

the law is not a duty always to obey the law. Traditional contract theory is less than helpful in sketching out these distinctions.

3. 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 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." 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.