

NELCO
NELCO Legal Scholarship Repository

New York University Public Law and Legal Theory
Working Papers

New York University School of Law

8-1-2010

Nationhood and Law in the Hebrew Bible

Geoffrey P. Miller

New York University, geoffrey.miller@nyu.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp

 Part of the [Arts and Entertainment Commons](#), [Constitutional Law Commons](#), [Jurisprudence Commons](#), [Legal History, Theory and Process Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Miller, Geoffrey P., "Nationhood and Law in the Hebrew Bible" (2010). *New York University Public Law and Legal Theory Working Papers*. Paper 220.

http://lsr.nellco.org/nyu_plltwp/220

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

Nationhood and Law in the Hebrew Bible

Geoffrey P. Miller
New York University (NYU) - School of Law

Abstract: This paper continues the analysis of political theory in the Hebrew Bible. The Book of Exodus identifies nationhood as the best form of political organization. Nationhood, in turn, requires self-government, centralized institutions, and control over territory. The narrative of Mount Sinai addresses the topic of centralized institutions. The author here distinguishes and insightfully analyzes four types of legal institution: the fundamental commitment, the rule of recognition, fundamental law, ordinary law, and rules pertaining to the organization of government.

* * *

This article analyzes the Bible's account of Israel's reception of the law on Mount Sinai and other wilderness locations. I argue that these narratives form part of an extended analysis of political ideas – a political philosophy – which rivals in sophistication, and probably predates, the theories developed by Plato and Aristotle in the Greek world.

As outlined in prior work, the Garden of Eden story serves as a prolegomenon to the Bible's political theory and also offers an impressive analysis of the question of political obligation – why people are required to obey their political rulers. The stories of the Dark Age after the expulsion of Adam and Eve address the question of anarchy: whether it is possible for human beings to lead a good and decent life in the absence of

government and law (the author's answer is no).¹ The history of the patriarchs and matriarchs from the book of Genesis address the nature, source and legitimacy of power in families. In the first fourteen chapters of the book of Exodus, the author demonstrates that political organization is the only feasible means for governing groups of substantial size; argues that nationhood is preferable to nomadism, dependency, and slavery as a form of political organization; and identifies self-governance, law, and control over territory as the essential attributes of nationhood. The Israelites achieve self-governance in the struggle with Pharaoh and the escape at the Sea of Reeds. The narrative of Mount Sinai provides the author with a frame within which to examine the second fundamental attribute of nationhood, namely the establishment of legal institutions.

The Importance of Sinai

Few would dispute that the revelation on Sinai is a central event in the biblical narrative. It is here that the author explores in greatest detail the concepts of revelation and consent as justifications for political authority. And it is here that God establishes the law that will govern the people of Israel—not only the written law as recorded in the Bible but also, in Jewish tradition, the unwritten law that God gave to Moses orally and that the sages developed in the Talmud.

The author signals the centrality of Sinai by its location in the structure of tradition extending from the beginning of the book of Exodus to the end of book of Joshua.² This body of narrative takes the form of a chiasmus (a figure of speech, common

¹ I use the term “author” as a conventional way of denoting the creator of the biblical narratives without implying anything in particular about the identity of this source.

² See Noth, *Exodus*, 12 (“If we look at the Pentateuch as a whole, it forms a frame round the Sinai theme and in its turn is framed by the two matching themes of the Exodus from Egypt and the Entry into the Promised Land. Thus, although there is at first sight a bewildering abundance of such different individual

in biblical and other ancient literature, in which a point is developed through parallel elements on either side of a central motif).³ The Israelites begin in slavery, engage in conflict with the people of the land, pass over a body of water that miraculously parts for them, wander in the wilderness, receive the law on a sacred mountain, wander in the wilderness, pass over a body of water that miraculously parts for them, engage in conflict with the people of the land, and wind up in freedom. The chiasmus takes the following form:

- A. Enslavement
- B . Conflict with the people of the land
- C. Departure from the land
- D. Miraculous passage over a body of water
- E. Wandering in the wilderness
- F. Receipt of the law
- E'. Wandering in the wilderness
- D'. Miraculous passage over a body of water
- C'. Entry into the land
- B.' Conflict with the people of the land
- A'. Freedom

The central element of this chiasmus—and therefore the matter that the author most wishes to emphasize—is the giving of the law to the Israelites on Mount Sinai. The author, accordingly, has structured his account in such a way as to highlight and emphasize the Sinai episode as the defining moment of the history recounted in these texts.

Recent scholarship has recognized yet another way in which the author stresses the centrality of the events at Sinai. In the course of the narrative of the flight from Egypt and the theophany at Sinai, the author frequently interposes imagery associated with

narratives, the Pentateuchal traditions have been arranged under a clear pattern which holds this unusual work together and makes it clear that the individual books—and among them Exodus—are just members of a greater whole”).

³ See Adele Berlin, *The Dynamics of Biblical Parallelism* (Bloomington: Indiana University Press, 1985).

cultic observances. The book of Exodus is explicit on this point: Moses demands that the Israelites be allowed to depart so that they can perform sacrifices in the desert (Exod 3:18; 5:3; 8:27). The time period Moses requests for the voyage to the sacrificial place—three days—is a conventional time for pilgrimage journeys (cf. Gen 22:4). As Mark S. Smith and Elizabeth Bloch-Smith observe, the literary pattern of the book of Exodus is that of pilgrimage—the sacred journey to the temple and the prayers and sacrifices that ensue—giving the entire book a “cultic sensibility.”⁴ The chiasmic structure noted above suggests an extension of this pilgrimage pattern. The institution of pilgrimage involves not only a voyage *to* a shrine or sacred spot; it also requires a return *from* the destination. The same families and groups who mustered in the outlands to travel to the shrine would travel home afterward, usually together. Chaucer’s *Canterbury Tales* provides an analogy: it contemplates that each pilgrim would tell two tales on the way to Canterbury and also two tales on the way back. The fellowship was not going to disperse after the visit to the shrine. Likewise the Israelites in the book of Exodus do not disperse after the theophany at Sinai; they continue on their wanderings and separate only after their (partial) conquest of the promised land. The chiasmic structure of the books of Exodus through Joshua suggests that the back end of the story—the Israelites’ journey from Sinai to the promised land—is also part of the pilgrimage pattern in these books. In the biblical story, of course, unlike the *Canterbury Tales*, the travelers do not return home to their starting place but rather continue on to a new home. But symbolically the cases are parallel. The condition of the Israelites in Egypt can be characterized as one of living in a spiritually (and physically) oppressed condition; the giving of the law at Sinai represents

⁴ Smith and Bloch-Smith, *The Pilgrimage Pattern in Exodus*, 16. Smith and Bloch-Smith focus on the “Priestly” redaction of the book.

the liberation of the spirit that is achieved at the pilgrimage shrine; and the journey to the promised land equates with the return voyage of the pilgrims relieved of spiritual burdens. Egypt and the promised land, in this pattern, are two versions of the same place: the difference is that at the beginning the subjects are oppressed and at the end they are liberated.

The author achieves multiple purposes by associating the exodus story with pilgrimage. He enhances the impact of his narrative by comparing the exodus events with an institution important to his readers. He provides a narrative grounding for later pilgrimage institutions by referring to a fundamental event in the history of the Israelite people. He saves Moses' request to Pharaoh from the criticism that it was a lie, even if a justified one: if the exodus was in fact a form of a pilgrimage, then Moses' request that the Israelites be allowed to leave to perform a sacrifice in the desert was substantially true, at least on a metaphorical level. Finally, allusions to pilgrimage in Exodus and other biblical books may have tended to validate the authenticity of the text by associating it with a genre of pilgrimage literature, now lost, that was extant in the society of ancient Israel.⁵

Why does the author make the Sinai narrative the watershed of this mass of tradition? From the standpoint of political theory, the implication is that the work done at Sinai—the reception of law—is more significant than the other fundamental attributes of nationhood. The reason for this priority may have to do with the fact that even though all three attributes are fundamental, the legal institutions of government tend to be more salient once a nation has been established. In the absence of a crisis, both self-governance

⁵ Similar traditions of storytelling may be instanced in the Islamic pilgrimage of the Hajj. See Inea Bushnaq, trans. and ed., *Arab Folktales* (New York: Pantheon, 1986).

and territory tend to be taken for granted; but the operation of government—the day-to-day administration of the laws and the ebb and flow of political power through which those laws are exercised—are of continuing and immediate relevance to the people. For this reason, the analysis of the institutions of government and law is at the forefront of the author’s attention.

The Rule of Law

The author uses the Sinai narrative to make several observations about the legitimacy of law in general. These considerations are today discussed under the rubric of the “rule of law”—a term of uncertain scope that refers generally to the “regular and impartial administration of public rules.”⁶ Any just political system, it is said, should administer its laws according to the requirements of the rule of law. The Sinai narrative codes certain elements that can be understood from a modern perspective as implementing rule-of-law values.

1. The rule of law suggests that unless there is a good reason to make exceptions, *laws should apply equally to all persons similarly situated.*⁷ The author codes this principle with the fact that God announces the law from the top of a mountain—a detail

⁶ Rawls, *A Theory of Justice*, 235. See also Jeremy Waldron, “The Concept and the Rule of Law,” *GLR* 43 (2008): 1–61, here 6 (describing the rule of law as a “multi-faceted ideal” centrally concerned with “a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong”); Lon Fuller, *The Morality of Law* (New Haven: Yale University Press 1964); Rawls, *A Theory of Justice*, 54–60, 235–43; Richard H. Fallon, Jr., “The ‘Rule of Law’ as a Concept in Constitutional Discourse,” *CLR* 97 (1997): 1–56; John Hasnas, “The Myth of the Rule of Law,” *WLR* (1995): 199–233; Andrei Marmor, “The Rule of Law and Its Limits,” *LP* 23 (2004): 1–43; Margaret Jane Radin, “Reconsidering the Rule of Law,” *BULR* 69 (1989): 781–819; Raz, “The Rule of Law and Its Virtue,” in *The Authority of Law*, 210, 224; Rolf Sartorius, “The Rule of Law as a Law of Rules,” *UCLR* 56 (1989): 1175–88; Robert S. Summers, “The Principles of the Rule of Law,” *NCLR* 74 (1999): 1691–712; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004); Jeremy Waldron, “The Rule of Law in Contemporary Legal Theory,” *Ratio Juris* 2 (1989): 79–96.

⁷ See Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” *HLR* 73 (1959): 1-35.

that symbolizes generality through its line-of-sight attributes. Because the mountaintop is elevated, it is in the line of sight of the foot of the mountain where the Israelites are assembled (the author deals with the problem that people should not also see God by wreathing the peak in cloud. The laws announced by God are applicable to all the Israelites, not just a few; and they apply in the same way to all those similarly situated.

2. The rule of law also suggests that *laws should be public*. In this way people can understand and comply with them. The author codes this principle with the detail that God speaks the law to all the people. This creates a bit of difficulty because it may confer too much political authority on the people; the author deals with this problem by making God's voice sound to the people like trumpet blasts or thunder and providing Moses as translator.

3. Another rule-of-law value is that *laws should not fluctuate over time*. This desideratum is coded in the fact that the law is announced by God and God does not readily change his mind. For the Decalogue in particular, the quality of stability is coded in the details of the tablets discussed above—the fact that the Ten Commandments are engraved in stone, which is durable and hard to alter.

Legal Institutions

The author portrays the Israelites adopting five types of legal institutions in the Sinai episode: (a) the basic commitment; (b) a rule of recognition; (c) constitutional rules; (d) legislation; and (d) rules of administration. The pattern the author identifies for the Israelites at Sinai holds true for virtually any society organized according to law.

Basic Commitment

Although people often think of constitutions as the most basic of legal principles, they are not. Underlying every constitution is something more fundamental: the commitment of the people to become and remain organized as a nation. This basic commitment is the “I do” of government: the act of the people in casting their lot together in a common enterprise—an enterprise that is not temporary but permanent, not based on expediency but on principle; undertaken not lightly but with full awareness of the gravity of the act. It is this basic commitment to nationhood that underlies genuine love of country, that motivates men and women to sacrifice their lives in the defense of their fellow citizens, and that induces people to accept outcomes they detest—whether they be laws, taxes, or political leaders—because they have made an allegiance to something more permanent and lasting. The basic commitment must be made at the time a nation is formed; it is also something that citizens of a nation experience as a lived reality, one that they may not consciously think of often but that serves as a constant guide for their conduct as citizens.

Because it is so fundamental, the basic commitment is rarely stated explicitly. But at times of national stress—in moments where the identity of political institutions is in flux—the commitment may appear in verbal form. The U.S. Declaration of Independence, adopted in 1776 at a moment of crisis between the thirteen colonies and Great Britain, is concerned with this issue.⁸ Jefferson’s text proclaims a basic commitment to the new nation in the following words: “We, therefore, the representatives

⁸ For an excellent introduction, see Garry Wills, *Inventing America: Jefferson’s Declaration of Independence* (New York: Houghton Mifflin, 1978).

of the United States of America ... do ... solemnly publish and declare, that these united colonies are, and of right ought to be free and independent states; that ... they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.” In words sublimely expressing the existential step involved, the declaration concludes, “and for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor.”

The setup of the book of Exodus provides a frame for the analysis of the basic commitment. During the voyage to Sinai the Israelites enjoy self-governance under the leadership of Moses but have made no lasting or binding commitment to nationhood. It was convenient and possibly necessary for them to participate in the exodus; if they had stayed behind they would have faced enslavement or worse. They have remained together in the wilderness, but again they had little alternative. At least when trekking under Moses’ guidance they receive manna to eat and water to drink; if they head out on their own, they will starve or die of thirst. They have not been tested in battle—the defeat of the Egyptian chariot force was due to God’s grace, not to any courageous acts by the Israelites. They have experienced individual hardship but have not sacrificed for one another; their repeated complaints about their personal suffering indicate that they have little concern for the welfare of the community as a whole. Prior to the covenant at Sinai, in short, there is nothing to stop the people from dropping out if a better alternative presents itself.

The author’s version of the basic commitment is found in Exod 19—appropriately the first covenant the Israelites agree to at the mountain. After the people reach Sinai,

God instructs Moses to place the following offer before them: “If you obey me fully and keep my covenant, then out of all nations you will be my treasured possession. Although the whole earth is mine, you will be for me a kingdom of priests and a holy nation” (Exod 19:5–6). The Israelites respond as one: “We will do everything the Lord has said” (Exod 19:8).

This covenant represents a basic commitment to nationhood. After promising to do everything the Lord has said, the people are no longer in a position of being able to drop out at any time. They have made a long-term agreement to obey God, an agreement that also represents a pledge to help and support one another. This is the moment of existential union—the point where the Israelites jointly commit their “lives, their fortunes, and their sacred honor”—the moment when, as Hobbes would later imagine it, the people merge in the “unity of them all in one and the same person, made by covenant of every man with every man.”⁹

A natural question about the basic commitment is whether it is made for all time or is conditional on the occurrence or nonoccurrence of certain events. The U.S. Declaration of Independence takes the latter view with respect to the British Crown, asserting that the ties that bound the people to Great Britain were conditional and that those obligations were no longer effective when the British king broke the rules.¹⁰ The

⁹ Hobbes, *Leviathan*, ch. 17.

¹⁰ The first sentence of the declaration acknowledges that the colonies are severing the “political bands which have connected” them with Great Britain and assuming “among the powers of the earth, the separate and equal station to which the laws of nature and of nature’s God entitle them.” Left unsettled was whether the basic commitment to the United States was also conditional—an ambiguity that would erupt into violence nearly a century later when the southern states sought to dissolve the political ties that bound them to the Union. Several Confederate states promulgated their own declarations of independence over the issue of slavery: Georgia’s stated that “we resume the powers which our fathers delegated to the Government of the United States, and henceforth will seek new safeguards for our liberty, equality, security, and tranquility.” Georgia Official Records, Series IV, Vol. 1, 81–85. President Lincoln rejected the claim that

Bible takes a different view. The pledge made by the Israelites at Sinai is not conditional. There are no circumstances in which the Israelites could legitimately seek to dissolve the political bonds that they assumed at Sinai.

Rule of Recognition

The legal philosopher H. L. A. Hart identified a rule of recognition as the standard that legal systems employ to identify the scope of primary rules.¹¹ It is the “master rule” that assigns the authority to make law.¹² Hart’s specific position on this issue is controversial, but all that need concern us here is the idea that the efficacy of any legal system depends on norms for recognizing when something is or is not law. The Bible codes a rule of recognition in this sense: what count as law in the Bible are the rules that God gives to Moses in the wilderness wanderings. The Bible is quite consistent about this principle, so much so that the later kings of Israel and Judah are almost never described as creating or changing the law.¹³ This rule of recognition has consequences for the structure of the Bible. Because to qualify as law a rule must be given by God to Moses during the wilderness wanderings, the author is forced to shoehorn a great deal of material into the account. It is for this reason that so much of the Bible from Exodus to Numbers takes place in the wilderness: a lot of laws must be crammed into the narrative space.

the Southern states could unilaterally secede; the matter was settled on the battlefields of Chancellorsville, Gettysburg, and Antietam.

¹¹ H. L. A. Hart, *The Concept of Law* (2nd ed.; Oxford: Clarendon Press, 1994), 100. For application to the United States Constitution, see Kent Greenawalt, “The Rule of Recognition and the Constitution,” *MLR* 85 (1987): 621–71.

¹² Ronald Dworkin, *Law’s Empire* (Cambridge: Belknap Press, 1986), 34–35.

¹³ See, e.g., Berman, *Created Equal*, 59.

Fundamental Law

The Sinai episode also announces constitutional rules: the most durable rules that govern and at the same time constitute a society as a continuing political entity. The fundamental law is the primary legal rule for the society, one that governs all the other rules in the event of conflict. It is easy to identify the fundamental law of the Sinai episode. It is the Decalogue, or Ten Commandments, which appears twice in the Bible: once in Exod 20 and then again, with modifications, in Deut 5:11–26 (another pronouncement, Exod 34, is also referred to as “ten commandments,” even though it is hard to identify ten separate rules in this version).¹⁴ The author makes specific observations about the Decalogue that are pertinent to any fundamental law:

1. One feature of constitutional law is the fact that, because it is fundamental, it receives *greater honor and respect* than ordinary law. The author signals the importance of the Decalogue by the elaborate preparations that the people must undergo before they receive the words: they wash their clothes, abstain from sex, are “consecrated” by Moses, and wait three days in anxious expectation (Exod 19). When the time for the announcement arrives, God stages an awesome display: the mountain shakes, thunder and lightning play on its peaks, and trumpet blasts resonate through the camp. Moses leads

¹⁴ The literature on the Decalogue is enormous. Useful studies include Childs, *Exodus*; Calum Carmichael, *The Spirit of Biblical Law* (Athens: University of Georgia Press 1996), 82–104; Johann J. Stamm, *The Ten Commandments in Recent Research* (ed. and trans. M. E. Andrew; 2nd ed.; SBT II/2; Naperville, Ill.: A. R. Allenson, 1967); Eduard Nielsen, *The Ten Commandments in New Perspective: A Traditio-Historical Approach* (trans. D. J. Bourke; SBT II/7; Naperville, Ill.: A. R. Allenson 1968); Dale Patrick, *Old Testament Law* (Atlanta: John Knox, 1985), 35–61; Bernard M. Levinson, “The Human Voice in Divine Revelation: The Problem of Authority in Biblical Law,” in *Innovation in Religious Traditions: Essays in the Interpretation of Religious Change* (ed. Michael A. Williams, Martin S. Jaffee, and Collett Cox; Berlin: de Gruyter, 1992), 35–71; Ernest W. Nicholson, “The Decalogue as the Direct Address of God,” *VT* 27 (1977): 422–33.

the terrified people to the foot of the mountain. God prolongs the suspense by recalling Moses to warn him again not to let the people break through. Assured of the people's safety, God then announces the commandments (Exod 20:1).

2. Another feature of constitutions is that they are *more deeply embedded* than other laws: they should be difficult to adopt and also difficult to change.¹⁵ The author codes this criterion in the Sinai narrative. The Decalogue's durability is symbolized in the details of the tablets. Unlike animal skins or papyrus, stone does not rot or wear away and also is resistant to tampering or alteration. The author also takes pains to establish that the words of the Decalogue are precisely the same as the words God spoke on Sinai. God speaks "all" the words reported in the text (Exod 20:1): nothing has been left out. Nor has anything been added. An intriguing detail about the Decalogue is the fact that the tablets are engraved on both sides (Exod 32:15). Perhaps in writing on both sides, God was trying to lighten Moses' burden. More likely, the author added this detail to ward off the idea that someone could add to the original text. Since the writing space is completely occupied it is impossible for anyone to make additions. And the Decalogue is even more durable than the stones on which it is inscribed. Moses destroys the original tablets during the episode of the golden calf (Exod 32:19) but obtains a new set containing "the words that were on the first tablets, which [he] broke" (Exod 34:1).

3. Constitutional rules are, almost by definition, *more fundamental* than other laws. The author uses several means for coding the fundamental nature of the Decalogue:

¹⁵ Amendments to the U.S. Constitution, for example, take effect only if they are proposed by two-thirds of both houses of Congress (or by a national convention) and ratified by the legislatures of three-fourths of the states (or by conventions held in three-fourths of the states). Laws, however, require only passage by a majority of both houses and approval by the president or passage over his veto.

(a) Most obviously, the proscriptions and prohibitions of the Decalogue are general and pertinent to everyone's life. Everyone has (or had) a father and mother; everyone faces the temptation to covet or steal; many people occasionally wish to kill or commit adultery. The religious rules of the Decalogue are also pertinent to everyone: they require everyone to worship God, refrain from idolatry, observe the Sabbath, and respect the name of God. Biblical laws outside the Decalogue, in contrast, are usually more specific. Probably few Israelites would face the situation referred to in Exod 21:33-34, a text dealing with the consequences that follow when an ox falls into a pit.¹⁶

(b) In a similar vein, the German biblical scholar Albrecht Alt distinguished between apodictic laws, which are unconditional assertions of obligation, and casuistic laws, which state the legal consequences of particular cases.¹⁷ The distinction can be overstated, since it is possible to phrase the same rule in either style, but Alt's observation does identify an important rhetorical difference. The Decalogue is distinctive in that it is composed entirely of apodictic rules—you shall not murder, you shall not steal, you shall not misuse the name of the Lord, and so on. The rest of the Bible's legal corpus is a mixture of apodictic and casuistic rules. One feature of apodictic rules is their generality.¹⁸ The apodictic phrasing implies greater generality—and thus a more fundamental subject matter for decision.

¹⁶ It is perhaps for this reason that the rules of the Decalogue are phrased in personal terms. They are directed at the individual who hears them: "you shall have no other gods before me"; "you shall not misuse the name of the Lord." Other legal rules are often impersonal in address: thus the Bible sets forth rules on what happens when "anyone" strikes a man and kills him (Exod 2:12) or "anyone" beats a slave (Exod 21:20).

¹⁷ Albrecht Alt, "The Origins of Israelite Law," in *Essays on Old Testament History and Religion*, 101–71.

¹⁸ For this reason, they are the type of rules that are set forth by higher courts rather than trial courts. The U.S. Supreme Court is fond of phrasing rules this way because it views its job largely as that of setting principles for the lower courts to follow.

4. Constitutions identify the *basic institutions* of government and define their responsibilities. The author codes this idea in the detail of the two tablets.¹⁹ Why are there two tablets, and what words are written on each? It would be natural to think that God divided the commandments in half, five on one tablet and five on another; but this would lead to a lopsided result because there are more words in the first five. For aesthetic reasons, if nothing else, it seems preferable to think that Moses came down the mountain with symmetrical tablets. Another alternative is to divide the commandments by subject: commentators have noted that the first four commandments concern relationships between man and god whereas the last six concern relations of human beings to one another. Dividing the commandments this way has the added benefit of improving the symmetry of the two tablets by establishing a somewhat more equal distribution of words.

A more basic question, however, is why there were two tablets *at all*. At 172 words, the Decalogue is not so lengthy that the whole text could not have been placed on one tablet. Other ancient Near Eastern texts are inscribed on a single stone. Perhaps God wanted two tablets to make it easier for Moses to lug the stones up and down the mountain, but it is not clear that two would be better than one in this respect. The most commonly accepted explanation for the use of two tablets is that God was marking a distinction in subject matter: either marking the difference between rules governing relations between man and god and rules governing relations between man and man, as in the conventional account, or, in Calum Carmichael's view, distinguishing between

¹⁹ See, e.g., Mordechai Breuer, "Dividing the Decalogue into Verses and Commandments," in *The Ten Commandments in History and Tradition* (ed. Ben-Zion Segal and Gershon Levi; Jerusalem: Magnes Press, 1990), 291–330.

judgments formulated from a scrutiny of the story of the golden calf and those derived from Genesis stories.²⁰ Yet these theories do not explain why God considered the distinctions so important as to require two tablets: why couldn't he have indicated a change of topic more parsimoniously through some marking on a single stone?

An explanation that responds to this latter difficulty is that the entire text of the Decalogue was written on *each tablet* with a copy for each of the contracting parties.²¹ According to this explanation the tablets are fabricated not for the purpose of distinguishing along subject-matter lines but rather to provide further assurance of authenticity. The duplication of the text enhances the reliability of the Decalogue because one text can always be checked against the other. If someone tried to alter the document, God or his representatives could compare it with his copy and quickly note the discrepancy.

Political theory offers a somewhat different explanation. Some light on the issue can be derived from an apparently unrelated text, Exod 17:8–15.²² This narrative tells how Joshua and the Israelites fight the Amalekites while Moses, Aaron, and Hur watch from a nearby hill. When Moses raises his hands the Israelites get the better of the battle, but when he lowers them the Amalekites prevail. Moses gets tired holding his hands in the air; the problem is solved when Aaron and Hur each support one of his hands. This narrative can best be understood as a rule allocating power over military operations between the king (Moses), his military commander (Joshua), the priesthood (Aaron), and

²⁰ Calum M. Carmichael, *The Origins of Biblical Law: The Decalogues and the Book of the Covenant* (Ithaca, N.Y.: Cornell University Press, 1992), 37.

²¹ So, for example, Nielsen, *The Ten Commandments in New Perspective*; Stamm, *The Ten Commandments in Recent Research*.

²² For background on this narrative, see Bernard P. Robinson, "Israel and Amalek: The Context of Exodus 17:8–16," *JSOT* 32 (1985): 15–22; George W. Coats, "Moses versus Amalek: Aetiology and Legend in Exodus XVII 8–16," in *Congress Volume, Edinburgh* (VTSup 28; Leiden: Brill, 1975), 29–41.

the bureaucracy (Hur).²³ The story can be connected with the Decalogue by realizing that the commandments also divide between religious and secular, priesthood and bureaucracy: the first four commandments have to do with faith and cultic observances and the last six concern matters of everyday life. Seen in this light, the image of Moses carrying the tablets of the law resolves into a symbolic representation of the constitutional organization of the Israelite state. Moses stands for the king—the head of state and leader of the nation. The tablets stand for the two basic institutions of his government: the civil authorities who administer secular affairs and the religious authorities who administer cultic and religious practices. The commandments are allocated according to function: the four religious commandments engraved on one tablet and the six civil commandments on the other. This interpretation suggests that the king is the ultimate political and legal authority but that he heads a government comprising administrative departments of equal stature: his civil bureaucracy and his official priesthood.

Legislation

The Sinai narrative contains a large corpus of ordinary law—laws other than the constitutional rules propounded in the Decalogue. Ordinary law, like the constitutional rules in the Decalogue, divides between rules pertinent to civil administration and those pertaining to religious matters. Although there is some intermixture between civil and religious rules,²⁴ the author takes pains to separate the spheres.

²³ See Geoffrey P. Miller, “J as Constitutionalist: A Legal-Economic Interpretation of Exodus 17:8–16 and Related Texts,” *CKLR* 70 (1995): 18–29.

²⁴ See Martin Noth, *The Laws in the Pentateuch and Other Studies* (trans. D.R. Ap-Thomas; London: SCM Press, 1984; orig. publ. 1957), 9.

1. Looking at the rules of civil law, we can observe that they are surprisingly incomplete. They cover some topics but omit others that one would expect to see in a well-functioning legal code (rules on contracts, for example, are nearly absent even though people in biblical days made contracts with one another and needed legal rules to interpret and enforce their agreements).²⁵ The incompleteness of the law is in striking contrast with evidence of a vibrant legal culture in biblical times.²⁶ Given the incompleteness of the Bible's civil law, what purpose was served by including it in the great national epic?

Some have concluded that the biblical laws were not actually intended as an operative legal system but rather represented scribal activity with a literary, intellectual, or historical focus. This would be consistent with other law collections of the ancient Near East, which apparently did not form the basis for actual adjudication.²⁷ While this argument is plausible, political theory suggests a somewhat different explanation. The author's goal was not necessarily to establish particular laws as binding on his readers (although he probably had no objection to this). His objective was rather to present Israel as having received *some law* on Mount Sinai. The substance was of less importance.

²⁵ For an argument that the biblical narratives contain a code of customary contract law, see Miller, "Contracts of Genesis," 15–45.

²⁶ The Bible reports rules for the organization of courts (Exod 18:17–26; Deut 17:8); admonitions against false testimony (e.g., Exod 23:1; Prov 12:17); concerns about judicial impartiality (Exod 23:3); demands for fair access to justice (Exod 23:6); laments about unfounded lawsuits (Hos 10:4); the use of the rhetoric of litigation by prophets (see, e.g., Herbert B. Huffmon, "The Covenant Lawsuit in the Prophets," *JBL* 78 [1959]: 285–95); and warnings from Christian writers about the risks of litigation (Matt 18:15–17).

²⁷ See Watts, *Reading Law*, 135. Many scholars today view these Mesopotamian codes as products of the scribal schools rather than elements of a functioning legal system. See Martha T. Roth, *Law Collections from Mesopotamia and Asia Minor* (SBLWAW 6; Atlanta: Scholars Press 1995), 4 (many see these laws as "manifestations of the intellectual processes that developed other scientific treatises, including such topically diverse treatises as the god lists, tree lists, professions lists, mathematical lists, star lists, omen lists, pharmacopoeia, etc."). See also Raymond Westbrook, "Biblical and Cuneiform Law Codes," *RB* 92 (1985): 247–64; Raymond Westbrook, "What Is the Covenant Code?," in *Theory and Method in Biblical and Cuneiform Law: Revision, Interpolation, and Development* (ed. Bernard M. Levinson; JSOTSup 181; Sheffield: Sheffield Academic Press, 1994), 24.

Possibly the author used an existing treatise that he simply folded into the narrative. The gaps and lacunae in the document would not have mattered because legal practice operated according to rules that may or may not have followed the law attributed to the Sinai event.²⁸

2. We find a different pattern for religious law. The rules on cultic practices scattered throughout Exodus, Leviticus, Numbers, and Deuteronomy are mind-numbingly precise. The contrast is stunning: the author seemingly omitted a law of contracts in his civil code but described the priests' breastpiece with the detail of an engineer's specifications (see Exod 28:15–21). To someone trained in modern legal practice, these rules have the feel of line items in an appropriations measure. Many modern laws specify that certain sums will be set aside for defined objectives—often pet projects of powerful legislators. The religious laws of the Bible do not specify an appropriation of funds, but they do instruct Moses and the Israelites to perform definite actions with respect to the cult. In this respect regulations such as the specifications for the priestly breastpiece may have fulfilled a real function at the time they were adopted: priests could point to divine commands in support of their demands that the government or the people provide them with the costly accoutrements of their jobs.

Administrative Rules

Exodus 18:13–26 describe how Jethro, Moses' father-in-law, comes to visit him as the Israelites are approaching the mountain.²⁹ Observing Moses adjudicating cases

²⁸ Even in modern times, actual legal practice sometimes does not closely track the formal rules or even the rules as administered in court. See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991).

²⁹ For an insightful treatment of this episode and its (subtly different) retelling in Deut, see Levinson, "Deuteronomy's Conception of Law," 62–68.

among the Israelites, Jethro remarks that the burden on Moses is too heavy. Rather than decide all cases himself, Jethro suggests that Moses should delegate responsibility to subordinate judges: he should “select capable men from all the people—men who fear God, trustworthy men who hate dishonest gain—and appoint them as officials over thousands, hundreds, fifties and tens. Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves. That will make your load lighter, because they will share it with you. If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied” (Exod 18:21–23). Moses agrees with his father-in-law’s advice and implements the proposal.

A noteworthy feature of this episode is that Moses undertakes an action that has some of the attributes of law: he establishes inferior courts and sets forth rules defining their jurisdiction. Yet this action does not satisfy the rule of recognition: it is not a rule given by God to Moses during the wilderness wanderings.³⁰ This detail is deliberate. It recognizes the law-*like* character of administrative regulations—hence the adoption of these rules in the wilderness very near to Mount Sinai. But it also gives rulers the authority to make subsidiary rules for the administration of government without having to insert these rules into the narrative of God’s commands—and indeed to rely on foreign sources.³¹ The narrative thus codes a discretionary authority to enact rules governing

³⁰ See Watts, *Reading Law*, 105.

³¹ See Levinson, “Deuteronomy’s Conception of Law,” 63. As Levinson observes, Deut 1:9–17 retracts this concession by claiming that the organization of the judiciary was solely Moses’ idea.

administration. Without this authority, rulers might have difficulty managing their bureaucracies—something every leader needs to do.³²

³² This interpretation helps explain the odd detail of Jethro advising Moses to organize his judiciary like an army, with “officials over thousands, hundreds, fifties and tens.” Obviously any king needs the discretion to structure his army; the same principles, the text informs us, apply also to forms of government organization, including the structure of the judiciary.