

Our Covenant-Constitution

The Covenantal Nature of the United States Constitution

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Abstract

The problem with the national government and politics in the United States today is that citizens and politicians have both forgotten, ignored, and undermined the nature and significance of the U.S. Constitution as a civil covenant based on civil and religious liberty and limited government. This thesis proposes to analyze the nature of the Constitution as a civil covenant and how a proper interpretation and application of it as such can solve many of today's most pressing political problems. It will discuss the nature and history of civil covenants, examine the mechanics of the Constitution in the creation of a Federal Republic, briefly trace the breakdown of this system through sundry events and policies in American history, and delineate a few possible solutions.

Our Covenant-Constitution

The Covenantal Nature of the United States Constitution

There is something broken in the American system. Politics in the United States have not been this polarized since the days of the Kansas-Nebraska Act of 1854 and the Election of 1860. From the Tea Party movement to the Occupy Wall Street protestors, from Congresswoman Michelle Bachmann to former Speaker of the House Nancy Pelosi, the vision of what the United States of America was, is, and should be is very different. This lack of unity is leading to a societal breakdown and an increase in the number of disorderly demonstrations. Protests in the streets of major cities, cable news talking heads screaming over one another, and outbursts during presidential addresses to Congress attest to the growing divisiveness in American politics. We also face the very real problems of an unstable economy, high unemployment and inflation, and a national debt that can only be described as prodigious. In addition, there is the ever-present culture war that is tearing at the very fabric of society through gay rights and pro-abortion movements. These events are enough to make any Christian conservative throw his or her hands in the air and say “it’s useless,” and either continue life as usual by ignoring the problems or stockpiling gold, guns, and non-perishable food items in a cabin in Montana.

What went wrong? Why does the U.S. Government today look so very different from how it did in 1789, not only in function but also in principle? What, if anything, can be done to prevent “The Last Best Hope”¹ from disappearing from the face of the earth? The problem with the national government and politics in the United States is that people and politicians have forgotten, ignored, and undermined the nature and significance of the

1. Abraham Lincoln, “Second Annual Message to Congress” December 1, 1862. National Archives, <http://www.archives.gov/legislative/features/sotu/lincoln.html> (accessed April 9, 2012).

U.S. Constitution as a civil covenant based on civil and religious liberty and limited government.

The Covenant Tradition

Most modern studies and examinations of the United States Constitution begin by simply focusing on the National Constitution of 1787 and its subsequent evolution. Yet this is a mistake; it is the culmination of a rich heritage, “the critical expression of the American constitutional tradition.”² The Constitution was not created in a vacuum; it is rather the result of thousands of years of political thought and discourse stretching “back to the Covenant tradition of the Old Testament.”³ It is this covenant tradition that bears import for politics and governance today.

Donald Lutz, a professor of political science at the University of Houston and preeminent scholar in the field of American Constitutionalism, describes a covenant as “a formal agreement that had legal validity under the seal of the Crown, which denoted a serious agreement witnessed by the highest authority. The counterpart to the secular covenant was any agreement secured by God.”⁴ In more fundamental terms, a covenant is “the most serious type of agreement attested to, or witnessed by the highest available authority.”⁵ The elements that identify it as such are: a justification of authority, continuity or limited changeability, invocation of God or the highest authority, the

2. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 6.

3. *Ibid*, 7.

4. *Ibid*, 17.

5. Gai M. Ferdon, “British and American Political Discourse: Part 1 – Compact, Contract, Patent, Agreement, Frame, Combination, Ordinance, Fundamental Colonial Documents of Foundation” (American Constitutional History Lecture Notes, Lecture 4, Liberty University, September 14, 2010), 4.

presence of various sanctions, and an incorporation of posterity.⁶ Daniel Elazar broadly defines a covenant as a “lasting yet limited agreement between free men or between free families of men, entered into freely by the parties concerned to achieve common ends or to protect common rights.”⁷ These definitional elements can all be identified in the Constitution of 1787 and in the many proto-constitutions that preceded it. From where did the writers of these constitutions, compacts, and charters receive the covenantal tradition? As astute researchers and writers, they turned to their contemporaries and other writers that immediately preceded them. Due to the fact that the writers of these documents were British citizens until July 1776, and were also generally religious men, it stands to reason that the tradition of political theory that the Framers of the U.S. Constitution drew from would be British in background as well as religious in nature.

The influence of the Reformation on political theory and American history cannot be overstated. The writings of Martin Luther (1483-1546) and John Calvin (1509-1564) on both theological and political issues revolutionized political discourse and altered the course of world history. The history of Great Britain is inextricably tied to the history of the Reformation. King Henry VIII’s creation of the Church of England in 1533 and repudiation of the Holy Roman Catholic Church, which fomented such political and ecclesiastical drama, defined the history of England in the 16th and 17th centuries.

A new Reformed hermeneutic that English Puritans adopted in the late 1500s was also extremely influential in the New World where many of the persecuted Puritan sects fled. This new hermeneutic was defined by “*Sola Scriptura* and the grammatical-

6. Ibid.

7. Daniel J. Elazar, “Federalism and Covenant” in *The Covenant Connection: From Federal Theology to Modern Federalism* (Lanham, MD Lexington Books, 2000), 253.

historical method of biblical interpretation”⁸ and was one of the greatest contributions made by Reformation writers such as Luther, Calvin, Zwingli, Knox, and others. It led to a true revival of a biblical worldview which proclaimed that Scripture is applicable to all of life. It was this new practice of applying the Bible to all of life, and to politics especially, that led to the English Civil War (1642-1651) and The Glorious Revolution (1688).

Donald Lutz trenchantly describes the influence of Reformed British political theorists on American constitutionalism: “The American constitutional tradition derives much of its form and content from the Judeo-Christian tradition as interpreted by the radical Protestant sects to which belonged so many of the original European settlers in British North America.”⁹ British political writers during the seventeenth century, such as John Milton, John Hampden, Algernon Sydney, and Henry Vane, all studied and wrote about what government should look like from a biblical perspective: “Christian scholars were exploring the Bible politically, which in part, gave rise to Rabbinic studies with its focus upon the Jewish Polity and other aspects of the Scriptures for constitutional considerations.”¹⁰

The Hebraic Covenant

Why would a covenant be the best means of creating a civil government? And why would God use covenants in relation to Israel? Both questions can be answered by examining the nature of covenants. Elazar describes them in this manner:

8. Gai M. Ferdon, “Protestant Political Readings – America’s Reformation Heritage: Issues of Jurisdiction Religious Liberty and Civil Authority: Advent of a New Hermeneutic and Reformed Christianity – Biblical Christian Worldview” (American Constitutional History Lecture Notes, Lecture 2, Liberty University, September 2, 2010), 3.

9. Lutz, *The Origins of American Constitutionalism*, 7.

10. Ferdon, “Protestant Political Readings,” 3.

Theologically, covenant embodies the idea that relationships between God and humans are based upon morally sustained compacts of mutual promise and obligation... Politically, covenant expresses the idea that people can create communities and civil societies through such compacts (whether religious or secular), thereby establishing enduring partnerships.¹¹

Unlike contracts, compacts, or other simple agreements, covenants speak to the truest relationships and the deepest form of love – a self-sacrificing *agape* that is the basis of intimate, eternal relationships. It is this element of sacrificial love and self-limitation that is the heart of a covenant; just as God limits His influence and power when entering into a covenant with Israel, the parties of a political covenant limit themselves in the pursuit of the “creation of communities or commonwealths animated by concern for the public good.”¹² God used covenants in dealing with the Israelites because they represented the essence of who He is, which is represented in the Trinity. The Father, Son, and Spirit are coequal and coeternal, but throughout the Bible they operate in service and submission to one another: Jesus’ submission to God the Father’s will in the Garden of Gethsemane before his crucifixion represents one of the most powerful examples.¹³ This model of mutual submission in love is also reflected in the marriage covenant highlighted by Paul in Ephesians 5.¹⁴ The foundation for covenantal relationships in love and mutual submission allows them to last, for all intents and purposes, in perpetuity, rather than break down under stress. It is for these reasons that God used covenants in His dealings with the Israelites.

11 Daniel J. Elazar, “From Biblical Covenant to Modern Federalism” in *The Covenant Connection: From Federal Theology to Modern Federalism*, ed. Daniel J. Elazar and John Kincaid (Lanham, MD: Lexington Books, 2000), 5.

12. Ibid.

13. See Matthew 26:36-39, Mark 14:32-36, and Luke 22:39-42.

14. See Ephesians 5:22-33.

In Scripture God made covenants with man that predated the Mosaic Covenant on Mount Sinai; these include the covenant with Noah in Genesis 9 and the Abrahamic covenants in Genesis 15 and 17.¹⁵ But it was on Mount Sinai that “the Israelites acquired a single national constitution and law administered by a combination of tribal and national officers and serving a federation of tribes, each itself a compound union of families.”¹⁶ The Covenant given to the Israelites established them as a people – a commonwealth – and created for them a system of laws and institutions whereby God would remain sovereign and the people free to live and worship Him. God could work in and through Israel as a model covenantal community.

However, as most people familiar with the biblical narrative know, the confederacy of the Hebrews governed by the Judges subverted the covenant, leading to the Hebrew Monarchy. The Israelites, articulating a mimetic desire to have a king like the nations surrounding them, created a “limited constitutional monarchy bounded by the covenant idea and periodically reaffirmed through specific covenants between the kings, the people, and God.”¹⁷ Although the Israelites would not keep their original covenant with God, the covenantal spirit lives on through the political ideas that it produced and which were rediscovered and re-employed by key figures from the Reformation and Puritan Revolution and subsequently by the drafters of the Constitution of the United States.

British and Early American Civil Covenants

15. Elazar, “From Biblical Covenant to Modern Federalism,” 6.

16. Ibid.

17. Ibid.

As mentioned, the writings of such Reformers as Calvin and Luther had a prodigious impact on various peoples throughout the Old World, including the French Huguenots, the Dutch Reformed, and the Scottish Presbyterians. Probably most important for America's history and its political and religious development were the English Puritan sects. Puritans were steeped in covenantal theology, which Elazar describes as thus:

Theologically, covenant embodies the idea that relationships between God and humans are based upon morally sustained compacts of mutual promise and obligation, as in the covenants with Noah, Abraham, Moses, and for Christians, the New Testament or Covenant. Politically, covenant expresses the idea that people can create communities and civil societies through such compacts (whether religious or secular), thereby establishing enduring partnerships.¹⁸

Covenant theology impacted political theology through the works of Scottish Presbyterian Rev. Samuel Rutherford (1600-1661), who wrote that although “rulers derive authority from God..., God gives this authority to rulers through the people.”¹⁹ Locke secularized this belief in his social contract theory that just government emerges by the consent of the governed.²⁰

As faithful Christians, the American colonists attempted to apply biblical principles to all areas of life, and to examine through “the Scriptures political readings of civil and religious liberty which significantly reshaped the role of civil and ecclesiastical authorities in matters of worship and conscience.”²¹ It was “these same groups that dominated the political revolutionary movements in Britain and America in the

18. Ibid, 5.

19. John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (Grand Rapids, MI: Baker Book House, 1987), 24.

20. Ibid, 24-25.

21. Gai M. Ferdon, “America's Reformation Heritage: Puritan Revolution (1640-1660): Republican Political Thought (Commonwealthsmen) – Great Britain's Unique Contribution to American Constitutionalism” (American Constitutional History Lecture Notes, Lecture 3, Liberty University, September 9, 2010), 1.

seventeenth and eighteenth centuries.”²² The Puritans transplanted themselves to the New World to create a new society based upon biblical mandates and principles. In this regard, the Pilgrims and Puritans in New England, and to a lesser extent the Scottish Presbyterians in the mountains and piedmont and the Dutch Reformed settlers in New York, sailed to America to create holy commonwealths where they could enjoy the freedom to fellowship with God and one another without fear of persecution. In these holy commonwealths, “the covenant provided the means for free men to form political communities without sacrificing their essential freedom and without making energetic government impossible.”²³ It was this common thread of covenantal theology that provided the basis for the sundry civil covenants that were to follow.

“When it came time...to order themselves politically as their charters allowed and as circumstances required,”²⁴ the Pilgrims in 1620 turned to the covenant form. The “Pilgrims and strangers aboard the ship covenanted among themselves to form a civil body politic”²⁵ on November 11, 1620, which became known as the Mayflower Combination and Compact:

In ye name of God, Amen. We whose names are underwritten, the loyall subjects of our dread soveraigne Lord, King James, by ye grace of God, of Great Britaine, Franc, & Ireland king, defender of ye faith, &c., haveing undertaken, for ye glorie of God, and advancemente of ye Christian faith, and honour of our king & countrie, a voyage to plant ye first colonie in ye Northerne parts of Virginia, doe by these presents solemnly & mutually in ye presence of God, and one another, covenant & combine our selves together into a civill body politick, for our better

22. Elazar, “Federalism and Covenant,” 253.

23. Elazar, “From Biblical Covenant to Modern Federalism,” 4.

24. Lutz, *The Origins of American Constitutionalism*, 25-26.

25. Steven A. Samson, *Crossed Swords: Entanglements between Church and State in America* (Eugene, OR: University of Oregon, 1984), 154, http://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1121&context=fac_dis (accessed February 27, 2012).

ordering & preservation & furtherance of ye ends aforesaid; and by ye vertue hereof to enacte, constitute, and frame such & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for ye generall good of ye Colonie, unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap-Codd ye 11. Of November, in ye year of ye raigne of our soveraigne lord, King James, of England, France, & Ireland ye eighteenth, and of Scotland ye fiftie fourth. Ano: Dom. 1620.²⁶

The Mayflower Compact represents the preeminent political covenant of the new American colonies; “it marks the introduction into the American colonies of a compact theory of government which would later serve as the basis for both popularly based State constitutions and the United States Constitution....”²⁷ The aspects of covenant in the Mayflower Compact are easily seen:

God is called upon as a witness. The signers state the reason why such a document is needed, for their ‘better Ordering and Preservation.’ It creates a people, all those undersigned, and... it creates a government, a civil ‘Body Politick.’ They wish to become a people who glorify God, advance the Christian religion, honor king and country, and value justice, equality, and the common good.²⁸

As one will notice, although the Mayflower Compact created a body politic, it did not delineate a civil institution for government.

The Pilgrim Code of Law, also known as the Plymouth Code of Law (1636) is “the first American Constitution.”²⁹ However, “much more than a code of law, this document lays out the fundamental values and political institutions of the community.”³⁰

26. *Mayflower Compact* quoted by Eidsmoe, *Christianity and the Constitution*, 29.

27. James McClellan, *Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government*, 3rd ed. (Indianapolis, IN: Liberty Fund, 2000), 97.

28. Lutz, *The Origins of American Constitutionalism*, 26.

29. Ferdon, “British and American Constitutional Discourse: Part 1,” 4.

30. Donald S. Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis, IN: Liberty Fund, 1998), 61.

The Pilgrim Code of Law effectively fleshed out the practical workings of the new Colony's government, putting institutional forms and practices into writing and establishing a unified code of law by which to govern the colony. The crafters of the Pilgrim Code of Law created "all the political practices and institutions, as well as the laws generated since 1620, into coherent form, eliminating what was redundant or no longer needed."³¹ After justifying the authority to create the code by prefacing it with the Mayflower Compact and the royal charter given to the Pilgrims, the writers established the legal authority for the subsequent code and provided a documentary basis for their authority. They also reiterated their individual rights as Englishmen: "the most important is basing government upon the consent of the governed."³² The Pilgrim framers then delineated the mechanics of their government, the specific institutions and laws that would make for a viable civil government. Donald Lutz succinctly describes the Pilgrim Code of Law:

The document not only contains all the covenant elements, but with the addition of the last foundation element, the description of institutions, the Pilgrim Code of Law becomes the first modern constitution—a constitution that is also a covenant. A free, self-governing people used a deliberative process based upon their consent to create a government. The government was centered upon a representative assembly beholden to a virtuous people as measured by God's law.³³

A significant aspect of the Pilgrim Code of Law that holds political importance for the subsequent documents, including the U.S. Constitution, is its federal character. At the time the Code was written, the Plymouth Colony was composed of several towns which retained their independent councils under the authority of an overarching colonial

31. Lutz, *The Origins of American Constitutionalism*, 27.

32. *Ibid.*

33. *Ibid.*

government.³⁴ The covenantal theology held by the settlers of Plymouth Colony can also be easily discerned through an examination of their political documents; with the Pilgrim Code of Law, “everything rested upon the consent of the governed.”³⁵ The Mayflower Compact and Pilgrim Code of Law represent a political documentary consequence of the Reformation practice of applying Scripture to the civil arena. Furthermore, by examining subsequent documents, one is able to see the covenantal thread running through them.

The Fundamental Orders of Connecticut (1639) is a constitution that has great import in the development of American constitutionalism because it “created a complicated institutional structure,”³⁶ the mechanics of which provided a model for subsequent constitutions. More specifically, it created a “federal political system,”³⁷ which allowed the individual towns of Hartford, Wethersfield, and Windsor to maintain their town governments while relinquishing some of their political rights and independence to a colonial government to promote the common good. This ensures that authority is divided and diffused. It is this understanding of federalism, embedded in the Fundamental Orders, that provided a precedent for the Framers when crafting the U.S. Constitution over one hundred years later.

Federalism, “the preservation of local control, diversity, and the individual character of each component, and the provision of unity on matters where unity was required,”³⁸ can be traced back to covenant theology and the Hebrew Commonwealth. As

34. Lutz, ed., *Colonial Origins of the American Constitution*, 61.

35. Lutz, *The Origins of American Constitutionalism*, 41.

36. *Ibid*, 42.

37. Lutz, ed., *Colonial Origins of the American Constitution*, 210.

38. Lutz, *The Origins of American Constitutionalism*, 43.

Lutz explains, the “tribes of Israel shared a covenant that made them a nation. American federalism originated at least in part in the dissenting Protestants’ familiarity with the Bible.”³⁹ Daniel Elazar remarks that “the word *federal* is derived from the Latin *foedus* which means covenant.”⁴⁰ Although the Fundamental Orders are not simply or explicitly a covenant in the same sense as the Mayflower Compact or Pilgrim Code of Law, they are, like the U.S. Constitution, covenantal in nature and background. Without a covenant theology, there would be no federalism and, in turn, no Constitution as we know it today.

Independence through Interdependence

For over one hundred years, British rule was characterized as a period of salutary neglect whereby the colonies were largely self-governing and independent of direct control from the crown and Parliament. A little over a year after the shot heard around the world outside of Boston was fired in 1775, the Declaration of Independence would be drafted changing the course of American history. Various declarations by the Continental Congresses, state constitutions, the Declaration of Independence and Articles of Confederation, while not all overtly theological or religious, share common covenantal threads in the development of American political thought; these covenantal threads all coalesced in the Constitution of 1787.

The move towards independence can be traced to when the First Continental Congress met in Philadelphia in 1774 in “response to the British Intolerable Acts, otherwise known as the Coercive Acts.”⁴¹ The delegates drafted the *Declaration and*

39. Ibid.

40. Elazar, “Federalism and Covenant,” 253.

41. Gai M. Ferdon, “Development of American Republicanism and Republican States: Part I: State Constitutions – Pre and Post Articles of Confederation (1781)” (State and Local Government Lecture Notes, Lecture 3, Liberty University, January 24, 2011), 1.

Resolves of the First Continental Congress (October 4, 1774) arguing that Parliament surpassed its authority in levying an internal tax on the colonies. The argument was based on the colonists' rights as Englishmen "established by the British Constitution, the Common Law, their Colonial Charters, and Laws of Nature."⁴² In response to the Continental Congress's *Declaration*, Parliament passed the Restraining Acts restricting trade throughout the colonies, and consequently provoking the colonists to fight the Battle of Lexington and Concord on April 19, 1775.

As expected, the English colonists in America were not satisfied to stand by and allow their rights as Englishmen to be trampled by Parliament and King George III. In May of 1775, the Second Continental Congress convened in Philadelphia, a year that saw the rendering of many important documents and decisions. The Continental Army was established under the command of George Washington in June and the *Declaration of the Causes and Necessity of Taking Up Arms* (July 6, 1775) and *Olive Branch Petition* (July 8, 1775) were both transmitted to the Crown and Parliament.⁴³ The intent of the delegates at the Continental Congress was reconciliation with Great Britain and a restoration of their rights as Englishmen. The aforementioned documents sought reunion with the British, but stressed that armed self-defense would be utilized as needed. However, after England's Royal Proclamation of Rebellion on August 23, 1775, the delegates understood that Great Britain was more interested in exerting absolute control over the colonies than reconciling with them, and that new measures would have to be taken.⁴⁴

42. Ibid, 2.

43. Ibid, 3.

44. Ibid.

The three documents mentioned each hold covenantal and constitutional significance in that they articulate a biblical principle – the principle of the lower magistrate, also known as the principle of interposition – as the lawful means by which to deal with a tyrant. The idea of interposition is one that can be traced back to the Old Testament, when King Ahab was confronted by Jehu in the book of 2 Kings. King Ahab was the tyrannical king of Israel who disobeyed the Mosaic Law and broke the covenant that God had established with the Israelites. As such, God decided to anoint a new king, Jehu, to replace Ahab as king of the Northern Kingdom. Jehu is given lawful authority from God to judge the House of Ahab and to kill Ahab’s family to take the throne.⁴⁵ The Continental Congress accordingly acted as a representative body with lawful authority that interposed itself between the people and the tyrants King George III and Parliament in order to protect the rights of the people. As history shows, King George would not cooperate with the colonists’ requests and in “late 1775 the Continental Congress instructed the states to draft constitutions that would ‘establish some form of government’ independent of the Crown.”⁴⁶ The states proceeded to craft constitutions that would create state governments independent of Great Britain.

These state constitutions would become the models that the Framers would embrace when they created the Constitution of 1787. Although there were many traditions that influenced the United States Constitution, “there was no European precedent or model for it in 1787. Its form and content derived largely from the early

45. See 2 Kings 9-10.

46. Lutz, *The Origins of American Constitutionalism*, 100.

state constitutions, as borrowings and as reactions.”⁴⁷ The state constitutions, much like the Constitution would later prove to be, were civil covenants at their core that embodied covenantal principles in some form or fashion. For instance, the first state to draft a constitution was New Hampshire, and it clearly “derives from the covenant/compact tradition.”⁴⁸ The others that followed, such as the Virginia Constitution (1776), were also “covenants or compacts to establish new civil societies.”⁴⁹ While these state constitutions were being created, the Continental Congress in Philadelphia worked to draft two of the most important documents in American history – the Declaration of Independence and Articles of Confederation.

In June of 1776, Richard Henry Lee, Virginia’s delegate to the Continental Congress, proposed to the Continental Congress that the colonies declare independence, form alliances with foreign states, and plan for a confederation of the colonies.⁵⁰ From June to July many drafts were composed in an effort to fashion the strongest possible document to declare independence from Great Britain. On June 28 the first drafts were read and presented, and after revisions, on July 4, the final draft of the Declaration of Independence was presented and ratified by the Second Continental Congress.⁵¹

What is important to note about this Declaration of Independence is that it “fundamentally expresses covenant ideas. Most of the Declaration of Independence

47. Ibid, 96.

48. Ibid, 102.

49. Elazar, “Federalism and Covenant,” 254.

50. Charles Thompson, *Journals of the Continental Congress June 7, 1776, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates 1774-1875*, Library of Congress. <http://memory.loc.gov/ammem/amlaw/lwjc.html> (accessed February 27, 2012).

51. Gai M. Ferdon, “The American Constitutional Order and System: The Declaration of Independence, July 4, 1776 and the Birth of the United States of America” (American Constitutional History Lecture Notes, Lecture 11, Liberty University, October 26, 2010), 1.

derives from the early state constitutions...and thus from the compact/covenant tradition.”⁵² It is primarily the form of the Declaration that mirrors the earlier covenant and compact tradition, because,

the covenant-derived compact form of foundation document evolved by English colonists in America usually began by creating a people, explained why the document was necessary, provided a definition of the kind of people they were or hoped to become, created a government, and described that form of government. All but the last two foundation elements are in the Declaration.⁵³

The Declaration of Independence also includes biblical and covenantal principles such as rule of law and the doctrine of the lower magistrate. It endorsed rule of law in that it provided for *de jure* independence. In addition, the Declaration listed a series of legal grievances against the Crown for violating the colonists’ rights as Englishmen. Due to the representative nature of the Continental Congress, it was justified in its authority and decision to separate from England. The representative authority that the Congress held qualified it as a lower magistrate, and therefore a suitable, “legal approach to vindication against tyranny.”⁵⁴ But the Declaration of Independence itself was not enough to unite the colonies and provide for an adequate governing body. The delegates at the Continental Congress therefore voted to begin drafting the Articles of Confederation concurrently with the Declaration of Independence.

The Articles of Confederation, although often ignored today, is significant as “the Americans’ first national constitution, as part of their first national compact, and as the

52. Lutz, *The Origins of American Constitutionalism*, 114.

53. *Ibid*, 115.

54. Ferdon, “The American Constitutional Order and System: The Declaration of Independence,”
2.

instrument upon which the present United States Constitution was directly built.”⁵⁵ The last part of Lutz’s statement is particularly overlooked today, which is unfortunate, because anywhere “from one-half to two-thirds of what was in the Articles showed up in the 1787 document.”⁵⁶ But what made the Articles ineffective as a governing document for the United States was the fact that the “States were to retain the greater share of power, or self-governing status ... local absolute sovereignty was the problem.”⁵⁷

Individual State sovereignty prevented the central goals of civil government – order and security – from being fulfilled, as evinced by instances of anarchy and rioting: “the most widely publicized event was Shays’ Rebellion, which occurred in Massachusetts in 1786.”⁵⁸ Therefore in 1787 a convention would be called again in Philadelphia with the express intention “to strengthen the Articles, not develop a new constitutional order.”⁵⁹

Although it did have its shortcomings, the Articles of Confederation provided the foundation on which the Constitution of 1787 would be built. “The Declaration of Independence and the Articles of Confederation together formed America’s first national compact. The Declaration of Independence and the United States Constitution together form the second national compact, under which we live today.”⁶⁰ The covenant/compact nature of these foundational documents represents the key to interpreting and applying the Constitution today in the twenty-first century.

55. Lutz, *The Origins of American Constitutionalism*, 126.

56. *Ibid*, 133.

57. Gai M. Ferdon, “Articles of Confederation 1781-1789: A System of Confederation and State Sovereignty” (American Constitutional History Lecture Notes, Lecture 12, Liberty University, October 28, 2010), 2.

58. McClellan, *Liberty, Order, and Justice*, 161.

59. Ferdon, “Articles of Confederation 1781-1789,” 4.

60. Lutz, *The Origins of American Constitutionalism*, 135.

The United States Constitution of 1787: A National Civil Covenant

In much the same way that a man and women must mutually submit to one another and work with each other to make a marriage work, the States and National Government have to work together and compromise in order to preserve the Union. The Articles of Confederation provided an introduction to covenantal relationship between the States and a National Government, but the manner in which sovereignty was divided and in which the institutions were structured led to a breakdown in the relationship to the point that order could not be kept at any level of government, as illustrated by Shays' Rebellion. As such, the relationship had to be revised, and a stronger, more robust one instituted which would allow power to be more appropriately balanced and clearly defined and institutions to be structured in such a way "to form a more perfect Union."⁶¹

It comes as no surprise that the Framers turned to the civil covenant form in creating the Constitution of 1787. A constitution is a civil covenant, and provides "the legal framework for administering law, and though the framers did not craft the U.S. Constitution with theological terms, it does, nevertheless, incorporate principles of covenants."⁶² The idea of *permanence* and *supremacy* of a covenant can be found in the Supremacy Clause of the Constitution in Article IV, Clause 2. The principle of *limited modifiability* is embodied in the amendment process outlined in Article V. The Preamble's call to "secure the blessings of liberty to ourselves and our posterity" and Article VI serve to identify the covenantal notions of *irrevocability and binding upon future generations*. Finally, a *justification of authority* can be found in the Preamble and

61. Preamble, United States Constitution.

62. Gai M. Ferdon, "The United States Constitution: A Civil Covenant" (American Constitutional History Lecture Notes, Lecture 14, Liberty University, November 2, 2010), 1.

in the enumeration of the National Government's powers throughout the Constitution.⁶³ These principles alone demonstrate the covenantal nature of the U.S. Constitution, but one particular element of the Constitution makes it unique among the world's governing documents: it is squarely based upon the federalist tradition of covenantal theology.

Federalism and Covenant

The foundation for the Constitution and its most basic premise is the concept of federalism. As mentioned, the term "*federal*" is derived from the Latin *foedus* which means covenant."⁶⁴ At its heart, federalism "was, at one and the same time, a new political invention and a reasonable extension of an old political principle; a considerable change in the American *status quo* and a step fully consonant with the particular political genius of the American people."⁶⁵ And with its combination of republican ideals, the U.S. Government as created by the Constitution stands out as one of the world's most unique forms of government.

Quite simply, the Constitution creates a "Federal Republic, and distributes authority and power among the three branches while recognizing the sphere sovereignty of the States."⁶⁶ The reason the Framers decided to divide power between the States and National Government and diffuse it among three branches at both levels was to ensure that absolute sovereignty "is nowhere lodged in civil government."⁶⁷ As general subscribers to the dominant biblical worldview of the time, the Framers recognized that

63. Ibid.

64. Elazar, "Federalism and Covenant," 253.

65. Ibid, 252.

66. Gai M. Ferdon, "The Institutional Evolution of the Congress and the Role of the Legislator" (American Legislative System Lecture Notes, Lecture 2 Part 3, Liberty University, February 3, 2012), 1.

67. Ibid.

only God is sovereign, and therefore civil government could not be; God is the final authority, not man, either individually or corporately. Herbert Titus states that “a unity of civil powers in one body tends to corrupt it toward tyranny.”⁶⁸ There are three principle tenets of federalism directly embodied in the Constitution: dual sovereignty, separation of powers, and checks and balances.

The Founders realized that in order to solve the problem of sovereignty which had plagued the Articles of Confederation government, they would have to ensure that neither the States nor the National Government would be sovereign in all matters, but that each would have its own sphere of authority. The Constitution limits the national government’s power by way of specific enumeration in the various articles, whereas the States have plenary authority in matters not delegated to the National Government, as reinforced by Amendment X. Titus puts it this way:

Among God’s desires for civil government is the capability of having a national unity in some matters, but local self-rule in all other matters. This preserves the national identity of a people in harmony with the institutions of family, ecclesiastical, and civil-government.⁶⁹

The great aims set forth in the Preamble – “more perfect Union... Justice... domestic Tranquility... common defence... general Welfare... Blessings of Liberty” – were aims that the States acting alone could not satisfy. Since the Articles government had been subservient to the States, the Constitution was crafted to create a National Government strong enough to accomplish these aims set forth in the Preamble, while still limited enough to protect individual liberty. For example, the enumeration of Congress’s powers in Article I served only to accomplish the goals set forth in the Preamble, and

68. Herbert W. Titus and Gerald R. Thompson, *America’s Heritage: Constitutional Liberty* (Novi, MI: LONANG, 1987) <http://www.lonang.com/conlaw/2/c21.htm> (accessed March 25, 2012).

69. Ibid.

nothing more. Establishing a system of dual sovereignty was a groundbreaking innovation that proved enormously beneficial, but the Framers understood that in order to prevent tyranny and preserve liberty, power would have to be broken down even further.

To prevent the unification of civil authority into a single tyrannous entity, the Framers decided to diffuse power between three branches of government: “The ‘Laws of Nature and Nature’s God’ provide the foundation for the three kinds of power of the U.S. Constitution: the Legislative, the Executive, and the Judicial, which represent a diversity of powers and a separation of power.”⁷⁰ The tripartite nature of power can also be seen in God’s nature and position as sovereign. In Isaiah 33:22 God is described as a judge (judicial), lawgiver (legislative), and king (executive). The Framers crafted the Constitution to reflect the three aspects of governmental power in three separate branches: “Article I: Legislative power is vested in Congress; Article II: Executive power is vested in a President and Vice President; Article III: Judicial power is vested in one Supreme Court.”⁷¹ These three branches are also found in all fifty States.

However, having three distinct branches with their own types of power was not enough of a restraint for the Framers who wanted to limit the National Government as much as possible while allowing for effective governance and ordered liberty. To that end, a system of checks and balances was instituted. Rather than having each branch exercise their powers supremely, the system of checks and balances serves to “legally restrict various departments of power by equipping them with legal weapons to check

70. Ferdon, “The United States Constitution: A Civil Covenant,” 2.

71. Ibid.

each other against encroachments.”⁷² James Madison argued for this type of check in *Federalist 51*, stating that “ambition must be made to counteract ambition”⁷³ since power tends to be self-aggrandizing. As discussed, a civil covenant by its very nature engenders a limited government, and the separation of powers and checks and balances serve to limit the authority of the national government.

Another key component in the Framers’ efforts to limit the authority of the national government, that has both biblical and secular roots, is the idea of republicanism defined as the rule of law and representation. The three kinds of power were “separated not only as to function because of the depravity of man, but because of virtue to insure a government of laws and not men, which is the main characteristic of a Republic.”⁷⁴ In a republic, the principle of *lex rex* (law as king) prevails in order to ensure that its leaders do not rule simply on their personal prerogative. *Lex rex* also reflects biblical teaching in that “the fact a law exists which supersedes the legislative enactments of various nations implies a power and authority higher than man.”⁷⁵ The idea of representation in a republic allows for “the direct involvement of a national citizenry in the government of a large country.”⁷⁶

Originally in the American system, there were to be different levels of federal representation; the members of the House of Representatives were to represent the interests of the people, whereas the members of the Senate were to represent the interests

72. Ibid, 3.

73. James Madison, “Federalist 51,” in *The Federalist: The Gideon Edition*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, 2001), 268.

74. Ferdon, “The United States Constitution: A Civil Covenant,” 2.

75. Eidsmoe, *Christianity and the Constitution*, 364.

76. Lutz, *The Origins of American Constitutionalism*, 155.

of the States. These multiple layers of enumerated powers, separation of powers, checks and balances, representation, and rule of law simply served to give the government authority to deal with human nature while not succumbing to its baser instincts. James Madison eloquently stated in *Federalist 51*: “But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”⁷⁷ The Founding Fathers, in general holding to a biblical worldview, understood that man was a fallen creature and that God was the only one who held absolute sovereignty. They therefore crafted a Constitution, a civil covenant that sought to build a government able to adequately confront those twin realities.

A Broken Covenant

As strong as the system was that had been created by the Framers over the past 225 years, the American Constitutional Order and System has unfortunately suffered some intense blows of late. This has had an impact on our understanding of federalism and specifically our own lack of awareness of the Constitution’s nature as a covenant. Misinterpretation and simple ignorance of the text of the Constitution, from private citizens to members of the Supreme Court, as well as attacks from those looking to expand and enhance the power of the national government, have all served to undermine this unique document even further.

One key arena where the covenantal nature of the Constitution has been subverted is in the realm of constitutional interpretation. Many lawyers, professors, and judges believe in an *evolving Constitution* that changes as frequently as the interpretations of its

77. Madison, “Federalist 51,” 269.

readers. This problem really stems from a shift in worldviews in the United States. The biblical Christian worldview dominant during our founding era has over time succumbed to an evolutionary or process philosophy, dominant from the late 1800s to today, which produces a “shift from a presupposed absolute law and resulting precedential jurisprudence to a presupposed relative law, [where] the result is sociological jurisprudence.”⁷⁸ Dr. Ferdon makes the argument that contrary to modern thinking, true meaning is gained through neither the reader’s interpretation nor the current dictionary’s definition. Rather, meaning is found in the author’s intention.⁷⁹ In other words, only the author has the authority to determine meaning. How can a constitution be effective if it signifies only what its readers determine, without regard to the text itself or its author’s intent?

A historical-textual hermeneutic is thus needed to understand the true meaning of the Constitution rather than an imagined meaning that the reader wants to insert into or impose upon the text. Why is the text itself so important? “The Text is Law,”⁸⁰ and without knowing what the text means or what it says, it is easy to be misled. For example, many citizens of the United States today believe the phrase “separation of church and state” is part of Amendment I, though the phrase is nowhere to be found in the text of the Constitution. The Preamble is the “basis for constitutional interpretation because it

78. Glenn R. Martin, *Prevailing Worldviews of Western Society Since 1500* (Marion, IN: Triangle Publishing, 2006), 210.

79. Gai M. Ferdon, “American Constitutional Order and System: The Legacy of Federalism and Constitutional Interpretation” (American Constitutional History Lecture Notes, Lecture 16, Liberty University, November 30, 2010), 1.

80. *Ibid*, 4.

explicitly states the great objects or great ends for which the specified enumerated powers are given.”⁸¹

Not only is the text itself important, but to fully understand the meaning of the words of the document, one must also examine the historical context in which it was written. Textual interpretation thus requires an examination of the context of the Constitution as a whole. Of course, one cannot know precisely and exhaustively what the Framers may have had in mind when crafting the Constitution. However, by examining their other writings, such as those that make up the *Federalist Papers* (1788), the debates on the Constitution while it was being considered in the Philadelphia Convention in *Elliot's Debates* (1827-1830), State ratification debates, early judicial rulings, and early Congressional debates, one can establish the meaning of terms and ideas in the Constitution and recognize how it should be interpreted. Right interpretation is fundamental in understanding and applying the Constitution as a civil covenant; covenants by nature are limited in their changeability. If someone interprets the Constitution to produce one meaning one day and another on a different day, the nature of the Constitution as a covenant will be completely undermined.

The second area of attack on the Constitution as a civil covenant has arisen from the impact of successive worldviews on American government. Over time, the influence of various worldviews such as Rationalism, Romanticism-Transcendentalism and Process Philosophy has served to disrupt the federal system. Federalism is derived from and is maintained by a biblical worldview, and as such, it is also subverted by those worldviews that increasingly came to supplant biblical Christianity in the United States.

81. Ibid, 1.

During the Romantic-Transcendentalist period prevalent in the 19th century, for instance, the American Constitutional Order and System was turned on its head by the Civil War and Amendments XIII, XIV, and XV. During the 1800s,

the Northern Yankee-dominated culture became transcendentalized, abolitionized, and politically activized. Finally it began to clash with the Southern neo-Evangelicalized culture...the Union was revolutionized with bayonets, successfully shifting the United States from a federal union or state to a national union or state by the force of arms.⁸²

In other words, the opposing worldviews of the North and South created an ecclesiastical, cultural, and political dualism in the United States that led to the armed conflict of the Civil War. Amendments XIII-XV to the Constitution, in limiting the power of the State governments and giving Congress additional powers, turns the Constitution on its head. Whereas Amendment I begins with the phrase: "Congress shall make no law...", Amendments XIII-XV contain the phrases "No State shall" and "Congress shall have power," both of which raise the national government to the place of ultimate authority and reduce the States' spheres of sovereignty. The Constitution of 1787 gave the national government limited authority through specific enumerations of power. Yet each of Amendments XIII-XV gives the national government plenary power to carry out its objectives by stating "Congress shall have power to enforce this article by appropriate legislation."

The twentieth century has seen this tendency towards both democratization and increased sovereignty in the national government through constitutional amendments that give more power to the national government through direct income taxation (Amendment XVI) and the direct election of senators (Amendment XVII), each of which undercuts State authority even more. The growth of the welfare state through the New Deal and

82. Martin, *Prevailing Worldviews*, 139.

Federal Grants-in-Aid – which Dr. Ferdon describes as the “principal instrument in the expansion of national power”⁸³—continues the same trend of reducing the authority of the States while increasing the authority of the National Government. This is not federalism. It is, as Glenn Martin states, “the implementation of process philosophy in the civil-social, economic, legal, and international-political areas ... which culminated in a sovereignized national executive.”⁸⁴ The amount of control Franklin D. Roosevelt exercised over the nation during his four terms in office and the sweeping reforms instituted by New Deal agencies fundamentally changed the way the average American viewed the role of government. Whereas under federalism, ultimate authority lies nowhere in civil government, the implementation of process philosophy not only created a sovereign national government, but the national executive as the supreme authority.

Federalism requires two partners to work together to accomplish a greater goal that each party on its own cannot accomplish. It requires a unity of vision, purpose, and a union that allows each party to retain its individuality. Federalism produces many fruits, such as economic prosperity, individual rights, religious freedom, liberty of conscience, civil liberty, and personal liberty, all within a framework of order that produces a peaceful society. Unfortunately, the original covenant between the States and National Government has become corrupted. Rather than existing simply for the liberty and security of its citizens, the National Government has been transformed into one that has

83. Gai M. Ferdon, “Break Down of Federalism: Shift of State Authority to National Government – From Federalism to Nationalism and the Rise of Social-Welfare Legislation (Part I)” (State and Local Government Lecture Notes, Lecture 8, Liberty University, February 4, 2011), 1.

84. Martin, *Prevailing Worldviews*, 226.

promised to coddle its citizens from “cradle to grave”⁸⁵ through various social programs and regulations.

There are a few policy options that could limit the continued growth of the national government and help to reinstitute federalism, by strengthening the understanding of the Constitution as a civil covenant. Rather than passing numerous amendments to further limit government, such as a highly touted Balanced Budget Amendment, the national government should simply abide by Constitution and only perform its enumerated duties. This would reduce the scope of the national government’s power and return it to its intended scope of authority. Eliminating Federal Grants-in-Aid that undermine the States’ authority would allow State Governments to pursue the agendas best for their States, rather than the agenda set by Washington bureaucrats. The Cato Institute recommends that “Congress should begin terminating the more than 800 federal grant programs that provide state and local governments with about \$500 billion annually in subsidies for... nonfederal activities.”⁸⁶

Another area where federalism could be enhanced, recommended by the Cato Institute, would be for Congress to “cease the practice of delegating legislative powers to administrative agencies.”⁸⁷ Executive agencies such as the Environmental Protection Agency currently act as quasi-legislatures, passing regulations on individuals and business as unelected, unaccountable bureaucrats. The passing of legislative duties from

85. Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* (Orlando, FL: Harcourt, Inc., 1980), 91.

86. David Boaz, ed., *Cato Handbook for Policymakers*, 7th ed. (Washington, DC: Cato Institute, 2008), 63.

87. *Ibid*, 11.

Congress to executive agencies “breeds political irresponsibility,”⁸⁸ violates the separation of powers, and undermines federalism. Amendment XVI granted Congress unlimited authority to tax individual incomes, which during the twentieth century “fueled a rapid growth in federal spending.”⁸⁹ Yet this spending has produced a crippling debt and a sprawling bureaucracy. Repealing Amendment XVI would be a step in the right direction to reduce the national government’s taxing, and therefore spending, authority. These policy options, while highly controversial and unlikely to be passed by the current Obama administration, would serve to help reclaim our federalist identity that has been lost in the expansive government of today.

The nation of Israel faced many of these same problems throughout the Old Testament. To be sure, they did not have a \$14 trillion national debt or face the threat of a nuclear Iran, but they did have to deal with the wrath of God and the consequences of their sin in breaking their covenant with Him. Israel and Judah had kings who put themselves in the place of God, and the people were held accountable for it. But the story does not end there; on multiple occasions the Israelites would repent of their sin, and reaffirm their covenant with God.⁹⁰

The United States Government has gone so far as to set itself up in the place of God. *Asia Times* columnist David Goldman, under the pen name Spengler, notes that, “the terrible sacrifice of the Civil War had soured Americans on their covenant with the God of the Bible. Americans did not want to be the instruments of a Divine Providence

88. Ibid, 85.

89. Chris Edwards, *Downsizing the Federal Government* (Washington, DC: Cato Institute, 2005), 136.

90. See Nehemiah 8-9.

that would hold them to account for their transgressions.”⁹¹ But just as the Israelites repented, and God responded, so can the American people repent and God can restore their covenant. What is truly needed is a shift in worldview – a return to a covenantal paradigm of limited constitutional government, a Federal Republic, interpreted through a historical-textual hermeneutic and embraced and implemented by the American people and politicians alike. 2 Chronicles 7:14 states that “if my people who are called by my name humble themselves, and pray and seek my face and turn from their wicked ways, then I will hear from heaven and will forgive their sin and heal their land.” It is this type of prayerful seeking after God that can spur the Holy Spirit to renew the hearts and minds of the American people. Salvation for the citizens of the United States will not come through a change in governmental ideology; only the power of the resurrection of Jesus Christ can accomplish that—a goal which a covenantal system of government both allows and encourages.

91. Spengler, “Lincoln’s Fatalism and American Faith,” *Asia Times Online*, February 14, 2012, http://www.atimes.com/atimes/Global_Economy/NB14Dj01.html (accessed February 19, 2012).

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