

CHAPTER 2

Language and the Bond of Conscience

Syllables govern the world. . . . [*All Power is of God*] means no more than *Fides est servanda*. When St. Paul said this, the people had made Nero Emperour. They agree, he to command, they to obey.

If our Fathers have lost their Liberty, why may not we labour to regain it? *Answ.* We must look to the Contract, if that be rightly made we must stand to it. If we once grant we may recede from Contracts upon any inconveniency that may afterwards happen, we shall have no Bargain kept. . . . Keep your Contracts, so far a Divine goes, but how to make our Contracts is left to our selves. I tell you what my Glove is, a plain Glove, and pretend no virtue in it, the Glove is my own, I profess not to sell Gloves, and we agree for an hundred pounds. I do not know why I may not with a safe Conscience take it. The want of that common Obvious Distinction of *Jus praeceptivum*, and *Jus permissivum*, does much trouble men.

—John Selden, *Table Talk*

IN THE EPIGRAPHS to this chapter, Selden muses on the language of political obligation. *Fides est servanda* was a tag familiar from classical rhetoric, Roman law, the church fathers and canon law, and articulated the principle that we have a moral obligation to keep our promises, an obligation that seventeenth-century jurist and antiquarian John Selden elsewhere traced to a divine command. *Fides est servanda* meant that one's bare promise or word was binding, even in the absence of any written documentation or tangible proof of exchange; the technical term in civil and canon law was *nudum pactum*.¹ But Selden, who was a preeminent scholar of the common law and always kept in mind the practical realities of human interaction, was less interested in bare promises than in how a moral obligation becomes a legal one. Thus he insisted that contracts needed to be *made* correctly, according to convention and positive law. God tells us to keep our promises but “how to make our contracts is left to ourselves.”

This concern with convention inflects Selden's question about the political contract. Characteristically, Selden answers his own question about regaining political liberty with a discussion of economic contracts and the necessity of keeping one's bargain. This move is authorized by the theological distinction, familiar from Suárez, Grotius, and others, between divine precept and permission. Although God commands us to keep our promises, he permits human discretion about the manner in which we promise and thus the definition of binding promises. So if we want to understand whether a contract is binding, it is not enough to look to the *nudum pactum* principle of *fides est servanda*; we must look instead to the particular contract, to see if "that be rightly made." If God is the remote cause of binding contracts, by virtue of his power to punish, convention is the proximate cause, not least of all the conventions of legal language. In this case, it is not conscience that authorizes the bargain; rather, conscience is freed from any reservations about shady deals by the fact that the seller has acted according to the conventions of exchange and has, moreover, "pretend[ed] no virtue" in the glove he wishes to sell.²

Selden immediately makes it clear that the principle that we must keep our promises does not mean that we cannot change our minds. Contracts by definition concern changeable human experience, contingent negotiations, not universal laws: "This is the Epitome of all the Contracts of the World, betwixt man and man, betwixt Prince and Subject, they keep them as long as they like, and no longer."³ In the charged political climate of the early seventeenth century, "keep them as long as they like, and no longer" might suggest that Selden thought of contracts in revolutionary terms. But, although Selden was an outspoken defender of parliamentary liberties in the 1620s and a critic of Charles during the Long Parliament, he insisted on the binding power of public and private contracts alike. "Every law," he remarked, "is a Contract between the King and the People, and therefore to be kept. An hundred men may owe me an hundred pounds, as well as any one man, and shall they not pay me because they are stronger than I? *Object.* Oh but they lose all if they keep that Law. *Answ.* Let them look to the making of their Bargain."⁴ Contracts for Selden were not merely expedient human arrangements to be broken when they no longer served private interest. Rather, contracts stood between men and brute force, between the individual and the hundred stronger men; they stood as well between society and the potentially subversive force of enthusiasm, the individual unrestrained by social agreements but empowered by his assurance of a heavenly contract. For Selden, this possibility was represented by the Anabaptist, of whom Selden asked rhetorically, "If we once come to leave that out-loose, as to pretend Conscience against Law, who knows what inconvenience may follow?"⁵

This chapter explores the discourses that Selden and his contemporaries drew on in elaborating their arguments about the new contracting subject: a continental and chiefly Protestant discourse of natural rights, a native tradition of covenant theology, and a heightened consciousness of the common law as a bulwark against the royal prerogative and a repository of ancient liberties. Each of these discourses came into its own in the early decades of the seventeenth century and each developed its own view of the relationship of the individual conscience to social and linguistic convention. To the construction of the contracting subject, natural rights discourse contributed both a minimalistic account of obligation and a Ciceronian narrative about the power of language to bring into existence new rights and obligations. The common law elaborated a legal fiction of the contracting subject that illustrated a new confidence in the adequacy of human agreements to secure or constrain intention. Covenant theology contributed the enabling fiction of the heavenly contract, a biblical narrative of the role of the covenant in history, and a theologically charged interpretive activism. Each of these discourses meant something different by “contract,” and each provided a different account of the subject who consents to a contract. In the decades leading up to the civil war, however, these discourses fed on and borrowed from each other to produce a heightened sense of the artifice, conventionality, and eventually the arbitrariness of political obligation.

NATURAL RIGHTS THEORY: THE SOCIAL CONTRACT AND THE LINGUISTIC CONTRACT

In the late sixteenth and early seventeenth centuries, a new conception of natural law emerged in response to the legitimation crisis brought about by the Reformation, the consolidation of nation-states, and the outbreak of religious wars. These wars dramatically illustrated the dangers of religious enthusiasm, the potential violence of acting on one’s conscience, and the manifold exceptions to the moral law that promises should be kept. All of a sudden it became necessary to rethink the basis of political association, political obligation, and the respective duties to God and sovereign. Aiming to provide a nonconfessional basis of social harmony and political order, continental writers resorted to the time-worn language of natural law and natural rights. But in contrast to older Aristotelian, Stoic, and canon law conceptions of natural law as the moral law or the objective law of reason, they elaborated a minimalist conception of natural law centered on sociability, self-interest, and the subjective right of self-preservation.⁶ In the minds of its proponents, this “*minima moralia*” offered a new, artificial method for generating political associa-

tion. Whereas older doctrines of natural law were predicated on the belief in a natural moral order dictated by God, these newer doctrines drew nearer to “the developing scientific view of the world as totally neutral with respect to value.”⁷ God was still the creator of the world, but man was the proximate creator of value by virtue of his voluntary social and political arrangements. Chief among these was the contract to transfer one’s rights to the sovereign and to establish government.⁸

In the early seventeenth century, the preeminent treatment of natural law for the new world of nation-states and confessional differences was Hugo Grotius’s great treatise of natural law jurisprudence, *De jure belli ac pacis*, first published in 1625. A Dutch humanist scholar who was sympathetic to the Arminians and who had escaped to Paris after the Statholder Prince Maurice threw his weight to the Calvinists, Grotius was responding to the religious wars raging on the continent, wars that were the occasion of intense interest and foreign policy debate in England in the 1620s.⁹ In *De jure belli*, Grotius’s English readers found the new minimalist theory of natural law, a contractual account of political association, and an analysis of the right of resistance. These arguments were of interest to royalists and republicans alike. We know that Filmer was reading Grotius in the 1630s. Hobbes certainly knew his work; and Milton, impressed by Grotius’s learned arguments, sought him out in Paris in 1638. Robert Sidney, the second earl of Leicester (and father of Algernon), also met Grotius in Paris in the 1630s and recorded his thoughts on Grotius’s theories in his commonplace book. With the outbreak of civil war in England, Grotius’s arguments would become directly relevant to the conflict at home. As Jonathan Scott has remarked, between 1640 and 1670 Grotius was “pre-eminent as a modern European influence upon English political thought.”¹⁰ This influence, I suggest, cannot be separated from Grotius’s humanist confidence in the power of language to subdue irrational conflict. In *De jure belli*, the social and political contract necessarily involved reflection on what we might call a linguistic contract and on the social construction of rights and obligations.¹¹

Cicero is the most important classical source for Grotius’s attention to the social and linguistic contract. In his moral and rhetorical works Cicero provided two accounts of the contractual origins of society. In *De inventione*, Cicero painted a picture of men wandering in a state of nature until they were brought together by the powerful eloquence of a single individual.¹² Only then did they establish communities and “give shape to laws, tribunals, and civil rights.” In this version of the original social contract, Cicero described asocial individuals voluntarily subjecting themselves to the new social order. By contrast, in *De officiis*, the most influential Latin work of moral philosophy in the early modern period, Cicero advanced a Stoic view of man’s natural sociability and natural disposition to form

contractual political associations. According to Cicero, nature is the source of the principles of community among men, who are joined together “naturali quadam societate” (1.16.50), “in a certain naturall fellowship,” as one sixteenth-century translation has it. *Societas*—the Latin term for a legal partnership—is Cicero’s metaphor for this distinctively human community, this willed but natural association.¹³

Cicero also invited his readers to think about language in contractual terms. At times, Cicero presented rhetoric as the handmaiden of natural sociability. At other times, Cicero argued that rhetoric rather than sociability, convention rather than nature, formed the basis of social and political organization. But in both cases, a precondition of justice or what Cicero called the “societas juris” is the bond or “societas” of language.¹⁴ Language is both a precondition of obligation and itself a source of obligation. In *De inventione* Cicero famously celebrated the power of language to create different forms of association: “[M]any cities have been founded, . . . the flames of a multitude of wars have been extinguished, and . . . the strongest alliances and most sacred friendships have been formed not only by the use of reason but also more easily by the help of eloquence” (1.1). And in *De officiis* he described language itself as a common bond or form of association: “[N]ature, likewise by the power of reason, associates man with man in the common bonds of speech and life [orationis et . . . vitae societatem]” (1.4.12).¹⁵ He alternately presented the gift of speech as reflecting human rationality or bringing it into being. The first account was predicated on natural law as the source of right reason, whereas the second implied the conventional establishment of rights and the imposition of political order.

In *De jure belli ac pacis*, Grotius did not simply use the prestige of Ciceronian rhetoric and moral philosophy to make neoscholastic arguments about contractual association more palatable, as has sometimes been argued. Instead, he drew on Cicero to recast earlier arguments about contractual association as powerful secular and rhetorical fictions appropriate to the early modern crisis of foundationalism. Cicero provided Grotius both with a secular narrative of political association and with a conviction that language can itself create the association it presupposes. Grotius, in turn, updated Cicero for the new world of nation-states and confessional differences by presenting natural law as first and foremost a matter of individual rights.

In the prolegomena, Grotius threw down the gauntlet by declaring that natural law was binding on all, regardless of religious belief or even the existence of God: “[W]hat we have been saying [about the existence of a natural law of justice] would have a degree of validity even if we should concede [*etiamsi daremus*] that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of

no concern to Him.”¹⁶ Grotius’s “*etiamsi daremus*” could be described as a hypothetical, strategic, or artificial skepticism, designed to respond to irrational dogmatism and religious wars. As such, it was arguably the grandfather of all such strategic fictions in natural rights discourse, including that of the social contract itself.¹⁷ Following upon this initial hypothesis, Grotius focused on natural rights. Whereas natural law referred to an objective order of duties, natural right referred to subjective faculties and powers—such as the freedom to defend oneself and one’s property.¹⁸ Along with natural sociability, Grotius argued, the natural right of self-preservation provided the lowest common denominator for individuals of conflicting religious beliefs and thus a particularly compelling motive for entering into a political contract.¹⁹

This minimalism in turn focused attention on the human realm of conventional agreements, the realm of the secondary law of nature. Although the principles of primary natural law—including the law that individuals should keep their promises—are by definition unchanging, the precise form they take in individual choices and in the law of nations may vary.²⁰ In reality, human beings have a great deal of discretion in implementing their own social and political arrangements, and promises and contracts are the vehicles by which they do so.²¹ This explains the very large place given in *De jure belli* not to Aristotelian and neoscholastic virtues but to what we might call the social and linguistic mechanisms of obligation, including verbal and written promises, oaths, contracts, vows, treaties, and professions of political allegiance.

For seventeenth-century readers, the centerpiece of *De jure belli* was Grotius’s contractualist account of property, society, and government. Like some of his medieval predecessors, Grotius asserted that there was initially no property in the state of nature: all things were held in common. As population increased, people became less trustful and their needs more elaborate. At this point private property or *dominium* was introduced by agreement or contract (*pactum*).²² But once it was brought into being by human agreement or secondary natural law, humans were morally and legally obliged to respect the property rights of others. Grotius made a similar argument about society: men joined together “to form civil society not by command of God, but of their own free will.”²³ They then transferred their rights of self-protection and dominion in exchange for protection, security, and what Hobbes would later call “commodious living.”²⁴ Although conceding that some governments have their origin in conquest or inheritance and others in the will of the people, Grotius described government primarily in Ciceronian terms as a voluntary association: “The state is a complete association [*coetus*] of free men, joined together for the enjoyment of rights and for their common interest.”²⁵ Still later, he insisted that, for those “who unite to form a state” by a “voluntary com-

pact” (*voluntate contractum*) sovereignty cannot be alienated without the people’s consent.”²⁶

Grotius’s contractualism leads to the second influential aspect of *De jure belli*, its attention to the right of resistance. As contemporary readers were well aware, Grotius’s account of how individuals consent to the political contract in exchange for protection provided grounds for the breach of contract in those exceptional cases where protection was no longer assured. Drawing on Cicero’s famous defense of *salus populi* in *De legibus*—“*salus populi suprema lex*”—Grotius argued that in cases of “extreme and imminent peril” individual resistance to the sovereign was justified. In support, he also cited the example of how the Jews were allowed to break the Sabbath and eat the shewbread in exceptional cases of hunger.²⁷ This example had already figured prominently in English manuals of casuistry and would become shorthand for *salus populi* or reason of state in English parliamentary treatises on the right of resistance. In books 2 and 3 Grotius argued that war against one’s sovereign, breach of the political contract, and obedience to a usurper were all justified for reasons of self-preservation.²⁸ Grotius tried to constrain the constitutional implications of his remarks about promises and contracts by arguing that the proof that one owns something—including the right to resist—is the ability to transfer it irrevocably to someone else. He also tried to bind the conscience of the individual subject by recourse to a kind of social contract of language, represented by custom and usage. But this emphasis on convention inevitably heightened awareness that obligation was constructed rather than natural and thus capable of alteration.

This brings us to Grotius’s Ciceronian concern with linguistic convention. The obvious question raised by the notion of a political contract was why do individuals remain bound by it when the sovereign acts contrary to their interests? Why should and do they keep their promises? Like his neoscholastic predecessors, Grotius cited the maxim of divine and natural law that “promises must be kept.” In support, he cited the biblical example of Joshua who kept his oath to the Gibeonites, even though it had been obtained by fraud.²⁹ But Grotius also pointed to speech as evidence of humans’ natural reason and sociability—and thus of the natural obligation to keep one’s promises.³⁰ Beginning with the assumption that language is a distinctively human capacity that is essential for the founding of society, Grotius gradually articulated the insight that language itself entails certain obligations. On the basis of this normative view of language, he then argued that a linguistic contract—a contract about the meaning and right use of language—is the precondition of all other contracts.

Like Cicero, Grotius sometimes confidently asserted that man has “an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech [*sermonem*].”³¹ He spelled

out the implications of this view in his discussion of good faith in book 3. Here Grotius went so far as to criticize Cicero's opinion that promises could be broken in exceptional cases.³² Although lying might be permitted in wartime, promises have a special status as a sign of our rationality: "From the association of reason and speech arises that binding force of a promise with which we are dealing" (3.19.1.3).³³

At other times, however, Grotius gave greater emphasis to the indispensable role language played in *eliciting* the capacity for reason and sociability. Here Grotius drew on, among others, Cicero's account of the linguistic origin and preservation of society in *De inventione* where the eloquence of one man was necessary both to transform irrational "wild savages into a kind and gentle folk" and to induce "those who had great physical strength to submit to justice without violence." Moreover, Cicero went on to argue, eloquence also has a role to play in regulating violence. In a passage that could describe Grotius's own ambitions, Cicero tells us that, after "eloquence came into being and advanced to greater development, . . . in the greatest undertakings of peace and war [*in rebus pacis et belli*] it served the highest interests of mankind."³⁴ In the prolegomena, Grotius proposed a similar role for eloquence with regard to his savage and irrational contemporaries. Here Grotius made it clear that the goal of his ambitious treatise was to subdue irrational force—to subdue war itself—to the constraints of rational discourse.³⁵

Although Grotius pointed to speech as evidence of natural reason and sociability—and thus of a natural obligation to keep one's promises—he also argued that a political contract was necessary because a natural disposition to sociability was not enough to ensure peaceful and faithful interaction. In *De jure belli*, reflection on political obligation is always shadowed by the conviction of sin or by its secular equivalent, the recognition that humans are naturally prone to breach of promise. Thus it was a short step from Grotius's observations on the distinctively linguistic nature of human society to the insight that a linguistic contract logically preceded the social or political contract. Because political and other contracts are forged in language, part of what is involved in making a contract is making language itself dependable or calculable. A contract in language is inevitably also a contract about the use of language—one that proscribes deceit, equivocation, and, in most cases, coercion. The possibility of binding signification then becomes the precondition of binding oneself politically, the precondition of the irrevocable transfer of rights.³⁶

The centerpiece of Grotius's argument about the relation between right linguistic usage and right government appears in book 2, chapter 16, of *De jure belli*, "On Interpretation." Here we see that Grotius was particularly anxious to establish criteria regarding the "objective" or socially determined meaning of words, criteria that would then serve to constrain

the speaking subject. The chapter thus registers Grotius's difference from his scholastic predecessors, who generally felt no such anxiety about the lack of fit between subjective intention and objective meaning. At the same time, it signals his debt to earlier humanist legal scholars who, in their effort to codify the norms of interpretation gave increased attention to the rules for the interpretation of Roman law found in *Digest* 50.16, "de verborum significatione."³⁷ Even more than his predecessors, however, Grotius was acutely aware of the political implications of the norms of interpretation. In particular, he argued that the meaning of an individual's consent to a contract, including a political contract, was constrained by a prior agreement regarding the use of language. This linguistic contract would be a bulwark against the anarchy of multiple, conflicting interpretations on the one hand and the tyranny of the sovereign as unique interpreter on the other.

Thus, to the fundamental question regarding political obligation, Must we mean what we say? Grotius answered a resounding yes:

If we consider only the one who has promised, he is under obligation to perform, of his own free will, that to which he wished to bind himself. "In good faith what you meant, not what you said, is to be considered," says Cicero. But because internal acts are not of themselves perceivable, and some degree of certainty must be established, lest there should fail to be any binding obligation, in case every one could free himself by inventing whatever meaning he might wish, natural reason itself demands that the one to whom the promise has been made should have the right to compel the promisor to do what the correct interpretation suggests. For otherwise the matter would have no outcome, a condition in which morals is held to be impossible.³⁸

In this passage Grotius both acknowledged and departed from the widespread medieval view that internal acts are perceivable by God and morally binding for that reason.³⁹ Instead, he imagined a world in which morals are secured in the realm of interpersonal communication. Confronting the ever-present possibility of deception and equivocation, he asserted a public standard of meaning and accountability: words should be understood "according to current usage" (2.16.2: "populari ex usu"). That is, while appealing to the independent authority of natural reason, Grotius also located that authority in common linguistic practice—in the hope that language itself might provide the ethical and interpretive guidelines that are "not of themselves perceivable," and for which there is no more obvious foundation. In light of the arguments we have surveyed, we can now recast Grotius's formulation, "etiamsi daremus": even if we were to imagine that God did not exist, language would still permit the transfer of rights and would still dictate certain rational obligations.⁴⁰

Although Grotius saw himself as elaborating in a systematic fashion the laws of international conflict, it was his voluntarism, contractualism, and concern with problems of interpretation that most impressed his contemporary English readers. One of these readers was Robert Filmer, who recorded his thoughts on *De jure belli* in *The Originall of Government* (1652). Filmer associated Grotius with Hobbes and Milton, whom he also attacked in this work. Despite their very different political orientations, Filmer saw all three as contractualists, and thus as enemies of the patriarchal account of political order. He was particularly agitated by Grotius's account of property, an account that presupposed a dangerous freedom of interpretation. Grotius's two main assumptions—that “the use of things in common was natural” in the state of nature and that “property as it now exists was introduced by human will”—produced “divers dangerous and seditious conclusions.” For they amounted to a distinction between the law of nature and subsequent voluntary human arrangements—whether property or government—and according to Filmer this implied that “the moral law depends upon the will of man.” As Filmer read Grotius, all forms of government were by consent, which meant that individuals had the right to resist their governors. Filmer was particularly dismayed by Grotius's response to the argument that divine law commands obedience. In *De jure belli* Grotius had argued, in a passage quoted by Filmer,

If any man shall say that this rigid doctrine of dying rather than resisting any injuries of superiors is no human but a divine law, it is to be noted that men at first, not by any precepts of God, but by their own accord, led by experience of the infirmities of separated families against violence, did meet together in civil society, from whence civil power took beginning. Which therefore St Peter calls an human ordinance, although elsewhere it be called a divine ordinance, because God approveth the wholesome institutions of men. God in approving a human law is to be thought to approve it as human, and in a human manner.⁴¹

One implication of this genealogy of society was that God permitted the exercise of human volition and discretion, not only in establishing and preserving government but in resisting threats to the commonwealth. (Selden was commenting on the same scriptural passage—1 Peter 2:13—when he asserted in one of the epigraphs to this chapter that “syllables govern the world.”) In the next passage cited by Filmer, Grotius explicitly linked this possibility of resistance to equitable interpretation: “The greater the thing is which is to be preserved [e.g., the state as a whole], the greater is the equity which reacheth forth an exception against the words of the law.” According to Grotius, “necessity”—which contemporaries equated with reason of state—legitimized the potentially revolu-

tionary, equitable interpretation of the law.⁴² It legitimized, that is, resistance to the sovereign.

According to Filmer, such a license to interpret amounted to the destruction of both property and the state because Grotius did not explain “who should be judge of the greatness and certainty of the danger.” Moreover, he did not explain where the force of obligation lies. “It must be remembered,” Filmer cautioned, “that is not sufficient for men to have a will to bind, but it is necessary also to have a power to bind.” “If it were a thing so voluntary and at the pleasure of men when they were free to put themselves under subjection, why may they not as voluntarily leave subjection when they please, and be free again?” According to Filmer, it is not possible for an individual to bind himself; obligation cannot be self-imposed. For, if Grotius’s account is right, “then it will be lawful for every man, when he please, to dissolve all government, and destroy all property.”⁴³ Because consent involves interpretation and is revocable, it poses a fundamental threat both to government and to property, to government as the property of the sovereign. As Filmer noted, this fundamental lesson from *De jure belli ac pacis* had been put to contrary but equally dangerous uses by both Hobbes and Milton in the 1640s.

THE COMMON LAW: MAGNA CARTA AND ECONOMIC CONTRACT

The common law proposed its own secular theories of binding the conscience in the late sixteenth and early seventeenth centuries that contributed to the creation of the individualized, denaturalized subject of contract and the focus on human agreements and arrangements. It did so both through a native tradition of constitutionalism and through specific developments in the common law of contract. Constitutionalist arguments were sharpened by specific conflicts between James and his parliaments, while contract law developed in response to the increasing commercialism of English society and the astonishing explosion of legal actions for debt. Moreover, in the minds of some seventeenth-century writers, these two areas converged. The economic theorist Edward Misselden summed up the perceived connection between these two realms of activity when he asked rhetorically: “Is it not lawfull for merchants to seeke their *Privatum Commodum* in the exercise of their calling? Is not gaine the end of trade? Is not the publike involved in the private and the private in the publike? What else makes a commonwealth but the private wealth . . . of the members thereof in the exercise of *Commerce*?” (204).⁴⁴

In the early seventeenth century, Edward Coke and other common lawyers actively promulgated the theory of the ancient constitution, according to which the institution of parliament, the common law, and the

ancient rights and liberties of Englishmen preceded the Norman Conquest or, as it was often called, the Norman Yoke. In so doing, they provided Parliament with a powerful rhetorical weapon for binding the king's conscience or the royal prerogative. Drawing on historical and legal documents, Coke argued that Magna Carta simply ratified these ancient liberties, and the coronation oath sworn by every monarch thereafter testified to the sovereign's willingness to respect the ancient traditions. According to the theory of the ancient constitution, kingship was an office rather than a personal attribute, and Magna Carta was a contract between sovereign and subject, one that declared rather than made the law. The respect for history evident in this recourse to immemorial custom did not preclude an activist political agenda. As Corinne Weston reminds us, the common lawyers in Parliament "were at least as interested in lawmaking as [they were] in the common law viewed as fundamental law."⁴⁵ In addition, members of Parliament increasingly began to think of themselves as the legal representatives of the people. The Commons MP Robert Mason spoke for many of his colleagues when he declared in 1626 that "we sit not here as private men but as public [persons] vested for the commonwealth's service." The refusal of the House of Commons to accede to Charles's imperious requests in 1628 and 1640 was in part a consequence of these views.⁴⁶

In the early decades of the seventeenth century, Coke was also codifying the common law in his series of *Reports*. These written records of case law provided new ammunition to those seeking to argue from precedent against the "innovations" of royal absolutism. Against the Roman legal maxim, *Rex est lex loquens*, favored by James and his supporters, Coke argued that only the judges—with their "artificial" or professionally educated reason—could declare the law.⁴⁷ In 1628 Coke, who by this time had been dismissed from the bench and the Privy Council but held a seat in Parliament, published his commentary on Littleton's *Tenures*, a legal textbook on land law. As Richard Helgerson has remarked, "in Coke's account tenancy takes a long step towards outright ownership," and ownership of land in turn "becomes the basis for and a type of the liberty of the subject." Not surprisingly, Charles suppressed the next three parts of Coke's *Institutes of the Laws of England*. In 1641, however, in an obvious affront to the king, Parliament arranged for their publication.⁴⁸

In the course of the sixteenth century, developments in the law of economic contract also contributed to the ability to imagine a contracting political subject. Although contract law as we know it came into existence in the nineteenth century, in the late sixteenth century the legal jurisdiction of breach of contract shifted from the ecclesiastical courts to the common law courts. These changes registered a wider cultural crisis of faithfulness in early modern England, a crisis precipitated by a shift

from an older economy of obligation, predicated on informal networks of kinship, to one in which economic transactions were, increasingly, between strangers.⁴⁹ The common law responded to these changes by arrogating to itself jurisdiction over breach of promise (formerly a matter for the ecclesiastical courts) and by placing greater emphasis on the intention of the contracting parties. Conscience itself thus came under secular jurisdiction and in the process was reconceived—at least for the purposes of legal disputes—in common law terms. As we will see, changes in contract law were not the main source of the rhetoric of political contract but, as political obligation seemed increasingly to involve an agreement among equals—a relationship of association as well as or instead of one of subordination—the economic contract of exchange came increasingly to seem one appropriate way of thinking about the political contract. The common law notion of the economic contract itself underwent a sea change, according to which the trust reposed in an individual on the basis of membership in a small community became less important than the legal analysis of the circumstances of the promise. With this change, economic contract came to speak not only to the equality of the contracting parties but also, increasingly, to the conventional nature of all contractual agreements.

In order to understand these developments, we need to turn first to the most influential early modern English treatise on the common law, St. German's *Doctor and Student* (1530). This dialogue between a canon lawyer and a student of the common law, which became “the standard textbook in legal theory almost until the time of Blackstone,” was written during the period of Henry VIII's break with the Catholic Church.⁵⁰ St. German, who was sympathetic to the Reformation parliament and to church reform, argued that the common law rather than canon law should have jurisdiction over the consciences of Englishmen. Drawing on Aristotle's authoritative treatment of equity in the *Nicomachean Ethics*, St. German argued for a well-established common law tradition of equitable interpretation.⁵¹ In light of this tradition, he asserted, Chancery was competent to adjudicate those matters of conscience that had previously been the purview of the ecclesiastical courts, in particular cases involving breach of promise or contract.⁵² Furthermore, Chancery should have jurisdiction over “parole” contracts, informal verbal contracts without witnesses, of the sort that were increasingly frequent with the explosion of commercial activity during the second half of the sixteenth century.⁵³ The introduction of an Aristotelian notion of equitable interpretation in England thus went hand in hand with development of the common law of contract, and both of these were tied to the idea that the common law should bind in conscience.

As his editors Plucknett and Barton argue, St. German's definitions were conventional, derived not only from Aristotle but also from Aquinas, Gerson, and medieval manuals of casuistry; but the political uses to which he put them were not. We see this in particular in St. German's double-edged use of equity. In defending a common law tradition of equitable interpretation, St. German aimed not only to legitimate the chancellor's equitable jurisdiction over against that of the ecclesiastical courts but also to constrain the chancellor's jurisdiction vis-à-vis the common law. Thus, the Student asserts that "the lord chancellor must order his conscience after the rules and grounds of the law of the realm."⁵⁴ This emphasis on the superiority of the common law to the chancellor's equitable judgment would have far reaching political consequences in the 1620s and 1630s.

St. German's treatment of the mutually enforcing relationship between conscience and the law of the realm was echoed in his treatment of promises and contracts, in particular, contracts regarding the sale or transfer of property. In sixteenth-century English law, legal actions involving debt were separate from those concerning breach of contract. The former were treated in common law, the latter by the ecclesiastical courts. What was legally actionable in breach of contract was not the existence of a debt but the failure to keep one's promise. St. German's Student argues, as part of his secularizing approach to conscience and equity, that breach of contract could also come under the jurisdiction of the common law. In addition, he states that what determines the enforceability of a sworn verbal promise is not mere intention (as at least some canon lawyers thought) but the evidence of some kind of exchange. Against the canon lawyers' defense of the binding nature of the *nudum pactum*, or what the Student calls the "nude contract" (a verbal promise without any token of exchange), the Student argues that no one can have access to a bare intention or promise, "For it is secret in his own conscience whether he intended for to be bound or nay. And of the intent inward in the heart, man's law cannot judge." It is for this reason that a promise needs to be "clothed" in some "recompence." Just as conscience was constrained by common law, so intention was legally bound by some "consideration" or material proof of exchange.⁵⁵ St. German thus stands on the cusp of an older common law doctrine of contract (a transaction involving the transfer of property or the creation of debt, but not one in which the notion of mutual promises was central) and a gradually evolving common law conception of contract as a mutual promise with consideration.⁵⁶

St. German's innovations were apparent in other ways as well. For example, he adopted Gerson's distinction between the primary and secondary law of nature or reason and identified the latter with human institutions, but he did so in order to argue that what had been established by

human law could also be revoked by human law. St. German offered the standard example of private property, which in turn gives rise to contracts. Such contracts are themselves a human invention and the laws concerning them may be changed by statute. But St. German also applied the argument to the temporal rights of the clergy, which, he argued, could be revoked by an act of Parliament. In both cases, the potential reversibility of decisions based on the secondary law of reason could be used—as they were against the clergy—to potentially revolutionary ends.⁵⁷

Doctor and Student is an important example of the complicated intersection of legal, economic, and political contract in the common law. Motivated by his religious and political allegiances as well as by his profession, St. German proposed a shift of jurisdiction for cases of conscience involving secular affairs, including economic transactions. This solution involved the elaboration of a common law tradition of equitable interpretation that was to have long-term consequences not only for the common law of contract but also for the political disputes of the early seventeenth century. In particular, St. German's treatment of equity was prophetic of the dual reception of equity in the decades leading up to the civil war. If in *Doctor and Student* questions of jurisdiction were bound up with the struggle between state and church, in the years that followed they were increasingly bound up with the struggle between the king and Parliament. On the one hand, equity was associated with the prerogative courts, such as Chancery and the Star Chamber, and thus with royal supremacy; on the other hand, equity was appealed to by parliamentarians and common lawyers in their fight against the abuses of the royal prerogative. In particular, the relevance of St. German's insistence that the chancellor order his conscience by the common law was not lost on critics of Charles I in the 1620s and following.⁵⁸

The common law jurisdiction over breach of contract was codified at the beginning of the seventeenth century by the decision in *Slade's Case* (1602), the most important early modern case in the historical development of contract law. The facts of the case are simple. In 1595 John Slade sold some wheat and rye to Humphrey Morley, who promised to pay for it at a specified time after receiving the goods. Although the grains were delivered, Morley refused to pay, and Slade brought a common law suit not for the recovery of debt, the usual action given the facts, but for breach of promise. The legal action of debt would have put Slade at a disadvantage since, in the absence of written evidence of a contract, an accusation of debt could be answered by the defendant's "wager of law," that is, by his swearing an oath of compurgation along with eleven or twelve character witnesses that he was innocent. There was no chance Slade would recover his losses under such a system. But if he brought the case as breach of promise, Slade could argue that the circumstances

of the case (the delivery of the wheat and rye, and so the existence of debt) amounted to “consideration.” That is, they provided good reason to assume that Morley had, implicitly, promised to pay for the goods received.⁵⁹

The lower court found for Slade but referred the question of whether debt could be treated as breach of promise to a higher court. Sir Francis Bacon argued for Morley and Edward Coke represented Slade. The court found that breach of promise was a legitimate action since any verbal (parole) contract with consideration presupposed the intention or promise to perform what one had contracted to perform. As Coke wrote in his summary of Chief Justice Popham’s decision, “every contract executory imports in itself an *assumpsit*, for when one agrees to pay so much money, or deliver any thing, thereby he assumes or promises to pay, or deliver it.” One could legally assume, in other words, that the defendant “super se assumpsit”—had taken it upon himself—to perform certain actions (such as delivering a sum of money) in exchange for consideration (a crop of wheat).⁶⁰ With the decision in Slade’s Case, which permitted the action of breach of promise, oaths of compurgation became irrelevant.

In breaking with the wager of law or oath of compurgation, the legal principle of *assumpsit* amounted to an increased concern on the part of the common law not just with the intentions of the contracting parties but also with the formal means of deducing them. If character and status fell by the wayside (at least as far as legal procedure was concerned), intention became both a relevant consideration and a necessary deduction from the facts at hand.⁶¹ These facts included the motive or reasons for entering into a contract. In mandating the consideration of circumstances, the doctrine of consideration amounted to a doctrine of equity.⁶² In opposition to the view that a mere verbal promise (*nudum pactum*) was binding, the doctrine of consideration held that promises were actionable when circumstances existed (e.g., when some prior relationship existed, something had been exchanged, or some action had taken place) that provided a reason for a promise.⁶³

Although there is general agreement that the modern law of contract, with its emphasis on intention, promissory liability, and consideration, takes its point of departure from Slade’s Case, the precise legal and larger cultural meanings of the case have been disputed.⁶⁴ Some scholars emphasize the way Slade exemplifies early modern ways of thinking about obligation, which differ in crucial respects from the modern “will” theory of contract; others stress the continuity between Slade and modern contract law. Some have argued that the doctrine of consideration was consistent with the older economy of obligation, whereas others have seen consideration and *assumpsit* as facilitating a newer protocapitalist economy, in

which the courts needed to “hold commercial agreements actionable” for trade to be calculable.⁶⁵

For our purposes, it is precisely the slipperiness of Slade—its uneasy joining of conscience and calculation—that is significant. Here I take issue with the legal historian A.W.B. Simpson, who has argued that we should avoid the temptation to ask, anachronistically, whether contractual obligation at the time of Slade was moral or legal. According to Simpson, early modern men and women made no such distinction; they believed that “commerce, like other areas of life, must be conducted morally if the general good is to be furthered, and there is no special set of principles of commercial morality.”⁶⁶ But, judging from contemporary comments, in the early seventeenth century *assumpsit* and consideration were not always seen as ratifying or codifying an existing moral obligation. Although something like these principles had been sporadically articulated in earlier legal discussion and common law, the decision in Slade was also represented as something new—a necessary and equitable reform of existing actions for debt. And part of what was new was that Slade articulated a new basis of obligation. Coke went so far as to suggest that together *assumpsit* and consideration seemed more suited to the modern world of self-interest, if not exactly commerce: *assumpsit* is superior to the wager of law because “experience now proves that men’s consciences grow so large that the respect of their private advantage rather induces men to perjury.”⁶⁷ In the new world of market relations, interest will induce men to swear false oaths, making the use of compurgation or the character witness inadequate; however, it will also induce them to keep their contracts—hence, the value of substituting contracts for oaths.

Slade thus stands at the crossroads of what Max Weber called the status contract and the purposive contract, of older and newer ways of thinking about intention and obligation. If in the older view of obligation, promises were to be kept because of a transcendent moral law (“*pacta sunt servanda*”), in Slade promises were to be kept because they had been articulated in the shared medium of language and ratified by the exchange of other material signs. In relying on consideration, rather than character witness and religious oath, Slade dramatized a pervasive skepticism about older ways of determining or guaranteeing intention, specifically the intention of the parties to a contract.⁶⁸ But, from another perspective, Slade exemplified a new confidence in the adequacy of human agreements—and of individual self-interest—to secure intention. Whether such agreements were primarily moral or legal, whether they were based on conscience, calculation, or some combination of the two, remained open to debate. But, it was clearly possible to suggest—as Coke did—that keeping one’s promise was not so much a moral obligation as a legal one. Specifically, the legal codification of the doctrines of *assumpsit* and consideration pro-

vided for legal sanctions for breach of contract, which the fear of divine punishment did not reliably provide. As James Morice, a Middle Temple lawyer, argued in *A briefe treatise of Oathes* (c. 1590), “Know we not that all, or the moste part of men will rather hazard their soules [by perjury] then put their bodies to shame and reproach.”⁶⁹ The legitimate power of the state—the force of law—provided the element of coercion necessary to the enforcement of contract. This insight about the cultural and political conditions of a binding contract, implicit in Slade, were to become explicit in mid-seventeenth-century political debate.

COVENANT THEOLOGY: DIVINE SPEECH ACTS AND THE COVENANT OF METAPHOR

At the same time that natural rights theorists were advocating a secular notion of the social and political contract, and common lawyers were codifying the economic notion of contract, puritan theologians were developing their own distinctive version of contractualism. Covenant theology—the offspring of Protestant scripturalism, Hebraism, and in England more immediate conflicts arising out of the Elizabethan religious settlement—offered an alternative to the ceremonies of High Church Anglicanism, focusing instead on the two covenants of Scripture and the fallen sinner’s unmediated relationship to God.⁷⁰ Although the notion of the heavenly contract was not simply a response to new economic and political circumstances, covenant theologians drew on both realms to make their view of the heavenly contract accessible to their readers and parishioners. In the process, they also radicalized the insights of those two domains: in covenant theology we find an even more radical linguistic turn than in natural law jurisprudence and an even more radical emphasis on individual intention than in the common law. In the words of the influential puritan minister William Perkins, “God is the author and worker of faith, so God hath appointed a means whereby he works it and that is his word.”⁷¹ For Perkins and his followers, the Word was the vehicle of the divine covenant, and this in turn meant that the moral subject—the subject of conscience—was created through an activity of interpretation.

Of course, the language of the covenant had always been a part of Jewish notions of faith and political obligation; the Word had always been at the center of Christian religion. But with the Reformation came a renewed concern with the unmediated word of Scripture as God’s covenant with man. The Reformation had both liberated the individual conscience from the oversight of the Catholic Church and condemned it to perdition without the assistance of grace. For the fallen Christian, obligation, including above all the obligation of faith, was strictly speaking unnatural, outside

the capacity of fallen human nature. The central “case of conscience” for Protestants of all persuasions was accordingly how to know whether they were damned or saved, bound to the devil or to God.⁷² Covenant theology thus included a powerful narrative dimension by virtue of its attention to the divine workings of the covenant in history, that is, the biblically sanctioned providential narrative of redemption. At the same time, the focus on the bond of the individual conscience produced an interpretive activism, beginning with an intense preoccupation with the artificial arrangements—or covenants—established by the voluntarist God of Calvinism. For covenant theologians, Scripture did not simply inform the reader of the spiritual covenant; as God’s word, Scripture was itself the prime instance of the covenant. And this meant that the first obligation—the obligation that trumped all others—was the individual obligation to interpret Scripture. Paradoxically, the centrality of the Word did not amount to a new determinism, but an optimism about the power of language to shape, make, or induce obligation. At the extreme, covenant theology reimagined fixed status or, rather, the ontological relations of man and God, in terms of the voluntary relations of contract.⁷³ This in turn was to have profound implications for the relation of subject and sovereign.

By the 1580s in England covenant or “federal” theologians (from the Latin *foedus* or covenant) characteristically distinguished between the law and the gospel in terms of a covenant of works and a covenant of grace.⁷⁴ God’s covenant with the Hebrews was a covenant of works: the Jews’ destiny as the chosen people was conditional upon their fulfillment of the moral and ceremonial law. Christ canceled the covenant of works and substituted a covenant of grace—a paradoxical covenant in which God’s grace enabled the faith of the individual believer. Covenant theologians stressed that the covenant of grace was already available in the Old Testament. In particular, God’s postlapsarian covenant with Abraham was a covenant of grace, made in Perkins’s words “not for the merit of his worke, but for the merit of Christ.”⁷⁵ This covenant, which was not only with the individual believer but also with “the entire nation of Moses” and with “the new Israel centered on Christ,” was progressively realized in history: “promised in the Garden to the fallen Adam, made more explicit in the dealings with Abraham, given added substance in the covenant of Sinai, and sealed and certified in the death of Christ, so that now men are incorporated under that New Covenant made most certain by him.”⁷⁶

In the interpretation of puritan theologians, the covenant thus served as an emblem of both the fall and redemption, a way of making human incapacity the occasion of divine accountability. This understanding of the covenant extended to the language of covenant itself: covenant theologians argued that God’s use of the metaphor of the covenant was an accommodation of divine truths to human understanding. Influenced in part

by New Testament metaphors of spiritual debt and in part by the increasing prominence of contracts in everyday life, puritan ministers glossed the covenant in terms of civil and common law notions of economic contract, debt, and indenture. As Richard Sibbes noted, “God will argue with us from our traffic and commerce with men.”⁷⁷ According to covenant theologians, although the language of debt and redemption made salvation imaginable, it also dramatized the incommensurability of human and divine transactions. In particular, economic metaphors of accounting very often functioned ironically to indicate an infinite debt, a debt that could never be repaid. God’s purpose in employing comparisons familiar from everyday business transactions was, paradoxically, to indicate a legal obligation that the individual was incapable of fulfilling. In *A Treatise of the Vocations or Callings of Men*, William Perkins glossed the parable of the good steward in terms of “the account that every man must make of the works of his calling,” only then to show that such “even reckoning” was impossible. By attempting to reckon their debts, sinners discover “that they are utterly unable” to repay them. Their only assurance lies in God’s being “content to account of Christ his satisfaction as payment for [their] sins.”⁷⁸ As William Gouge noted, “By covenant [God] is bound to man, but his covenant is established upon his own promise . . . there never was, nor could be anything in man to move God to enter into covenant with [him].”⁷⁹

At the same time, the impossibility of a mutual covenant was a source of consolation. Although human beings could not of themselves fulfill the covenant, God bound himself to fulfill it and, in so doing, became reliable and calculable. The irony or paradox of the heavenly contract was that God bound himself to become a debtor to the human sinner. Thus, the covenant was regularly compared with an indenture, bond of debt, or “earnest” by which God assured the believer of his salvation. In *A Golden Chain* Perkins asserted: “This covenant is also named a testament, for it hath partly the nature and properties of a testament or will. For it is confirmed by the death of the testator. Secondly, in this covenant we do not so much offer or promise any great matter to God, as in a manner only receive: even as the last will and testament is not for the testator’s but for the heir’s commodity.” Unlike a contract, a testament is a pure gift. It is legally binding on the giver but not on the beneficiary, who is not obligated to promise anything in return. There is, and can be, no *quid pro quo*. Thus Jeremiah Burroughs compared the covenant of grace with “God’s insurance offer,” for which the sinner pays no premium.⁸⁰ In his *Marrow of Theology*, Perkins’s follower William Ames described the believer’s redemption through Christ in similar terms: spiritual redemption “was not primarily effected by power, nor by prayers . . . but by the payment of a just price.”⁸¹

In the logic of covenant theology, Christ's payment transformed the covenant from a unilateral transaction to a bilateral one: God's gift of grace rectified human incapacity and made a place for the will. Accordingly, along with the Calvinist notion of the covenant of grace as "God's promise to man," which God has obligated himself to fulfill, some English and continental federal theologians conceived of the covenant as "a conditional promise on God's part, which had the effect of drawing out of man a responding promise of obedience, thus creating a mutual pact or treaty. The burden of fulfillment rest[ed] upon man."⁸² God's conditional promise, in other words, turned what might simply have been passive assent into what George Downame called "a true, willing, and lively assent," "not forced, as that of the devils."⁸³ Although the distinction between assent and consent is not always clear in this period, Downame seems intent on making a distinction between passive assent to an existing state of affairs and active consent, which helps to realize the new covenant.

Once the heavenly contract was reconfigured as a mutual pact or divinely authorized exchange of redemption for obedience, it made sense to compare this exchange with a political contract. Peter Bulkeley analogized the divine covenant to the covenant "which passeth between a king and his people; the king promiseth to rule and govern in mercy and righteousness, and they again promise to obey in loyalty and faithfulness." In their attempts to explain the workings of covenant theology, other writers borrowed from contemporary understanding of the magistrate or member of Parliament as a "public person" or legal representative of the people. Thus Perkins described the way humankind sins with Adam to the way a county or shire is represented by an MP: "[A]s in a Parliament whatsoever is done by the burges of the shire is done by every person in the shire." John Preston similarly described Christ as a "public person" or legal representative of the faithful. Christ, in this view, is not only an attorney but a model MP, one who is related to the people not as their spiritual father but as their elected representative. Even more than covenant theology's emphasis on consent, this view of Christ as representative was obviously difficult to square with the Stuart rhetoric of inherited right and patriarchalism.⁸⁴

Arguably, the most unusual aspect of covenant theology's treatment of the heavenly contract was its equation of performance with faith. Here we begin to see the different constructions of contract in natural rights theory and the common law, on the one hand, and covenant theology, on the other. In the first two cases, a contract involves a quid pro quo and faith enters into the equation insofar as each party to the contract relies on the other's performance. In contrast, covenant theologians used the metaphor of the contract to turn faith itself into what is required of the contracting party. In *Life Eternall* (posthumously published in 1631),

John Preston articulated the paradoxical status of a covenant with the Almighty, when he spoke of a “double covenant” in which “God doth not onely promise for his part, but makes a covenant to inable us to performe the conditions on our part.”⁸⁵ According to Preston, the legal condition of God’s promise was man’s faith: what was required before God’s promise could be fulfilled was a belief in God’s promises. As the puritan minister John Ball remarked in his *Treatise on the Covenant of Grace* (1645), “That therefore Man should enter into Covenant with God, it was necessary that men should first give credit to the Word of God.”⁸⁶ The believer’s faith in turn enabled his “free and willing obedience.”⁸⁷

We can see this complex negotiation between God’s promise and man’s faith reflected in the contemporary analysis of the covenant as a divine speech act—an analysis that in turn heightened awareness of the interpretive activity and speech acts of the covenant theologians themselves. In his extraordinarily influential treatise of theology, *A Golden Chain*, William Perkins defined “God’s covenant” as “his contract with man concerning the obtaining of life eternal upon a certain condition.”⁸⁸ He then went on to analyze the two covenants as different kinds of speech acts. The covenant of works is identical with the moral law, “that part of God’s word which commandeth perfect obedience unto man.” By virtue of this command, the law reveals sin and “denounce[s] eternal damnation.” “This sentence the law pronounceth against offenders, partly by threatening, partly by terrifying, it reigneth and ruleth over man.” The covenant of grace, in contrast, is not a commandment but both a conditional promise and a testament. “The covenant of grace is that whereby God freely promising Christ and his benefits, exacts again of man that he would by faith receive Christ and repent of his sins. This covenant is also named a testament, for it hath partly the nature and properties of a testament or will.”⁸⁹ Later covenant theologians such as George Downname and John Preston echoed Perkins’s description of the covenant of grace as both an unconditional testament and conditional contract. These different linguistic forms solicit different responses. The legal covenant of the Old Testament demands that the believer fulfill the commands of the law; the covenant of grace is both an absolute gift and contingent upon faith—what we might call *bona fides*.⁹⁰

This emphasis on faith in turn had the potentially revolutionary effect of licensing the individual’s equitable interpretation of the law. In the axiom of covenant theology, God accepts the will for the deed.⁹¹ In *A Treatise Tending unto a Declaration Whether a Man Be in the Estate of Damnation, or in the Estate of Grace* (1595), Perkins explained the consolations of covenant theology’s focus on intention: “If any humbled Christian find not this measure of sanctification in himselfe, yet let him not bee discouraged. . . . And though he faile greatly in the action of obe-

dience, yet God will accept his affection to obey, as obedience acceptable to him.” In the sublime process of accounting outlined by Perkins, intention substitutes for the deed, faith for works, equity for strict law. Like Perkins, Ball linked intention to equity, construed both as a principle of interpretation and a disposition of the affections—both God’s and man’s. Commenting on the representation of God in the Psalms, Ball stated in his *Treatise of the Covenant of Grace*, “His will is the most certaine rule of equity and rectitude; and our hearts are then upright, when they stand in conformity” with it. “And herein is implied . . . an holy disposition of mind, will and affections.” “For God regards not so much the matter, as the forme of obedience: nor so much as the thing done, as the affection wherewith we doe it.”⁹² In *The New Covenant* John Preston also stressed the crucial importance of “uprightness” or “sincerity” in all the believer’s dealings with God. The covenant is the “ground of all our sincerity” and sincerity is all that is required by the covenant. “In this sense,” Preston tells his readers, “*faith* is said to be *accounted for righteousness*.” Preston went on to describe the transformative effects of the new covenant, which alters the sinner’s “disposition and affection”: “he looks not on God now as upon a hard and cruell Master, but he lookes upon him now as a *God* exceeding full of mercy and compassion”:

[N]ow hee sees another way, his apprehension is altered, even as a servant when it is revealed to him that he is a son, and that those hard taskes that are laid on him, are the best way to leade him to happnesse . . . *the case is altered*, hee lookes now not upon the Law of God as an enemy, or as a hard bondage, but he lookes upon all the Law of God, as a wholesome and profitable rule of direction, that hee is willing to keepe for his owne comfort: now, when the heart is thus softened, then the Spirit of God is sent into his heart, and writes the Law of God in his inward parts.⁹³

This passage clearly exemplifies the links between the new covenant, right intention, and equitable interpretation in covenant theology. Together, they were part of a new way of seeing that read the letter of the law metaphorically and so transformed the law into an internal disposition, into the law of the heart. Particularly striking is Preston’s use of “the case is altered,” a common phrase for the *casus omissus*, the case not covered by existing law and thus requiring equitable judgment.⁹⁴ Preston used the phrase to signal God’s equitable dealing with man and the believer’s understanding of the Law. The New Covenant transformed the sinner’s desperate case and ensured merciful treatment; it also instructed the believer to read the Old Covenant metaphorically and equitably as the New Covenant, a better covenant that took one’s intentions for one’s

deeds.⁹⁵ Equitable interpretation was both a principle of divine mercy and a hermeneutical imperative.

Reading the law metaphorically revealed not only that covenant and contract were God's metaphors but that metaphor itself could be a kind of covenant. Thus in his enormously popular *A Golden Chain*, in language that echoed discussions of the mutual assent necessary to a covenant, William Perkins described figurative language in Scripture as a kind of "mutuall, and as I may say, sacramentall relation."⁹⁶ William Ames in turn read the sacraments of Baptism and the Eucharist as figures of the covenant.⁹⁷ Both effectively equated the covenant of grace with figurative understanding. In *Of the New Covenant*, John Preston drew out the implications of this equation when he presented metaphor as a promissory or conditional contract that enjoined a labor of interpretation on the faithful reader. Discussing the "similitude" between the Christian life and a journey, Preston commented:

I finde not any metaphor in the Scriptures used more frequently, and therefore it should teach us some thing: for a metaphor, you know, is but a similitude that is contracted to one word, it is but a short similitude, folded up in a word, and somewhat is to be taught us, some resemblance there is that wee will labour to expresse, and make some short use of it. (181)

The metaphor of the journey dictated a labor of interpretation which was in turn part of the working out of one's own salvation. That is, the believer performs his part of the covenant by interpreting.

According to Preston, this equation of metaphorical walking and hermeneutical working was made explicit in God's covenant with or promise to Abraham:

When the *Lord* sayth to *Abraham*, *I am All-Sufficient*; therefore *walke perfectly before me*, it is as if he had sayd, *Abraham*, I meane to be a good Master to thee, I meane to give thee sufficient wages, thou shalt want nothing thou needest; now be thou carefull to doe thy worke, be not idle, sit not still, but be working (that is intimated by *walking*), to *walke* is still to be acting some thing, still to be working, to be in employment, and not sit still. (181–82)

Preston glossed the covenant not only as a promise but also a contract of "wages" for interpretive labor. His own activity of interpretation then served as an example of walking/working with God.⁹⁸ In the words of William Ames's injunction in *Conscience with the Power and the Cases thereof* (1639), "the interpretation of the Scriptures, or a judgement to discern Gods will for a mans selfe, in his owne Conscience, belongs to every man."⁹⁹ In this way, Preston dramatized the analogy between the

covenant of grace and figurative or equitable interpretation. The individual activity of interpretation was itself one of the ways in which the covenant was realized.

Covenant theology thus made room for human agency, even as it seemed to deny it. It authorized scrupulous analysis of the intentions and dispositions of the individual believer; it enabled the fallen sinner through the divine gift of a contract; it made the activity of interpreting Scripture an obligation of faith; and it licensed the metaphorical or equitable interpretation of the law. If the divine covenant as testament suggested a saving legalism, according to which God was more calculable and dependable than Calvinist theology might at first suggest, the covenant as mutual contract implied “the partial rehabilitation of natural man,” the partial legibility of natural law, and thus the meaningfulness even to sinners of the notion of moral obligation.¹⁰⁰

As we will see in the following chapters, it was a short step from imagining the covenant with God to having the covenant of grace dictate a revocable social and political contract. In the early seventeenth century covenant theologians, like most everyone else, did not think to question the institution of monarchy.¹⁰¹ Over the next few decades, however, covenant theology began to provide critics of the king with a powerful weapon. As Perry Miller has observed, “Charles I was tyrannical [not only] because he broke the compact, violated immunities, and invaded rights sealed in the agreement,” but also because “he pretended to a prerogative to which only God was entitled, but which God himself scorned to exercise.”¹⁰² By definition, the contract with God trumped all merely human contracts and thus authorized not only passive but, in some cases, active resistance to secular power. If the immediate effect of the metaphor of contract was to make God more calculable, its ultimate effect was to make the individual less calculable, less predictable, by virtue of the role it granted to intention and consent. In this way, covenant theology came to underwrite political contractualism of the sort we have seen in natural law jurisprudence and the common law.

In concluding this first part of my anatomy of the tributary discourses of contract, a few general remarks are in order. In their predominant seventeenth-century meanings, covenant is a theological concept, whereas contract is a secular one; and the history of political thought usually charts a shift from one to the other. There is an obvious truth to this account but it misses features that are equally and, arguably, more characteristic of early modern debates about obligation: a widespread preoccupation with the linguistic dimension of contract, a concern with the linguistic character of the bond of conscience, and a related interest in the human capacity to create and enforce contractual agreements. There was, of

course, no single view of the relationship between conscience and language, the *nudum pactum* and the contingent circumstances of our agreements. Yet, if the “poetics” of contract could be aligned with no one set of political or religious beliefs, the focus on the linguistic dimension of contract served to denaturalize and demystify the grounds of political obligation. Obligation was coming to be seen as a human artifact, a product of human artifice. This pervasive concern with artificial bonds in turn dictated an interest in the supplementary role of the passions, equitable interpretation, and imaginative literature in the new economy of political obligation.