American University International Law Review

Volume 18 | Issue 3 Article 1

2003

Empowering Constitutionalism with Text from an Israeli Perspective

Barak Cohen

EMPOWERING CONSTITUTIONALISM WITH TEXT FROM AN ISRAELI PERSPECTIVE

BARAK COHEN*

*BS, United States Military Academy at West Point; MA, Walsh School of Foreign Service, Georgetown University; JD, Georgetown University Law Center. Judicial clerk to Senior Judge Loren Smith, United States Court of Federal Claims. Many thanks to Mark Tushnet, Gary Peller, and Lore Unt for their comments, guidance, and patience, and to Matthew Solomson for his comments regarding Orthodox Judaism and the Halachic Code. Thanks also to the efforts of the editors and staff of the *American University International Law Review*.

INTRODUCTION

Constitutional thinkers have long debated the impact of the written word on constitutionalism.[1] More precisely, they have focused on whether a constitution's "written-ness," its unique character as a written document, effectuates what this article terms "empowered constitutionalism."[2] Empowered constitutionalism in liberal democratic polities has four salient characteristics: constitutional norms based upon a liberal agenda; constitutional supremacy over legislation; a judiciary exclusively entitled to construe state action in light of constitutional norms; and constitutional entrenchment against formal modification of the constitution except by an expression of democratic will.[3]

---

1. *See e.g.*, Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); HARVEY V. JAFFA, ET AL., ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1994); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Michael W. McConnell, *Textualism and Democratic Legitimacy: Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

2. *See* Grey, *supra* note 1.

3. *See* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 65 (1999) (defining "liberal democracy" as a set of programmatic commitments to freedom, individual rights, the rule of law, and limited government); *see also* Dr. Gidon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HASTINGS INT'L & COMP. L. REV. 617 (1999) (proposing that supremacy over legislation, entrenchment against formal modification except by democratic process, and empowerment of the judiciary to exclusively construe state action against constitutional norms generally define a constitution); Karl Lowenstein, *Reflections on the Value of Constitutions in Our Revolutionary Age*, *in* CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 204 (Arnold J. Zurcher ed., 1951) (defining "nominal" and "semantic" constitutionalism); HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE 19 (2000); ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING (1987) (discussing authoritarian abuse of the constitutional form). This article adopts and modifies Sapir's descriptive qualities to define empowered constitutionalism, adding a fourth requirement that the constitution adhere to a liberal agenda. *See* Sapir, *supra*, at 645. This agenda should uphold both structural

In the United States, written-ness stands as a basic issue in the struggle over constitutional meaning.[4] Some argue persuasively that on both normative and descriptive grounds, empowered constitutionalism in America does not depend on the Constitution's written-ness.[5] These thinkers believe that written-ness is secondary to the evolving meaning of the Constitution.[6] They have concluded that constitutional development in the United States has and should have

---

aspects of democratic governance and the civil rights necessary to maintain that structure's substantive democratic spirit. This article adds the additional requirement to Sapir's descriptive qualities because the present discussion is specifically concerned with the role of constitutionalism in liberal democracies. The additional descriptor ensures that not only is a particular constitutional system "empowered," in the sense that the constitutional system holds specific powers vis-à-vis the state, but also that the system employs those powers in the service of democratic principles. To illustrate empowered constitutionalism by way of contrast with other forms of constitutionalism, empowered constitutionalism squarely contradicts what political scientist Karl Lowenstein has typified as "nominal" constitutionalism and "semantic" constitutionalism. *See* Lowenstein, *supra*, at 204. Nominal constitutionalism arises where political authorities declare a constitution, but neither follow nor enforce the principles articulated by that constitution. Consequently, that constitution has no significant effect on the life of a state's citizenry. *See id.* One example of this is Yugoslavia's 1963 constitution, which promulgated a limited system of judicial review through a Federal Constitutional Court and six republican constitutional courts. *See* SCHWARTZ, *supra*, at 19. The Yugoslav constitution gave the Federal Constitutional Court the power to review the constitutionality of federal legislation. *See* Lowenstein, *supra*, at 204. However, in practice, the Yugoslav government structured the Federal Constitutional Court so that the Communist Party and the Federal Parliament could overrule the Federal Constitutional Court through ordinary legislative means. *See id.* Similarly, semantic constitutionalism exists where a constitution carries absolutely no independent force and serves only to promote the selfish interests of a ruling state power elite. *See id.* Examples of authoritarian use of a semantic constitution include Generalissimo Francisco Franco's Fundamental Laws and Philippine President Ferdinand Marcos' Decrees. *See* BONIME-BLANC, *supra*, at 9-12.

4. *See* Grey, *supra* note 1, at 703-04 (discussing Justice Black's criticism of constitutional textualism in judicial review).

5. *See id.* at 705 (arguing that courts apply values not articulated in the Constitution to determine the constitutionality of a statute).

6. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing that the text of the Constitution does not have a prominent role in constitutional understanding versus reliance on caselaw).

little to do, if anything, with text, and much more to do with socially and politically entrenched liberal values.[7]

However, this logic is flawed. First, it often unquestioningly assumes that empowered constitutionalism primarily serves to support democratic principles through judicial review, without closely examining the connections between governance and constitutionalism. It is premature to announce the preeminence of judicial review over textual imperative in maintaining American constitutionalism, without accounting for the ultimate function of empowered constitutionalism in a democratic society.

Second, this logic is geopolitically parochial.[8] It typically focuses on the American constitutional experience without seeking the benefit of comparative constitutional analysis.[9] Examining emergent democratic regimes with constitutional aspirations offers fresh data with which to evaluate commonplace notions regarding the relation between empowered constitutionalism and written-ness.[10]

This article seeks to fill these gaps in constitutional thought by examining Israeli constitutional development.[11] Examining the evolution of Israeli constitutionalism demonstrates that judges' formal commitment to text as a source of normative authority may

---

7. *See supra* notes 5-6 and accompanying text (rejecting the written-ness of the Constitution as the primary means of constitutional interpretation).

8. *See* Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study,* 100 COLUM. L. REV. 1327 (2000) (stating that in the United States, questions on constitutional issues lack a comparative analysis and are often discussed in "parochial terms").

9. *See id.* (criticizing the lack of a comparative constitutional approach in the United States). *But see* CASS SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 22-37 (2001) (providing an exception to the general lack of comparative constitutional analysis by addressing South African constitutionalism). However, the subject of Sunstein's book is not the role of text in constitutionalism. Mark Tushnet comes close to addressing this issue from a comparative constitutional position when he discusses formalism and constitutional evolution in his book review. *See* Tushnet, *supra* note 8 (addressing the reviewed book from a comparative constitutional perspective).

10. *See* SUNSTEIN, *supra* note 9, at 6 (noting that new constitutions have recently arisen in democracies such as South Africa, Russia, the Czech Republic, Hungary, Bulgaria, Canada, Ukraine, Lithuania, and Slovakia).

11. *See* discussion *infra* Part II (discussing written-ness and Israeli constitutionalism).

prove critical in the early development of empowered constitutionalism.[12] Israeli constitutionalism provides an especially useful case study for this proposition because Israeli constitutionalism reverses the usual American account of constitutional development. The conventional description of constitutional development in America upholds a written document as the genesis of American constitutionalism. In contrast, Israeli Supreme Court justices have crystallized judge-made law into the textual basis for Israeli empowered constitutionalism. Thus, analyzing Israel's constitutional development makes it possible to examine textualism from a fresh perspective.

This article explores the relationship between empowered constitutionalism in Israel and text in two parts. Part I evaluates the function of empowered constitutionalism in a liberal democratic state; a necessary antecedent inquiry given the difficulty of investigating the importance of constitutional text without explaining empowered constitutionalism's role in a democracy.[13] Part I undertakes this investigation by focusing on the law's ability to maintain order in pluralist societies.[14]

Part I begins by showing that empowered constitutionalism helps governments to regulate the law's normative potential.[15] Law assumes various narrative possibilities reflecting the individual cultural narratives of the myriad communities that compose society. Empowered constitutionalism serves as a stabilizing cultural adhesive that enables the socially disaggregated groups that compose

---

12. *See* discussion *infra* Part II.A (exploring Israel's constitutional history). This commitment to text need not be directed to the text of a *constitution*; it can address other textual sources of normative authority, such as a Declaration of Independence. Nevertheless, we may characterize this commitment to text as constitutional because it uses non-constitutional text as either a foundation or substitute for a constitution.

13. *See* discussion *infra* Part I (explaining that the mainstream conception of American constitutionalism, which has its roots in a post-enlightenment worldview, inadequately explains the connection between empowered constitutionalism and the fulfillment of liberal democratic principles).

14. *See* discussion *infra* Part I.A (discussing post-enlightenment constitutionalism)

15. *See* discussion *infra* Part I (explaining empowered constitutionalism's function).

nation-states to cohere by imagining themselves as a single, albeit pluralist, community. Judicial review serves this process by ensuring that the state's conception of society, codified as a basic set of elementary aspirations in a constitution, controls the growth of alternative social orders. Similarly, judicial review also makes the government's *internal* narrative cohere. Part I further argues that the cultural coherence that judicial review helps produce is especially significant in light of the inherent instability of the nation-state, as well as post-modern challenges to the nation-state's existence.

Part II uses Israel's constitutional experience to evaluate the role of text in upholding the purpose of empowered constitutionalism explained in Part I.[16] Part II first traces the history of Israeli constitutionalism, explaining that the first Israeli parliament, the Knesset, originally refused to establish a constitution.[17] The primary reason for the Knesset's refusal was the new state's ambivalence regarding Israeli constitutive aspirations.[18] Israeli leaders could not decide whether Israel should exist as a secular liberal Jewish state with an empowered constitution, or as a religious Jewish state governed by the Halachic Code, Jewish law developed through progressive rabbinical interpretation of the Torah.[19] Instead of

16. *See* discussion *infra* Part II (discussing written-ness and Israeli constitutionalism).

17. *See* discussion *infra* Part II.A (exploring Israeli constitutional history and explaining the Knesset's struggle with attempts at drafting a constitution).

18. *See id.* (noting the Knesset's failure to agree on a constitutional formulation).

19. *See* S. ZALMAN ABRAMOV, PERPETUAL DILEMMA: JEWISH RELIGION IN THE JEWISH STATE 97 (1976) (stating that the provisions of the Halachic Code, the law of the Jewish people, address civil and criminal law, as well as purely devotional matters and moral rules); *see also* ALBERT S. LINDEMANN, ESAU'S TEARS: MODERN ANTI-SEMITISM AND THE RISE OF THE JEWS 40-124 (1997) (historicizing Jewish communities in Europe with respect to Anti-Semitism and the rise of the nation-state). The Halachic Code encompasses "Written Law," regulations that appear in the Torah, and "Oral Law," interpretations and regulations based upon the written rules. *See* ABRAMOV, *supra*. Rabbi Yehuda Ha-Nasi compiled the Oral Law toward the end of the Second Century, C.E. *See id.* at 98. Subsequent religious thinkers further explicated the Oral Law. *See id.* This project became the basis of the Talmud, the collection of rabbinical scholarship constituting the basis of Jewish religious authority. *See id.* The Palestinian version of the Talmud was edited at the end of the Fifth Century, C.E., and the Babylonian version of the Talmud was edited at the end of the Sixth Century, C.E. *See id.* Many attempts to

establishing a constitution, the Knesset determined that subseqent embodiments of the Knesset would periodically enact Basic Laws.[20] The Basic Laws were meant to serve as independent provisions that the Israeli government could ultimately combine into a single, written constitution at some undetermined future time.[21] However, until 1992, none of the Basic Laws protected individual rights and the Knesset had entrenched only a few of the Basic Laws against ordinary legislative modification.[22] Thus, there was nothing particularly constitutional, at least from the standpoint of empowered constitutionalism, about the Basic Laws passed by the Knesset prior to 1992.[23]

In 1992, the Knesset passed two new Basic Laws that renewed the promise of empowered constitutionalism in Israel.[24] However, these two Basic Laws merely codified human rights previously established by the Israeli judiciary through caselaw.[25] The Israeli Supreme Court ultimately had to decide two watershed cases, *Kol Ha'Am*[26] and

---

produce a Talmudic code that would codify the Talmud and the precedential rulings citing the Talmud followed. *See id.* Joseph Karo's attempt in the mid-Sixteenth Century, C.E., is widely considered the standard Halachic Code. *See* ABRAMOV, *supra*. The Halachic Code continued to evolve and serve as the definitive source of Jewish law for Jewish communities in the Diaspora. *See id.* The Halachic Code carries state-recognized force in Israel regarding religious matters and matters of personal status touching upon religion, such as marriage and divorce. *See id.* at 98-99, 208.

20. *See infra* notes 207-210 and accompanying text (describing the formulation of Basic Laws).

21. *See infra* notes 211-211 and accompanying text (noting the Knesset's intent that each Basic Law should serve as an independent, pro-constitutional law).

22. *See infra* notes 213-217 and accompanying text (discussing the modification of the Basic Laws).

23. *See id.*

24. *See infra* notes 217-218 and accompanying text (discussing the 1992 "constitutional revolution" represented by the passage of the Freedom of Occupation and Human Dignity and Liberty Basic Laws).

25. *See id.*

26. *See* H.C. 73/53, 87/53, Kol Ha'Am Co., Ltd. v. Minister of the Interior, 7 P.D. 871 (Isr. S. Ct), *reprinted in* 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: 1948-1953 90 (E. David Goitein ed., 1962) (concerning whether a publication endangered the public peace).

Mizrachi Bank,[27] to actualize the implicit possibility of empowered constitutionalism represented by the two Basic Laws.

Kol Ha'Am and *Mizrachi Bank* are also significant because of the manner in which the Israeli Supreme Court used text as a source of normative authority to construct empowered constitutionalism.[28] The importance of text in the establishment of empowered constitutionalism in Israel suggests that written-ness has substantial constitutional significance. This article does not attempt to argue that some species of originalism, textualism, or formalism should govern constitutional interpretation. It does argue, however, that contemporary scholarship should recognize that textualism of some kind can serve as an important interpretive strategy in the *establishment* of liberal democratic traditions and empowered constitutionalism.[29]

I. EMPOWERED CONSTITUTIONALISM'S FUNCTION

Part I of this article explicates the post-Enlightenment roots of empowered constitutionalism as understood in the United States and demonstrates why mainstream views regarding American constitutionalism inadequately explains empowered constitutionalism's role in a liberal society.[30] Part I then builds upon the scholarship of the late Robert Cover to describe an alternative conception of constitutionalism.[31] This alternative conception depends upon viewing the law as primarily concerned with the

27. *See* C.A. 6821/93, Ha'Mizrachi Bank v. Migdal, P.D. 221 (Isr. S. Ct.), *reprinted in* 31 ISRAEL L. REV. 764 (1997) (considering the violation of property rights and the cancellation of debt).

28. *See* discussion *infra* Part II.A.2 (providing further analysis of *Kol Ha'Am* and *Mizrachi Bank*).

29. As a secondary goal, this article attempts to raise critical questions regarding the role of liberal traditions and constitutionalism in the service of the nation-state.

30. *See* discussion *infra* Part I.B (explaining the deficiencies of the centrist liberal constitutionalist position in addressing empowered constitutionalism).

31. *See* discussion *infra* Part I.C (arguing that constitutional jurispathy is essential to the cultural stability of the nation-state).

state's perpetuation of social control through the regulation of the law's normative meaning.[32]

The law exists as a myriad of normative possibilities that reflect the unique cultural narratives of the disparate communities composing a society.[33] Empowered constitutionalism is central to the maintenance of cultural stability through the imposition of coercive force that enables state control of the law's meaning via the power of judicial review.[34] Illustrating this process requires showing how the official version of the law regulates the creation of alternative legal orders, the Constitution's role in this process, and the relative instability of the contemporary nation-state as a monolithic cultural unit.[35]

A. POST-ENLIGHTENMENT CONSTITUTIONALISM

Many historians view the late seventeenth and eighteenth century philosophy of notables such as Montesquieu, Voltaire, Rousseau, and Kant, who celebrated the values of pre-Christian Greeks and Romans, as a coherent body of work signaling the advent of modernity.[36] The Enlightenment, as we have come to know this period, shaped the ideas that help determine, in either adverse

32. *See id.* (discussing the relationship between social control and the interpretation of laws).

33. *See infra* notes 94-105 and accompanying text (relating myth and narrative to the legal views of different communities).

34. *See* discussion *infra* Part I.C.2 (discussing the manner in which constitutionalism enables jurispathy).

35. *See* discussion *infra* Part I.C (analyzing the stabilizing influence of common cultural referents and exploring the relationship between empowered constitutionalism and the post-modern nation state).

36. *See, e.g.*, MARK V. KAUPPI & PAUL R. VIOTTI, THE GLOBAL PHILOSOPHERS: WORLD POLITICS IN WESTERN THOUGHT 184-97 (1992) (explaining the philosophies of Montesquieu, Rousseau, and Kant); MICHEL FOUCAULT, *What is Enlightenment? in* THE FOUCAULT READER 32 (Paul Rabinow ed., 1984) (describing the cultural impact of the Enlightenment); MAX HORKHEIMER & THEODOR W. ADORNO, *The Concept of Enlightenment, in* THE CONTINENTAL PHILOSOPHY READER (Richard Kearny & Mara Rainwater eds., 1996) (critiquing the Enlightenment).

reaction, promotion, or passive acceptance, "what we are, what we think, and what we do today."[37]

Enlightenment ideas permeate contemporary Western thought.[38] The movement's general belief in secular values and its view of humans as perfectible, rational beings inherently imbued with rights and joined in a global community, has helped modern thinkers to weave liberal notions of self-governance, secular humanism, and cosmopolitanism into the fabric of democratic ideals.[39] Enlightenment views of human nature and the characteristics of the type of government best suited to accommodate that nature produce two basic assumptions that shape the prevalent American constitutionalist position, "post-Enlightenment constitutionalism." First, an Enlightenment perspective tends to view democracy in terms of self-government achievable through popular access to state decision-making procedures. Second, an Enlightenment perspective takes a complementary view of the Constitution's essential role in maintaining democracy through the power of judicial review. However, as this article will show, a close look at the theoretical problems with judicial review raises serious questions regarding the deeper function of empowered constitutionalism in a democratic society.[40]

Post-Enlightenment constitutionalists commonly perceive democracy as a type of government that sets up, in the words of John Rawls, "a form of fair rivalry"[41] for political authority achieved

---

37. FOUCAULT, *supra* note 36, at 32.

38. *See* KAUPPI & VIOTTI, *supra* note 36, at 184-97 (demonstrating that the Enlightenment influenced many thinkers); FOUCAULT, *supra* note 36, at 34-37 (relating the influence of the Enlightenment on Kant's approach to philosophy).

39. *See* Tony Judt, *The New Old Nationalism*, N.Y. REV. OF BOOKS, May 26, 1994, at 50 (stating that the Enlightenment's brand of "optimistic universalism" has also helped produce socialism, which competes with the liberal-democratic worldview).

40. *See* discussion *infra* Part I.B (revealing conceptual problems with liberal constitutionalism).

41. JOHN RAWLS, A THEORY OF JUSTICE 227 (1971). *But see* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 10 (2001) (claiming that "democracy" is impossible to define with specificity, and characterizing democratic regimes as generally enjoying significant amounts of internal political rivalry while maintaining broad inclusiveness); ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1-9 (1971) (stating that "the development of a

through "just procedural rules."[42] The ultimate goal in this endeavor is the establishment of a collective form of self-government accomplished through electoral representation.[43] A government may embody these ideals in different ways. For example, Ronald Dworkin conceives of democracy in terms of the substantive rights that it aims to promote.[44] In Dworkin's view, democracy is a form of collective government focused on maximizing *self*-government via foundational laws that "rule out caste, guarantee a broad and equitable political franchise, prevent arbitrary legal discriminations and other oppressive uses of state powers, and assure governmental respect for freedoms of thought, expression, and association and for the intellectual and moral independence of every citizen."[45] On the other hand, Robert Post envisions democracy from a procedural standpoint.[46] For Post, democracy is a system in which every citizen who so chooses may enjoy a warranted sense of individual contribution to the process of shaping the communal order.[47] A system is thus democratic to the extent that its procedures ensure and promote individual governance.

These disparate viewpoints share the idea that empowered constitutionalism helps guarantee the maintenance of democracy. Constitutionalism does this through "[t]he containment of popular political decision-making by a basic law . . . designed to control which further laws can be made, by whom, and by what

---

political system that allows for opposition, rivalry, or competition between a government and its opponents is an important aspect of democratization); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4 (1956) (arguing that "democracy is an effort to bring off a compromise between the power of majorities and the power of minorities").

42. *See* RAWLS, *supra* note 41 (considering the relationship between political justice and the constitution).

43. *See infra* notes 44-48 and accompanying text (discussing the different ways to approach the goal of self-government and electoral representation).

44. *See* MICHELMAN, *supra* note 3, at 17-18 (explaining Dworkin's concept of democracy as focused on substantive rights rather than secondary, procedural rights).

45. *Id.* at 18.

46. *See id.* at 34-38 (exploring Robert Post's responsive democracy theory).

47. *See id.* at 35 (explaining Post's conception of a lawmaking consensus of "legally guaranteed access for everyone").

procedures."[48] Constitutions thereby provide the "laws of law-making" that make constitutionalism possible.[49] This foundational law ultimately rests on the power of judicial review, which grants the U.S. Supreme Court the ultimate right to determine the constitutionality, i.e., the democratic legitimacy, of state action.[50] Thus, judicial review serves to regulate government's interaction with the governed in a way that maintains predetermined public rights essential to the liberal conception of democracy.[51]

It is therefore ironic that the implied predicate to the democratic political order that post-Enlightenment constitutionalists espouse is the *counter*-democratic institution of judicial review. Judicial review paradoxically enables constitutional principles to promote democratic aspirations through the judiciary's counter-majoritarian supervision.[52] According to conventional wisdom, judicial review of

---

48. *See id.* at 6.

49. *See* MICHELMAN, *supra* note 3. (discussing how the U.S. Constitution contains popular political decision-making); *see also* Daniel J. Elazar, *Constitution-Making: The Pre-Eminently Political Act, in* CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 11-12 (Daniel J. Elazar ed., 1990) (describing constitutions as having three basic functions: providing the framework of government, the moral bases for a polity, and a socio-economic power map for society).

50. *See* MICHELMAN, *supra* note 3, at 6 (explaining how the U.S. Constitution serves to contain popular political decision making).

51. *See* BONIME-BLANC, *supra* note 3, at 9-12 (citing Carl Friedrich's description of constitutions as "effective regularized restraint" on government, and Giovanni Sartori's description of constitutions as "techniques of liberty" that serve "first and above all, [as] *procedures* intent upon ensuring a controlled exercise of power"); *see also* MARK BRZEZINSKI, THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND 6-9 (1998) (providing an analytical framework for exploring constitutionalism, limited government, and transition to democracy); A.E. Dick Howard & Mark F. Brzezinski, *Development of Constitutionalism, in* TRANSITION TO DEMOCRACY IN POLAND 133 (Richard F. Staar ed., 1998) (discussing the development of constitutionalism and stating that "the primary purpose of a constitution is to describe the permissible scope and limits of governmental power and to protect individual liberties").

52. *See e.g.* MICHELMAN, *supra* note 3, at 4-11 (relating how the Constitution confines popular decision making); BONIME-BLANC, *supra* note 3, at 11-14 (exploring the interrelationship between regimes and constitutions, and the process of establishing a constitution); Howard & Brzezinski, *supra* note 51, at 9-10 (noting that constitutional government is limited and restrained government); RAWLS, *supra* note 41, at 228-43 (explaining how "[t]he extent of the principle of

government action is necessary to prevent majorities from either implicitly contradicting democratic ideals by oppressing minorities through state action, or by explicitly voting society out of its democratic character.[53] Judicial review supposedly upholds democracy by entrusting the judiciary, as an entity that is perceived of as relatively free from the pressures of electoral politics, with the responsibility of policing state decisions for violations of foundational law.[54]

From the mainstream constitutionalist perspective, the neutral application of justice via judicial review is the only way to ensure the maintenance of the defining characteristics of democratic government.[55] Conventional wisdom maintains that a democratic polity must rely on such a foundational law to guarantee: specific rights (according to Ronald Dworkin);[56] an egalitarian political franchise (according to Robert Post);[57] and equitable political participation amidst competition for power (according to John

---

participation is defined as the degree to which the procedure of (bare) majority rule is restricted by the mechanisms of constitutionalism").

53. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 26 (Jack N. Rakove ed., 1990) (stating that "[t]he majoritarian process cannot be expected to rectify claims of minority rights that arise as a response to the outcomes of that very majoritarian process").

54. See *id.* (advising that "[f]aith in the majoritarian process counsels restraint"); MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS 161 (1994) (arguing that the current system of nomination to the Supreme Court is distinctly majoritarian because it is shaped more directly by electoral politics than was previously true). *But see* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (arguing that elected politicians may do a better job, or at least a comparable but more truly democratic job, of enforcing the Constitution than judges under the current system of judicial review). Tushnet perceives electoral pressures as shaping judicial decisions and undermining the perceived integrity of judicial review, and consequently advocates an end to the tyranny of judicial review by making constitutional interpretation a populist endeavor. *See id.*

55. *See supra* notes 48-54 and accompanying text (providing an account of the restraints on government).

56. *See* MICHELMAN, *supra* note 3, at 17 (explaining Dworkin's conception of democracy as a "cluster of substantive requirements").

57. *See id.* at 34 (exploring Post's procedural conception of democracy).

Rawls).[58] Despite superficial differences, mainstream thinkers from "Sunstein to Scalia," from left to right on the centrist band of the ideological continuum, agree on the same basic liberal constitutional attributes.[59] They believe in the possibilities of democracy and the importance of the jurisdictional predominance of a neutral judiciary as an integral component of democratic governance.[60]

However, the mainstream constitutional perspective fails to account fully for the role that empowered constitutionalism plays in democratic governance. If judicial review is important because it sustains democracy, then mainstream explanations fail to account for the importance of empowered constitutionalism on conceptual grounds. Conceptual problems with judicial review undermine empowered constitutionalism's underlying assumptions, raising serious questions concerning constitutionalism's role in a democratic

---

58. *See* RAWLS, *supra* note 41, at 221-28 (discussing political justice and the Constitution in terms of competition).

59. *See* SUNSTEIN, *supra* note 9, at 67-68 (commenting on preservationist constitutional views); *see also* David Luban, *The Warren Court and the Concept of a Right,* 34 HARV. C.R.-C.L. L. REV. 7 (1999) (describing the adjudicative strategy of center-left constitutionalists of the Warren Court); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7 (1971). On the one hand, center-right thinkers tend to stress the importance of preserving the state's long-standing practices through relatively formal attachment to the original and supposedly determinate meaning of the Constitution, or through the restraint of the judiciary vis-à-vis the democratically legitimized powers of the electorate. On the other hand, center-left constitutionalists lean toward interpreting the Constitution in view of its immanent liberal potential in the hopes of transforming the state into an idealized vision of democratic government. *See* SUNSTEIN, *supra* note 9, at 67-68; *see also* Luban, *supra*, at 7. However, while conservative and liberal constitutionalists may disagree about certain issues, such as the importance of the Framer's original intentions, their differences arise only within a narrow bank of variation in constitutional thinking. Thus, it is unsurprising that Robert H. Bork, the conservative advocate of the originalist strand of preservationists, argued that "[w]e have not carried the idea of neutrality far enough." *See* Bork, *supra*, at 7. Nor is it surprising that the late U.S. Supreme Court Justice William J. Brennan, Jr., the celebrated advocate of liberal constitutionalism, also upheld neutrality's value by arguing that the judiciary's special role is to maintain the overall impartiality of justice by policing majoritarian state action for the oppression of minority elements in society lacking political influence. *See* Brennan, *supra* note 53, at 26.

60. *See, e.g.*, Brennan *supra* note 53, at 26 (noting the importance of preserving the rights of members of relatively powerless minority groups within the majoritarian political process).

state. While these conceptual problems do not necessarily vitiate the mainstream perspective in its entirety, they show the need for a fuller explanation for constitutions' sociopolitical function.

B. CONCEPTUAL PROBLEMS WITH THE MAINSTREAM CONSTITUTIONALIST POSITION

Mainstream constitutionalism suffers from significant conceptual problems stemming from its process-based approach to constitutional adjudication. Mainstream constitutionalists widely uphold a process-oriented approach to the law,[61] which focuses on the challenge of making the counter-majoritarian nature of judicial review cohere with post-Enlightenment notions of democracy.[62] Process theorists attempt to mediate the tension between the maintenance of democratic processes and the perceived need for judicial review as a component of empowered constitutionalism.

Process theorists resolve these contradictory impulses by linking democratic governance with institutional competence. To the legal process adherent, producing legally just results has less to do with the content of laws than with the successful correlation of specific legal conflicts and the institutional dispute resolution procedures best suited to resolving each conflict in a manner consonant with democratic decision-making. For example, a process approach to the law might suggest that the bench is best suited to resolving legal issues, while the legislature should have jurisdiction over issues properly decided by the majoritarian operations of democratic

---

61. *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 13-80 (1995) (providing an historical overview of the development of legal process theory); Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683, 1688-89 (1998) (describing the proceduralist constitutional tradition); Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988) (discussing whether the "Supreme Court utilized the proper institutional procedures for decision making, defined by Wechsler as reasoning by "neutral principles"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (proposing a "representation-reinforcing" theory of judicial review); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that "courts have the power, and duty, to decide all constitutional cases in which the jurisdiction and procedural requirements are met").

62. *See* sources cited *supra* note 61.

governance.[63] It follows that applying the process approach to constitutional adjudication entails determining which law-related institution, the legislature, the Executive branch, or the judiciary, should address a particular constitutional issue.

The problem with the legal process approach is that it ultimately requires judges to identify legitimate democratic self-determination, a highly subjective appraisal that belies judicial neutrality. [64] Judicial responses to this challenge tend to fall toward either of two extremes: formalism, which is often identified with the scholarship of Herbert Wechsler, or functionalism, which is often identified with the scholarship of John Hart Ely. On one hand, Wechsler's relatively formalist approach emphasizes the facial maintenance of judicial neutrality through broad deference to legislative decision-making.[65] From Wechsler's perspective, judges may identify democracy *formally* through signifiers such as the imprimatur of democratically elected legislative representatives.

On the other hand, Ely's approach to process theory concentrates on the de facto effect of law-making. The Ely approach ultimately requires judges to analyze the content of state processes for substantive fulfillment of democratic values.[66] Judges thus recognize democracy *functionally*, as a result of substantive analysis of the conditions underlying state decision-making.

Both the Wechsler (formalist) and Ely (functional) approaches contradict mainstream ideas about democracy. A formalist proponent of process theory would argue that democracy remains free of the danger of a politically interventionist legal tyranny so long as the judiciary eschews social policy questions. However, this argument assumes the democratic adequacy of state decision-making while ignoring evidence that elections and representative governance occur against background socioeconomic conditions that create systemic

63. *See id.*

64. *See* Crenshaw & Peller, *supra* note 61, at 1697-1705 (discussing the inherent contradictions of process theory approaches to constitutionalism).

65. *See* Wechsler, *supra* note 61.

66. *See* ELY, *supra* note 61.

biases against particular groups in American society.[67] Thus, state procedure facially appears to be democratic, while the decisions generated by that procedure are skewed by systemic bias, thereby undermining the practice of democratic government.[68]

For example, police officers, regardless of their ethnicity, are more likely to be suspicious of black rather than white citizens while investigating criminal activity.[69] This is because police officers, like all Americans, are subject to the unconscious internalization of stereotypes regarding black Americans.[70] Judges evaluating some of the cases resulting from these police investigations for the violation of constitutional rights will likely only confirm the de jure guarantee of individual rights, rather than noticing the prejudicial application of police action that initially undermines those rights. This dynamic ultimately devalues the constitutional rights supposedly protected by judicial scrutiny.

William J. Stuntz provides a related example of the difficulties that may arise when the judiciary commits itself to the evident social equality of constitutional jurisprudence without acknowledging the substantive impact of the factors underlying that jurisprudence.[71]

---

67. *See* DAVID COLE, NO EQUAL JUSTICE 20 (1999) (providing an example of judicial bias and noting that the reasonable person standard has different effects on the poor, the wealthy, ethnic minorities, and whites).

68. *See id.* at 41 (citing an example in which fifty-six percent of Americans, regardless of ethnicity, believe that blacks are more prone to violence than are other Americans). Since this bias affects the majority of Americans, institutional decision-makers' prejudicial cognitive stereotypes may skew facially democratic state action. *See id.* Reverend Jesse Jackson once stated that, "There is nothing more painful to me . . . than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody white and feel relieved." *Id.* It is reasonable to conclude on the basis of this evidence that if many Americans, including civil rights leaders such as Jesse Jackson, suffer from internalized associations of skin color with crime, then so may state actors such as police officers and judges. These inherent biases may influence the practical application of superficially equitable democratic procedures.

69. *See id.* at 20-21 (arguing that police disproportionately suspect black citizens of committing crimes and therefore single blacks out for investigatory searches).

70. *See id.* at 40-41 (noting that law enforcement officials are susceptible to forming the same biases as the general population).

71. *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1265-66 (1999) (suggesting that such underlying biases

Stuntz focuses on the political economy of judicial protection from unauthorized searches and seizures under the Fourth Amendment of the U.S. Constitution.[72] He points out that the manner in which the U.S. Supreme Court has defined Fourth Amendment privacy interests in terms of property privileges wealthier suspects at the expense of poorer suspects.[73]

The Supreme Court has interpreted the Fourth Amendment[74] as protecting individual privacy from arbitrary searches and seizures by law enforcement agencies.[75] Generally speaking, the greater the perceived invasion of privacy, the greater the justification required of law enforcement to perform a search or seizure of the invaded property under the Fourth Amendment.[76] According to Stuntz, the

---

have led the justice system to target poor and black people with relatively greater frequency than other citizens).

72. *See id.* at 1274-77 (noting that it is more cost-effective to police criminal activity in poorer neighborhoods) .

73. *See id.* at 1266-67 (proposing that the privacy interests of wealthier citizens enjoy greater protection from society because wealthier citizens tend to possess the places and things that are granted enhanced protection under Fourth Amendment caselaw); *see also* CHARLES R. EPP, THE RIGHTS REVOLUTION 48-54 (1998) (arguing that the strategic organization of advocacy groups, such as the American Civil Liberties Union, resulted in the Supreme Court's recognition of individual rights such as freedom of expression, criminal procedure, and women's rights, in the last half of the twentieth century). Epp notes that this organized advocacy was contingent upon the development of a complex and expensive support structure for legal mobilization. *See id.* at 44. Thus, financial resources emerge as a de facto insurance of "democratic" access to the judiciary. *See id.* It is possible to interpret this as another example of the manner in which wealth skews the otherwise equitable exercise of constitutional rights in our society.

74. *See* U.S. CONST. AMEND. IV (providing a statutory basis for protection against unreasonable searches and seizures).

75. *See* Johnson v. United States, 333 U.S. 10, 14-15 (1948) (expressing a judicial preference for warrants to protect citizens from potentially arbitrary searches and seizures).

76. *See, e.g.,* United States v. Knotts, 460 U.S. 276 (1983) (holding that police do not require justification to scrutinize street activity); *see also* Terry v. Ohio, 392 U.S. 1 (1968) (finding that police may search a pedestrian's pocket where there is both reasonable suspicion that the pocket contains a weapon and there is reasonable suspicion that the pedestrian was involved in criminal activity); California v. Acevedo, 500 U.S. 565 (1991) (ruling that police may search a car if there is probable cause, a higher standard than reasonable suspicion, to believe that there is evidence of a crime in the car); Mincey v. Arizona, 437 U.S. 385, 390, 395 (1978) (noting that police may search inside a home only where there is probable

practical result of this graded distribution of rights is that it is more difficult under the Constitution to search property that is likely to be held by wealthier citizens.[77]

Furthermore, Stuntz notes that the Fourth Amendment makes it more efficient for law enforcement agencies to police crime in poorer rather than wealthier neighborhoods.[78] This is because wealthier citizens tend to own homes, which require a relatively high justification to search, and have the means necessary to hire lawyers to bring suits against police for improper searches and seizures of property.[79] Therefore, it is more demanding, both in terms of the time required to obtain proper search warrants and the resources required to adjudicate cases against aggrieved citizens, for law enforcement agencies to target crime that takes place in relatively wealthy neighborhoods.[80] The result is that police tend to enforce the law inequitably with respect to crimes related to Fourth Amendment rights. Fourth Amendment jurisprudence thereby fulfills the formal requirements of equality promised by American constitutionalism, while simultaneously failing to satisfy the content of that promise.

The Ely-functional strand of the neutral process approach to constitutional jurisprudence also suffers from a theoretical inconsistency based upon the difficulty in identifying democratic legitimacy in the law. Adherents of Ely's approach recognize the hollowness of assuming the democratic nature of legislation and presumptively deferring to legislative decisions.[81] Ely's proponents respond to this problem by requiring the judiciary to evaluate state

---

cause to believe that the home contains evidence of criminal activity and the police previously obtained a warrant to search the home).

77. *See* Stuntz, *supra* note 71, at 1267-74 (stating that the courts' definition of privacy tends to favor the interests of wealthier people).

78. *See id.* at 1276 (commenting that it is more expensive for the police to monitor wealthier neighborhoods).

79. *See id.*

80. *See id.* at 1275 (noting that it is costly and burdensome for police officers to obtain search warrants).

81. *See* Crenshaw & Peller, *supra* note 61, at 1696 ("[i]f the basis for deference to the legislature is its democratic character, such deference is inappropriate when the legislature calls its own democratic character into question . . . or when it legislates about the interests of groups that majoritaria democracy is poorly structured to consider, such as the interests of discrete and insular minorities.").

action with respect to de facto democratic effects, as well as democratic form.[82] Thus, a judge operating from Ely's perspective might identify problems with the practical application of a criminal justice system that appears to equitably protect the rights of all Americans while actually producing a disproportionately negative impact on some Americans.

However, the Ely-functional approach fails to limit judicial power. Taken seriously, the Ely perspective violates democracy's central aim, collective self-government accomplished through elected representation, by ultimately giving judges the counter-majoritarian power to decide what democracy itself means. This problem arises because the characteristics signifying democracy are ultimately indeterminate.[83] For example, contrary to mainstream opinion, some argue that hate speech hinders free expression under the Constitution by helping to construct a negative social image of targeted minority groups, thereby devaluing those groups' public voices.[84] This raises the question whether a true democracy should allow hate speech as a form of constitutionally-guaranteed free expression, or outlaw hate speech as a challenge to constitutionally-guaranteed expression?[85] The indeterminacy revealed by such questions complicates any reasonable judicial attempt to identify the basic yet elusive values announced in the Constitution.[86]

---

82. *See* ELY, *supra* note 61.

83. *See* Crenshaw & Peller, *supra* note 61, at 1699 (stating that democratic principles are not easily defined).

84. *Compare* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT 24-25 (1993) (arguing that the negative effects of hate speech ultimately restrict the victims' own personal freedom) *with* Catharine MacKinnon, *Pornography, Civil Rights, and Speech,* 20 HARV. C.R.-C.L. L. REV. 1, 26 (1985) (presenting a similar line of argument concerning the relationship between pornography and women's freedom of expression) *and* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality,* 8 HARV. WOMEN'S L.J. 1, 17 (1985) (stating that women's public voices are silenced by the portrayal of women in pornography).

85. *See generally* Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression,* 1996 U. ILL. L. REV. 789 (1996) (discussing whether hate speech actually hinders freedom of expression for some groups).

86. See *id.; see also* Smith v. Collin, 439 U.S. 916, 916-19 (1978) (Blackmun, J., dissenting) (noting that these considerations can be difficult for judges). This

Based upon the evidence presented above, mainstream views fail to completely justify constitutionalism in general, and judicial review, in particular, as predicates to democracy. This conclusion does not categorically reject empowered constitutionalism's role in democratic governance, or the maintenance of some notion of justice consonant with democracy. However, at the very least, the above analysis suggests that constitutionalism plays some other core function in state governance than the standard account offered by centrist thinkers. It also suggests that this core function has little to do with reinforcing democracy as conceived of by mainstream constitutionalists. The late Robert Cover's vision of society as composed of rival normative legal worlds overlaying a single authoritative legal regime, offers an alternative explanation for empowered constitutionalism that may better explain the Constitution's function in American society.

C. CONSTITUTIONS AND THE CONTROL OF LEGAL MEANING

Robert Cover suggested that constitutions serve primarily to facilitate the state's control of society through the imposition of a hierarchy of legal meaning.[87] According to Cover, legal codifications

---

opinion concerns the Supreme Court's decision to decline review of the Seventh Circuit's invalidation of ordinances that attempted to restrict demonstrations by neo-Nazis in Skokie, Illinois, a town with a large Jewish population. *See id.* The dissent notes that "when citizens assert . . . that the proposed demonstration is scheduled at a place and in a manner that is taunting and overwhelmingly offensive to the citizens of that place, that assertion, uncomfortable though it may be for judges, deserves to be examined." *Id.* at 919.

87. *See* ROBERT COVER, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 96 (Martha Minow, et al. eds., 1992) [hereinafter COVER, ESSAYS] (noting that legal prescriptions require cultural narratives to give them meaning). *See generally* ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975) [hereinafter COVER, JUSTICE ACCUSED] (discussing the judicial response to fugitive slave laws). *Cf.* Peter Gabel, *The Bank Teller: The Experiential Origins of Hierarchy; Founding Father Knows Best: The Search By the Framed for the Intent of the Framers, in* THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING (2000). Gabel's view of constitutionalism coheres with Cover's ideas to the extent that both thinkers agree that society uses the law to impose hierarchical orders of control upon citizens. However, whereas Cover suggests that this order is necessary in the maintenance of pluralist communities, Gabel rejects it from a "psycho-political" perspective. Gabel sees this attempt at community formation as an ultimately alienating experience by which we imagine completely artificial identities as "citizens," a "fantasized

such as the U.S. Constitution lack inherent meaning.[88] Cultural narratives imbue the unadorned "black letter" of legal precept with significance by locating rules in a socially-constructed normative legal universe—a "nomos."[89] Society is composed of multiple nomoi that compete over the law's meaning with respect to shared legal codifications.[90] The legal system responds directly to the challenge to interpretive dominance represented by these normative possibilities through "jurispathy,"[91] the destruction of rival normative systems, and the regulation of "jurisgenesis,"[92] the creation of legal meaning.

This article builds on Cover's ideas to show that the Constitution is integral to the law's jurispathic function and that constitutional jurispathy is essential to the cultural stability of the nation-state. This argument has three components. First, states employ coercion to regulate jurisgenesis. Second, empowered constitutionalism facilitates this coercion by establishing jurisdiction and imposing cultural boundaries on the law's potential meaning. This boundary-setting also has an important stabilizing effect on the law's evolution. Third, empowered constitutionalism emerges as an important way of maintaining coherent cultural communities given the challenges faced by the contemporary nation-state.

1. Legal Narratives and the Determination of Law Through Violence

According to Cover, a "nomos" combines myth and narrative to imbue a body of law with meaning that is unique to a particular community.[93] Myths are the stories that undergird communal self-

common image of connection whose fantasy-based nature is collectively denied." *Id.* at 143. Thus, according to Gabel, the Constitution serves as a fetish object in the mass consciousness, which prevents citizens from realizing their immanent and true inter-connections as human beings.

88. *See* COVER, ESSAYS, *supra* note 87, at 96 (stating that narratives are what give the Constitution its meaning).

89. *See id.* at 95-102 (defining nomos as a normative universe that influences human behavior through myth).

90. *See id.* at 103-13 (noting that competing laws arise within a single society).

91. *See id.* at 138-44 (defining jurispathy as the way in which courts destroy rival legal normative systems).

92. *See id.* at 103 (defining jurisgenesis as the creation of legal meaning).

93. *Id.* at 100-01 (stating that myths imbue the law with meaning).

understanding, providing "paradigms of behavior" constructed out of imagined patterns in a community's history.[94] For example, the notion of America's founders as spiritual pilgrims seeking religious independence from Protestant oppression overseas is a story commonly understood as an expression of American commitment to religious tolerance and freedom. Cover argues that narratives convey these stories as a function of relating a community's vision of an imagined past with that community's present.[95] Thus, grade school children re-enacting the first Thanksgiving feast at Plymouth Rock express a narrative that implicitly affirms a commitment to social values animated by a communal understanding of the Thanksgiving myth. Culture is the medium for the expression of this narrative.[96]

Interwoven cultural narratives form a universe of social norms, a bounded nomos that shapes how people absorb and comprehend ideas.[97] Cover notes that nomoi include ideas about the meaning of legal precepts.[98] Nomoi thus permeate legal rules with meaning that is particular to a community by situating those rules within a universe of social norms.[99] This socially constructed meaning allows the law to assume significance in diverse contexts ranging from banal legal doctrine applied to mundane affairs, to apologetic

94. COVER, ESSAYS, *supra* note 88, at 101 (explaining the purpose of myths).

95. *See id.* at 101 (explaining that myths provide insight into the past that can serve as a vision for the present).

96. *See* RAYMOND WILLIAMS, THE LONG REVOLUTION 41 (1961) (defining culture as the social construction of reality, the whole of a "particular way of life which expresses certain meanings and values" nurtured at the interstices of human interaction); *see also* LOUIS ALTHUSSER, FOR MARX 230-36 (1969) (defining culture as a system of myths that govern society's behavior); DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE 5-15 (1979) (discussing the meaning of culture); Ernest Gellner, *Nations and Nationalism*, *in* CONFLICT AFTER THE COLD WAR: ARGUMENTS ON CAUSES OF WAR AND PEACE 290 (Richard K. Betts ed., 1994) (positing that cultures are not rigid, monolithic, or clearly delineated, but are instead porous, overlapping, and capable of shading into each other without definite boundaries).

97. *See* COVER, ESSAYS, *supra* note 87, at 101 (explaining that cultural narratives help shape social norms).

98. *See id.* at 98-99 ("The normative universe is held together by the force of interpretive commitments . . . [which] define what law means and what law should be").

99. *See id.* at 102 (describing the relationship between legal meaning, nomoi, and communities).

justifications for legal coercion, to criticism of the extant legal order.[100] Thus, as Cover explains, narratives inhere the law in community life by relating rules to the universe of normative contained within a particular nomos.

Nomoi engage in a constant state of jurisgenesis that often competes with the state's claim to the exclusive power to regulate the law's meaning.[101] This competition involves the nomos seeking to carve out an independent interpretive space for itself from the state's legal plenitude. This nomic jurisgenesis is potentially unlimited because a community's self-conception changes in dynamic inter-relation to the state's nomic conception. Thus, nomoi and the narratives that structure nomoi are unstable.

Nomoi may also directly challenge the state's power over legal meaning by seeking to transform the political-social order of the dominant regime.[102] An example of such a nomos lies in the radical constitutionalist camp of anti-slavery abolitionists who fought for the

---

100. *Id.* at 101.

101. *See* COVER, ESSAYS, *supra* note 87, at 121-27 (illustrating jurisgenesis and explaining this concept by discussing the Church of God in Christ, Mennonite's amicus curiae brief to the U.S. Supreme Court in *Bob Jones University v. United States*). Cover argues that the amicus brief illustrates both a nomos and the manner in which nomic jurisgenesis may challenge the state's legal meta-order. *See id.* at 126. In the brief, the Mennonites expressed their support for an interpretation of the free exercise of religion and free association clauses of the Constitution's First Amendment that would have permitted discrimination against black university applicants on the basis of religious belief. *See id.* at 124. As Cover explains, the brief is a concise illustration of nomic formation because it clearly articulated the Mennonite cultural narrative with respect to the religious and associational freedoms supposedly guaranteed by the First Amendment. *Id.* at 125-26. The narrative offered three cultural referents that defined the Mennonites' nomos: (1) a vision of an antecedent group of First Century Christians that served as the fixed point in the contemporary Mennonites' experience of social history; (2) visions of historical reoccurrence of oppression towards groups with which contemporary Mennonites associated themselves; and (3) the shared Mennonite self-conceptualization as a community dedicated to the preceding visions. *See id.* at 122-23. This self-conception provided an insular meaning for the Mennonites to the plain language of the First Amendment. This insular meaning deviated from and competed with the state's governing legal definition of the Amendment.

102. *See* COVER, ESSAYS, *supra* note 87, at 142 (positing that communities may challenge the state over legal meaning).

manumission of American slaves preceding the Civil War.[103] Radical constitutionalists hoped to bring an end to slavery by altering the Constitution to eliminate any possible constitutional justification for the practice of slavery.[104] Whether a community conflicts directly or indirectly with the state over legal meaning, such conflict necessitates grappling with the coercive civil order of the state. The state's legal regime typically responds with the instrument of control monopolized by governments in contemporary society: violence.

The state is just one contestant among many for generating and implementing socio-legal norms. However, the state is better suited to compel commitment to its norms than any other collective body within the nation-state through the effective management of violence. This is because the state is better able to organize violence than any other societal entity in the contemporary nation-state. Explaining why this is true first requires defining the "state." The state is that over-arching institution preeminently concerned with order maintenance.[105] The state monopolizes organizations capable of implementing the force necessary to coerce norm commitment, such as the police and the military, and organizations with the ability to sanction that implementation in the regulation of jurisgenesis through the state's judicial dominion over legal meaning such as the courts.[106]

---

103. *See id.* at 133-38 (providing an example of how different groups challenged state power).

104. *See id.* (detailing the abolitionist perspective with respect to the Constitution); *see also* COVER, JUSTICE ACCUSED, *supra* note 87 (providing an extensive discussion of the judiciary's role in preventing manumission and the state's role in imposing law). Cover shows how and why judges with anti-abolitionist sentiments could interpret the law in a way that contradicted their personal moral viewpoints. *See id.*

105. *See* Gellner, *supra* note 96, at 282-83 (providing a definition of the state).

106. *See id.* (building on Max Weber's definition of the state as that agency within society possessing a monopoly on legitimate violence). In contrast to Weber, Gellner aptly points out that societies do not necessarily monopolize legitimate violence. *See id.* Gellner offers the example of the feudal state, in which a lord may allow his vassals to war upon each other so long as they remain loyal to their overlord. *See id.* At the very least, it is possible to surmise that the state monopolizes the force necessary to compel widespread commitment to norms. This may also often include a monopoly on legitimate violence, as is the case in our own society.

The state retains its legal primacy through jurispathy.[107] Although some might argue that the state's legal regime merely makes the law clear by distinguishing proper interpretation of the law from erroneous interpretation, this viewpoint assumes that the state's reigning legal interpretation is qualitatively better than that offered by non-state sources.[108] Assuming, as Cover does, that society exists as a poly-centric universe of juridical potential consisting of multiple nomoi capable of imbuing rules with social meaning, then the state's interpretation of law has more to do with the control of jurisgenesis than the inherent superiority of the state's legal analysis. Justice Jackson raised this point in *Brown v. Allen* when he stated with respect to the U.S. Supreme Court that "[w]e are not final because we are infallible, but we are infallible only because we are final."[109] Thus, jurispathy serves to distinguish what is privileged as "law" (state interpretation of legal precept) from the other nomic possibilities that may arise within society.

The state creates law by destroying and circumscribing alternative legal possibilities as a function of regulating society. The state may allow certain nomic communities to survive as relatively independent preserves when such action serves governmental ends. For example, the U.S. government has allowed company towns to assert the right to independent legal enforcement with respect to labor relations.[110] Alternatively, the state may choose to destroy other nomic communities that challenge state supremacy regarding legal meaning. Producing an ordered socio-legal system via either strategy requires the state to manage the application of jurispathy. Courts enforce jurispathy by employing coercive force ranging from parking

107. Cover views "jurispathy" as a negative, violent thing that a state should apply sparingly, if at all. *See* COVER, ESSAYS, *supra* note 88, at 1-2. In contrast, this article uses the term in a neutral, descriptive manner.

108. *See id.* (emphasizing the placement of communal groups—groups that would seem peripheral if the government's worldview were the starting point—at the center of law).

109. 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

110. *See* COVER, ESSAYS, *supra* note 87, at 127-28 (noting that the U.S. government has permitted company towns to independently enforce the law against unions).

tickets to court injunctions and executions.[111] Constitutionalism is central to the regulation of legal meaning.

2. Empowered Constitutionalism and Jurispathy

a. Jurisdiction

Cover's analysis neglected to address fully how constitutionalism enables jurispathy. Empowered constitutionalism uses judicial review to help establish extra-state and intra-state boundaries that facilitate the state's control over the law's meaning. One way in which the U.S. Constitution enables extra-state jurispathy is through the establishment of the power of jurisdiction, the right of courts to apply the law.[112] The Constitution, as the rule of rules within the American legal system, ultimately provides the raw material that judicial narratives use to uphold the jurisdiction of courts.[113] Judges invoke their explicit power and right to apply the law under the

111. *See* COVER, JUSTICE ACCUSED, *supra* note 87, at 203 (asserting that legal interpretive acts signal and cause violence upon others). These acts justify violence that has already occurred or which is about to occur, frequently leaving behind victims whose lives have been torn apart by these organized, social practices of violence. *See id.* Cover further provides a description of the nature and range of the coercion forces. *See id.*

112. *See* COVER, ESSAYS, *supra* note 87, at 155-62 (describing the importance of jurisdiction in creating the state's legal hierarchy). However, this article's discussion regarding boundary-setting and empowered constitutionalism with respect to stabilizing cultural referents is entirely original.

113. *See id.* at 156 (noting that judges appeal to the "texts of jurisdiction" and that "[t]he most basic of [these] are the apologies for the state itself and for its violence—the ideology of social contract or the rationalizations of the welfare state"). Cover does not explicitly state that the Constitution upholds jurisdiction, although he does discuss the importance of jurisdiction to the law. *See id.* However, a judge adjudicating a case must appeal to a particular rule, and cases involving core social issues involve constitutional rules. Also, the "texts of jurisdiction" that Cover mentions are narratives generally built around the notion of a single constitutive law extending directly from the social contract—the Constitution. Cover himself notes that, "[m]any . . . historical narratives treat the Constitution as foundational . . . and generative of all that comes after." *Id.* Thus, it is reasonable to conclude that the Constitution ultimately establishes jurisdiction.

Constitution of the United States, invoking the Constitution's declaration of itself as "Supreme Law."[114]

Jurisdiction is the institutional decree that conceptually separates judicial authority from the object of that authority. Jurisdiction thus facilitates the control of society by allowing judges to clothe the brute display of jurispathy that is the rule of law with the pretense of civilized legitimacy.[115] Absent this division, the implicit connection between judicial interpretation of the law and the arbitrariness and force that characterize law enforcement would become explicit. This revelation would jeopardize the apparent neutrality of the rule of law that underlies mainstream constitutional narratives, thereby undermining widespread acquiescence to the law as an even-handed mechanism of justice.

Jurisdiction also provides an institutional excuse for judges to perpetuate the state's monopoly over jurispathy by privileging hierarchy over substantive justice in adjudication.[116] For example, in *Walker v. City of Birmingham*,[117] the U.S. Supreme Court refused to review a trial court's injunction prohibiting a civil rights protest on the merits, despite admitting that the injunction was most likely unconstitutional.[118] The Supreme Court based this decision on the fact that the civil rights demonstrators at issue had willfully violated the lower court's questionable injunction.[119] The *Walker* decision

---

114. *See* U.S. CONST. art. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land").

115. *See* COVER, ESSAYS, *supra* note 87, at 159-63 (asserting that judges consider maintenance of authority over substantive principles of justice when adjudicating).

116. *See id.* at 157-58 (providing *Walker v. City of Birmingham*, 388 U.S. 307 (1967) as an example of the Supreme Court privileging authority over justice); *cf.*, Owen Fiss, *Civilizing Hand of the Law? Birmingham, 1963*, 89 YALE REV. 1 (2001) (asserting that the *Walker* decisions shows that the Supreme Court's focus had begun to change from dismantling Jim Crow to maintaining law and order), *available at* http://www.law.yale.edu/outside/html/faculty/omf2/pdf_files/handofthelaw.pdf (last visited Jan. 27, 2003).

117. 388 U.S. 307 (1967).

118. *Id.*

119. *See id.* at 315-17 (repeating the demonstrators' statements that the injunction was "raw tyranny under the guise of maintaining law and order").

thus exemplifies the law's preeminent concern with upholding the extant legal power structure at the expense of the substantive principles of justice in question in any particular case.

b. The Stabilizing Influence of Common Cultural Referents

Another way in which constitutionalism enables jurispathy is through the setting of shared narrative focal points, "common cultural referents," which impose boundaries on the law's meaning both within and outside of the state. The Bill of Rights imposes these boundaries through a general textual focus on certain social values, such as the freedom of speech, which Americans may variably interpret.[120] The bare text of constitutional rules provides a basic shape to the varying legal narratives draped over the unadorned words of the Constitution. This underlying shape serves as a *common* referent for diverse nomic communities. A common referent limits the conceptual possibilities of jurisgenesis by ensuring that all of the variable meanings attributed to the law must relate to the Constitution's text in some way.[121]

This boundary-setting function is critical to state maintenance not only as a means of regulating competing versions of the law, but perhaps more importantly, by stabilizing the law's inevitable evolution. The state codifies its nomic identity to establish cultural referents via empowered constitutionalism.[122] However, the state never fully captures its nomos in a rigid formula.[123] Instead, the state,

120. This is not to say that text is the only way in which empowered constitutionalism creates common cultural referents. It merely points out that the Constitution's text serves this purpose in American constitutionalism.

121. *Cf.*, Strauss, *supra* note 6, at 879 (suggesting that the Constitution's meaning evolves through caselaw in a process much like the development of the common law). According to Strauss, the Constitution provides "focal points" that serve as rules of the game, so to speak, when constitutional disputes arise. *See id.* The Constitution thereby serves as a protocol for its own evolving meaning.

122. *See* BRUCE ACKERMAN, WE THE PEOPLE 160-63 (1991) (offering a popular account of how this process may occur through constituent assemblies).

123. *See id.* (asserting that effective constituent assemblies are most likely to exist in "constitutional moments" when the state is particularly focused on issues affecting the fundamental organization of a polity). Thus, a constituent assembly is likely to be more public-spirited and less politically selfish than other state bodies. *See id.* This suggests that the state's nomic conception is fluid.

when it has determined an initial set of constitutive aspirations, creates a constitution, written or unwritten, which fixes the aforementioned cultural referents.[124] These initial aspirations establish little as a matter of substance. Indeed, the aspirations initially set merely prescribe some starting points concerning societal priorities. The meaning of these priorities changes over time as judges, the citizens composing society, and other state actors progressively develop narratives that overlay these fixed cultural referents. While these narratives evolve constantly, the common constitutional referents that the narratives incorporate remain fixed. The common cultural referents thereby stabilize the evolution of constitutional meaning.

Empowered constitutionalism also exercises this stabilizing limitation on jurisgenesis within the state, as well as outiside of the state. Failure to examine intra-state jurisgenesis obscures a vital constitutional function: the subordination of jurisgenesis within the state to the state's own nomic self-conception.[125] State existence is jeopardized when empowered constitutionalism does not exist to stabilize the official version of the rule of law and to make it cohere internally. This is particularly true given that state actors often compete for power over the direction of state action. For example, Jim Crow presented a conceptual as well as geographical fissure in the state nomos built out of America's narratives of freedom.[126] American's legal order claimed to ensure the rights of all citizens, at least as a de jure, if not a de facto, matter.[127] However, in the South, to paraphrase Martin Luther King, the narratives of justice and

124. *See id.* (noting that public spirit uniquely qualifies a constituent assembly to establish constitutional provisions).

125. *See* COVER, ESSAYS, *supra* note 87 (arguing that the purpose of the law is to maintain order in society by regulating jurisgenesis). Cover did not explore the topic of intra-state jurisgenesis. He analyzed the law from a counter-statist perspective focused on the adversarial relationship between the communities that compose society and the government. Such a one-sided perspective recognizes narratives that compete *with the state*, while neglecting the existence of competing narratives *within* the state.

126. *See* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 22-29 (3d ed. 1974) (discussing segregation in America during the Jim Crow era).

127. *See id.* (tracing legal developments in the wake of Jim Crow).

freedom promoted segregation policies that made differential treatment based on skin color legal.[128]

This fracture in the state nomos threatened to create the kind of social crisis over legal meaning that empowered constitutionalism helps to prevent by forcing governments, as well as non-state proponents of rival legal orders, to conform their activities to the contours of a universally-shared legal meta-precept bounded by common cultural referents. Rival legal narratives may permeate these precepts with disparate meanings. However, the existence of shared precepts serves to focus rule comprehension, making arbitrary action more difficult on the government's part, and thus circumscribing the use of state force. This mediates the tension between law, social stability, and the myriad normative possibilities that both challenge and enrich the formation of any society.

For example, if the Warren Court had not invoked the power of judicial review to dismantle institutionalized segregation, it is not unreasonable to predict that African Americans would have widely and violently rebelled against their oppression.[129] Instead, the U.S. Supreme Court imposed its own narrative on this nation's legal regime, killing off Jim Crow's rival normative interpretation of the law.[130] The Warren Court thereby created a coherent and uniform nomos for the state with respect to race under the Equal Protection Clause of the Constitution's Fourteenth Amendment.

Outside of the state, constitutional boundary-setting delineates state authority from non-state dissent in interpretation of law. Cover's example of the Mennonite's amicus curiae brief to the U.S. Supreme Court in *Bob Jones v. United States*[131] articulated the effect

---

128. *See* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 83 (1964).

129. There is no doubt that many people fought to dismantle Jim Crow through both peaceful and violent means. However, at no point did this resistance to Jim Crow reach the point of a popular uprising that threatened the existence of the American state.

130. The point here is not that the Constitution enabled the Justices of the Warren Court to propagate democratic freedom in America. Indeed, as this article has noted, many would argue strongly that democratic freedom is still very much in question in America.

131. 461 U.S. 574 (1983). The example is taken from COVER, ESSAYS, *supra* note 87, at 121-27 (asserting that the structure of the Anabaptist nomos determines

of this boundary-setting. In the brief, the Mennonites argued in favor of their understanding of the First Amendment. The Mennonites interpreted the words of the First Amendment's Free Exercise and Free Association clauses in a different manner than did the government, reflecting the cultural narratives of the Mennonites' unique nomos. However, both the authoritative government interpretation and the Mennonites' rival understanding of the law referred to the salient value of religion and the right of association expressed by the text of the Constitution's First Amendment. These First Amendment rights therefore served as common cultural referents that created an imagined boundary between the state's "legitimate" interpretation of the law and the opposing interpretation of the Mennonites.

This type of boundary serves as an excuse for the state to commit jurispathy against dissenting interpretations of the law whenever nomic belief systems clash over the law's meaning. Just as jurisdiction separates judges from the violence of the law, the boundary also upholds the law's apparent neutrality by disguising the state's often arbitrary use of the law to impose control on society through force. Furthermore, common cultural referents perform an even more important function with respect to the maintenance of the nation-state.

3. Empowered Constitutionalism and the Post-Modern Nation-State

Nation-states are inherently unstable from a cultural perspective because they exist as arbitrary groupings of cultures.[132] Consequently, the essential challenge of nation-states is the consolidation of diverse cultures into single, relatively stable political units.[133] Making culture and polity congruent within one geopolitical body requires enabling the diverse citizens of nation-states to imagine themselves as part of a single community organized

---

the communities within it, and therefore the meaning of the principle of free exercise of religion enunciated in the U.S. Constitution).

132. *See* Gellner, *supra* note 96, at 286.

133. This cultural diversity includes the myriad political actors composing the state.

within a specified geographical space and beneath the aegis of a single state.[134]

Two factors complicate the effort to imagine the national community. First, the post-modern erosion of geopolitical and national-cultural borders hampers the nation-state's coherence as a community.[135] Ironically, the same factors that helped enable the rise of the nation-state through the ability to create "imaginary communities" have progressively helped erase national borders.[136] Advances in travel and telecommunications have made it

---

134. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 5-6 (1991) (arguing that nationalism, dedication to the nation-state as a fundamental unit of social organization, is a cultural invention). Anderson notes that nations are imagined entities because "the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion." *Id.* at 6. Nationalism arose toward the end of the eighteenth century in response to the complex interaction of social forces and technological innovations associated with the rise of modernity, which enabled people to imagine themselves as parts of large communities. *See id.* at 9. These factors helped create and magnify perceived political and cultural intra-connections with the nation-state. *See id.*

135. *See* ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 58 (1998) ("[p]ostmodernity is distinguished by a dramatic restructuring of capitalism in the postwar period, a reconstructing of labor and capital markets, the displacement of production relations to nonmetropolitan regions, the consolidation of mass communications in corporate conglomerates, and the pervasive penetration of electronic media and information technologies.").

136. *See, e.g.*, Richard Falk, *Revisioning Cosmopolitanism*, *in* FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 57-60 (Martha C. Nussbaum ed., 1996) (discussing the role that modern communications capabilities play in erasing national borders); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 915-17 (1996) (describing the impact of international legal agreements on national sovereignty); Oscar Schacter, *The Decline of the Nation-State and Its Implications For International Law,* 36 COLUM. J. TRANSNAT'L L. 7, 19-21 (1997) (explaining that international legal bodies need to balance popular sovereignty and the sustainability of individual states); William H. Lash, III, *The Decline of the Nation State in International Trade and Investment,* 18 CARDOZO L. REV. 1011 (1996) (addressing the decline of the nation state); Peter J. Spiro, *The Decline of the Nation State and Its Effect on Constitutional and International Law: New Global Potentates: Nongovernmental Organizations and the 'Unregulated Marketplace,'* 18 CARDOZO L. REV. 957 (1996) (examining nongovernmental organizations' role in the decline of the nation state); JOSEPH A. CAMILLERI AND JAMES FALK, THE END OF SOVEREIGNTY? (1992).

increasingly easy not only to establish social connections with other areas of the world, but to experience these connections physically as well.[137] Citizens gradually cease to understand themselves as "citizens," as they find new ways to understand their relationships with people in other parts of the world.[138] This broadened perspective has undermined the relevance of constructed national consciousness, the source of the nation-state's cultural stability.

Second, the nation-state's Enlightenment roots make it difficult to settle on national aspirations. Constitutions both reflect and alleviate this difficulty. For example, as Mark Tushnet has noted, post-Enlightenment states generally use constitutions both to structure their governments according to *particular* needs of the state and to commit the state to *universal* moral principles.[139] These bifurcated constitutive aspirations reflect the logical need for a government to concern itself with the specific community it represents and the pervasive influence of the Enlightenment's concern for universal values discussed earlier in this article.[140] For example, one place in which the U.S. Constitution expresses its commitment to universal values is in its Preamble, wherein "We the People of the United

137. *See* Iris M. Young, *Beyond Borders*, *in* A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 61-62 (Joshua Cohen et al. eds., 1999) (arguing that social and economic connections between citizens of the U.S. and the people of other countries are strong enough to form a "continuous society" between the United States and other states). This implies that the socioeconomic and cultural ties between the people of different nation-states are increasingly eclipsing geopolitical divisions.

138. *But see e.g.* MICHAEL IGNATIEFF, BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM 24-28 (1993) (describing the resurgence of nationalism and the nation-state over the last decade in view of ethnic conflicts in places like the Balkans and Chechnya). However, the general trend in global affairs still seems to point toward the decreasing cultural importance of nation-states. Indications of this decreasing cultural importance include the continued growth of regional conglomerations of nation-states in the formation of supra-national states such as the European Union and the continued importance of global multi-lateral organizations such as the United Nations.

139. *See* Tushnet, *supra* note 8, at 1330 (using Israel as an example of a nation-state's attempt to accommodate both universalism and particularism).

140. *See* Richard Warren Perry, *The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity,* 28 IND. L. REV. 547 (providing a helpful discussion regarding the relationship between the rise of the nation-state and the Enlightenment).

States" claim to have decreed the Constitution to uphold universal values, such as "Justice."[141] At the same time, the judiciary must apply the Constitution to the particular issues affecting Americans as citizens of a specific nation-state—the United States of America. American constitutionalism mediates the tension between universalism and particularism by articulating American particularism with respect to universal yearnings in the interpretation of the Bill of Rights.[142] Thomas Jefferson reflected this cosmopolitan formulation of American civic parochialism when he wrote, "[l]et this be the distinctive mark of an American, that in cases of commotion he enlists under no man's banner, but repairs to the standard of the law."[143]

However, the universalist-particularist tension is difficult to manage in countries that lack the wherewithal to settle on the shared constitutive aspirations necessary to establish common cultural referents. This inability can hamper the formation of empowered constitutionalism, which is critical to the maintenance of a coherent state nomos, perhaps ultimately threatening state maintenance. For example, Israel has struggled throughout its history with the question of whether to see itself as a secular liberal Jewish state or a religious state united under the Halachic code.[144] In a sense, proponents of

---

141. U.S. CONST. pmbl.

142. *See* BENJAMIN R. BARBER, *Constitutional Faith*, *in* FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 32 (Joshua Cohen ed., 1996) (citing an appeal by Supreme Court Justice Frankfurter for Americans to be bound together by the universal ideals expressed in the Bill of Rights); *see also* Tushnet, *supra* note 8 (providing examples of when Supreme Court Justices have embraced and rejected cosmopolitan readings of the Constitution).

143. BARBER, *supra* note 142, at 32.

144. *See* DANIEL J. ELAZAR, *Constitution-Making: The Pre-Eminently Political Act*, *in* CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 20-21(Daniel J. Elazar ed., 1990); Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact,* 21 CAP. U. L. REV. 1, 20-21 (1992) (describing the debate regarding drafting a formal Israeli constitution and Bill of Rights); ABRAMOV, *supra* note 19 (relating the development of formal Israeli law); GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES (1993); Donna E. Arzt, *Religious Freedom in a Religious State: The Case of Israel in Comparative Constitutional Perspective*, 9 WIS. INT'L L.J. 1, 8-19 (1990) (discussing the intersection of religious and secular law in Israel); CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, 2 RELIGION AND

both groups are dedicated to particularism and universalism. Secular liberal Jews are Jewish nationalists who want to anchor their brand of liberal universalism in the physical site of the Israeli nation-state.[145] Religious Jewish nationalists believe that Jewish law under the Torah should not only root itself in Israel, but should also apply beyond the borders of Israel to Jews living throughout the Diaspora.[146]

However, in their most extreme forms, the two ideologies differ regarding the degree of cosmopolitanism inherent in their respective worldviews. Generally speaking, at their most extreme, secular liberal Jews believe that liberal Israeli constitutive values should take root in the geopolitical particularity of Israel as a function of propagating democracy globally without religious, ethnic, or national distinction. On the other hand, religious Jews are concerned with the relevance of the Halachic code only to the lives of other Jews, regardless of where those Jews may reside. Secular liberal Jews emerge as relative cosmopolitans in this comparison, while religious Jews are relatively particularist in orientation. As discussed in greater detail in Part II, the tension between universalist and particularist impulses[147] has stymied Israel's efforts to develop a coherent set of

---

POLITICS IN ISRAEL (1984); STUART A. COHEN & ELIEZER DON-YEHIYA, COMPARATIVE JEWISH POLITICS: CONFLICT AND CONSENSUS (1986).

145. *See* Arzt, *supra* note 144, at 12-14 (explaining conflicts between liberal and orthodox Jews).

146. *See id.* A strong example of this is the manner in which Israeli orthodox Jewish parties have attempted to define who is truly "Jewish" so as to prevent non-sanctioned Jews from assuming Israeli citizenship through the Right of Return upheld by Israeli law. The Right of Return guarantees automatic Israeli citizenship to Jews emigrating to Israel from the Diaspora. The imposition of an orthodox Jewish definition of Jewish authenticity on Israeli law would intentionally help shape Jewish identity beyond the borders of Israel.

147. *See* PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY xiii (1997) (describing the particularist-universalist tension in Israel as a struggle between "catastrophe Zionism" and "utopian Zionism"). Lahav defines these categories by stating that, "[f]or catastrophe Zionists, Israel serves primarily as a safe haven from repetition of the various catastrophes that have befallen Jews in the past. In contrast, utopian Zionism stands for the proposition that Israel should be constructed as a model state." *Id.*; *see also* Donna E. Arzt, *Growing a Constitution: Reconciling Liberty and Community in Israel and the United States,* 19 L. & SOC. INQUIRY 253, 257 (1994) (discussing the Holocaust as a form of particularism in Israeli constitutionalism); Barak Cohen, *Democracy and the Mis-Rule of Law: The*

constitutive aspirations in the establishment of empowered constitutionalism.[148] Consequently, the Israeli state's nomic self-conception is fragmented and uncertain.

Empowered constitutionalism helps manage the nation-state's struggle between universalist and particularist yearnings by using shared cultural referents to unite the myriad communities composing nation-states beneath the aegis of common constitutive aspirations reflecting the state's nomic self-conception. This does not necessarily mean that citizens commonly share and uphold these constitutive aspirations. It merely requires the state nomic self-conception to reflect what citizens collectively imagine as unifying constitutive principles. Thus, it does not matter whether the proverbial Framers of the U.S. Constitution spoke for the majority of Americans when the Framers enacted the Constitution. What is important is that the Framers successfully agreed upon constitutional principles that were crystallized into shared cultural referents via the Constitution, and that Americans believe in the abstract notion that these referents define Americans as Americans.[149]

The difficulty with this process lies in creating a situation in which the state can agree on principles worthy of codification as cultural referents. Paradoxically, it is questionable whether a nation-state may

---

Failure of the Israeli Legal System to Prevent the Torture of Palestinians in the Occupied Territories, 12 IND. INT'L & COMP. L. REV. 75 (2001) (assessing the impact of national security in Zionist cultural narratives); Tushnet, *supra* note 8, at 1330-41 (elaborating on Lahav's categories by offering the additional possibility of a model *Jewish* state that combines aspects of particularist-universalist ideologies); LIEBMAN & DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL, *supra* note 144, at 48-51, 54-56 (discussing the universalism of Labor Zionism versus the particularism of Holocaust-based particularism in Israeli "civil religion"). While this aspect of the particularist-universalist tension affects Israeli constitutionalism, the conflict that has directly hampered the growth of Israeli constitutionalism is the struggle over Israel's identity as a religious versus secular state.

148. *See* discussion *infra* Part II.A.1 (discussing Israeli cultural ambivalence and constitutional reluctance).

149. *See* TUSHNET, *supra* note 54, at 50-53 (noting that "[a]t the level of national self-definition, not race, not religion, not ethnicity, but a commitment to constitutional principles defines the people of the United States"); *see also* BARBER, *supra* note 142, at 32 (discussing the development of American patriotism). Echoing Tushnet's point, the late Justice Felix Frankfurter declared that American citizenship is a type of "fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the constitution." *Id.*

survive its inherent instability without empowered constitutionalism, and yet a nation-state must enjoy a modicum of cultural stability to establish empowered constitutionalism in the first place. How does a nation-state achieve or compensate for the absence of this antecedent stability? Part II applies the insights gained in Part I to Israel's constitutional genesis to evaluate the possibility that textualism may help facilitate the stability necessary as a precondition to the establishment of empowered constitutionalism.

II. WRITTEN-NESS AND ISRAELI CONSTITUTIONALISM

Textualism is the belief that constitutional principles should grow organically from the Constitution's text.[150] Originalism is the related view that original understandings of the Constitution's text traceable to the document's Framers should control constitutional interpretation.[151] Both views regard written-ness as a constitutional virtue, demanding formal adherence to the written words of the Constitution.[152] These linked perspectives have historically exerted and continue to exert a powerful influence on debates over constitutional interpretation.[153]

David A. Strauss presents a compelling descriptive and normative alternative to these viewpoints.[154] He argues that the Constitution's text is secondary to the judiciary's evolving understanding of the Constitution through precedent.[155] Contrary to the various factions of textualists and originalists representing the prevailing norm of

150. *See* Strauss, *supra* note 6, at 881-82 (examining the use of the Constitution's text in judicial decision making).

151. *See id.* at 882 (discussing the role of the Framers' intentions in constitutional interpretation).

152. *See id.* at 879 (tracing the views of various constitutional scholars as to methods of interpretation).

153. *See id.* at 877-79 (offering specific examples of textualist and originalist critiques and defenses of constitutional adjudication from the liberty-of-contract, *Lockner* era, and the post-Warren Court era of the U.S. Supreme Court).

154. *See* Strauss, *supra* note 6 (evaluating traditional theories of constitutional interpretation).

155. *See id.* at 878 (stating the view of many that principles of constitutional law must be traced to constitutional text).

constitutional interpretation, Strauss maintains a pragmatic regard for the Constitution's text while rejecting any inherent value in upholding the Constitution's language as the inviolable bedrock of American constitutionalism.[156]

According to Strauss, the specific words and original meanings of the Constitution play at most a minor role in the practice of contemporary constitutional interpretation.[157] He argues that constitutional adjudication primarily relies on settled principles of law that are divorced from the plain language of the document.[158] In fact, Strauss notes that some principles of constitutional interpretation squarely contradict the Framers' original understandings of the Constitution. For example, debates over the Equal Protection Clause focus on the principles behind the Court's decision in *Brown v. Board of Education*,[159] rather than on the words of the Constitution.[160] Strauss's main point is that the progressively changing understanding of the legal significance of constitutional language via adjudication and judicial adherence to the principle of *stare decisis* in a process akin to the development of common law has effectively, if not entirely, displaced slavish obsession with the Constitution's plain language and original meaning.[161]

On the other hand, Strauss's "common law constitutional" approach does leave some room for textual influence on what Strauss identifies as rational traditionalist and conventionalist grounds. Briefly, rational traditionalism is the practical adherence to the Constitution's text as a set of well-tested judgments that have

156. *See id.* at 879 (using a common law approach as an example of an interpretive analytic that better restrains judges, is more justifiable, and provides a better record of our practices than textualism or originalism).

157. *See id.* at 883-84 (examining the role of text in the evolution of constitutional doctrine).

158. *See id.* (providing as an example of this phenomenon the separation of church and state, an accepted principle that is not a necessary implication of the Establishment Clause).

159. 347 U.S. 483 (1954).

160. *See* Strauss, *supra* note 6, at 877, 883 (discussing the limitations of decision-making based solely on the written word of the Constitution).

161. *See id.* at 928-29 (explaining that precedent allows judges to balance the spirit of the Constitution's text with a sense of moral rectitude and evolving democratic traditions).

remained valid under changing conditions.[162] Such judgments matter less because of their age than for their general reliability as well-tested legal principles of the highest order.[163] However, where a prior judgment makes less sense than a new idea, the old judgment may be cast aside with relative ease such that "revolutionary change remains possible."[164]

Similarly, conventionalism is the pragmatic notion that "it is more important that some things be settled than that they be settled right."[165] Conventionalism presupposes that, at best, the Constitution's text may provide generally precise and therefore useful guidance. Where the Constitution's text fails to provide such guidance, adherence to the text at least narrows the range of interpretive discussion, enhancing the efficiency of constitutional discourse.

The interaction of the forces of rational traditionalism and conventionalism produces a vision of the Constitution as a protocol, as a general outline for the practical evolution of the Constitution's own meaning. This perspective is valuable because rather than seeing the Constitution as a universal, basically unchanging scheme demanding absolute adherence, Strauss's view recognizes the *living* value of constitutional text. The perspective thereby overcomes the essential problem of originalism: the fundamental lack of relevance of the judgments of people (the Framers) who lived long ago in a society vastly different from our own. Strauss's common law constitutionalism allows the Constitution to constantly reevaluate itself and evolve, using the Constitution's text as a framework and starting-point. It also avoids the inherent challenge of textualism: what to do when constitutional text neither squares with society's changing needs nor makes plain sense? This problem does not arise under common law constitutional interpretation, because under

---

162. *See id.* at 892 (positing that under this view, although the Framers do not rule us today, their judgments were based on serious deliberation).

163. *See id.* (arguing that un-amended parts of the Constitution have been implicitly accepted by many generations and thus should not be haphazardly swept aside). These portions should be changed only with proof that they are mistaken, or that they constantly fail. *Id.*

164. *Id.* at 895.

165. *Id.* at 907.

Strauss's approach, constitutional text is less meaningful than the changing structure of the legal precedent built over that text.

Strauss's understanding of constitutional interpretation harmonizes with the description of empowered constitutionalism as a cultural stabilizer presented in Part I.[166] Constitutional interpretation must evolve over time to maintain the relevance of the common cultural referents that are pivotal to the stabilizing quality of empowered constitutionalism.[167] Strauss's notion of common law constitutional interpretation thus makes sense as a practical, sound analytic. Indeed, as Strauss concludes, perhaps we should be less concerned with the written-ness of constitutions as a measure of the strength of constitutional regimes, than with the maturity and entrenchment of constitutional traditions in a given society.[168]

Or should we? As already suggested, the presence of a stable set of constitutional aspirations is an essential ingredient in the development of the shared cultural referents that lie at the heart of empowered constitutionalism.[169] In light of this understanding, Strauss's concept of common law constitutionalism begs the question: is it possible to develop a mature constitutional tradition without some formalist commitment to text? Could this text serve as a source of normative authority with the legitimacy necessary to

166. *See supra* notes 31-149 and accompanying text (exploring the concept of empowered constitutionalism).

167. However, where Strauss emphasizes the importance of the facilitation of constitutional discourse, the theory of empowered constitutionalism developed in Part I focuses upon stability and hierarchies of legal interpretation as a means of state cultural regulation. This is most evident in the contrasting virtues of conventionalism at work in Strauss's theory versus conventionalism's role in the notion of empowered constitutionalism presented in this article. Strauss upholds conventionalism primarily because it enhances constitutional dialogue by narrowing interpretive options. However, conventionalism is important in empowered constitutionalism because conventionalism limits the normative possibilities of legal meaning, thereby helping to enable cultural stability-cum-state control of society.

168. *See* Strauss, *supra* note 6, at 879-80 (expressing a preference for a method of constitutional interpretation that focuses less on texts and more on the entrenchment of constitutional traditions).

169. See *id.*; *supra* notes 36-60 and accompanying text (exploring the democratic ideals embodied in the Constitution).

bridge the gap between inchoate constitutional yearnings and stable constitutive aspirations?

One way to evaluate these questions is by examining the constitutional experience of another liberal democratic state. Israel provides a particularly useful example in such an investigation by turning Strauss's central assumption regarding constitutional development on its head.[170] Strauss's analysis takes for granted that somebody has already written a constitution and that constitutionalism develops by *departing* from this initial textual foundation.[171] In contrast, Israeli judges have developed Israeli constitutionalism through adjudication on the path *toward* the establishment of a textual foundation to a constitution. Thus, examination of the Israeli experience should provide a fresh understanding of the importance of written-ness to empowered constitutionalism.

Part II examines these issues by reviewing the history of Israeli constitutionalism. This contentious history reflects the struggle between liberal secular-universalist and religious-particularist types of Jewish nationalism in the development of an Israeli national consciousness. Despite this instability, two watershed cases decided by the Israeli Supreme Court have proven decisive in the development of empowered constitutionalism in Israel: *Kol Ha'am*[172] and *Mizrachi Bank.*[173] The two cases are instructive in their use of text as a means of establishing empowered constitutionalism.

---

170. There is a strong argument that Israel is an ethnic democracy whose liberal values extend mostly to Jews. *See* Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity,* 13 GEO. IMMIGR. L.J. 233, 271 (1999) (defining ethnic democracy in Israel as a situation in which "Israel's Arab citizens receive full civic and political rights, but have no access to the 'common good' foundations of the Jewish state"). For the purposes of this article, an ethnic democracy represents a sufficient expression of liberal democratic principles to permit comparative analysis with American constitutionalism.

171. *See generally* Strauss, *supra* note 6 (examining various methods of interpreting the U.S. Constitution).

172. Kol Ha'Am, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: 1948-1953, at 90.

173. Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 764.

A. ISRAELI CONSTITUTIONAL HISTORY

1. Cultural Ambivalence and Constitutional Reluctance

Israeli constitutional history is marked by a cycle of promise, compromise, and ambivalence.[174] This unsettled condition reflects the cultural instability of Israeli society. This instability has hindered the Israeli development of the common cultural referents that undergird empowered constitutionalism. The Declaration of the Establishment of the State of Israel (the Declaration of Independence) promised that an Elected Constituent Assembly would formally adopt a constitution for Israel no later than October 1, 1948.[175] However, the Israeli Constituent Assembly was not elected until January 1949.[176] The Constituent Assembly ultimately found it impossible to establish a consensus regarding the language of constitutional provisions.[177]

This reluctance to formally declare a written constitution that would capture Israel's constitutive aspirations stemmed from a

---

174. *See, e.g.*, The Honorable Dalia Dorner, *Does Israel Have a Constitution?*, 43 ST. LOUIS U. L.J. 1325 (1999) (providing a general history of Israeli constitutional evolution); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585 (1996) (discussing the role of courts in developing Israeli law); Amos Shapira, *Why Israel Has No Constitution, But Should, And Likely Will, Have One*, 37 ST. LOUIS U. L.J. 283 (1993); Zeev Segal, *A Constitution Without A Constitution*, 21 CAP. U. L. REV. 1 (1992); Daphne Barak-Erez, *From an Unwritten To A Written Constitution: The Israeli Challenge In American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995); Z. Sigal and A.S. Rehany, *The Promised Constitution of the Promised Land: The Israeli Constitutional Experience*, DENNING L.J. 63 (including a particularly detailed account of the Harari Resolution); Ran Hirschl, *Israel's "Constitutional Revolution": The Legal Interpretation of Entrenched Civil Liberties In An Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998) (exploring Israeli's constitutional revolution with regard to labor rights); Bernard Susser, *Toward a Constitution For Israel*, 37 ST. LOUIS U. L.J. 939 (1993); GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES (1993); Arzt, *supra* note 147.

175. ISRAEL'S WRITTEN CONSTITUTION: VERBATIM ENGLISH TRANSLATION OF THE DECLARATION OF INDEPENDENCE AND OF THE BASIC LAWS, CONSOLIDATED AND UPDATED AS OF MARCH 1, 1995 6-8 (1995).

176. *See* sources cited *supra* note 174.

177. *See id.*

variety of factors. First, Israeli law in the period immediately following the dissolution of the British Mandate inherited the received tradition of British law, which did not then constitutionally protect human rights.[178] This discouraged the Israeli perception that their new state urgently required a constitution.[179]

Furthermore, as socialists, revolutionaries, and pragmatists, the leadership of the new state had little regard for a liberal democratic commitment to the rule of law.[180] Many of Israel's early leaders, particularly the leaders of Mapai, the Jewish Socialist Party that dominated Israeli politics until 1977,[181] were committed socialists.[182] These leaders generally viewed justice as ultimately indeterminate and the law as a socially constructed tool useful only to advance the state's sociopolitical agenda.[183] This ambivalence regarding the law is reflected in the fact that the Israeli government did not treat the judiciary as a co-equal branch of government until 1953.[184]

Also, Israeli leaders, as Zionists, had for decades fought against a status quo that had oppressed Jews globally.[185] In particular, these leaders had recently overthrown the British Mandate.[186] The leaders

178. *See* Shapira, *supra* note 174, at 285-86 (explaining that Israeli law inherited much from the British mandate). Under the Human Rights Act, the United Kingdom developed constitutional legislation that protected human rights. *Id*; *see also* Susanna Frederick Fischer, *Rethinking Sullivan: New Approaches In Australia, New Zealand, and England*, 34 GEO. WASH. INT'L L. REV. 101, 140-43 (2002) (explaining that British law ultimately recognized and protected human rights under the Human Rights Act of 1998).

179. *See* Shapira, *supra* note 174, at 286 (exploring the effect of British law on the development of Israeli law).

180. *See id.* (positing that a written constitution would hamper the political efforts of the Knesset).

181. *See generally* TOM SEGEV, THE SEVENTH MILLION (1993) (providing an in-depth discussion of the development of Israeli politics). In 1977, *Herut,* Israel's right-wing party, rose to power under Menachem Begin. *Id.*

182. *See* LAHAV, *supra* note 147, at 86-88.

183. *See id.* at 86.

184. *See id.* (explaining that in 1953, the Knesset passed a bill formally granting the judiciary independence from the rest of the state apparatus).

185. *See* SEGEV, *supra* note 181; LAHAV, *supra* note 147 (describing the attitude of Zionist leaders).

186. *See* SEGEV, *supra* note 181 (stating that many Israeli leaders had actually fought as terrorists against the British occupiers of Palestine); MENACHEM BEGIN,

were thus disinclined to perceive order as a necessary virtue in governance. To the contrary, as one commentator has remarked, the Israeli national character was marked by "deep streaks of lawlessness."[187] The pragmatic assessment that the state would require the maximum freedom available to defend the new country against foreign threats reinforced national "lawlessness."[188] This pragmatism expressed itself as a deep-seated disdain for the due process of law and civil liberties.[189] David Ben-Gurion, Israel's first Prime Minister, reflected the synergistic impact of these factors during a debate in the Knesset regarding the passage of emergency state powers that threatened civil liberties:

> [e]very jurist knows how easy it is to weave juridical cobwebs to prove anything and refute anything . . . . As a [former] law student I know that no one can distort any text and invent farfetched assumptions and confusing interpretations like the jurist . . . . We need recognition of the reality and knowledge of the facts, and this should be decisive, not juristic, legalisms.[190]

However, the primary source of Israeli reluctance to establish a constitution lay in the new state's ambivalence regarding Israeli self-identity. This ambivalence had two aspects. One argument against Israel's readiness for a constitution lay in Israel's ongoing commitment to what a Zionist might call the "in-gathering of Jewish

---

THE REVOLT (1951) (offering the late Israeli Prime Minister Menachim Begin's personal account of his role as a leader of the Irgun Zvai Leumi, which had fought against the British Mandate).

187. LAHAV, *supra* note 147, at 86.

188. *Id.*; *see* Shapira, *supra* note 174, at 286 (stating that Israel's unresolved national security problem has made many Israelis apprehensive about writing a constitution in a situation where the very physical survival of the nation has not yet been guaranteed and is constantly challenged).

189. *See* Shapira, *supra* note 174, at 286 (noting that writing a constitution in this tumultuous time would mean giving the government, and especially the military, far reaching powers, which were bound to encroach upon human rights and fundamental freedoms); Arzt, *supra* note 147, at 256 (stating that David Ben-Gurion proposed establishing an Israeli "Bill of Obligations," rather than a Bill of Rights) Instead of stressing the importance of citizens' rights, many pragmatic Israeli leaders favored a legal system that emphasized the duties of citizenship. *See id.*

190. LAHAV, *supra* note 147, at 87.

exiles" from the Diaspora.[191] Many influential political leaders of the day held that it did not make sense to prematurely commit the nascent state to constitutive principles given that the Zionist project of importing world Jewry from the Diaspora to Israel had scarcely begun.[192] Indeed, Jewish leaders expected forthcoming torrents of Diaspora Jews emigrating to Israel.[193] These leaders thought that it was prudent to wait to establish an Israeli constitution until the bulk of these immigrants had arrived in Israel. This would supposedly allow the newcomers to share in the process of helping the new state decide upon a constitution that would bind all Israeli citizens, old-timers and newcomers alike.[194] However, this was not the best argument for repeatedly postponing the creation of an Israeli constitution in light of the fact that only a relatively small number of the Jews expected to ultimately become Israeli citizens actually emigrated to Israel.[195]

A stronger reason for Israel's difficulty establishing a national self-identity was the question of whether Israel should be a secular state dedicated to liberal democratic values or a Jewish state that should exist only under the religious mandate of the Halachic Code.[196] The most obvious expression of this conflict lay in the

---

191. Shapira, *supra* note 174, at 285.

192. *See id.* (recounting the hypothesis that at the time of the declaration of independence, Israeli citizenry comprised only a small portion of the potential future residents).

193. *See id.* (noting that Israel expected a large immigration boom, and that in fact hundreds of thousands of people immigrated to Israel in the late 1940s and early 1950s).

194. *See id.* (stating that it would be imprudent and politically illegitimate to write a constitution that would then be difficult to change in the future, without giving the entire potential population a fair opportunity to participate in the process).

195. *See* SEGEV, *supra* note 181 (explaining the disappointment of many Israeli Zionist leaders at the fact that only a relatively small number of Diaspora Jews eventually made *aliyah*—the return to Israel from exile in the Diaspora).

196. *See* Sapir, *supra* note 3, at 633-34 n.53 (describing political divisions in Israel's early constitutional development). This is not meant to suggest that the schism had to express itself in zero sum terms. A basically secular Israeli state that officially recognizes and upholds certain distinctively Jewish religious ideas was and is a constitutive possibility for Israel. However, the debate generally polarized into two distinct and antithetical camps.

conflicting views of religious versus secular political parties.[197] Religious political parties objected to a constitution that relied on "the people," rather than God, as an ultimate source of legitimacy.[198] On the other hand, secular political parties objected to a constitution that rested upon divine sovereignty.[199] These clashing views originated in the development and subsequent fragmentation of Zionist thought in the nineteenth century, which pitted liberal secular Zionists focused on cultural nationalism against religious Zionists dedicated to a religious nationalist identity.[200]

The Constituent Assembly reacted to the impasse formed by the collision of these related yet divergent worldviews by declaring its inability to create a constitution and the consequent passage of

197. *See id.* This ambivalence about identity resonates with the particularist-universalist tension at the heart of the nation-state. *See* discussion, *supra* Part I.B.3.

198. *See id.* (addressing the political dissent between religious and secular parties); *see also* ABRAMOV, *supra* note 19; COHEN & DON-YEHIYA, *supra* note 144 (examining the religious aspects of Israeli constitutionalism); LIEBMAN & DON-YEHIYA, *supra* note 144.

199. *See* Sapir, *supra* note 3, at 633-34 (asserting the political views of the non-religious parties).

200. *See* ABRAMOV, *supra* note 19, at 55-81 (discussing the rise of Jewish nationalism). Historically speaking, it is possible to divide Zionism, or Jewish nationalism, into four camps. The ideological cleavages between these groups created cultural schisms that continue to destabilize Israeli society. Dr. Theodor Herzl, often celebrated as the ideological founder of the Israeli state, founded political Zionism through the World Zionist Organization. Herzl's Zionism was secular, liberal, and supported primarily by Western European Jews. Its basic premise was that the lack of a nation-state resulted in the oppression of Jews throughout the Jewish Diaspora. In contrast, Ahad Ha'Am was supported primarily by Eastern European Jewish members of the World Zionist Organization. Ahad Ha'Am rejected religious nationalism, but believed in the necessity of promoting a "Jewish spirit," which included an appreciation of the Jewish religion as an expression of Jewish culture. Alternatively, Mizrahi was a worldwide organization composed of Orthodox Jewish members of the World Zionist Organization. Mizrahi supporters believed in the importance of the establishment of an Israeli state under the Halachic Code. However, Mizrahi believed that cooperation was necessary among the various Zionist factions, secular and religious, to ensure the establishment of a Jewish state. Finally, Agudat Yisrael was composed of extreme Orthodox Jews who believed in the establishment of a Jewish state under the Halachic Code, but who rejected cooperation with secular Zionists and Mizrahi. The group was created by Mizrahi supporters who had resigned in protest from the World Zionist Organization.

Israel's first legislative act, the Transition Law of 1949.[201] Under the Transition Law, the Constituent Assembly changed its name to the "Knesset" and declared itself Israel's legislative body.[202] David Ben-Gurion, Israel's first Prime Minister, subsequently charged the first Knesset with drafting Israel's constitution.[203]

The Knesset struggled for a year with the same issues that had beset the Constituent Assembly's constitutional attempts.[204] Mapam, the Israeli left-wing party, formed an alliance with the right-wing Herut party and the centrist General Zionist party in support of a constitution.[205] However, Mapai, the political party then dominating the Knesset, was unwilling to establish a constitution because it feared that a constitution would jeopardize the party's fragile coalition government, which included religious parties opposed to a constitution.[206] Finally, the Knesset accepted the fact that it could not agree on a constitutional formulation capable of bridging the Israeli polity's divided self-identity.[207] The Knesset responded to the impasse by passing the Harari Resolution in 1950.[208]

The Harari Resolution was Israel's defining act of constitutional ambivalence. The Harari Resolution endorsed the establishment of a constitution in piecemeal fashion through the regular passage of

---

201. *See* Hofnung, *supra* note 174, at 588 (discussing the differing political views of religious and secular parties, which prevented the groups from coming to a consensus on the language of the constitution).

202. *See id.* (discussing the establishment of the Knesset).

203. *See* Susser, *supra* note 174, at 940 (outlining the obstacles to adopting an Israeli constitution).

204. *See id.;* Hofnung, *supra* note 174, at 588 (addressing the Knesset's efforts to bridge the gap between the contrasting views of the religious and secular parties).

205. *See* Sapir, *supra* note 3, at 633-34 n.53 (examining the formation of Israeli political camps).

206. *See id.*; Hofnung, *supra* note 174, at 588; Susser, *supra* note 174, at 940 (discussing the coalition between the Mapai and Orthodox religious parties).

207. *See* Susser, *supra* note 174, at 940 (asserting the reasoning behind the Knesset's ultimate decision not to draft a constitution).

208. *See* Sapir, *supra* note 3, at 634 (indicating that the Harari Resolution represented a political compromise for the Knesset); *see also* ISRAEL'S WRITTEN CONSTITUTION, *supra* note 175 (providing the text of the Harari Resolution).

"Basic Laws."[209] The Knesset intended each Basic Law to serve as an independent, proto-constitutional law that the Knesset could ultimately combine into a unified, written constitution at an unspecified future date.[210] The Resolution thus allowed the Knesset to avoid composing a formal constitution, which could jeopardize the fragile stability of the Israeli polity, while at the same time retaining the exclusive power to declare a constitution.[211]

Until 1992, the Knesset had passed nine Basic Laws that mainly address the powers invested in the branches of government.[212] None of these nine Basic Laws addresses the protection of civil rights founded on liberal democratic principles, nor are the nine truly supra-legislative.[213] A few of these Laws are "entrenched;" the Knesset can only modify them through an absolute voting majority consisting of sixty-one of the one hundred twenty members of the

---

209. *See* Hofnung, *supra* note 174, at 588 (outlining the role of the Basic Laws in the eventual creation of an Israeli constitution).

210. *See id.* (examining the enactment of the Basic Laws and their intended role).

211. *See* LIEBMAN & DON-YEHIYA, *supra* note 144; COHEN & DON-YEHIYA, *supra* note 144; Sapir, *supra* note 3, at 619-34 (discussing the constitutional dimension of the so-called "status quo" doctrine in Israel). Some commentators credit the status quo doctrine with enabling the Israeli political system to resolve secular-religious conflict through relatively peaceful means. *See id.* at 625. The doctrine entails a permanent state of ambivalence in the Israeli polity regarding the question of whether the Israeli state is primarily religious or secular. *See id.* at 627-29. The doctrine maintains this ambivalence by preserving a collection of formal and informal arrangements regarding religion and state, thus allowing the Israeli state to avoid directly confronting the question of its cultural basis. *See id.* at 619-20. Among other things, these arrangements include the grant of exclusive jurisdiction to religious courts over matters of personal status and state observance of Jewish religious holidays. *See id.* at 620-21.

212. *See* Hofnung, *supra* note 174, at 588 n.10 *citing* GOVERNMENT OF ISRAEL (SELECTED READINGS) 991-1056 (Yitzhak Galnoor & Menachem Hofnung eds., 1993) 991-1056 (Hebrew) (providing a list of basic laws including Basic Law: the Knesset, Basic Law: Lands of Israel, Basic Law: The President, Basic Law: National Economy, Basic Law: The Army, Basic Law: Jerusalem the Capital of Israel, and Basic Law: State Comptroller); *see also* ISRAEL'S WRITTEN CONSTITUTION, *supra* note 175 (listing the Basic Laws in their entirety).

213. *See* Barak-Erez, *supra* note 174, at 314 (asserting that the Basic Laws sought to define the form of government and its powers rather than to protect civil rights); Susser, *supra* note 174, at 940 (indicating that the Basic Laws lack "special legal standing" that distinguishes them from "normal legislation").

Knesset.[214] However, the Knesset can abrogate or modify the majority of the Basic Laws via ordinary legislative procedure.[215] More importantly, none of these Basic Laws confers upon the judiciary the right to review and abrogate legislation for violating the Basic Laws.[216]

However, in a 1992 "constitutional revolution," the Knesset passed two new Basic Laws that greatly advanced the development of empowered constitutionalism in Israel—Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.[217] The two 1992 Basic Laws hold increased constitutional significance with respect to empowered constitutionalism for two reasons.[218]

---

214. *See* Susser, *supra* note 174, at 940 (discussing some provisions of the Laws that have achieved special status).

215. *See* Hofnung, *supra* note 174, at 594-97 (discussing the Knesset's power to enact or amend legislation); ISRAEL'S WRITTEN CONSTITUTION, *supra* note 175 (expressing the Knesset's sovereign power to amend legislation).

216. *See* Hofnung, *supra* note 174, at 594-95 (examining the limited power of judicial review of legislation under the earlier Basic Laws).

217. *See* Barak-Erez, *supra* note 174, at 327 (discussing the political development and potential meaning of these two Basic Laws); Hofnung, *supra* note 174, at 596 (examining the Knesset's repeal of The Basic Law: Freedom of Occupation on March 9, 1994, and its replacement by a Basic Law covering the same subject matter and with the same title). The only substantive change in the Basic Law: Freedom of Occupation, was the repeal, under pressure of religious parties, of the provision stating that the Law could only be altered by an absolute majority of the Knesset. *See id.* This was replaced by a balancing test. *See id.* at 595. The Knesset also passed the Basic Law: the Government in 1992. *See id.*; *see also* Susser, *supra* note 174, at 944 (describing the Basic Law: the Government in 1992) The Basic Law: the Government holds little constitutional importance relative to the two other Basic Laws passed in 1992 for two reasons. First, the Basic Law: the Government was not actually enacted until 1996. *Id.* Therefore, it did not assume full significance until after the enactment of the other two Basic Laws passed in 1992. *See id.* Second, it did not represent anything particularly new with respect to the evolution of Israeli empowered constitutionalism; it merely made relatively minor structural reforms in Israeli government. *See* Barak-Erez, *supra* note 174, at 315 (describing the Basic Law: The Government). The structural component of Israeli democracy had already been well defined by the seven Basic Laws passed by the Knesset before 1992. *See id.* However, the protection of civil rights offered by the two other 1992 Basic Laws was not previously addressed by the Knesset. *See id.*

218. *See infra* notes 226-240 and accompanying text (examining the significance of the Laws' express protection of civil rights and protection from modification).

First, they represent a nascent Israeli Bill of Rights because they are the first of the Basic Laws to explicitly protect civil rights.[219] The two Basic Laws protect the rights of state citizens and residents with respect to the unhindered pursuit of professional occupations, freedom of movement, due process of law, life, property, privacy, and human dignity.[220] Second, the two Basic Laws have stronger supra-legislative powers than previously enacted Basic Laws.[221] While neither Basic Law is entrenched against ordinary parliamentary modification, both Laws contain special provisions protecting them against modification.[222] Section 8 of the Basic Law: Human Dignity and Liberty prevents modification of this Basic Law without satisfaction of a balancing test.[223] The Section 8 balancing test prevents the infringement of any right protected by the Basic Law "except by a Law appropriate to the ethical values of the State of Israel, which has a valid purpose, and then to an extent that does not exceed necessity, or under an aforesaid Law by virtue of an explicit authorization in it."[224] Section 4 of the Basic Law: Freedom of Occupation contains a similarly-worded provision designed to prevent the untested modification of that Basic Law.[225] Thus, both of these Basic Laws may only be modified or abrogated by another Basic Law that satisfies a broad requirement of agreement with the "values of the State of Israel."[226]

---

219. *See* Barak-Erez, *supra* note 174, at 323 (outlining the process by which Israel constitutionalized human rights).

220. *See* Hirschl, *supra* note 174, at 430 (discussing the specific rights protected by these two basic laws); ISRAEL'S WRITTEN CONSTITUTION, *supra* note 175, at 10-12 (containing the translated text of the Basic Laws).

221. *See* Barak-Erez, *supra* note 174, at 328-29 (outlining the amendments to the Laws that prohibit the enactment of statutes that would infringe upon the rights and freedoms protected by these Laws).

222. *See* Hirschl, *supra* note 174, at 430 (examining the limitation clauses in both laws, which forbid "the infringement of the declared rights").

223. *See* Hofnung, *supra* note 174, at 595 (discussing the Law's provision protecting it from infringement by other legislation).

224. ISRAEL'S WRITTEN CONSTITUTION, *supra* note 175, at 10.

225. See *id.* at 12 (expressing a limit on infringing legislation).

226. *See* Dorner, *supra* note 174, at 1333 (asserting that the two Basic Laws also codify Israel's dualist liberal-religious identity while emphasizing the preeminence of liberal values in a distinctly Jewish state). This is best exemplified by the

The fact that the Israeli judiciary ultimately holds responsibility for evaluating subsequently passed Basic Laws against this highly subjective norm imbues the two new Basic Laws with a previously unrealized supra-legislative potential for judicial review.[227] However, this proto-constitutional legislation was not enough on its own to establish empowered constitutionalism in Israel,[228] because the Israeli judiciary still lacked an explicitly declared power to review legislation in light of the Basic Laws.[229] Establishing empowered constitutionalism in Israel ultimately required a formal commitment to textual authority in Israeli judicial opinions decided both before and after the 1992 passage of the two Basic Laws.[230]

2. Text and Empowered Constitutionalism

The story of the establishment of empowered constitutionalism in Israel is a mirror image of the development of empowered constitutionalism in the United States with respect to the importance

---

aforementioned balancing test incorporated into the two Basic Laws. *See id.* The balancing test requires that the infringement of a right protected by either of the Basic Laws must satisfy the values of the State of Israel as a Jewish *and* democratic state. *See id.* The test exists to protect universal, liberal-secular rights, but is articulated in a manner that concedes a place to Jewish-particularist concerns. *See id.* When the Basic Law: the Freedom of Occupation was amended in 1994, it included an explicit acknowledgment of the principle of religious equality, thus endangering future statutory preferences to Orthodox Judaism. *See id.* at 1334. As Israeli Supreme Court Justice Dalia Dorner has noted, this respect for "Jewish" concerns may represent a synthesis of Jewish cultural and democratic principles, or it may mean that the Halachic Code is a default law that applies when the Israeli Supreme Court is confronted by more than one approach to an issue and both approaches are compatible with democratic principles. *See id.* From the standpoint of the development of Israeli common cultural referents, either alternative may represent a keystone articulation of Israeli self-identity and a decisive step in the development of empowered constitutionalism. *See id.*

227. *See* Hofnung, *supra* note 174, at 595-96 (asserting that the Laws granted to the judiciary the power to narrowly review future legislation).

228. *See* Barak-Erez, *supra* note 174, at 326 (indicating that the extent of the power of judicial review is still relatively unclear in Israel); *see also supra* note 147 and accompanying text (observing that empowered constitutionalism has taken root in the Israeli legal landscape).

229. *See* Hofnung, *supra* note 174, at 595-96 (expressing the limitations of judicial review in Israel).

230. *See supra* notes 227-229 and accompanying text (discussing the significance of judicial precedent due to the lack of a constitution).

of text. In the United States, the Bill of Rights introduced a fully-fledged liberal constitutional regime, which the American judiciary subsequently developed through caselaw.[231] In contrast, Israeli constitutional development required the Israeli Supreme Court[232] to introduce a rights-based legal regime to Israel through a key case, *Kol Ha'Am*, which ultimately led to constitutionally significant legislation in Israel.[233] Also, the U.S. Supreme Court claimed the exclusive right to review legislative action in light of the existent Constitution.[234] Conversely, in Israeli constitutional development, the Israeli Supreme Court reviewed specific legislation in *Mizrachi Bank* to retroactively proclaim a constitution with supra-legislative status.[235]

The difference in constitutional development between the two countries results from the contrast in the cultural stability of Israel versus the United States.[236] Americans, or at least the Framers of the Constitution acting as representatives of the American people, benefited from a reasonably stable cultural self-identity that allowed the early expression of American constitutive aspirations in the Bill

---

231. The structural aspects of American democracy had been previously established by the seven original articles codified by the Constitutional Convention. The Bill of Rights was significant because it articulated the liberal rights, the very social aspirations that American's democratic structure was intended to serve.

232. *See* Arzt, *supra* note 147, at 257-58, *quoting* the Basic Law: The Judicature, 38 L.S.I. 101 (1984), sec. 15(c) (discussing the structure and powers of the Israeli Supreme Court). The Israeli Supreme Court consists of eleven justices. *See id.* The Court sits in panels of three, although parties can seek further hearings from panels composed of five justices. *See id.* The Court functions in three capacities: as the Supreme Court of Civil Appeals, the Supreme Court of Criminal Appeals, and as the High Court of Justice. *See id.* The High Court of Justice serves as an administrative law court of first and last instance with broad authority, including the right to intervene in cases not already within another court's jurisdiction "in the interests of justice." *See id.*

233. *See* Dorner, *supra* note 174, at 1326-27 (announcing that Israeli Supreme Court caselaw established certain civil rights as fundamental legal norms).

234. *See* Marbury v. Madison, 5 U.S. 137 (1803) (expressing the necessity of judicial review to uphold the Constitution).

235. *See* Dorner, *supra* note 174, at 1330 (indicating that the Israeli Supreme Court gave supra-legislative, constitutional status to the Basic Laws passed in 1992 in *Mizrachi Bank*).

236. *See* discussion, *supra* Part I.C.3, II.A.1.

of Rights.[237] Over time, as the United States has grown increasingly heterogeneous, the general constitutive aspirations codified in the Bill of Rights have served as stabilizing common cultural referents. In contrast, Israel has historically proven ambivalent on a national level regarding its self-identity, and has thereby lacked sufficient cultural stability to encode its social aspirations in a constitution.[238] Nevertheless, Israel has managed to develop empowered constitutionalism through caselaw despite lacking a constitution to serve as a normative statement of agreement upon a basic national self-identity.[239]

How was the Israeli state able to do this? Close examination reveals that the Israeli Supreme Court used non-constitutional text as a source of normative authority in *Kol Ha'Am* and *Mizrachi Bank* to help establish empowered constitutionalism in Israel.[240]

a. Kol Ha'Am

In *Kol Ha'Am,* the Israeli Supreme Court determined that the Israeli government could not necessarily suppress public speech despite the exigencies of national security threats.[241] The case concerned the Israeli Minister of the Interior's decision to suspend the publication of two newspapers for publishing controversial stories that were critical of the Israeli government.[242] In March 1953, *Kol Ha'Am*, a newspaper published by the Israeli Communist Party,

237. *See id.*

238. *See id.*

239. *See* Dorner, *supra* note 174, at 1325-26 (asserting that the Declaration of Independence provides the basic principles for the protection of human rights although it was never granted constitutional status). It is possible to point to the Israeli Declaration of Independence as reflecting such a consensus. *See id.* However, the Declaration of Independence lacks the explicit force of law that helps "empower," so to speak, empowered constitutionalism's regulation of social order. *See id.*

240. *See infra* notes 241-301 and accompanying text (discussing the significance of the *Kol Ha'Am* and *Mizrachi Bank* decisions).

241. *See* Kol Ha'Am, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: 1948-1953, at 90 (ruling that freedom of expression must be balanced against national security).

242. *See id.* (holding that the right to free speech outweighed state interests under the facts of the case).

and *Al Itihad*, the Israeli Arabic counterpart to *Kol Ha'Am*, published stories that criticized the Israeli government for allegedly promising to commit 200,000 Israeli soldiers in support of the United States in the event of a war between the United States and the Soviet Union.[243] Fearing that these stories might disrupt support for the Israeli government at home and abroad, the Israeli Minister of the Interior invoked his expansive powers under the Press Ordinance of 1933, emergency powers that Israel had inherited from the British Mandatory Government of Palestine, to suspend the two newspapers' right to publish.[244] The newspaper challenged the government's action before the Israeli Supreme Court.[245]

The Israeli Supreme Court unanimously held that the Minister's suspension order was invalid.[246] The Court also held that free speech is fundamental to democratic governance, stating that "[t]he principle of freedom of expression is closely bound up with the democratic process."[247] The panel deciding the case realized that the state needed to balance the right to the freedom of expression against state needs, saying that:

> [t]he right to freedom of expression is not an absolute and unlimited right, but a relative right, subject to restriction and control in the light of the object of maintaining important interests of the state and society, which . . . in certain conditions . . . [take] precedence over those secured by the principle of freedom of expression.[248]

Thus, "in moments of supreme urgency—when, for example, the state is at war or is undergoing a grave national crisis—greater weight (according to the particular circumstances of each case) will

---

243. *Id.*

244. *Id.*; *see* LAHAV, *supra* note 147, at 107-10 (stating that this action was motivated by the Israeli government's rejection of the Communist Party because of the Communist Party's opposition to Zionism's nationalist basis and the Communist Party's repetition of Stalin's incendiary anti-Semitic and anti-Israel rhetoric).

245. *See* Kol Ha'Am, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: 1948-1953, at 90 (announcing the issue before the Court).

246. *See id.*

247. *Id.* at 94.

248. *Id.* at 99.

be given to state security."[249] However, in this particular set of circumstances, the Justices of the Israeli Supreme Court chose to uphold the right to public expression over the national security needs cited by the Israeli government.[250]

The *Kol Ha'Am* decision was the genesis of empowered constitutionalism in Israel. Narrowly construed, the decision merely protected the Israeli press from arbitrary oppression by the state. More broadly speaking, in *Kol Ha'Am* the Israeli Supreme Court created a limited, but important, right of judicial review in the service of a rights-based legal regime. In the decision, the Israeli Supreme Court recognized that it could not overrule the Knesset by invalidating a legally promulgated statute. However, the Israeli Supreme Court reserved the right to construe particular state action undertaken pursuant to presumptively valid legislation for consistency with the fundamental notions of a liberal society.[251] This limited power of judicial review allowed the Israeli Supreme Court to invalidate government action that violated democratic norms announced by the Declaration of Independence.[252]

What is also remarkable about *Kol Ha'Am* is that the Israeli Supreme Court defended a right, the freedom of expression, which had not previously existed in Israeli law. Deciding a similar case of first impression, the U.S. Supreme Court would have invoked the First Amendment of the Constitution. However, adjudicating decades prior to Israel's 1992 constitutional revolution, the Israeli Supreme Court decided *Kol Ha'Am* without any legislative or official constitutional justification for the protection of public speech.[253]

---

249. *Id.* at 100.

250. *See id.* at 90-94 (holding that the right to free expression outweighed the state's national security interests).

251. *See* Kol Ha'Am, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: 1948-1953, at 90-94 (explaining that state security should not categorically supercede the principle of free expression).

252. *See id.* (finding that the Israeli government actions that violated democratic norms were invalid as ultra vires).

253. *See* LAHAV, *supra* note 147, at 92 (indicating that Israel's Knesset had not enacted a written constitution providing the Court with justification for the *Kol Ha'Am* decisions).

Instead, the Israeli Supreme Court inserted the protection of individual rights into the Israeli legal regime in *Kol Ha'Am* through a formal commitment to non-constitutional text as an indirect source of normative authority in the establishment of a liberal legal system.[254] The Israeli Supreme Court cited the text of the Israeli Declaration of Independence in lieu of a Bill of Rights to justify the legal protection of individual rights, thereby helping to embed empowered constitutionalism in Israeli legal thought.

Prior to the *Kol Ha'Am* decision, Israelis considered the Declaration of Independence as an expression of popular will that carried political force, but not the force of law.[255] However, in *Kol Ha'Am*, Justice Simon Agranat, writing on behalf of the Israeli Supreme Court, boldly and without precedent[256] declared that, "we are bound to pay attention to the matters set forth in the [Declaration of Independence] when we come to interpret and give meaning to the laws of the State."[257] In particular, the Israeli Supreme Court cited the Declaration's provisions that emphasize Israeli national self-identity's dependence upon liberal notions of democratic self-governance, such as "'the foundations of freedom' and the securing of freedom of conscience."[258]

Subsequent Israeli Supreme Court decisions used the Declaration of Independence in a similar manner, leading to the judicial creation

---

254. *See* Tushnet, *supra* note 8, at 1343-46 (elaborating upon the role of textual formalism in the establishment of empowered constitutionalism in Israel). Mark Tushnet recognizes the formalism that is the central strategy in *Kol Ha'Am*. *But see* LAHAV, *supra* note 147, at 108 (interpreting the *Kol Ha'Am* opinion as having "rejected legal formalism and rigid positivism and [recognizing] law as a social system and the judicial process as an enterprise engaged in balancing political interests").

255. LAHAV, *supra* note 147, at 92 (describing the Israeli view of the Israeli Declaration of Independence as a source of legal authority prior to the *Kol Ha'Am* decision).

256. *See* H.C. 10/48, Zeev v. Gubernik, 1 P.D. (Isr. S. Ct.) (rejecting the use of the Declaration of Independence as a source of legal authority).

257. *See* Kol Ha'Am, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL: 1948-1953, at 105 (using the Israeli Declaration of Independence as a basis for Israeli legal norms).

258. *Id.*

of additional rights.[259] This body of judicially created rights became widely known as Israel's "unwritten constitution."[260] The Knesset ultimately inscribed many of these rights into the two constitutionally significant Basic Laws passed in 1992.[261] As Justice Aharon Barak, speaking for the majority of the Israeli Supreme Court in *Mizrachi Bank*, found:

> [t]he constitutional revolution in the field of human rights is built upon the foundation of judicial precedent. In exercising its constituent authority, the Knesset adopted a number of judicially formulated rights and conferred upon them a supra-statutory constitutional status . . . Without the contribution of the case law, it would not have been possible to erect the constitutional structure in the area of human rights.[262]

---

259. *See* Dr. Asher Maoz, *Defending Civil Liberties Without A Constitution—The Israeli Experience,* 16 MELB. U. L. REV. 815, 826 (1988) (noting the constant reference to the Declaration of Independence as a supra-statutory source of constitutional authority in Israeli caselaw protecting civil rights left unprotected by the Knesset); *see also* Barak-Erez, *supra* note 174, at 316-17 (noting that the Israeli Supreme Court created a right to personal liberty in *Al-Karbutli v. Minister of Defense*, 2 P.D. 5 (1948); a right to freedom of religion, conscience, and equality in *Peretz v. Local Council of Kfar Shmaryahu*, 16 P.D. 2101, 2116, *translated in* 4 Selected Judgments 191 (1962); and the right to procedural due process in *Berman v. Minister of the Interior*, 12 P.D. 1493, *translated in* 3 Selected Judgments 29 (1958)). Careful readers will note that *Al-Karbutli* was decided before *Kol Ha'Am* and might therefore question why *Kol Ha'Am* has greater relevance to the creation of Israeli constitutionalism than *Al-Karbutli*. *Al-Karbutli* concerned a habeas corpus petition involving an Arab detained under the Defense (Emergency) Regulations of 1945 on suspicion of espionage and sabotage during the Israeli War of Independence. The Israeli Supreme Court decided the case on narrow technical grounds, ordering the release of the detainee because a non-judicial advisory committee required under the Regulations to review the detention did not exist at the time of the detention. The fact that *Al-Karbutli* was decided on merely technical grounds, rather than by articulating a substantive vision of the law producing a significant precedential impact, makes the case relatively less influential than *Kol Ha'Am* with respect to the development of Israeli empowered constitutionalism.

260. Barak-Erez, *supra* note 174, at 317 (explaining that Israel governed its people without a written constitution).

261. *See* Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 778 (finding that earlier decisions of Israel's judicial body contributed to the establishment of Israel's written constitution).

262. Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 778.

b. Mizrachi Bank

Before the two Basic Laws passed in 1992 could fully assume constitutional import, the Israeli Supreme Court had to establish its right to overturn legislation contradicting the Basic Laws. Establishing this right first required the Israeli Supreme Court to retroactively empower the Knesset to act as a constituent assembly with the authority to imbue the Basic laws passed in 1992 with supra-legislative constitutional status. The Israeli Supreme Court recognized the Knesset's power to act as a constituent assembly in *Mizrachi Bank* and thereby set the foundation for a full-fledged power of judicial review in Israel.[263]

Mizrachi Bank concerned the Family Agricultural Sector Law (the Gal Law), which was designed to help rehabilitate Israel's agricultural industry.[264] The Gal Law provided for the establishment of a special administrative body, the "Rehabilitator," which, among other powers, could cancel part of a debt.[265] In the facts leading to the case, creditors of a debt cancelled by the Rehabilitator asked an Israeli District Court to annul the Gal Law for allegedly violating the creditors' property rights.[266] The District Court decided the case in the creditors' favor, holding that the Gal Law should be annulled for violating Section 3 of the Basic Law: Human Dignity and Liberty.[267] This decision marked the first instance of an Israeli court overturning a law, rather than merely specific government action undertaken pursuant to a law, for being unconstitutional.[268]

263. *See id.* at 765-66 (stating that *Ha'Mizrachi Bank* launched judicial review for Israel's judicial system).

264. *See id.* at 764 (stating that Israel created the Family Agricultural Sector Law ("Gal Law") in response to a severe economic process).

265. *See id.* (explaining how the Gal Law served to rehabilitate Israel's agricultural sector).

266. *See id.* (illustrating Mizrachi Bank's and other creditors' argument that the Gal Law violated their property rights).

267. *See id.* (providing the District Court's holding that the Gal Law violated the creditor's property rights and should be annulled).

268. *See* Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 766.

The Israeli Supreme Court subsequently heard the case on appeal.[269] The basic issue was whether the judiciary held the power to revoke a law for substantive unconstitutionality, which hinged upon whether the judiciary could validly consider legislatively enacted Basic Laws as supra-statutory constitutional provisions.[270] A threshold question was whether or not the Knesset had the authority to act as a constituent assembly by establishing a constitution that could bind the Knesset's prospective ability to legislate.[271] Sitting in an unusually large panel of nine justices, the Israeli Supreme Court overturned the lower court's decision in the case on other grounds—property rights under the Gal Law.[272]

What is important in the case with respect to the establishment of empowered constitutionalism in Israel are the Israeli Supreme Court's holdings in *dicta*.[273] The Israeli Supreme Court found in dicta by a majority of eight out of nine justices that the Knesset held the authority to establish a constitution for Israel.[274] Furthermore, the justices recognized the Basic Laws passed in 1992 as supra-legislative, constitutional rules protecting human rights.[275] Writing for the majority, Justice Barak stated that:

> [t]he Knesset . . . has the authority to frame a constitution. It exercised this power in enacting two Basic Laws covering human rights. In so doing, the Knesset created a superior constitutional norm. In the normative hierarchy that was created, the two Basic Laws regarding human rights stand above regular legislation. Conflict between a

269. *See id.* at 764 (indicating that the Israel Supreme Court heard the case on appeal).

270. *See id.* at 766 (commenting on the issues before the Court).

271. *See id.* at 780-83 (discussing the "key issue" as to whether the Knesset had the authority to create a constitution).

272. *See id.* at 766 (indicating that all nine Supreme Court Justices took part in the decision).

273. *See id.* (stating that the Knesset has the authority to establish a constitution).

274. *See* Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 766-68, 777-80 (holding that the Knesset has the authority to frame a constitution).

275. See *id.* (finding that the Basic Laws regarding human rights supersede regular legislation).

> provision of one of these two Basic Laws and a provision of a regular statute leads to the invalidation of the contradicting statute.[276]

In the decision, Justice Barak also claimed an expanded right of judicial review allowing the Israeli judiciary to construe legislation against the newly enacted constitutional standard represented by the Basic Laws and to nullify legislation contradicting the new constitutional standard.[277] Justice Barak thus stated in *Mizarachi Bank* that "[the Israeli Supreme Court] is competent to declare the conflicting norm invalid. In this manner, the Court actualizes democracy and the separation of powers. Indeed, if the constitution itself is democratic, then judicial review is democratic."[278] The Israeli Supreme Court emphasized the actualization of empowered constitutionalism in the case by declaring the 1992 Basic Laws as the textual foundation to Israeli constitutionalism.[279]

Thus, the *Mizrachi Bank* decision was critical to the development of empowered constitutionalism in Israel.[280] The case upheld the Knesset's power to establish an Israeli constitution, recognized that the human rights articulated by the two Basic Laws passed in 1992 had supra-legislative status and represented the textual basis to an Israeli constitution, and empowered the Israeli judiciary to construe subsequent legislation against the constitutional standard produced by the two Basic Laws.[281] While the Israeli Supreme Court expressed these holdings in *dicta*, it is sufficient to note that the Israeli Supreme Court brought Israeli constitutionalism within closer proximity than

---

276. *Id.* 777.

277. *See id.* However, the decision does not specify whether any Israeli court, or only the Israeli Supreme Court, has the power to determine the constitutionality of legislation.

278. *Id.* at 785.

279. *See id.* at 779 (stating that the two Basic Laws of human rights are inscribed "upon the pages of the constitution and enjoy normative superiority").

280. *See* Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 780 (declaring that Israel's "constitutional philosophy has undergone a change").

281. *See id.* at 766-68, 777-80 (indicating that Israel has authority to establish a constitution deriving from the two Basic Laws of human rights and that the Israeli judiciary has the power to interpret Israel's constitution and laws).

ever before to the achievement of empowered constitutionalism through the *Mizrachi Bank* decision.[282]

The Israeli judiciary's formal invocation of textual sources of authority was essential to this "constitutional moment."[283] For example, speaking for the majority, Justice Barak stated that:

> [i]n order to frame a constitution, which is founded on a higher normative level than a law, the Knesset requires an Archimedes' point, external to constitution or statute, which confers upon it authority to adopt a constitution. The constitution cannot create the authority by which it will be created. A statute cannot create a constitution to which the statute is subject. Legislation cannot create the authority by which it will be created. A constitutional act always requires a foothold external to the legislative body."[284]

Barak found the external rule that he required to justify the Knesset's authority to establish a constitution in the same place that the Israeli Supreme Court had discovered the authority to create a limited right of judicial review in *Kol Ha'Am*—the Israeli Declaration of Independence.[285] The majority of the Israeli Supreme Court agreed that the Knesset derives its power to create a constitution for Israel via the Declaration of Independence, which expressly provided for the establishment of a constitution.[286] The Israeli Supreme Court also agreed in *Mizrachi Bank* that the

---

282. *See id.* at 785 (marking an unprecedented decision to grant the Israel judiciary the power of judicial review).

283. *See* Ackerman, supra note 122 (discussing "constitutional moments"). The process of the creation of empowered constitutionalism in Israel raises the interesting point that constitutions do not necessarily need to arise directly from constitutional assemblies held during "constitutional moments." The fact that the development of Israeli constitutionalism seems to rely so strongly on the Israeli judiciary suggests that Bruce Ackerman's stress on the importance of constitutional moments is over-stated.

284. Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 780-81.

285. *See id.* at 782-83 (holding that Israel's Declaration of Independence reflects Israel's democratic basis).

286. *See id.* at 778 (finding that the Knesset's authority to establish a constitution derives from the Declaration of Independence); *Declaration of the Establishment of the State of Israel,* ISRAEL'S WRITTEN CONSTITUTION, *supra* note 175, at 7 (declaring that a constitution shall be adopted no later than October 1, 1948).

Knesset's implementation of the Harrari Resolution fulfilled the Declaration of Independence's mandate through the piecemeal passage of separate Basic Laws that would ultimately be consolidated into a written constitution.[287]

Justice Barak further recognized in the decision that the two Basic Laws of 1992 merely re-stated rights that the Israeli Supreme Court had created through its own caselaw.[288] However, he emphatically celebrated the newfound written-ness of these rights in *Mizrachi Bank*[289] by suggesting that the rights expressed by the 1992 Basic Laws had particular force precisely *because* the Knesset had committed the Israeli state to these rights textually, in legislation: "no longer does the individual in Israel possess only 'unwritten' judicial rights [*citation omitted*]. These rights were transformed into constitutional rights which are inscribed upon the pages of the constitution and which enjoy normative superiority."[290] This suggests that the Israeli Supreme Court understood both the significance of the Israeli state's willingness to commit itself to an initial set of constitutive aspirations and the necessity of the judiciary bridging the gap between Israel's cultural ambivalence and latent constitutive commitment through textual formalism.

CONCLUSION: WRITTEN-NESS AS A SUPPLEMENT TO CULTURAL STABILITY

Constitutional written-ness matters.[291] In fact, in certain circumstances, written-ness may prove essential to the establishment of empowered constitutionalism. However, this possibility only emerges in light of a critical examination of empowered

287. *See* Ha'Mizrachi Bank, 31 ISRAEL L. REV. at 777 (ruling that the Knesset "has authority to frame a constitution").

288. *See id.* at 778 (indicating that establishing the constitutional structure of human rights would have been impossible without the court's decisions in previous case law).

289. *See id.* at 779 (suggesting that the Israel community no longer "possess only unwritten" judicial rights, but instead can enjoy the liberty of a written constitution).

290. *Id.*

291. *See* discussion *supra* Part II (arguing that constitutional text matters because it serves as a source of legitimacy for judicial interpretation).

constitutionalism's fundamental operation in society. Mainstream assumptions regarding the presumed connections between empowered constitutionalism and democratic governance tend to obscure how judicial review conducted under the auspices of constitutional precepts facilitates the state's control of society through the imposition of hierarchies of legal meaning.[292]

To briefly recap the key points made above, empowered constitutionalism is primarily involved with maintaining the state's control of society by regulating the normative meaning of the law.[293] Empowered constitutionalism controls the development of legal meaning through jurispathy.[294] Empowered constitutionalism's propagation of common cultural referents enables state jurispathy by bounding the potential meaning of the law throughout society.[295] Thus, by focusing constitutional concerns, common cultural referents do not *create* constitutional meaning, as we might ordinarily expect, but instead *limit* constitutional meaning by anchoring constitutional interpretation to widely shared socio-legal foci.

More importantly, common cultural referents help maintain the state's nomic identity, an urgent constitutional function because of the inherent instability of the national-state and post-modern challenges to the nation-state's sovereignty.[296] Empowered constitutionalism thus helps allow the socially atomized citizens of nation-states to imagine themselves as aggregated communities united beneath the banner of common constitutive aspirations.[297]

A nation-state creates common cultural referents when it encodes its social aspirations in a constitutional project. This does not require a written commitment to these constitutive aspirations. This codification merely necessitates a national self-identity that is sufficiently coherent to allow the people of the society, or the state acting as the people's representative, to commit the nation-state to particular constitutive aspirations. As societies change, grow, and

---

292. *See supra* note 87 and accompanying text (suggesting that the role of a constitution is to provide legal meaning as a function of facilitating state control).
293. *See* discussion *supra* Part I.C.
294. *Id.*
295. *Id.*
296. *See* discussion *supra* Part I.C.1.
297. *See* discussion *supra* Part I.C.2.

culturally splinter, these constitutive aspirations, which perhaps once held particular meaning, become common cultural referents.[298] Where this stabilizing process cannot occur because the initial cultural stability required to encode constitutive aspirations is lacking, the nation-state's existence is in jeopardy if other factors do not force the state to cohere on the level of national culture.[299]

As illustrated by this article, Israel offers one way in which a nation-state can establish empowered constitutionalism despite lacking a coherent national self-identity. Even before the establishment of a Jewish state, Zionism suffered from ambivalence regarding Jewish national identity. This ambivalence centered on the question of whether a Jewish state should organize itself primarily around secular liberal or religious principles.[300] Following the establishment of Israel, these issues, among others, prevented Israel from committing itself to a national identity through a constitution. Nonetheless, the Israeli judiciary successfully established empowered constitutionalism in Israel in key judicial opinions through the use of non-constitutional text as a source of indirect

298. This assumes that as nation-states develop, their cultural makeup grows increasingly complex, a safe assumption given the post-modern challenges to the nation-state's social and geopolitical borders.

299. *See* Sapir, *supra* note 3, at 628-29 (noting that as threats to Israeli national security have decreased in urgency, the Israeli public has grown increasingly aware that "unresolved internal disagreements—especially the dispute over the proper relationship between religion and state—pose the real threat to the country's stability"); Ervin Staub, *Torture: Psychological and Cultural Origins*, *in* THE POLITICS OF PAIN: TORTURERS AND THEIR MASTERS 99-111 (Ronald D. Crelinsten ed., 1995) (suggesting that a self-other dichotomy is instrumental in the formation of national identity). For example, serious external threats, such as the presence of hostile neighboring countries, may force a nation-state to unify to survive. Thus, it is possible that Israel has managed to maintain a relatively stable national identity because of the existential threat represented by Israel's Arab neighbors and Palestinian residents, despite the considerable social disorder within Israel. An obverse point is that some of the Arab nations that oppose Israel, such as Syria, maintain their opposition to Israel as a means of encouraging internal support in the face of otherwise unpopular and oppressive government regimes.

300. *See supra* note 174 and accompanying text (providing a discussion on the general history of Israel and its constitution).

normative authority in a case-by-case process of constitutional construction.[301]

This emphasizes two points. First, it highlights the importance of judicial interpretation in the establishment of legal regimes. Second, it underscores the critical importance of formal adherence to text, at least in some circumstances, in the creation of empowered constitutionalism. Where a society is ambivalent regarding self-identity, text may temporarily bridge the gap between cultural confusion and the codification of constitutive aspirations on the road towards the development of common cultural referents. Liberal constitutional regimes need not and generally do not slavishly adhere to the tyranny of the written word.[302] But this is not necessarily true, at least based on the Israeli example, until *after* that regime has used written-ness as the basis for establishing empowered constitutionalism. The Israeli example indicates that language committed to text and judicial interpretation formally tied to the resultant codification of that language may provide sufficient stability to establish empowered constitutionalism where societies cannot agree upon common cultural referents.[303] Once empowered constitutionalism is well-established, text matters relatively little with respect to constitutional meaning.[304]

---

301. *See supra* notes 27, 259 and accompanying text (detailing the cases that led Israel's Supreme Court to determine that the Knesset has authority to establish a written constitution).

302. *See* Strauss, *supra* note 6 (arguing that the text of the constitution plays a minimal role in judicial interpretation).

303. *See* discussion *supra* Part II.A.2.b (discussing how the Israeli Supreme Court in *Ha'Mizrachi Bank* gave the Knesset authority to create a written constitution).

304. *See supra* notes 291-299 and accompanying text (explaining why the text of a constitution has little control over judicial interpretation).