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# Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care

By  
Rivka Weill\*

## I. INTRODUCTION

Israel experienced a constitutional revolution in the 1990s.<sup>1</sup> In 1992, the Knesset, the Israeli Parliament, enacted two Basic Laws dealing with individual rights: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.<sup>2</sup> They were enacted with the sparse presence and slim support of

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1. Barak, more than any other speaker, is identified with coining the term “constitutional revolution” to describe the enactment of the 1992 Basic Laws. Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 L. & GOV’T 9, 9-13 (1992). Israel has enjoyed a substantive constitution since its founding, including protection for individual rights through common-law methods. It even had an *interpretive* constitution, under which the courts created, through common-law methods, a requirement that statutes would be interpreted to the extent possible in accordance with individual rights. This interpretive requirement meant that courts at times abandoned traditional methods of interpretation in order to protect individual rights. That is, even in its founding era, Israel serves as an example of weak-form constitutionalism. See Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457 (2012) [hereinafter Weill, *Reconciling*].

2. Though Israel enacted Basic Laws since the 1950s, prior to 1992, Basic Laws dealt only

Members of the Knesset (MKs).<sup>3</sup> But in the 1995 *United Mizrahi Bank* decision, the Israeli Supreme Court seized upon this opportunity to declare not only the existence of a *formal* Constitution in the form of Basic Laws, but also the resulting Court power of judicial review over primary legislation.<sup>4</sup>

Since then, there has been an ongoing vehement debate in Israel over the existence of a formal Israeli Constitution (including the question of whether a Constitution is even desirable).<sup>5</sup> Thus, scholars and citizens have witnessed

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with the structure of government and had at most a procedural entrenchment provision in them. The 1992 Basic Laws included provisions for substantive, not just procedural, entrenchment. That is, they included a “limitations” clause. It was also the first time that individual rights were provided for in the Basic Laws. Weill, *Reconciling*, *supra* note 1, 467-68. By substantive entrenchment, I mean that they set substantive criteria that infringing statutes must fulfill. The 1992 Basic Laws require any statute that infringes upon their provisions to pass muster under the following four-part cumulative substantive test: (1) The conflicting provision must be in a statute or authorized by a statute; (2) the infringement must be compatible with the values of a Jewish and democratic State; (3) it must be done for a proper purpose; and (4) it must be proportional. Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 8 (Isr.); Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 4 (Isr.) (Basic Law: Freedom of Occupation originally enacted in 1992, replaced in 1994). By procedural entrenchment, I mean that some Basic Laws set a special amendment process, usually requiring the affirmative consent of a specified supermajority of Members of the Knesset (MKs), to amend them.

3. Only a fraction of the 120 MKs actually voted for their enactment. Posner accordingly wrote that “only one-quarter of the Knesset’s members voted for those laws.” Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC, Apr. 23, 2007, at 53; *cf.* RICHARD A. POSNER, HOW JUDGES THINK 362-68 (2008) (for a somewhat softer criticism). Basic Law: Freedom of Occupation passed first reading with the vote of 21 to 16, and the final reading with the support of 23 MKs and none against. Basic Law: Human Dignity and Liberty passed first reading with the vote of 40 to 12, and the final reading with the support of 32 MKs and 21 against. 2 AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 918 (5th ed. 1996) [hereinafter CONSTITUTIONAL LAW OF ISRAEL (5th ed.)]

4. CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Collective Vill.*, 49 (4) PD 221 [1995] (Isr.). It was partially translated in 31 ISR. L. REV. 764 (1997); *see also* full translation at 1995-2 ISR. L. REPORTS 1, *available at* [http://elyon1.court.gov.il/files\\_eng/93/210/068/z01/93068210.z01.pdf](http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf). By formal Constitution, I mean a Constitution that enjoys the following three characteristics: identification, supremacy, and entrenchment. Identification means that it is relatively easy to identify the various parts of the Constitution. There is a commonly accepted document or set of documents that citizens and elites alike refer to as the country’s Constitution. Supremacy means that the legal system includes a hierarchy that defines the Constitution as supreme over regular law. Thus, a statute should not infringe on a constitutional provision, and, if it does, the courts in many countries are authorized to exercise judicial review to protect the supremacy of the Constitution. Entrenchment means that the constitutional amendment process is more arduous than is the process of amendment of regular law. Obviously, different countries offer a spectrum of these characteristics and the fulfillment of the requirements is often a matter of degree rather than of kind. *Cf.* Ruth Gavison, *The Constitutional Revolution--A Reality or a Self-Fulfilling Prophecy*, 28 MISHPATIM [LAWS] 21, 34-37 (1997). Constitution with capital C is used throughout this Article to describe a formal Constitution as distinguished from a material one.

5. *See e.g.*, ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 111-34 (2003); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 50-74 (2004); Gavison, *The Constitutional Revolution*, *supra* note 4; Menachem Hofnung, *The Unintended Consequences of the Unplanned Legislative Reform – Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 594, 601 (1996); Eli M. Salzberger, *The Constituent Assembly in Israel*, 3 L. & GOV’T 679 (1996); Moshe Landau, *The Supreme Court as*

bizarre events over the last sixteen years in which the President of the Supreme Court discussed the details of Israel's formal Constitution, while the Chair of the Knesset, the Minister of Justice, or the head of the Israeli Bar Association denied its very existence during the same discussion.<sup>6</sup> This debate continues today.<sup>7</sup>

This Article argues that commentators and politicians focus on the wrong question. Rather than struggle with the existence—or lack thereof—of a formal Israeli Constitution, the polity should debate what type of formal Constitution Israel is developing. The either/or approach—influenced by US *Marbury*<sup>8</sup> rhetoric, which established the foundations for the exercise of judicial review over primary legislation in the United States—is not compatible with Israel's historical, political, and societal conditions, as elaborated below. Yet Israeli constitutional discourse has been too affected by the American experience.

Among those who do believe that Israel enjoys a formal Constitution, the consensus view seems to be that its constitutional development is best explained<sup>9</sup> by the Constituent Assembly (or Authority) theory, as articulated by

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*Constitution Maker for Israel*, 3 L. & GOV'T 697 (1996); Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel*, 70 ALB. L. REV. 409 (2007); MENACHEM MAUTNER, *LAW & THE CULTURE OF ISRAEL* 175-80 (2011).

6. Thus, in various settings former President Barak spoke of the contents of the formal Constitution while Knesset Chairman Reuven Rivlin or Justice Ministers Yossi Beilin, Tzipi Livni and Daniel Friedmann or Israeli Bar Head Hotter-Yishai denied the very existence of a Constitution. See, e.g., *Justice Minister Bielin is not So Sure There is Democracy in Israel*, GLOBES (July 10, 1999), available at <http://www.globes.co.il/news/article.aspx?did=172483> (“Yesterday, in the grand opening of 2000 judicial year, it turned out that Israel is the only democracy in the world where the Justice Minister and the President of the Supreme Court are holding opposing opinions on the question whether there exists an Israeli Constitution.”). President's House Conference: Israel's Democracy in the Trial of the Hour (22/5/2003), available at [http://www.idi.org.il/PublicationsCatalog/Documents/BOOK\\_7042/2003הדמוקרטיההישראליתבמבחןהשנההשנייה2003](http://www.idi.org.il/PublicationsCatalog/Documents/BOOK_7042/2003הדמוקרטיההישראליתבמבחןהשנההשנייה2003).pdf (The Israeli Democracy Institute) (documenting the dispute between Knesset Chairman Rivlin and President Barak). Even former President Shamgar expressed his opinion, in a conference held by the Israeli Association of Public Law in November 2008, that Israel has no formal Constitution. By that, he most likely meant to lament the fact that it is incomplete since he recognized the existence of an Israeli formal Constitution in *United Mizrahi Bank*. See *infra* Part II. In fact, to this very day, the Knesset's official website states that “unlike many other countries in the world, Israel has no Constitution.” *The Knesset as a Constitutive Authority: Constitution and Basic laws*, The Knesset, [http://www.knesset.gov.il/description/heb/heb\\_mimshal\\_hoka.htm](http://www.knesset.gov.il/description/heb/heb_mimshal_hoka.htm) (last visited March 15, 2012).

7. See e.g. Caroline B. Glick, “Democracy Strikes Back” JERUSALEM POST, December 8, 2011, <http://www.jpost.com/Opinion/Columnists/Article.aspx?id=248747> (last visited March 15, 2012).

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall wrote that between these alternatives there was no middle ground. Either the Constitution was supreme and thus no regular statute may contradict it, or a Constitution was a futile attempt on the part of the People to limit the legislature. *Id.* at 177.

9. By “best explained,” I mean in Dworkian terms. See RONALD DWORKIN, *LAW'S EMPIRE* 225-275 (1986); RONALD M. DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* (1990).

President Barak in *United Mizrahi Bank*.<sup>10</sup> Scholars adhere to this view because they believe that this theory is the one adopted by the Israeli Supreme Court.<sup>11</sup> In contrast, this Article suggests that Constituent Authority is only one of four possible theories that explain Israel's constitutional development, each with its own strengths and weaknesses, and each of which has some grounding in judicial decisions. This Article revives and expands the debate presented in *United Mizrahi Bank* regarding the theoretical foundations of the Israeli Constitution,<sup>12</sup> and it rejects the consensus of legal academia that the *United Mizrahi Bank* debate is already obsolete since the Constituent Authority theory has prevailed in the Court.

More importantly, this Article asserts that this debate is not merely theoretical, but rather has practical implications for Israel's present and future constitutional development. The theory one ascribes to Israel's formal Constitution determines how present and future constitutional debates will be resolved. For example, this Article explores the way the theories differ in how they will affect such fundamental matters such as the legitimacy of Israel's use of referenda to decide territorial concessions, the effectiveness of legislative self-entrenchment provisions found in regular statutes, the implications of using "notwithstanding" language to overcome Basic Laws,<sup>13</sup> and the "unconstitutional constitutional amendment" quandary.<sup>14</sup>

Because of its unusual path to a formal Constitution, Israel's development presents a fascinating case study for comparative constitutional law. Israel is unique in that it adopted a formal Constitution, despite its tradition of parliamentary sovereignty, by utilizing an evolutionary process nurtured by, the

10. For discussion of the theory, see Part III below.

11. For the prevalence of the theory, see 1 AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 60 (6th ed. 2005) [hereinafter CONSTITUTIONAL LAW OF ISRAEL (6th ed.)] (writing that the Constituent Authority theory is the law applicable today); Yoav Dotan, *Constitution to Israel?—The Constitutional Dialog After "The Constitutional Revolution"*, 28 MISHPATIM 149, 173 (1997) (writing that Barak's opinion enjoyed majority support in *United Mizrahi Bank*); Ruth Gavison, "A Constitutional Revolution?" in TOWARDS A NEW EUROPEAN IUS COMMUNE 517, 517 (A. Gambaro & A.M. Rabello eds., 1999) ("Naturally, [Barak's] analysis and interpretation are likely to become the law and the accepted approach to these matters.").

12. In *United Mizrahi Bank*, of a nine-member Court, three Justices (Dov Levin, Eliahu Matza, and Itzhak Zamir) concurred with Barak's constituent authority theory. Three Justices (Zvi Tal, Eliezer Goldberg, and Gabriel Bach) were undecided about which of the two theories, Shamgar's parliamentary sovereignty or Barak's constituent authority, was the correct one. Thus, there was no majority opinion in favor of either theory, only a plurality opinion in favor of the latter. Justice Cheshin dissented, writing that Israel lacks a formal Constitution. See *United Mizrahi Bank*, *supra* note 4.

13. The "notwithstanding" mechanism enables the legislature to override the Constitution (or the court's interpretation of it) for a defined period. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 215–21 (2010).

14. For definition and discussion of the "unconstitutional constitutional amendment" doctrine, see Parts III.C. and V below.

Israeli Supreme Court, an unelected body. The debates related to this process may resonate in other countries contemplating these same issues, including the “unconstitutional constitutional amendment” doctrine, the validity of legislative self-entrenchment, and the uses and misuses of “notwithstanding” language.

In the following Parts, this Article elaborates on the four possible theories to explain Israel’s constitutional development:

(1) The monistic theory of parliamentary sovereignty under which both constitutional and regular laws are enacted via the same legislative process. As sovereign, the legislature may decide to entrench some of its enactments, thus enabling the adoption of a formal Constitution.<sup>15</sup>

(2) The dualistic theory of popular sovereignty under which the adoption of a Constitution is the result of the enactment of a Constituent Assembly (or Authority) or other equivalent mechanisms that guarantee that the People express their broad, deep and decisive consent to the document and any amendment thereof. Under popular sovereignty, the People should decide the most important constitutional decisions in the life of the nation. In contrast, the People’s representatives should make regular daily government decisions.<sup>16</sup>

(3) The “manner and form” theory under which the sovereign legislature may define in legislation how to enact statutes. Once defined, the legislature must act according to the predefined process for its enactments to be considered

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15. By “monist,” I mean a constitutional system that has only one-tier enactment. Both constitutional and regular laws are enacted via the same legislative process. I follow the terminology of Ackerman in this regard. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, 3-33 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39 (8th ed. 1915). For theoretical developments in the twentieth century relaxing these requirements, see Part II below. See also H.L.A. HART, *THE CONCEPT OF LAW* 74, 149 (2d ed. 1994). Parliamentary sovereignty has traditionally been understood to require three conditions: that parliament may enact any statute except one restricting its successors, that constitutional law is on par with regular law, and no judicial review power over primary legislation is granted to the courts.

16. By “dualist,” I mean a constitutional system that has a dual-tier enactment. It distinguishes between the enactment of regular law by the legislature and the enactment of constitutional law by the People. I use People with capital P to express the instances in which the People are involved in a dualist constitutional moment as further elaborated in Part III below. I follow Ackerman’s terminology in this regard. See ACKERMAN, *FOUNDATIONS*, *supra* note 15, at 3-33. For American perceptions of popular sovereignty, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160-229 (1992); ACKERMAN, *FOUNDATIONS*, *supra* note 15; BRUCE ACKERMAN: *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). For a similar approach described in French constitutional theory, see Jeremy Waldron, *Judicial Power and Popular Sovereignty*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 181-202 (Mark Graber & Michael Perhac, eds., 2002) (primarily discussing Sieyes’ theory). For a similar theory arising from British constitutional thinkers and political actors of the nineteenth and early twentieth century, see Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006) [hereinafter Weill, *Evolution*]. For European attitudes, see *REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* (David Butler & Austin Ranney, eds., 1994).

“law.”<sup>17</sup>

(4) The foundationalist theory under which certain values and rights are so fundamental in a given constitutional system as to be beyond the authority of the legislature or even of the body amending the Constitution to change. The Constitution defines these values and rights as fundamental or they become fundamental as a result of constitutional history.<sup>18</sup>

A different strand of this foundationalist theory is common-law constitutionalism, whereby certain values and rights become too fundamental for even the People or the original Constituent Assembly to alter. The courts guard these rights and values. In the absence of a formal Constitution, or even regardless of the Constitution, these rights can retain their special status.<sup>19</sup>

Thus, two of the theories that may explain the Israeli constitutional development derive from parliamentary sovereignty traditions (legislative self-entrenchment and “manner and form”); one is grounded in popular sovereignty traditions (Constituent Authority); and one is based on “common-law constitutionalism” (“foundationalism”).

Each Part of this Article focuses on one of these different theoretical frameworks and how it is applicable to the Israeli constitutional context. This Article presents each in turn, explaining its strengths, weaknesses, and implications for the present and future. Each theory is measured against the following criteria: (1) its suitability to the country’s legal and constitutional history; (2) its corresponding process of constitutional enactment; (3) the

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17. See e.g. SIR W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 139-45 (3rd ed. 1943); GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* 41-53 (1971); Hamish R. Gray, *The Sovereignty of Parliament Today*, 10 U. TORONTO L.J. 54 (1953-54); Robin Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L. J. 215 (1991). For further elaboration, see Part IV below.

18. See *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India); Article 1: Human Dignity [Basic Law], May 23, 1949 (Ger.); Article 20: Basic Institutional Principles; Defense of the Constitutional Order [Basic Law], May 23, 1949 (Ger.); Article 79(3): Amendment of the Basic Law [Basic Law], May 23, 1949 (Ger.); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, 48, 542 (2nd ed. 1997); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006). See also Sam Brooke, *Constitution-Making and Immutable Principles* 52-78 (2005) (M.A. in Law and Diplomacy Thesis, The Fletcher School, Tufts University), <http://fletcher.tufts.edu/research/2005/Brooke3.pdf> (last visited Jul. 13, 2009) (discussing various constitutional systems that have decided to treat certain provisions within the Constitution as not amendable by explicitly granting them absolute entrenchment. When done, such absolute entrenchment is granted to the democratic or republican nature of the State and to certain fundamental rights.) For support of such a theory in the US, see for example Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163 (1995) [hereinafter *RESPONDING TO IMPERFECTION*].

19. See generally T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001); Paul Craig, *Constitutional Foundations: The Rule of Law and Supremacy*, PUB. L. 92 (2003); David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT’L J. CONST. L. 183 (2009). For further discussion see Part V below.

democratic legitimacy it offers; (4) the type of judicial review that stems from it; and (5) the appropriateness of the division of labor between the courts and the representatives that it fosters. The underlying assumption of the discussion is that the type of process used to adopt the formal Constitution determines the Constitution's character.

This Article concludes that Israel's Constitution is a hybrid Constitution of the Commonwealth model type, with mixed features from the various aforementioned theories. It is thus the "missing case" in international discussions of the Commonwealth model.<sup>20</sup> In addition, this Article also suggests that any of the various plausible theories explaining Israel's development may become weaker or stronger as a result of future legislative, judicial, or executive action. This adds import to this Article's attempt to highlight and understand the importance of these constitutional theories to each branch of government.<sup>21</sup> This Article further argues that the potential for divergence in Israel's constitutional development reflects the inherently unstable nature of intermediate constitutional models, which lie along the spectrum between supreme Constitution and supreme legislature.

The Israeli case study has important implications for comparative constitutional law. Gardbaum, Hiebert, and Tushnet described "weak-form" or intermediate constitutionalism as dependent upon the specific constitutional provisions found in the various countries sharing the Commonwealth model.<sup>22</sup>

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20. This is not to argue that Israel belonged to the Commonwealth, only that its type of constitutionalism fits the Commonwealth model. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (1996) [hereinafter Gardbaum, *The New Commonwealth Model*]; Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167 (2010) [hereinafter, Gardbaum, *Reassessing*]. The focus of this emerging area of study is the intermediate model between supreme Constitution and supreme legislature found in Commonwealth countries such as Canada, the U.K., New Zealand, and lately even to some extent Australia at the territorial and state levels. None of these writers mention the Israeli case. *But see* GIDEON SAPIR, *CONSTITUTIONAL REVOLUTION IN ISRAEL* (2010) (Hebrew), who discusses the commonwealth model in the Israeli context as a model for future Israeli development by repeating the discussions already offered by Gardbaum, Hiebert and Tushnet on Britain, New Zealand and Canada. In his book, Sapir offers three possible models—a Constitution as a gag rule, a Constitution as a dialogue, and a Constitution as a guardian of basic values—for Israel's future development. These models are distinguished from each other based on the underlying reason for the constitutional formation. In contrast, this article suggests that it is not the reason for constitutional formation, but rather it is the process of its adoption that determines the nature of the Constitution that results. But under all models discussed in my article there is a dialogue between courts and the other branches of government. It only takes a different nature depending on the model.

21. Kelsen and Hart have taught us that we may learn to identify the ultimate rule of recognition, or the "Grundnorm," by observing what courts, officials, and the People treat as the ultimate rule of recognition. HELEN KELSEN, *PURE THEORY OF LAW* 193-95 (Hans Knight trans., Univ. of Cal. Press 1967). HART, *supra* note 15, at 105-07. Thus, the practice of the various branches of government may affect and define the nature of the constitutional system.

22. See *supra* note 20.



These scholars suggest that Canada pioneered this model with its constitution, or Charter, which exemplifies an intermediate model because of, *inter alia*, its famous “notwithstanding clause,” which allows both the provincial and federal legislatures to legislate by regular majorities, notwithstanding the provisions of the Charter.<sup>23</sup> The UK offers another prominent example because, *inter alia*, only the superior courts may issue declarations of incompatibility, which the legislature may then disregard.<sup>24</sup> While these scholars deduce the nature of the Constitution in a given country from constitutional provisions, this Article argues that the nature of the Constitution and the strength or weakness of judicial review correlate strongly with the method used for constitution-making. Existing literature neglects this issue. But the Israeli case—thus far omitted from the international literature on the Commonwealth model—exemplifies how constitution-making methodology is relevant to determining the nature of a Constitution and its accompanying judicial review mechanism.

## II.

### LEGISLATIVE SELF-ENTRENCHMENT OR SELF-EMBRACING SOVEREIGNTY

One way to explain Israel’s constitutional development is through the legislative self-entrenchment theory (also titled self-embracing sovereignty). This theory best explains pre-*United Mizrahi Bank* constitutional development. It also aligns with British constitutional development since the 1970s, as well as that of some Eastern-European countries since the 1990s as elaborated below.<sup>25</sup> Though the theory has been neglected in Israeli academic writings and treated as obsolete, it has great explanatory force even today. But it may result in a weak form of constitutionalism.

#### A. Presenting the Theory

President Shamgar in *United Mizrahi Bank* articulated the legislative self-entrenchment theory of Israel’s constitutional development.<sup>26</sup> Under this theory, the Knesset as a sovereign body may entrench some of its own enactments, thereby creating a Constitution. Under this theory, entrenchment equals supremacy, which equals the creation of a formal Constitution.

This theory follows the influential legal philosopher H.L.A. Hart in arguing that two concepts of a sovereign body are possible: one that cannot restrict itself by entrenching enactments and one that can. But once restricted in this way, the

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23. Section 33 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

24. Human Rights Act, 1998, c. 42 (U.K.). The superior courts that are empowered to issue declarations of incompatibility are enumerated in section 4 of the Human Rights Act, 1998.

25. *See infra* Part II.B.

26. *United Mizrahi Bank*, *supra* note 4, at 288-94 (Shamgar President).

body is no longer sovereign with respect to the entrenched issue.<sup>27</sup> Under the theory of legislative self-entrenchment, Israel chose this second concept of sovereignty.

The theory of legislative self-entrenchment does not provide special legitimacy to the Constitution beyond the legitimacy of the liminal decision of a body to entrench itself. Under this theory, the entrenching body is the body entrenched, and the decision to self-entrench is made in the same way as any other decision. That is, there are no preconditions to exercising entrenchment authority, such as requiring symmetry in the size of the majority entrenching and being entrenched. There are also no inherent limits to entrenchment power from within the theory. Rather, it is considered part of the sovereignty of the entrenching body to entrench itself. The entrenchment may be procedural (requiring a special process to amend the entrenched provision) or substantive (requiring a substantive limitations test).<sup>28</sup>

Legislative self-entrenchment offers numerous unique advantages: entrenchment provisions may contribute to constitutional and legislative stability. They allow the legislature to pre-commit to a certain policy, avoiding *ex post* conflicts that might arise from individual political considerations. Such provisions allow the legislature to credibly signal its commitment to a certain policy, thus reducing *ex ante* the costs of legislation. They remove certain contested topics from the public agenda and thus enable the legislature to concentrate on other imperatives. They guarantee public deliberation before the entrenched provision is amended. They also provide a better decision-making rule than a simple majority for protecting minority rights from majority abuse.<sup>29</sup>

This theory of legislative self-entrenchment has its roots in parliamentary sovereignty traditions. But it is a deviation from the classic Blackstonian and Diceyan views of sovereignty of the eighteenth and nineteenth centuries, under which the sovereign legislature can enact almost anything provided that its enactments do not bind its successors, who would then no longer be sovereign. Under the classic view of sovereignty, no judicial review over primary legislation is possible because no body, including the courts, may be superior to and declare invalid the acts of the sovereign legislature. Thus, no true distinction between constitutional and regular law is possible, and both are enacted via the same processes.<sup>30</sup> This classic monistic theory of sovereignty is one of the main reasons that Britain still lacks a formal supreme Constitution.<sup>31</sup>

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27. HART, *supra* note 15, at 149.

28. For Israel's standard limitations test, *see supra* note 2.

29. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670-1673 (2002) (elaborating these advantages with regard to legislative self-entrenchment in a constitutional system that enjoys a supreme Constitution).

30. DICEY, *supra* note 15; 1 W. BLACKSTONE COMMENTARIES 91.

31. In fact, in the U.K. Parliament's official site, parliamentary sovereignty is described as "the most important part of the UK constitution." *See Parliamentary sovereignty*, U.K.

### B. Advantages of the Theory

Legislative self-entrenchment offers an attractive justification for the legitimacy of judicial review because when the courts exercise judicial review they may portray themselves as merely obeying the Knesset's will to entrench. Support for this theory can be found in Israel's constitutional history.<sup>32</sup> It is also the theory that best explains pre-*United Mizrahi Bank* judicial review decisions. Prior to *United Mizrahi Bank*, in all four decisions in which the Court exercised judicial review, it did so to protect an entrenched provision.<sup>33</sup> This theory also aligns with Israel's partial historical roots in the British Mandate,<sup>34</sup> which led to linking Israel's nascent judiciary to the British legal system during the State's first decades.<sup>35</sup> As detailed in Part III below, it is also compatible with the process utilized to enact the Basic Laws in Israel. The Knesset enacted the Basic

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PARLIAMENT, <http://www.parliament.uk/about/how/sovereignty/> (last visited on January 2, 2012).

32. Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217 (1970); Weill, *Reconciling*, *supra* note 1, at 476-86.

33. Prior to *United Mizrahi Bank*, judicial review over primary legislation occurred four times, each with regard to section 4 of Basic Law: the Knesset, which includes an entrenched provision. The section states: "The Knesset shall be elected by general, national, direct, equal, secret, and proportional elections, in accordance with the Knesset Election Law; this section shall not be varied save by a majority of Members of the Knesset." See *Basic Laws: The Knesset – 1958*, KNESSET, [http://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm) (last visited March 17, 2012); H CJ 98/69 Bergman v. Minister of Finance and State Comptroller, 23 (1) PD 693 [1969] (Isr.) (an English translation is available in 4 ISR. L.REV. 559 (1969)); H CJ 246/81 Agudat Derech Eretz v. Broadcasting Authority 35(4) PD 1 [1981] (Isr.); H CJ 141/82 Rubinstein MK v. Chairman of the Knesset 37(3) PD 141 [1983] (Isr.); H CJ 172, 142/89 Laor Movement v. Speaker of the Knesset 44(3) PD 529 [1990] (Isr.) [hereinafter *Laor Movement*]. For a comprehensive discussion of Israel's founding era of constitutionalism, see Weill, *Reconciling*, *supra* note 1, especially at 476-501.

34. To avoid legal chaos, the new State adopted (by statute) the law as it existed at the time of the State's founding but with the necessary implied alterations resulting from its establishment. That law included British judicial decisions that served as precedents for the new State. Law and Administration Ordinance, 5708-1948, OG No. 2 p. 9, § 11 (Isr.). See Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324 (1975); Aharon Barak, *The Israeli Legal System—Tradition and Culture*, 40 HAPRAKLIT 197, 202-05 (1992); MAUTNER, *supra* note 5, at 35-38. Furthermore, Mapai, the political party that led the Israeli government from 1948 to 1977 almost exclusively, and its leader David Ben-Gurion, were strong advocates of the British legal tradition. Shlomo Aronson, *David Ben-Gurion and the British Constitutional Model*, 3 ISR. STUDIES 193-214 (1998); Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259, 266-67 (1999). Because of Israel's parliamentary system, Mapai was also the party in control of the majority in the Knesset. Thus, all three branches of government (legislative, executive, and judicial) treated the British legal tradition with veneration and looked to it for guidance during Israel's founding era.

35. In 1956, the primacy of British references reached a peak with 40% of references in Israeli Supreme Court decisions being of British origin. This percentage declined gradually and consistently, with no particular identifiable reason according to Y. Shachar, R. Harris & M. Gross, *Citation Practices of the Supreme Court, Quantitative Analyses*, 27 MISHPATIM 119, 152, 157-59 (1996). Of the Supreme Court Justices serving from 1948-80, 20% were educated in England, 20% were educated in Israel and 32% were educated in Germany. See ELYAKIM RUBINSTEIN, JUDGES OF THE LAND 142 (1980). For the ramifications of these demographics, see Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 ISR. STUD. 159, 185 (1998) (arguing that Israel's "German" Supreme Court judges were "Anglophilians").

Laws via the same process as regular laws. The identical process for enacting constitutional and regular laws is a hallmark of parliamentary sovereignty, as discussed above.<sup>36</sup>

This theory is also compatible with the experience of some European countries. After the fall of the Soviet Union, many Eastern-European countries' legislatures adopted formal supreme constitutions that can be amended via legislative supermajorities. These countries show that legislative self-entrenchment can serve as the vehicle for the creation of formal constitutions.<sup>37</sup> The theory is also compatible with British constitutional development since the 1970s. Ever since Britain joined the European Union, British judges have not applied statutes that conflict with the superiority of European law. By Parliament's own enactment via the European Communities Act, parliamentary sovereignty became subject to the higher law of the European Union.<sup>38</sup>

### C. *Difficulties with the Self-Entrenchment Theory*

The self-entrenchment theory, however, suffers from at least five important conceptual difficulties. Chief among these is the question of whether legislative self-entrenchment can create a supreme formal Constitution.

#### 1. *The Self-Entrenchment Theory Equates Entrenchment with Supremacy*

The theory erroneously equates entrenchment with supremacy—two very separate mechanisms. An enactment may be entrenched without being supreme and vice versa. It is true that a supreme Constitution is often characterized by amendment provisions that outline a more arduous track for achieving constitutional (as opposed to legislative) change. In that sense, a supreme Constitution may enjoy some degree of entrenchment. However, entrenchment

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36. DICEY, *supra* note 15, at 39. *See also supra* note 15. The Israeli legislative process consists of three readings for each bill: The first reading is the one in which the statute is introduced to the Knesset, and a vote takes place on whether to refer the bill to the committee stage. The second reading takes place after the bill emerges from committee stage and, during this reading, a vote takes place on each section separately to allow a vote on objections to particular provisions. The last reading is on the bill as a whole as the content has been defined in the second reading. If it is a bill that has been proposed by a private MK, there is an additional preliminary vote to the three regular readings. 2 CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 11, at 733-743.

37. Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION*, *supra* note 18, at 275, 280-94; Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 *PUB. ADMIN.* 169, 187-95 (1993). These Eastern-European constitutions are not exemplary of the popular sovereignty model, since even a requirement for supermajority in the legislature is not enough to guarantee that the populace has consented to constitutional change, as further elaborated in Part III below.

38. *Regina v. Sec'y of State for Transp., ex parte Factortame* (No. 2), [1991] 1 AC 603. Anthony Bradley, *The Sovereignty of Parliament--Form or Substance?*, in *THE CHANGING CONSTITUTION* 26 (Jeffrey Jowell & Dawn Oliver, eds., 6<sup>th</sup> ed. 2007). The Human Rights Act of 1998 is less relevant for this theory because even the superior courts must apply incompatible statutes. *See* Human Rights Act, 1998, c. 42 (U.K.).

provisions may appear in regular enactments as well, which in fact has happened in Israel,<sup>39</sup> the United States,<sup>40</sup> and elsewhere. Yet no one seriously claims that entrenched *regular* statutes are part of the Israeli formal Constitution. Not only may entrenched provisions appear in regular law, but legal supremacy also may exist even without entrenchment provisions. Thus, supreme constitutions enjoy wide-ranging amendment mechanisms that vary from the requirement of a mere simple legislative majority to the complete inability to amend certain provisions. Moreover, the same Constitution may employ different amendment procedures for different provisions.<sup>41</sup> In fact, most of the provisions in Israel's Basic Laws lack entrenchment protection.<sup>42</sup> Supremacy deals with the relationship between the Constitution and regular law. It curtails the regular legislature. Entrenchment deals with the relationship between the Constitution and amendments thereof. It curtails the body in charge of amending the Constitution.

## 2. *This Theory Does Not Easily Align with post-United Mizrahi Bank Constitutional Development*

The theory does not easily align with post-*United Mizrahi Bank* constitutional development, under which the Court also treats un-entrenched Basic Laws as supreme,<sup>43</sup> unless one construes the very title "Basic Law" to imply some form of entrenchment. The Knesset cannot infringe upon un-entrenched Basic Laws' provisions dealing with individual rights unless the infringing statute fulfills the four-part cumulative test of constitutional scrutiny (i.e., a limitations clause). While the Basic Laws enacted in 1992 explicitly included these limitations for the first time, the judiciary subsequently read these

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39. Thus, for example, the Protection of the Israeli Public Investment in Financial Assets Act, 5744-1984, SH No. 1121 p. 178, § 3 (Isr.), requires an absolute majority of MKs for its amendment to signal to the public that the government would not unilaterally alter the conditions of financial instruments such as state bonds.

40. See Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L. J. 1539 (1995); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L. J. 73 (1996). For critique, see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995). This controversy arose in the context of *Skaggs v. Carle*, 898 F. Supp. 1 (D.D.C. 1995) *aff'd*, 324 U.S. App. D.C. 87 (1997).

41. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment* in RESPONDING TO IMPERFECTION, *supra* note 18, at 237.

42. In fact, Shamgar was not consistent regarding his own theory. In some places, he asserted that, when there is no entrenchment provision in place, then the Basic Laws are only potentially and not *de facto* supreme. *United Mizrahi Bank*, *supra* note 4, at 271. In other places, he seemed to suggest that after *United Mizrahi Bank*, all Basic Laws should be treated as supreme and be amended by "Basic Laws" alone, regardless of whether they enjoy entrenchment provisions. *Id.* at 299.

43. See e.g., HCJ 212/03 Herut-The National Movement v. Chairman of the Central Elections Commission to the Sixteenth Knesset, 57(1) PD 750 [2003] (Isr.) (treating Basic Law: the Judiciary, which was enacted before the constitutional revolution, as supreme); EA 92/03 Mofaz v. Chairman of the Central Elections Commission to the Sixteenth Knesset, 57(3) PD 793 [2003] (Isr.) (reading a limitations clause into Basic Law: the Knesset, though it lacks an explicit clause to that effect).

limitations into previous Basic Laws as well.<sup>44</sup>

### 3. *The Theory Creates a Democratic Deficit*

Aside from the well-known logical difficulty of self-reference,<sup>45</sup> self-entrenchment of the legislature is questionable on democratic grounds. It allows one legislature to bind another without providing democratic legitimacy: Why should the entrenching legislature enjoy more power than its successors by restricting the latter through entrenched provisions? Moreover, entrenchment that results from a supermajority requirement is essentially a grant of veto power to the minority over the majority of legislators. In theory, people choose the legislature to legislate, not to delegate its authority to yesterday's majority or tomorrow's minority, as occurs under common entrenchment.<sup>46</sup>

Further, entrenchment provisions that can only be undone by a supermajority are especially problematic when established by a simple coincidental majority, as is the case with the entrenched provisions of Israel's Basic Laws.<sup>47</sup> Thus, for example, under the theory of legislative self-entrenchment, by a majority of 2 to 1 or 20 to 18 (a simple coincidental majority), the Knesset may prevent the amendment of certain Basic Laws unless 80 MKs agree to the change. This way, a large majority of 61 to 5 cannot amend the Basic Law. This is true although a supermajority of 80 MKs—the prerequisite for amending the law—may never have existed, not even to enact and entrench the Basic Law.

Entrenchment as described in the previous paragraph thus amounts to an abuse of legislative power by a small coincidental majority seizing the opportunity to prevent its policy from being changed. It thus subverts true

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44. *Id.* It is unclear whether the Court will read entrenchment into unentrenched Basic Laws' provisions dealing with the structure of the government. For the four part cumulative test, see *supra* note 2.

45. The logical difficulty with self-reference is that the rule itself serves as the basis for its own legitimacy. In the context of constitutional amendment, it is part of the broader paradox whether omnipotent power can truly limit itself. On the logical difficulty of self-reference, see Alf Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 *MIND* 1 (1969). See also PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE AND CHANGE* (1990). When the legislature itself, rather than a higher external hierarchy, is the source of the Constitution it is unclear why we should grant more authority to the Constitution than any other later statute enacted by the legislature. While we may claim that self-entrenchment reflects the legislature's will to grant the Constitution special status, we may at the same time assert that the legislature's later breach of the entrenchment shows that it does not want to grant the Constitution special status.

46. "The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others." JOHN LOCKE, *The Second Treatise, in TWO TREATISES OF GOVERNMENT* § 141 (Peter Laslett ed., 1988). See also Bruce Ackerman et al., *supra* note 40; Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 *AM. B. FOUND. RES. J.* 379. Democracy seems to require that the last will of the legislature prevail over its predecessors' will. Thus, later statutes usually prevail over earlier ones in case of conflict between the two.

47. Weill, *Reconciling*, *supra* note 1, at 475 and note 86.

majority rule.<sup>48</sup> This kind of legislative self-entrenchment suffers from a serious democratic deficit.<sup>49</sup> This cautions against majority power abuses that discriminate against minority groups and also against the manipulation of legislative processes to restrain the majority. However, if legislative self-entrenchment occurs in the context of a legislative supermajority—reflecting broad, deep, and decisive support—then its entrenching nature may instead be dualist as elaborated in Part II below. In sum, the legislative self-entrenchment theory creates a democratic deficit by placing no inherent limits on entrenchment power.

#### 4. *This Theory Creates Weak Constitutionalism*

As a practical matter, legislative self-entrenchment may create a weak form of constitutionalism because there is no guarantee that the courts will act in a counter-majoritarian way by granting preference to the past will of the legislature (as manifested in entrenched provisions) over the current legislature's will (as expressed by current legislative breaches of past entrenchment).<sup>50</sup> Thus, this Article specifically argues that legislative self-entrenchment is a model of weak constitutionalism for reasons that are detailed below.

*First*, this claim is supported by comparative historical experience. There is a long tradition in the common law world that parliament is sovereign and may enact as it pleases except to bind its successors.<sup>51</sup> Even Hart, who wrote of the theoretical possibility of self-embracing sovereignty, admitted that this sovereignty concept was *de facto* rejected.<sup>52</sup> This does not mean that parliaments did not try to limit their successors but courts did not enforce those limits on breaching parliaments.<sup>53</sup>

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48. See John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (arguing for the need to be symmetric in the size of majority adopting and amending entrenched statutes).

49. "A democratic deficit occurs when ostensibly democratic organizations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy." Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (2007).

50. See *infra* note 53. For the counter-majoritarian difficulty, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2nd ed., 1986).

51. DICEY, *supra* note 15, at 39. See *supra* note 15.

52. HART, *supra* note 15, at 149.

53. See DICEY, *supra* note 15, at 21-25 ("That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure."); Mark Elliott, *Embracing "Constitutional" Legislation: Towards Fundamental Law?*, 54 N. IR. LEGAL Q. 25 (2003) (explaining the central role courts play in deciding whether to respect entrenchment); Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L. J. 457 (1991) (suggesting the use of a referendum to entrench a U.K. bill of rights and explaining why a statutory bill of rights would be inferior); Posner & Vermeule, *supra* note 29, at 1667-68; John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L.

Thus, even recent changes in British constitutional law, such as adherence to the law of the European Union or the Human Rights Act [HRA], are not treated in Britain as beyond Parliament's legislative power to undo by deciding to leave the Union or amend the HRA. Thus, Parliament is able to breach its self-imposed limitations.<sup>54</sup>

*Second*, the reason why a court may choose not to enforce legislative self-entrenchment provisions on breaching parliaments is that this theory does not sufficiently answer the democratic challenges raised above. On the contrary, the tradition of parliamentary sovereignty grants legitimacy to the judge to rule that the last will of the legislature prevails, even against entrenched past provisions.

Further, this monistic legislative self-entrenchment model leaves the court to battle the breaching legislature instead of involving other governmental bodies in the process of adoption and amendment of constitutions, as is done under the dualist model. Thus, it is difficult for the court to withstand the pressure of the legislature that decides to breach self-entrenched provisions.

*Third*, even in Israel, where the Court seems to impose self-entrenched provisions on the Knesset, no case has arisen in which the Knesset has decided openly and explicitly to "notwithstanding" entrenched Basic Laws, except with regard to the prohibition on importation of non-kosher meat to Israel.<sup>55</sup> In that case, the Knesset enacted a statute with a notwithstanding provision and it was done in accordance with Basic Law: Freedom of Occupation, which is the only Basic Law in Israel that explicitly allows for notwithstanding practice.<sup>56</sup>

So far, the Court has enforced the Basic Laws on breaching Knessets. But in all those cases the Knesset believed it was acting according to the demands of the Basic Laws, while the Court ruled otherwise. We thus cannot yet be certain how the Court will treat a Knesset's decision to explicitly breach or notwithstanding the entrenched provisions of the Basic Laws.

To conclude, legislative self-entrenchment may create a weak form of constitutionalism that will not withstand the test of time. This model might collapse again into full parliamentary sovereignty. In fact, this is what happened in Canada with regard to its Bill of Rights Act of 1960. This Act was based on substantive entrenchment of the legislature but failed to achieve strong protection for individual rights.<sup>57</sup> Only the Canadian Charter, which was

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REV. 1773, 1789-95 (2003) (suggesting that US courts will treat the breach of legislative self-entrenchment as non-justiciable).

54. See John Laws, *Law and Democracy*, 1995 PUB. L. 72. Cf. Bradley, *supra* note 38; Gardbaum, *The New Commonwealth Model supra* note 20, at 732-39.

55. For the story of the enactment of this statute, see *infra* Part III.C.

56. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.).

57. The Canadian Bill of Rights Act of 1960 was enacted via the same legislative process as any regular federal legislation and included no procedural entrenchment. Ten years after its adoption, the Canadian Supreme Court interpreted the Bill of Rights Act as authorizing it to exercise judicial review and even abolish statutes that cannot be interpreted in accord with the Charter and include no explicit notwithstanding language in them. *Regina v. Drybones*, [1970] 3 S.C.R. 282



adopted as a result of a dualist process, led to strong constitutionalism.<sup>58</sup>

#### 5. *Who is the Sovereign?*

So far, we have examined the possibility that legislative self-entrenchment would be ineffective in the face of a determined breaching legislative body. But if it is effective, then this legislative self-entrenchment theory poses additional challenges. When Hart wrote of the two possible concepts of sovereignty, he also wrote that once the legislature entrenches itself, the legislature is no longer sovereign with regard to the matter entrenched.<sup>59</sup> This is so, because sovereignty implies supremacy: the lack of a body (such as a Court) that may tell the sovereign legislature that its enactments are not law.<sup>60</sup>

Thus, while legislative self-entrenchment theory assumes that legislative sovereignty and valid entrenchment are not mutually exclusive, if we take this theory to its logical end, then a legislature that successfully establishes a Constitution through self-entrenchment by definition diffuses its sovereignty and unavoidably curtails its own powers. This theory thus illustrates how parliamentary sovereignty destroys itself without defining a clear successor: what new sovereign replaces the legislature? Ultimately, where does responsibility lie when the Constitution is unalterable according to existing rules, but there is broad agreement in the legislative body or the People that it should be changed?<sup>61</sup> The legislative self-entrenchment theory does not provide answers to these challenges.

#### D. *Relevance to Current Israeli Debates*

While the prevailing assumption in Israeli academia is that the Court has rejected the legislative self-entrenchment theory in favor of the dualist theory,<sup>62</sup> it is difficult to deny this theory's explanatory force with regard to judicial decisions given before *United Mizrahi Bank*.<sup>63</sup> It further aligns with the process

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(Can.). But even after this decision there is general agreement among commentators that this Act did not sufficiently succeed in protecting individual rights. See e.g. Gardbaum, *New Commonwealth Model*, *supra* note 20, at 719-21.

58. The Charter was enacted via a special dualist track that received the consent of both the federal and all provincial legislative bodies except for Quebec. 2 PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 15-16, 28-29 (5th ed. 2007). The Charter amendment process requires dualist consent as well. Canada Act, 1982, c.11 (U.K.), containing Constitution Act, 1982, 38, annex B.

59. HART, *supra* note 15, at 149.

60. DICEY, *supra* note 15, at 39. See also *supra* note 15.

61. Thus, for example, a Basic Law may require a supermajority of 80 MKs to amend it and despite repeated majorities of 70 MKs in consecutive elected legislative bodies, there is no mechanism from within the monistic theory that will allow the overcoming of the entrenched provision unless the supermajority of 80 MKs is met. Even a referendum will not serve to break the deadlock under the monistic theory.

62. See *supra* note 11.

63. See *supra* note 33.

through which Basic Laws were enacted in Israel, as discussed in Part III below. It was also the theory offered by President Shamgar in *United Mizrahi Bank* as the best explanation for Israel's constitutional development, and three additional Justices in *United Mizrahi Bank* remained undecided regarding this theory.<sup>64</sup> Since *United Mizrahi Bank*, the theory has not been explicitly discussed anew by the Court.

Interestingly, this theory not only explains past judicial decisions or current legislative processes but also current judicial decisions. The *Yekutieli* decision, given in 2010,<sup>65</sup> shows that the Court implicitly treats legislative self-entrenchment theory as a valid thesis upon which to base judicial review. This decision, which incited supportive public demonstrations on equality between the Ultra-Orthodox and secular segments of society,<sup>66</sup> a very hot topic in Israel, struck down a section in a budget statute.<sup>67</sup>

In the *Yekutieli* decision, the Court struck down a provision that provided money to Ultra-Orthodox Yeshiva students who needed financial support,<sup>68</sup> primarily because no similar stipend had been granted to students in the higher education system. Why did the Court treat the two populations as requiring equal treatment? The Court learned of the legislature's intent to treat the two as equal from a 1980 statute, which guaranteed income and excluded both Yeshiva and higher-education students from entitlement for support.<sup>69</sup> Had this been the exclusive basis for the decision, the Court would have probably applied the regular maxim of interpretation and required that the later regular budget statute of 2010 prevail over the previous regular statute of 1980. But the Court found that the duty to treat the two equally also arises from the Budget Principles Statute of 1985, which requires money to be allocated to similar institutions equally.<sup>70</sup>

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64. See *supra* note 12.

65. HCJ 4124/00 *Yekutieli v. Minister of Religious Affairs* (Jun. 14, 2010), Nevo Legal Database (by subscription) (Isr.).

66. Isabel Kershner, *Some Israelis Question Benefits for Ultra-Religious*, N.Y. TIMES, Dec. 29, 2010, at A1.

67. Though the Court declared the provision in the budget statute invalid (¶ 51 in President Beinish opinion), it delayed the operation of its decision to the next budget year to allow the elected branches and the Ultra-Orthodox community to prepare for the change.

68. The case dealt with financial support of about 1,000 NIS for families with at least five members. There were about 10,000 families in the Ultra-Orthodox community who qualified for this stipend. See *Yekutieli*, *supra* note 65, at ¶¶ 1, 4 to President Beinish opinion.

69. In fact, the statute itself only provided that the minister will define which students shall not be entitled for support. Guaranteeing Income Statute, 5740-1980, SH No. 991 p. 30, § 3(4) (Isr.). In the regulations that implemented the statute, both Yeshiva and higher education students were exempted from entitlement for support. Regulations Guaranteeing Income, 5742-1982, KT No. 4316 p. 590, § 6(a) (Isr.).

70. The Budget Principles Law, 5745-1985, SH No. 1139 p. 60, § 3a (Isr.). This Budget Principles Statute did not require treating the students equally but it did require equal treatment for the institutions in which they learn. But this did not prevent the Court from deducing the equality norm from the statute and applying it also with regard to the students themselves. *Yekutieli*, *supra*

However, the Budget Principles Statute is a regular statute and not part of the Basic Laws. How can the Court rely on it to strike down a provision in the budget statute of 2010, which is later in time? The Court's answer is that section 3(a) of the Budget Principles Statute, which requires equality in monetary distributions under budget statutes, should be treated as embodying a substantive entrenchment norm of equality.<sup>71</sup> Moreover, the entire Budget Principles Statute should be treated as a framework statute for regular annual budget statutes.<sup>72</sup> Based on the substantive entrenchment of either the entire Budget Principles Statute or solely its section 3(a), the Court may strike down a later conflicting regular budget provision. This decision shows that the legislative self-entrenchment theory has force even now, and the Court may strike down statutes because they conflict with entrenched provisions, even if the entrenchment appears in regular statutes and not in Basic Laws.<sup>73</sup>

Still one may argue that we should understand the *Yekutieli* decision as based not on the substantive entrenchment nature of the Budget Principles Statute but on the unique legal status of budget statutes in Israeli law. There are judicial precedents for the assertion that the budget statute should be considered as inferior to regular statutes because its content is not truly normative, and it is more similar to an executive order than a statute.<sup>74</sup> Thus, it is easier for the Court to intervene in budgetary statutes, rather than regular statutes.

The difficulty with this explanation is that the Knesset enacts budget statutes via the same legislative process as any other statute. There is no constitutional theory that recognizes a hierarchy that distinguishes among *regular* laws.<sup>75</sup> Further, such attitude towards budget statutes does not align with modern democratic principles, which developed in tandem with the legislative authority to approve national budgets.<sup>76</sup> Budgetary matters in other

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note 65, at ¶¶ 30-34 to President Beinish opinion.

71. *Id.* at ¶¶ 19, 21, 50 of President Beinish opinion.

72. *Id.* at ¶¶ 19-21 of President Beinish opinion.

73. The Court towards the end of its decision applies the substantive limitations test of the Basic Laws. *Id.* at ¶¶ 42-51 of President Beinish opinion. This limitations test is relevant only in the context of the Basic Laws and to protect their supremacy. BARAK, *PROPORTIONALITY*, *supra* note 13, at 173-186. Thus, it seems that the Court was undecided regarding the source of the duty to treat equally Ultra-orthodox Yeshiva and higher-education students: Did it derive from the basic right to human dignity provided for in Basic Law: Human Dignity and Freedom or from the Budget Principles Statute? If the former, there was no need to rely on the substantive entrenchment nature of the Budget Principles Statute. If the latter, there was no need to apply the Basic Laws' substantive limitations test.

74. *See* HCJ 1438/98 Conservative Movement v. Minister of Religions 53(5) PD 337, 385-88 [1999] (Isr.). The budget statute is also temporary in nature, applying to a particular fiscal year.

75. *See* Suzie Navot, *The Normative Status of Budget Laws*, 6 HAMISHPAT 123 (2001).

76. Thus, for example, even before the British Parliament became a legislative body, it first enjoyed the authority to approve the King's budget. This way Parliament supervised the King with regard to the imposition of taxes, the spending of expenditures and the initiation of wars. *See* CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 271 (rev. ed. 1949).

common law jurisdictions have usually been treated as the sole prerogative of the elected branches, as a tool to translate their mandate into operation.<sup>77</sup> In parliamentary systems (as distinguished from presidential ones), it is also one of the main mechanisms through which the parliament may express its confidence, or lack thereof, in the executive branch.<sup>78</sup> Thus, the Court's intervention in the budget is actually more problematic than its intervention in other regular statutes. This is especially true in parliamentary systems, where such an intervention may lead to a crisis between the legislative and executive branches, which in turn can spur elections.<sup>79</sup>

In conclusion, legislative self-entrenchment, while not an appealing theory, remains a possible explanation for Israel's constitutional development, as seen in the *Yekutieli* decision. The theory's greatest weakness is the danger that it may create a feeble form of constitutionalism, which would permit the legislature to overcome constitutional restrictions on its actions. Such a system might ultimately fall into complete legislative sovereignty.

### III. CONSTITUENT AUTHORITY (OR ASSEMBLY) THEORY

The second theory that may explain Israel's constitutional development is the Constituent Authority (or Assembly) theory, as articulated by President Barak in *United Mizrahi Bank*.<sup>80</sup> The Israeli legal academia largely contends that the Israeli Supreme Court adopted this theory and thus that it best explains post-*United Mizrahi Bank* constitutional development.<sup>81</sup> However, although the Constituent Authority theory is the more desirable theory on which to base the Israeli formal Constitution, it lacks historical and social support. The difficulty is not that the Knesset enacted the Basic Laws, but that the Basic Laws' process of enactment did not reflect broad, deep, and decisive dualist support of the People for constitutional change. Further, this theory has implications for

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77. THE FEDERALIST PAPERS 334 (Jacob E. Cooke, ed., 1961) (Federalist 48) (Madison).

78. See COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES, AND MATERIALS 567 (6th ed. 2007) ("the requirement that the government must retain the confidence of the House of Commons is still a fundamental principle of the constitution. In the last resort it is sustained by the government's dependence on the House of Commons for 'supply' (finance) and the passing of legislation."); A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 218 (12th ed. 1997) ("A government which failed to ensure supply would have to resign or to seek a general election.").

79. In fact, the House of Lords' rejection of the budget act of 1909 in Britain has led to a severe constitutional crisis and the enactment of the Parliament Act 1911, which curtailed the Lords' veto power with regard to the budget. The other branches of government could not accept that an unelected body, such as the Upper House, intervenes in the budget. Rivka Weill, *We the British People*, PUB. L. 380 (2004).

80. *United Mizrahi Bank*, *supra* note 4, at 352-427 (Barak President). President Barak relied on Claude Klein, *The Constitutional Power in Israel*, 2 MISHPATIM 51 (1970).

81. See *supra* note 11.

holding referenda on territorial matters.

#### A. Presenting the Theory

Under the Constituent Authority theory, the Knesset enjoys a dual authority—operating alternately as a Constituent Assembly and as a regular legislative body.<sup>82</sup> Only in its capacity as a Constituent Assembly may the Knesset entrench its enactments or create a more arduous process for the amendment of Basic Laws than for regular laws. Any attempt on the part of the Knesset as a regular legislative body to entrench its enactments is questionable on democratic grounds and may not survive judicial scrutiny.<sup>83</sup> Thus, the *Yekutieli* decision, where the Court applied a theory of legislative self-entrenchment to a statute that was enacted as a regular statute, does not easily align with this theory.<sup>84</sup> Further, only in its capacity as a Constituent Assembly may the Knesset enact a supreme Constitution that binds the Knesset in its capacity as a regular legislative body. Thus, this theory can be seen as a variant of *popular sovereignty* theories. Under such theories, the legislature gains an additional layer of legitimacy by acting as a constituent authority and not merely as a regular legislative body.<sup>85</sup>

The Constituent Assembly theory asserts that Members of the Knesset (MKs) are aware when enacting Basic Laws of fulfilling their task of a Constituent Assembly, although the Knesset does not use a separate legislative track for the enactment of constitutional law.<sup>86</sup> The theory suggests that the Knesset purposely uses the combination of the title “Basic Law” and omits a year mark—essentially a “technical title test”—to distinguish chapters of the Constitution from that of regular legislation.<sup>87</sup> Under the theory, this differentiation is sufficient to validate entrenched constitutional enactments but not entrenched regular ones.

This theory attributes the Knesset’s power of constituent authority (continuing since 1949) to “constitutional continuity.”<sup>88</sup> Had the First Knesset, elected in 1949, chosen to adopt a Constitution, no one seriously doubts that it would have enjoyed the authority to do so.<sup>89</sup> This First Knesset was elected primarily as a constituent rather than a legislative body.<sup>90</sup> Even voters’

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82. *United Mizrahi Bank*, *supra* note 4, at 355-56 (Barak President).

83. *Id.* at 410-11 (Barak President).

84. *Yekutieli*, *supra* note 65. See discussion *supra* Part II.D.

85. See discussion *infra* Parts III.B. & III.C.

86. *United Mizrahi Bank*, *supra* note 4, at 369-83 (Barak President).

87. *Id.* at 403-06 (Barak President).

88. *Id.* at 359-69 (Barak President).

89. *Id.* at 392-93 (Barak President).

90. Yechiam Weitz, *General Elections and Governmental Crises*, 9 ISRAEL AT THE FIRST DECADE 10 (2001). Its election campaigns focused on various proposals to a Constitution advocated by the political parties. “The fact that the Constituent Assembly was elected for the purpose of

participation in the election to the Constituent Assembly was the highest ever achieved in Israel (86.9%).<sup>91</sup> Although the First Knesset did not adopt a Constitution, it passed the *Harrari Resolution* charging future Knessets with the task of drafting the Constitution in the form of “Basic Laws.” The *Harrari Resolution* specifically assigned the task of preparing a draft Constitution in the form of “Basic Laws” to the Committee on Constitution, Legislation, and Justice of the Knesset.<sup>92</sup> The First Knesset further enacted the Transition to the Second Knesset Act of 1951, which stated that any authority enjoyed by it would also be available to its successors.<sup>93</sup> The Constituent Authority theory thus concludes that when future Knessets enacted “Basic Laws,” they assumed they were enjoying the same authority of Constituent Assembly as the First Knesset.<sup>94</sup>

This theory accepts one key difference between the First Knesset and all subsequent Knessets: that the First Knesset’s elections focused on the constitutional agenda whereas all subsequent Knessets’ elections dealt with a variety of issues. Nevertheless, this theory posits regular general elections as sufficient to anchor the legitimacy of the formal Israeli Constitution. That is, the theory relies on the relatively amorphous mandate that the People grant the Knesset through regular general elections as sufficient for constitutional legitimacy.<sup>95</sup>

The Constituent Authority theory asserts that all relevant political actors in Israel—the Knesset, the executive, the Court, the people, and academia—shared a common expectation that the Knesset would draft a Constitution. The Knesset fulfilled these expectations when enacting the “Basic Laws.” Since all relevant constitutional actors recognize the Basic Laws as Israel’s Constitution, it forms part of the Hartian rule of recognition or the Kelsian Grundnorm of Israel’s legal system.<sup>96</sup> Further, this cumulative recognition grants popular legitimacy to the

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enacting a constitution would seem to vest that body with such authority by direct mandate from the people.” Nimmer, *supra* note 32, at 1239, n. 92 (1970). “Only in this election was the constitutional issue brought to the voter decision as a matter of legal requirement.” *United Mizrahi Bank, supra* note 4, at 486 (Cheshin J.). See also DK (1950) 739-49 (Isr.); DK (1950) 804 (Isr.); DK (1950) 826 (Isr.) (for MKs’ discussion of the campaigns’ promise to draft a Constitution).

91. AVRAHAM DISKIN, THE ELECTIONS TO THE 12TH KNESSET 7 (1990).

92. According to the Resolution, the task of proposing a Constitution was entrusted to a Knesset committee that would draft chapters of the Constitution that the Knesset would enact as Basic Laws. When the task was complete, all Basic Laws would be unified in one document to serve as Israel’s Constitution. As expected of a compromise, everyone understood this resolution differently. The status of the Basic Laws enacted prior to the completion of the Constitution was unclear. These ambiguities were intentionally left for future Knessets to address, since the First Knesset failed even to reach a consensus on the most fundamental question: Whether a Constitution was at all desired. Benyamin Neuberger, *The Constitution Debate in Israel*, in GOVERNMENT AND POLITICS IN ISRAEL unit 3, 38-40 (1990).

93. The Transition to the Second Knesset Act, 5711-1951, S.H. No. 73 p. 104, §§ 5 and 10 (Isr.).

94. *United Mizrahi Bank, supra* note 4, at 365-83 (Barak President).

95. *Id.* at 400 (Barak President).

96. *Id.* at 356-58. See also HART, *supra* note 15, at 79-99; KELSEN, *supra* note 21, at 193-95.

Constitution. Put differently, the assumption behind the Constituent Authority theory is that the different political branches, in a cumulative capacity, express the will of the People.

*B. Advantages of Constituent Assembly Theory*

The Constituent Assembly theory has obvious advantages over its rival, the legislative self-entrenchment theory. In fact, any country would be wise to prefer the constituent assembly model, unless it intentionally seeks a weak constitutional model. The reasons for this are enumerated below.

*1. The Theory Establishes a Clear Hierarchy of Norms and Authorities: It Distinguishes between the People and its Representatives, between Constitution and Statute*

Popular sovereignty theory distinguishes between the People and their representatives. It does not assume that the will of the representatives necessarily aligns with the will of the People, as is assumed under parliamentary sovereignty.<sup>97</sup> Thus, for example, the constitutions of the American colonies were first adopted by the legislatures (like parliamentary sovereignty). Later, the States recognized the inferiority of such constitutions and replaced them with constitutions enacted by the People (like popular sovereignty).<sup>98</sup> Bernard Bailyn explains:

In order to confine the ordinary actions of government, the constitution must be grounded in some fundamental source of authority, some “higher authority than the giving out [of] temporary laws.” This special authority could be gained if the constitution were created by “an act of all,” and it would acquire permanence if it were embodied “in some written charter.”<sup>99</sup>

The American Revolution teaches us that if a state desires to subject its legislature to a Constitution, then an authority superior to the legislature—the People—must adopt such a document.

We should not equate the will of the legislature with the will of the People for numerous reasons. Usually, it is nearly impossible to derive from election results the People’s will with respect to a particular issue,<sup>100</sup> since people vote for representatives based on a mixture of issues. The People also do not

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97. ACKERMAN, FOUNDATIONS, *supra* note 15, at 3-10, 230-322; ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 3-31; Amar, *supra* note 16.

98. Lutz, *supra* note 41, at 237.

99. BAILYN, *supra* note 16, at 182-83.

100. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1284 (1995); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 47 (1990) (suggesting that “reading electoral politics is only slightly less fatuous than reading tea leaves.”); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman’s We the People*, 9 CONST. COMM. 309, 319-22 (1992).

seriously deliberate on any particular topic before voting at regular elections because they usually are preoccupied with their private lives.<sup>101</sup> There is ample empirical evidence suggesting that legislation supported, even by an overwhelming majority of the representatives, does not always enjoy similarly enthusiastic support of the People.<sup>102</sup> Also, representatives frequently deviate from their pre-election campaign commitments. This is the nature of representative democracy. Thus, a citizen's electoral vote is usually too far removed from a representative's vote on a constitutional matter to suggest that the will of the representative expresses the will of the citizenry.

For a legal system to be based on popular sovereignty, it is not enough that the legislature consents to the Constitution or an amendment. In fact, even in the eighteenth century, the French philosopher Emmanuel Joseph Sièyes, who is considered the architect of the Constitution of the French revolution, wrote that popular sovereignty requires that no constituted body, *acting on its own*, may assert that its will represents the People's will in constitutional matters.<sup>103</sup> Rather popular sovereignty requires that a nation's most important constitutional decisions are supported by the broad, deep, and decisive consent of the People, not just that of their representatives.<sup>104</sup> In essence, popular sovereignty requires a dual lawmaking track: The first track is for the enactment of regular laws by the legislature as representatives of the people. The other more arduous track is for the enactment of constitutional law by the People.<sup>105</sup>

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101. ACKERMAN, FOUNDATIONS, *supra* note 15, at 3-10, 230-322.

102. *See, e.g.*, Vernon Bogdanor, *Western Europe*, in REFERENDUMS AROUND THE WORLD, *supra* note 16, at 24, 65-68 (on the Italian experience), 96 (with regard to the European Community, the author wrote: "The unwillingness of electors to endorse Maastricht when contrasted with the large majorities for it in the legislatures of the member states showed that the European Community was beginning to give rise to that deepest and most intractable of all political conflicts - that between the electorate and the political class. The referendum is an instrument peculiarly well equipped to expose such a conflict"); Kris W. Kobach, *Switzerland*, in REFERENDUMS AROUND THE WORLD, *supra* note 16, at 98, 132 (on the Swiss experience).

103. *See* Waldron, *supra* note 16, at 181-202.

104. Ackerman, for example, writes that proponents of constitutional change must gain "extraordinary support for their initiative in the country at large." ACKERMAN, FOUNDATIONS, *supra* note 15, at 272. The depth and breadth of popular support should be extraordinary: "Numbers count." *Id.* at 274. Needless to say, the support of a majority is required. *Id.* at 274-75. The quality of public consideration and deliberation should be comparable to that of individuals making major life-decisions. The decisiveness of the popular support should be extraordinary, defeating "all the plausible alternatives . . . it should be a Condorcet-winner." *Id.* at 277. The aim of this phase is "to penetrate the barriers of ignorance, apathy, and selfishness [typical of normal politics] in an extraordinary way." *Id.* at 279. Ackerman suggests these three criteria—depth, breadth and decisiveness—to assess the legitimacy of both the signaling and eventual ratification of the constitutional transformation. The hurdle, however, for meeting these criteria is higher as the transformation process proceeds. For similar criteria in British constitutional thought, see Weill, *Evolution*, *supra* note 16.

105. ACKERMAN, FOUNDATIONS, *supra* note 15, at 3-10, 230-322; ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 3-31, 383-420. For similar theory arising from British constitutional thinkers and political actors of the nineteenth and early twentieth centuries, see Weill, *Evolution*, *supra* note 16; Weill, *We the British People*, *supra* note 79; Rivka Weill, *Dicey was not*



Inherent in this theory is the requirement that decisions on constitutional matters result from procedures that better express the will of the People than can be accomplished by legislative vote. It requires a dialogue and interaction between elected bodies and the populace. The People in this context “is not the name of some superhuman being . . . but the name of an extended process of interaction between political elites [especially the various branches of government] and ordinary citizens.”<sup>106</sup> It necessitates a dispersion of authority to adopt and amend the Constitution between various independently elected branches of government so that their cumulative consent to the constitutional change will attest to the popular consent.

Thus, elections held during constitutional times may signify the People’s consent if constitutional change is the main, if not sole, issue of the election.<sup>107</sup> In fact, dualist systems typically require a series of elections before popular consent to constitutional change may be attributed to the elections’ results.<sup>108</sup> Therefore, dualist constitutional change demands broad and repeated majority support for the change in *consecutive* elected bodies.

There may be better political tools to ascertain the People’s will on constitutional issues than repeated elections. For example, referenda (or a series of referendums) focusing exclusively on the constitutional change can unambiguously reflect public views, if mechanisms allow the People an opportunity for deep public deliberation and broad participation. An election to a Constituent Assembly that is charged with the sole mission of drafting constitutional change and bringing it to the People’s decision is another possible mechanism. While these mechanisms are not free of challenges, they are at least better approximations of the popular will than that which can be achieved by the legislative body acting alone.

To conclude, Constituent Assembly theory rests the supremacy of the Constitution over regular law on the supremacy of those adopting the constitutional change—the People—over their legislature.

## 2. *This Theory Distinguishes between Supremacy and Entrenchment*

Under this theory, the supremacy of the Basic Laws is not based on self-entrenchment (as in the monist theory), but rather on the superior authority of a Constituent Assembly over the regular assembly. All Basic Laws are then treated as supreme, regardless of whether or not they are protected by an arduous amendment process. This is especially important in the Israeli context,

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*Diceyan*, 62 CAMBRIDGE L.J. 474 (2003).

106. ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 187; *see also id.* at 162.

107. *See* Amar, *supra* note 16, at 1094. On the use of elections as *semi* referenda, *see* Weill, *Evolution*, *supra* note 16, at 450-53, 466-68. It is not sufficient for the constitutional issue to be only one of the issues at election such that election’s results are used to suggest the consent of the People.

108. ACKERMAN, TRANSFORMATIONS, *supra* note 16; Weill, *Evolution*, *supra* note 16, at 466-69. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 667 (2000).

since most Basic Laws are not entrenched.<sup>109</sup>

Further, ascribing constituent power to the Knesset, which also serves as a regular legislative assembly, is a potent device. This is so, since it is likely to be more difficult to persuade legislators to entrench individual rights and constitutional values than to merely enact them.<sup>110</sup>

In contradistinction to the monist theory, the Constituent Authority theory also enjoys the advantage of setting inherent limits to entrenchment power from within the theory, by which regular statutes, even if entrenched, will not enjoy supreme status. Indeed, the validity of entrenched regular statutes might be democratically problematic. Using a Constituent Authority theory avoids democratic compromises by aligning supreme (entrenched) constitutional law with the supreme authority to enact it. Put differently, only constitutional and not regular matters may be entrenched.<sup>111</sup>

### 3. *This Theory Deals with the Democratic Deficit: It Grants Popular Legitimacy to the Constitution*

This theory suggests that the Constitution enjoys the legitimacy of popular consent. The legislature is limited not by its own self-entrenchment power, but by the higher authority of the People. If grave democratic doubts arise as to the power of one legislature to bind its successors without a special mandate from the People, there is little remedy under legislative self-entrenchment theory. In contrast, under the Constituent Assembly theory, it is the *demos* that binds its representatives.

A pure popular sovereignty theory assumes that the entrenching power is not endowed to the one entrenched. The People limit the authority of their representatives by the Constitution, but they are free to amend the document if the amendment process guarantees that their broad, deep and decisive consent is expressed.<sup>112</sup> How do we prevent tyranny of the majority under this theory? The dualist theory assumes that, because it is so difficult to garner the People's consent for constitutional change, the Constitution will most likely reflect the deep and permanent will of the People, rather than its passing passions. Dualism

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109. Weill, *Reconciling*, *supra* note 1, at 475-78 and accompanying footnotes that detail which Basic Laws are entrenched.

110. In fact, MKs enacted Basic Law: Human Dignity and Freedom after being assured by the Chair of the Constitution, Legislation and Law committee, Uriel Lin, that the Basic Law does not grant the power of judicial review to the Court. See Judith Karp, *Basic Law: Human Dignity and Liberty: A Biography of Power Struggles*, 1 L. & GOV'T 323, 365-66 (1993). MKs probably assumed that judicial review was possible only in the context of entrenched Basic Laws since this was the theory prevalent before *United Mizrahi Bank*. See *supra* Part II.B.

111. See *supra* note 83 and accompanying text.

112. Under this interpretation, Article V of the US Constitution does not codify an exclusive track for amending the Constitution. See e.g. ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16; Amar, *supra* note 16; Weill, *Evolution*, *supra* note 16, at 458-61. See also *infra* Part III.C.2.

is intended to codify history, not hysteria.<sup>113</sup>

#### 4. *This Theory Establishes Marburian Legitimacy for Judicial Review*

Constituent Authority theory allows courts to assert their power of judicial review. Under this theory, there is no substantial counter-majoritarian difficulty when the judiciary exercises judicial review, because the judiciary frustrates the will of the legislature (expressed in statutes) to enable the will of the People (expressed in the Constitution or the Basic Laws) to prevail. Only the People, not its representatives, may amend the Constitution. If the judiciary is wrong in its interpretation of the People's will, the People may amend the Constitution to clarify their will, which has happened four times in American history.<sup>114</sup> This is, indeed, the rationale for judicial review in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. . . . Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.<sup>115</sup>

The Israeli Supreme Court relied explicitly on *Marbury* in its own claims to the power of judicial review in *United Mizrahi Bank*.<sup>116</sup>

#### 5. *The Theory Creates a Strong Model of Constitution*

The Constituent Assembly theory offers a strong version of a Constitution. This ensures vigorous protection of individual rights and societal values, since it is based on a superior, external entrenchment mechanism imposed by the People, rather than on legislative self-entrenchment power. It also eases the work of the Court when exercising judicial review, because the Court does not stand alone in a power struggle with the legislature as occurs under monism. Rather additional political actors are involved in the constitutional dialogue. This is one of the main advantages of a superior external binding authority over legislative self-entrenchment.

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113. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 108 (2006).

114. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 414-15 (1983); Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 435-36 (1983).

115. *Marbury*, *supra* note 8, at 176-77.

116. *United Mizrahi Bank*, *supra* note 4, at 416-17 (Barak President).

It is therefore unsurprising that the Constituent Assembly theory has prevailed in Israeli academia as the best theory to explain the supreme status of Basic Laws among those who believe that Israel has a formal Constitution following the *United Mizrahi Bank* decision.

C. *Lack of Fitness between Theory and Practice*

The only challenge with Constituent Assembly theory is that it does not easily align with Israel's constitutional history and development. Constitutional legitimacy based on Constituent Assembly theory requires the broad, deep, and decisive consent of the People, not just that of their representatives as previously discussed.<sup>117</sup> In Israel, however, the enactment of Basic Laws reflects a more haphazard decision-making process than by the People's broad, deep, and decisive consent. *First*, Basic Laws were enacted in Israel using the same procedures that are applicable to regular law. *Second*, the test to identify Israel's constitutional provisions (as separate from regular law) is typical of monist, not dualist, constitutional systems. *Third*, the way that the Basic Laws were recognized as comprising Israel's Constitution manifested a fear of losing the opportunity to do so. The dynamics exhibited in the Court's *United Mizrahi Bank* decision revealed an impulse to turn the desired dream of a Constitution into actual law.

1. *Process of Enactment Does Not Manifest Dualist Consent*

The process of enactment for Basic Laws was typical of monist systems. Even Barak himself conceded that, excluding the elections to the First Knesset, elections never focused on the constitutional issue. In subsequent elections, the constitutional agenda was rather one of many issues competing for electorate attention and not even a central issue among them.<sup>118</sup> Elections in Israel were usually a battleground regarding security, politicians' personalities, and socioeconomic matters, not constitutional topics. This was also true of the elections preceding the 1992 revolutionary Basic Laws' enactment.<sup>119</sup> Under dualism, such regular elections grant a mandate for the enactment of regular, not constitutional, law.

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117. See *supra* Part III.B. For sources see *supra* note 16.

118. See *supra* note 95 and accompanying text.

119. There was the activity of the "Constitution for Israel" movement prior to the elections to the 12th Knesset and during the time it was in session. But the 1988 elections to the Knesset dealt primarily with the explosion of the Intifada by the Palestinians, and voters were not thinking about the Constitution. DISKIN, *supra* note 91, at 47. Further, the "Constitution for Israel" movement focused its struggle on electoral change, advocating direct elections to the office of Prime Minister. The movement's proposed Bill of Rights was entirely different than that enacted by the Knesset. The movement also sought to have its proposed Constitution ratified by the support of both two-thirds of the entire Knesset and a referendum. Neither of these ratification requirements was ever followed. GUY BECHOR, CONSTITUTION FOR ISRAEL 55-58, 62-63, 68, 128, 133 (1996).

While the theory of continuity assumes that it is sufficient for later Knessets to enact constitutional law based on the special popular mandate granted to the First Knesset, dualism in the sense of popular sovereignty requires that the assembly, which actually adopts constitutional change, directly enjoy such authority. It cannot rely on its predecessors' authority, but must itself earn a special popular mandate for a defined constitutional agenda. Certainly, the Knesset cannot enjoy constituent authority through its own legislation in the Transition Act. It cannot simply grant itself supreme legal authority. Under dualism, such authority belongs to the People. Moreover, it is not at all clear that the Transition Act meant to transfer constitutional authority to later Knessets. Some interpret it to declare that every Knesset is Israel's legislature—that is, every Knesset enjoys the same scope of legislative, not constitutional authority.<sup>120</sup> Further, if, under dualism, legislation cannot grant constitutional authority to adopt constitutional change, the same limitation applies to a mere decision of the Knesset in the form of the *Harrari Resolution*. It should also be noted that, contrary to the *Harrari Resolution*, most Basic Laws were not actually initiated by the Constitution, Legislation, and Justice Committee.<sup>121</sup>

The Knesset enacted Basic Laws and regular laws via the same legislative process consisting of three readings,<sup>122</sup> as is typical of a monist, not a dualist, constitutional system. Basic Laws were also often enacted and amended by a small number of MKs, as is typical of monist systems.<sup>123</sup> For most Basic Laws, there is not even an official record of the number of MKs supporting their enactment, and for the twelve extant Basic Laws, only partial data exists of MKs' votes with regard to just six of them.<sup>124</sup> Although some academics assert that most Basic Laws enjoyed wide support during their enactment,<sup>125</sup> it seems that no one thought that the breadth and depth of MK support for Basic Laws' enactment mattered enough to record it. While some MKs may have understood that they were fulfilling a constitutional role when passing Basic Laws, many more were utterly unaware of their task as a Constituent Assembly.<sup>126</sup> Barak

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120. *United Mizrahi Bank*, *supra* note 4, at 484 (Cheshin J.).

121. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 731.

122. For explanation of the three readings process, see *supra* note 36.

123. See *supra* note 47 and accompanying text.

124. There is no record on MKs' votes on Basic Law: Israel Lands, 5720, SH No. 312 p. 56 (Isr.); Basic Law: The President of the State, 5724, SH No. 428 p. 118 (Isr.); Basic Law: The Government, 5728, SH No. 540 p. 226 (Isr.), except for the vote on first reading of fifty-one to twenty-three MKs (DK (1966) 2533 (Isr.)); Basic Law: The State Economy, 5735, SH No. 777 p. 206 (Isr.); Basic Law: The Army, 5736, SH No. 806 p. 154 (Isr.); Basic Law: The Judiciary, 5744, SH No. 110 p. 78 (Isr.); and Basic Law: The State Comptroller, 5748, SH No. 1237 p. 30 (Isr.).

125. See e.g. Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1, 2 (2007), [http://www.harvardilj.org/2007/08/online\\_49\\_medina/](http://www.harvardilj.org/2007/08/online_49_medina/) (asserting that "the bulk of the Basic Laws passed by a decisive majority.") (last visited March 17, 2012).

126. See *United Mizrahi Bank*, *supra* note 4, at 495-501 (Cheshin's dissenting opinion quoting MKs' speeches at the Knesset). Judith Karp, who accompanied the enactment process in 1992 of

himself wrote in his scholarly work that two watershed Basic Laws passed in 1992 without the public or media attention to their significance. In an interview, he feared “the crisis of legitimacy originated by the way in which the Basic Laws were enacted. They were not preceded by enough preparation of the public. The constitutional revolution occurred in quiet, almost in secrecy.”<sup>127</sup>

The final content of the Basic Laws was also a matter of sheer luck or lack thereof. The draft of Basic Law: Human Dignity and Liberty originally included a procedural entrenchment requiring the support of an absolute majority of MKs to amend it. However, at the last moment, one MK changed his opinion and this entrenchment fell through.<sup>128</sup> A day after the Knesset’s vote on the final reading of Basic Law: Human Dignity and Liberty, Professor and MK Amnon Rubinstein lamented in the Knesset that there was no precedent anywhere in the world for that turn of events, in which such important constitutional provisions were enacted “by the way.” He asserted that the importance of the Basic Law stands in sharp contrast to the absent of interest in it by the media and MKs.<sup>129</sup> This is not the kind of broad, deep, and decisive popular consent required to satisfy the requirements of the dualist model.

Further, Basic Laws have frequently been enacted or amended to suit whatever political need arises.<sup>130</sup> The politics involving their enactment has been characteristic of regular, not constitutional, politics. Thus, for example, in 1994, the Knesset revised Basic Law: Freedom of Occupation to ensure that a statute prohibiting the importation of non-kosher meat would survive constitutional scrutiny,<sup>131</sup> and enable the return of the Ultra-Orthodox political party Shas to the coalition. But, both Prime Minister Rabin and Shas later “discovered” that the Basic Law they had voted for included reference to the

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Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation as representative of the Minister of Justice, believes that a constitutional revolution has occurred with their enactment. Nonetheless, she attested “that it is doubtful whether the opinions raised in the Knesset during the discussion of the law show that Knesset Members were aware of their part and participation in the process of a Constitutional Revolution.” Karp, *supra* note 110, at 326.

127. Aharon Barak, *The Knesset Was Never Sovereign, The People Are The Sovereign*, 24 HALISHKAH 8, 14 (1995). See also Karp, *supra* note 110, at 325 (quoting Barak’s speech at Haifa U. of May 18, 1992 speaking of the fact that “not everyone is aware of it, but recently a revolution has occurred.”).

128. Section 13 of the proposed Basic Law required an absolute majority of MKs for its amendment. On second reading, however, the religious political parties proposed to omit the entrenchment and the vote was 27 to 27 in favor of their proposal, thus, the original draft should have remained intact. However, MK Charlie Biton announced that he had mistakenly voted against the proposed change and in a recount of the vote there was a majority of one in favor of the change. The entrenchment was rejected by a vote of 27 to 26. See DK (1992) 3793 (Isr.); 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 921-22 and n. 40.

129. See DK (1992) 3852 (Isr.) (March 18, 1992).

130. Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 L. & GOV’T 443, 445-46 (1994).

131. This replacement was done according to the advice of the Israeli Supreme Court. See H CJ 3872/93 Meatrael v. Prime Minister and Minister of Religions 47 (5) PD 485, 505 [1993] (Isr.) (The decision was given on October 22, 1993).

Declaration of the Establishment of the State of Israel and felt “cheated.”<sup>132</sup> Shas and Rabin never intended to enact the reference to the Declaration or so they claimed. Because of the reference to the Declaration in the amended Basic Law, Shas never returned to the coalition despite the fact that the Basic Law was amended only to enable its return.<sup>133</sup> Because of the claims against the way the 1994 Basic Law was enacted, it is also difficult to accept the “redemption story” promoted by some members of legal academia, under which the broad majority supporting the 1994 Basic Laws’ enactment cured the lack of adequate majority supporting the enactment of the 1992 Basic Laws.<sup>134</sup>

One recent example of the inappropriate process used in Israel for the passing of Basic Laws is found in the way Israel’s Parliament introduced the innovation of a dual-year budget. Just after elections and two days before Passover, while the public was busy preparing for the holiday in April 2009, the Knesset passed within the same day, a *temporary* Basic Law providing for a dual-year budget,<sup>135</sup> without either the benefit of committee review or the support of anyone outside the coalition.<sup>136</sup> Its very title—“provisional”—negates the essence of the Constitution as providing for long-term arrangements. Creating a two-year budget deprived the public and the Knesset of their unique annual constructive check on whether the executive body still enjoyed Parliament’s confidence.<sup>137</sup> This example is typical of the politically driven way

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132. They had learned, after their vote, of the Basic Law’s declaration that the rights enumerated in it and in Basic Law: Human Dignity and Liberty would be respected in the spirit of the principles embodied in the Declaration of the Establishment of the State of Israel. Basic Law: Freedom of Occupation, 1994, § 1 and the amended new § 1 of Basic Law: Human Dignity and Liberty.

133. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 924.

134. In 1994, the Knesset replaced Basic Law: Freedom of Occupation with a new one, this time with the presence and support of sixty-seven to nine MKs on third reading. *See* DK (1994) 5439 (Isr.). With this replacement, the Knesset also amended some sections of Basic Law: Human Dignity and Liberty. Thus, the “redemption story” is that the broader support of MKs in 1994 remedied the slim support granted to these Basic Laws in 1992. For the redemption story, see Dan Meridor, *Court Rulings in Light of the Basic Laws*, in CONSTITUTIONAL REFORM IN ISRAEL AND ITS IMPLICATIONS - CONFERENCE PROCEEDINGS, JUNE 1994 69, at 70-71 (1995). *See also* 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 915.

135. Basic Law: The State’s Budget for the Years 2009 and 2010 (Special Provisions) (Provisional Enactment), 5760, SH No. 2245 p. 550 (Isr.). This Basic Law was later amended: Basic Law: The State’s Budget for the Years 2009 to 2012 (Special Provisions) (Provisional Enactment), 2009. The Basic Law also includes the year of its enactment. This stands against the general practice not to include the year of enactment in the title of the Basic Laws. *See supra* note 87 and accompanying text.

136. For the Knesset’s discussions on this Basic Law, see DK (2009) 657-97, 723-845 (Isr.). It is also available at [http://www.knesset.gov.il/plenum/heb/plenum\\_search.aspx](http://www.knesset.gov.il/plenum/heb/plenum_search.aspx) (April 6, 2009).

137. With non-confidence motions, the Opposition needs to master at least a majority of the legislature to topple the government. In contrast, the government needs to master a majority to pass the budget and avoid the need to step down. On the importance of the budget in parliamentary systems, *see* TURPIN & TOMKINS, *supra* note 78, at 567; BRADLEY & EWING, *supra* note 78, at 218-19. A petition against the enactment of this Basic Law was rejected in HCJ 4908/10 MK Roni Bar-On v. The Israeli Knesset (July 4, 2011), Nevo Legal Database (by subscription) (Isr.).

Basic Laws—which comprise the nation’s Constitution—are enacted in Israel.

The Knesset has also amended provisions in Basic Laws via enactment of later regular statutes and the Court has approved of this practice before *United Mizrahi Bank*.<sup>138</sup> Thus, there was no true distinction between constitutional and regular law, as is typical of monist systems. In fact, the Justices acknowledged this constitutional reality in *United Mizrahi Bank*. In response, Barak stated that the past cannot be undone but, going forward after *United Mizrahi Bank*, the Knesset should amend Basic Laws only in other Basic Laws.<sup>139</sup>

## 2. *Conflicting Criteria for Identifying Constitutional Norms*

Only in *United Mizrahi Bank* do the Justices come up with a test for identifying what is part of the formal Israeli Constitution. Barak suggested that, if the enactment is entitled “Basic Law” without a year mark, then it will be construed as part of the formal Constitution in accordance with the *Harrari Resolution*.<sup>140</sup> The very need to define the elements of the Constitution arose because, prior to *United Mizrahi Bank*, the Knesset did not treat constitutional law differently than regular law, as is typical of monist systems.<sup>141</sup>

Barak’s “technical title” test could have worked, but Barak was not satisfied with this single factor. In *dicta*,<sup>142</sup> he qualified this “technical title” test twice. He first suggested that some of the enactments of the First Knesset might be part of the formal Constitution, although they lack the title “Basic Law.” Barak had in mind mainly two statutes, the Law of Return enacted in July 1950 and the Statute of Equal Rights for a Woman, enacted in 1951.<sup>143</sup> Although

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138. See e.g. HCJ 60/77 Ressler v. Chairman of the Central Elections to the Knesset Commission, 31 (2) PD 556, 560 [1977] (Isr.). HCJ 148/73 Kniel v. Minister of Justice, 27 (1) PD 794, 795 [1973] (Isr.). See also Weill, *Reconciling*, *supra* note 1, at 487-98.

139. *United Mizrahi Bank*, *supra* note 4, at 406-07.

140. *Id.* at 294 (Shamgar), 406 (Barak).

141. In the *Bar-On* decision, given in 2011, the Court has left open the question whether to “apply a substantive test for identifying Basic Laws,” in addition to the technical test. *Bar-On*, *supra* note 137, at ¶ 35 to President Beinisch opinion.

142. Since the Court did not strike down any statute or provision thereof in *United Mizrahi Bank*, some have argued that the entire decision recognizing both Israel’s Basic Laws as its formal Constitution and the resulting power of judicial review was all *dicta*. Salzberger, *supra* note 5, at 679-86. It may however be argued that the Court needed to discuss the status of the Basic Laws and its power of judicial review to reach a conclusion that the disputed statute at stake was valid.

143. Shamgar specifically referred to these two Acts and explained in *dicta* that, because the First Knesset was primarily a Constituent Assembly, its enactments may be classified based on their content, not their titles. If their content is constitutional, they may be part of the formal Constitution. *Id.* at 294 (Shamgar). In contrast, Barak raised this issue of the status of the First Knesset’s enactments without referring explicitly to these two Acts. *Id.* at 406 (Barak). But, in his book, which laid the theoretical basis for *United Mizrahi Bank*, Barak mentioned these two Acts as the main candidates to be included in the Constitution despite the lack of the title “Basic Law.” See AHARON BARAK, *INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATIONS* 46 (1994). Both Shamgar and Barak, however, chose in *United Mizrahi Bank* to leave this issue open for future Court decisions.



Barak's dualism rests on the notion that later Knessets enjoy the same authority as the First Knesset, he himself treated the First Knesset differently.

Second, Barak qualified his "title test" by suggesting that there may be an unconstitutional constitutional amendment or an abuse of the Knesset's constituent authority.<sup>144</sup> If the first qualification broadened what may be included in the formal Constitution, the latter qualification attempted to narrow those options. With this second qualification, Barak laid the theoretical groundwork for the courts to decide the content of the formal Israeli Constitution.

Yet, his reasoning is inconsistent with dualism for two reasons. *First*, it leaves to the Court, rather than the People, the determination of what provisions comprise the Constitution. *Second*, under a dualist approach based on popular sovereignty, the People reserve the power to alter the Constitution and may even do so by procedures that violate the amendment process defined in the constitutional text as long as the process satisfies the substantive requirements of dualism—primarily, it must manifest broad, deep, and decisive popular consent for change. Further, constitutional theorists have long recognized that many constitutional changes *de facto* occur outside the regular mechanisms prescribed in the Constitution for change. Thus, for example, Ackerman has shown that the adoption of the American Civil War constitutional amendments (13th-15th) violated Article V, but these are nonetheless valid because they received the People's dualist consent.<sup>145</sup>

Under dualism, the People's power to alter the Constitution is treated on par with their original power to create a Constitution.<sup>146</sup> Under Barak's approach, the power to amend is necessarily inferior to the power to create the

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144. *United Mizrahi Bank*, *supra* note 4, at 406, 408 (Barak).

145. See, e.g., ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16; Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION, *supra* note 18, at 13; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); Peter H. Russell, *Can the Canadians Be a Sovereign People? The Question Revisited*, in CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES 9, 9-34 (Stephen L. Newman ed., 2004); Ian Greene, *Constitutional Amendment in Canada and the United States*, in CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES, 249, 249-71 (Stephen L. Newman ed., 2004).

146. That the People included in the Constitution explicit provisions governing its amendment only restricts their representatives (constituted power) when amending the document. But the People themselves may alter it by other means as well. In this way Ackerman legitimizes the fact that during constitutional transformations, the reformers often break the rules governing the official constitutional amendment process. Ackerman argues that constitutional transformations usually consist of innovations in both the constitutional content and constitutional amendment process. See, e.g., ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16; Waldron, *supra* note 16, at 185 (quoting Sieyes: "It would be ridiculous to suppose that the nation itself could be constricted by the procedures of the constitution to which it has subjected its mandatories."). Others have vehemently debated the proposition that constitutional amendment may legitimately occur in violation of the Constitution's provisions governing its amendment. See, e.g., Tribe, *Taking Text*, *supra* note 100, at 1284.

Constitution.<sup>147</sup> This is why the doctrine of the “unconstitutional constitutional amendment” is possible under Barak’s approach but not under pure dualist theory.<sup>148</sup> Barak’s approach suggests in final analysis that Barak is more foundationalist than dualist, as further illustrated in Part V below. It should be noted that, in the 2011 *Bar-On* decision—which rejected a constitutional challenge against the validity of the Basic Law: The State’s Budget for the Years 2009 to 2012 (Special Provisions) (Provisional Enactment) 2009—the Israeli Supreme Court left open the question whether the doctrine of the “unconstitutional constitutional amendment” is applicable in Israel, but it nevertheless expressed its inclination to adopt it.<sup>149</sup>

### 3. *Dynamics of Seizing the Moment and Preventing a Lost Opportunity*

It seems that the *United Mizrahi Bank* decision was partly driven by the Justices’ belief that the 1992 Basic Laws dealing with individual rights was a constitutional opportunity that should be seized. The young Israeli State could not afford to squander that opportunity.<sup>150</sup> The Declaration of the Establishment of the State of Israel, with its enumeration of rights, could have served as a Constitution, but instead the Court treated it as legally non-binding during Israel’s founding era.<sup>151</sup> The First Knesset could have enacted—but did not—a Constitution under the *Harrari Resolution*.<sup>152</sup> The 1969 *Bergman* decision, the first case in which the Israeli Supreme Court exercised judicial review over primary legislation, could have laid a solid ground for constitutionalism and judicial review, but it was instead laconic.<sup>153</sup> It led to the application of judicial review in the limited context of protecting equal elections under Section 4 of

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147. Barak relied on Klein, *supra* note 80, at 51 (1970) (Klein discusses the distinction between original and derivative constitutional power).

148. Ackerman provides the following example: if the American Constitution were amended such that it included that “Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden,” this amendment would be valid. Although this amendment negates the most basic principles of the current American Constitution, it would be valid because of America’s ultimate commitment to dualism. ACKERMAN, FOUNDATIONS, *supra* note 15, at 10-16.

149. *Bar-On*, *supra* note 137, at ¶ 35 to President Beinisch opinion.

150. Bruce Ackerman, *The Lost Opportunity?*, 10 TEL AVIV U. STUD. IN LAW 53, 66-69 (1990) (discussing the fact that, although Israel had all the features of a “fresh start” constitutional scenario, its founders risked missing the window of opportunity entirely).

151. *See, e.g.*, HCJ 7/48 Elkarbotly v. Minister of Defense, 2(1) PD 5 [1949] (Isr.). *See also* M. Ben-Porat, *A Constitution for the State of Israel: Whether Desirable and Feasible?*, 11 TEL AVIV. U. L. REV. 17, 19 (1985) (writing of the lost opportunity to recognize the Declaration as part of the Israeli Constitution). The Declaration was also signed by representatives of all the Jewish fractions in the Israeli society. Ben Gurion doubted whether any further consensus could be reached than that achieved in the Declaration. *See* DK (1950) 820 (Isr.).

152. *See supra* note 92 and accompanying text. *See also* Segev, *supra* note 5 (describing Israel’s entire constitutional history as a decision not to decide with regard to a formal Constitution).

153. *Bergman*, *supra* note 33.

Basic Law: the Knesset.<sup>154</sup> If this opportunity, too, went by, Barak portrayed a very bleak constitutional horizon for Israel. He expressed grave doubts about the ability of Israel ever, in the future, to adopt a Constitution.<sup>155</sup>

This pessimism, however, warrants close examination. Comparative constitutional experience does suggest that it is more difficult to adopt a Constitution after the founding period.<sup>156</sup> It further shows that often the adoption of a dualistic Constitution is accompanied by violence, turmoil, and a break from the regular legal rules of the system. It does not suggest, however, that dualistic constitutions cannot be adopted in stages, in an evolutionary fashion. It does not imply that a monistic constitutional system cannot transform into a dualistic one gradually or by the use of referenda. There is nothing irreversible about the non-use of referenda in the past in Israel.<sup>157</sup> Barak's great worry regarding Israel's constitutional future ultimately reflected his own heart's desire that Israel would have a formal dualistic Constitution. But, the "ought" does not necessarily reflect the "is," however desired it might be.

To conclude, though a desirable end, there was no adoption of an Israeli Constitution through a dualist process. Further, in the absence of a dualist process, the entrenched provisions of the Basic Laws suffer from all the legitimacy difficulties associated with the legislative self-entrenchment theory.

#### D. Implications of the Constituent Assembly Theory

There are a few interesting implications of the Constituent Assembly theory to current Israeli constitutional issues. *First*, the *Yekutieli* decision does not easily align with this dualist theory. *Yekutieli* is based on the validity of entrenchment provisions appearing in regular statutes while, under the Constituent Assembly theory, it is probably undemocratic for the regular legislature to bind its successors through entrenchment provisions.<sup>158</sup> Only a Constituent Assembly may entrench its enactments. Put differently, under the

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154. Between *Bergman* and *United Mizrahi Bank*, the Israeli Supreme Court applied judicial review over primary legislation in the following cases: *Agudat Derech Eretz*, *supra* note 33; *Rubinstein MK*, *supra* note 33; *Laor Movement*, *supra* note 33. See also Weill, *Reconciling*, *supra* note 1, at 483-84.

155. Barak warned that such an interpretation by the Court would have dire implications, since it is not at all clear how Israel can adopt a Constitution today from scratch. Usually, a country adopts a Constitution at its founding. But Israel does not want to begin again. Israelis do not want the fire, turmoil, and violence typical of a nation's founding and constitutional birth. Moreover, Barak asserted that referring a Constitution for the people's decision via referendum is not simple, since Israel has no tradition of such referrals to the populous. *United Mizrahi Bank*, *supra* note 4, at 392.

156. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 3, 46 (1992); K.C. WHEARE, *MODERN CONSTITUTIONS* 8-9 (1951).

157. See the writings of Gardbaum, Tushnet and Hiebert with regard to the Commonwealth model discussed *supra* note 20; see also Weill, *Evolution*, *supra* note 16.

158. See discussions *supra* Part II.A. See also *Yekutieli*, *supra* note 65 and discussion of the case *supra* Part II.D.

Constituent Assembly theory entrenchment provisions are valid only if they appear in Basic Laws, not regular law.

*Second*, Israel is now debating the adoption of the referendum as a tool to decide territorial concessions. The referendum, endorsed by the Knesset through regular legislation as a tool to bind elected bodies to territorial decision,<sup>159</sup> may be relevant to East Jerusalem and the Golan Heights.<sup>160</sup> Because it requires the consent of the majority of all votes actually cast in addition to Knesset's consent, the referendum has the potential to veto a decision by the elected branch to cede territory. Eighty MKs would need to agree to territorial concessions to forgo the need for a referendum. The underlying assumption is that, in a system of proportional representation, such broad legislative support reflects the People's support.

In December 2010, Dr. Mohammed S. Wattad filed a petition with the Israeli Supreme Court challenging the constitutionality of the referendum process on the grounds that, *inter alia*, the process undermines the constitutional authority of the elected bodies, as provided for in the Basic Laws. As such, the referendum process should have been introduced in a Basic Law rather than in a regular statute.<sup>161</sup>

The claimant's arguments are contrary to the concept of popular sovereignty, which would demand that the People be allowed to express their opinion on fundamental constitutional issues. Under true commitment to popular sovereignty as discussed above, formalism about the question whether the introduction of the referendum into the Israeli constitutional system was done in a Basic Law or in a regular law is unimportant. More significant is the enabling of a deep, stable, and lasting will of the People to express itself.<sup>162</sup> This presents a dilemma for those who support the Constituent Assembly theory on the one hand but desire a peace agreement on the other hand. Either the Constituent Assembly theory, with its underlying notion that the People's will should prevail, must be upheld, or that theory must be abandoned so that the requirement to hold referenda can be abolished, which, in turn, would strengthen the peace process. Put differently: embrace popular sovereignty at the expense of the peace process, or embrace the peace process at the cost of appearing

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159. The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) (Amendment) Act, 5771-2010, SH No. 2263 p. 58 (Isr.) (adopted Nov. 22, 2010). See also Isabel Kershner, *Israel Enacts Bill to Force Referendum on a Treaty*, N.Y. TIMES, Nov. 23, 2010, at A4, available at <http://www.nytimes.com/2010/11/23/world/middleeast/23mideast.html>.

160. It does not apply to Judaia and Samaria, which were never officially and legally annexed to Israel according to the Court. See, e.g., HCJ 1661/05 Hamoeza Haezurit Hof Aza v. Israeli Knesset 59(2) PD 481, 514 [2005] (Isr.).

161. The content of the petition (number 9149/10) is available at <http://humanrights.org.il/main.asp?Search=7אשג%20ע>.

162. See *supra* Part III.B.1. & 3. C.2 and especially *supra* note 104.

autocratic.<sup>163</sup>

The Constituent Assembly theory could have provided greater constitutional legitimacy because it derives the higher authority of the Constitution from the People's adoption of the Constitution. But the way in which Israel has historically implemented Constituent Assembly theory has been formalistic. The Knesset merely uses the word "Basic" to impute constitutional legitimacy without using a special process for the enactment of Basic Laws. Therefore, the Knesset can easily meet the current requirement that a "Basic Law" can only be amended by another "Basic Law" and not by regular statutes by merely calling the new statute "Basic." If we truly want to establish the Israeli Constitution on this theory, it is time to involve the People in the adoption of the Constitution through one of the various possible mechanisms discussed above. Until then, Israel will have a Constitution that is predominantly monistic.

#### IV.

##### "MANNER AND FORM" THEORY

The "manner and form" theory enables judicial review of primary legislation even without a formal supreme Constitution upon which to expound. This Part presents the theory and explains why it is still relevant in the Israeli context. It further explains the ramifications of this theory to Israel's constitutional future when compared to the implications of the other theories discussed thus far.

##### *A. Presenting the Theory*

The third theory that may explain Israel's constitutional development is another variant of parliamentary sovereignty: "manner and form" theory. It is different from the self-entrenchment theory in that it does not restrain the sovereignty of the legislature with a supreme formal Constitution. Instead, under this theory, Parliament retains its sovereignty. As part of its sovereignty, however, Parliament may use *legislation* to define the process—in other words, the "manner and form"—for enacting statutes. This theory argues that, since the legislature is an artificial body composed of numerous members, the rules governing legislative processes, as well as the legislature's composition and

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163. It is interesting to note that an opposite dilemma arose in Britain towards the end of the nineteenth century. Dicey, Britain's great constitutional scholar of the nineteenth century, is identified more than anyone else with characterizing the British constitutional system as monistic (i.e., based on parliamentary sovereignty.) Nonetheless, Dicey repeatedly offered the referendum as a tool to decide the contested issue of Home Rule for Ireland. His biographer, Richard Cosgrove, explained that Dicey was so against Home Rule that he embraced a tool of popular sovereignty, thus negating his own theory. See RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* 105-110, 247 (1980). For a different interpretation, see Weill, *Dicey, supra* note 105.

membership, cannot logically be subject to parliamentary sovereignty. Thus, parliamentary sovereignty applies to the content of its statutory enactments but not to the process of enactment. Put differently, Parliament is sovereign when it enacts for others, but may be restricted with regard to the rules governing its own conduct. Thus, Parliament may *de facto* restrict itself procedurally by setting a more arduous or a different track for legislation. Once it has done so, if Parliament later tries to violate the *pre-defined* procedure, the Court may exercise judicial review to strike down the enactment on the grounds that because it was not enacted under those procedures, it is not truly a “statute.”<sup>164</sup> In British literature, this theory is still considered new and is distinguished from the classic Diceyan approach, which did not recognize the possibility of binding the legislature or enabling judicial review.<sup>165</sup> In reality, however, the theory is rather old and dates back to at least the 1930s, when Sir Ivor Jennings first articulated it. In his minority opinion in *United Mizrahi Bank*, Justice Cheshin articulated the “manner and form” theory.<sup>166</sup>

It should be emphasized that Justice Cheshin agreed both in *United Mizrahi Bank* and in later decisions, to the very exercise of judicial review, despite his belief that Israel lacks a formal supreme Constitution. He could do so, because under “manner and form,” judicial review is possible even in the absence of a formal Constitution. This interpretation deviates from the conventional scholarly view that Cheshin abandoned his support for the “manner and form” theory after *United Mizrahi Bank* and joined Barak’s approach after *United Mizrahi Bank*.<sup>167</sup> In fact, Cheshin himself has recently testified that he still adheres to his *United Mizrahi Bank* minority opinion.<sup>168</sup> It was possible for Cheshin to remain faithful to “manner and form” even after *United Mizrahi Bank* because later judicial decisions did not renew the theoretical discussion about the three major explanatory theories for Israel’s constitutional development: legislative self-entrenchment, Constituent Assembly, and “manner and form.” In *United Mizrahi Bank* the debate was not resolved either. Instead, there was only a plurality opinion in favor of Barak’s Constituent Assembly theory.<sup>169</sup>

The “manner and form” theory tries to distinguish itself from the legislative self-entrenchment theory by allowing only procedural, and not substantive, limitations on future legislation. Further, each of these procedural limitations is

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164. See *supra* note 17.

165. DICEY, *supra* note 15 and accompanying text. See also Rivka Weill, *Centennial to the Parliament Act 1911: The Manner and Form Fallacy*, PUB. L. 105, 107-08 (2012).

166. *United Mizrahi Bank*, *supra* note 4, at 530-35 (Cheshin J.).

167. For the conventional approach, see SAPIR, *supra* note 20, at 97-107.

168. “My opinion did not change, not even a bit.” Mishael Cheshin, *Responses*, 6 NETANYA ACAD. C. L. REV. 503, 503 (2007). Similar views were expressed on the eve of his retirement: HCJ 7052/03 Adalah v. Minister of Interior Affairs 61(2) PD 202, para 39-40 [2006] (Isr.) (Cheshin Deputy President).

169. See *supra* note 12.

subject to majority rule, and thus arguably does not enable true legislative self-entrenchment.<sup>170</sup> This theory explains that procedural limitations align with parliamentary sovereignty, because Parliament is a multi-member body that must set its own rules for the enactment of legislation. Parliament may change these rules, however, as long as it acts according to the predefined process for enacting statutes.<sup>171</sup>

What kinds of procedural limitations are possible? The legislature might entrench statutes (regular or “Basic”), as long as this entrenchment does not violate the democratic principle of majority rule. This way the legislature remains sovereign and arguably does not truly bind its successors. In other words, rather than create true entrenchment, the legislature may set attendance or quorum requirements. The legislature may, for example, require the support of an absolute majority before an enactment is changed, or mandate explicit repeal or override of statutes. Statutory repeal requiring a supermajority of members of Parliament would accordingly be interpreted to require an absolute majority. In this way, the legislature’s intent to tighten the requirements for repeal would be respected without defying majority rule.<sup>172</sup> For these reasons, the “manner and form” theory might be treated not as a variant of the legislative self-entrenchment theory but rather as a separate, independent approach.

Arguably this theory is no longer plausible in the Israeli context (assuming it ever was). The Israeli Supreme Court has time and again struck down statutes based on the limitations clause found in Basic Law: Human Dignity and Liberty (a substantive entrenchment clause).<sup>173</sup> A theory that allows only procedural limits on the legislature and prohibits content-based limitations, treating the latter as negating the legislature’s sovereignty, should not have potential explanatory force.

The answer to this challenge is that under “manner and form,” the legislature may also substantively entrench statutes; however, substantive entrenchment has a different meaning under this theory than under the others discussed above. Under “manner and form” theory, substantive entrenchment presents the legislature with a choice: either abide by the substantive entrenchment or explicitly violate it (by explicit repeal or override), taking public responsibility for those actions. Every substantive entrenchment would thus be translated to a procedural “manner and form” requirement by preventing the legislature from absent-mindedly or implicitly repealing or overriding entrenched statutes. Only a self-conscious public act, with Parliament held

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170. *United Mizrahi Bank*, *supra* note 4, at 537-43 (Cheshin J.).

171. It should be noted that judicial review that stems from “manner and form” is distinguished from judicial review over internal parliamentary proceedings because the former imposes a process defined in primary legislation, while the latter deals with a process that is defined in secondary sources, such as the internal rules of the legislative body.

172. *United Mizrahi Bank*, *supra* note 4, at 529-47, especially 542-43 (Cheshin J.).

173. Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 8 (Isr.).

publicly accountable for its actions, would suffice.<sup>174</sup> But were Parliament to explicitly override the substantive entrenchment, its statute would be valid, since previous statutes cannot bind a sovereign body.<sup>175</sup>

So far, Israel's Parliament has not attempted to explicitly "notwithstanding" Basic Law: Human Dignity and Freedom. Israel has not yet seen the *Occam's razor* case that would demonstrate whether this "manner and form" theory is still plausible in the Israeli context. There is, however, support for such a theory in the Court's treatment of substantive entrenchment in regular statutes.<sup>176</sup>

### B. *Advantages of the Theory*

On its face, "manner and form" theory—which would limit the legislature's self-entrenchment power to majority rule and construe substantive entrenchment as merely requiring explicit repeal or override of prior legislation—is attractive. Majority rule comports with democracy. Explicit repeal or override guarantees that the breach of entrenchment is done self-consciously and in the public eye. It necessitates public deliberation and extracts a political price from the breaching parliament. It is thus a form of accountability and a shaming mechanism.<sup>177</sup> At the same time, it respects the ultimate democratic authority of the legislature to repeal or override its predecessors' legislation by majority vote, thus raising no substantial counter-majoritarian difficulty.

Under "manner and form" theory, one can enjoy the power of judicial review over primary legislation, which is usually associated with the existence of a formal Constitution, *and* use judicial review merely to respect Parliament's predefined process. The theory has the potential to enable weak constitutionalism that may be overcome by majority rule and explicit legislative language. The 2005 *Jackson* decision by the House of Lords in the United Kingdom reveals traces of such an approach.<sup>178</sup>

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174. *United Mizrahi Bank*, *supra* note 4, at 551-63 (Cheshin J.).

175. DICEY, *supra* note 15, at 39. *See* BLACKSTONE, *supra* note 30.

176. Substantive entrenchment provisions appear, for example, in the following regular statutes: The Women's Equal Rights Law, 5711-1951, SH No. 82 p 248, § 1a (Isr.); The Budget Principles Law, 5745-1985, SH No. 1139 p. 60, § 3(a) (Isr.); Commodities and Services Control Law, 5718-1957, SH No. 240 p. 24, § 46(b) (Isr.). For decisions interpreting these substantive entrenchment provisions to require explicit repeal, see, e.g., HCJ 104/87 *Nevo v. Nat'l Labor Ct.* 44(4) PD 749, 764 [1990] (Isr.); HCJ 256/88 *Medinvest Herzliya Med. Ctr. v. CEO of Minister of Health* 44(1) PD 19, 42-46 [1989] (Isr.); *Conservative Movement*, *supra* note 74, at 385-88.

177. Scholars usually discuss shaming of individuals. *But see* Berthold Rittberger and Frank Schimmelfennig, *Explaining the Constitutionalization of the European Union*, 13 J. EUR. PUB. POL. 1148 (2006) (suggesting that shaming of community enabled European constitutionalism).

178. *R (on the application of Jackson) v. Attorney Gen.*, [2005] UKHL 56. The *Jackson* case dealt with the question whether the Hunting Act 2004 was valid, given that it had been enacted without the consent of the Upper House using the procedure defined in the Parliament Act 1949. The judicial decision declared the Hunting Act was valid, as the Parliament Act 1949 set new "manner and form" for the passage of statutes without the consent of the Upper House. *See* Weill, *Centennial*, *supra* note 165, at 110-12.



### C. Difficulties with the Theory

The difficulties with “manner and form” theory are numerous. Four of the most troubling difficulties are discussed below.

#### 1. Historical Origins and Current Use of the Theory are Incompatible

The “manner and form” theory originated historically with the *Colonial Laws Validity Act* of 1865, under which the British imperial superior parliament set restrictions on inferior dominion-colonial bodies.<sup>179</sup> The very origins of this theory define it as a manifestation of dualism, in that it reflects a structure in which a higher authority can instruct an inferior governmental body, rather than a parliamentary structure in which procedures are predefined.<sup>180</sup>

#### 2. The Theory Allows De Facto Content Restrictions

To be faithful to the theory, the predefined process for enactment of statutes must be applicable to all legislation, not just a subcategory of statutes. But, as the theory is actually employed in Israel, Britain, and elsewhere, it enables distinctions between different kinds of legislation, establishing different processes for their enactment.<sup>181</sup> In doing so, it negates the “manner and form” theory’s prohibition on placing content restrictions on legislatures in order to preserve a parliamentary sovereignty model.<sup>182</sup>

#### 3. The Theory Creates a Democratic Deficit

This theory does not fully escape the democratic deficit problem, a difficulty that is currently debated in Britain and New Zealand. This debate hinges on whether demands for explicit repeal negate parliamentary sovereignty.<sup>183</sup> The difficulty arises because courts would interpret a later

179. JENNINGS, *supra* note 17, at 143-44.

180. See Chander, *supra* note 53; see also M.H. Tse, *The Canadian Bill of Rights as an Effective Manner and Form Device: An Analysis of the Supreme Court of Canada Decision in Authorson v. Canada (Attorney General)*, 18 NAT’L J. CONST. L. 71 (2005).

181. Thus, for example, in Israel, “manner and form” restrictions apply mainly with regard to amending or overcoming some Basic Laws. For elaboration, see Weill, *Reconciling*, *supra* note 1, at 473-76. In Britain, some judicial decisions interpret statutes creatively, and even against what would otherwise be legislative intent, to align the statutes with the Human Rights Act. See J.W.F. ALLISON, *ENGLISH HISTORICAL CONSTITUTION: CONTINUITY, CHANGE AND EUROPEAN EFFECTS* 221-36 (2007); Gardbaum, *Reassessing*, *supra* note 20, at 188-98. These decisions thus require explicit repeal, which is a type of “manner and form,” to interpret statutes as incompatible with the Human Rights Act. See also *Thoburn v. Sunderland City Council*, [2003] Q.B. 151, 185-89 (Laws LJ discussing “constitutional statutes” that should enjoy special status so that if Parliament were to repeal them it should do so explicitly).

182. DICEY, *supra* note 15, at 39. See discussion *supra* Part IV.A.

183. See, e.g., *Thoburn*, *supra* note 181, at 151 (Laws LJ requiring explicit repeal of statutes he characterized as fundamental); Rebecca Prebble, *Constitutional Statutes and Implied Repeal: The*

statute to imply the repeal of an earlier statute only when the two could not be reconciled through interpretation, because the assumption is that if the legislature desired to abolish the earlier statute it would have done so directly. Implied repeal is considered a “last resort” tool in common law. If such circumstances arise where implied repeal should be recognized, then should not the last will of the sovereign legislature govern despite its predecessor’s requirement for explicit repeal?

#### 4. *The Theory Offers a Weak Model of Constitutionalism*

In light of the above difficulties, it seems wise to recognize that “manner and form” restrictions should be allowed only in limited contexts—mainly to protect individual rights and constitutional values. The theory should be recognized as providing a weak form of constitutionalism within a parliamentary sovereignty system. This form of constitutionalism is weak insofar as Anglo-American courts occasionally have refused to impose such requirements on noncompliant parliaments, as discussed above.<sup>184</sup> It is also weak in that it enables the legislature to ultimately prevail by explicitly taking responsibility for the breach of predefined substantive constitutional limits. In other words, explicit legislative language overcomes the limitations clause. While some Israeli academic circles characterize as courageous Cheshin’s opinion in *United Mizrahi Bank* (stating that Israel lacks a formal constitution),<sup>185</sup> interpretation of “manner and form” presented here suggests that Cheshin actually *did* express a commitment to constitutionalism, although weak in form.

#### D. *The Implications of “Manner and Form” Theory*

The implications of “manner and form” theory to Israel’s current development are numerous. *First*, this theory allows for potential expansion of the “notwithstanding” clause to all Basic Laws, not just to Basic Law: Freedom of Occupation, which contains an explicit clause to this effect.<sup>186</sup> This occurs because any limitations clause (i.e., substantive entrenchment clause) may be translated into a procedural clause if Parliament is permitted to explicitly deviate from the limitations clause.

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*Thoburn Decision and the Consequences for New Zealand*, 36 VICT. U. WELLINGTON L. REV. 291 (2009); Elliott, *supra* note 53; Andrew Butler, *Implied Repeal, Parliamentary Sovereignty, and Human Rights in New Zealand*, PUB. L. 586 (2001).

184. See *supra* Part II.C.

185. *United Mizrahi Bank*, *supra* note 4, at 471-526; Joshua Segev, *Was it a Dream or Reality: Justice Cheshin on the Knesset’s Constituent Authority*, 6 NETANYA ACAD. C. L. REV. 461 (2007).

186. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.). In the 1994 Basic Law: Freedom of Occupation, the Knesset adopted an override clause to the effect that the Knesset could enact, with the support of an absolute majority of MKs (61 out of 120), an infringing statute explicitly proclaiming its validity despite its conflict with the Basic Law. This override would be valid for four years, unless a shorter period was provided for in the infringing statute.

By contrast, under the Constituent Assembly theory, an explicit override in breach of substantive entrenchment provisions would only assist the Court in deciding the unconstitutionality of the breaching statute. If the Knesset itself declared that it did not fulfill the requirements of substantive entrenchment, why should the Court hold otherwise?<sup>187</sup>

*Second*, adopting the referendum as a binding tool, as has now occurred in Israel, may infringe upon “manner and form” theory’s commitment to parliamentary sovereignty. In Britain, the referendum was used as a consultative, non-binding tool.<sup>188</sup> Under a Constituent Assembly theory, however, to strike down a requirement for referenda on constitutional change would negate the theory’s ultimate commitment to popular sovereignty, as discussed above.<sup>189</sup> So far, the statute requiring the State to hold referenda on territorial concessions is itself un-entrenched and may be amended via a simple majority.<sup>190</sup> If the Knesset decides to hold a referendum and its results negate the Knesset’s decision, then we will have a case study as to whether our constitutional system is dualist or monist.

*Third*, under “manner and form,” a procedural entrenchment (whether in a “Basic” or regular law) that exceeds the requirements of an absolute majority would merely be interpreted as a requirement for an absolute majority.<sup>191</sup>

However, under the Constituent Authority theory, the entrenchment may very well be valid if it appears in a “Basic Law.” The purpose of a Constitution is to restrict majority rule. However, if the entrenchment appears in a regular statute, a requirement for an absolute majority may not even be valid. If members of Parliament have a right to abstain, then a requirement of absolute majority may infringe upon MKs’ right to be undecided.<sup>192</sup> Certainly, if the entrenchment in a regular statute exceeds absolute majority, the entrenchment would most likely be undemocratic and thus invalid. The Knesset, in its role as a legislative assembly, enjoys no superior authority over its successors.

*Fourth*, under “manner and form,” even a regular statute may amend a Basic Law unless that Basic Law explicitly requires that it must, in turn, be

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187. *United Mizrahi Bank*, *supra* note 4, at 409 (Barak President).

188. Chander, *supra* note 53, at 476-79; DAVID DENVER ET AL., SCOTLAND DECIDES: THE DEVOLUTION ISSUE AND THE SCOTTISH REFERENDUM (2000); LEIGHTON ANDREWS, WALES SAYS YES (1999). Though the referenda held in Britain were consultative, the British government treated their results as binding *de facto*. See Weill, *Centennial*, *supra* note 165, at 121-23.

189. See *supra* Part III.D.

190. See HCJ 1169/07 Rabes v. Israel’s Knesset (unpublished, 2007), available at <http://elyon1.court.gov.il/files/07/690/011/B02/07011690.b02.pdf>. (Isr.) (the Court held that even if a statute includes a provision requiring a more arduous track for deciding on an issue, if the provision itself is not entrenched, the Knesset may overcome it by simply amending the statute by a simple majority).

191. See discussion *supra* Part IV.A.

192. *United Mizrahi Bank*, *supra* note 4, at 411 (Barak President) (Barak left the issue open for future Court decisions).

amended via another Basic Law, in which case such a requirement would be treated as a process requirement. This is so since under “manner and form,” Basic Laws are not fundamentally different than any other law. This interpretation of “manner and form” actually aligns with pre-*United Mizrahi Bank* judicial decisions.<sup>193</sup>

Each of the other two theories stipulates that a Basic Law can only be amended via another Basic Law. One does so because it treats Basic Laws as the product of Constituent Authority theory (dualism), while the other does so by treating the title “Basic Law” as a form of entrenchment (monism).

*Fifth*, under “manner and form,” we may enjoy judicial review within a full parliamentary sovereignty system and without a formal Constitution to expound.

In conclusion the “manner and form” approach provides another plausible theory to explain Israel’s development. Further, only when the Court confronts Parliament’s attempt to explicitly overcome or “notwithstanding” Basic Law: Human Dignity and Freedom, or when the Knesset tries to act contrary to referenda results, will there be a test case as to the explanatory value of this theory. Such a test case may help us better define the hybrid intermediate nature of Israel’s Constitution by demonstrating whether it is leading to a strong model of dualism or to a weaker model of monism. It is therefore particularly important to understand the hybrid nature of Israel’s Constitution and the debate over its predominant characteristics. This way, when the case study arises, the political actors will be informed about the possible routes available to them and their respective implications.

## V.

### COMMON-LAW CONSTITUTIONALISM OR FOUNDATIONALISM

The desire to imitate the US Constitution is so great in Commonwealth countries that certain jurists who had given up on the prospect of adopting a complete formal American-style Constitution are referring to “common-law constitutionalism” or “fundamental unwritten values” as a mechanism to impose higher law on legislatures.<sup>194</sup> Although this jurisprudence is considered innovative in these nations, its roots may be found in their early common law foundations.<sup>195</sup> In the United Kingdom, for example, the Law Lords’ *dicta* in *Jackson* indicated that if the legislature were either to abolish judicial review

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193. See *supra* Part II.B.

194. See, e.g., ALLAN, *supra* note 19; Craig, *supra* note 19; Jenkins, *supra* note 19.

195. See *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 652 (C.P.) (“in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void.”). For discussion of the case as possibly laying foundations for judicial review power, see, generally, Theodore F.T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30 (1926); Edward S. Corwin, *The ‘Higher Law’ Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Raoul Berger, *Doctor Bonham’s Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521, 521-45 (1969).

over governmental acts in a way that greatly infringed upon human rights or to abolish the House of Lords without its consent, the Court might find such enactments to be invalid.<sup>196</sup>

This Part argues that the same motivation may explain the Israeli constitutional development. It explores two variants of this foundationalist approach. It also explains why common-law constitutionalism, also known as foundationalism, may be an inferior justification for Israeli judicial review.

#### A. Presenting the Theory

The last theory that may plausibly explain Israel's constitutional development is foundationalism, although this theory was not explicitly offered in *United Mizrahi Bank*.<sup>197</sup> Under the foundationalism theory, some values and rights are so fundamental that they exist beyond the authority of either the legislature or the body amending the Constitution to violate them or take them away. The courts serve as guardians of these rights.<sup>198</sup> These rights and values represent the most important and defining values of a given legal system. Because this theory relies on foundational values of a given constitutional system rather than attempting to derive such values and rights in the abstract, it is distinguished from pure natural law theories.<sup>199</sup>

This theory has two variants. Under the first foundationalist approach, those fundamental values are derived from the written Constitution and are inviolable because of their constitutional history or because of express constitutional language to that effect. This is the approach of the German constitutional system, which also relies on text, and the Indian system, which relies solely on history.<sup>200</sup> Under a common-law constitutionalism approach, these unwritten fundamental values derive from the history of the given legal system, even in the absence of a formal Constitution or regardless of the existing Constitution. Instead, the courts are charged with identifying these fundamental

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196. *Jackson*, *supra* note 178. Lord Stein [101-102] and Lord Hope [104-107] made the most explicit comments in this direction. Lord Carswell at [178] and Lord Brown at [194] inclined towards this direction but left it open for future decisions. Lord Bingham in dissent upheld unrestricted parliamentary sovereignty at [9, 32]. *See also* Weill, *Centennial*, *supra* note 165, at 111, 125-26.

197. *United Mizrahi Bank*, *supra* note 4.

198. For support see *supra* note 18.

199. *See* Dotan, *Constitutional Dialog*, *supra* note 11 (discussing the possibility of basing judicial review in Israel on meta-textual considerations); Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson From Mistakes and Achievements*, 53 AM. J. COMP. L. 77 (2005) (arguing that Israel's Basic Laws may not be treated as a Constitution but the Court has nonetheless the power of judicial review to protect core democratic values; he discusses various models of rights); *Cf.* 1 CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 11, at 86-92 (arguing that the Court based the Knesset's Constituent Power, *inter alia*, on a justification that it is desirable to recognize such authority).

200. For sources see *supra* note 18.

common law constitutional values.<sup>201</sup> Such values and rights may even restrain the People or the original Constituent Assembly adopting the Constitution, because they are not derived from the Constitution itself. Their power is not subject to the boundaries of the constitutional document.

In Israel, we find traces of both variants of foundationalism. Traces of common-law constitutionalism and foundationalism are evidenced in various Israeli Supreme Court decisions, including *Laor Movement*,<sup>202</sup> *United Mizrahi Bank*,<sup>203</sup> *Movement for Quality Government (MQG)*,<sup>204</sup> as well as several others.<sup>205</sup> Further, it seems that foundationalism unites the different opinions of the Justices in *United Mizrahi Bank* as all implicitly expressed commitment to this theory.

### 1. Foundationalism in Barak's Constitutional Theory

Before *United Mizrahi Bank*, Barak tried to develop common-law constitutionalism in the *Laor Movement* decision. Barak, in *dicta*, raised the possibility that the Court in the future may strike down a statute if it does not align with fundamental unwritten principles of the legal system.<sup>206</sup> Although he relied on German post-World War II sources to justify his position,<sup>207</sup> Barak also referred to British common-law precedents. At the time *Laor Movement* was decided, there was no formal Constitution recognized by the Court and thus

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201. For sources see *supra* note 19.

202. *Laor Movement*, *supra* note 33, at 551-54. The *Laor Movement* case dealt with the following difficulty: Two weeks after the elections for the twelfth Knesset—the same Knesset that enacted Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation—the Knesset's finance committee decided, and later ratified by statute, to retroactively increase the public funding granted to the political parties that had competed in the previous election. This was done to cover huge deficits that the parties suffered as a result of the preceding electoral campaign.

The statute, if valid, would have permitted political parties to spend more money than their economic fortunes allowed for campaigning if they could safely assume they would be part of the majority in the forthcoming legislature and could then enact a statute with retroactive funding increase. This would have heavily distorted election results, since small parties that were insecure about their electoral success would be unable to spend equally with large political parties whose future place in the Knesset was guaranteed. The retroactive funding would have meant unequal elections in real time. For the full story, see Weill, *Reconciling*, *supra* note 1, at 493-95.

203. See, e.g., *United Mizrahi Bank*, *supra* note 4, at 394, 406, 408 (President Barak). For full discussion, see *infra* Part V.A.

204. HCJ 6427/02 *Movement for Quality Gov't v. Knesset* 61(1) PD 619 [2006] (Isr.) [hereinafter *MQG*].

205. See, e.g., HCJ 2605/05 *Human Rights Dep't v. Minister of Fin.* (Nov. 19, 2009) Nevo Legal Database (by subscription) (Isr.) (invalidating privatization of prisons); see *infra* note 238 for discussion of common-law constitutionalism in the Human Rights Dep't decision; see also *Bar-On*, *supra* note 137.

206. *Laor Movement*, *supra* note 33, at 551-554 (Barak, J., dissenting).

207. Barak cited H. REICHEL, *GESETZ UND RICHTERSPRUCH* (1915); K. ENGISCH, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN STUTTGART-BERLIN-KÖLN*, 173 (7th ed. 1977); G. RADBRUCH, *RECHTSPHILOSOPHIE* 4 (Stuttgart, 1954); *Article 117 Case* (3 BVerfGE 225).

it seems that Barak was advancing common-law constitutionalism. Although Barak asserted that such authority might theoretically be attributed to the Court, he qualified his opinion by suggesting that the time has not yet come to utilize it in Israel.<sup>208</sup>

In *United Mizrahi Bank*, President Barak referred again to foundationalist theories without labeling or characterizing his views as such. He suggested in *dicta* that a future case may arise in which the Court finds that certain constitutional amendments are unconstitutional. That is, they are beyond the authority of the body amending the Constitution (the “unconstitutional constitutional amendment” doctrine).<sup>209</sup> The Court is therefore authorized to review the content of constitutional amendments and decide whether they are valid. Thus, in the very decision that recognized the Court’s judicial review power, he began laying the groundwork to review the content of the Basic Laws.

He also suggested in *dicta* that some retrofitting might later be necessary, if the Knesset were to misuse the title “Basic Law.” Should misuse occur, a “Basic Law” that did not “deserve” to be treated as constitutional might be treated as regular law.<sup>210</sup> Barak relied on both Indian and German constitutional jurisprudence to justify his position.<sup>211</sup> Both constitutional systems are famous for embodying a foundationalist approach. With both propositions—the unconstitutional constitutional amendment and misuse of the title “Basic Law”—Barak hinted that the basis of Israeli constitutionalism may be foundationalist after all, rather than dualist. Both propositions also try to employ existing Basic Laws to restrict the power of constitutional amendment.

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208. Scholars have described the *Yardor* decision, given in 1964, as the first decision to rely on foundationalism in reaching a result contrary to the explicit language of a statute. EA 1/65 *Yardor v. Chairman of Cent. Elections Comm. to the Sixth Knesset*, 19(3) PD 365 [1965] (Isr.) In a majority opinion, the Court validated the Central Election Commission’s decision to disqualify the political party, *El Ard*, from competing in elections to the sixth Knesset. The statute did not authorize the Commission to exclude a political party based on the content of its platform and ideology. To the contrary, Basic Law: The Knesset explicitly granted equal rights to all parties to compete at elections. §§ 4 and 6. Nonetheless, the Court ruled that Israel was not required to permit campaigning by political parties that aimed to abuse the democratic laws to destroy the State from within the Knesset. The majority opinion relied on fundamental unwritten principles, but it did not use explicit language of striking down a statute. On one hand, the Court implicitly overruled both election statutes and Basic Law: The Knesset with regard to the most basic norm of a democracy: equal elections. On the other hand, it is possible to read the majority decision as a robust interpretation of existing statutes to embody principles of self-defense that were not explicitly stated but seem self-evident. See Ruth Gavison, *Twenty Years to the Yardor Decision--The Right to be Elected and Historical Lessons*, in *ESSAYS IN HONOUR OF SHIMON AGRANAT* 145, 181 (R. Gavison & M. Kremnitzer eds., 1986); Barak Medina, *Forty Years to Yeredor: The Rule of Law, Natural Law and Restrictions on Political Parties in a Jewish and Democratic State*, 22 *BAR-ILAN L. STUD.* 327 (2006).

209. *United Mizrahi Bank*, *supra* note 4, at 394, 406, 408.

210. *Id.* at 406 (Barak President) (though Barak left it an open question to be decided in the future).

211. *Id.* at 394 (Barak President) (citing *Kesavananda*, *supra* note 18 (India) and 6 BverfGE 32 (1957) (Germany)).

But Barak is not decisive in *United Mizrahi Bank* regarding the origins of his foundationalist commitments. Common-law constitutionalism might better explain Barak's assertions that judicial review is justified by the very nature of the rule of law. Further, Barak contends that judicial review is necessary to protect basic rights in a democracy that is substantive, not formal.<sup>212</sup> Barak thus reveals a philosophy that embraces judicial review regardless of whether a specific formal Constitution exists to expound such principles. This is why Barak declared that anyone challenging judicial review as undemocratic effectively also asserts that the protection of individual rights is undemocratic.<sup>213</sup> Thus, in *United Mizrahi Bank*, Barak promotes dualism and foundationalism simultaneously—and within foundationalism he advances two variants, opening the way for the Court's broad judicial review power.

In the decisions after the *United Mizrahi Bank* revolution, President Barak seemed to advance the foundationalist theory, as shown for example in his *Meatrael* decision.<sup>214</sup> Barak suggested in *dicta* that, if a statute were to severely infringe on the most basic values of a Jewish and democratic State—even if it were to include a “notwithstanding provision”—the Court could nonetheless find it unconstitutional. In such a case, the Court may narrowly read the notwithstanding provision in the Basic Law: Freedom of Occupation to prevent a statute from undermining Israel's most basic societal values, which are protected by the “purpose and basic principles” clauses of the Basic Laws. This is a foundationalist approach, because the notwithstanding clause, according to its language and purpose, was intended to enable the legislature to override the entire Basic Law: Freedom of Occupation and not just some provisions of it.<sup>215</sup> In the *Meatrael* decision, Barak attempted to anchor his foundationalist approach in the Basic Laws themselves, following the German and Indian style, to legitimize the approach: It is not based on the Court alone as in common-law constitutionalism but is rather based on the Basic Laws.

To conclude, Barak moved from common-law constitutionalism in *Laor Movement* to an uncertain variant of foundationalism in *United Mizrahi Bank*, to finally embracing its Indian and German version in *Meatrael*. It appears that, having accomplished the constitutional revolution, Barak felt comfortable basing foundationalism on a creative interpretation of the Basic Laws.

After Barak's retirement, he continued to express his commitment to foundationalist theory in his scholarly work, although without explicit acknowledgement of such. In his article on the “unconstitutional constitutional amendment,”<sup>216</sup> Barak recognizes that the unconstitutional constitutional

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212. *United Mizrahi Bank*, *supra* note 4, at 419-27 (Barak President).

213. *Id.* at 424 (Barak President).

214. HCJ 4676/94 *Meatrael Ltd. v. Knesset*, 50 (5) PD 15 [1996] (Isr.).

215. *See* Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.).

216. Aharon Barak, *Unconstitutional Constitutional Amendment*, in GABRIEL BACH BOOK 361 (David Hahn et al. eds., 2011).



amendment doctrine developed in Germany, Turkey, and Brazil to protect explicit “eternity clauses,” which prohibit amending certain constitutional provisions. Nonetheless, he asserts that this doctrine was also adopted in countries lacking eternity clauses such as India. The Indian Court adopted this doctrine to protect the basic structure of the Constitution. Thus, Barak suggests that, although Israel lacks explicit eternity clauses in the Basic Laws, it may nonetheless adopt the doctrine to protect its most basic character as a Jewish and democratic country. This manifests a commitment to foundationalism, but it may be anchored in the Basic Laws.

But Barak advances his reasoning even further. He suggests that the very adoption of the Constitution—an issue that is relevant in Israel since the enactment of Basic Laws has not been completed—may be subject to the unconstitutional constitutional amendment doctrine. With this further proposition, Barak reveals the essence of his approach: Even the original constituent power is restricted by common-law constitutionalism, not just the power to amend an existing Constitution. That is, a Constitution may be adopted, but its content must satisfy the Court’s criteria. Barak’s approach goes beyond the unconstitutional constitutional amendment doctrine. In other countries the doctrine was intended to restrict the amending power, not the original power to adopt a Constitution. Also, in his new book, *Proportionality in Law*, he implicitly reaffirms his commitment to common-law constitutionalism.<sup>217</sup>

## 2. Foundationalism in Shamgar’s Constitutional Theory

Foundationalism also explains Shamgar’s *dicta* in *United Mizrahi Bank*, which states that there were limits to the Knesset’s self-entrenchment power. Not every subject may be entrenched, and not every form of entrenchment would be accepted. Shamgar mentioned that he treated Israel’s “Jewish and democratic” nature as setting limits on the self-entrenchment power.<sup>218</sup> In other words, the limits on self-entrenchment power were not inherent in the legislative self-entrenchment theory itself but were imposed by Shamgar’s foundationalist commitments.

## 3. Foundationalism in Cheshin’s Constitutional Theory

Surprisingly, for a theory that was not explicitly discussed, foundationalism unites not only Barak’s and Shamgar’s approaches, but also Cheshin’s. In a dissenting opinion in *MQG*, Cheshin found a statute deferring and even exempting Ultra-Orthodox students’ duty to serve in the army (the Tal statute) to be repugnant to the most fundamental unwritten constitutional values of the

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217. For discussion of his work on proportionality in this light, see Rivka Weill, *Did the Lawmaker Use a Canon to Shoot a Flea? On Proportionality in Law*, L. & BUS. J. (forthcoming).

218. *United Mizrahi Bank*, *supra* note 4, at 293 (Shamgar President).

Israeli legal system and thus invalid.<sup>219</sup> He found that the statute violated the fundamental value of equality. This conclusion was not, however, derived from the Basic Laws' protection of human dignity. For Cheshin, serving in the Israeli army was an honor, not an infringement of dignity. Rather, Cheshin was willing to invalidate the statute as contrary to equality as a fundamental common-law value, and as contrary to the nature of the Israeli State both in its Jewish aspects (implicating the need for an army to protect the State) and democratic aspects (implicating the imperative to not discriminate against seculars). This was the first and only instance that an Israeli Supreme Court Justice was willing to explicitly utilize common-law constitutionalism to invalidate a statute.<sup>220</sup> This decision surprised some Israeli legal academics that perceived Cheshin to be expressing a conservative opinion regarding judicial review in *United Mizrahi Bank* because he did not recognize Israel's Basic Laws as its formal Constitution. In *MQG*, he suddenly expressed a contrasting expansive approach regarding the power of judicial review.<sup>221</sup>

However, Cheshin's opinion in *MQG* should not have surprised Israeli academia because it aligns with his *United Mizrahi Bank* opinion. In *United Mizrahi Bank*, Cheshin treats democracy as a fundamental unwritten value protected by common-law constitutionalism such that no legislative procedure may require more than the support of an absolute majority of MKs to enact or amend statutes.<sup>222</sup> He holds that Israel's Parliament is sovereign when "legislating to others," as opposed to its more limited authority in the regulation of its own conduct.<sup>223</sup> Thus, the Knesset may even legally declare that a man is a woman or vice versa.<sup>224</sup> With regard to its own authority, however, the Knesset is restricted by the most fundamental unwritten value: democracy.<sup>225</sup> In 2006 *MQG* decision, Cheshin extended common-law constitutionalism, so that it applied not just to the internal proceedings of the Knesset ("legislating for itself"), but also to enactments for the public at large ("legislating for others").

Barak, however, wrote that the Tal statute could have been invalidated as unjustly unequal because existing Basic Laws prohibited unjustified infringement on human dignity. Thus, Barak's argument did not need to rely on common-law constitutionalism.<sup>226</sup> Barak did not dispute the potential of relying

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219. Deferral of Service to Yeshiva Students That Torah Is Their Work Act, 5762-2002, SH No. 1862 p. 521 (Isr.).

220. *MQG*, *supra* note 204, at 722-78.

221. *SAPIR*, *supra* note 20, at 97-107.

222. *See supra* notes 170, 172, 174 and accompanying text.

223. *United Mizrahi Bank*, *supra* note 4, at 545-46 (Cheshin, J.); *see supra* Part IV.A.

224. *United Mizrahi Bank*, *supra* note 4, at 527 (Cheshin J.); *cf.* DICEY, *supra* note 15, at 5 ("It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.").

225. *United Mizrahi Bank*, *supra* note 4, at 544-46 (Cheshin J.); *see also* discussion *supra* Part IV.A.

226. *MQG*, *supra* note 204, at 714-17. Barak also did not want to declare the statute

on common-law constitutionalism but rather the need to refer to it in this specific case of *MQG*. He wanted to preserve common-law constitutionalism for those extreme situations of gross infringement of constitutional rights and values, where no other route is available except common-law constitutionalism.

#### 4. *The Influence of Carolene Products*<sup>227</sup>

While Cheshin tried to expand the basis for judicial review power in *MQG*, Justice Grunis, the new President of the Supreme Court (since February 2012), tried to constrain it to situations where judicial review enhances the democratic process, thus mitigating the counter-majoritarian difficulty. Grunis explicitly relied on John Hart Ely's democratic process enhancing theory.<sup>228</sup> In Grunis' words:

The central justification for judicial review over legislation is the need to protect the minority and the individuals from majoritarian tyranny. The Court is the last barrier that can prevent the majority from injuring the individuals and minority groups.<sup>229</sup>

Grunis found that the Tal statute was valid because it granted a privilege to the minority group of Ultra-Orthodox men. The majority of secular people do not need the Court's protection, as they were responsible for the statute's enactment. There is no danger of the majority discriminating against itself.<sup>230</sup>

Why restrain judicial review in this Eliyan way? Grunis' approach expresses a foundationalist perspective, though its content differs sharply from that in Cheshin's and Barak's theories. With Cheshin and Barak, foundationalist perspectives complement their other main theories, while with Grunis it is the only one.

The Israeli literature has suggested that Grunis' theory should be applied to identify when there is any "infringement" of constitutional rights: If the statute does not target individuals or minorities, there is no infringement of constitutional rights.<sup>231</sup> Grunis' approach is understood as an interpretation of the scope of existing constitutional rights, but it does not replace constituent

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unconstitutional but rather suspected of unconstitutionality. He thought there was not enough experience with the Tal statute to know whether it actually succeeds in drafting the Ultra-Orthodox community to the army or not. *Id.* at 714. In the *Ressler* decision, handed in February 2012, the Court finally struck down the Tal statute based on Barak's opinion in *MQG*. H.CJ 6298/07 *Ressler v. The Knesset* (February 21, 2012) (unpublished) available at: <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx>.

227. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

228. *MQG*, *supra* note 204, at 802-804 (Grunis J.); *see generally* J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Ely's book theorizes *Carolene Prod. Co.*, 304 U.S. at 152 n.4 (1938).

229. *MQG*, *supra* note 204, at 809-10 (Grunis J.).

230. *Id.* at 798-810 (Grunis J.).

231. *See, e.g.*, Moshe Cohen-Eliya, *Towards a Procedural Limitation Clause*, 10 L. & GOV'T 521 (2007).

authority or self-entrenchment theories in *United Mizrahi Bank*. Further, Grunis is thought to hold a very conservative approach to judicial review, incompatible with foundationalist theory.

But a different reading of Grunis' opinion is possible. Grunis interprets *United Mizrahi Bank* to state that the Israeli Supreme Court has judicial review power over primary legislation. But he does not view the decision as deciding in favor of monism or dualism.<sup>232</sup> Why does the Court enjoy judicial review? Grunis suggests that it exists to protect the democratic process, as well as individual and minority rights. Who gave this guardian role to the Court? Grunis does not rely on the Basic Laws but on a foundationalist view of the Court's role in a democracy. This is also why he relies on Ely and not on the language of the Basic Laws.<sup>233</sup>

Further, Grunis emphasizes that his view extends beyond the question of whether there exists an infringement of constitutional rights or whether the infringement is proportional. Rather, it is an *a priori* approach and deals with the question of when judicial review is ever justified.<sup>234</sup>

It seems that Barak in *MQG* understood Grunis' thesis as foundationalist. He wrote that both Cheshin's and Grunis' opinions in *MQG* attempt to anchor judicial review on doctrines external to the Basic Laws, regardless of their limitations clauses.<sup>235</sup>

So far, Grunis' approach is a lone voice in Israeli judicial decisions, though this may possibly change now that he became the President of the Court. He offers the most constrained approach to the power of judicial review, and it contains internal contradictions. His approach purports to limit judicial review to cases in which the legislature infringes the democratic processes or minority groups. But he also states that judicial review is always justified to protect the rights of the individual. This last statement undermines his initial conservative limitations on judicial review power. Every statute that infringes constitutional rights also infringes the rights of individuals.<sup>236</sup> In fact, one could also make this argument with regard to the Tal statute, as Barak has done.

Grunis' answer is that, in the Tal statute case, it cannot be shown that exempting Yeshiva students from the army leads to infringement of individual rights. There is no proof that, were Yeshiva students to serve, the toll on the individuals already serving would be lessened.<sup>237</sup> But Grunis' opinion would

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232. *MQG*, *supra* note 204, at 808-809 (Grunis J.).

233. In fact, all the examples he brings in which the Court should intervene—disenfranchisement of minority groups, double vote to part of the electorate/MKs, extension of parliament's life—do not rely on the language of the Basic Laws or refers to them at all. *Id.* at 802-804.

234. *MQG*, *supra* note 204, at 807-808 (Grunis J.).

235. *Id.* at 721 (Barak President).

236. See Cohen-Eliya, *supra* note 231, at 530-531 n.27.

237. *MQG*, *supra* note 204, at 809-810 (Grunis J.).

lead the Court to abstain from intervening when equal allocation of State resources is challenged, and these are the prime examples of failure in democratic processes, even according to Ely's thesis. Grunis does not adequately deal with this internal conflict in his own approach.

To conclude, the various judicial opinions regarding the scope of judicial review power in Israel post-constitutional revolution share a commitment to foundationalism, whether as a sole source for judicial review (Grunis) or as a complementary source (the other approaches). The Court has reaffirmed its commitment to foundationalism in the *Human Rights Department*<sup>238</sup> and *Bar-On* decisions.<sup>239</sup>

### B. Difficulties with the Foundationalist Theory

This theory is the most problematic when articulating the rationale and justifications for judicial review. The challenges it poses include the following:

#### 1. Should the Validity of Constitutional Amendment be Justiciable?

At first glance, the concept of an unconstitutional constitutional amendment seems self-contradictory. How can part of the Constitution be deemed unconstitutional? Against what content should the text of the amendment be measured? The amendment contradicts the text of the existing Constitution; otherwise no amendment would have been necessary. If the amendment were passed according to the applicable procedural rules set in the Constitution, why shouldn't the constitutional amendment be valid? Indeed, some constitutional systems—chief among them the US system—rejected the idea of judicial review over the constitutionality of constitutional amendments. The US Supreme Court treats this issue as non-justiciable. That is, on prudential grounds the Court prefers to leave the judgment as to the validity of constitutional amendments to the political branches.<sup>240</sup>

#### 2. Intensifying the Counter-majoritarian Difficulty

If judicial review over primary legislation suffers from counter-majoritarian

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238. *Human Rights Dep't*, *supra* note 205. President Beinisch, who wrote the main opinion, relied on the social contract idea to conclude that privatization of prisons infringe upon the rights to liberty and human dignity (¶¶ 23-39). Deputy President Rivlin *in dicta* suggested that maybe the privatization statute could have been abolished based on common-law constitutionalism because it negates the fundamental social contract principles of the State. He did not rely on the Basic Laws to reach this conclusion. In contrast, Justices Chayut, Naor and Levi wrote that the infringement was not so severe as to justify such a move on the part of the Court (¶¶ 3-4 of Chayut's opinion, ¶ 29 of Naor's opinion, ¶¶ 18-19 of Levi's opinion).

239. *Bar On*, *supra* note 137; *see discussion supra* Part III.C.

240. *See Coleman v. Miller*, 307 U.S. 433, 454 (1939) (though this was not always the attitude of the US Supreme Court). For discussion *see* Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185 (1951).

difficulties, although grounded in a supreme Constitution, then judicial review of the very content of the Constitution itself is even more contentious on democratic grounds. When the Court's exercise of judicial review is based on foundationalism, it will be difficult for the Court to assert that it only guarantees that the People's will prevail over the legislative will, because the People have already expressed their opinion in favor of constitutional change. Judicial intervention in the content of the Constitution grants it the last word in constitutional matters, while the "regular" judicial review power may be overcome by constitutional amendment.

### 3. *Incompatibility with the Other Justifications for Judicial Review*

It should be clarified that while the Justices in Israel have tried to assert foundationalism as a complementary theory, foundationalism is a deviation from the other theories in that it does not easily align with their major premises. In a system of parliamentary sovereignty, parliament should ultimately be able to act without constraints. Similarly, in a system of popular sovereignty, many scholars believe that the amending power should be treated on par with the original constitutive power and that constitutional amendments may occur outside the process prescribed for amendment in the constitutional text. As long as the constitutional amendment satisfies the dualistic requirements of expressing the People's deep, deliberate, and sustained judgment, it should be treated as the new higher law governing the nation.<sup>241</sup> Acceptance of an "unconstitutional constitutional amendment" doctrine thwarts this profound commitment to popular sovereignty. The Justices' reliance on common-law constitutionalism or foundationalism reflects their commitment to the superiority of some constitutional values and rights over democratic or participatory processes. In this sense, the foundationalist or common-law constitutionalism theory has the potential to *supplant* rather than *supplement* the other theories.

### 4. *Importance of Textual and Historical Support for the Unconstitutional Constitutional Amendment Doctrine*

Germany and India, whose constitutional jurisprudence Barak relied on to promote the application of the unconstitutional constitutional amendment in Israel, have expressed textual and/or historical support for foundationalism. It is doubtful that Israel has similar support in its Basic Laws' language or history.

#### i. *Comparative Experience*

Many constitutional systems have decided to treat certain provisions within the Constitution as not amendable by explicitly granting them absolute entrenchment (eternity clauses). Usually, such absolute entrenchment is granted

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241. See *supra* note 146 and accompanying text.

to the democratic or republican nature of the State, as well as to certain fundamental rights.<sup>242</sup> To protect these eternity clauses, some states developed the doctrine of the unconstitutional constitutional amendment.

The German Basic Law is famous for its foundationalist character. The Basic Law's drafters, working in 1949, had the horrors of Nazism firmly in mind. They therefore made some provisions, especially those regarding the basic value of human dignity and the democratic character of the State, inviolable.<sup>243</sup> This textual and historical background also explains why the German Federal Constitutional Court, in its first major constitutional decision, introduced the notion of the unconstitutional constitutional amendment into the system.<sup>244</sup> However, since the Court has never yet acted on this doctrine, it remains a *dictum*.<sup>245</sup>

Even the absence of textual support such as an eternity clause may not be an obstacle for adopting the doctrine of the unconstitutional constitutional amendment. This happened in India because of its unique constitutional history.

The Indian Supreme Court, by a majority of seven to six in *Kesavananda*, decided that its Constitution has some "essential features" and a "basic structure" that could not be violated, even by a constitutional amendment.<sup>246</sup> This decision was given in April 1973, and the Court relied on the history of the drafting of the Indian Constitution. It suggested that the Constituent Assembly that drafted the Constitution represented the various minority groups within the Indian society and reached its decisions consensually. Thus, it was inappropriate for a coincidental transitory supermajority of Parliament to amend the essential features of the constitutional document.<sup>247</sup> That is to say, the Court wanted to protect the results of the dualist process that led to the adoption of the Indian

242. See BROOKE, *supra* note 18.

243. Article 79(3) of the German Basic Law states: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited." Article 1 provides that "Human dignity shall be inviolable," and Article 20 defines that "Germany is a democratic and social federal state." KOMMERS, *supra* note 18, Appendix A.

244. *Southwest State Case*, 1 BVerfGE 14 (1951) (Ger.). For partial English translation of the case, see KOMMERS, *supra* note 18, at 62-69. See also *id.* at 542 n.90. In fact, there is some ambiguity in the decision as to whether the German Federal Constitutional Court derives the foundationalist commitments from the Basic Law or even from some higher principles that bind the Basic Law itself. *Id.* at 63. For discussion of the case, see also Gerhard Leibholz, *The Federal Constitutional Court in Germany and the "Southwest Case"*, 46 AM. POL. SCI. REV. 723, 725-26 (1952). The doctrine was further embraced in the *Article 117 case*, 3 BVerfGE 225, 234 (1953) (Ger.). KOMMERS, *supra* note 18, at 48.

245. See Jacobsohn, *supra* note 18, at 477. It is important to note, that in the *Klass case*, 30 BVerfGE 1, 33-47 (1970), there was a dissenting opinion of three justices that found a constitutional amendment unconstitutional. See KOMMERS, *supra* note 18, at 48, 228-29 and especially 563 note 98.

246. See *Kesavananda*, *supra* note 18.

247. See David G. Morgan, *The Indian "Essential Features" Case*, 30 INT'L COMP. L. Q. 307 (1981).

Constitution (constituent assembly) from being fundamentally altered through a monist process (of supermajority legislative support).

Further, the decision should be seen as part of a power struggle between the legislative and judicial branches. This struggle began in the 1960s, with Parliament adopting statutes that fundamentally infringed on constitutional rights, which were thus invalidated by the Court. This led Parliament to implement its policy through constitutional amendments. In the 1967 *Golk Nath* decision, the Court declared that there are limits to Parliament's constitutional amendment power, but that these limits would only be imposed in the future.<sup>248</sup> This constitutional decision became the prominent issue of the 1971 elections and brought victory to Indira Gandhi. Parliament amended the Constitution to abolish the doctrine of the unconstitutional constitutional amendment. In *Kesavananda*, decided in 1973, the Court abolished the *Golak Nath* decision, authorizing Parliament to amend the Constitution in a way that greatly curtails rights. But the Court preserved its power to apply judicial review over a constitutional amendment, if the amendment violates the essential features of the Constitution. The power struggle between the two branches peaked in almost two years of "emergency rule" in India during the years 1975-1976, when Parliament suspended some of India's most important constitutional provisions with regard to fundamental rights and imposed a dictatorial regime. It also amended the Constitution to abolish yet again the judicial power to review constitutional amendments.<sup>249</sup> The Court abolished some of these constitutional amendments in the 1980 *Minerva Mills* case based on the "essential features of the Constitution" doctrine.<sup>250</sup> These extreme historical and political circumstances, in which all political actors realized after the fact that Parliament had abused its constitutional amendment power, lend credence and retroactive legitimacy to the innovative decision of the Court to adopt the unconstitutional constitutional amendment doctrine.

*ii. Israel's Experience*

Barak relied on the German and Indian experiences in offering foundationalism to Israel, but it is questionable whether this reliance is justified. Unlike Germany, Israel has no inviolable language or eternity clauses in its Basic Laws. It is also as difficult to speak of the "essential features" of the Israeli Basic Laws as it is with Indian jurisprudence, since Israel has not completed the process of adopting a Constitution of which the essential features can be readily identified. Nor was the process of adopting the Basic Laws typified by consensual support as has happened with regard to the Indian

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248. See *L.C. Golak Nath and Others v. State of Punjab*, A.I.R. 1967 S.C. 1643 (India).

249. Brooke, *supra* note 18, at 63-65; Morgan, *supra* note 247, at 326-37; Jacobsohn, *supra* note 18, at 470-76.

250. See *Minerva Mills Ltd. V. Union of India*, A.I.R. 1980 S.C. 1789 (India).



Constitution.

5. *Should Common-law Constitutionalism Serve as the Theoretical Basis for Constitutionalism?*

Even if the Knesset does not adopt eternity clauses, there is still support for the view that certain constitutional values are so fundamental that the Knesset may not substantially violate them, thus advancing common-law constitutionalism. But the circumstances that would justify such judicial decisions should be quite extreme. In the two decisions where the Justices seriously considered applying common-law constitutionalism in Israel—the *Laor Movement* (dealing with unequal allocation of funding for elections) and *MQG* (dealing with inequality in the draft duty)—the circumstances were not extreme enough to justify implementing common-law constitutionalism.

Why should common-law constitutionalism be treated as the last resort rather than the tool for constructing Israel's constitutional regime? Simply because, in the absence of explicit foundationalist provisions in the Constitution, it is not really known what common-law constitutionalism requires. We do not know the origins of its principles. There is no agreed-upon document that can serve as its basis. It is a form of secular religion, but religion nonetheless. Thus, for example, in the *MQG* case, both sides could have invoked common-law constitutionalism on behalf of their cause. The Ultra-Orthodox population could have claimed that their common-law constitutionalism required respect for Jewish tradition and Torah learning, necessitating the exemption of Yeshiva students from army service. Those serving in the army, on the other hand, could have invoked equality and protection of life as requiring no exemption for the Ultra-Orthodox community. History is full of examples of the use of common-law constitutionalism to advance not-so-liberal goals, such as slavery, racial segregation, or degradation of women.<sup>251</sup>

Further, common-law constitutionalism raises critical epistemic concerns of the kind discussed in Adrian Vermeule's *Law and the Limits of Reason*.<sup>252</sup> It is not at all clear why we should prefer the decisions of the courts to those of the elected branches, when the latter enjoy the following advantages over the courts: (1) greater numbers; (2) diversity of background and professional experience; (3) tools for gathering information; and (4) the ability to respond rapidly to changing circumstances. When the courts exercise judicial review in the name of the Constitution, it is arguable that they are joining the political branches in a

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251. Thus, for example, before the Civil War, it was argued by both sides of the slavery debate that God's law either required or forbade that black people should be slaves. See ELY, *supra* note 228, at 50-51. During the nineteenth century, it was argued that women could not be attorneys since, by the law of nature, they were destined to fulfill the role of mothers and wives. *Bradwell v. Illinois*, (16 Wall.) 130, 141 (1872) (Bradley, J., concurring). In *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), "the nature of things" required social segregation of blacks and whites on railroad trains.

252. ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 1-122 (2009).

cumulative enterprise. But, when the courts use common-law constitutionalism to decide the content of the Constitution, overriding the political branches' amendments, it is harder to defend judicial decisions as part of a cumulative enterprise. Such judicial review amounts to a naked superiority of the judges over the other branches of governments. In the words of Thomas Poole in *Questioning Common-law constitutionalism*: “[T]o allow the ultimate decision on the prioritisation of values to rest with the judges smacks of abandoning a democratic system in favour of one layered with aristocracy.”<sup>253</sup>

It should be noted that theories of common-law constitutionalism or foundationalism cannot prevent constitutional change from occurring when the popular will overwhelmingly and passionately favors it. The commitment to these theories only raises the stakes for constitutional change by requiring a new Constitution or even the use of force to bring about change. It is thus only advisable to rely on these theories in extreme cases.

Probably because of these challenges, the Israeli judiciary in *United Mizrahi Bank* did not rely exclusively on foundationalism or common-law constitutionalism to base its power of judicial review. Commitment to foundationalism may have inspired the Justices to recognize Israel's Basic Laws as its Constitution, but they were careful to treat foundationalism as supplementary to the other theories already discussed in this Article, rather than as a substitute for them. The margins of the different opinions contain a common commitment to foundationalism or common-law constitutionalism. All the Justices seem willing to refer to common-law constitutionalism or foundationalism in the extreme, but they differ in what they consider “extreme.”<sup>254</sup>

### C. *Implications of the Theory*

What are the implications of this theory to present constitutional development? It is often asserted that Israel's legislature has accepted the constitutional revolution as legitimate. Commentators point to the fact that Basic Law: Human Dignity and Liberty is not procedurally entrenched and is thus exposed to amendment by a simple majority; nevertheless, the legislature does not amend that Basic Law.<sup>255</sup> But this assertion must be qualified: The very fact that foundationalism or common-law constitutionalism was raised in judicial decisions means that the legislature operates in the *shadow* of this theory.<sup>256</sup> In

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253. Thomas Poole, *Questioning Common Law Constitutionalism*, 25 *LEGAL STUD.* 142, 162 (2005).

254. See discussion *supra* Part V.A.

255. See, e.g., Rivka Weill, *Shouldn't We Seek the People Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel's Constitution*, 10 *L. & GOV'T* 449, 467-68 (2007).

256. “Since [1992] the Knesset stopped enacting Basic Laws and refuses to continue enacting them. The main reason is the pressure of the religious political parties. Arie Deri, former leader of

other words, the reason why the Israeli legislature does not amend the Basic Laws dealing with individual rights is unclear. The legislature may refrain from doing so because it accepts the legitimacy of Israel's constitutional revolution. But it also may refrain because of concern that the Court would use its authority to declare a constitutional amendment unconstitutional. In light of foundationalism or common-law constitutionalism, it is difficult to explain Parliament's inaction regarding the constitutional revolution or some of its parts.

Barak's latest article on the unconstitutional constitutional amendment intensifies these difficulties. He expands the application of the unconstitutional constitutional amendment doctrine to situations in which the constitutional adoption process was not completed, making it difficult to differentiate between adoption and amendment. He also suggests that, were the Constitution to exclude judicial review over constitutional amendment, this may be treated as an unconstitutional constitutional amendment.<sup>257</sup> And, were the Knesset to entirely abolish judicial review over primary legislation, this would also be considered an unconstitutional constitutional amendment. The arguments set forth in this Article suggest that Barak believes the Knesset cannot abolish the constitutional revolution of the 1990s. Barak further suggests in *his* article that it may be the time to treat Israel's current Basic Laws as its complete Constitution, even if the Knesset did not decide to end the constitutional project.<sup>258</sup> If the Court made this declaration, any attempt by the Knesset to undo *United Mizrahi Bank* would require it to initiate the replacement rather than the amendment of the Constitution.

## VI.

### AN INTERMEDIATE CONCLUSION

Israel is the only country in the world where a law professor asking her students, during their first constitutional law lecture, whether the nation has a formal Constitution will receive no answer in the affirmative. This position stands in sharp contrast to the fact that the Israeli Supreme Court currently exercises judicial review to protect the country's Constitution.

This Article contends that Israel's formal Constitution is a hybrid. It is based on a parliamentary sovereignty process of enactment. Yet, it achieved a semi-dualist outcome insofar as only other "Basic Laws" may amend the Basic Laws. Further, foundationalist motives have created judicial recognition of the existence of a formal Constitution. Although omitted from the international

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Shas, said that even were the Knesset to enact the Ten Commandments as Basic Laws, he will oppose it. This is so, because of the interpretation of the Supreme Court, and especially that of Barak." Moshe Gorali, "Only Three Statutes were Invalidated" HAARETZ, March 27, 2002, <http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=146225> (last visited on January 2, 2012).

257. Barak, *Unconstitutional*, *supra* note 216, at 373.

258. *Id.* at 381 (Barak leaves this issue undecided but it is his way to examine ideas before endorsing them in full).

literature on commonwealth constitutionalism, as mentioned above, Israel, like Commonwealth countries (notably Canada, the United Kingdom and New Zealand), has thus succeeded in creating a middle ground between the sovereignty of the legislature and the supremacy of the Constitution (or, some would say, of the Justices). After *United Mizrahi Bank*, Israel enjoys a formal supreme Constitution in the form of the Basic Laws that are protected via judicial review. This Constitution, however, is vulnerable to the light entrenchment requirements provided for in the Basic Laws.

Every country has its unique history of constitutional development. The process of constitution-making worldwide has always required compromises. It has often involved calls for coercion against dissenters. It sometimes also required a resort to illegality in order to bring about change.<sup>259</sup> This Article has attempted to portray Israel's compromises in its constitutional adoption process. Since *United Mizrahi Bank*, the Knesset has accepted the Court's judicial review "trumping" power, at least to the extent of being willing to repeatedly amend regular statutes found by the Court to be unconstitutional.<sup>260</sup> This may legitimize Israel's formal Constitution over time, based on *ex post facto* acquiescence.<sup>261</sup>

But the impetus behind this Article has been deeper. It has elaborated that, depending on one's views of the theoretical bases of Israel's formal Constitution, present and future constitutional debates may be resolved differently. Each theoretical framework leads to a different conclusion, and these conclusions should affect Israel's constitutional present and future—whether toward a weak or strong form of constitutionalism. Because of the hybrid nature of Israel's Constitution, Israel may develop in either direction as a result. Therefore, it is now appropriate to debate the kind of a Constitution that is forming in Israel rather than the question of whether an Israeli Constitution exists.

## VII.

### ON THE NEXUS BETWEEN FORMS OF CONSTITUTION-MAKING AND TYPES OF JUDICIAL REVIEW

This Article uses a comparative analysis to better understand Israel's constitutional development. At the same time, one may deduce the relevant lessons for a comparative study from Israel's unique experience. Politicians and

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259. See e.g., ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16 (American experience); Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (2000) (American and French experience); Weill, *Evolution*, *supra* note 16, at 453-79 (American and British experience).

260. Weill, *Reconciling*, *supra* note 1, at 500, 504 and note 190.

261. See also Or Bassok, *A Decade to the "Constitutional Revolution": Israel's Constitutional Process From a Historical-Comparative Perspective*, 6 L. & GOV'T 451 (2003) (discussing the potential that Israel's Constitution would acquire legitimacy in an evolutionary manner).

scholars alike show growing interest in various forms of judicial review, especially alternatives to the prevalent “strong-form” judicial review exercised in the United States.<sup>262</sup> The interest in weak forms of judicial review arises out of a desire to see a better balance between the protection of individual rights and democratic self-governance, on one hand, and the redistribution of power from the courts to elected representatives in constitution-making and interpretation, on the other. The focus of this emerging area of study is on the intermediate model found in Commonwealth countries such as Canada, the United Kingdom, New Zealand, and to some extent in Australia at the territorial and state levels.<sup>263</sup> This intermediate model lies along a continuum between the supremacy of the Constitution (or judges), as in the United States, and the supremacy of the legislature, as in the classic Diceyan tradition of the United Kingdom. The intermediate model allows for better protection of rights than that found in traditional forms of parliamentary sovereignty. But, in contrast to the US “strong-form” model, this weaker intermediate model recognizes that different branches of government—primarily the legislature and the judiciary—can legitimately and reasonably disagree about the interpretation of the Constitution; and when this occurs, the elected bodies should retain the final word on the subject.<sup>264</sup>

Leading scholars of this Commonwealth model have asserted that the features of a given constitutional document determine the nature of intermediate or hybrid constitutionalism.<sup>265</sup> In contrast, the underlying theme of this Article is that there is a strong connection between the process of constitution-making and the resulting democratic legitimacy of the Constitution. Consequently, this legitimacy, or lack thereof, affects the nature of judicial review that may be utilized by the courts. That is to say, intermediate constitutionalism is the result of the political processes that accompany the adoption (and amendment) of the Constitution, rather than the result of the language of the constitutional provisions.

A dualist, popular sovereignty Constitution offers the strongest democratic legitimacy, since it is based on the deliberative, deep, sustained decisions of the People. This, in turn, allows for strong-form judicial review, under which courts may argue that they are protecting the will of the People from incursions by the legislature at times of normal politics. Courts guarantee that the People, rather

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262. Tushnet argued that some weaker forms of judicial review exist and should even be used within the US to examine certain constitutional issues. Thus, for example, the non-justiciability doctrine is already employed in the United States as a mechanism to ensure that decision-making responsibility rests with the elected bodies. Also, the social rights of citizens may in the future be recognized as particularly suitable for weaker forms of judicial review. TUSHNET, *supra* note 20, at 37, 227-64.

263. See *supra* note 20 and accompanying text; see, e.g., TUSHNET, *supra* note 20, at xi, 23. Gardbaum, *The New Commonwealth Model*, *supra* note 20, at 707-11, 739-48.

264. See e.g. HOGG, *supra* note 58, at 172-74; TUSHNET, *supra* note 20, at xi, 23.

265. For literature, see *supra* note 20.

than their representatives, are the only ones entitled to alter the Constitution through special constitutive processes. This in fact is the justification in *Marbury* for judicial review developed in the United States.<sup>266</sup> This model also allows political dissent from judicial decisions; but this dissent must gather the support of the People in order to override judicial decisions.<sup>267</sup>

The legislative self-entrenchment model suffers from a democratic deficit in the case of the “monist” constitutions that rely on constitution-making by regular legislative assemblies in regular legislative processes. The problem is that this model does not explain why one legislature should enjoy more power than its successors, so as to bind them to constitutional arrangements. The model’s application is thus totally dependent on how both the courts and the representative bodies *de facto* treat the Constitution. As long as subsequent legislatures adhere to legislative self-entrenchment, semi-constitutional arrangements may protect individual rights and constitutional values. But when legislatures choose to violate legislative self-entrenchment provisions, it will be up to the courts to decide whether to force them to abide by those provisions. Both theory and history suggest that this will not necessarily happen. Dicey and more recent British commentators provide various examples of this phenomenon within British history.<sup>268</sup> This model thus offers inherent instability and is a weak form of constitutionalism.<sup>269</sup>

The “manner and form” model, which is also rooted in monist traditions, enjoys better democratic legitimacy than legislative self-entrenchment does. That model does not entrench rights or values but merely sets a shaming mechanism against their infringement. The courts may exercise judicial review to respect the legislature’s own predefined process of enactment, but this judicial power gives way once the legislature openly declares its will to violate or override constitutional rights and values.<sup>270</sup> This may account for New Zealand’s current constitutional regime, which some argue is not actually a constitutional democracy.<sup>271</sup> This “manner and form” idea may also be the impetus behind the “notwithstanding” clause in Canada, which allows the legislature to explicitly contradict provisions of the Canadian Charter with a simple majority.<sup>272</sup> “Manner and form” restrictions have also been advocated lately in Commonwealth countries—notably New Zealand, Britain, and

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266. *Marbury*, *supra* note 8.

267. For elaboration, see *supra* Part III.

268. See *supra* note 53 and accompanying text.

269. For elaboration see *supra* Part II. C.

270. See *supra* Part IV.

271. The New Zealand Bill of Rights Act of 1990 grants courts the power to interpret statutes as far as possible in accordance with protected rights contained in the Bill. But the courts lack the power to invalidate statutes. The legislature may overcome any interpretation by explicitly declaring its intention to violate rights. See Gardbaum, *Reassessing*, *supra* note 20, at 183-88 (describing New Zealand’s intermediate model of constitutionalism).

272. See Weill, *Reconciling*, *supra* note 1, at 506-10.

Canada—as an intermediate model between parliamentary sovereignty and supreme constitutions.<sup>273</sup> While the model may thus be attractive in parliamentary systems, it is at the price of creating very weak protection for rights as shown above.

Lastly, foundationalism or common-law constitutionalism is the most problematic theory on which to exercise judicial review. Since the courts primarily develop foundationalism, it suffers from the most severe democratic legitimacy problem. It serves mainly as a threat against the legislature rather than a potent weapon. Even in the countries from which the foundationalist model emerged—initially Germany and subsequently India—it is rarely used. Nonetheless, this model is not without consequences. The knowledge of the elected bodies that their courts might potentially use foundationalism to strike down statutes may affect legislation in ways that cannot be easily measured.<sup>274</sup>

This Article rejects the assertion, sometimes found in the literature, that the instability of intermediate hybrid models results only or mainly from the political culture in which they operate.<sup>275</sup> Instead, the inherent instability of intermediate models of constitutionalism stems from their hybrid nature. This hybrid nature enables these models to become either weak—or strong—form constitutionalism through evolution and “experimentalism,” without revolutions or other grand constitutional beginnings.<sup>276</sup> Rather, their evolution is dependent on the behavior and interaction between the various constitutional actors—primarily courts, executives, legislatures, and the People.

Further, although the literature suggests that hybrid models tend to develop into “strong-form” judicial review,<sup>277</sup> this is not supported by history.<sup>278</sup> Rather, hybrid models may develop in either direction. The method of constitutional adoption may be a strong indicator of the direction in which they will evolve. This leads to the last point: emphasis on the connection between the method of constitutional adoption and the resulting type of judicial review leads one to

273. See e.g., Prebble, *supra* note 183 (citing British authorities); Tse, *supra* note 180, at 83 (citing Canadian authorities).

274. For elaboration see *supra* Part V.C.

275. TUSHNET, *supra* note 20, at 43-76; Gardbaum, *Reassessing*, *supra* note 20, at 177, 183; Hiebert, *supra* note 20, at 12, 14, 19, 25, 27.

276. The term experimentalism is taken from Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

277. See, e.g., TUSHNET, *supra* note 20, at 43, 47; Gardbaum, *Reassessing*, *supra* note 20, at 175, 178-79, 183, 188, 191, 198-99 (writing that commentators’ major criticism against the Commonwealth model is that it tends to strong-form judicial review like the US instead of being an intermediate model. He however does not share this criticism particularly with regard to New Zealand that seems to have successfully created an intermediate model).

278. See, e.g., DICEY, *supra* note 15, at 21-25 (attesting that parliaments’ attempt at self-entrenchment has often failed in practice); Weill, *Centennial*, *supra* note 165 (suggesting that the *Jackson* decision may weaken the dualist commitments of Britain); Gardbaum, *New Commonwealth Model*, *supra* note 20, at 719-21 (describing Canada’s Bill of Rights of 1960 as a failed attempt to achieve strong constitutionalism).

question the classifications of some countries as belonging to the intermediate model. The literature suggests that judicial review in both Canada and the United Kingdom is evolving toward *de facto* “strong-form” judicial review,<sup>279</sup> and this is not surprising in light of the process of adoption of their constitutional documents. The Charter’s adoption occurred through a dualist popular sovereignty process, not by legislative enactment.<sup>280</sup> Thus the relatively strong democratic legitimacy of the Charter lends legitimacy to strong-form judicial review. Similarly, the UK Human Rights Act 1998—though of domestic origins—is the result of higher European structures in the form of the European Convention of Human Rights that is binding upon Britain through the Strasbourg Court. The operation of judicial review in both Canada and the United Kingdom should thus resemble strong-form judicial review as in other dualist countries, including the United States. Perhaps they should have been classified as belonging to strong-form constitutionalism to begin with. In contrast, Israel—as shown in this Article—and maybe some Eastern European countries may fit the intermediate model, though they are omitted from the international literature on Commonwealth constitutionalism.<sup>281</sup>

## VIII. CONCLUSION

This Article in its entirety may be treated as a theoretical exercise in how to transform from parliamentary sovereignty to constitutional democracy, and vice versa, through evolutionary processes with the involvement of regular political actors, rather than through a special Constituent Assembly or another explicit constitution-making process. It is also a theoretical exercise in how various modes of constitutional adoption lead to different mechanisms of judicial review. As such, it challenges conventional accounts of how intermediate models come about and what systems should be classified as belonging to this intermediate model. This Article may be of special relevance to the United Kingdom, which still struggles with the question of how to adopt a formal Constitution within a monist framework, and the United States, which frequently deals with fundamental questions of informal constitutional amendments, possible mechanisms of judicial review, and the validity of legislative self-entrenchment.

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279. See *supra* note 278.

280. See *supra* note 58 and accompanying text.

281. See *supra* Part II.B.