

HALAKHIC INTERPRETATION FROM A CONSTITUTIONAL PERSPECTIVE

Daniel J. Elazar

The breakdown of traditional Jewish society and belief has led to the need to find new common ground for halakhic interpretation if the Jewish people's halakhic framework is to be in any respect preserved in any reasonable manner. One possible way in which that might be done is by applying the canons of constitutional interpretation developed for modern constitutions, allowing for the differences between the comprehensive character of the Torah as constitution and the more limited character of modern frames of government. This article suggests six basic halakhic positions in the contemporary Jewish world that have brought us to where we are and then suggests a fourfold method of constitutional interpretation involving, in order, the plain or literal meaning of the constitutional text, the intentions of the text's framers, the accumulative interpretations of later legitimate interpreters subsequent to the framers, and the sense of what would fulfill the text's purpose in light of the present situation, while at the same time not doing violence to the text's plain sense and the intentions of the framers. After discussing these in some detail in comparison with the interpretative processes applied to modern constitutions, it concludes by discussing the interpretive debate surrounding these four elements as suggestive for the Jewish situation.

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Modern and Postmodern Stances on *Halakhic* Decision-Making

With the breakdown of the premodern order and the coming of modernity, new questions arose with regard to *halakhic* interpretation, questions which reflected the changing conditions of religious faith and belief that affected Jews as well as non-Jews. In the previous 2500 years or more a rather elaborate and sophisticated system of *halakhic* interpretation had developed, organized in the Talmud and elaborated on by the Rishonim and Ahronim. At various points in the history of its development, that system, too, underwent one or more revolutions in *halakhic* interpretation and was not all of one piece. That system, however, was predicated on a very traditional faith system which was rocked by the winds of modernity in a revolution similar to the Copernican revolution which overthrew the Ptolemaic system.

This transformation of premodern faith into various versions of modern and then postmodern faith and belief may be seen as a continuing process, but so, too, were discussions of premodern faith in their time. This might overlook the revolutionary transformations which have taken place in the grounds of faith and belief. Those revolutionary transformations which must be grappled with in all such discussions are even more critical for questions of *halakhic* interpretation.

To give the most extreme example, Jews who happen to be atheists, because they deny the total existence of God, no doubt would not approach *halakhah* as in any respect God-given or rooted in God-given foundations. They may chose to regard some *halakhic* elements as folkways or they may regard all *halakhic* elements as obsolete or irrelevant. However, even for believers there have been radical transformations.

For example, the Reform movement was founded on a reemphasis in the belief in God as One who manifested Himself in this world in modern liberal, progressive, and up-to-date ways. Not surprisingly, then, theological discussion in Reform is well developed while *halakhic* discussion is not since the Reform rabbinate, periodically reaffirming the Reform movement's liberal foundations, rejects the binding character of any part of *halakhah*. This has carried over in recent years even to the most basic matters of conversion to Judaism and the inheritance of Judaism through patrilineal and not only matrilineal descent. Thus the Reform movement could emphasize the belief in God along with the abolition of the binding character of *halakhah*. This allowed them to pick and choose among *halakhic*

requirements, now no longer required, on the basis of what they perceived to be progress in the world and changes in modern sensibilities.¹

By the same token, the Conservative movement has tried to have its cake and eat it too. On one hand, it has proclaimed itself irrevocably faithful to *halakhah*. On the other hand, it feels very pressured by the transformations of modernity and postmodernity and the sensibilities that they have evoked. Their resolution of this conflict has normally involved *halakhic* decision-making that reaches the same conclusions as modern contemporary sensibilities and on finding the *halakhic* grounds to do so. So, for example, the Conservative movement claims to have found a way to *halakhically* authorize American Jews to ride to synagogue on the Sabbath. After World War II, new patterns of American Jewish settlement placed many, if not most, Conservative synagogues beyond walking distance for most of their members. Hence this move was deemed necessary by the Conservative leadership in order to retain their membership and to grow by attracting new members as American Jews suburbanized. Because of the movement's commitment to *halakhah*, they felt the need to find a way to permit this change *halakhically*.²

In the 1970s, similar changes were introduced in response to feminist demands for equalizing the status of women within Judaism. The Conservative movement went through elaborate procedures to find *halakhic* justification for ordaining women rabbis, counting women in prayer quorums, and otherwise empowering them in the synagogue. The formal discussion of these matters was carried on in *halakhic* terms, although the reality was that the movement sought to harmonize itself with current trends in American life.

Exactly how this should be done and to what extent, has been a matter of continuing debate within the ranks of the Conservative leadership.³ To give some examples, Solomon Schechter stood fast on *halakhic* principles but attempted to make their presentation more acceptable to moderns through institutional and stylistic transformations. Louis Ginsberg found his solution by separating traditional *halakhic* requirements from modern academic methodologies and living in a compartmentalized world. Cyrus Adler was willing to be very traditional on *halakhic* matters that involved those elements of life defined as "religious" in the late nineteenth century Western world, particularly the United States of America, but rejected the political dimensions of *halakhah* as being incompatible with modernity.

Mordecai Kaplan went so far as to give *halakhah* "a vote but not a veto," as he frequently said, to explicitly define *halakhic* require-

ments as religious folkways to be taken seriously only up to a point and then to entrust each generation with the right to decide what is to be retained and what is not. It seems that by each generation, he meant the leadership of the generation but not simply the *halakhic* or rabbinical leadership, even in their modern adaptations, but the civil leadership, what had come to be called the lay leadership as well. After World War II and particularly after the events of the late 1960s, the Conservative movement leadership moved in the direction of accepting modern sensibilities first and then finding *halakhic* ways to reflect them that would not make the movement seem as if it were non-*halakhic*.⁴

For a while the cutting edge of Orthodoxy also sought a reconciliation with modernity in matters of faith, belief, and religious behavior, although there always remained a strong faction in Orthodoxy that accepted modernity only outside the realm of faith, belief, and behavior, i.e., in connection with technology, but otherwise insisted on maintaining the closed premodern world. One might say that their Judaism was Ptolemaic while their lives beyond were Copernican. Since World War II, however, those latter haredim or ultra-Orthodox have gained the upper hand within the world of Orthodoxy and have pushed the so-called modern Orthodox back toward a redefined centrist position that accepts haredi premises which are further to the right religiously in a conscious and militant rejection of modernism and its postmodern child. Nevertheless, even for them the problem of *halakhic* interpretation has been reopened and they must rebuild the system of interpretation, in their case in a manner far less liberal than their premodern predecessors since they must maintain a position of confrontation with modern and postmodern developments.⁵

In recent years there have been numerous suggestions as to approaches to *halakhic* interpretation. To put it simply, it is probably fair to say that the Orthodox camp looks for continuity based on immediately past precedents, following the lead of earlier *posekim* (*halakhic* decisors), as they understand them, down to the latest generation. Often, that lead is increasingly narrow on the theory that generations further from Sinai cannot know as much as generations closer.

Two other elements enter into Orthodox interpretation. One is that the Torah is only to be read through the prism of the Talmud and not directly, especially, although not exclusively, in matters of religious as distinct from civil law (a distinction which in itself is not drawn or only drawn in a limited way in *halakhah*). A second is that it is possible to go back beyond one's immediate predecessors in interpretation if one seeks more restrictive interpretation and finds

it among earlier *posekim*. This is particularly useful to those in the haredi community who seek an ever more rigid and stringent set of *halakhic* requirements. It has been useful in more moderate ways for those elements in the modern or centrist Orthodox community, either for Zionist reasons, that is, to revive practices that fell into disuse in the diaspora because of lack of opportunity, or to legitimize a certain amount of compartmentalization, i.e., living in the external world as moderns, especially in terms of civil law, while retaining the religious requirements of *halakhah*.

Conservative movement *halakhic* interpreters generally accept the premise of filtering the Torah through the Talmud, but are willing to turn directly to the Torah in more instances. Their interpretive approach is further modified by, one, a tendency toward the acceptance of a positivistic view of the law, that is to say, that the law is what the judges say it is, with a minimum of recourse to earlier principles; two, that civil law is generally obsolete outside of Israel and can be downplayed or ignored; and three, religious law should be as close to the contemporary temper of a particular age as it can possibly be without jettisoning *halakhah* altogether.

This present stance is especially the product of *halakhic* decision-making over the last thirty years. Before that, the dominant *posekim* in the movement took a position that was in principle closer to Orthodoxy, only with a more flexible view on certain issues. When the present group of *posekim* became dominant, the heirs of the former group began to issue their own decisions in the name of "traditional Conservative Judaism." In relatively short order they found, for various reasons, that the word "Conservative" was best dropped, and that they seek to speak in the name of "traditional" Judaism. Most of them are gathered in a new North American movement known as the Union for Traditional Judaism.⁶

The other offshoot of Conservative Judaism, the Reconstructionist movement originally fathered by Mordecai Kaplan, has so completely abandoned *halakhah* that it does not even see the need to address critical questions from any kind of *halakhic* perspective. In this respect they now are further removed from the *halakhic* system than the contemporary Reform movement.⁷

The Reform movement, rejecting the binding character of *halakhah*, has had something of a turn toward more traditional behavior on the basis of "customs and ceremonies." They have also developed several *halakhic* experts of their own and, while not suggesting that they are binding, have issued decisions along a whole front.⁸ The problem, of course, is that those decisions are not binding. Rabbis can choose to ignore them, accept them, or take some position in between, which means that they are no more than discussions of Jewish

tradition couched in more legal language. On the critical decisions such as recognizing patrilineal descent for purposes of Jewishness, accepting women as rabbis and cantors, and accepting homosexuals and lesbians as equals in every aspect of Jewish life, no *halakhic* decisions are called for and none are made.

To summarize, we can identify six *halakhic* positions in the contemporary Jewish world:

1) The ultra-Orthodox which favors rigid interpretation of text, flexible only to the degree that the text does not address the question fully and then interpretation from a conservative perspective based on "*daat Torah*," that is to say, the opinions of conservative Torah sages.

2) The centrist Orthodox, somewhat more flexible but still with first priority given to the traditional interpretations of the text and always looking over their shoulders at ultra-Orthodox decision-making.

3) Conservative/Masorti decision-making that claims faithfulness to the text but looks first to the contemporary climate before going to read the text.

4) Reform, which does not recognize *halakhah* as legally binding but is willing to consult it as one consults tradition for ideas.

5) Reconstructionist, rejection of any legally binding system in favor of following what is considered to be contemporary, enlightened opinion and harmonizing it with Jewish tradition.

6) Sephardic *halakhic* — I add this as a separate category, despite the tremendous pressure it is under from the first and second groups, because one can still see a tendency among Sephardic *posekim* to look upon all of *halakhah*, religious and civil, as a piece, to consider contemporary conditions while searching for the proper decision according to the text, to take a broader view of contemporary issues, and to seek to bring less *halakhically*-committed Jews closer to Judaism in their decision-making insofar as possible.

The Constitutional Approach and Its Virtues

With the possible exception of the haredim, the movements in Jewish life that feel bound by *halakhah* are thus faced with problems of interpretation pulled in several ways. Curiously enough, the modern revival of constitutionalism with its systematic interpretive developments may offer a way to resolve the problem of *halakhic* interpretation that remains faithful to the normative principles of *halakhah*, being at once immutable yet adaptable through interpreta-

tion in each generation. This requires as a starting point the acceptance of the Torah as a constitution, albeit an ancient constitution that sets forth a comprehensive way of life and not just a modern constitution which confines its concerns to the establishment of an appropriate frame of government and appropriate protections for human rights or, perhaps, adds an enforceable ideological dimension as well. The Torah itself rather explicitly claims that it is a constitution in that ancient sense and combines both the draconian rules against direct formal amendment and the *promise* of flexibility through interpretation by the judges of each generation (Deuteronomy 16:10-11).

Viewing the Torah as a constitution in this way allows us to apply principles of constitutional interpretation which have been worked out and tested in the world of civil government to the Jewish environment with its mixture of civil and religious laws rooted in obligation to holiness, commanded by God.⁹ Drawing from these secular sources may seem like blasphemy to some, but in fact it can be done within the most unquestioning framework of belief as well as within a context that involves substantial if not total abandonment of belief. That, indeed, may be its greatest recommendation for our times. Even though the end result of the interpretive process may vary considerably based on whether or not and to what extent belief is involved, we will still have, insofar as it remains possible in the modern age, established the basis for a common dialogue, for interacting around the same questions, which often is the major means of establishing the unity of a people otherwise divided by different beliefs, even when or where common answers cannot be expected.

As yet, we have not even touched upon those who reject the religious dimension of *halakhah* entirely but who seek to benefit from the moral norms that inform its civil dimension as well, some of whom are even capable of seeking spiritual sustenance in what they perceive to be a non-religious way from the moral norms that inform Torah and *halakhah*. Since such people represent an ever-growing number of Jews, especially Jews who care, to be able to include them within a system of *halakhic* interpretation would not only be no mean feat but would have to be welcomed with great seriousness by those who seek to maintain the unity of the Jewish people along some kind of faithfulness to Jewish tradition and not merely identification with a common Jewish fate.

A Four-Fold Constitutional Approach

What then can be used as points of reference for *halakhic* decision-making in our time that can encompass all this, yet be sufficiently faithful to first principles? In my opinion, one can construct a four-fold foundation on a constitutional basis for rendering interpretations based on the following:

- 1) The plain or literal meaning of the constitutional text.
- 2) The intentions of the text's framers.
- 3) The accumulated interpretations of later legitimate interpreters of the text subsequent to the framers.
- 4) The sense of what would fulfill the text's purpose in light of the present situation while at the same time not doing violence to the text's plain sense and the intentions of the framers.

This is an approach to any kind of constitutional interpretation and can be applied within a religious as well as a civil framework. Let me elaborate on each of the four in turn.

I. The Plain or Literal Meaning of the Constitutional Text

As we begin our quest for interpretation we have before us a text or texts of varying degrees of constitutional validity. For example, the Torah is presented as a set of direct commandments from God set in a canonized context which includes historical and prophetic materials without claiming to be narrative or chronological history per se, but contextually relevant to understanding the commandments. This can be understood in contrast to the Constitution of the United States which appears to stand alone.¹⁰ This means that the constitutional sections of the Torah have a built-in context to help us judge and understand their literal or plain meaning, whereas modern constitutions keep the context apart from the document. While this does not solve all problems, it gives us a basis for providing solutions to most that are agreed upon and to others where there is less agreement but a number of sensible explanations.

Nevertheless there are problems. (1) There are apparent contradictions in the text that have to be properly understood in each case. (2) There are terms whose original meaning may have been lost in the intervening millennia. (3) Texts or words may have been garbled in the transmission over the centuries.

In addition to these, there are several other possibilities. These have to do with the interpretation of the intentions of the framers, that is to say, God and Moses (to be as traditional as possible), which

is something that the sages of the Talmud claimed, as in the example that monetary damages constituted the original meaning of "an eye for an eye and a tooth for a tooth." The short and sometimes cryptic character of the biblical text provides us with a text but not necessarily one within which to easily understand the intentions involved.

It has generally been assumed that the intentions are linear and of a piece. It is only from the period of Ezra the Scribe onward that we get clear dialogues with regard to meaning. More recently, some have claimed that the Bible itself and even the Torah consist of dialogues, discussions, and at times disagreements, as in the Talmud, which need to be understood and in some cases reconciled. This could be a great advance in approaching the plain text and the problem of intentions. We should approach it with some caveats, however. When the critical study of the Bible began, biblical criticism was welcomed as the best way to elucidate the plain text through comparative linguistics, for example, or raising issues of garbled letters and words, but biblical criticism soon took off to follow its own dynamic and ceased to treat the text as a whole even though, while it may or may not have been compiled from several different texts at one point or another in its early history, it has come down to us as a single whole and needs to be interpreted constitutionally as such. Thus the view of all or part of the Bible including the Torah as a discussion and dialogue should be approached very judiciously.

It is also true that any worthy constitutional text has ambiguities built into it to allow a variety of interpretations and even changing interpretations over time. A good constitution includes some things that are very specific, such as the scheduling of Sabbaths and festivals in the Torah or election days in the U.S. Constitution, and other things which lend themselves to and even demand interpretation, such as the form of government (monarchic or republican) in the Bible and the character of federal-state relations (dual or cooperative) in the United States Constitution. Sorting all of this out is not easy and an accurate understanding of the meaning of words at the time that the constitutional text was framed seems to be the first anchor to which the quest must be tied, followed by an understanding of the context in which the text was written.

II. The Intentions of the Framers

The foregoing leads us to the question of the framers' intent. Methodologically and operationally, the need to search for an understanding of what the framers intended is much the same whether

we are speaking of human framers or a Divine Lawgiver. The intentions of both rest upon wills which led them to have intentions in the first place. Obviously, violating the intentions of human framers is less critical for a believing person than violating the intentions of God, but the search for intentions and the methodology of that search is not very different in the case of one or the other, especially since according to the Bible the intentions of God were conveyed to the people via His prophet Moses after the people refused to receive even the first constitutional statements of God directly (Exodus 19).

The matter of intentions becomes important because of the grounding of all constitutional texts serving the political societies of which we speak, in mutual consent through covenant or compact. Let us exclude from our discussion those constitutional systems which exclude consent, which involve unilateral actions on the part of the constitution-makers that are forced on the recipients. There is, indeed, some question as to whether such actions can be referred to as constitutional.

There are those who would argue, with good cause, that for something to be legitimately constitutional it must involve consent. Certainly in our two exemplary cases, no matter how different they may be in other respects, the role of consent is basic and critical, either by their own account or by other contemporary accounts of their drafting and adoption. In both systems it is assumed that those who are to be governed by the constitution have a right (in American terminology) to know what is in it and what they are accepting, or the drafters have an obligation (in biblical terminology) to inform those to be governed of their intentions. Both sets of framers, despite their great differences, do just that.

In the case of the Bible, God, through Moses, gave us the book of Genesis and the books of the Prophets and Writings to elucidate the meaning of the four books of the Torah that are essentially constitutional. In the case of the United States, records were made of the debates in the Constitutional Convention, extensive discussions were held in the state ratifying conventions and preserved, and *The Federalist*, plus some other writings supporting the Constitution of 1787, elucidate its meaning. *The Federalist*, for example, is accepted as a primary elucidation of intent.

The intentions of the framers should be understood in two ways: the original intention, that is to say, what they intended to establish in the constitutional text; and the larger intention, the purposes for which they wanted to establish it. Thus sometimes the narrow terms of what they wanted to establish were adequate for their times, but they themselves wanted to leave an opening or we ourselves would

like to find an opening to fulfill their larger intentions. In some cases that requires formal constitutional amendment in systems where that is possible. In others it will require constitutional interpretation, searching out the framers' larger intentions. The minimum reason for accepting the framers' intentions as determinative is that they are part and parcel of what the governed have consented to.

III. Precedent

Legal/constitutional systems must assume that the framers' intentions need not be searched out anew "from scratch" in each case every time unless there are compelling reasons to do so. Rather, we may follow the precedents of those who have tried to divine those intentions earlier, often based on the idea that those closer to the framers are likely to have had a better understanding of what the framers intended and that those closest may even have learned the meaning of the constitutional text and the framers' intentions from the framers themselves. Thus it is generally wise to accept and build upon the decisions of previous interpreters or decisors.

The problem with this approach is that invariably there are distortions, deliberate or mistakenly, by the interpreters in interpreting both the text and the intentions, and they, too, are influenced by their times and places. Thus their actions must be examined in context as well so that current interpreters can react to them properly. This becomes even more important the longer a constitutional text remains in force constitutionally.

In short, legal study of precedents is not sufficient to continue the process of interpretation. There is also the need to undertake historical and social scientific study of the context to divine the earlier interpreters' reasons for interpreting as they did. Still, the reversal of the thrust of earlier interpretation or precedent must be done very carefully so as not to upset the systemic aspects of a legal/constitutional system and thereby destroy its stability. That stability often is what makes a legal system attractive and reassuring to the public served by it, a very essential quality of law and a political requisite for any legal system. Still later constitutional interpreters who are too wedded to precedent, even bad precedent, only further distort the text and the intentions of the framers, usually laying the groundwork for, or causing, future revolutions which push things further away, and only by accident, if then, move us back to the original texts and their framers' understanding of them.

IV. Contemporary Conditions

After paying serious and due attention to the foregoing, we arrive at the contemporary situation. There is a reason why it should be considered last and not first in constitutional interpretation. In civil polities there is always the possibility of adopting a new constitution altogether if the force of the contemporary situation is deemed by those served by an older constitution to be such that radical change is necessary. However achieved, this is usually known as revolution.

Thomas Jefferson, who had some experience in drafting civil constitutions though not as much as some of the other American framers, believed that since no constitution could bind those who had not directly consented to it, every constitution should be subject to comprehensive change no less frequently than every twenty years, at the point when approximately half of those who had been alive at the time of the original framing have been replaced by a new generation.¹¹ Whatever the theoretical attractiveness of that idea in connection with civil constitutions, it was too disruptive and cumbersome to work and leaders and publics rapidly came to the conclusion that constitutional development should be more continuous and less disjointed. This led to the development of theories of implied consent, on the one hand, and broadening of the power of interpretation by authoritative sources, on the other.

Needless to say, religious constitutions, especially those derived from Divine authority, cannot be so easily changed even if their publics would want them to be. Hence they must rely even more heavily on interpretation. That means, however, that constitutions, as long as they are kept, require those bound by them to be faithful to them if they are to have any meaning. While great, even massive, changes of 180 degrees can be made by clever interpretation and every constitutional system has examples of that, I would argue that it is not desirable to do so except perhaps in the most extraordinary circumstances, else the constitution itself loses its authoritative and binding character, *de facto* if not *de jure*. If something is written in a certain way and the intentions of its framers can clearly explain why, then 180-degree turns that change whole meanings or even radical steps short of that are delegitimizing.

On the other hand, specifics that are not specifically stated are amenable to greater change by interpretation in accord with understandings of original intention when placed in the context of contemporary situations. For example, in the Bible, forms of regime have had to change at different times, given the needs and temper of the times. Thus it was important to discover the intentions of the Torah

with regard to the kind of government God required, rather than the particular form of government, and to make certain that every regime conformed to the former even if it was based on a different set of institutions shaping the latter. The Torah itself suggests that this is appropriate in its discussion of the original Mosaic regime and the subsequent regime of kingship introduced at the time of Saul and David.¹²

This kind of institutional change would be more difficult within the context of a civil "frame of government" constitution such as that of the United States where both offices and relationships are specified, but even within that context large changes have occurred, e.g., from a balance between the executive and the legislative in early days, to congressional government in the late nineteenth century, to the imperial presidency of the latter half of the twentieth century. Nevertheless, the system has been self-corrective, usually restoring some measure of the basic constitutional principles and practices in time, albeit on a different plane. Since the time span during which the Torah-as-constitution has been in force is ten times that of the U.S. Constitution, not to speak of its religious dimension, there have been more changes of regime but a remarkable adherence to the original constitutional intentions in most cases.

In sum, the contemporary context is critically important for a constitutional interpreter, provided that it is not considered alone and not as, in Ronald Dworkin's words, "trumps," but in the context of the text itself, the intentions of its original framers, and, to a somewhat lesser extent, their elaboration by those interpreters that followed them. This is of course more easily said than done and it certainly will not eliminate conflicting interpretations or the necessity for hard decisions, but it should keep the dialogue of constitutional interpretation within a common framework, much like a river may have different currents and eddys, but, except in exceptional times of flood, all stay within identifiable, even if changing, banks.

The Interpretive Debate

In fact, interpretation is properly carried out through the involvement of all actors in the continuing constitutional drama. While those whom the body politic or religious designate as authoritative interpreters may have a larger say and may seem to have even more of a say than they do, proper constitutional interpretation within a consensual context involves all others within the body, and perhaps more than one body of authoritative interpreters.

For example, while the U.S. Supreme Court is deemed to have ultimate authority in many situations, the Congress of the United States has the authority to overturn Supreme Court decisions, change the court's jurisdiction and composition, and take other actions that stake its own authoritative claim to interpretation, while the president and the officers of the executive branch interpret the constitution every day, most times in ways that never reach other authoritative bodies. At the same time, historians, social scientists, and legal scholars have their input by virtue of their studies of the context and impact of constitutional texts and decisions. Other jurisdictions who have to apply authoritative interpretations may reinterpret them to their satisfaction, reinterpretations that often go unchallenged. The general public in their reaction to those selected interpretations which strike them most vividly will subtly shape both the application of current interpretations and future interpretations of the same issue. We have seen how this has occurred in the United States in connection with the abortion controversy, but we can also note it in terms of the protection of the rights of criminals and accused criminals, in connection with pornography and obscenity, and in many other matters.

With regard to Jewish law we have a more complex situation. When all Jews (or essentially all of them) lived within the framework of *halakhah*, public opinion was so powerful that the *halakhic* decisors even included the dictum that ordinances (*takkanot*) otherwise *halakhic* were not binding if the public could not live under them. Today when most Jews simply ignore questions of *halakhah*, if they do not openly reject *halakhah's* binding character, *halakhic* interpretation becomes confined to those who consent to the system, and to the extent that those who consent are those who are willing to accept ever more rigorous interpretations in most cases, the mainstream of the *halakhic* system has become more closed than it ever was. While the side streams may have become more open, in doing so they have also become less authoritative in the eyes of other *halakhic* interpreters and even in the eyes of their own publics, few of whom accept the binding character of *halakhah* in the first place. Those among them who do, usually recognize the desperate maneuvers of the side-stream *halakhic* interpreters to stay contemporary while also remaining within the *halakhic* framework.

Despite all of these problems, the four-fold context that I have described here seems to me to offer the best, most accurate, and most livable way of *halakhic* interpretation, one that permits its constitutional dimension to be retained, that brings us back to those first constitutional principles on a regular basis, yet enables us to develop within a context and in light of contemporary needs. With all that,

rules of interpretation, like all other rules in human institutions, are not self-enforcing. They depend upon the quality of the individuals who enforce and interpret them. Let us always pray that we have individuals to do that who have the appropriate qualities.

Notes

1. On Reform Judaism and *halakhah*, see Solomon Freehof, *Liberal Judaism and Halakhah* (Pittsburgh, PA: Rodef Shalom Press, 1988).
2. On Conservative Judaism and *halakhah*, see David Aronson, *The Jewish Way of Life* (New York: United Synagogue of America, 1972).
3. Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986).
4. Solomon Schechter, *Studies in Judaism*, 3 vols. (Philadelphia: Jewish Publication Society, 1896-1924); *Aspects of Rabbinic Theology* (New York: Schocken, 1972). Louis Ginsberg, *The Significance of the Halakhah for Jewish History* (1929); *Commentaries and Innovations in the Yerushalmi*, 3 vols. (1941); *Studies in the Origins of the Mishnah* (1920). Cyrus Adler, *Selected Letters* (Philadelphia: Jewish Publication Society, 1985); *I Have Considered the Days* (Philadelphia: Jewish Publication Society, 1947). Mordecai Kaplan, *Judaism as a Civilization* (New York: Schocken, 1967); *Judaism Without Supernaturalism* (New York: Reconstructionist Press, 1967); *The Meaning of God in Modern Jewish Religion* (New York: Jewish Reconstructionist Foundation, 1962).
5. On post-World War II Orthodoxy and *halakhah*, see Aaron Kirschenbaum, *Equity in Jewish Law* (New York: Yeshiva University Press, 1991).
6. Alan J. Yuter, *Theology for Liberal Jews: Is It Possible?* (1993).
7. Eugene Kohn, *What is Jewish Religion* (New York: Jewish Reconstructionist Foundation, 1957); Ira Eisenstein, *Creative Judaism* (New York: Jewish Reconstructionist Foundation, 1953); Mordecai Kaplan, *The Jewish Reconstructionist Papers* (New York: Behrman's Jewish Book House, 1936); Mordecai Kaplan, *Questions Jews Ask: Reconstructionist Answers* (New York: Reconstructionist Press, 1956).
8. Solomon Freehof, *Reform Responsa for Our Time* (Cincinnati: Hebrew Union College Press, 1977); *New Reform Responsa* (Cincinnati: Hebrew Union College Press, 1980).
9. Daniel J. Elazar and Stuart A. Cohen, *The Jewish Polity: Jewish Political Organization from Biblical Times to the Present* (Bloomington: Indiana University Press, 1985), Introduction.
10. The noted student of American constitutional development, Donald Lutz, argues persuasively that the constitution of the United States must also be read in the context of the state constitutions of the time and the other constitutional documents of the American tradition to

see the origins of American constitutionalism. See Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University, 1980).

11. Letter from Thomas Jefferson to James Madison, September 6, 1789.
12. I have elaborated on this theme in my book *Covenant and Polity in Biblical Israel* (New Brunswick, NJ: Transaction Publishers, 1995), particularly in Chapters 9, 14 and 15.