

Federal Systems, Covenantal Theory and Common Property

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Abstract

Liberal political theorists and practitioners of modern democracy have occasionally observed that a liberal individualist conception of rights unduly limits the set of governing relations to a two-level system, with individuals at one level and the state at another. The extent of the problem caused by this limited vision is apparent when liberal democracies are faced with the challenges of common pool resource issues. The observations Alexis de Tocqueville in the last century and Vincent Ostrom's at the close of the present age, show that liberalism in itself does little to remove the conceptual fetters of a theory of sovereignty that assumes that a single, absolute center of political authority must rule individuals. Tocqueville also reveals liberal theory's dangerous division of life into public and private -- a division that limits our conception of political activity to the realm of government alone and fails to recognize the importance of an authentic private sphere to the development of a vital public life. In terms of contemporary policy making and analysis, this limitation prevents us from identifying an alternative to dichotomous choices between private property and state ownership, ignoring the multiplicity of voluntary, self-organizing, and self-governing activities that address common pool resource problems.

Perhaps it is not surprising that liberalism fails to conceptualize institutional possibilities beyond this limited depiction. The early thinkers in this genre, Hobbes and Locke, each -- though in different ways -- tell us how individuals construct authority that ever-after rules them. What should surprise us is that while 17th Century liberals wrote of abstract individuals, actual people were establishing a different, although related form of government in North America. This form of self-government and self-organization was based in a covenanting tradition that provides the foundation of American federalism. Reclaiming early documents pertaining to this covenantal period, political historian Donald Lutz helps us recognize how federalism differs from liberalism and offers an alternative to individualism.

Although federalism is usually understood as an instrument that promotes the particular aims of liberalism, it is based on a method that, unlike liberalism, neither focuses solely on abstract right-and-duty-bearing individuals, nor abstract individuals from the inevitable collective problems that they face. Rather it accounts for communities formed by persons who, thereafter, are never wholly autonomous from them. Government may promote or diminish the chance for some types of relationships, but governments, even federal governments, are structures that support antecedent communities. In this conceptual scheme, analysts must account for individuals and communities in order to understand the various institutional frameworks that address common property problems.

In this essay I will draw on the observations of Alexis de Tocqueville, the historical work of Donald Lutz, and Vincent Ostrom's interpretation of American federalism to discuss the covenantal basis of federal systems and their potential for dealing with common pool resource problems. In addition to the America experiment in self-government, scholars who understand federalism *as a reflection of a covenantal theory*, may also draw on the prior example of Swiss federalism. Analysts might also learn from traditional and contemporary means for recognizing groups with distinct ways of life in nation states -- such examples range from Native peoples with sovereignty embedded in the constitutional systems of Canada and the United States, to the "Travelers" in Ireland to the Sami of Norway.

My emphasis in this essay will be on the United States, although my intention is to draw out larger principles, identifying federal instruments and the covenanting theory that they represent, and in so doing, find an alternative to the dichotomies of liberal theory which limit our political analysis.

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What can liberal theorists of the late 20th century learn from the Sami of Norway and managers of the Foyle Fisheries Commission of Northern Ireland and the Irish Republic? They teach us that the practice of self-government requires a view of sovereignty that differs from the conception of command and obedience that persists in liberal thinking. What can the study of colonizers abandoned in the North American wilderness and the present day sovereignty of indigenous groups in federal nation states tell us about the commons? That the state is not the sole source of "common property" and may even destroy the self-organizing capabilities that spawn this and other actualities of commonalty. In this age of advanced institutionalism why does common pool resources present us with dilemmas that pit citizens against the whole? Perhaps because we envision community as only a means of coordinating aggregated individual interests, and individuals themselves as representing little more than these interests. Institutional designs that confer benefits on isolated individuals, reflect the primacy of individualism in our models, and undermining any motivation to maintain collective self-governing strategies. Ironically, liberal theory may intend to empower self-governing capabilities, but the sole focus on individual interests weakens the status of collective processes that actualize collective choice strategies as foundations of self-government. This apparently insoluble tension between the individual and the state hampers the liberal approach to common property problems. Such problems require an alternative to the liberal offerings of either private rights or state ownership. The "solution" to the "liberal dilemma" lies in recognizing that the institutional basis of self-government is not merely liberal, but also federal and covenantal. In this essay I will explore this thesis by considering the complex liberal analysis of Thomas Hobbes in light of modern contractarians, contrasting modern liberal approaches to self-government with the covenanting traditions analyzed by Alexis de Tocqueville, Vincent Ostrom, and Donald Lutz.

Tensions in liberal Theory, Lessons from Communal History

Liberal political theorists and practitioners of modern democracy have occasionally observed that a liberal individualist conception of rights unduly limits the set of governing relations to a two-level

system, with individuals at one level and the state at another. Not only does liberal theory conceive the relationship between citizen and state as one of tension, it fails to conceptualize institutional possibilities beyond this dichotomy of state and private ownership. Yet alternative forms for communities have persisted since the inception of liberal philosophy. Historians of jurisprudence have recovered important documents pertaining to such alternatives to private property. Legal historian Paolo Grossi chronicled a period of great debate on property rights in 19th Italian politics, showing that today's narrow interpretations of individual-state relations are a consequence of modern adaptations of Roman law. Grossi rediscovers the ideas of Cusumano and Laveleye, and especially the central influence of British jurist, Henry Sumner Maine, on this debate. Maine's work showed unquestionably that individual ownership of the soil was not a constant reality throughout history and maintained that collective forms of property were instructive alternatives to private property. Scholars favoring the liberal model of property viewed communal land-owning associations as archaic, although, as Grossi suggests, common property "gave testimony to other times and to alternative juridical cultures, to *another* way of understanding the relationship between subject and means of production"¹. Those inquiring into practices of communal land ownership as an alternative to private property lost this debate to a theory of sovereignty that viewed individual rights as the product of state provision.

Liberalism and federalism differ not only in their approaches to the individual and community, but most significantly, supply entirely different views of sovereignty. Liberal theory did represent an advance in humanity's control and responsibility for the artifact of political authority. No longer were tyrannous or just actions of the sovereign arbitrary judgments, beyond the grasp of reason. Nor was sovereignty itself justified by mystical forces, eluding human understanding. The reign of reason carried with it the promise of humanity's indefinite perfectibility through institutional engineering, as suggested by Hobbes's opening analogy between God's creation, the human being, and human creation of the artificial being, the Leviathan. The Leviathan is constituted with absolute powers as an analogy to God's creation of a natural man.

Nature, the art whereby God hath made and governs the world, is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal. For seeing life is but a motion of limbs, the beginning whereof is in some principal part within; why may we not say, that all automata (engines that move themselves by springs and wheels as doth a watch) have and artificial life? For what is the heart, but a spring, and the nerves, but so many strings, and the joints, but so many wheels, giving motion to the whole body, such as was intended by the artificer? Art goes yet further, imitating that rational and most excellent work of nature, man. For by art is created that great Leviathan called a Commonwealth, or State . . . which is but an artificial man; though of greater stature and strength than the natural, for whose protection and defense it was intended . . . ²

Reason's triumph over revelation also admits perils, however, including false pride from specious reasoning that fallible creatures could construct infallible institutions. Hobbes, himself, saw the abyss of such faulty reasoning gaping before him when he drew the dismal conclusion to "Of Commonwealth," the second part of *Leviathan*.

I am at the point of believing this my labour, as useless, as the commonwealth of Plato. For he also is of opinion that it is impossible for the disorders of state and change of governments by civil war, ever to be taken away, till sovereigns be philosophers.³

Constructed justifications for absolute rule derived from individual equality did little to change the actual character of that rule. Hobbes, as well as contemporary liberals, emphasize the character of sovereignty, asking "who is the sovereign?" and what is the nature of rule and obedience. As Hobbes shows, liberalism lays a foundation for human responsibility and control, but does not create authority such that any particular individual experiences self-rule. In fact, arguing against absolute sovereignty seems at odds with liberalism's initial premises.

Hobbes presents no method for pursuing individual civil liberty. Liberal theory has continued to pursue the apparent paradox concerning the justification for absolute rule: why should free and equal individuals ever submit to rule, who among them is more fit to rule than any other? In this formulation, the character of rule and obedience become the primary analytical concern. From this point of view, little is questioned about the absolute nature of rule. At best, government, as the embodiment of rule, creates rights through representative bodies, the "people" elect their rulers, which is a sufficient condition for "popular sovereignty."

"Democracy," taken to mean majority sovereignty, may do little to challenge ideas of absolute sovereignty. Rather, as James Madison showed in *Federalist 10*, direct democracy may simply provide a new method of tyranny through majority rule.⁴ Even representative government, Madison showed, is insufficient to assure self-government. Only when popular sovereignty was understood as self rule and institutions based on a compound republic of limited, distributed, shared authority were designed, could a new theory of sovereignty be actualized.

Liberalism's limited approach to conflicts between individuals and groups is apparent when liberal democracies face challenges of common pool resource use. Operating with a view of state-created and enumerated individual rights, liberal theory builds individual alliances to a ruling state, often displacing communal strategies for resource use.

Liberalism and Common Property. Challenges to Self-Government

In the liberal view, common pool resource issues can be seen as a category of problem in which individual motivations or rights conflict with the common good, and, counter-intentionally, also the individual's good. Individualistic action produces individual and group harm in the aggregate. Only when individuals empower a sovereign to end their autonomous behavior can they work individualistically toward aggregate and individual benefits.⁵ When liberal individualism is seen mistakenly as the foundation to democratic practice, we are driven to a false choice between individual autonomy and the salvation of the whole, choices that each thwart efforts at self-government.

Common pool resource problems, when approached from a liberal stance raise issues in terms of individual rights that are enumerated only in relation to a governing state, undermining self-governing capacities in two steps.⁶ First liberal governments construct an abstract individual, and next create the whole by aggregating individual interests. Thus we have two actors, individuals in their isolated capacity or states as a summation of individuals. States are conceived as the only powerful protectors of individual rights, since only the state can make legitimate claims on the individual, duty is owed to no one else. In

this institutional environment, little motivates the citizen to engage in public problem-solving; loyalty to others along with intermediary institutions and a vital public sphere are sacrificed to the tightening bond of citizen to state. In this setting individual interests are irreconcilably in tension with the claims of groups. An example of such a conflictual situation recently arose when zealous concern for the civil rights of individual Muslim women in France and Britain, led to claims by members of the Muslim community that modern liberalism threatened its traditional culture.⁷

Examples of the destruction of self-organizing groups and self-governing capacities abound in environmental policy dealing with common pool resource problems. The paradigmatic prisoner's dilemma and tragedy of the commons cases show isolated individuals that can only be controlled by third party enforcement of absolute rule. Significantly, such models are based on situations where communication is purposely limited (the prisoner's dilemma) or assumed to be unmotivated (the commons). Seldom do analysts ask why self-organization is impeded, assuming instead that benevolent sovereigns will manage wisely where "ordinary" citizens have failed.⁸ An exception to this approach is found in recent work by Audun Sandberg, in which he documents resource-governing institutions of Sami pastoralists in contrast with the 400 years of state attempts "to limit the self-governing capacities of the northern communities by altering fundamental property rights to the individual whole . . . called "the outer fields."⁹ The Foyle Fisheries Commission, which, for forty years has managed the inland and sea fisheries of Northern Ireland and the Irish Republic provides a significant example of self-governing capacities in a context of terrorism and war.¹⁰

Understanding the original premises and present day conception of liberalism will help us see more clearly why liberalism is not capable of addressing these dilemmas in the context of citizens' self-governing capacities. Historical and foundational variables set federalism apart from liberalism in very fundamental ways. One essential variable limiting institutional design suggested by Robert Putnam is the quality of the citizen.

Does the performance of an institution depend on its social, economic, and cultural surround?
 If we transplant democratic institutions will they grow in the new setting as they did in the old?
 Or does the quality of a democracy depend on the quality of its citizens, so that every people
 gets the government they deserve?¹¹

Putnam's question implies that institutional design alone will not deal with the dilemmas of liberalism. In self-governing systems, an understanding of the self that governs, including knowledge of the theory of self-government and the practices employed by citizens is prerequisite to evaluating the quality of citizenship. Self-governing citizens need to know that conceptions of government as command and obedience, including the ruler-ruled paradigm of representative democracy, is contrary to the theory of self-government, and destroys its very foundation. To govern, self-governing citizens need a new view of sovereignty.

The qualities of citizens that are most important to self-government include more than the nature of obedience. Citizens' capacities to develop and maintain relationships in self-organizing activities depend on judgments fostered by experience. In a covenanting tradition these capabilities may be exhibited in even the worst cases, including those lacking enforceable rules, the state of nature or commons.

One who has written most clearly about the commons is Thomas Hobbes. In his commons or "state of nature" heuristic, incentives abound to prevent individuals from initiating cooperative strategies. In his well-known argument for Leviathan, Hobbes reasons that foresighted, prudent individuals approach each other with profound diffidence, engaging in inflationary acquisition of "power after power unto death." Interactions motivated by fear incline rational strategists counter-intentionally to lives that are "nasty, brutish, and short." Unless people construct a government with absolute power to maintain their bargains for procuring peace, Hobbes argues, environs of impending violence may erupt into anticipatory strikes, causing a war of each against all. Only through the social construction of rights can we be freed from our dependence on the unreliable benevolence of others. Even in this strong argument for Leviathan, Hobbes maintains that reason dictates that once cooperative strategies are commenced, others have greater reason to maintain commitments than to defect.

The foundational elements of this narrative -- that violence is imminent without government conceived as command and obedience -- persist in contemporary liberal analysis. Contemporary liberal arguments about the capacities of individuals facing incentives to maintain voluntary associations or defect, omit Hobbes's careful reasoning about covenants in the state of nature. To move towards Hobbes's argument that voluntary cooperation is not only a prudent strategy, but is the logically necessary antecedent to Leviathan, we must explore three topics in Hobbes's portrayal of natural life and social artifice: 1. How do equal individuals originate a social contract? 2. Why do citizens continue to relate in ways that maintain the commonwealth they form? and 3. What constrains the sovereign of Hobbes's Leviathan?

Originating the Social Contract: Covenants in the State of Nature

Covenants differ from contracts involving immediate, mutual transfer of rights, entailing, instead, perpetual or future obligations. Depending on the belief that performance by one party will induce future performance by the other party, covenants initiate continuing relationships of trust that change individual risk calculations from "I will deliver when you deliver" to "I will continue to deliver, until you fail to do so." In Hobbes's own words:

The mutual transferring of right, is that which men call contract.

There is difference between transferring of right to the thing; and transferring, or tradition, that is delivery of the thing itself. For the thing may be delivered together with the translation of the right; as in buying and selling with ready-money; or exchange of goods, or lands; and it may be delivered some time after. . . .

Again, one of the contractors, may deliver the thing contracted for on his part, and leave the other to perform his part at some determinate time after, and in the mean time be trusted, and then the contract on his part, is called PACT, or COVENANT; or both parts may contract now, to perform hereafter: in which cases, he that is to perform in take to come, being trusted, his performance is called keeping a promise, or faith, and the failing of performance if it be voluntary, violation of faith.¹²

As deliberate acts of will, covenants change individual vulnerability, yet the level of trust these acts supply may not be sufficient to relieve the extreme suspicion that threatens voluntary pacts. Hobbes argues, "the bonds of words are too weak to bridle men's ambitions, avarice, anger, and other passions,"

because, "the condition of mere nature," being a "war of every man against every man," relationships maintained by trust, such as covenants, are voided "upon any reasonable suspicion," that others will break their promises.¹³ In Hobbes's account, the threat of anticipatory violence is sufficient to make those who might cooperate feel vulnerable to the possibility that others would not. Since all parties, "in mere nature," are equal "judges of the justness of their own fears, we expect individualistic strategies of defection to prevail."¹⁴ Yet Hobbes does not endorse anticipatory violence as a prudent defense in the state of nature. Discussing the natural relationship of justice and reason, Hobbes concludes that only fools disdain the natural punishment for injustice in a state of nature. In *Leviathan*, Hobbes emphasizes justice as an artifact of civil society, yet he places civil justice in the context of reason, the foundation of natural law. Civil justice must comport with the natural order, known through reason. Hobbes concludes that justice, based on natural law, prevails in the state of nature as well as in civil law. Fools who defect after someone attempts cooperation act against right reason because the long chain of consequences that defectors initiate end in self destruction. Understanding justice as mere expedience, we foolishly ignore the consequences of natural law.

The fool hath said . . . there is no such thing as justice . . . seriously alleging, that every man's conservation, and contentment, . . . being committed to his own care, there could be no reason, why every man might not do what he thought conduced thereunto . . .¹⁵

Acknowledging covenants, defectors see that they may be broken or kept, calling the former justice and the latter injustice. If it bestows a benefit, injustice is a reasonable choice, according to this position, one that Hobbes believes is the product of specious reasoning.

For the question is not of promises mutual, where there is no security of performance on either side; as when there is no civil power erected over the parties promising, for such promises are no covenants: but either where one of the parties has performed already, or where there is a power to make him perform; there is the question whether it be against reason, that is, against the benefit of the other to perform, or not. And I say it is not against reason. For the manifestation whereof, we are to consider, first, that when a man doth a thing, which notwithstanding any thing can be foreseen, and reckoned on, tendeth to his own destruction, howsoever some accident which he could not expect, arriving may turn it to his benefit; yet such events do not make it reasonably or wisely done. Secondly, that in a condition of war, wherein every man to every man, for want of a common power to keep them all in awe, is an enemy, there is no man who can hope by his own strength, or wit, to defend himself from destruction, without the help of confederates; where every one expects the same defence by the

confederation, that any one else does: and therefore he which declares he thinks it reason to deceive those that help him, can in reason expect no other means of safety, than what can be had from his own single power. He therefore that breaketh his covenant, and consequently declareth that he thinks he may with reason do so, cannot be received into any society, that unite themselves for peace and defence, but by the error of them that receive him; nor when he is received, be retained in it, without seeing the danger of their error; which errors a man cannot reasonably reckon upon as the means of his security: and therefore if he be left, or cast out of society, he perisheth; and if he live in society, it is by the errors of other men, which he could not foresee, nor reckon upon; and consequently against the reason of his preservation.¹⁶

Analyzing voluntary maintenance of covenants, Hobbes first sorts out the roles in this scenario: those who perform first in a state of nature, initiating the covenant; those who perform thereafter, thus maintaining the covenant; and either party in civil society. Directing our attention to those who perform a covenant second, maintaining their bargain voluntarily, Hobbes shows why it is reasonable to perform, rather than gain an advantage by defection. Simply put, there is no real advantage, rather such defection leads to mutual destruction. This insight, that breaking trust is self destructive, is available to one and all. As the outcome of reason, Hobbes argues there is no mystery about the egoistic action of defectors for humanity to penetrate. The counter-intentional consequences of extreme individualism are destructive and only fools persist in making war when another party has initiated peace.

To construct this logic, Hobbes asks us first to consider whether accidents are the result of reasoned strategies. If we affirm that they are not, he presses onward to show that actions that should reasonably be expected to end in destruction are not "reasonable," if by chance they lead to another result. Nor are self destructive acts prudent if, by happenstance, they prove a benefit. Windfalls may be wonderful ironies, but expecting them is imprudent; by definition they are not the result of reasoned action.

Hobbes's logic to demonstrate the self destructive character of defection is also worth following in detail. He argues: 1. When every person is an equal without a common power to keep them in awe (the defining terms of a state of nature), each is an enemy of every other person. 2. In such a condition, no person can hope to survive long without confederates. 3. Confederations require reciprocity. 4. In a confederation, those who deceive will be detected. 5. Defectors cannot possibly believe it is rational that their confederates will continue to defend them once they know of this deceit. 6. Only luck prevents

detection. 7 Once detected, defectors are cast out, only good fortune or stupidity on the part of others prevents this fate. 8 Survival is brief outside the confederation. 9. Defection is self destruction and cannot possibly be called a reasoned strategy. 10. Defection is injustice, so injustice, even in a state of nature, cannot possibly be called reasonable.

If all that Hobbes says is so, why is there a commons dilemma and numerous other counter-intentional-intentional aggregate results from individual behavior? Arguing that covenanting is possible is not the same as saying covenanting will produce sufficient assurances to gain the trust that leads us out of our common resource tragedies. From Hobbes's logic we learn that fallible humans face a core paradox: trust is lacking and trust is necessary. Those who maintain covenants should be tempted to defect only as a defensive strategy, when trust is lacking. Close study of the state of nature suggests that Hobbes's argument for the all-powerful Leviathan follows more from the anxiety of uncertain voluntary arrangements than from egoistic scoundrels.

What assurances reduce the risk of cooperation? In covenanting and contracting, the answer lies in communication, monitoring, and appropriate public responses to defection. In *Leviathan*, Hobbes's primary interest is in the cases in which only enforceable rules suffice to eliminate the climate of diffidence and suspicion resulting in the war of each against all. Right and force reduce our fear that enemies lie in wait. Only "if there be a common power set over covenanting parties, with right and force sufficient to compel performance," can they reduce the causes of suspicion that promise only bad faith.¹⁷ Only then can the one who performs the covenant first be certain not "betray himself to his enemy."¹⁸

Covenants and enforceable rules together maintain civil order. Hobbes limits his analysis of public responses to defectors to the imposition of government sanctions, but, if we follow Hobbes closely, we learn that to compel performance sanctions must do more than punish. By providing the foundation for security, sanctions have a psychological effect on individuals' perceptions of threat and remove the disposition to defect as a defensive strategy. Hobbes's core argument concerning reason, communication, and monitoring may be applied beyond the realm of government in an active public life of voluntary self-

organizing groups. Although this is not Hobbes's subject matter, he gives it some attention in his logic of maintaining the covenant through social contract.

Maintaining the Covenant

Although Hobbes toils to demonstrate the qualities of individuals, discriminating very subtle differences in a variety of predominantly egoistic and fear motivations to create Leviathan, he spends little time on the qualities of citizens in civil society. Focusing instead on the nature of authority and the grounds of obedience, Hobbes turns his attention from covenant to social contract. Contemporary liberal analysis follows this model even when the subject of today's world involves civil liberties and rights unknown to Hobbes. While Hobbes is entirely consistent in turning his attention to absolute authority, viewing rights as emanating from a ruling state, the same is not so easily said of liberal analysis in a democratic context. Hobbes after all made no normative claims for self-government; to do so requires a different conceptualization of sovereignty than Leviathan and far more attention to the role of covenants in civil order.

For Hobbes public functions become sites of political authority, while the private arenas of markets or events that government does not create are not significant subjects of his political science. "Public" is narrowly defined as the sphere of government. This sphere establishes the framework in which all private interactions occur, but finds little role in the activities of private life. The distribution of property, goods in commerce, and the necessities of life are influenced by Leviathan's general design, but Hobbes recommends against public lands and the imposition of sovereign powers on the private, lest they reduce the nourishment of this artificial body.¹⁹

Hobbes defines the private sphere as the locus in which the liberty of subjects plays out in daily life. Liberty consists in what the sovereign permits, including "the liberty to buy and sell, and otherwise contract with one another, to choose their abode, their own diet, their own trade of life, and institute their children as they themselves think fit." In all permitted actions citizens "have the liberty of doing what

their own reason shall suggest, for the most profitable to themselves²⁰ The greatest liberty of subjects, Hobbes advises "dependeth on the silence of the law"²¹

Little more needs to be said of voluntary transactions once they are relegated to the private sphere. Certainly social capital is not automatically a positive quality of citizens²² Regular private bodies such as families may be constituted without written authority, except those pertaining to the common body. Such bodies are important to political life because they perform important socialization. But private self-constituting bodies may also be "illegal." Unsettled peoples such as gypsies are classified along with beggars, thieves and "the corporations of men, that by authority from any foreign person, unite themselves in another's dominion, for the easier propagation of doctrines, and for making a party, against the power of the commonwealth."²³ Feuds between families, secret cabals, and factions that undermine government also fall into this latter category. Covenants for mutual defense or "leagues of subjects," also are unsavory indicators of factions within the commonwealth. But in conditions of mere nature, significantly, in the case of international pacts such as the Foyle Fisheries Commission, voluntary arrangements may be the key to enforceable bonds.²⁴

Covenants and contracts share this ability to change expectations and thereby alter risk calculations. They differ in their methods of enforcement and source of authority. Determining whether and how they differ in their effectiveness is a matter of complex calculation, as Hobbes's discussion of the institutional designs and beliefs that maintain covenants and the social contract show. In part this calculation depends on how the law of nature is joined to civil law. The relationship of civil law to natural law largely determines citizen's perceptions of the benefits of either covenants or contracts, relative to individualistic strategies in the state of nature. Hobbes addresses this point in analyzing the constraints of nature that limit sovereign power.

The Kingdom of God by Nature. Constraining the Sovereign

Civil law constitutes the Leviathan, providing the basis for discussions of civil rights, liberty, and human justice. Civil law only constrains subjects, not the sovereign. Vincent Ostrom draws out many of

the implications of this dramatically asymmetrical power. Hobbes, he says, attempts to reconcile the equality necessary for peace with the inequality of rulers and subjects by finding a more fundamental symmetry in the law of nature. The sovereign is not immune to natural punishments that follow misdeeds and the ill use of reason. Immutable and eternal law, God's law, makes sovereigns accountable, if not to other humans, then to God.²⁵

The implications of natural constraints can also be demonstrated by considering the limitations on citizens' obligations to obey the sovereign. Even in the design of absolute authority, citizens cannot alienate their right to self protection. Although citizens have only this limited cause for just resistance, it is a matter of great significance for understanding the subtleties of Hobbes's analysis of liberty and natural justice. In this very important way citizens cannot alienate deliberation, choice, and the will that allowed them to choose Leviathan and continues to permit them to compare its benefits of civil liberty to natural freedom in terms of their primary goal, survival.

In Leviathan individuals voluntarily accept (to lay down a right to all things so long as and to the extent that others do so also) offering their natural liberty to the sovereign, without reciprocal obligations, but they cannot alienate their right to resist death at the hands of the sovereign.²⁶ Citizens have the liberty to do as law permits, exercising their judgment in procuring their good and evaluating the benefits of absolute authority against the lack of it. The primary goal of the social contract is to secure peace, promoting one's own survival. The tacit will of any citizen is to survive. Although the social contract expressly wills the surrender of rights to the sovereign, in cases of conflict between expressed will and tacit will, tacit will takes precedence. Thus the tacit will to avoid death is never alienated by the subject.²⁷

The sovereign power of life and death is not abolished, or limited and yet the subject is not obligated to submit to death without resistance. The true meaning of liberty "that is to say, what are the things which though commanded by the sovereign, he may nevertheless, without injustice, refuse to do," are determined by our expressed agreement to own "all the actions, without exception of . . . our sovereign."²⁸ The act of submitting our natural freedom determines our obligation and our liberty.

The Leviathan limits natural freedom in order to expand the scope of humanity's practical exercise of liberty. Liberty is by no means unlimited, but peaceful, secure, stable relations enlarge the possible actions that individuals can take. Civil liberty may reasonably be expected to expand citizens' actual choices and control over the insecurities found in the state of natural freedom. Yet Hobbes does not assert that civil liberty is always greater than natural liberty. Since civil society is preferable only if it maintains trust and the consequential benefit of security, we must be concerned with the cases in which the sovereign itself becomes predatory. In the case of predatory sovereigns, the state of nature, with its potential for covenants, may provide greater actual liberty than a predatory state of civil "liberty." In such cases, resistance to death and a return to the state of nature may be anticipated.

Hobbes tells us that we need only reasonable human beings to maintain this balance of absolute power against the right to resist death. The asymmetries of ruler and ruled would seem to outspan the capacities of reason to maintain a check on passions. As Ostrom shows, we must return to the logic of binding covenants, protected by the law of nature to find a means of rectifying this power difference.

Hobbes reasons that "the law of nature and the civil law, contain each other, and are of equal extent." By establishing civil society, the sovereign power obliges citizens to obey laws that depend on natural law, which in nature "consist in equity, justice, gratitude, and other moral virtues."²⁹ Sovereigns, like subjects are bound to the law of nature by the dictates of reason.

Civil, and natural law are not different kinds, but different parts of law; whereof one part being written, is called civil, the other unwritten, natural. But the right of nature, that is, the natural liberty of man, may by the civil law be abridged, and restrained: nay, the end of making laws, is no other, but such restraint; without which there cannot possibly be any peace. And law was brought into the world for nothing else, but to limit the natural liberty of particular men, in such manner, as they might not hurt, but assist one another, and join together against a common enemy.³⁰

Hobbes draws on the Hebraic covenanting tradition to demonstrate the relationship between all parts of this argument, covenanting, maintaining contracts, and binding the sovereign to the laws of nature. Hobbes analyzes the content of God's covenant with Abraham and concludes,

In this contract of God with Abraham, we may observe three points. . . First, that at the making of this covenant, God spake only to Abraham, and therefore contracted not with any of

his family, or seed, otherwise than as their wills, which make the essence of all covenants, were before the contract involved in the will of Abraham.³¹

In this formulation, a covenant is the foundation for civil rule when the covenant is taken into the commonwealth by consent. In Hobbes's account of Abraham's covenant, the Hebrews exist as a people bound to one another prior to any constitution of civil order. The basis of their relationship, insofar as it is a paradigm of social contract, is not an ontology of individual equality, known as individual rights, but is a special relationship as a people to God. This conception of equality is not captured in contemporary conceptions of equal rights. Individual rights mean little outside the community context. Adding the requirement of consent for naturally free people to choose civil liberty, does not lead Hobbes to the atomistic formulation of today's liberal individual. If we attend to Hobbes's ontology of covenant and the laws of nature as a foundation for self-government, we get a different picture. Following his dismal prediction that he had done little more than present a new philosopher king, Hobbes underscores what is different in his account from modern liberal views:

But when I consider again, that the science of natural justice, is the only science necessary for sovereigns. I recover some hope, that one time or other, this writing of mine may fall into the hands of a sovereign, who will consider it himself, . . . without the help of any interested, or envious interpreter; and by the exercise of entire sovereignty, in protecting the public teaching of it, covert this truth of speculation, into the utility of practice.³²

Such self-governing sovereigns who could think for themselves might one day be found. They would need to understand that this natural science includes the laws of nature, particularly natural punishments for those who unjustly disregarded their voluntary pacts -- covenants -- outside of civil order. While Hobbes was writing this, such sovereigns were instituting such principles in a covenantal tradition in North America. By searching self-government's theoretical in liberal philosophy, Hobbes's covenantal principles and the actual tradition of covenanting in North America is largely ignored.³³ Just this fact makes it difficult for liberal democracies to conceive of alternative formulations of problems from the inevitable conflict of state unity and individual rights.

Covenantal Theory

While Hobbes and other liberal theorists were honing a theory of consent, Calvinists and Puritans were implementing a related, but very different theory based on a covenanting tradition. American political theory and institutions are based on the amalgam of Hebraic, and Christian thought that, in the *Mayflower Compact*, forged a covenantal community, and, in the *Declaration of Independence*, presumed such a community, and, many argue, is the foundation of the *Federal* form which came out of the Constitutional Convention.³⁴ Indeed *foedus*, or covenant, refers to "the grounding of all human relationships in the original covenant between God and man described in the Bible and subsidiary pacts," a Puritan intellectual tradition described by Daniel Elazar as being "actively reflected in the founding."³⁵ By exploring America's development through its founding documents, political historian, Donald Lutz, finds that the concept of covenant brought about the federal form which was later expressed as theory and experience in *The Federalist*. Early covenants and compacts are religious and political, presuming a relationship between God and a covenanting people who create self-governing instruments, secular constitutions, anchored in this belief.

Federalism can be discussed as this instrument, promoting certain types of relationships of voluntary associations, foundational to collective problem-solving, and as a reflection of a theory that does not abstract individuals from the inevitable collective problems they face. Lutz finds that political constitutions do more than present the rules of a settlement -- they also define a way of life, summarizing a community's commitments and the "standards by which [a people] assess, develop, and run [a] political system." Though it accords individual rights, federalism, unlike liberalism, takes into account the knitted communities that individuals form and from which they are never wholly autonomous. Government may promote or diminish the chance for some types of relationships, but governments, even Federal governments, are structures designed to support antecedent communities. In this conceptual scheme, analysts must account for communities as well as individuals in order to understand the various institutional frameworks that address collective problems.³⁶

Federalism, Lutz argues, was not the result of conscious design. The compacts of the American founding defined specific communities, weaving ties between citizens, and binding them collectively to God. The same ideas and forms were used to knit settlements together in what *The Federalist* later described as a federal form. Settlers in the North American wilderness designed governments to fit the covenanting relationships and environmental necessities of the North American wilderness. Although Lutz shows convincingly that North American federalism developed from experience rather than a conscious effort to implement the systematic theories of Hobbes, Locke, or even Montesquieu, it would be a mistake to conclude that settlement was devoid of theoretical conceptions. Rather, as Vincent Ostrom suggests, *The Federalist*, and the 150 years of political experimentation it represents, are grounded in a theory of constitutional choice, reflecting covenanting theory and self-governing experience.³⁷

In the 19th century Alexis de Tocqueville also recognized the theoretical implications of this experiment in covenantal theory:

In that land the great experiment of the attempt to construct society upon a new basis was to be made by civilized man; and it was there, for the first time, that theories hitherto unknown, or deemed impracticable, were to exhibit a spectacle for which the world had not been prepared by the history of the past.³⁸

This great experiment called "democracy," could only be understood, Tocqueville argued by taking the religious and republican origins of settlement into account. Tocqueville is so strongly convinced that the republican and religious roots of Anglo-Americans determine the self-governing life, he writes:

If we carefully examine the social and political state of America, after having studied its history, we shall remain perfectly convinced that not an opinion, not a custom, not a law, I may even say not an event is upon record which the origin of that people will not explain.³⁹

These origins, which Tocqueville says provide "the germ of all that is to follow and the key to almost the whole work [of *Democracy*],"⁴⁰ include common language, the most durable tie, but more importantly, a new conception of sovereignty. The immigrants "were more conversant with the notions of right and the principles of true freedom than the greater part of their European contemporaries."⁴¹ In particular, in their struggle in a country agitated for centuries by faction, they had learned the lessons of self-government.

At the period of the first emigrations the township system, that fruitful germ of free institutions, was deeply rooted in the habits of the English; and with it the doctrine of the sovereignty of the people had been introduced into the very bosom of the monarchy of the house of Tudor.⁴²

"Democracy," Tocqueville showed, contains the logic for two distinct views of sovereignty and consequently, two different results. Self-government was surely one possible outcome of popular sovereignty, but it coexists with the potential for a "new physiognomy of servitude," democratic despotism. A Hobbesian formulation of absolute sovereignty contains the seeds of institutional failure in a self-governing context. Self-government requires a different conception of the individual, the community, and liberty, one which the covenanting tradition supplied. Two variables are important in describing the origins that made this tradition possible. The consciousness of the people and the evolution of the institutions that they designed.

Founding Ideas and Self-Government

Tocqueville emphasizes the importance of the motivations of the New England colonists, describing their Pilgrimage as the fulfillment of an intellectual craving. Whether they faced political turmoil or sought adventure and commercial success, the Pilgrims, Tocqueville maintains, came to the new world for the sake of an idea.

They had not been obliged by necessity to leave their country; the social position they abandoned was one to be regretted, and their means of subsistence were certain. Nor did they cross the Atlantic to improve their situation or to increase their wealth, it was a purely intellectual craving that called them from the comforts of their former homes; and in facing the inevitable sufferings of exile their object was the triumph of an idea.⁴³

Contemporary scholars have also recognized the importance of these origins for national identity and consensual government. Sacvan Bercovitch and Perry Miller before him, have traced the intellectual origins and purposes of early settlers, identifying the Puritans as a community on an errand for God in the "New Zion," North America.⁴⁴ Bercovitch finds that the Puritans saw themselves as an outpost of the Protestant Reformation. He describes their "New England Way" as a detour "(and they hoped a shortcut) on the road leading from the Anglican establishment to renovated England."⁴⁵ The Puritans' story of colonization started as exodus, but soon became one of exile. Finding themselves isolated and abandoned

after the 1660 collapse of Cromwell's Protectorate, they "turned inward, accordingly to fill their venture 'with meaning by themselves and out of themselves,'" they commenced establishing a new world through experiments of their own design.⁴⁶ Exodus imagery and the political power of a people conceived as in exile co-mingled with the vision of a people fulfilling God's errand in the Promised Land. Referring to peace and prosperity in New England and the life beyond, these images described a people chosen not only for heaven, but as instruments of a sacred historical design. Their theocracy, its rhetoric, and ideology, was to be at once a model to the world of Reformed Christianity and a prefiguration of a New Jerusalem.

Protestantism was not just another creed, but the last stage of the worldwide work of redemption. . . . The Puritans took possession first by imposing their own image on the land, and then by seeing themselves reflected back in the image they had imposed. The wilderness became their mirror of prophesy. [Their identity was as] a chosen nation in progress — a New Israel whose constituency was as numerous, potentially as the entire people of God, and potentially as vast as America.⁴⁷

Developing Self-Governing Institutions

Joining religious and political institutions, Puritan America developed a new theory of sovereignty and the institutions that made its practice possible. "Federalism" in New England employed a covenanting consciousness along with multi-tiered institutions for self-government. Foremost among these institutions was the township. Later expressions of covenantal theory, particularly *The Federalist*, describe a federal compound republic that maintains these indigenous institutions, enabling self-organization to flourish. Tocqueville begins his discussion of America's institutional design with the township, describing it as a natural association, incorporated into the multi-tiered framework by those who appreciated its importance.

It is not without intention that I begin this subject with the township. The village or township is the only association which is so perfectly natural that wherever a number of men is collected, it seems to constitute itself. . . . It is men who make monarchies and establishes republics, but the township seems to come directly from the hand of God.⁴⁸

The covenantal roots of the compound republic developed from these natural associations, informed by the specific religious content of Puritanism and Calvinism. Together, experience and ideas

established a multi-tiered framework based on a particular view of individuals, community, and liberty

Lutz describes the principles that formed a nation from local self-organization,

It was as a developing nation of communities rather than of individuals that Americans first formed their constitutions at the state and national level. They believed that humans develop and maintain their highest moral and material existence on Earth while living in communities.⁴⁹

Communities created government, an institutional tool that was subservient to and not constitutive of society. The idea of "community" related to shared beliefs, while "government" related to consent, a product of natural liberty from which civil liberty was constituted. This conception of community entails a view of individual liberty that differs from contemporary liberal individualism.

The competitive exercise of all the talents in human nature would simultaneously promote the welfare of individuals and the community at large. Indeed, no serious conflict was perceived between individual interests and community interests, as long as individuals did not violate the laws of God and nature. Today, however, we are inclined to assume, or hope, that out of many individuals pursuing their respective interests will come the community good. Americans, during the founding era began with the good of the community and assumed, or hoped, that individuals interests would not lead some astray. If conflict arose between the individual and the community, the former was assumed to be mistaken.⁵⁰

Lutz describes the liberty in America's founding era as an independent will to reflect and choose for the good of the community. New Englanders' civil liberty represented a view of the self and its interests as inseparable from the good of the community. Lutz chronicles two aspects of liberty in founding documents: Natural freedom, leaving all individuals free to act as they see fit, subject only to limitations of nature and the laws of God and the second, civil liberty, the product of civil law, which restricts natural liberty, as "an expedient necessary for the good of the community."⁵¹ Like Hobbesian liberals, New Englanders created usable liberty through the artifice of civil order. In contrast to modern liberal theorists, New Englanders inextricably joined the good of individuals with a holistic notion of the community good.

Although the differences between the liberal and covenantal approaches to community are subtle, they are significant. The New Englanders' view of natural equality corresponds to the Hobbesian notion that all individuals have sufficiently equal use of reason and the capacity to exercise free will in giving

and withholding consent⁵² Both also assume that government is the product of choice and consent⁵³ Hobbescans and New England settlers even agree that civil institutions are designed to improve living conditions, providing more useful freedom than that available in the conditions of nature Yet the perils of the natural world faced by Puritans differed from the Hobbescan heuristic Common dangers from a harsh environment necessitated common problem-solving Individualistic strategies were contrary to the real exigencies of nature, as well as to the laws of nature Fools who broke their covenants perished by the whims of nature, rather than by human hands To understand the origins of self-governing groups we must pay more attention to the incentives for cooperation in actual nature Such logic is found in Hobbes, but de-emphasized in contemporary common pool resource scholarship The incentives to maintain covenants in the North America wilderness made it possible to create communities that corresponded with relevant qualities of individual welfare.

Covenanting theory differs, however, from liberal frameworks in more than the chance events of historical situations For the New Englanders, the purpose of community transcended the protection and material welfare of individuals Communities were structures necessary to the moral development of an individual Only when the individual realized a unique purpose in the context of the needs and moral well-being of the whole, could the transcendent purpose of individual be actualized This moral quality leads to a view of community as something other than the aggregation of individual interests, and views individual liberties and community welfare as transcending the construction of governing instruments As such, the institutions of self-government rely on a different view of sovereignty in which self-rule necessitates a view of individuals in the context of community.

Lutz contends that New Englanders held such a view, their documents suggest that "ultimately, the people *as a people*, attempted to govern themselves through their own consent"⁵⁴ Reading the *Declaration of Independence's* justification of revolt in this light, Lutz argues that Jefferson is not addressing individuals, but a covenanting people In the *Declaration*, Jefferson speaks to a situation in which two covenanting societies were in a state of nature with respect to each other American people are

equal to English people. Jefferson reasons, because all people are equal in a state of nature, having the same ability to give and withhold consent. The state or body politic is governed by the same principles as a single individual. The *Declaration* concerns not individual Americans, but the rights of two peoples. Constructing this argument Jefferson, Lutz suggests, assumes that when people create a body politic through consent, they are considered a moral whole.⁵⁵

[T]hose reading Jefferson's words would understand that all men have equal liberty to give and withhold consent, that in civil society all men have the same rights while they are members of that society, that any given people have the same rights to self government as do any other people, and that once a people form a government they are on equal footing with any other self governing people.⁵⁶

This conception of a community as a moral whole required a different view of public and private from the one offered by Hobbes. In order to protect individual rights, communities must be understood as a particular means for pursuing individual aims.⁵⁷ Individuals and minorities were asked to "place their interests in a broader context on issues that are deemed part of the public arena, and government in its treatment of them must refer to long-term community interests and not favor one group of individuals over another."⁵⁸ Only when the good of the whole required it, did an individual put forward an issue for public determination, otherwise the issue stayed private. In contrast to the liberal view such "private" issues were never wholly separated from the "public." Neither the moral nor institutional context of public and private separated the two, viewing the community as antagonistic to individual interests, rights, and liberties. For such views of individual and community, and public and private to evolve self-governing, rather than tyrannical practices, the institutions that constitute a community must "be more than institutions for collective decision-making. There must be values, attitudes, and commitments -- a mental stance, if you will -- that lead people to frame their discourse, approach problems, and justify solutions in terms of the long-term community interests."⁵⁹

True self interest was the pursuit of the common good of the community. Self interest at odds with the community was mistaken, because it was short term. But the long-run interest of the individual invariably matched that of the entire community.⁶⁰

Covenantal Approaches to Common Property

Self-government for common property designs is the result of complex ideas and particular qualities of citizens and communities. The use of federal instruments that constitute a multi-tiered federal community requires both knowledge and wisdom from those who will govern themselves. Tocqueville concludes from his observation of the American experiment that the whole form of government is artificial or conventional and would be "ill adapted to a people which has not been long accustomed to conducting its own affairs, or to one in which the science of politics has not descended to the humblest classes of society."⁶¹

Tocqueville expands our usual thinking of the social contract to include a covenant or compact, demonstrating that neither common material interests nor the design of laws alone constitute a workable democracy. Federalism is not solely a product of Hobbesian-Lockean liberalism, but occurs within a covenanting framework. Covenanting communities challenges liberalism's usual understanding of the isolated individual, as well as the two-tiered view contrasting state ownership and private rights. Covenanting theory provides a more appropriate view of sovereignty for self-governing practices. To use this theory, we must, in Ostrom's words, understand federalism's meaning.

The crucial issue is that the concept of federalism enables people to break out of the conceptual trap inherent in a theory of sovereignty that presumes there must exist some single center of supreme authority that rules over society.⁶²

Answers to how people manage resources in environments such as Norway's Northern communities or Irish fishing territories cannot be found in Leviathan, individualism, or majority sovereignty. New approaches to these problems are more likely to be found in collective ownership -- common property -- in which people have rights as individuals, but also have a consciousness and the governing instruments to develop self-governing capabilities acquired only in a community. Ideas of sharing and collective problem-solving cannot be applied to individuals in isolation. The alternative that provides the governing instruments and the new theory of sovereignty for a more adequate understanding of the relationship between the individual and the community is the federal covenanting tradition.

- ¹ Paolo Grossi, *An Alternative to Private Property*, Chicago: University of Chicago Press, 1981, 154-155
- ² Thomas Hobbes, *Leviathan*, Michael Oakeshott, ed., New York: Macmillan, 1962, orig. pub. 1651, P. 19
- ³ *Ibid.* 270
- ⁴ Alexander Hamilton, John Jay, and James Madison, *The Federalist*, New York: Modern Library, n.d., orig. pub. 1787-1788 pp. 53-62.
- ⁵ For a complete analysis of the problems of models and metaphors based on the assumptions of liberal individualism see: Elinor Ostrom, *Governing the Commons*, New York, Cambridge University Press, 1990, especially chapters 1 and 2.
- ⁶ See Vernon Van Dyke, "The Individual, the State, and Ethnic communities in Political Theory," *World Politics*, 29 (April, 1977) 343-369. Van Dyke assumes that liberal political theory since Hobbes and Locke has as its "primary purpose to explore relationships between the individual and the state" (343). This view as well as those of Van Dyke's exponents and those who contest his claims represents a core issue in liberal justifications of governing powers -- a necessity after the demise of patriarchy's divine right belief. Yet it does not adequately present the practices of individuals who actually constitute self-governing institutions. Liberalism, starting with Hobbes, poses a sticky problem for practitioners who would govern the commons. Removing divine right of Kings as the legitimate source of authority left theorists such as Hobbes and Locke with the need to explain why any rule of one person over another was legitimate. The "problem of sovereignty" gave rise to the contract theory of government by consent. Rights-bearing individual consented to an ultimate source of authority that provided for security. More than 200 years passed before political theory addressed the terrible powers of the unitary, potentially tyrannical sovereignty embodied in Hobbes's model.
- ⁷ Youssef M. Ibrahim, "Arab Girls' Veils at Issue in France," *New York Times*, Nov 12, 1989, A 8+.
- ⁸ For further criticism of this approach see E. Ostrom op. cit. For an alternative analysis and approach, see Elinor Ostrom *Crafting Institutions for Self-Governing Irrigation Systems*, San Francisco: ICS Press, 1992.
- ⁹ Audun Sandberg, "Entrenchment of State Property Rights to Northern Forests, Berries and Pastures," Workshop in Political Theory and Policy Analysis Working Paper, December, 1993, p. 4.
- ¹⁰ Garret FitzGerald, "The Harvest from Harmony," *The Guardian*, Feb. 2, 1995, 20
- ¹¹ Robert Putnam, *Making Democracy Work*, Princeton: Princeton University Press, 1993, 3
- ¹² Thomas Hobbes, *Leviathan*, Michael Oakeshott, ed., New York: Macmillan, 1962, orig. pub. 1651, P. 106
- ¹³ *Ibid.* 108
- ¹⁴ *Ibid.*
- ¹⁵ *Ibid.* 114
- ¹⁶ *Ibid.* 114-115
- ¹⁷ *Ibid.*
- ¹⁸ *Ibid.*
- ¹⁹ *Ibid.* 185-187
- ²⁰ *Ibid.* 161
- ²¹ *Ibid.* 165
- ²² *Ibid.*
- ²³ *Ibid.* 176-177
- ²⁴ *Ibid.* 177-178
- ²⁵ Vincent Ostrom, *The Meaning of American Federalism*, San Francisco: Institute for Contemporary Studies Press, 1994, 39.
- ²⁶ Hobbes op. cit. 105
- ²⁷ *Ibid.*
- ²⁸ *Ibid.* 163
- ²⁹ *Ibid.*

³⁰ Ibid 199-200

³¹ Ibid. 342

³² Hobbes, op cit, 270

³³ John Rawls (*A Theory of Justice*, Cambridge Harvard University Press, 1971 and *Political Liberalism*, New York, Columbia University Press, 1993) provides a partial exception to this criticism Rawls explains that he seeks a more abstract formulation of justice from the contract tradition of Locke and Rousseau. Hobbes he asserts is a different case. He fails to explore this difference and eventually seems to mistakenly place Hobbes in with others who, for Rawls, represent a de-ontological liberal view

³⁴ Daniel J. Elazar, Foreword to Vincent Ostrom, *The Political Theory of the Compound Republic*, Second edition, Lincoln: University of Nebraska Press, 1987, xvii-xviii, Donald Lutz, as cited in Elazar, op cit. For a view of the contemporary understanding of the Constitution as an article of faith, see Sanford Levinson, *Constitutional Faith*, Princeton: Princeton University Press, 1988

³⁵ Elazar, op cit.

³⁶ In discussing federalism as a theory or as a reflection of a theory, I will refer to covenantal theory as the larger foundation of American federal traditions, history, documents, and thought.

³⁷ Vincent Ostrom, *The Political Theory of the Compound Republic*, Second edition, Lincoln: University of Nebraska Press, 1987.

³⁸ Alexis de Tocqueville, *Democracy in America*, V. 1-2, trans. Henry Reeve, New York: Vintage, 1945, orig. pub. 1830-1835, VI: 27.

³⁹ Tocqueville, op cit VI, 29

⁴⁰ Ibid.

⁴¹ Ibid

⁴² Ibid.

⁴³ Ibid VI, 33

⁴⁴ Sacvan Bercovitch, *The American Jeremiad*, Madison: University of Wisconsin Press, 1978 and *The Rites of Assent*, New York: Routledge, 1993. Perry Miller, *Errand into the Wilderness*, New York: Harper & Row, 1956.

⁴⁵ Bercovitch, 1978, 5

⁴⁶ Ibid.

⁴⁷ Bercovitch, 1993, 35

⁴⁸ Ibid. (L), 62; (R) 1-62

⁴⁹ Ibid. 71

⁵⁰ Ibid. 75

⁵¹ Ibid. 74

⁵² Ibid. 74-75

⁵³ Ibid

⁵⁴ Donald S. Lutz, *The Origins of American Constitutionalism*, Baton Rouge: The University of Louisiana Press, 1988, 77.

⁵⁵ Ibid. 80

⁵⁶ Ibid.

⁵⁷ Ibid. 76

⁵⁸ Ibid. 77

⁵⁹ Ibid

⁶⁰ Ibid. 77

⁶¹ Ibid V 1. 172.

⁶² Ostrom, 1994, 8

Charlestown-Boston Church Covenant, July 30, 1630

In the Name of Our Lord Jesus Christ, & in Obedience to His holy will & Divine Ordinance. We whole names are hereunder written, being by His most wise, and good Providence brought together into this part of American in the Bay of Massachusetts, & desirous to unite ourselves into one congregation, or church, under the Lord Jesus Christ our Head, in such sort as becometh all those whom He hath Redeemed & Sanctified to Himself, do hereby solemnly and religiously, as in His most holy Presence, Promise, & bind ourselves, to walke in all our ways according to the Rule of the Gospel, & in all sincere Conformity to His holy Ordinances, & in mutual love, & respect each other, so near as God shall give us grace.

Mayflower Compact, November 11, 1620

In the Name of God, Amen We, whose names are under-written, the Loyal Subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King Defender of the Faith, &c Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the honor of our King and Country, a voyage to plant the first colony in the northern Parts of Virginia; Do by these Presents, solemnly and mutually, in the presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the ends aforesaid And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, be thought most meet and convenient for the general Good of the colony; unto which we promise all due Submission and Obedience. IN WITNESS whereof we have hereunto subscribed our names at Cape-Cod the eleventh of November, in the Reign of our Sovereign Lord King James, of England, France, and Ireland, the eighteenth, and of Scotland, the fifty fourth, Anno Domini, 1620

Combination of the Settlers Upon the Piscataqua River for Government

Whereas sundry Mischiefs and Inconveniences have befallen us, and more and greater may, in regard of want of Civill Government, his gracious Majesty haveing settled no order for us, to our knowledge, we whose names are underwritten, being Inhabitants upon the River of Piscataqua have voluntarily agreed to combine ourselves into a body Politick, that wee may the more comfortably enjoy the Benefit of his Majesties Laws, and doe hereby actually engage ourselves to submit to his Royall Majesties Laws, together with all such Laws as shall be concluded by a major part of the Freeman of our Society, in Case they be not repugnant to the laws of England, and administered in behalf of his Majestie. And this wee have mutually promised, and engaged to doe, and so to continue till his excellent Majestie shall give other orders concerning us. In witness whereof Wee have hereunto set our hands, October 22. In the 16th year of the Reigne of our Sovereigne Lord, Charles by the grace of God, King of Great Brittain, France and Ireland, Defender of the Faith, &c

Lutz, op. cit. 25, 26, 30.