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# ***Torah and Constitutionalism***

Jonathan Burnside<sup>1</sup>

## **Introduction**

This chapter explores some of the key constitutional ideas associated with biblical law; how they are applied across the Hebrew Bible and their relationship to the New Testament.

It should be said at once that what we find in the Bible is long way from constitutions in the modern, European, sense. The modern constitution is tied to the rise of the nation-state which itself consists, in broadly Weberian terms, of a people, a territory and a government that possesses a monopoly of legitimate force. Modern constitutions are conventionally said to have substantive and formal elements. Substantively, they are concerned with the content of rules that determine both the exercise of government power and the basic legal status of the individual whilst, formally, they are also concerned with rules (or ‘higher law’) that are seen as fundamental, or prior, to day-to-day legal life. Both strands are combined in eighteenth-century constitutionalism, along with a concern for codification.<sup>2</sup> Obviously, there was no eighteenth-century-style constitution operating in biblical Israel. The tribes of Israel (either pre- or post-Conquest) do not constitute a state, even in the broad sense of a people exercising sovereign authority over themselves in a defined territory. There is no territory to speak of pre-Conquest and Israel’s borders are not particularly stable until the Davidic monarchy. Even then, the most that can be said about this political arrangement, from a modern perspective, is that it is a quasi-state.<sup>3</sup>

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<sup>1</sup> Professor of Biblical Law, Law School, University of Bristol. Part 4 of this chapter has its origin in discussions at a conference, ‘Towards a Relational Constitution’, held in St. Catharine’s College Cambridge in July 2010, the proceedings of which were not published. I am grateful to Dr. Michael Schluter CBE and Relationships Global (which became Relational Research in 2013) for organising this conference, to all those who attended and presented, especially Dr. Jonathan Chaplin. Regarding the current chapter, I am grateful to Dr. Jonathan Chaplin; Professor Bernard Jackson (Manchester); Professor Julian Rivers (Bristol) and Dr. Michael Schluter CBE for their responses to an earlier draft. The usual disclaimers apply. Biblical quotations are drawn from the English Standard Version (ESV) translation of the Holy Bible.

<sup>2</sup> Rivers’ definition of the modern constitution is helpful: “A constitution is a codified, legally binding statement of the fundamental principles of political order, entered into on the basis of a democratically grounded constituent act, and making provision for a separation and limitation of legislative, executive and judicial branches of government, representative democracy, the Rule of Law, the legal protection of individual civil and political rights and basic social welfare”; ‘Government’ in Michael Schluter and John Ashcroft (eds.) *Jubilee Manifesto* (Leicester: Inter-Varsity Press, 2005) 140.

<sup>3</sup> For this reason, although I draw widely upon Daniel Elazar’s works in this paper, I try to avoid reading into the biblical texts modern constitutional concepts and terms which seem to me insensitive to what we know, from

However, this does not mean *Torah* is irrelevant to constitutional thought. Constitutions, like law, predate modernity. Just as it is possible for law to exist without a state, so it is possible for a constitution to exist without a state. We can thus conceive of constitutions that are not statist or even tied to any territory or territorial element. So although Israel's *Torah* is not a constitution in a modern statist or territorial sense, it does contain substantive regulations that determine the exercise of government power and formal regulations that concern the fundamental legal status of persons. The presence of these substantive and formal elements means that we can speak of something recognisably constitutional in biblical law which may even be regarded as a 'quasi-constitution' from a modern perspective. In turn, this means we can also speak of '*Torah* and constitutionalism' because constitutionalism concerns the idea there are values associated with good constitutional design. It is constitutionalism that provides the bridge between the biblical texts and modern constitutional thinking. This is because *Torah* conveys profound political insights that have shaped later constitutional thought.

Recognising the relationship between *Torah* and constitutionalism is important given the way in which the major, and distinctive, contribution of Hebraic thought has been airbrushed out of the picture in recent centuries. A sad consequence of this is that Jewish thought has, at times, even been presented as opposed to supposedly 'Christian' ideas about the constitution. An historical survey would be a chapter in itself but one example will here suffice: during the passage of the Jew Bill in England the slogan used during the election campaign of 1754, in Lancashire, was 'No Jews; Christianity and the Constitution.'<sup>4</sup> I am thus glad to have this opportunity, in a volume expressly titled *Christianity and Constitutionalism*, to outline briefly how *Torah* informs our assumptions regarding constitutionalism and has continuity with New Testament perspectives. We cannot speak of Christianity and constitutionalism without appreciating what *Torah* teaches on the subject, starting with the importance of covenant to constitutional thought.

## 1. Covenant as a constitutional idea

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our limited archaeological data, about ancient Israel's cultural experience. For example, Elazar repeatedly uses the terms 'federal' and 'confederal' to cover different periods of pre-monarchical Israel although, in my view, terms such as 'federal' and 'confederal' are only meaningful when talking about a state.

<sup>4</sup> David S. Katz, *The Jews in the History of England 1485–1850* (New York: Oxford University Press USA 1997, 246 at n. 18), citing contemporary editions of the *London Evening Post*.

A covenant can be defined as “a morally informed agreement or pact based upon voluntary consent and mutual oaths or promises, witnessed by the relevant higher authority, between peoples or parties having independent though not necessarily equal status, that provides for joint action... under conditions of mutual respect....”<sup>5</sup> Covenant is thus “a seminal political idea”<sup>6</sup> because it enables people to “freely create communities and polities, peoples and publics, and civil society itself” thereby “establishing... enduring partnerships.”<sup>7</sup> A covenant differs from a contract, first, in that a covenant is public in character, whereas a contract is essentially private. Second, the parties to a covenant are expected to behave towards each other in ways that go beyond the mere letter of the agreement, whereas the point of a contract is to limit the parties’ obligations. Put otherwise, it is the foundation of an amicable relationship, rather than an adversarial settlement (although we do find it used also in the latter context, e.g. between Jacob and Esau). Even when contracts are used for public purposes (as with Rousseau’s ‘social contract’) they do not involve the same degree of moral obligation as do covenants.<sup>8</sup> This difference between covenantal and social contract thinking is important in view of the influence of the latter on modern constitutionalism.

Israel’s constitution is repeatedly grounded in covenant. It is at Sinai, in the course of a covenantal ceremony, that Moses reads the *sefer haberit* (“book of the covenant”) to the people, to which they respond: “All that the LORD has spoken we will do, and we will be obedient” (Exod. 24:7). Covenant and constitution also go together in the book of *Deuteronomy*. Here, a generation on from Sinai, Israel’s constitution is formally adapted in a covenant ceremony to settled life in the promised land (Deut. 29:10-13 [MT 29:9-12]). Covenant and constitution also belong at the end of the book of *Joshua*. Here, Joshua makes a covenant (*berit*) with the people (Josh. 24:25) which, along with certain “statutes and rules” (*hoq v’ mishpat*) form part of a larger constitutional text (Josh. 24:26) which effectively becomes the people’s (written) constitution or, as it is called, “the Book of the Law of God” (*sefer Torat Elohim*; Josh. 24:26).

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<sup>5</sup> Daniel J. Elazar, *Covenant and Civil Society* (London: Routledge, 2018/1998) 8.

<sup>6</sup> Daniel J. Elazar, *Dealing with fundamental regime change*, available at <http://www.jcpa.org/dje/articles2/regimechange.htm>, accessed 24 March 2018.

<sup>7</sup> Elazar, ‘The Political Theory of Covenant’ (1980) 10 *Publius* 3, 6.

<sup>8</sup> Elazar, *Covenant and Civil Society*, 8-9.

Covenants are thus an inherently relational idea, being focused on relationships to such a degree they can be said to be “the constitutionalization of a relationship.”<sup>9</sup> In Israel’s case, what is ‘constitutionalised’ is the people’s holiness, reflected in her calling to be “a kingdom of priests and a holy nation” (Exod. 19:5-6). Consistent with the relational character of the covenant, the covenantal ideal seeks to balance freedom and obligation.<sup>10</sup> This is reflected in the biblical texts. Whereas typical Mesopotamian and West Semitic covenants turn previously independent entities into vassals, God’s covenants with Israel, by contrast, call into existence a new creation to live in freedom. Consequently, whereas vassal-suzerain treaties are formed in the ANE between a greater king and a lesser king, at Sinai and Moab every Israelite shares in the status – and the responsibilities – of the subordinate king of the suzerainty treaty.<sup>11</sup> Accordingly, the covenants at both Sinai and Moab are democratic documents addressed, not to an elite, but to all those who constitute Israel. The whole people assumed responsibility for following *Torah* (e.g. Exod. 24:3).<sup>12</sup> At the same time, God relates to each individual Israelite. Every single commandment of the Decalogue, for example, “can be fulfilled, or transgressed, by an individual.”<sup>13</sup> For these and other reasons, Berman suggests that “[the] elevation of the individual in the eyes of God may well represent the most profound political teaching, and most lasting political legacy, of the Hebrew Bible.”<sup>14</sup>

This concern for freedom is partly why covenant, as an idea, has had a major influence on the political history of human liberty. Elazar’s four-volume treatment of the covenant tradition in politics traces the development of covenant traditions in the West. Covenantal peoples, and a covenantal way of life led, *inter alia*, to “reformed Protestantism with its federal theology, federalism as a political principle and arrangement, the modern corporation [and] civil societies based upon interlocking voluntary associations....”<sup>15</sup> Elazar points out how national covenants were used to found many of the original colonies in British North America,<sup>16</sup> as

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<sup>9</sup> Elazar, *Covenant & Polity*, 24.

<sup>10</sup> Shulman, ‘Political Thought’, 28.

<sup>11</sup> Joshua A. Berman, *Created Equal* (Oxford: Oxford University Press, 2008) 40-44.

<sup>12</sup> Ze’ev Weisman, ‘The place of the people in the making of law and judgement’ in David P Wright *et. al.* (eds.), *Pomegranates and Golden Bells* (Eisenbrauns: Winona Lake, 1995) 407, 407.

<sup>13</sup> Berman, *Created Equal*, 41.

<sup>14</sup> Joshua A. Berman, ‘God’s alliance with man’ (2006) 25 *Azure*, 104.

<sup>15</sup> Elazar, ‘Political theory’, 5.

<sup>16</sup> Daniel J. Elazar, *Covenant and Civil Society* (London: Routledge 2018), 15.

they had been central to Swiss,<sup>17</sup> Dutch,<sup>18</sup> Scots<sup>19</sup> and English Puritan<sup>20</sup> societies before that. Covenantal thinking became “the common mode of political conceptualization and expression during the American Revolution”<sup>21</sup> where it was reflected in numerous constitutional documents, including the Declaration of Independence.

Covenants are thus capable of major heavy lifting, in constitutional terms. They address the moral foundations of the political system (how people in a given polity should live and what their vision of justice should be); its frame of government, and even its socio-economic basis.<sup>22</sup> Their appeal to transcendent authority and concern for relationships mean they are also well placed to determine questions of legitimacy (i.e. by what right a particular authority holds power and whether this is justified). Tellingly, re-covenanting ceremonies were used on several occasions when the normal relationship between ruler and ruled broke down in biblical Israel, resulting in threats to the legitimacy of the House of David.<sup>23</sup>

Despite all this, there is a difference between a covenant and a constitution. The Sinai covenant is not, in itself, Israel’s constitution; instead, it is a necessary first step to prepare Israel to receive a constitution. This is provided by *Torah* as a whole and, most especially, by *Deuteronomy* (see 2, below). Moreover, the fact that a constitution is grounded in a covenant does not thereby make every covenant a constitution, although a specific covenant may well form the basis of a later constitution. For that reason, there is a difference between constitutionalism and what may be called ‘covenantalism’, *viz.* the perceived value of grounding political arrangements in the form of a covenant. Covenantalism, then, is one of the values of biblical constitutionalism because of the importance placed on covenant faithfulness. It is a precept of constitutionalism because it is a particular way of relating to power; one that is characterised by amity, respect, relationship and liberty.

## 2. The Deuteronomic constitution

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<sup>17</sup> *Ibid.*, 177-194.

<sup>18</sup> Daniel J. Elazar, *Covenant and Commonwealth* (London: Routledge 2017) 209-228.

<sup>19</sup> *Ibid* 269-307.

<sup>20</sup> *Ibid* 231-267.

<sup>21</sup> Elazar, ‘Political theory’, 4.

<sup>22</sup> Elazar, *Covenant & Polity*, 30.

<sup>23</sup> Crises included Jehoshaphat’s accession (2 Chron. 23:2-3); Hezekiah’s purification of the Temple (2 Chron. 29:10) and Josiah’s reform (2 Kgs. 23:3); Elazar, *Regime change*.

Within the DNA of the covenant tradition, one strand stands out. This is *Deuteronomy*, to which we now turn. Although *Deuteronomy* is not a constitution in the modern sense, we can see it as a quasi-constitution, from a modern perspective. Substantively, *Deuteronomy* deals with a variety of topics concerning the regulation of power. It is also concerned with the prior status of persons by setting out, formally, the fundamental way in which God relates to his people. Within that material, we can also identify more general values that comprise what we can call constitutionalism. This is further supported by the fact that this is how *Deuteronomy* is seen by key figures in later constitutional thought.

As far back as Roman times, Josephus described *Deuteronomy* as Israel's divinely authorised and comprehensive "constitution",<sup>24</sup> using the Greek term *politeia*, with its overtones of statecraft.<sup>25</sup> This makes *Deuteronomy*, along with the Constitution of Athens, "one of the oldest such documents available to students of government and politics."<sup>26</sup> During the Diaspora, *Deuteronomy* formed the basis of rabbinic and medieval Jewish political thought regarding the ideal Jewish state. Both the rabbinic patriarchate in Israel during the second century AD and the exilarchate in Babylon were organised in the spirit of *Deuteronomy*, as were self-governing Jewish communities in Europe between the eleventh and fourteenth centuries AD.<sup>27</sup> With the founding of the State of Israel in 1948, *Deuteronomy* became a resource once again among some religious Jewish thinkers for "a proper Jewish state", thereby creating new literature based on *Deuteronomy* as a political constitution.<sup>28</sup> *Deuteronomy* had comparable influence in the hands of Christian theologians, political philosophers and social reformers who regularly turned to this text as a biblical source for political ideas (see 3(a), below). For example, John of Salisbury's twelfth-century *Policraticus*, has an extended section on Deut. 17:14-20, every word of which is described as "thunder in the ears of the prince if he is wise."<sup>29</sup> *Deuteronomy* has thus been "a living tradition" in constitutional thought going back as far as 3,000 years. Given the constraints of this chapter, however, we can only consider a few verses. We will concentrate on Deut. 16:18 – 18:22 because their relationship to subsequent ideas concerning 'separation of powers' attests to the enduring power of the Deuteronomic constitution.

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<sup>24</sup> *Antiquities* Book 4. "[Moses] gave them the laws and the constitution of government" (at 194).

<sup>25</sup> S. Dean McBride Jr., 'Polity of the covenant people' in John T. Strong and Steven S. Tuell (eds.), *Constituting the Community* (Winona Lake: Eisenbrauns 2005), 17, 17.

<sup>26</sup> Elazar, *Covenant & Polity*, 194.

<sup>27</sup> Elazar, *Deuteronomy*. See also Elazar and Cohen, *Jewish Polity*, 121-134, 137-145, 160-177.

<sup>28</sup> Elazar, *Covenant & Polity*, 196.

<sup>29</sup> John of Salisbury (ed. and trans. Cary J. Nederman), *Policraticus* (Cambridge University Press, 1990) 36.

Deut. 16:18 – 18:22 sets out the balance of power between four different sources of authority in biblical Israel, namely, judges (16:18 – 17:13); the king (17:14-20); priests (18:1-13) and prophets (18:14-22). It underlines the fact that the Israelite polity was to be one of “separated but shared powers”, so structured that “power never could be concentrated in a single human authority.”<sup>30</sup> This makes perfect sense in the light of Israel’s own experience of slavery under a totalitarian Pharaoh. It is just one outworking of the radical constitutional change celebrated by Moses and the Israelites in the triumphal Song of the Sea (*Shirat HaYam*), immediately following the Exodus (Exod. 15). This proclaims that God has dethroned the kings and peoples of Philistia, Moab, Edom and Canaan, just as God dethroned the king of Egypt. It means that, since God has overthrown these political leaders, no human ruler can be king or exercise political authority in Israel in the same way again.<sup>31</sup> Unsurprisingly, we find some form of separation of powers functioning prior to *Deuteronomy*, in which Israel’s judges are, to a degree, independent of the hereditary priesthood (Exod. 18:21-26). This concern to keep power in check is but one aspect of what has been called, in a different context, “the manifesto of the monotheistic revolution”<sup>32</sup> and which is designed to keep Israel in the freedom God has won for her.

**(a) The judges (Deut. 16:18-20; 17:8-13)**

The final form of Deut. 16:18 – 18:22 presents the local judges (*shoftim*) and civil officers (*shotrim*) as first in the order of authorities. This may seem a little surprising, given the relatively lowly status of their equivalents in modern societies. However, it may reflect the reality that “[w]hile the constitution of Israel is comprehensive, the role of government is limited.”<sup>33</sup> This means that, We note in passing that this, in itself, challenges the modern trend towards government centralisation, as well as government interference with the family as an independent political unit. *Deuteronomy* probably imagines here the “elders” (*zekenim*), or council of adult males, meeting at the so-called “city gate” (e.g. Deut. 21:18-21; 22:13-21; 25:5-10; Josh, 20:2-4; Ruth 4:1-12 and Prov. 31:23). Whereas Canaanite permanent settlements were politically independent, forming what is thought to be a series of independent Canaanite city-states, the reference in Deut. 16:18 to judicial

<sup>30</sup> Elazar, *Covenant & Polity*, 205.

<sup>31</sup> Shawn Zelig Astor, ‘Historical issues connected to Sinai’. Unpublished paper delivered at conference “What does ‘Torah from heaven’ mean?”, Herzl Institute, 18-22 June 2017.

<sup>32</sup> Avigdor Shinan and Yair Zakovitch, *From Gods to God* (Jewish Publication Society, 2012) 1.

<sup>33</sup> Elazar, *Covenant & Polity*, 209.



appointments being made “according to your tribes” indicates that the Israelite equivalent was subordinated to tribal government.<sup>34</sup>

The deliberate positioning of the *shoftim* and *shotrim* at the head of the list may not only be practical but philosophical. The judges are commanded to “judge the people with righteous judgment” (Deut. 16:18) but the following command: “Justice, and only justice, you shall follow, that you may live and inherit the land that the LORD your God is giving you” (Deut. 16:20) is addressed in the singular to every individual Israelite and not only to the judges as individuals.<sup>35</sup> Everyone is tasked with the proper administration of justice.<sup>36</sup> This is reflected in the use of self-executing rules that are formulated in such a way as to reduce the need for third-party adjudication.<sup>37</sup> And because none can evade responsibility, everyone is answerable for the actions of their judges. I suggest the *shoftim* are placed first because they are the most visible representation of this personal responsibility which is, in fact, underlined in the laws that follow concerning witnesses (Deut. 17:4-7).

Placing the requirement to seek justice at the start of a section on the organisation of government makes the link explicit between the constitution of that government and justice. Because all Israelites are commanded to seek justice then it follows that all the biblical laws concerned with justice are deeply constitutive of the Hebrew polity. This includes laws dealing with land and the economy; matters which we might not, at first glance, associate with constitutionalism. Land ownership and distribution can be said to provide foundations for biblical constitutionalism because they form the basis for Israel’s economic and political organisation. Accordingly, chapters 13-22 of *Joshua*, which deal with the division of the land among the tribes, and which form nearly half the book, can be read as “a constitutional act of the highest order.”<sup>38</sup> This is not how such texts are normally read but it is how *Deuteronomy* suggests they should be read. Deut. 16:18ff reminds us that the Deuteronomic constitution is intensely practical and should be approached as a series of case-studies in what it means to do justice in a particular society. In that sense, what matters is not the constitution *per se* but

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<sup>34</sup> Ibid.

<sup>35</sup> J. G. McConville, *God and Earthly Power* (T&T Clark, 2008) 86.

<sup>36</sup> Berman, *Created Equal*, 69-70.

<sup>37</sup> Characterised by Jackson as ‘wisdom-laws’: Bernard S. Jackson, *Wisdom-Laws* (Oxford University Press, 2006) 29.

<sup>38</sup> Elazar, ‘Joshua’, 127.

whether justice and righteousness are done.<sup>39</sup> The constitution is only a means to an end. After all, if the nations were dispossessed from the land due to their “abominations” (Deut. 18:12) it is not surprising that Israel’s continuing possession of the land is contingent on her doing justice (Deut. 16:20). This raises the question of to what extent modern constitutionalism is related to questions of access, social mobility and social justice.<sup>40</sup> Biblical constitutionalism is also concerned not only with justice for those who are presently alive but also with previous generations and those who are yet unborn. In this way, it challenges modern constitutionalism to recognise intergenerational justice in a radical way.

A final reason for putting the *shoftim* first may also be narrative. Judges were established, even prior to Israel’s own existence as a nation (Exod. 18:21-22, 25-26; Deut. 1:15-17). By comparison, kingship – if and when it would arise – was an innovation, by Israelite standards. Putting the judges at the head of the list reflects their venerability and, I suggest, Moses’ own order of priorities (on Jethro’s advice; Exod. 18:17-23). If this reading is on the right lines, there may be a further, implied, critique of monarchy; it was not part of the original desert regime.

At any rate, the judiciary are radically independent. The task of judging is delegated to individuals who are chosen by ordinary people (Deut. 16:18-19).<sup>41</sup> Already *Deuteronomy* goes some way towards fulfilling the hallmarks of Montesquieu’s enlightened constitution, by having an independent judiciary drawn from the ranks of the common people.<sup>42</sup> Deut.

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<sup>39</sup> Weinfeld has shown that the hendiadys ‘justice and righteousness’ (*mishpat v’tsedeqah*) in the Hebrew Bible refers to establishing conditions of social justice and equity. It is thus closely associated with ideas of mercy and loving-kindness (*hesed*): Moshe Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East* (Magnes Press, 1995).

<sup>40</sup> For Elazar, the willingness of ancient constitutionalism to engage with “the way of life of the polity as a whole” is a major point of departure with modern constitutionalism: *Deuteronomy*.

<sup>41</sup> Though the criteria remain the same, i.e. the judges’ reputation for wisdom; Deut. 16:18-19.

<sup>42</sup> Berman, *Created Equal*, 80. I recognise, however, that *Deuteronomy* differs from Montesquieu, not least in regard to separation of powers. For example, the judicial responsibilities of the Levitical priesthood potentially overlapped with the judicial role of the king. This is an example of a blurring of separation of powers which, to modern eyes, is later clarified in the post-biblical tradition. Zimmermann argues that Montesquieu’s doctrine of separation of powers was informed by Christian reflections upon power and human nature: Augusto Zimmermann, ‘God, Locke and Montesquieu: Some thoughts concerning the religious foundations of modern constitutionalism’ (2010) 1 *Western Australian Jurist* 1. More is needed to demonstrate that the biblical ideas had specifically influenced modern constitutionalism. Indeed, we might query whether there is a separation of powers in the Bible in the strong sense intended by Montesquieu. We may note that in written constitutions, such as those of Australia and the USA, the three powers are stated explicitly and positively, while the separation of powers is a negative implication. It is possible that the same occurs in *Deuteronomy*. If so, it strengthens the link between it and modern constitutionalism. Even so, *Deuteronomy* presents the three powers in a somewhat different way, with Deut. 16-18 separating two sets of what we today would call ‘civil’

17:6-7 reinforces this by giving similar priority to the witnesses who give testimony and who execute judgement.

**(b) The king (Deut. 17:14-20)**

It has been observed that in *Deuteronomy* the office of the king is conceptualised “in a way that rejects all prevailing models of monarchic power within both ancient Israel and the broader Near East”.<sup>43</sup> This is especially remarkable given the many ways in which Israel otherwise conformed to ancient Near Eastern (ANE) royal ideology.<sup>44</sup> In classic covenantal style, Deut. 17:15 prohibits a foreigner from becoming king. Instead, the king must be a “brother” Israelite; someone “under the covenant.”<sup>45</sup> Moreover, this brotherly king is limited in three main ways, in terms of “weapons, women and wealth.”<sup>46</sup>

First, he cannot acquire “many horses for himself” (Deut. 17:16). This prevents the king from developing an elite military class in the form of a royal chariot force.<sup>47</sup> Like the insistence on brotherhood, this prohibition speaks volumes about *Deuteronomy*’s concern to preserve Exodus-style egalitarianism. This is further underlined by the prohibition immediately following, that the king shall not “cause the people to return to Egypt in order to acquire many horses, since the LORD has said to you, ‘You shall never return that way again’” (Deut. 17:16). The fear is that the king will reverse what God has done for Israel in the Exodus and become a new Pharaoh. A decentralised form of defence acts as a check on the king’s power and keeps him reliant upon YHWH for success in battle. Second, the king cannot “acquire many wives for himself, lest his heart turn away” (Deut. 17:17). Although this is often taken as a prohibition against taking foreign wives in order to make foreign alliances, with the added risk of idolatry, the text in fact limits multiple marriages generally with all women, not just those with foreign women. Not only does this prevent royal sexual misadventures, it also blocks attempts to consolidate power by marrying into powerful social

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authorities (i.e. judges and kings) and ‘religious’ authorities (i.e. priests and prophets) authorities. Although it is beyond the scope of this brief article to trace this out, these divisions have implications for Montesquieu’s limited separation of the civil institutions of executive, legislature and judiciary as well as for Madison’s and Jefferson’s separation of church and state.

<sup>43</sup> Bernard Levinson, ‘The reconceptualization of kingship in Deuteronomy and the Deuteronomistic history’s transformation of Torah’ (2001) 51 *Vetus Testamentum* 511, 511.

<sup>44</sup> Levinson, ‘Reconceptualization’, 512-518.

<sup>45</sup> Gerbrandt, *Kingship*, 109. ‘Brotherhood’ is, of course, a major theme throughout the laws of *Deuteronomy* (e.g. Deut. 15:11; 19:18; 23:7 [23:8]).

<sup>46</sup> Christopher J. H. Wright, *Deuteronomy* (Carlisle: Paternoster, 1996), 209.

<sup>47</sup> Berman, *Created Equal*, 62.

networks.<sup>48</sup> Finally, the king cannot “acquire for himself excessive silver and gold” (Deut. 17:17). This restricts “the king’s control of the economic surplus ... [and] his rights to taxation, trade, rents, fees, plunder and confiscation...”<sup>49</sup> All three prohibitions limit “the king’s abilities to use typical exclusionary power strategies” and prevent him from “assert[ing] military, political and economic independence...”<sup>50</sup>

Tellingly, the king has only one positive duty, which is to “write for himself in a book a copy of this law...” and “read in it all the days of his life that he may learn to fear the LORD his God by keeping all the words of this law and these statutes, and doing them” (Deut. 17:18-19). The Hebrew of Deut. 17:18 is ambiguous regarding the role of the priests; the king may either be writing “in the presence of the Levitical priests” (*per* NAS translation) or writing “out of that [copy] which is before the priests the Levites” (*per* KJV and JPS translations). But either way, he is to spend his time, as Levinson puts it, in the company of “the very... scroll that delimits his powers.”<sup>51</sup> Such a king would truly be like a brother since the same requirement is made of the ordinary Israelite (e.g. Deut. 6:2; 10:12; 31:12).<sup>52</sup> The king serves the law as a legally-constituted and legally-constrained monarch,<sup>53</sup> a model citizen and servant of the people. Israelite kings were prohibited from, and never developed into, human-divine mediators between God and the people, as was the case in the neighbouring empires of Egypt, Babylon and later Rome. The king was also prohibited from trespassing upon the unique responsibilities of priests and Levites, illustrated by the condemnation of Saul’s presumptuous making of the burnt offering at Gilgal when Samuel was delayed (1 Sam. 13:8-14). Similarly, a significant punishment was applied when King Uzziah usurped the role of the priests in the Temple by burning incense on the altar (2 Chron. 26:16-21).

None of this should come as any surprise in the light of the Sinai covenant. Since, as we have seen, all Israelites have priestly-royal status, the role of an Israelite king is relativised from the start. If every Israelite is a vassal king in regard to God – the Great King – there can be no absolute monarch in Israel’s constitution. The king’s position is further relativised by being

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<sup>48</sup> Ibid 61.

<sup>49</sup> Patricia Dutcher-Walls, ‘The circumscription of the king: Deuteronomy 17:16-17 in its ancient social context’ (2002) 121 *Journal of Biblical Literature* 601, 609.

<sup>50</sup> Ibid 609, 615.

<sup>51</sup> Levinson, ‘Reconceptualization’, 522.

<sup>52</sup> Berman, *Created Equal*, 63. “[T]he king is... set apart as *an exemplar* of torah-piety for all the people”: Jamie A. Grant, *The King as Exemplar* (Atlanta: Society of Biblical Literature, 2004), 208, emphasis original.

<sup>53</sup> Elazar, *Covenant & Polity*, 199 refers to him as a “constitutional monarch.”

introduced after the local judges and civil officials who, be it noted, are appointed by the people and not the king.<sup>54</sup>

The wisdom of the Deuteronomic laws is amply illustrated by the history of its kings. Even David had (at least) eight wives, as well as concubines (which made his succession difficult), whilst Solomon accumulated chariots, women and wealth.<sup>55</sup> Without the latter, Solomon might not have engaged in such excesses as “building temples to Kemosh, Moloch and other gods in Jerusalem.”<sup>56</sup> The forced labour imposed by Solomon on Israel recalls that imposed by Pharaoh on Israel in Egypt.<sup>57</sup> This critique from within the canon suggests that Deut. 17:14-20 was intended to have practical effect. Contrary to scholars who view these laws as utopian,<sup>58</sup> there are indications that the Deuteronomic vision was taken seriously. Joshua inscribes a copy of Moses’ teaching on stones as part of the covenant renewal ceremony at Shechem (Josh. 8:32). This suggests that it is not only the king who was to write out the *Torah* but also Israel’s republican leaders.<sup>59</sup> Likewise, instead of absorbing chariots and horses acquired as part of his Conquest victories into his army, Joshua hamstring the horses and burns the chariots (Joshua 11:6, 9).<sup>60</sup> Nor does Joshua at any time assume to himself any of the prerogatives of monarchy. His primary role is that of military leader marshalling the armies of Israel. Following Joshua’s lead, there was no monarchy in Israel for a long time and, when it finally did emerge, it remained weak, especially compared with other ANE monarchies. Even in “paganized Northern Israel, the monarch had no power ... to impose his will by force upon his subjects”,<sup>61</sup> as indicated by the story of King Ahab and Naboth (1 Kgs. 21). The fact that Jezebel – a Phoenician princess accustomed to absolute forms of monarchical power – is sufficiently constrained by the political culture that she must pretend Naboth’s judicial murder is in accordance with *Torah* suggests the Deuteronomic laws had some practical impact.

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<sup>54</sup> Norbert Lohfink, ‘Distribution of the functions of power’ in Duane L. Christensen (ed.) *A Song of Power and the Power of Song* (Eisenbrauns: Winona Lake, 1993) 347.

<sup>55</sup> Hazony, ‘Biblical case’, 44-45.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid 45.

<sup>58</sup> E.g., Lohfink, ‘Distribution’, 346. Levinson, “Reconceptualization”, 512, flatly denies its practical effect (“This utopian delimitation of royal power never passed from constitutional vision into historical implementation”).

<sup>59</sup> Elazar, ‘Joshua’, 116.

<sup>60</sup> Ibid 121.

<sup>61</sup> Nahum M. Sarna, ‘Naboth’s vineyard revisited (1 Kings 21)’ in Mordechai Cogan (ed.), *Tehillah le-Moshe* (Eisenbrauns: Winona Lake, 1997), 119.

**(c) Priests and Levites (Deut. 18:1-8)**

Priests were another bastion of power in the ancient world. Their appearance at this point is possibly suggested by the role of the Levitical priests in Deut. 17:18<sup>62</sup> in providing the king with (apparently) an original copy of the Deuteronomic scroll. The priests' role, like that of the king, is radically circumscribed compared with other cultic officials in the ANE. In Mesopotamian cities the temple "typically ... controlled vast economic resources."<sup>63</sup> By contrast, in biblical Israel, priests were denied land ownership (e.g. Deut. 18:1-2).

Despite having an extensive brief in cultic and judicial affairs (e.g. Deut. 17:8-13) the Levitical priesthood, who served alongside the hereditary Aaronide priesthood were also denied any earthly "portion or inheritance" (Deut. 12:12). Instead, they must live off tithes and gifts received from the people (Deut. 12:18-19). Indeed, their condition is one of such dependency they are even bracketed with the underprivileged as being entitled to tithes (Deut. 14:28-29). Of course, the priests do have considerable status as guardians of the constitution, since their job is to teach *Torah* to the people (Lev. 10:11; although 2 Chron 17:7-8 suggests "certain Levites" seemingly outrank the priests in the teaching commission sent out by King Jehoshaphat). But whether primary authority is given to either priests or Levites, the point is that here, too, authority is constrained because *Torah* is a public text that is widely promulgated at every level of Israelite society (e.g. Deut. 31:10-13). Anything taught by priests, or Levites, could be measured against the text itself, a further check on power.

**(d) The prophets (Deut. 18:9-22)**

The final power-base addressed is the prophets. They probably follow the priests in the list because their ability to declare the will and judgement of God is beyond the priests' control.<sup>64</sup> However, their independent ability to function as a source of constraint should not be taken to imply that they either should or did outrank the priests. Different groups fulfil different functions within the constitution and, because they are different, each wields power and authority in different ways. Both priests and prophets are cross-cutting ways of exercising power (cf. the exercise of power by distinct groups in the modern State). Along with judges and the king, the net effect is to create a dispersal of power and a system of checks and balances.

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<sup>62</sup> Lohfink, 'Distribution', 336, 341.

<sup>63</sup> Berman, *Created Equal*, 94.

<sup>64</sup> Lohfink, 'Distribution', 342, 351.

Prophets held a potentially very powerful position, possessing charismatic authority to deliver “extra-constitutional knowledge of the divine will.”<sup>65</sup> Although they do not themselves seek to rule, they can be “king-makers and critics.”<sup>66</sup> When God promises David and his heirs permanent dominion, the fact that this is communicated via Nathan the prophet “lends it constitutional credibility.”<sup>67</sup> Yet when, as later, David’s murder of Uriah the Hittite tends towards monarchical absolutism (2 Sam. 11:14-17), Nathan plays the reverse role and acts as “a constitutional check”<sup>68</sup> upon the king (2 Sam. 12:11-14). A similar role is played by the prophet Elijah in regard to Ahab (1 Kgs. 21:17-24). Yet although prophets are supposed to be a constitutional counter-balance, false prophets and sycophantic members of the royal court abounded (e.g. 1 Kgs. 22:10-12). Consequently prophets, too, were constrained and held accountable through public tests that challenged and evaluated the veracity of their prophetic words (Deut. 18:14-22). As a later prophet would proclaim: “To the Law and to the Testimony: if they speak not according to this word, it is because there is no light in them” (Isa. 8:20; KJV).

### **3. *Torah*, constitutionalism and wisdom**

The Deuteronomic constitution is consistent with a range of constitutional regimes. This is seen in narrative accounts of constitutional change and reforms in biblical Israel.

Accordingly, this section considers the relationship between biblical constitutionalism and wisdom. At the same time, the history also reveals God’s judgment on Israel’s covenant unfaithfulness. In that sense it also bears witness to other ideas about the constitution in biblical law, including, critically, the centrality of divine sovereignty.

#### **(a) Biblical constitutionalism as wisdom**

There is a close connection between biblical constitutionalism and wisdom. Deut. 4:5-8 expects the nations to say, in response to Israel’s observance of *Torah* as a whole, “‘Surely this great nation [i.e. Israel] is a wise and understanding people.’ ... And what great nation is there, that has statutes and rules so righteous as all this law that I [Moses] set before you today?” Deut. 4:5-8 only makes sense on the basis that God cares about the wellbeing of the

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<sup>65</sup> McBride, ‘Polity’, 31.

<sup>66</sup> Elazar, *Regime change*.

<sup>67</sup> *Ibid.*

<sup>68</sup> Shulman, ‘Political Thought’, 25.

nations<sup>69</sup> and their laws. According to rabbinic commentary, *Torah* was given in the wilderness so that all nations could accept it as their own:

Why was the *Torah* not given in the land of Israel? So as not to give the nations of the world the chance to say that they only reject the *Torah* because it was not offered to them on their land... Three things are associated with the giving of the *Torah* [at Sinai]: Desert, fire, and water. We learn that just as these are available freely to all mankind, so too is the *Torah* a gift to all mankind (*Mechilta* 20:2).<sup>70</sup>

Certainly, the political wisdom of *Torah* has had profound influence, in practice, among the nations. It laid the foundations for constitutional arrangements as diverse from each other as modern republicanism<sup>71</sup> and constitutional monarchy,<sup>72</sup> and thus constitutional government<sup>73</sup> and Western constitutional thought generally.<sup>74</sup> As Hazony points out, “so much of the Bible’s political teaching has by now been absorbed into our own – the right of resistance and revolution, for example, or the concept of a limited government – that one is tempted to forget how radical these ideas originally were.”<sup>75</sup> During the Protestant Reformation, the founders of the new Swiss, Huguenot, Rhineland, Dutch, Puritan, and Scottish commonwealths all rested their polities on Deuteronomic foundations.<sup>76</sup> This culminated in the American revolutionary polemical literature between 1765 and 1805 in which *Deuteronomy* was quoted more frequently than the citations of all European political philosophers combined.<sup>77</sup>

Nor should we, in our own time, ignore the specificity of constitutional arrangements in biblical Israel. These include (1) a kind of separation of powers; (2) a ‘covenant’ between ethnic or other groups as the basis for the constitution rather than the rights of the individual; (3) a focus on citizen obligations rather than rights; (4) a head of state that is under, and not

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<sup>69</sup> Thomas Kruger ‘Law and wisdom according to Deut. 4:5-8’ in Bernd Schipper and D. Andrew Teeter (eds.) *Wisdom and Torah* (Leiden: E. J. Brill, 2013).

<sup>70</sup> I owe this reference to Yoram Hazony, *The Philosophy of Hebrew Scripture* (Cambridge: Cambridge University Press, 2012) 347, n. 73.

<sup>71</sup> Shulman, ‘Political thought’, 25. Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Cambridge: Harvard University Press, 2010).

<sup>72</sup> Levinson, ‘Reconceptualization’, 532.

<sup>73</sup> Hazony, ‘Biblical case,’ 44.

<sup>74</sup> Levinson, ‘Reconceptualization’, 532.

<sup>75</sup> Hazony, ‘Biblical case,’ 46.

<sup>76</sup> Elazar, *Deuteronomy*.

<sup>77</sup> *Ibid.*



above, the law; (5) restraints on capital and land markets to protect family and community relationships; and (6) the importance of collocated extended families for the provision of welfare. Just as these matters were included in Israel's national covenant in order to direct national life for generations to come, so too contemporary constitutional thinking is intended to direct public life for generations to come. Biblically-influenced constitutionalism should therefore take account of what biblical law teaches on the areas of finance, avoidance of national debt, criminal justice, administration of welfare and healthcare, and a host of other areas and consider whether and, if so, how these ideas should shape constitutional thinking today.<sup>78</sup>

### **(b) Compatibility with diverse constitutional regimes**

Understanding biblical constitutionalism as wisdom means it is consistent with a range of constitutional regimes. In fact, Israel's own history shows that the Deuteronomic constitution was compatible with a gallimaufry of constitutional regimes. This can be briefly sketched, as follows.

The first change of regime is the transition from the nomadic tribal gathering headed by Moses (and described in *Exodus – Deuteronomy*) to a government of settled tribes under Moses' appointed successor Joshua. Together with the high priest, and supported by a vigorous tribal leadership, they are responsible for interpreting *Torah* and the constitution. The decline described in the book of *Judges* leads to further change in which power returns to tribal elders, supported by regional "judges" (*shoftim*) as well as local priests, Levites and the occasional prophet. Over time, this degenerates into a much looser political arrangement that is "operationally hardly more than a league at times."<sup>79</sup> Perhaps inevitably, the next stage is a period of anarchy in which "everyone did what was right in his own eyes" (e.g. Judg. 21:25). From an Israelite perspective, the subsequent introduction of monarchy was necessary, politically, since this internal weakness made it impossible to withstand external threats from the Philistines.<sup>80</sup>

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<sup>78</sup> For which see, generally, Jonathan Burnside, *God, Justice and Society* (Oxford University Press, 2011) *passim* and Schluter and Ashcroft (eds.), *Jubilee Manifesto*.

<sup>79</sup> Daniel J. Elazar, *The Book of Judges: The Israelite Tribal Federation and Its Discontents*, available at <http://www.jcpa.org/dje/articles/judges.htm>, accessed 26 March 2018.

<sup>80</sup> *Ibid.*

The first two books of *Samuel* show the constitutional consequences of this changing political climate, starting with the fall of the house of Eli and the hereditary priesthood (1 Sam. 1-4). Further change comes with the rise of a prophet-led regime. Here, the prophet Samuel seems to combine the authority of multiple power-bases. Separation of powers here is blurred; not only is Samuel superior to the chosen king, Saul, but he also has links to the priesthood at Shiloh. Perhaps because of this, Samuel's regime also fails. The reasons are not entirely clear but, certainly, we are left in no doubt that a regime of dynastic prophets, in the form of Samuel's sons, is no better than the regime of dynastic priests with which the book opened (1 Sam. 8:1-5).

This gives way to even greater constitutional change (1 Sam. 8:5, 19-20). Israel's request to have a king "like all the nations" is meant polemically,<sup>81</sup> since the nations are pejoratively contrasted with Israel (e.g. Deut. 18:9). But, as Gerbrandt points out, although Israel's request was an act of rebellion against God, it does not automatically mean that kingship itself is wrong.<sup>82</sup> Biblical Israel had other political institutions and systems of governance in common with other nations, including a sacrificial system, priests and prophets. All were radically changed to reflect God's requirements.<sup>83</sup> This being so, kingship was not, in principle, different from any other political institution that might be adapted, as appropriate, to biblical Israel. The only question is: how would it be changed? Deut. 17:15ff provides part of the answer, as we saw in 2(b), above. God's choice of the king provides another (e.g. 1 Sam. 9:17).<sup>84</sup> Although kingship seems to be second-best, alternative in contrast to the spirited citizenry led by Joshua, its introduction nevertheless shows covenantal ideals were adapted by necessity.

Soon after, in *2 Samuel*, we arrive at the classic Israelite monarch in the form of King David. David seems to observe some separation of powers, reaffirming priests and prophets as distinctive power-bases, even though this will leave him open to challenge later (e.g. 2 Sam. 12). At the same time, both are subordinated to the monarchy and are brought within the royal court (2 Samuel 7; 9:15-18; ). Likewise, although David heads a monarchy that gives

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<sup>81</sup> Gerald Eddie Gerbrandt, *Kingship According to the Deuteronomistic History* (Atlanta: Scholars Press, 1986) 109.

<sup>82</sup> Ibid 109.

<sup>83</sup> Ibid 110. See Levinson, 'Reconceptualization', for an account of Israel's participation in ANE royal ideology.

<sup>84</sup> Ibid. Divine choice is especially salient in *Deuteronomy* (witness repeated references to "the place that the LORD your God will choose"; e.g. Deut. 12:11).

considerable power to tribal institutions, there is a marked thrust towards centralisation in the form of a royal bureaucracy and standing army. This leads to various tribal revolts (e.g. 2 Sam. 15-19, 20). Nor can we forget the revolutionary constitutional change of building a Temple that identified the dwelling of Israel's God as being in a fixed place, as opposed to a portable tent (2 Sam. 7).

Following the corruption of the republic in *1&2 Samuel*, *1&2 Kings* shows the fall of its successor, the monarchy. Israel's rebellion against the House of David (1 Kgs. 12) ensures this will now play out as the fortunes of a split kingdom – Israel and Judah – instead of a political union. This constitutional change is a further sign of decline. The failure of the monarchy is seen, firstly, in the northern, non-dynastic, kingdom of Israel and, secondly, in the southern, dynastic, kingdom of Judah. When (what is left of) Judah returns from exile, Israel transitions again from a monarchy to a nomocracy under Ezra and Nehemiah (e.g. Neh. 8:1-8)<sup>85</sup> and from there the story continues, with further developments, throughout Jewish history.

The point of this brief summary is to emphasise that this variety of political regimes is possible only because no single one is mandated by the Deuteronomic constitution. Subsequent generations were faced with applying its provisions to constitutional affairs right across the spectrum from republic to monarchy, from loose to tight forms of federation and in periods when, variously, priests, prophets and kings held the upper hand. It also means that the actual experience of applying the Deuteronomic constitution will, at times, have seemed more hierarchical or more egalitarian than at others.<sup>86</sup> The point is that “the biblical political tradition allows for a range of regimes, so long as the covenantal principles are not violated.”<sup>87</sup> Choices can and must be made. Nevertheless, there are constraints. This brings us to the next section.

### **(c) Centrality of divine sovereignty**

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<sup>85</sup> Daniel J. Elazar and Stuart A. Cohen, *The Jewish Polity* (Bloomington: Indiana University Press, 1985) 95-103. To what extent, and for how long, the Ezra/Nehemiah settlement remained in force is doubted by biblical historians, and the history from there until the Maccabees is poorly documented.

<sup>86</sup> This, in turn, may depend on whether divine justice is thought to operate “under delegated authority from God in some semi-autonomous manner” (which Jackson calls a “dualistic” model) or whether it should be understood as “an integral part of a single system of divine justice” (termed a “monistic” model). Jackson thinks the latter better suits the biblical texts: B. S. Jackson, ‘Human law and divine justice’ (2010) 9 *Jewish Studies: An Internet Journal* 223, available at <http://www.biu.ac.il/JS/JSIJ/9-2010/Jackson.pdf>, accessed 30 July 2018.

<sup>87</sup> Shulman, ‘Political Thought’, 29.

Although God’s covenant with Israel at Mount Sinai does not mandate a particular political regime it does, critically, insist upon certain kinds of relationships.<sup>88</sup> This means that, notwithstanding the variety noted in 3(b), above, some political regimes will be off-limits to Israel if their effect is to compromise the people’s relationship with God and one other, such as syncretistic alliances. As Berman puts it: “God is the sovereign, Israel the subordinate. To revere another god is not just to accept a falsehood; it means violating a relationship.”<sup>89</sup> What is true of Israel is true of the history of covenantal alliances in general; although a wide range of political options are possible, not all are suitable vessels for carrying the covenantal relationship. The covenant might not impose any particular political regime, but the constitution is still anchored to it (as we saw in 1, above). Israel can experiment with different constitutional forms, but she is still tied to the covenantal “finger of God” (Exod. 31:18; Deut. 9:10).

It is here that the covenant (originally, at Sinai) becomes decisive: what ultimately matters is whether God’s sovereignty is upheld or not. This is not to imply that divine sovereignty should be maintained in a positivistic sense, or purely for its own sake, so to speak. From a biblical perspective, there is no gap between affirming divine sovereignty and saying that what matters is whether justice and righteousness between and among human beings is done. That, of course, can only happen if God’s sovereignty is upheld. Divine sovereignty and national obedience produces a society in which justice and righteousness are done – and is the only way in which they will be done.

All idolatry produces injustice, as we have seen in the book of *Judges*. Israel’s decline in covenant faithfulness leads to the downfall of the republic and makes constitutional reform necessary.<sup>90</sup> The recurring phrase “... there was no king in Israel. Everyone did what was right in his own eyes” (e.g. at Judg. 21:25) first appears in a story about syncretism (Judg. 17:6). Kingship was also necessary, spiritually, since Israel’s syncretism meant she was not much different from the other peoples, who also had kings.<sup>91</sup> In this sense, the introduction of a king can be seen as divine punishment upon Israel.

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<sup>88</sup> Ibid 179.

<sup>89</sup> Berman, ‘God’s alliance,’ 79.

<sup>90</sup> Elazar, ‘Joshua’, 103.

<sup>91</sup> Elazar, *Judges*.

This is the very view expressed in the proximate texts of 1 Samuel 8 and 12, where the king is portrayed by the prophets as someone who will undermine the people's freedom. Data from Alalakh (in the northern Levant) and Ugarit, ranging from the eighteenth to thirteenth century BC, indicate that Samuel's denunciation of kingship, as recorded in 1 Sam. 8:9-17, is "an authentic description of ... Canaanite society as it existed"<sup>92</sup> before and during Samuel's time. Samuel warns the people "not to impose upon themselves a Canaanite institution alien to their way of life."<sup>93</sup> This, then, is Israel's tragedy: "a people unable to live as they should as a free people under covenant are inexorably driven to lose their freedom."<sup>94</sup> Ultimately, this culminates in exile as mandated by the lengthy curses of the Deuteronomic covenant (Deut. 28:63-68). Indeed, the giving of the Deuteronomic constitution is accompanied by Moses' prophecy of Israel's complete loss of political independence (Deut. 31:24-29).

#### 4. The Gospel and Constitutionalism

The relationship between the gospel and constitutionalism is complex. As this question will be addressed in subsequent chapters it is considered only briefly here, with reference to whether, and how, the New Testament affirms or changes the Hebrew Bible in this respect.

In broad terms, what joins the Hebrew Bible and the New Testament is the narrative nature of books like *Deuteronomy* which not only look back a generation but prophetically declare what will happen to Israel, and the world, in the far future. By anticipating the 'prophet-like-Moses' (Deut. 18:15), *Deuteronomy* shows it is keenly aware of a larger narrative that has constitutional implications. From the perspective of the New Testament, this is explicitly fulfilled when the one greater than Moses appears, from among his brothers, namely Jesus Christ who opens up the eschatological future (Acts 3:22). Israel's liberation, and subsequent constitution, thus points forward to the deliverance of all political systems to Christ. In the life, death and resurrection of Jesus, the challenge of relating *Deuteronomy* to contemporary constitutions is both clarified and deepened.

Thus Romans 13, for example, is clear that government is a servant and that servanthood is teleological. Government is understood as the servant of public, or common, good.

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<sup>92</sup> I. Mendelsohn, 'Samuel's denunciation of kingship in the light of the Akkadian documents from Ugarit' (1956) 143 *Bulletin of the American Schools of Oriental Research* 17, 18.

<sup>93</sup> *Ibid.* 22.

<sup>94</sup> Elazar, *Judges*,

Accordingly, and contrary to some contemporary accounts of constitutionalism, there is a core duty to establish justice in the public realm<sup>95</sup> and there is no distinction between ‘public’ and ‘private.’ In this respect, the *Gospels* show continuity with the Deuteronomic model of the servant king, who is a model citizen and appointed for a purpose. These ideas are affirmed and given new energy in the gospel. The New Testament’s proclamation of Jesus as Lord intensifies the relativisation of all earthly political authorities. It also intensifies humbled government (see Phil. 2):<sup>96</sup> all authorities are now humble servants of the Lord and of the people they govern. Rulers are accountable to God but also to other human beings. It is hard to exaggerate the significance of this ‘de-divinisation’ of temporal power,<sup>97</sup> which radically underlies developing understandings of constitutional order as they developed within Christian Europe.

The gospel also deepens and radicalises the prophetic tradition of the Hebrew Bible. The gift of prophecy is widely dispersed in the church (e.g. Acts 2:17-18; 1 Cor. 12:10), increasing its potential to provide political challenge. This intensifies the Hebraic tradition of speaking truth to power, as well as its concerns for accountability and transparency, together with the legitimacy of criticism and political opposition. Combined with the idea of the State as a servant of public good, there is now a need to consult with ‘the public’ on their judgments of that good. In this way, the New Testament provides a democratising thrust. Christians can and must shape whatever constitution they live under despite (or rather, because of) their lack of territorial political community.<sup>98</sup> But there are clearly limits to popular sovereignty. For example, Jesus’ statement at His trial that all political authority is delegated from God (Matt. 26:64; John 19:11) undermines Enlightenment doctrine which sees constitutional authority as proceeding from the wills or rights of individuals.

At the same time, the New Testament brings significant changes to how the Hebrew Bible understands constitutionalism. This is because the proclamation of Jesus as Lord thus has cosmic and political dimensions. If Jesus is Lord, then Caesar (and the government) is not.

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<sup>95</sup> See generally Oliver O’Donovan, *The Ways of Judgment* (Grand Rapids, Michigan: Eerdmans, 2005) 4-12.

<sup>96</sup> Oliver O’Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1996) 223.

<sup>97</sup> Eric Voegelin, *The New Science of Politics* (Chicago: University of Chicago Press, 1987).

<sup>98</sup> From a legal perspective, jurisdiction is classically asserted over territory, people and certain subject matters. Where Christianity asserts jurisdiction (e.g. in canon law) this has tended to be based either on persons or subject matter and not on territory. Although territorial claims have occasionally been made by those claiming to be Christians – and continue to be made (e.g. the Vatican State) – this is not warranted on the basis of the biblical texts.

All constitutional thinking is consequently provisional and must be subject to review. Political power is no longer the final horizon of authority, the ultimate source of identity or the guarantor of peace. No matter how well an earthly polity organises itself constitutionally, it can never, finally, disclose how people should live together. From the perspective of the New Testament, then, no ethnic or national narrative can rival the ending in *Revelation* where all nations, tribes and tongues are gathered around the throne of the Lamb in the new Jerusalem. The church is trans-national (“neither Jew nor Greek...”; Gal. 3:28) and is not tied to any particular nationality or ethnicity or government. Instead, it is a new community, fully ruled in every relationship by God as revealed in Jesus. This affects how Christians seek to understand and apply the constitutional wisdom of *Torah*. Living in the New Testament period, there are no longer any nations covenanted with God and the New Testament ‘people of God’ are no longer tied to any territorial political community. At the same time, the emphasis on brotherhood in *Deuteronomy* – intensified by the absence of ethnic barriers and inclusivity of the New Testament – raises the question of how radically egalitarian a constitutionalism informed by *Torah* and gospel is prepared to be.

Another major change concerns the exercise of power in the Messianic age. Whereas some Jewish political thought has expected there to be a separation of powers in the Messianic age (“even the *Mashiach* [Messiah] is not to be trusted alone with all the powers”<sup>99</sup>) the New Testament explicitly presents Jesus as fulfilling, embodying and exercising kingly, priestly and prophetic roles. He is not only the King who is greater than David (Matt. 22:41-46); He is also the Great High Priest who offers the sacrifice of himself (Heb. 9:11-28) but also the prophet greater than Moses and Elijah (Matt. 17:3) and John the Baptist (John 5:36). The New Testament’s account of Jesus’ life, ministry and resurrection is intended to demonstrate that Jesus is to be trusted – supremely – with the exercise of power. However, this is not a template for tyrannical rule, for the *Gospels* demonstrate a profound continuity with the Deuteronomic model of the servant king and the many critiques of authoritarianism in the Hebrew Bible.

Drawing these strands together, the key question from a Christian perspective becomes: how should the fulfilment of *Torah*-inspired constitutional thinking in the gospel of Jesus Christ shape modern constitutionalism? This presents difficult issues for constitutionalism, which

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<sup>99</sup> Elazar, ‘Covenant as the basis’, 39.

subsequent chapters will explore. If Jesus is Lord, how should political constitutions stand *vis-à-vis* the church (and religious communities generally)? And if, as the New Testament believes, the ultimate community is now the church of Jesus Christ, to what extent should constitutionalism recognise this? Can we imagine, today, forms of constitutionalism that are explicitly theistic or, even, explicitly Christian? One way of answering this might be to note that, in the Hebrew Bible, God does not directly rule the people of Israel but relies instead on a person who is chosen by the people or appointed by Him. On that basis, the Lordship of YHWH in the Hebrew Bible could be said to be mirrored by the Lordship of Christ over all nations in the New Testament. But this raises the question of to what extent the same ambiguity can be said to apply in the modern state.

To this we must add the further complication that the New Testament does not address political order directly. Jesus stresses the importance of all human beings living by the revealed word of God (Matt 4:4) and seems to assume that whatever is needed for Christians to be salt and light in society has already been revealed (Matt 5:11-20). Where a political order is laid out specifically, it is in *Torah* and, especially, in *Deuteronomy*. Yet *Deuteronomy* is, of course, distinctive from contemporary constitutions. Israel is governed by God, through mediators, and God has far greater capacity than earthly governments to marshal and motivate an earthly polity. This level of penetration places some limits on how *Deuteronomy's* wisdom might map onto contemporary political constitutions. A final difficulty is that the Sinai and Moab covenants constitute a people whereas in the Lockean liberal tradition there are two compacts; the first which constitutes the people or the polity and the second which constitutes the government. Finally, God's constitution of Israel was sufficient for all Israelite life (or, at least, sufficient to enable the wisdom necessary for all Israelite life), unlike contemporary constitutions. At the same time, *Deuteronomy* still assumes that Israel's constitution is a practical display of wisdom which other nations will admire and ought to emulate. And since *Torah* in the *Gospel of Matthew* expressly takes into account the "hardness" of the human heart (Matt. 19:8), it may still be said to provide an indication of what it may be possible to achieve in such a context.

## **Conclusion**

*Torah* is a great gift from God to Israel that teaches about a life worth living – and a constitution worth having. The biblical history of Israel, among many other things, conveys profound political insights that have shaped political philosophy. Although its complexity



belies neat summary, an account of constitutionalism in the Hebrew Bible would emphasise the sovereignty of God, covenantal politics, limited government, separation of powers, federalism and civic virtue. Although the relationship between *Torah* and gospel is complex, the New Testament is in long-range continuity with the constitutional catalysts of biblical law. Whichever way the texts of the Hebrew Bible texts are interpreted in the light of the New Testament, they should not ignore the specifics of how constitutional thought is disclosed in the Scriptures of the Old and New Testaments. Despite differences in culture, history and technology there are abiding norms of political order, rooted in *Torah*, that the Gospel implicitly affirms and emphasises. Certainly, as subsequent chapters in this book will show, *Torah* offers much more than has been appreciated in modern times in potentially guiding nations in thinking about constitutionalism. Its power is real because it operates at an ideational and moral level, for the only way a constitution can really affect people is by shaping how they think. The confluence of *Torah* and Gospel thus generates a uniquely powerful kind of constitutionalism, one that has shaped Western civilisation down to its roots and can do so again.