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## Drawing up *The Jewish Social Contract*

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FOLLOWING THE PUBLICATION in 2000 of his *Covenantal Rights: A Study in Jewish Political Theory* and in 2005 of *The Jewish Social Contract: An Essay in Political Theology*, the American Canadian rabbi, scholar, and theologian David Novak has emerged as perhaps the most important political thinker within the Jewish tradition in the still very young twenty-first century. With his customary display of vast erudition and incisive thinking Novak has made an impressive endeavor in these books to formulate distinctively Jewish but broadly applicable answers to some of the age-old questions of political philosophy. For this effort he has already received much acclaim.<sup>1</sup>

Novak's goals are certainly very ambitious. Far from being a mere academic exercise, his theological-political project represents a bold attempt to replace modern liberalism. Rejecting what he sees as the "mythical" social contract foundations on which it is based as well as the political theories that have been erected upon them, he offers the blueprints for a better world, one in which the deficiencies of liberalism will be remedied but where the admitted benefits it has conferred upon humankind will still be retained. Whenever a thinker of Novak's stature promises to do so much, it behooves us to listen carefully.

*Covenantal Rights*, Novak indicates, is a work of political theory and *The Jewish Social Contract* articulates a political theology. What exactly he considers to be the difference between these two disciplines is difficult to discern. But it is quite clear that his political theory is completely intertwined with his theology, just as his political theology is deeply theoretical. And, if we disregard their respective subtitles, it is also quite clear what place each of his two most recent books occupies in his overall project. *Covenantal Rights* seeks mainly to locate the foundation of human

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1. See the most recent discussion by Gordon Schochet, Leora Batnitzky, Michael Walzer, and Novak himself in "Symposium on David Novak's 'The Jewish Social Contract,'" *Hebraic Political Studies* 1.5 (Fall 2006): 593–622.

rights, properly understood, in men's covenantal relationship with God. *The Jewish Social Contract* aims above all to explain how modern polities can be best sustained and utilized if they are conceived not as conglomerations of isolated individuals but as the products of social contracts agreed upon by disparate but mutually accommodating covenantal communities.

Novak's theoretical efforts will no doubt attract the attention of many Jews who are ill at ease with modern liberalism but averse to anything that would tend to undermine its greatest achievements, especially its guarantee of religious freedom. Ultimately, however, his reasoning can be fully persuasive to only a small sector of the Jewish people. For Novak, a self-described traditionalist Jew, bases most of his positive recommendations on dogmatic premises that less traditional Jews simply cannot accept. And the political theology with which he wishes to replace liberalism rests on a belated and inconsistent appropriation of ideas that are only justifiable on the basis of what he considers to be his liberal adversaries' invalid assumptions. It provides, in the final analysis, no solid justification for the preservation of religious freedom and is consequently of very doubtful use to the Diaspora Jews it is primarily meant to serve.

#### DOGMATIC FOUNDATIONS

David Novak rejects the idea of the state of nature as a "hypothetical—that is, fictitious, even mythical" condition.<sup>2</sup> He faults the modern social contract theory that takes this idea as its starting point both for its lack of "any real history and ontology" and for its essential inutility (*JSC*, 19). It is, at bottom, a way of thinking that "is insufficient to protect us from the anarchy most of us correctly fear."<sup>3</sup> Rejecting the social contract theorists' focus on the primacy of individuals, Novak emphasizes the primacy of community, something that can "be really located in history—especially in Jewish history" (*JSC*, 19). For Novak, Jewish history is above all the record of his people's interaction with the God who rules the entire universe.

The "real history" to which Novak refers is hardly distinguishable from the biblical narrative, taken quite literally. This is a matter of course for him because, as a traditional Jew, he accepts "the Written Torah" as "the direct revelation of God." He likewise affirms the authority of "the Jewish legal tradition (*halakhab*), often called the Oral Torah," and belief in

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2. David Novak, *The Jewish Social Contract: An Essay in Political Theology* (Princeton, N.J., 2005), 18. Quotations from this work are cited in the text as *JSC*, followed by page numbers.

3. David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (Princeton, N.J., 2000), 7.

the final redemption, “including the bodily resurrection of the dead by God” (*JSC*, 27). Yet neither *Covenantal Rights* nor *The Jewish Social Contract* includes any attempt at a rational defense of these dogmas, an indication of where one might look for such a defense in any of Novak’s previous works, or even an explanation of why he does not believe it necessary to provide one. If, however, one examines carefully his *Election of Israel* (Cambridge, 1995), one can determine essentially where he stands on these matters.

Novak simply sees no need for apologetics. Philosophy has its uses, but to give it a “foundational role” in understanding the Torah would be an impermissible concession, an attempt, in effect, “to reduce the Torah to the world.” Hence it is necessary to “be outspoken in insisting that the Torah can never, and therefore must never be justified by the world or anything in it. The Torah comes from God and it is for God’s sake that it is given to us. The world is made by God and God has given his Torah to the world, but the Torah always teaches us more than the world does.”<sup>4</sup>

Nevertheless, the world can indeed teach us something about Torah, Novak is eventually prepared to concede. He admits that

the understanding we now have of the initial context of the biblical text in time and place supplied to us by historical research cannot be ignored without our becoming totally arbitrary in our scholarly standards. Historical research cannot be rejected out of hand any more than natural science can without the worldly weight of the Bible being simultaneously surrendered and the Jewish readers of the Bible being relegated to the level of obscurantists.<sup>5</sup>

This acknowledgment of the utility of historical research for understanding the Bible might seem like only a minimal concession to “the world” if scholarly endeavors in this area generally tended to corroborate what Novak regards as the “real history” narrated in the divinely revealed Torah. But even if this was once the case, it long ago ceased to be so.

Today, even a conservative biblical scholar like William Dever will go only so far as to claim that “there is nothing inherently improbable in the main outline of the biblical story as it now stands.”<sup>6</sup> Dever cannot accord a similar degree of credibility to every detail of the biblical narrative,

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4. David Novak, *The Election of Israel* (Cambridge, 1995), 8–9.

5. *Ibid.*, 112–13.

6. William G. Dever, *What Did the Biblical Writers Know and When Did They Know It? What Archaeology Can Tell Us about the Reality of Ancient Israel* (Grand Rapids, Mich., 2001), 268.

however, and frankly states that the critical study of the Bible is bound to diminish its moral and cultural value for many believers and to undermine the religious faith of fundamentalists and “even many conservative Christians, Jews and others.”<sup>7</sup> Less conservative scholars, and not only the so-called biblical minimalists, go considerably further than Dever and reject even the main outlines of the biblical story, dismissing such key events as the exodus from Egypt and the Israelites’ sojourn in Sinai as mere legend.<sup>8</sup> Can a theologian who dogmatically identifies the biblical narrative as “real history” ignore all of this scholarship or reject it out of hand without running the risk of being considered an obscurantist?

Apparently, David Novak either believes that he can or does not mind being the target of any such accusations. For his writings contain almost no attempt to come to terms with modern biblical scholarship.<sup>9</sup> While he recognizes the necessity of grappling with the philosophical deniers of the doctrine of Israel’s election, he evidently sees no parallel need to deal with the deniers of the truth of the “real history” on which both that doctrine and his entire political teaching are founded. Given the fact that the adherents of what Novak calls the “liberal Judaisms” have effectively substituted the results of modern biblical criticism for the idea of *Torah mi-Sinai*, his rejection of this scholarship has necessarily excluded all but traditionalist and Orthodox Jews from the ranks of his potential disciples.<sup>10</sup> Novak no doubt is well aware of this exclusion but unbothered by

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7. *Ibid.*, 282.

8. See, for instance, Israel Finkelstein and Neil Asher Silberman, *The Bible Unearthed: Archaeology’s New Vision of Ancient Israel and the Origin of Its Sacred Texts* (New York, 2001).

9. Novak’s many books contain a few brief and scattered references to the decades-old works of George Mendenhall and Roland De Vaux, but nothing more up-to-date or controversial than that. See, for example, *JSC*, 57.

10. Novak does not turn his back on liberal Jews, but he derides them as proponents of “antinomianism” and deniers of Judaism’s fundamental dogmas. On the other hand, he disagrees with those traditionalists who have claimed that “liberal Judaisms are ‘not Judaism’” at all. He himself believes that traditionalists ought “to try to persuade the followers of liberal Judaisms that their Judaisms are inadequate in the light of full Jewish tradition.” Novak’s attitude toward secular Jews is far more condemnatory. Their own logic, he maintains, reduces Jewish identity to that of what he calls “a merely human opinion group.” The worst thing about them is that they “fall back,” for the most part, “on a racial definition of the Jewish people and Jewish culture.” In view of what the Jewish people have experienced in modern times, Novak says, “it is rather shocking that so many Jewish secularists would be so oblivious to the paradox of presenting definitions of Jews and Jewish culture that seem racial, if not actually racist” (*JSC*, 26–28).

it, or perhaps consoled by the fact that he has a much larger potential audience among the millions of Christians who share his faith in biblical revelation and who might therefore find his political thought “appropriable.”

*THE JEWISH SOCIAL CONTRACT AND THE FREEDOM OF RELIGION*

It is, of course, still possible that adherents of “liberal Judaisms” could learn some lessons from Novak’s political writings. My concern here, however, is not with the benefits that such people might conceivably derive from Novak but with his entire political teaching, a subject that I have already discussed once before, prior to the publication of *The Jewish Social Contract*. In a response to *Covenantal Rights* I attempted to show that the political theory it outlined fell far short of its stated goal of supplying an adequate basis for the rights of individuals and minorities over against society, including the right to religious freedom.<sup>11</sup>

In *Covenantal Rights* Novak himself recognized the limitations in this respect of the Jewish political tradition from which he took his bearings. He ruefully admitted that there is “no explicit source for individual rights *against* those of the community in the Pentateuch” or, for that matter, anywhere else in the Bible.<sup>12</sup> Novak claimed, however, to have found “a more adequate source for the concept of individual rights over against the power of the state in the Talmud.” I attempted to show that even if he had succeeded in marshaling enough texts to accomplish this purpose, he still had not demonstrated that this concept of individual rights was sufficiently broad to encompass such basic rights as the right to religious freedom. For whatever rights against society individual Jews could be said to possess were, by Novak’s own account, justifiable “only when they do not conflict with our prior social duties.”<sup>13</sup> And, as Novak himself had emphasized, the biblical covenant imposed upon Jews, among many other things, the prior duty to engage in public worship of God.<sup>14</sup> Any state whose citizens discarded social contract–based theories of natural rights and replaced them with the idea of “covenantal rights,” I therefore argued, would be a state one in which individual religious freedom could very well be in jeopardy.

After rereading *Covenantal Rights*, it still seems to me that Novak in-

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11. Allan Arkush, “Conservative Political Theology and the Freedom of Religion: The Recent Work of Robert Kraynak and David Novak,” *Polity* 37.1 (January 2005): 82–107.

12. *Covenantal Rights*, 206.

13. *Ibid.*, 158.

14. *Ibid.*, 94.

tended there to outline a theory of the origins and nature of human rights that ought to be appropriated by modern states. Now, however, with the publication of *The Jewish Social Contract*, I see that he has shifted his ground and addressed the questions posed by the modern state in a rather different way. He still seeks a foundation in rabbinic sources for rights against the state. But this time “the linchpin” of his argument is not the medley of fairly recondite texts on which he had previously relied but the well-known talmudic principle of “the law of the kingdom is the law,” or, as he quite aptly updates it, “the law of the state is law” (*JSC*, 120).<sup>15</sup> Mainly through reference to this principle he “attempts to show how Jews can cogently formulate an idea of the social contract out of their own traditional sources” (*JSC*, 5).

Novak presents an extensive and learned account of the origins and development of the principle of “the law of the state is the law,” stretching from ancient Babylonia to late medieval Spain. In diverse locales, he explains, it supplied the justification for a kind of social contract between the Jews and their hosts. It recognized that a sphere in which Gentile law is authoritative provided “a legitimate authorization of limited secularity for Jews” (*JSC*, 121), while it also authorized the Jews’ maintenance of “a legitimate secondary autonomy” within a given non-Jewish state (*JSC*, 123). All in all, this principle justifies the participation of the Jews, as a covenanted community, in a larger, secular polity based on a social contract drawn up between themselves and other religious communities. It also provides, in turn, an example that these Gentile communities can emulate in their efforts to understand their own relationship to the state in which they live.

Yet Novak does not really need the principle of “the law of the state is law” in order to explain how a Jewish community ought best to live within the context of a mostly non-Jewish state. Such a notion would already follow from his conception of religious communities as having ontological and historical priority over any secular states to which they need nevertheless to accommodate themselves. And it is really his argument to this effect, not his recourse to talmudic precedent, that constitutes the core of *The Jewish Social Contract*. This argument is necessary, too, in order to explain why the state, understood in terms of its own proper

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15. “Literally, the words used in the formulation of this principle mean ‘the law of the kingdom (*malkhuta*) is law.’ Nevertheless, I prefer to translate them as ‘the law of the state is law,’ because, whereas every state known to the Jews in talmudic, geonic, and early medieval times was a monarchy of some sort or another, the idea that Jews can live in good faith under regimes not governed by halakhah should not be restricted to monarchies” (*JSC*, 114).

purposes, has no right to interfere with the internal lives of religious communities.

Novak takes communities and not individuals as his point of departure because “persons are social beings by nature, not by mutual agreement.” Consequently, only people who are “*already* socialized” can enter into social contracts. This original “socialization takes place in the family as the basic component of a primal community” (*JSC*, 11–12). Families are mere components, however. The politically relevant primary communities are not the smallest social units but those that unite many families in religious communities. The two such communities on which Novak concentrates almost all of his attention are those of Jews and Christians.

Jews are part of the Jewish people, and this is their most primary identity. Christians are part of the church—the body of Christ—and this is their most primary identity. Only subsequently do Jews and Christians participate in various associations, and they can only participate in these in good faith when they justify the participation by references to the ends for which their own communities live and thrive. (*JSC*, 196)

But Jews and Christians do not make up the only communities that Novak aspires to see integrated into his ideal, multicultural polities. As he himself recognizes, “true multiculturalism” in Western societies should encompass Muslims as well (*JSC*, 192). And although he makes no explicit reference to any specific non-Abrahamic religions that also pass muster, he seems to be also welcoming other communities into the polity when he notes the tendency of Jewish tradition “to respect other religiously based cultures whose general moral commitments are close enough to the Noahide norms Judaism takes to be universal” (*JSC*, 234).

Despite this openness to other religious groups, Novak’s entire theological-political project revolves around the fundamental “question of how faithful Jews and faithful Christians can enter into civil society and survive there intact, let alone flourish, without, however, either conquering civil society or being conquered by it” (*JSC*, 195). In referring to the possibility of a religious community’s conquest of civil society Novak presumably means the exercise of hegemony in a way that would infringe the religious freedom of the other communities subject to its dominion. Being conquered by civil society would entail subordinating one’s religion to it.

But why wouldn’t a religious community prefer to conquer society if it could? Both Jews and Christians, Novak informs us, look to their reli-

gions for their “primary orientation in this world” (*JSC*, 197). Are there never situations in which they would consider it advisable to stamp their own religion’s imprint firmly upon the social framework within which they live and to push unbelievers to society’s margins? In practice, Novak says, religious communities

are rarely if ever politically, economically, or intellectually, self-sufficient. In one way or another, they need to make alliances with others outside their own cultural domain, alliances in which no one party dominates the others, or one in which all the parties merge and create a new identity for themselves. (*JSC*, 19)<sup>16</sup>

But forswearing any attempt at the conquest of society is not from all points of view a matter of mere pragmatism. Christians, in particular, should understand that “the Kingdom of God on earth will not be brought any nearer by assuming that the Church can or should claim authority over others in the world as it is presently constituted politically.” And Christians and Jews alike, as peoples of God, ought to conduct themselves in this world in such a way that the political order positively facilitates their survival.

This not only means working for a political order where religious liberty is the most important right that civil society is obligated to uphold but also a political order where enhancing the dignity of human life in its various forms is the *raison d’être* of the society, especially the state created by that society. Indeed, the protection of religious liberty, which is the political right to respond to or turn away from the God who elects us, is the epitome of human dignity by which all other rights are grounded. (*JSC*, 198–99)

The duty of covenanted communities to strive toward establishing an order supportive of religious liberty is matched by a corresponding duty on the part of civil society. The state must indeed safeguard much more than what Novak specified in his initial definition of “religious liberty” in *The Jewish Social Contract*, such as “the freedom of citizens of a democracy to find their primal identity by being and remaining parts of their traditional communities” (*JSC*, 9). For any member of a civil society, he subse-

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16. Novak has evidently chosen here to overlook the existence of the many liberal as well as illiberal societies in which single religious communities enjoy overwhelming numerical superiority and cultural predominance.

quently maintains, is entitled to make “the democratic claim to be able to convert to a religion of his or her choice” (*JSC*, 24). “Religious liberty entails the right of religious conversion” for everyone (*JSC*, 25). The state must therefore “respect the prior human freedom of any of its participants to either accept or reject any historical revelation that purports to realize the relationship between God and humans in the world” (*JSC*, 199).

Civil society, as Novak understands it, is “a truly *secular* space” that only emerges “out of intercultural agreement” among religious communities (*JSC*, 19). It is rooted in a social contract at which both Jews and Christians arrive “not as individuals but as fully communal beings” (*JSC*, 203). The social contract is an arrangement into which these communities enter in order to protect and enhance “prior *communal rights*” and in which they accept “subsequent *social duties*” in return (*JSC*, 21). Nevertheless, the

social contract in a democracy may not mandate that a citizen have *some* religion any more than it may mandate that all the citizens have the *same* religion, or even that the state officially establish *one* religion. Any such religious mandates from the state would have the state acting in *loco Dei* instead of allowing the religious (or areligious) commitments of its citizens to transcend its authority by freely seeking their salvation elsewhere. (*JSC*, 215)

#### NOVAK'S DILEMMA

Having previously faulted *Covenantal Rights* for its inadequate support for the idea of religious freedom, I cannot help but be impressed by the strength of Novak's affirmation of this principle in *The Jewish Social Contract*. He could hardly have given it any greater weight. But how can we account for this? Although he does speak in the former work of human rights as being “rooted in natural needs long before they are the subject matter of covenantal negotiation,” he never shows how such needs could be construed to have given rise to a precovenantal universal right to religious freedom.<sup>17</sup> He has not retracted the assertion in *Covenantal Rights* that there is “no explicit source for individual rights *against* those of the community in the Pentateuch” or anywhere else in the Bible. Nor has he continued to rely on his earlier and rather complicated talmudically inspired argument for individual rights against the community or state. What, then, can explain his sudden discovery of what he calls a “prior human freedom” of religion? How can Jews, in particular, retain posses-

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<sup>17</sup>. *Covenantal Rights*, 64.

sion of this freedom when they have social duties, including the duty to worship God, which he characterized in *Covenantal Rights* as being “prior” to any rights they may have? What gives them and other peoples the right to complete religious freedom? What has inspired Novak to adopt something suspiciously like liberalism’s own foundational premises, namely, the existence of individual freedoms “prior” to the establishment of any kind of social arrangements? For his insistence that a state interfering with religious freedom would be usurping the role of God sounds very much like an echo of the idea that all people “are endowed by their Creator with unalienable rights,” including the right to liberty of conscience. Indeed, his belief that religious liberty “is the epitome of human dignity by which all other rights are grounded,” seems to point the way back from a Scripture-based political theology to an acceptance of liberal political philosophy. But Novak is not really willing to take this route. Why not?

Perhaps the best way to approach these questions would be to consider Novak’s reasons for developing his own political theory or political theology in the first place. What we should bear in mind above all is that his ruminations on these matters seem to be entirely agenda-driven. Supremely loyal to his own religion, he wishes to delineate the role of the state in which he and his coreligionists live in such a way as to maximize the extent to which they can put their beliefs into practice. For Novak, this means a great deal more than protecting an environment where Jews can quietly maintain a religious communal life free of outside interference. It means establishing the basis for a certain understanding of the Jewish community’s role as “a full and active participant” in “the larger secular society” (*JSC*, 218). This entails the formulation of a political theory that will justify “Jewish advocacy for such things as public support for religiously based education *for whichever community requires it*” (*JSC*, 238).<sup>18</sup> And in order “to claim such aid as a justified entitlement . . . one needs to be aware of the contractual relation between Jews and any secular democratic polity” (*JSC*, 228).

The main obstacle that Novak faces in such an endeavor is the argument of liberals, including Jewish liberals, “that there should be no religiously based advocacy of any issue of public policy inasmuch as religion, a private matter, has no right to make any public claims at all” (*JSC*,

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18. See Michael Walzer’s remarks in the above-mentioned symposium for a discussion of the problems entailed by the phrase that Novak italicizes. *Hebraic Political Studies* 1.5 (2006): 605.

219). This is a hurdle that he has chosen to circumvent by focusing on the historical and ontological priority of religious communities and describing the state as merely an instrument to serve their common interests created by means of a contract among them. Within the framework of such a state, Jews, Christians, and others should feel fully entitled to take their bearings primarily (although not exclusively) by their own religious traditions when they formulate their policy preferences.<sup>19</sup>

This is Novak's answer to the "question of how faithful Jews and faithful Christians can enter into civil society and survive there intact" and even flourish, but it does not meet all of his needs. Something more is required in order to guarantee that these religious communities avoid the danger of "either conquering civil society or being conquered by it." As an American and a Canadian, Novak does not have to concern himself very much, of course, with any religious Jewish community trying to conquer civil society, something that could conceivably occur only in the Jewish State of Israel.<sup>20</sup> But Christians are another story. Novak is encouraged by the fact that "we are at a point in history, certainly in North America, when Jews and Christians can recognize each other first as the closest neighbor rather than as the most threatening enemy" (*JSC*, 192). But he is well aware that this is a very recent development and he has by no means forgotten how bad things were for many Jews when hostile Christians exercised hegemony over civil society. It is vitally important,

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19. "As for a first criterion for a Jewish public policy position," Novak writes, "it is only when it is grounded in the Torah and Jewish tradition that it has any Jewish authenticity." But he says this in the context of a discussion of the other factors that have to be taken into consideration, including "the common good of the larger society in which we participate" (*JSC*, 223–24).

20. It is interesting to compare one of Novak's statements in *Covenantal Rights* with one of the few comments about Israel in *The Jewish Social Contract*. In the earlier book, he maintained that "the renewed government of Jewish law in civil society, of which the institution of individual human rights must be developed, can only come when there is a true renewal of the covenant by the vast majority of the Jewish people with their God" (*CR*, 218). In the later book, he argues that "even those religious Jews who want the State of Israel to become a state fully governed by halakhah would only want that transition to come about through democratic means, namely, through the choice of the vast majority of Jews in Israel (and probably in the whole Diaspora as well)" (*JSC*, 223). Apparently, Novak has for some reason recently come to the conclusion that the establishment of a halakhic state might not necessarily require the acquiescence of the majority of Diaspora Jews. One is left wondering how such a state could ever be legitimate, in terms of his political theology. Wouldn't it represent the "conquest" of society by one of the covenantal communities constituting it, even if the vast majority of Jews were in favor of it?

therefore, that Christians, especially those who continue to regard their own religion as the only true one, remain firmly attached to the principle of religious freedom.

Novak can take heart from the fact that “many Christians” have recognized that when Christianity exercised control over civil society “it was as disastrous for Christian witness of the Kingdom of God as it was for justice in civil society” (*JSC*, 191). He can, as we have already have seen, remind Christians that “the Kingdom of God on earth will not be brought any nearer by assuming that the Church can or should claim authority over others in the world as it is presently constituted politically.” But this is certainly not the basis on which Jewish rights can be allowed to rest. For, as Novak himself has told us, “if human rights in a democracy are to ‘have teeth,’ and not be vague, hypothetical claims made by rootless persons, then a real and sufficient foundation for these rights should be found and explicated” (*JSC*, 3).

As already noted, Novak has admitted that no such foundation for individual rights against the community can be found in the Hebrew Bible. Nor does he make any move in the direction of the kind of social contract theory that he clearly regards as invalid, the kind that derives citizens’ rights to religious freedom from the prepolitical individual rights that they possessed in the state of nature. What he chooses to do instead, is to make an entirely pragmatic argument for religious freedom that quickly and strangely morphs into a kind of principled argument. “The task of any people of God in this world is survival,” Novak tells us, and such survival is feasible only in a political order based on the right to religious liberty. Therefore religious communities must uphold that right.

But are these things undeniably true at all times and in all places? Surely the history of both Christianity and Islam provides ample evidence that they are not. Throughout the centuries both religions have regularly enhanced their ability to survive and flourish through the exercise of the kind of hegemony that Novak deplors. To demonstrate this point, I will mention only the Reconquista and the expulsion of the Jews and the Moors and the ways in which these developments strengthened Catholicism in Spain (if not necessarily Spain itself). Things have changed, of course, since the fifteenth century, and it is easy to see that in modern times it might indeed often be impractical and self-defeating for any covenanted community to attempt to conquer a religiously divided society. But would this necessarily be the case everywhere? Aren’t there religiously homogeneous countries such as Poland or Tunisia where the members of the dominant religious group could exercise hegemony with-

out making “alliances with others outside their own cultural domain, alliances in which no one party dominates the others?” To be sure, neither of these states constitutes the kind of multicultural society with which Novak is most concerned (nor does either one of them any longer contain a significant number of Jews). But even with respect to societies of this type Novak’s derivation of the right to religious liberty is questionable.

What if a number of covenantal communities chose jointly to exercise a condominium over the religiously diverse society in which they lived, not dominating each other but dominating lesser groups? What if they were to establish a kind of *convivencia* among themselves but at the same time outlaw any new religions, prohibit any of their own members from switching allegiances, and ban any public expressions of atheism?<sup>21</sup> It is at least arguable that such an alliance would obviate the practical difficulties to which Novak points and would strengthen religion more than it would weaken it. And what if a narrower coalition were somewhere to be formed, one that consisted, say, exclusively of the Christian denominations constituting the vast majority of the people a particular society (such as the United States) and demonstrated intolerance toward all non-Christian religions? It is at least arguable that such an alliance would circumvent the practical difficulties on which Novak concentrates his attention and would benefit Christianity in that specific locale. One cannot, therefore, proceed automatically from the premise that individual covenanted communities require religious liberty in order to flourish to the conclusion that the members of such communities have no choice but to be advocates of a social order that grants untrammelled religious freedom to everyone. Even in modern, multicultural societies the adherents of particular faiths may reasonably conclude that the maintenance of such freedom is not necessarily in their own best interest.

From all of this it should be clear that Novak has not succeeded in

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21. Novak is very concerned with people who wish to bring into existence what he calls a “thoroughly atheistic society,” one “in which public recognition of the moral sovereignty of the creator God is outlawed, and where the religious beliefs and practices of the citizens are relegated to an ever narrower private sphere.” Fortunately, they are not “in positions of power strong enough—yet—to make the society thoroughly atheistic” (*JSC*, 214–16). But in view of the menace that they pose, wouldn’t it perhaps be prudent to engage in preemptive action against them? Wouldn’t this be a better means of ensuring the survival of covenanted communities than allowing such people the freedom to propagate their subversive views? Wouldn’t it be logical, therefore, for David Novak to prefer such arrangements to untrammelled freedom of expression?

building a bridge from either the doctrines or the pragmatic interests of covenanted communities to the principle of religious freedom. If he has thrown up nothing more than a shaky excuse for a bridge, it is because he has not had any other choice. Unable to anchor the right to religious freedom securely in scriptural tradition, and unwilling to derive it from a liberal, social contract theory, but unprepared to surrender it either, he has to identify a source for it somewhere or other. But even if he looks at first glance like someone who has succeeded in grounding the idea of religious freedom in Jewish tradition or in the alleged requirements for religious groups' survival, he has actually left it stranded. All that he has really shown is how one can become tied up in knots if one tries to assert at one and the same time the priority of the community and the priority of the individual. In the end, anyone who takes the community as prior, as Novak does, cannot help but undermine the rights of the individual.

Novak thus finds himself caught on the horns of very much the same dilemma as the one Moses Mendelssohn faced at the end of the eighteenth century. Mendelssohn's assertion of the priority of individual rights in his preface to Menasseh ben Israel's *Vindiciae judaeorum* exposed him to the accusation that he was implicitly denying the validity of the Sinaitic covenant. How, asked one of his adversaries, could he insist upon the inalienable right to freedom of religion and at the same time affirm the truth and authority of a revealed law that required the severe punishment of religious offenses?

Mendelssohn's best answer combined a reaffirmation of the social contract theory on which his belief in religious freedom was based with a defense of the historicity of the events at Sinai, while consigning biblically endorsed theocratic arrangements to the remote past and, perhaps, the distant future. This does not satisfy Novak at all. In view of what he sees as Mendelssohn's skewed priorities, he dismissively characterizes him as someone whose "social contract theory" fails to "give the covenant primacy" (*JSC*, 178). He argues furthermore that his "theory of Judaism is inadequate to the Jewish tradition" in part "because it renders it subordinate to a non-Jewish universe" (*JSC*, 183). "At the end of the day," Novak concludes (correctly, in my opinion), "Mendelssohn is a much better Enlightenment philosopher than he is a Jewish theologian" (*JSC*, 187).<sup>22</sup> Novak himself, like Mendelssohn, wants to uphold both the individual's absolute freedom of religion and the genuineness of the covenant. But he refuses to do so by "reducing the Torah to the world." In giving priority

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22. I have expressed my views on these matters in my book *Moses Mendelssohn and the Enlightenment* (Albany, N.Y., 1994), 167–292.

to the former and rooting his political thought in it, he has made it clear that he himself is a better Jewish theologian than he is an Enlightenment-style philosopher.

#### CONCLUSION

David Novak's political thought, based as it is on dogmatic theology, can be entirely convincing only to those who share his fundamental beliefs. But even readers who fall into this category will see that there are very deep flaws in his arguments. He has, in my opinion, failed twice to achieve his main objectives. In *Covenantal Rights* he failed to extract from Jewish sources a defense of individual or minority rights against the state that would include the right to freedom of religion. In *The Jewish Social Contract* he has now failed to devise a desirable substitute for liberalism by means of a "Jewish justification for a secular democratic order" (*JSC*, 5). Where Novak has ironically succeeded, however, is in demonstrating how indispensable liberalism remains, even for some of those who wish to overcome it. For in his work we are confronted by the odd spectacle of a thinker who rejects the basic principles of liberalism and constructs an alternative to it by means of a political theology rooted in Scripture, and then is forced, by his desire to preserve the right to religious freedom, to complete his theoretical enterprise with a vain attempt to prop it up with stones borrowed from the foundations of the liberal edifice that he has so unequivocally condemned.

And what would happen, we must ask, if this makeshift theory were ever to be put into practice? Our society would then consist of strong covenanted communities, full of traditional Christians, Jews, and perhaps Muslims and other minorities loyal primarily to their respective communities but also ready to cooperate, for limited purposes, with the others that together constitute their polity. What kind of citizens would such people make?

It seems reasonable to assume that they would be more parochial, more focused on the ideals and welfare of their own respective communities than on the well-being of the state as a whole. Or they would be dangerously prone to identify the best interests of the state, at all times, with the best interests of their own religious community. Living in a postliberal world, they would be free of the influence of the liberal ideas that Novak deems to be so morally damaging. But so would their theologies. They would be all too likely to revert to the intolerant teachings to which they had adhered prior to being subjected to the influence of liberalism. How committed would they then be, in principle, to the bestowal of equal

rights on the members of other religious communities, some of which they might once again regard, with new-found fervor, in a very hostile light?

To be more specific, what would things be like for the American Jewish community if it found itself living in a society populated mostly by old-fashioned kinds of Christians who had broken free of the Lockean legacy? Novak himself acknowledges that there are still Christians on the scene who “long for the premodern world they think they once controlled, a control that inevitably made Jews political outsiders and cultural pariahs” (*JSC*, 191). Isn’t it likely that the erosion of liberalism would lead to an increase in the numbers of such people? How would the Jewish community fare if it lived in a country full of Christians who believed that the Jews were a reprobate people and who were no longer convinced that they, as well as other non-Christians, had *by nature* a “prior” human right to full equality? It is hard to believe that under such circumstances Jews would be able to thwart any movement to return them to a subordinate position with Novakian arguments. If they were to remind their opponents that their own survival as Christians required them to work “for a political order where religious liberty is the most important right that civil society is obligated to uphold,” they would be faced, at best, with incomprehension.

I am, of course, merely speculating about what would happen if Novak’s political theology were eventually to supplant the currently regnant liberal outlook. In the end, things might not be so bad. The beneficial aspects of liberalism might linger for a long time, even after the abandonment of its intellectual foundations. Freedom of religion could conceivably outlast the political theory that has given rise to it. But I have little faith that this would be likely to happen, and I therefore consider it advisable to take issue with a political theologian who places his hopes in such a development. I do so not as someone who is oblivious to the problematic side of liberalism to which Novak has drawn our attention but as someone who is unconvinced that he has devised a good strategy for resolving our contemporary difficulties.

This strategy, Novak would have us believe, is less a revolutionary than a restorative one. He makes this particularly clear toward the end of *The Jewish Social Contract* when he speculates about the predicament in which “faithful Jews and faithful Christians” might find themselves “if an atheistic elite in the United States or Canada” were “able to dictate the further elimination of religio-moral commitment from the public square.” If this were to happen, the first course of action open to them would be to mount a concerted political effort to restore the country to its founding principles, which have clearly recognized the sovereignty of

God and the liberty to worship that God to be a right truly prior to the state and not a revocable entitlement from the state (*JSC*, 216–17).

Contrary to what Novak says, however, on the strength of nothing more than the Declaration of Independence's invocation of the Creator as the source of human rights, the sovereignty of God is not one of the founding principles of the United States (*JSC*, 215).<sup>23</sup> It is, as we have seen, David Novak's most fundamental assumption and the ultimate source of his own political theory. But far from marking a return to the thought of the American founders, this theory represents, as Douglas Farrow has put it, "a fundamental reorientation of social contract theory" that "has enormous implications for jurisprudence as well as for political life."<sup>24</sup> Among these implications, as I have sought to show, is the potential weakening of something David Novak himself values very highly, the freedom of individuals or minority groups to worship (or not to worship) God as they please. Critics of liberalism who nevertheless cherish religious freedom ought to consider this problem carefully before exchanging any theory to which they previously adhered for the one presented in *The Jewish Social Contract*.

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23. Novak makes no mention, for one thing, of the inconvenient fact that the U.S. Constitution includes no reference whatsoever to God, much less his sovereignty. Alan Mittleman discusses the difference between Novak's thought and the American founding fathers in his review of *The Jewish Social Contract* (*First Things*, March 2006, 52). "The Framers, in the American case, were political men who constructed a limited, rights-respecting republic for political reasons. They accepted the imperative of religious liberty and eventually worked out a synthesis to protect it but they did so as political founders, not as religious contractarians. Furthermore, the groups that they knew would limit federal power and retain pre-contractual rights were the individual states, not the primordial religious communities, and these states are no less political than the national government."

24. Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal, 2004). Farrow is commenting on the outline of his social contract theory that Novak presents in chapter 4 of this collection, which consists of his essay entitled "Human Dignity and the Social Contract."