israel's covenant: it displays itself as an entirely human contrivance. Indeed, its thoroughly secular character bears remarking. Should we imagine the United States preparing a similar document in the early twenty-first century, we would expect it to contain somewhere an effusive peroration to a benign providence or a plea for divine guidance. Their absence in the eighteenth-century document is a function of the uniquely rationalistic character of that phase of the American experience.[34] In other respects, however, the Constitution bears more resemblance to the Sinai story than it does to Lockean contract.

Most obviously, the agreement is neither hypothetical nor indefinite. The manner in which its terms are debated and approved is a matter of public record, and all parties to it are identifiable. Among them are the thirty-nine signers, but they are not proceeding on their own authority. Rather, they act on behalf of the states for which they are delegates. This constitution is a compact uniting those states, but, as the preamble makes explicit, it is not the states as such but rather the totality of *the people* who "ordain and establish" the union.

A people is, of course, too numerous and dispersed for each citizen to be active in designing and approving the instruments of a new government. There could be grounds for suspicion, then, that their imprimatur is being invoked as cover for the real actors. Allaying this concern are several related factors. First, the people are represented by the most respected and distinguished of their compatriots, arguably the most accomplished assemblage of Americans ever to occupy a room together. Their probity is exceptional. If these men cannot be trusted to transact the public business, it is hard to see who could be. Second, the Constitutional Convention's product is then taken back to the several states for ratifica-

[34] Not only chronologically is it maximally distant from the Mayflower Compact on one end and Billy Graham's revival meetings on the other.

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tion. It is discussed at a higher level of sophistication—most notably in the *Federalist Papers*—than political discourse has ever subsequently been afforded on the continent. Citizens know what they are being offered and have access to illuminating and principled arguments for and against. The state conventions in which the ratification question is debated are responsive to the citizenry they represent. Approval is not by the unanimity that Israel allegedly offered up at Sinai, but it comprehensively engages public reason. This is indeed a mechanism of translating private opinion into public assent that justifies identification of the new polity's enabler as "the people."[35]

Writing constitutions is easy; some countries have gone through dozens.[36] Generating one that possesses stability and normative authority is more difficult. In this regard, the United States Constitution is a standout. With remarkably few modifications, it has served as the national charter from the first term of President Washington until the present. Americans do not always agree concerning what the Constitution forbids or requires, but with near-unanimity they accept constitutionality as the final authority for political warrant. It is held in a quasi-scriptural veneration. That calls for explanation.

An experience of recent escape from tyranny concentrates the mind. People who have taken drastic measures to shed oppressive structures will be especially keen to establish for themselves fair and effective alternatives. These are conditions in which politics will be taken *seriously.* Even more so will that be the case in the aftermath of an initial attempt that proves misbegotten. Compared with Israel's unfortunate flirtation with the Golden Calf, America's meandering under the provisions of the Articles of Confederation was benign. Nonetheless, the malaise of that period sufficed to underscore the costs of inadequate associational engineering. Young America was strongly motivated to construct and swear allegiance to a structure that enabled cooperation without oppression. Whether the proposals that emerged from Philadelphia in 1787 were likely to provide such a structure was an open question to contemporaries, but there was a strong presumption in favor of giving it a chance.

First impressions are important. Sometimes they are enduring. The functionaries of the new republic were a glittering lot, comparable in distinction to the framers. *Primus inter pares* was Washington himself. The

[35] It must be conceded that this people was almost entirely white, male, and propertied. Is that a blot on the popular authority claimed for the document? Undoubtedly. But rather than arbitrary exclusion undermining the normative status of the Constitution, over time the constitutional logic undermined policies of exclusion.

[36] Whether that numeration is strictly accurate depends on criteria for individuation of constitutions: When is it the old constitution substantially modified, and when is it, instead, a genuinely new framework? However one comes down on constitutional metaphysics, the variability of constitutions is undeniable. See Robert L. Maddex, *Constitutions of the World,* 3d ed. (Washington, DC: CQ Press, 2008); and Rudiger Wolfrum and Rainer Grote, eds., *Constitutions of the World* (New York: Oxford University Press, 2008).

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nation's deliverer in time of war, he had earned the trust of an admiring citizenry. Indeed, there was less controversy in the new republic concerning whether he or someone else should be at the nation's helm than there was in the wilderness over Moses' leadership.[37] The cabinet Washington assembled was exemplary, crossing geographical and ideological lines. (Congress was less uniformly distinguished, but that became the norm for Congress.) Natural opponents such as Jefferson and Hamilton would disagree ferociously, but in doing so they established the precedent of fighting it out *within the parameters of constitutional governance* rather than extramurally. That precedent was strengthened by changes of administrations, with the losers accepting, however grudgingly, the verdicts of electorates acting under decision procedures established by the Constitution. Over time, the prestige of the initial generation grew. We now call them the "Founders," but the (politically incorrect) term "Founding Fathers" serves better to express the filial piety accorded them by subsequent generations.[38] Constitutional authority, in that sense, combines admiration for the excellence of the design with the personal authority of those who have accepted and acted in an official capacity under it.

This is not the occasion for a close examination of that design, so I content myself with an observation that the nation's early experience demonstrated the resilience of its constitution when subjected to stress. Increasing prosperity and expansion across half a continent proved, with one exception, to be compatible with maintenance of the "empire of liberty." The exception is the sanction afforded to slavery, and that grievous flaw proved almost fatal. In a roundabout way, however, that breakdown of the original constitutional design paid it a supreme tribute. The oceans of blood shed for the sake of preserving the Union testified to its more than quotidian significance. Especially in Lincoln's soaring rhetoric at Gettysburg and in the Second Inaugural, it assumed transcendent significance. When victory was finally secured and the primal blot on the nation's charter was written over by the post–Civil War amendments, the worthiness of the Constitution was burnished with a sacral patina.[39]

This provides a partial response to Jefferson's worries about domination of the living by the dead hand of the past. If the living have been confirmed in the faith of their fathers, then they are not conscripts but willing participants in the continuing association. Constitutional structures are capital goods that provide a flow of ongoing dividends. Disassembling them every nineteen years would be like blowing up a productive

[37] For the rebellion of Korah, see Numbers 16.

[38] I am not aware of a revisionary movement to eulogize George Washington as "Parent of his Country" but would not be surprised by its emergence.

[39] Redemption of a nation by blood has at most a marginal role in Israel's covenant but is central to Christianity's. At the risk of over-theologizing, Washington plays the role of Moses/Joshua in the American mythology, while the role of Jesus is taken by Lincoln (and reprised in a fashion by the Kennedys and Martin Luther King).

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factory or chopping down an orchard. Inheritance of valuable properties is not a cause for regret, although it very well could be if the capital asset were immutable. (Even Henry Ford knew that his factories had to be retooled from time to time.) However, the constitution handed down by the Founders contains provision for amendment. This is not an easy process to carry out, but neither was its original design. Reasonable people can disagree concerning optimal constitutional malleability, but it must be acknowledged that each generation enjoys some prerogative of altering the document that it has received—and also a prerogative to enjoy its benefits unchanged.

A further respect in which the current generation is master rather than servant of the Constitution is that the job of interpretation is in its hands. The Supreme Court is the interpretive agency par excellence, but applying the Constitution to contemporary realities is also a task for the lower courts, the executive, and the legislature. The term "living constitution" is highly charged, but taken in the most literal sense, it could not be otherwise. The dead are beyond being either rulers or ruled. In a constitutional order, though, their influence remains profound because insofar as contemporaries see themselves as interpreting or reinterpreting the Constitution, they take themselves to be in a dialectical relationship with the entire history extending back to Philadelphia. They are free to apply the Constitution in novel ways, but they are not at liberty to substitute creation for interpretation. Such, at any rate, is the theory of constitutionalism.

The rabbinic theory of faithful allegiance to covenant was similar. A scholar suitably qualified by virtue of office and ingenuity could twist the precepts of scripture like a birthday entertainer does party balloons, but the grounding postulates must in one way or another always be affirmed. Nor was amendment allowed, at least not officially. In that respect, the purity of the founding document is preserved to the greatest possible extent. Whether that provided not enough, just the right amount, or too much scope to a "living covenant" has been the crux of debate in Israel's history from antiquity to the present. Mutatis mutandis, it is the central ongoing American jurisprudential debate.

V. Conclusion

Let me close by trying to be clear about the significance of covenant for understanding the functionality of constitutionalism. It has often been observed that Americans treat their founding documents[40] as having quasi-religious status. An important book-length development of this theme

[40] This discussion has focused exclusively on the Constitution, but a comprehensive examination of the country's testamentary inheritance would offer equal attention to the Declaration of Independence.

is Sanford Levinson's *Constitutional Faith.*[41] As I understand Levinson's thesis, he argues that Americans have come to view their constitution less and less as an ordinary legal-political document and more as a sacred text. This essay does not dispute that claim but aims to offer a complementary one. I have argued that the biblical narrative of covenant is undeniably theological but also intrinsically political. It presents a theory of institutional justification for which consent is a necessary condition. Unlike the thought experiments of the social contract philosophers, biblical covenant sees fit to supply matters of time, place, and circumstance of its own origin; spells out in considerable specificity its various provisions; makes a strong case for its own stringency; takes the issue of transgenerational consent seriously; and provides within itself a means of ongoing interpretive development. That renders it uniquely suitable as an alternative to social contract for modeling a polity of citizens who are bound by foundational law yet also free.

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[41] Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988).

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