The United States Constitution as Social Compact

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Thanks largely, I think, to John Rawls's "A Theory of Justice," the social contract has assumed a prominent place in contemporary political theory. As we celebrate the Bicentennial of the United States Constitution, it is interesting to consider the Constitution as social compact. I do so under the following headings: Was the Constitution a valid social compact? Is the Constitution a social compact today? What were—what are—the terms of that compact? What are the implications, if any, of considering the Constitution a social compact?

1.

The Constitution does not explicitly espouse any political theory. In that respect, it differs from the other political instruments that comprise our national hagiography. The Declaration of Independence, the Virginia Bill of Rights on which the Declaration drew, the other state bills, declarations, and constitutions which were inspired by Jefferson's Declaration, all were explicitly committed to a theory of government—to the social compact.

The Declaration of Independence justified the exercise by the colonists of "self-determination" by invoking a theory of government, one so deeply and widely held as to be a truth that was self-evident. In these precincts it is doubtless supererogatory to quote what every schoolchild has learned by heart:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Legitimate government results when individuals band together to establish a government to secure their natural rights. The legitimacy of the
government rests on the consent of the governed. The people may alter or abolish their government at will.

Jefferson was articulating the political principles that were in the Zeitgeist of the Eighteenth Century on the American continent. Those principles are the essence of American constitutionalism. They are not expressed in the United States Constitution, but only, I believe, because of the particular genealogy of that instrument.

The United States Constitution, we know, emerged from a process designed to amend the Articles of Confederation. The Articles were a treaty establishing a federation of states; they were not a constitution for a government, and therefore did not articulate or reflect any theory of government. Instead of amending the Articles, the Convention framed a constitution for a “government of the United States.” But the new government was designed to be “a more perfect union,” not a full-fledged government in the spirit of the Declaration, designed and instituted “to secure these rights.” The task of securing the rights of individuals was to remain the responsibility of the governments of the individual states. For their purposes—to form a more perfect union—the Framers saw no need to articulate any theory of government, as they saw no need to include a bill of rights. Later, the lack of a bill of rights proved to be a cause of wide concern, and the addition of a bill of rights became a condition of ratification. The lack of an explicit theory of government was not a cause of concern; none has been added.

 Alone among the early American constitutions, then, the Constitution of the United States remains without explicit commitment to the American theory of government—to natural rights antecedent government, popular sovereignty as the source of political authority, government by social compact, the consent of the governed as the justification of government. But although not fully articulated, the commitment to social contract is reflected in the instrument concluded in Philadelphia in 1787. When it was decided that a more perfect union required not a confederation of states but a new government, the articles of agreement among the states, prepared and signed by “the undersigned Delegates of the States,” were replaced by a constitution ordained and established by the only legitimate source of authority for a government, “We the people.”

The commitment of the Framers and of their generation to the principles of the Declaration is implied also in the amendments we now call the Bill of Rights, adopted and ratified within two years of the birth of the new Constitution. The Bill of Rights does not grant rights; it protects pre-existing, natural rights. Congress shall make no law abridging “the freedom of speech.” “The right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated.” The Ninth and Tenth Amendments are explicit: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” “The powers not delegated to the
United States . . . are reserved to the States respectively, or to the people." (Emphasis added.)

The United States Constitution, I believe, was—became—an authentic expression of the principles of American Constitutionalism articulated in the Declaration of Independence and the state constitutions of the time—a social contract.

2.

"We the people" of 1787–89 ordained and established the Constitution. The authenticity of that assertion has not passed unquestioned. The delegates to what later was called the Constitutional Convention were chosen by state legislatures whose members were elected by the votes of only a small percentage of the population. The constitution which the delegates produced—exceeding their delegated authority to amend the Articles of Confederation—was ratified by representatives of only a small percentage of the population, and by narrow (in some instances questionable) majorities.

Clearly, our political ancestors were republicans, not democrats. For them, "the people" did not mean all the inhabitants of the land, or even all of its citizens; the people consisted of those white males qualified for self-government by intelligence, "virtue," commitment (as manifested by ownership of sufficient property). The majority of the population—women, slaves, free blacks, persons without substantial property—had no voice in ordaining the Constitution. Were they not part of "the people"? Were they deemed to be represented by the few who had the right to vote, as married women were said to be represented by their husbands?

There are even more serious difficulties in justifying the government of 1789 et seq. under Jefferson's second principle: the just powers of government are derived from the consent of the governed. If the unenfranchised majority of the population were not part of "the people" entitled to participate in instituting government, surely they were among the governed. Since they had no vote, in what sense did they consent? Except for slaves (and in a different sense married women), they were free to leave—if they had a place to go and the means to leave, if the various costs of leaving were not so exorbitant as to render their freedom to leave questionable. (After the revolution, many had in fact left for England or Canada.) Did those who stayed "decide to stay"? Did they appreciate that by staying they were consenting? Did they understand what they were consenting to?

3.

Questions about "the people" who originally ordained the Constitution, and about the consent of the governed in 1789, pale beside chal-
challenges to the continuing legitimacy of the Constitution and to the authenticity of the consent of the governed thereafter. Jeffersonian social contract theory, it would seem, requires that government be instituted or reconfirmed and maintained by the people in each generation. (For that reason, perhaps, Jefferson wrote that a constitution has a life of nineteen years.) Jeffersonian theory requires the consent of the people who are being governed at any time, not merely the consent of their ancestors.

The constitutional system ordained by the people of 1787–89 has been imposed on those born or arriving here since 1789. For them, there has been no opportunity to ordain and establish a constitution for their governance; for them, constitutional change has been possible only in accordance with pre-prescribed, difficult procedures for Constitutional amendment. Under the theory to which the Framers were committed, if the Constitution of 1789 is the Constitution of later generations—our Constitution—it must be because later generations adopt the Constitution, at least by acquiescence. Perhaps, those who came to the United States voluntarily, knowingly, can be said to have accepted the Constitution and the Constitutional system which they found; for those born here, acceptance would have to be deemed to be implied in their continued residence here after they came of age.

Again, the authenticity of that consent is suspect. Most of them—many of us—do not fully appreciate what we have consented to. We do not know what is in the Constitution, surely not all that the courts have found there. Many of us do not appreciate our right and ability to leave. Many cannot in fact leave, and during some periods of war or emergency departure is forbidden by law. In any event, is consent present and authentic when there is only choice between departure and submission? Are we to be deemed to consent as long as we do not join to exercise “the right of the people to alter or to abolish it,” our Jeffersonian right of revolution?

The continuing consent of the governed has become less questionable. Finally we have become a democracy. Slowly, in the past 100 years, exclusions from suffrage were eliminated: exclusion on account of race was forbidden by the Fifteenth Amendment (1870), on account of gender, by the Nineteenth (1919), on account of failure to pay a tax, by the Twenty-fourth (1962), on account of age (for persons over 18), by the Twenty-sixth Amendment (1971). More important, by creative construction (some might say distortion) of the Fourteenth Amendment only some twenty years ago, we have moved from eliminating grounds for exclusion to affirming a right to equal universal suffrage in principle for all citizens. “The people” today are all the people, at least all citizens. Consent of the governed has finally come to mean all the governed, at least all citizens. Today only the non-citizen is governed without an opportunity to participate in government, and in general he can acquire that equal opportunity readily by becoming a citizen.
If the Constitution was—a social compact, who are the parties to the compact, and what are its terms?

The Declaration of Independence and the state constitutions contemplated two different compacts: by the first compact, the people agree among themselves to form a government; a second compact, between the people and the government they create, binds the agencies of government to respect the blueprint of government and the rights retained by the people.

As regards the United States Constitution, the compact among the people to create a government of the United States is implied in the preambular phrase: “We the people . . . do ordain and establish this Constitution.” There is no other reference to that compact in the text of the Constitution.

It might be suggested that a compact to form a government implies other commitments among the people—a promise to each other to respect the government to be created, to abide by the laws (and to pay the taxes) enacted by the agreed government in accordance with agreed procedures. Also implicit in that compact, perhaps, is a commitment by the people to respect each other’s antecedent rights. If such commitments are implied in the compact to form a government, there is no hint of them in the United States Constitution, and they are not part of our constitutional jurisprudence. A citizen cannot make a constitutional claim that another citizen is not fulfilling his/her obligations to pay taxes, or to observe the law, or to respect the rights of others. Although—Jefferson said—governments are instituted to secure life and liberty and other rights, the Constitution does not protect such rights against invasion by one’s neighbor.

That principle has become part of our Constitutional jurisprudence. It is only governmental action—“state action”—that the Constitution addresses and circumscribes. The failures of the people, and the failures of some of the people in respect for others, are not the concern of the Constitution. For a notable example, individual violations of the life, liberty or property of other individuals, or private discriminations on grounds of race, religion or gender, are not constitutional violations. It has required legislation to establish remedies against private invasions of rights, and for long the Constitution was construed as denying Congress the power to enact such civil rights legislation.

The United States Constitution, then, contains only the second compact, the compact between the people and their government. Our constitutional jurisprudence includes, and the courts will enforce, the blueprint of government ordained by the people: the reciprocal limitations between the states and the Federal Government which we have come to call federalism; the respective spheres of the three branches of the federal government; the limitations on the authority of the federal branches and on the authority of the states that are set forth in the
Constitution and the Amendments, notably in the Bill of Rights and the Fourteenth Amendment.

Strange to say, the compact between the government and the people does not include a commitment by government to carry out the purpose of government according to Jefferson—to secure our natural rights against our neighbors. An affirmative obligation to enact and execute civil rights acts and other laws to that end is not in the Constitution. Surely such an obligation is ordinarily not enforceable by the courts, which say what the Constitution means.

5.

The social compact between the people and their government is enforced by the courts, perhaps as surrogates for the people. But there is little talk of social contract in the jurisprudence which the courts have derived from the Constitution. The courts have built their authority to enforce the Constitution in substantial part on the fact of a written Constitution; perhaps for that reason, they have felt obliged to stick close to the text, and there is not enough social contract in the text to make it serve jurisprudential purposes. Early, Justice Chase in 1798 (Calder v. Bull) and John Marshall in 1810 (Fletcher v. Peck) suggested that governments were bound to respect natural rights even if such rights are not expressed in the Constitution, but their colleagues insisted that, though governments were—naturally—obliged to respect natural rights, the courts had not been given authority to compel governments in the United States to do so. In our century, Justice Black warned against leaving courts at large with power to invoke natural rights to frustrate the policies of representative government. Distrust of the judiciary may largely explain the nullification of the Ninth Amendment as a textual basis for securing natural rights not enumerated in the Constitution.

Yet natural, inherent rights creep in, notably when the courts read the clause forbidding government to deprive a person of life, liberty or property without due process of law as imposing substantive limitations. In particular, liberty was held to mean not only freedom from incarceration and the political-religious freedoms articulated in the First Amendment, but substantial autonomy and freedom from legislative regulation. Later, liberty was held to include a zone of autonomy in intimate matters, such as the right of persons to use contraceptives and the right of a woman to have an abortion. (It is not easy to understand the basis on which the Court refused to recognize that the right of privacy includes homosexual activities between consenting adults.)

6.

The United States Constitution has never been formally replaced or reordained, and it has hardly been amended. (The first ten amendments,
the Bill of Rights, were the price of ratification, and in a real sense form part of the original package; except for the 13th, 14th and 15th Amendments—the peace treaty of the Civil War, which abolished slavery, reshaped our Federalism, and extended protection for individual rights—constitutional amendments have not been fundamental.) If the Constitution is a social contract, if it is our social contract today, it is because “we the people” reordain our Constitution, informally, continually. If so, are the terms of our social contract only what they were in 1787 and during Reconstruction, only what is in the original text and its formal amendments? It has been suggested that the effect of constitutional ordainment should be accorded also to “constitutional outbursts,” to expressions of the will of the people that are of constitutional dimension and import, such as the overwhelming vote for President Franklin Roosevelt and his Congress in 1936, effectively rejecting the rigid Constitutional construction by which the Supreme Court had frustrated the early New Deal program. Might the people also ordain Constitutional change tacitly, subtly—though it may not be easy to determine that the people had done so, except in retrospect?

There is strong evidence that in some respects the contemporary social contract has moved beyond constitutional text. Principally, the social compact represented by the Constitutional text reflects eighteenth-century views of the purposes of government. Per Jefferson, the government of 1789 was instituted “to secure these rights,” the rights which men and women had before government and apart from government—the natural inalienable rights, including notably life, liberty and the pursuit of happiness. Two hundred years later the people look to government for larger purposes. Is it not the case that the people today have recognized and ordained that it is among the purposes of government to ensure to every inhabitant—as of right, not by grace and charity—basic human needs (food, shelter, health care, education) when the individual cannot provide them?

There has also been, I think, a change of Constitutional character both in our conception of rights, in the catalogue of rights protected, and in the scope of particular rights. The Framers of the Fourteenth Amendment had limited views as to what they meant by the equal protection of the laws. For them, apparently, it did not mean that there could be no racial segregation in the schools. For them, perhaps, it did not mean that women could practice law equally with men. Our social contract, however, has rejected the view that a white majority can impose “separate but equal” schools. Our social contract recognizes the right of women to equal treatment, even if the country did not complete the formal procedures pursuant to Article V for an equal rights amendment.

Or, consider the clause prohibiting an establishment of religion. The Framers of the First Amendment—if we could agree on who they were
—sought to prohibit an official church, and probably to prevent official preference for one Christian denomination over another. Jefferson and Madison talked of a wall of separation between Church and State, but it is not clear that they spoke for "the people" of their time; and what "the wall" meant for them is not obvious. Later, the people who ordained the Fourteenth Amendment may or may not have intended to make the Establishment Clause applicable to the states. But in 1940 the courts held that the Establishment Clause does apply to the states. In 1948, the Supreme Court converted the Jefferson-Madison metaphor of a wall of separation between church and state into Constitutional principle. It may or may not be what the First and Fourteenth Amendments meant when they were ordained. It may or may not be what the Framers of these Amendments intended. But has it not been incorporated into the social contract of we the people—of an urban, religiously pluralist people, in the second half of the Twentieth Century?

7.

It may be that somewhere along the centuries we have dropped the ancestral commitment to social contract, that we maintain only a commitment to a fixed, inherited constitution. Or, perhaps we satisfy the original theory of our constitutionalism in that we the people today agree to ordain and establish the Constitution of 1787 (as formally amended) as our social contract. If we had a clearer idea as to the theory that justifies our living under a 200 year old Constitution, we might have better guidance as we seek our way among the issues that agitate the Constitutional universe.

I think we should take Jefferson seriously. Constitutionalism is better justified, I think, by contemporary social contract than by ancestor worship. If we remain committed to social contract, it is our social contract that matters more than that of our ancestors. We have maintained their text but we give it our meaning. We accept Article V, the Amendment clause, but we assert also the right to reinterpret the text interstitially without formal amendment. That, perhaps, is why there have been few formal amendments of moment.

Perhaps, in yet a third, ancillary, compact, we the people have accepted the Supreme Court as our surrogate for calibrating and updating the Constitution to reflect better the contemporary social compact. We have given that task to judges and, to protect ourselves against abuse by even that least dangerous Branch, we continue to root the authority of the Justices in holy writ and frame the judicial mandate in Constitutional text. We cabin our judges by the rules and traditions of judicial process; we insist that they act as judges, and that they work in the spirit and within the limits of the art of interpretation. But it is our compact they are determining. If we the people effectively reordain the Consti-
stitution in our generation, are we committed to the text as our ancestors wrote it, or as we read it? Are we committed to what the Framers intended by what they wrote, or to what we would make of it? Marshall stressed to his colleagues and their successors that it is a Constitution they were expounding. Should they not be reminded that it is our Constitution they are expounding?

In any event, our principal social compact is not with the judiciary, but with all of our government. "We the people" ought to be aware of, and insist on, our contemporary constitutional values. We ought to assure that government is instituted and maintained "to secure these rights" as we understand them, the rights identified by Jefferson, but also the rights we recognize and exalt today.