

# Valuing our Discordant Constitutional Discourse: Autonomous-Text Constitutionalism and the Jewish Legal Tradition

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## INTRODUCTION

Constitutional interpretation is a central concern of the American legal system. American law is, at its core, constitutional law, and the meaning of the United States Constitution bears in some way on virtually every legal issue, substantive and procedural. But understanding the Constitution is not easy; for a number of reasons—the centrality of the Constitution as the sacred-text of our civil religion, the Constitution’s often vague and ambiguous language, the contradictory enforcement of a democratic constitution through the undemocratic process of judicial review—deciding what the text means and how we ought to determine what the text means constitute one of the most contentious spheres of American public life.<sup>1</sup> American constitutionalism prides itself as being the enlightened rule of law, the primacy of right reason over selfish will,<sup>2</sup> but the increasingly caustic tone of our constitutional disagreement threatens to collapse the distinction, making ours a rule of men.

This devolution of legal argument into political disagreement finds potent expression in the debate over interpretive theory, over the how of constitutional

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1. See Hillary Salans, *More Harm than Good?*, 38 HASTINGS L.J. 1023, 1035 (1987) (book review) (“The debate over constitutional interpretation becomes more heated when one asks how the Supreme Court should interpret the vague meaning of the Constitution’s text.”).

2. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 7-30 (1999).

interpretation. Disagreements about the proper way to interpret the Constitution are driven in part by interpretive theorists' varied perspectives on how best to resolve some of the central problems of American constitutional theory, which manifest particularly in the interpretive context.<sup>3</sup> Competing visions of how to deal with the dead hand problem, the counter-majoritarian difficulty, and the competing needs for pragmatism and continuity translate into a fierce debate over proper methods of interpretation with each side accusing the other of subjectivity, judicial activism, and making rather than applying the law.

Autonomous-textualism, an interpretive theory inspired by Hans-Georg Gadamer's philosophical hermeneutics, holds the promise of elevating our constitutional debate above the partisan political fray. This theory posits that textual truth is pluralistic, and that the meaning of the Constitution lies in the epistemological product of an interpretive dialectic between the constitutional text and each individual reader.<sup>4</sup> While the idea of interpretive pluralism bears the foreboding tidings of constitutional anarchy, Jewish law's three-thousand year old constitutional tradition offers a powerful model for how autonomous-textualism might work in practice. Interpretation in Jewish law closely resembles the Gadamerian model, and has been used to successfully apply Jewish law across time and space in a pragmatic way that preserves the historical continuity of the Jewish legal tradition.<sup>5</sup> Relying on interpretive pluralism, Jewish law has dealt effectively with the constitutional dilemmas that drive America's harsh interpretive debate, and thus offers a way of elevating our discordant constitutional discourse by embracing autonomous-textualism's epistemologically pluralistic vision.<sup>6</sup>

Part I of this Article begins by discussing three principle approaches common to contemporary American interpretive theory, and then explains the autonomous-textualism

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3. See *infra* Part III.

4. See *infra* Part I.B.

5. See *infra* Part II; cf. AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 7 (1979).

6. See *infra* Part III.

alternative inspired by Gadamer's hermeneutical work. Part II turns to legal interpretation in the Jewish legal tradition, first explaining the constitutional foundations of the Jewish legal system, next exploring the autonomous-text in Jewish law interpretive theory, and finally discussing how Jewish law deals with interpretive pluralism in legal practice. Part III concludes by briefly discussing how Jewish law addresses some of the central problems of constitutionalism that animate the contemporary debate over interpretation, and by suggesting how Jewish law's resolutions for these problems might make autonomous-textualism a desirable interpretive paradigm for American constitutional discourse.

#### I. CONSTITUTIONAL INTERPRETATION, HERMENEUTICS, AND THE AUTONOMOUS TEXT

Hermeneutics generally, and textual hermeneutics in particular, is concerned with providing an account of the relationship between a standardized object and a shifting context.<sup>7</sup> Scholars consider the nature of this object-subject relationship and the manner in which factors like authorial intent, the objectivity of language, historical context, and interpretive subjectivity relate to the structuring of this relationship in the quest for textual understanding. As applied to constitutional jurisprudence, the hermeneutics of legal interpretation works to explain the relationship between the text of the Constitution and the circumstances under which constitutional interpretation takes place. Thus, constitutional hermeneutics focuses on relations between a fixed constitutional text and the interpretive application of that text to a particular factual circumstance, the case.<sup>8</sup> Scholars of constitutional interpretation thus consider how various hermeneutical, jurisprudential, and political values—language, intent, precedent, judiciousness, majoritarianism, and rights, to name a few—factor into the hermeneutical equation, the constitutional interpretive enterprise.

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7. See Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1068-69 (1993).

8. See *id.* at 1068-69.

This Part explores the field of contemporary constitutional hermeneutics. Part I.A briefly reviews the principle hermeneutical typologies—textualism, historicism, and pragmatism—that have come to dominate the interpretive field. Part I.B turns to explicate an alternative interpretive paradigm—autonomous-textualism—that derives from Hans-Georg Gadamer’s innovative philosophical hermeneutics.

#### A. *The Interpretive Orthodoxy*

This Section briefly summarizes the goals, justifications, and principle critiques of the three dominant theories of constitutional interpretation. Part I.A.1 discusses textualism, which maintains that legal texts ought to be interpreted and given meaning in light of the plain meaning of their language gleaned through the use of dictionary definitions, rules of grammar and syntax, and accepted canons of legal interpretations. Part I.A.2 turns to historicism, which sites the meaning of legal texts in some point in time, usually the time of a law’s enactment. Historical interpreters may look variously at the “original intent” or “original meaning” of a law, and understand textual meaning to lie in some sense with the intentions of those who brought a particular text into being. Finally, Part I.A.3 examines pragmatic interpretation, which contends that the meaning of a legal text, a statute or a constitution, should be determined in light of any number of contemporary policy objectives, whether economic utility, racial equality, or majoritarian decision-making.

##### 1. Textualism

Textualist theories of interpretation claim normative support in several general concepts of legal and political theory. Textualists contend that laws must be interpreted and understood in terms of their plain textual meaning because only the text of the law—and its apparent linguistic meaning—were enacted into law by a legislating authority.<sup>9</sup>

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9. See James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1539 (2011).

As Justice Scalia points out, “[t]he text is the law, and it is the text that must be observed.”<sup>10</sup> On this view, textualism is required as a function of the law’s democratic legitimacy. If laws are normatively binding because they embody the majoritarian decisions of the demos or their representatives, then it is only the text law enacted by such legislative bodies that can claim such democratic pedigree.<sup>11</sup> Other conceptions of what the law means lack such normative legitimacy: Interpretations based on authorial intent derived from legislative history are not truly indicative of the majority’s will, merely reflecting the subjective hopes of individual lawmakers.<sup>12</sup> Similarly, textual understandings grounded in pragmatic policy concerns do not hearken to the democratic roots of the text at all; they reflect the political preferences of individual contemporary interpreters.<sup>13</sup> Moreover, textualists claim that their formalistic approach to legal interpretation is needed to preserve the democratic character of legal rules from the machinations of subjective, unconstrained, and unelected judicial interpreters.<sup>14</sup>

Critics of textualist interpretation level a number of principle arguments against this formalistic interpretive methodology. Some non-textualists contend that textualism falls prey to what it sees as most damning in other interpretive approaches: judicial subjectivity. These critics argue that words have many reasonable usages, that reference to the structure and syntax of legal texts is usually indeterminate, and that even the canons of interpretation must themselves be interpreted before they can be applied.<sup>15</sup> Consequently, textualism too involves a high degree of inevitably subjective judgment to decide which among any

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10. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997).

11. *Id.* at 21-23.

12. See WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 403-05 (3d ed. 2003).

13. See *id.* at 415-17.

14. See SCALIA, *supra* note 10, at 25.

15. See Campos, *supra* note 7, at 1069-70.

number of plain meanings should control.<sup>16</sup> Another important criticism of textual interpretation argues that textualism's overly formalistic methodology and lack of regard for results is simply unworkable in the real world, where interpreters have to live with the consequences of their abstract textual constructions.<sup>17</sup>

## 2. Historicism

The historical method of constitutional interpretation finds constitutional meaning not in the text itself, but in a particular historically-grounded conception of what that text means. For some historicists, the subjective *intentions* of the Framers of the Constitution are the principle source of constitutional meaning;<sup>18</sup> for others the *understandings* of the Constitution's Framers or Ratifiers are binding;<sup>19</sup> still others focus on what a reasonable person of the founding era would have likely understood the Constitution to mean.<sup>20</sup> Historicists, in other words, argue that the Constitution is legally binding because of a particular historical event, and it is therefore an understanding of the text inextricably

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16. See MURPHY ET AL., *supra* note 12, at 390-95.

17. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125-28 (1994); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 422-23 (1989).

18. See, e.g., Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 811-12 (1983) (“[J]udges should be guided by the intent of the Framers of the relevant constitutional provisions.”).

19. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) (“The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean.”).

20. See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002) (defining historicism as “a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision”).

bound up with that event that is controlling. As Attorney General Meese put it in his famous articulation of originalist interpretation, “only ‘the sense in which the Constitution was accepted and ratified by the nation,’ and only the sense in which laws were drafted and passed provide a solid foundation for adjudication.”<sup>21</sup>

Like textualism, historicism is driven chiefly by a desire to preserve the democratic legitimacy of the Constitution and statutes, and it is used to interpret and to constrain the discretion of unelected judges interpreting and applying legal texts.<sup>22</sup> For historicists, the Constitution gets its authority from the supermajoritarian decision of 1789 Americans to ratify the document proposed by the Philadelphia Convention. Consequently, the Constitution must be understood to mean what those who enacted it thought it to mean.<sup>23</sup> Moreover, historicists claim that pragmatic and textualist methodologies are inherently malleable and subjective, and that only a search for historical understandings offers an objective, neutral standard for constitutional interpretation.<sup>24</sup> Indeed, for many historical interpreters, the choice of methodology is simply one between the constrained and objective approach offered by

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21. Edwin Meese, III, Attorney General, Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 10 (Paul G. Cassell ed., 1986).

22. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* 713, 714 (2011) (“Originalism was born of a desire to constrain judges.”).

23. See Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 *S. TEX. L. REV.* 455, 465 (1986) (“The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.”); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 5-8 (1980).

24. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 864 (1989) (“Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).

originalism, and the undemocratic judicial subjectivity and activism threatened by any other interpretive theory.<sup>25</sup>

Historicism has been subject to withering critique, particularly since its resurgence in the legal academy and judiciary over the past thirty years.<sup>26</sup> Justice Brennan for example, referring to originalists' claim that historical interpretation avoids the problem of judicial subjectivity and pointing to the inherent indeterminacy of all interpretation, called originalist methodology "little more than arrogance cloaked as humility."<sup>27</sup> This critique stems from a belief that the real historical meaning of a legal text is ultimately unknowable. As an empirical matter, historical interpretation cannot really recover the original intent or understanding of a legal text because "the whole concept of 'intent' is meaningless when considering a large legislative body."<sup>28</sup> Also, even if some collective intent or understanding could be known, available materials paint an incomplete picture of the whole. Moreover, even if the raw materials for historical interpretation were adequate, the contemporary interpreter's impression of the original intent or

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25. See Robert Bork, *The Struggle Over the Role of the Court*, NAT'L REV., Sept. 17, 1982, at 1137-38 ("The truth is that the judge who looks outside the [original understanding of the] Constitution always looks inside himself and nowhere else."); see also DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 173-75 (2005).

26. For an excellent summary of the various empirical and normative critiques of originalism, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

27. Justice William J. Brennan, Jr., Speech Before the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE*, *supra* note 21, at 11, 14; see also *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (arguing it is "dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor" when relying on legislative history).

28. Bradford C. Mank, *Textualism's Selective Cannons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 536 (1997-1998) (footnote omitted); see William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213-17 (1980).



understanding would inevitably be colored by being situated in the present.<sup>29</sup>

### 3. Pragmatism

The pragmatist approach to constitutional interpretation includes many diverse interpretive theories that contend the Constitution should be understood in light of any number of policy objectives,<sup>30</sup> such as economic utility,<sup>31</sup> majoritarian processes,<sup>32</sup> or contemporary morality.<sup>33</sup> “The common trait among them is that they ultimately conclude that the judiciary should act as a pragmatic policymaker.”<sup>34</sup> For pragmatists, therefore, the key interpretive question is not what the words mean—critiques of textualism and historicism demonstrate that textual meaning is ultimately indeterminate.<sup>35</sup> Instead, pragmatist interpreters focus on “how we ought to interpret [the text] in trying to approximate [its] true meaning or the best interpretation.”<sup>36</sup> Pragmatists interpret the text of the Constitution in light of deeply held national and constitutional values, understanding the content of protections like “due process of law,”<sup>37</sup> “cruel and

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29. See Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 10, at 65, 72.

30. See Richard Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1656-57 (1990).

31. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

32. See, e.g., ELY, *supra* note 23.

33. See, e.g., Owen Fiss, *The Supreme Court 1978 Term—Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 9, 11 (1979).

34. Keith E. Whittington, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 32 (1999).

35. See *supra* notes 25-28 and accompanying text.

36. SOTORIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* 155 (2007).

37. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

unusual punishment,”<sup>38</sup> and “equal protection of the laws”<sup>39</sup> as a function of policies furthering those values.<sup>40</sup>

Interpretive pragmatism rests on several jurisprudential premises. As Judge Posner explains,

[t]he first [premise] is a distrust of metaphysical entities “reality,” “truth,” “nature,” etc.[.] viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the difference they make [in terms of whatever pragmatic criteria an interpreter favors] . . . . The third is an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs rather than to “objective,” “impersonal” criteria.<sup>41</sup>

As the critiques of the textual and historical approaches indicate, there is ample reason to be skeptical of the notion that interpretation can ever yield an objective textual understanding; “*any* interpretive method necessarily reflects the embrace of some substantive values.”<sup>42</sup> If all interpretive understandings of legal texts make substantive judgment, then, it makes sense to choose the understanding that maximizes important substantive values.<sup>43</sup> Pragmatic interpretation makes further sense in light of the reality that laws are instituted to serve social policy aims, and they should therefore be interpreted and applied to further those substantive objectives.<sup>44</sup> Understandably then, the success of any interpretation turns on how well it furthers the values that drive the interpretive process.<sup>45</sup>

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38. U.S. CONST. amend. VIII.

39. U.S. CONST. amend. XIV, § 1.

40. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 70-78 (3d ed. 2000). See generally *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

41. Richard A. Posner, *What Has Pragmatism to Offer Law?*, in *PRAGMATISM IN LAW AND SOCIETY* 29, 35-36 (Michael Brint & William Weaver eds., 1991).

42. TRIBE, *supra* note 40, at 71.

43. See Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331, 1342 (1988).

44. See Posner, *supra* note 30.

45. See Farber, *supra* note 43, at 1343.

Several principle arguments are advanced against pragmatism as an interpretive methodology. The most common criticism of pragmatic interpretation is that it is unprincipled, that it allows legal interpreters to determine textual meaning on an ad hoc subjective basis.<sup>46</sup> More problematic, pragmatism enables unauthorized judicial activism. As Ronald Dworkin explains, “[a]n activist justice would ignore the Constitution’s text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture . . . in order to impose on other branches of government his own view of what justice demands.”<sup>47</sup> Another criticism of pragmatist interpretation, offered by Richard H. Fallon, Jr., contends that by encouraging judges to interpret and apply the Constitution to further substantive ends, pragmatists denigrate “values associated with the rule of law” like democracy and individual rights.<sup>48</sup> Even pragmatists who champion majoritarian processes as the prime standard of interpretive textual meaning undermine democratic decision-making through their result oriented rulings not sanctioned or controlled by majoritarian institutions. Pragmatism also undermines the significance of legal and constitutional rights because for the pragmatist interpreter, like the legal realist, a legal right exists only because the judge decides that its existence will further some other substantive end. The right itself thus becomes a mere instrument, a means to a greater political end.<sup>49</sup>

B. *Gadamer’s Philosophical Hermeneutics and Autonomous-Text Constitutionalism*

The traditional hermeneutics of textualism, historicism, and pragmatism does not exhaust the interpretive field. A fourth methodology, which I call here “autonomous-textualism” offers a powerful alternative to the interpretive

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46. See, e.g., Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1455 (1987).

47. RONALD DWORKIN, *LAW’S EMPIRE* 378 (1986).

48. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 573-74 (1999).

49. See *id.*

orthodoxy. Autonomous-textualism posits that once enacted, the binding text of the Constitution became unmoored from any particular conceptions of what the text means, that constitutional interpretation is a dialectical interaction between text and interpreter, and that textual meaning is an evolving concept rather than a fixed object of interpretation.

Autonomous-text constitutionalism derives principally from Hans-Georg Gadamer's philosophical hermeneutics, which in turn relies on a unique epistemological conception of textual understanding and a powerful critique of the other interpretive methodologies' abilities to produce true textual understanding. According to Gadamer, all interpretation—indeed, all understanding—is ontological; we understand things as “part of the total human experience of the world.”<sup>50</sup> We try to understand and make sense of everything around us, and we do so through interpreting those things; constitutions, novels, television shows, billboard ads, and conversations with the mailman—we interpret these things and give them meaning based on our own prior experience of the world. An interpreter thus approaches a text with inevitable prejudices—his experiential consciousness, what Gadamer calls his “horizon of understanding”<sup>51</sup>—and interprets the text through that subjective lens. Interpretation does not consist merely of the interpreter imposing his subjective perspective on the text, however, because as he interprets the text it becomes part of his experiential horizon, further influencing the way in which he understands the text.<sup>52</sup> For Gadamer, therefore, interpretation, the process of arriving at textual understanding, is a cyclical dialectic: The interpreter approaches and begins to read and understand the text through the lens of his subjective horizon, but that initial understanding immediately integrates itself into the interpreter's experiential lens, and this new, broader horizon in turn continues to color and refine his understanding of the

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50. HANS-GEORG GADAMER, *TRUTH AND METHOD* xi (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989).

51. GADAMER, *supra* note 50, at 143.

52. See Frank S. Ravitch, *Interpreting Scripture/Interpreting Law*, 2009 MICH. ST. L. REV. 377, 381-83.

interpreted object.<sup>53</sup> As Gadamer puts it, “the anticipated meaning of a whole [text] is understood through the parts, but it is in light of the whole that the parts take on their illuminating function.”<sup>54</sup>

Building on this epistemology, Gadamer views texts, the objects of interpretation, as essentially autonomous, released from any particular meaning attributed to them through textual, historical, or pragmatic interpretive methodologies. Once set down in writing, a text “has detached itself from the contingency of its origin and its author and made itself free for new relationships.”<sup>55</sup> On this view, “[t]he text is what it is, no matter what meaning is assigned to it by its author and no matter how that meaning is revised by its readers.”<sup>56</sup>

Gadamer’s conception of interpretive understanding condemns the formalistic methodology of textualism. Textualists claim that the true meaning of a text lies in the plain meaning of the text itself, and is derived by applying formal rules and canons of interpretation to the language, structure, and form of a text. On this view, a text and its meaning is an object distinct from its interpreter; the interpreter uses textualist methods to discover the meaning that inheres in the text. For Gadamer, however, a textual meaning is not a thing distinct from the interpreter capable of being unearthed by using the right interpretive method.<sup>57</sup> Instead, textual understanding is a product of a dialectic interaction between a text and its interpreter; it is the result of a “merging of horizons,”<sup>58</sup> and is thus part of the interpreter’s experiential consciousness as much as it is part

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53. See Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661, 684-90 (1991).

54. Hans-Georg Gadamer, *The Problem of Historical Consciousness*, in INTERPRETIVE SOCIAL SCIENCE 103, 146 (Paul Rabinow & William M. Sullivan eds., 1979).

55. GADAMER, *supra* note 50, at 357.

56. Steven Knapp & Walter Benn Michaels, *The Impossibility of Intentionless Meaning*, in INTENTION AND INTERPRETATION 51, 57 (Gary Iseminger ed., 1992).

57. See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 31-33 (2000) (“Gadamer’s philosophical hermeneutics maintains that . . . no uninterpreted or foundational source of meaning stands outside of or prior to interpretation.”).

58. DERMOT MORAN, INTRODUCTION TO PHENOMENOLOGY 252-53 (2000).

of the interpreted text. On this view, there is no objective understanding or plain meaning of a text. The way a text is understood, what a text means, depends on who is reading it; every interpreter understands the text through the lens of his own horizon, and his honest, good-faith interpretation of that text is therefore as unique as his own experiential consciousness.

Even if texts had an objective meaning, however, even if textual understanding was something to be discovered and not an evolutionary experience unique to every interpreter, on Gadamer's view textualist methodologies would still fail to uncover this true textual meaning. Because he views understanding as ontological, a product of a merging of horizons between the subject interpreter and object text, "[o]ne of Gadamer's central arguments . . . is that any inquiry or investigation believed to be without prejudice or bias is in denial of its own conditioned ways of understanding."<sup>59</sup> The textual understanding derived through any particular interpretive methodology thus cannot be the "true" meaning of the interpreted text. Instead, it is the interpreter's subjective conception of what the text means, a product of an interaction between the interpreter's experiential self, the text, and the methodology, which itself is applied only after it is understood by the interpreter through the subjective lens of his own epistemological horizon. Thus, even the hermeneutical product of textualist interpretive methods is not—cannot be—a simple reflection of the objective plain meaning of the text.<sup>60</sup>

Gadamer's hermeneutics similarly rejects historicism as an interpretive methodology accurately reflective of a text's meaning. Historicists maintain that we uncover the meaning of a text by reconstructing the text as an historical phenomenon in terms of the authorial intent or

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59. STANLEY E. PORTER & JASON C. ROBINSON, HERMENEUTICS: AN INTRODUCTION TO INTERPRETIVE THEORY 85 (2011).

60. *See id.* at 86 ("Understanding happens through a gradual and perpetual interplay between the subject matter and the interpreter's initial position — a fusion of one's own horizon and the horizon of the text or other. Within this fusion, Gadamer denies the possibility of any single and objectively true interpretation that could transcend all viewpoints . . .") (emphasis added).

understanding, or in terms of some objective meaning attributed to the text at some historically significant point in time.<sup>61</sup> However, like textualism, historicism fails because in Gadamer's conception of understanding a reliance on *any* methodology of interpretation misunderstands the nature of interpretation and textual understanding as an interactive dialectic between text and interpreter.<sup>62</sup> Interpretation is inextricably linked with the interpreter's "being' in the world,"<sup>63</sup> and therefore his "perception is never a simple reflection of what is presented to the senses."<sup>64</sup> Even if historical interpretive methodology seeks to discover the authorial intent or understanding of a text, after an interpreter applies this approach, "[w]hat is reconstructed . . . is not the original."<sup>65</sup> Instead, an historical interpreter uncovers his own subjective perception of what the author intended or understood, filtered as all interpretation is through the interpreter's experiential horizon.<sup>66</sup>

Historicism also fails on a normative level. "For Gadamer, the meaning of a literary work is never exhausted by the intentions of its author; as the work passes from one cultural or historical context to another, new meanings may be culled from it which were perhaps never anticipated by its author."<sup>67</sup> The meaning of a text is simply not what the

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61. See, e.g., Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 682 (1991) ("What is authoritative, for sophisticated originalism, is the principle (or principles) the ratifiers understood themselves to be establishing. (More precisely, what is authoritative is the principle that the enfranchised public understood, or would have understood, the ratifiers to be establishing.)").

62. See *supra* notes 54-58 and accompanying text.

63. Isaak Dore, *Pragmatic Existentialism in a Post-Newtonian World*, 54 ST. LOUIS U. L.J. 1277, 1291 (2010).

64. GADAMER, *supra* note 50, at 90.

65. *Id.* at 167.

66. See William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 620-23 (1990) ("[I]nterpretation as re-creation-of-the-past is not only impracticable, it is an impoverished view of the activity."); see also Campos, *supra* note 7, at 1072.

67. TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 61-62 (Anniversary ed., Blackwell Publishing 2008).

author of the text intended it to mean or what he or others of his or another time understood it to mean. The meaning of a text is an amorphous thing; it is the product of Gadamer's dialectic interaction between text and interpreter, and it therefore changes from one reader to the next, and within the conscious of one interpreter from one reading to the next. Textual meaning literally "comes into being" every time a text is read.<sup>68</sup> It is not an object waiting to be discovered in dusty historical archives, but an ever-unique, continuously evolving product of each interpretive experience.<sup>69</sup> "[T]o understand and to interpret means to discover and recognize a valid meaning. . . . It is the legal significance of the law—and not the historical significance of the law's promulgation or of particular cases of its application—that he is trying to understand."<sup>70</sup>

Gadamer's epistemology similarly rejects pragmatism as a viable means of understanding a text. Pragmatist interpreters—in the constitutional context, those often associated with the "living constitutionalism" school—understand legal texts in light of policy ends. As Judge Posner explains, when interpreting texts, "pragmatists will ask which of the possible resolutions has the best consequences."<sup>71</sup> While pragmatism does not suffer from the misplaced allegiance to method exhibited by textualism and historicism,<sup>72</sup> it nevertheless misconceives the nature of the interpretive process and textual understanding. In Gadamer's hermeneutics, interpretation is a dialectic, a two way conversation between the interpreter and interpreted text. "[I]nterpretation is . . . [not] the imposition of the interpreter's views upon the text."<sup>73</sup> Instead, one interprets a text by reading it through the lens of his experiential horizon, but at the same time also allowing the apparent fair meaning of the text shape that horizon. Thus, "[t]o understand . . . is

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68. GADAMER, *supra* note 50, at 462.

69. *See id.* at 267; Feldman, *supra* note 53, at 684-85.

70. GADAMER, *supra* note 50, at 324.

71. Posner, *supra* note 30, at 1664.

72. *See supra* notes 63-64, 66 and accompanying text.

73. Eskridge, *supra* note 66, at 617.



not merely an act from one's subjectivity wherein the interpreter is only injecting his or her own biased views on a static text."<sup>74</sup> An interpreter cannot, as the pragmatist would have, impose his own values or preferred results onto the text. Rather, just as the "interpreter does not take the text at face value . . . but instead challenges and questions its assumptions to get at its truth value" the interpreter must also place "her own prejudgments at risk, by opening them to questions and challenges from the text."<sup>75</sup> On the Gadamerian view, therefore, pragmatism is not really interpretation at all. Interpretation involves the interpreter's speaking to the text and allowing the text to speak to him.<sup>76</sup> Pragmatism, however, is a one way conversation where the interpreter understands through his own horizon and justifies his understanding by reference to a text that represents another world-experience entirely.<sup>77</sup>

Thusly released from the shackles of any particular interpretive methodology and liberated from the limits of particular conceptions about what it means, the constitutional text, in the Gadamerian hermeneutical conception, is largely autonomous. Once enacted into law through ratification, textual provisions of the Constitution take on an existence of their own. As Justice Story observed in his monumental and highly influential treatise on the Constitution, "[n]othing but the text itself was adopted by the people."<sup>78</sup>

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74. PORTER & ROBINSON, *supra* note 59, at 86.

75. Eskridge, *supra* note 66, at 623; *see also* PORTER & ROBINSON, *supra* note 59, at 86 ("[U]nderstanding is a historical act wherein one is responding to his or her own tradition (relying on past experiences to make sense of the present) *while rethinking what was believed to be true because of what is encountered currently in the text.*") (emphasis added). *See generally* PORTER & ROBINSON, *supra*, at 86-89.

76. *See* GADAMER, *supra* note 51, at 379 ("To reach understanding in a dialogue is not merely a matter of putting oneself forward and successfully asserting one's own point of view, but being transformed into a communion in which we do not remain what we were.").

77. *See* FELDMAN, *supra* note 57, at 31.

78. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 389 (1833).

This sense in which the text of the Constitution is autonomous is nicely explained by Professor Aleinikoff's analogy to a ship.<sup>79</sup> In enacting a legal text, Aleinikoff writes, the ratifier "builds a ship and charts its initial course."<sup>80</sup> The ratifier does not captain the vessel, however; indeed, it does not accompany it on its voyage at all. "[T]he ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail."<sup>81</sup> On this view, once enacted, a legal text takes on a character of its own; numerous factors, some controllable and others not, play a role in the law's development. The textual meaning of the law evolves and changes subject to these changing interpretive circumstances, not because successive interpreters are not true to the "real" meaning of the text, but because they "try to understand the text"<sup>82</sup> itself rather than any particular conception of what the text means. Thus, the autonomous-text model "understands a [legal text] as an on-going process (a voyage) . . . . The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board."<sup>83</sup> To bring the analogy full-circle, the language and structure of a legal text set the wide bounds of how it may be understood, but what it means here and now, and how it applied to a particular case are determined by contemporary judges, practitioners, and scholars charged with implementing that text. Dennis Goldford similarly explains:

When a shipyard builds a ship and launches it into the world, however the ship is built – and the way it is built could well structure where it can go in the world – the shipyard does not and cannot control that ship as it makes its way in the world. The same holds for language: We do not control our language once we have launched it into the world.<sup>84</sup>

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79. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21-22 (1988).

80. *Id.* at 21.

81. *Id.*

82. GADAMER, *supra* note 50, at 259.

83. Aleinikoff, *supra* note 79.

84. GOLDFORD, *supra* note 25, at 233.

Working on the conception of the Constitution as an autonomous text, the task of constitutional interpretation takes on the image of Gadamer's dialectic hermeneutics. Gadamer's literary hermeneutics sees interpretation as an ongoing process of interactions between an interpreter and a text, and identifies textual meaning as the product of this process for a given interpreter at a given time. Legal scholars sympathetic to autonomous-text constitutionalism similarly contend that constitutional interpretation is not a methodological search for a correct textual meaning, but is instead a dialectic process wherein an interpreter interacts with the constitutional text and understands that text as a function of a merging of horizons.<sup>85</sup>

Ronald Dworkin, who believes that Gadamer's account of interpretation "strikes the right note" in a constitutional context,<sup>86</sup> analogizes the process of constitutional interpretation to the sequential writing of a story in which different authors add successive parts to the narrative.<sup>87</sup> Successive authors of a chain-novel each make unique contributions to the story, but do so with an eye towards making the novel as a whole—both that which has already been written and that which will be written after their section—as good a book as possible.<sup>88</sup> While an individual author will certainly inject his own subjective creativity into his portion of the narrative, therefore, he does so with a measure of constraint, building on what has already been written rather than injecting an unrelated plotline into the story, and setting a foundation for what has yet to be written rather than leaving subsequent authors without anything to build on.<sup>89</sup> In a similar vein, judges, lawyers, and scholars interpret legal texts through their own subjective experiential lenses. But, their understandings of those texts are not merely reflections of their personal preferences; nor are they slavish recitations of authorial intent or the text's plain meaning. Instead, their understandings are a product

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85. See, e.g., DWORKIN, *supra* note 47, at 52 ("Creative interpretation, on the constructive view, is a matter of interaction between purpose and object.").

86. *Id.* at 62.

87. *Id.* at 228-38.

88. *Id.* at 229.

89. *Id.* at 229-31.

of their interacting with the text; they act upon the text by filtering it through their unique selves, and they are acted upon by the text as well by allowing whatever they perceive to be the text's fair meaning to impact their interpretive consciousnesses. A similar account is offered by Christopher Wolfe:

Perhaps the best analogy [to constitutional interpretation] one might offer is the following. An actor is said to "interpret" a particular character in a play. This might mean that his aim is to play his part so that it conforms as closely as possible to the intent of the author of the play. . . . It might also mean, however, that the actor has freedom, within the bounds of what is conceivably consistent with the play, to play the role in a variety of different ways . . . . The quality of the actor's "interpretation" of a role, in this sense, could be said to turn . . . on his "creativity" . . . . This broad . . . conception of an actor's job of "interpreting" a role seems to be the sense in which modern constitutional "interpretation" should be understood.<sup>90</sup>

On this view, interpretation is a personal, interactive experience with the text. An interpreter does not simply act upon the text, working to discover some preexistent objective meaning. Textual understanding is created by the interpreter. Like Dworkin's chain novelist and Wolfe's actor, a constitutional interpreter reads within certain constraints—as Gadamer puts it, the interpreter allows the text itself to influence his experiential horizon as that horizon itself colors his understanding of the text.

A similarly Gadamerian account of constitutional interpretation is offered by Dennis Goldford, another proponent of autonomous-textualism. For Goldford, "[textual] meaning is always constructed rather than discovered."<sup>91</sup> Goldford thus criticizes both originalist (what I call here "historicist") and non-originalist (what I refer to as "pragmatist") interpretation, for both methodologies see constitutional meaning as a mixed object to be discovered, whether in the Federalist Papers and Madison's notes on the Philadelphia Convention, in Rawl's theory of justice, or

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90. CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 327-28 (1986).

91. GOLDFORD, *supra* note 25, at 190.

Posner's utilitarian economics.<sup>92</sup> For Goldford, like Gadamer, however, "the Constitution must be understood not as an object but as a social practice, an ongoing and participative interpretive activity."<sup>93</sup> Interpretation, in other words, is an interactive activity between every interpreter and the Constitution; as interpreters of the Constitution, "we are active creators . . . but we create only within the structured context of the past."<sup>94</sup> In other words, we create textual meaning by filtering the Constitution through our respective experiential consciousnesses, but if we are truly interpreting (instead of imposing our preferences on) the text, the meaning we create is constrained by what the Constitution itself tells us it should mean. Meaningful constitutional interpretation "relies ultimately on the reader's willingness to participate as an active subject in the activity of construing meaning."<sup>95</sup> Quoting Georgia Warnke, and hearkening back to Gadamer's cyclical interpretive dialectic, Goldford observes that "[t]he past acquires its meaning in light of present experiences and anticipations while the meaning of the present and anticipation of the future are conditioned by the way in which the past has been understood."<sup>96</sup> Thus, for proponents of autonomous-text constitutionalism, "constitutional interpretation is an ontological event in which meaning comes into existence," and that constitutional

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92. *Id.* at 194-95.

93. *Id.* at 198.

94. *Id.* at 278. Immediately before this line, Goldford also quotes approvingly from Marx, who observed that "[m]en make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past." KARL MARX, *THE EIGHTEENTH BRUMAIRE OF NAPOLEON* (1852), *reprinted in* THE MARX-ENGELS READER 595 (Robert C. Tucker ed., 1978). Marx's historical observation translates neatly into the constitutional interpretive context. While every interpreter makes a constitutional meaning based on his own experiences with the world, he does not do so on a blank slate; the constitutional text itself, and everything that has been said, written, and done in relation to that text stands before him, and to truly interpret he must take those realities—the text's experiential horizon—as a serious account of textual meaning.

95. GOLDFORD, *supra* note 25, at 275.

96. *Id.* at 278 (quoting GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION, AND REASON* 38 (1987)).

meaning “comes into being through the interpretive encounter between the [reader] and the text.”<sup>97</sup>

Autonomous text constitutionalism thus entails a conception of the Constitution as an autonomous text whose meaning becomes clear to each reader on their own terms through a dialectic conversation between the interpreter and the text. On the autonomous-text view, therefore, the Constitution is understood as encompassing multiple meanings; it is the text that is binding, and when fairly read that text and its horizon can legitimately lend itself to many different understandings depending on the subjective experiential consciousness of the interpreter with which it is merged.<sup>98</sup> Thus, “each interpreter extracts a new meaning from the ‘common object’ of interpretation,”<sup>99</sup> and a text can only be said to be truly interpreted “if it is understood in a different way as the occasion requires.”<sup>100</sup> As Stephen Feldman observes, “as the horizon of the present [interpreter] shifts . . . the meaning of the Constitution is always potentially new and different.”<sup>101</sup>

Autonomous-text constitutionalism thus supports a pluralist interpretive theory. The binding Constitution is the actual autonomous-text of the Constitution, the words on the page that we typically refer as “the Constitution.” Because it is this text—rather than any particular conception of what this text means—that is legally authoritative, the

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97. Feldman, *supra* note 53, at 693.

98. See PORTER & ROBINSON, *supra* note 59, at 86 (“Understanding happens through a gradual and perpetual interplay between the subject matter and the interpreter’s initial position — a fusion of one’s own horizon and the horizon of the text or other. Within this fusion, *Gadamer denies the possibility of any single and objectively true interpretation that could transcend all viewpoints.*”) (emphasis added).

99. Campos, *supra* note 7, at 1072.

100. GADAMER, *supra* note 50, at 309; see EAGLETON, *supra* note 67, at 62 (“[For Gadamer, all] interpretation is situational, shaped and constrained by the historically relative criteria of a particular culture; there is no possibility of knowing the literary text ‘as it is.’”).

101. Feldman, *supra* note 53, at 693.

autonomous-text of the Constitution has no fixed meaning.<sup>102</sup> Nor, therefore, can any interpretive understanding of the autonomous constitutional text claim to be *the* right one. As with all hermeneutical understanding, constitutional understanding is a constantly changing, continually evolving thing. Every interpreter arrives at his or her own understanding of the Constitution, a singular hermeneutical experience as unique as the historical-experiential horizon of each interpreter.<sup>103</sup> “We – always and necessarily *we* – decide” what the text of the Constitution means in practice.<sup>104</sup> We decide what the Constitution means, and because each of us approaches the constitutional text with a unique experiential horizon, we can each be expected to reach a unique understanding of the Constitution. Thus, while the need to merge with the Constitution’s relatively fixed horizon structures interpretation and limits the range of possible interpretive understandings, interpretation is nevertheless “not determined if by that we mean that there is a single right answer to constitutional questions.”<sup>105</sup>

## II. AUTONOMOUS-TEXT CONSTITUTIONALISM IN ACTION: THE CASE FROM JEWISH LAW

While autonomous-text constitutionalism is certainly not the mainstream in American interpretive theory, it does have a rich experiential tradition in the Jewish law system. Part II.A begins by explaining how Jewish law, or *Halakhah*, retains a constitutional character, recognizing a complex hierarchy of unchangeable, fundamental constitutional legal norms and subordinate rules and principles established through legislation by constitutionally authorized lawmaking bodies. Part II.B explains how interpretation in Jewish law constitutionalism follows the contours of Gadamerian autonomous-textualism. Finally, Part II.C discusses how the theoretical interpretive pluralism

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102. See GOLDFORD, *supra* note 25, at 166 (“If the real constitutional text is the document itself, then all understandings and interpretations of that text are relevant and none is privileged.”).

103. Campos, *supra* note 7, at 1072 (“[E]ach interpreter extracts a new meaning from the ‘common object’ of interpretation.”).

104. GOLDFORD, *supra* note 25, at 15.

105. *Id.* at 279.

supported by autonomous-text constitutionalism plays out in *Halakhic* practice, which requires a uniformity of conduct under the law.

A. *Jewish Law as a Constitutional System*

At its core, the Jewish legal system is, like its American counterpart, a constitutional order. Constitutional systems can be identified by three salient characteristics, which go to the very heart of what a constitutional form of government is, and which are exhibited by both the Jewish and American legal regimes. First, constitutional systems include a set of supreme legal norms that are relatively stable and unchanging, and which are normative in the sense that they are enacted by the ultimate source of legal authority. Second, constitutional regimes also comprise a collection of subordinate legal norms enacted by inferior law-making authorities whose legislative power is not normative but instead is created by the system's superior constitutional rules. Finally, constitutional systems maintain that the legal rules promulgated by subordinate law-making authorities must be consistent with the superior constitutional norms in terms of both substance and procedure.<sup>106</sup>

American constitutionalism, the quintessential case of constitutional government, rightly exhibits these three essential characteristics. The United States Constitution is the self-declared “[S]upreme Law of the Land”;<sup>107</sup> it is fairly stable, requiring extraordinary popular effort to amend;<sup>108</sup> and it claims normative authority as the enactment of “We the People,” the fundamental source for legal-political authority.<sup>109</sup> The United States Constitution empowers various subordinate law-making authorities—the legislative, executive, and judicial branches—to enact new legal norms within particularly delineated spheres and in accordance with certain procedures and substantive limitations.<sup>110</sup> As this arrangement of supreme, normative and created,

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106. Cf. MURPHY ET AL., *supra* note 12, at 48-53.

107. U.S. CONST. art. VI.

108. See U.S. CONST. art. V.

109. See U.S. CONST. pmb. l.

110. See U.S. CONST. arts. I, II, III.



subordinate lawmaking authorities indicates, American constitutionalism accepts that laws enacted by subordinate legislative authorities, who derive their power from the Constitution itself, must be consistent with the substantive and procedural limitations imposed by that superior legal ordinal, a requirement enforced through the practice of judicial review.<sup>111</sup>

The Jewish legal system, too, exhibits the essential characteristics of constitutional regimes. It includes a superior law that claims normative authority as the product of the ultimate source of legal authority; its superior constitutional law empowers inferior law makers to promulgate new legal norms; and the legal pronouncements of subordinate legislative authorities must be consistent with the norms established by the superior constitutional law.

The fundamental legal norm, the Constitution of the Jewish legal system is the Torah.<sup>112</sup> Jewish tradition maintains that the Torah was revealed to the Jews by God at Mount Sinai, and that the Jews freely consented to abide by the Torah, thereby sealing their obligation to be bound by its content.<sup>113</sup> Thus, the substantive content of the Torah, the

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111. See generally SOTORIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* (1993).

112. See 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 232 (Bernard Auerbach & Melvin J. Skyes trans., 1994) (“[T]he basic norm of Jewish law . . . is the fundamental norm that everything set forth in the Torah, *i.e.*, the Written Law, is binding on the Jewish legal system.”); AARON KIRSCHENBAUM, *EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW* 10 (1991) (“The ultimate legal principle (*Grundnorm*) is the rule that the Torah, the Five Books of Moses, is of binding authority for the Jewish legal system.”).

113. See BABYLONIAN TALMUD, *Shabbat* 86a. Throughout this Article, translations directly from Hebrew are supplied by the Author unless otherwise stated. For a published translation of the Babylonian Talmud, see BABYLONIAN TALMUD, *Shabbat* 86a (R. I. Epstein trans., 1938).

Rav Avdimi bar Hama bar Hasa said, “[Prior to the revelation at Sinai, God suspended a mountain over them [the Jews], and said to them: ‘If you accept the Torah, good; but if not this shall be your grave.’” Rav Aha bar Yaakov responded, “If so, this episode provides a strong basis for rejecting our obligation to the Torah!” Rava explained, “That is true, but they [the Jews] subsequently consented to the Torah’s laws without coercion.”

basic, constitutional norm of Jewish law, is normatively authoritative as the revealed will of God, and that content is binding on the Jewish people due to their enacting God's will into law through an act of collective popular consent.

The Torah-constitution of the Jewish law system thus encompasses the entire legal corpus revealed by God and accepted by the Jews at Mount Sinai. This complete revelation includes two distinct but related textual components: the Written Law—the text of the Pentateuch, the first five books of the Old Testament—and the Oral Law, a comprehensive collection of explanations and elaborations on the Written Law.<sup>114</sup> According to Jewish tradition, the Written Law was related by God himself to Moses who in turn recorded God's words verbatim, forming the first five books of the Hebrew Bible. The Written Law is relatively

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*Id.*; see also SIFRE, A TANNAITIC COMMENTARY ON THE BOOK OF DEUTERONOMY 352-53 (Reuven Hammer trans., 1986) (“When God revealed Himself to give the Torah to the Jews, He first went to all the nations of the world [to offer them the Torah], but they did not want to accept it. . . . [Each nation asked about the content of the Torah's laws, and upon hearing them, declined to accept them] . . . Finally, God approached the Jews and offered them the Torah, and they opened their mouths and said, ‘whatever God will command us, we will do and we will listen.’”); BABYLONIAN TALMUD, *Avodah Zarah* 2b.

114. See BABYLONIAN TALMUD, *Shabbat* 31a (“A certain gentile approached Shammai and asked, ‘How many Torahs do you have?’ Shammai answered, ‘we have two Torahs, one Written and one Oral.’”); Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 HASTINGS CONST. L.Q. 441, 444-45 (1997).

While typically associated with the written text of the twenty-four books of the Old Testament, in Jewish legal thought, the “Torah” as a descriptive of the fundamental constitutional norms of the Jewish legal system encompasses far more than the Bible. The Torah as constitution includes the Written Torah, the text of what is popularly thought of as the Old Testament, as well as the Oral Torah, an extensive collection of explanations and explications of the text of the Written Torah traditionally held to have been revealed to Moses by God. See *id.* at 445. The Oral Torah was as its name implies transmitted orally from generation to generation until it was compiled, edited, and committed to writing in the Mishnah and Talmud. See MISHNAH, *Avos* 1:1; see also MAIMONIDES, *Introduction to MISHNEH TORAH*. Thus, the constitutional law of the Jewish legal system includes not only the Written Torah, the Bible, but also the Mishnah and the Talmud, and therefore, specific rules of law clearly explicated in the Talmud are held to be as immutable as a verse of Scripture. See R. JACOB B. ASHER, *ARBAH TURIM, Hoshen Mishpat* § 25; R. JOSEF CARO, *SHULHAN ARUKH, Hoshen Mishpat* § 25:1.

brief, however, and does not explain the details of many of its provisions. In addition to the Written Law, therefore, God also related to Moses the Oral Law, which included explanations and elaborations on the minutiae of many of the doctrines covered only generally in the Written Law.<sup>115</sup>

While the Written Law portion of the Torah was immediately written by Moses upon his receiving it from God, the Oral Law, as its name implies, was sustained for a time as an oral tradition passed from teacher to student.<sup>116</sup> Eventually the Oral Law was committed to writing in order to prevent an increasingly complex oral law tradition's being forgotten by subsequent generations of increasingly pressed and persecuted Jews.<sup>117</sup> The Talmud was the product of this writing of the Oral Law. Consequently, Jewish law considers the redaction of the Talmud sometime in the early sixth century<sup>118</sup> to be a seminal point in Jewish legal history. At that point, the whole of the constitutional law of Judaism was finalized in written form—the Written Law in the Pentateuch and the Oral Law in the Talmud—and all subsequent legislation or interpretation would be considered inferior law that could not contradict the final legal conclusions recorded in the Talmud.<sup>119</sup>

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115. See BABYLONIAN TALMUD, *Megillah* 19b; ELON, *supra* note 112, at 200-03.

116. See MISHNAH, *Avos* 1:1; see also MAIMONIDES, *Introduction* to MISHNEH TORAH. There are a number of reasons why the bulk of the Torah-constitution was initially transmitted orally rather than in writing. In a formal sense, the Torah itself instructs, "Write down these commandments," *Exodus* 34:27, which the Talmud interpreted to mean that only the Written Law may be written, while the Oral Law must be sustained as an unwritten tradition. See BABYLONIAN TALMUD, *Gittin* 60b. One pragmatic explanation for this prohibition on reducing the Oral Law to writing is that "oral instruction requires constant thought and concentration to keep the material in mind, and consequently, many more laws will be more fully developed through the deliberations and reasoning processes involved in teaching and studying the Oral Law." R. Joshua Falk, *Introduction* to *Sefer Me'irat Einayim*. For a more extensive discussion of this issue see ELON, *supra* note 112, at 224-26.

117. See ELON, *supra* note 112, at 226.

118. See *id.*

119. See CARO, *supra* note 114, §25:1 (declaring that judicial rulings that err in matters of law explicitly decided by the Talmud are considered legal nullities);

Thus, the Torah and Talmud together comprise the Constitution—the fundamental legal norm—of the Jewish legal system. As Professor Levine explains, “[t]o describe a law or legal principle as *d’oraita* [“of the Torah”] is roughly equivalent to describing a law or principle in American law as being based in the Constitution.”<sup>120</sup> Interpretations of the Torah and Talmud are therefore the Jewish law equivalent of constitutional interpretations establishing fundamental rules of law.<sup>121</sup>

The Torah-constitution itself empowers various institutions with subordinate legislative and judicial authority. Judges are authorized by the Torah to interpret and apply normative Torah law to cases brought before them for resolution.<sup>122</sup> In addition to judicial power, the Torah-constitution also grants subordinate legislative powers to several institutions, including rabbinic courts, lay communal legislatures, and a king or other national executive.<sup>123</sup> The Torah says that “you shall not deviate from the law that they [the judges] shall tell you.”<sup>124</sup> The Talmud understands this verse to authorize courts to not only decide cases but to also promulgate new laws as the occasion requires.<sup>125</sup> Relying on this interpretation, Maimonides thus wrote:

[i]t is immaterial whether the direction given by the court concerns the Oral Law . . . or whether it concerns legislative enactments . . . measures devised by the members of the court to serve as a fence around the [Torah] law or designed to meet the

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Levine, *supra* note 114, at 476 (“[W]hen the Talmud was compiled, later authorities accepted as binding the legal decisions found in it.”).

120. Levine, *supra* note 114, at 445.

121. *See id.*

122. *See Deuteronomy* 17:8-11.

123. *See* 2 ELON, *supra* note 112, at 485 (“[E]ven though halakhic authorities disagreed as to what specific verse constitutes the source of delegation of legislative authority in the Jewish legal system, there is consensus that the grant of such authority derives from Scripture, Jewish law’s ‘constitution.’”).

124. *Deuteronomy* 17:11.

125. *See* BABYLONIAN TALMUD, *Berakhot* 19b; 2 ELON, *supra* note 112, at 481-83.

needs of the time. Obedience to the court in all these matters is a positive commandment.<sup>126</sup>

Thus, Jewish law courts, or *battei din* (singular, *bet din*) function in both judicial and legislative capacities, enacting new rules of law referred to in rabbinic literature as *takkanot* (singular, *takkanah*) and *gezierot* (singular, *gezerah*). A *takkanah* (literally, “fixing”) is a legislative enactment that principally addresses matters of social rather than strictly religious concern; thus, the main aim of *takkanot* is *tikum olam*, “the fixing of the world.” A *gezerah* (literally, “decree”), by contrast is a legislative measure aimed at protecting normative Torah laws from being violated. The goal of these rules is *l’migdar miltah*, to build a fence around a Torah law principle by prohibiting acts permitted under normative Torah law in order to prevent the Torah precept’s being violated through inadvertence or confusion.<sup>127</sup>

The Torah also grants subordinate legislative authority to every Jewish community or its representatives. Jewish law equates the status of lay communal majorities with that of rabbinic courts. The judges of every generation have power to authoritatively resolve questions of law and enact new norms for their constituencies<sup>128</sup> because “the members of each generation agree to accept the rulings and enactments of the highest court in their generation.”<sup>129</sup> A *beis din*’s legislative and judicial power, in other words, stems from some of its constituency’s popular consent to its authority. Thus, whenever this basis of popular acceptance is present,

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126. MAIMONIDES, MISHNEH TORAH, *The Laws of Apostates*, ch. 1:1; see also NAHMANIDES, COMMENTARY ON MAIMONIDES’ SEFER HAMITZVOT § 1.

127. See THE PRINCIPLES OF JEWISH LAW 74 (Menachem Elon ed., 1975).

The term *gezerah* is generally applied to the determination of directives aimed at deterring man from the prohibited, at making “a fence around the Torah”—i.e., directives of a negative nature prohibiting the performance of a particular act. The term *takkanah*, on the other hand, generally refers to directives aimed at imposing a duty to perform a particular act, i.e., directives of a positive nature enjoining the doing of a particular matter.

*Id.* (citing *Introduction to MAIMONIDES’ COMMENTARY TO THE MISHNAH*).

128. See *infra* Part II.C.

129. R. ELIJAH MIZRAHI, RESPONSA ELIJAH MIZRAHI NO. 57.

the institution in which that public trust resides “has the same authority as the Sanhedrin in Jerusalem.”<sup>130</sup> The lay leaders of a community have the same constitutionally-granted legislative power as a court “since the townspeople look to the communal leaders for guidance in matters affecting the public and agree to accept their determinations.”<sup>131</sup>

The Torah-constitution is the fundamental legal norm of the Jewish law system; it is unchangeable, and retains supreme legal authority. The legislative authority held by courts, lay leaders, and the national executive, by contrast, is not normative, but is created by the Torah-constitution. Thus, rabbinic and lay legislation,<sup>132</sup> post-Talmudic interpretations of Torah-constitutional law,<sup>133</sup> and legal rulings called responsa<sup>134</sup>—which claim legal authority only by virtue of a constitutional grant of law-making power—are subordinate to the fundamental Torah law.<sup>135</sup> In Jewish law, therefore, there is a basic jurisprudential distinction between laws that are *de-oraita* (“of the Torah”) and those that are *de-*

130. *Id.*

131. R. ELIJAH MIZRAHI, RESPONSA ELIJAH MIZRAHI NO. 57; *see also* R. ISAAC B. SHESHET, RESPONSA RIBASH NO. 249. For another example of an *halakhic* authority equating the status of the *kehillah* with that of a court via the rule that “Jephthah in his generation is like Samuel in his generation,” *see* BABYLONIAN TALMUD, *Rosh hashana* 25b.

132. On the subordinate authority of legislative enactments promulgated by rabbinic or lay authorities, *see* 2 ELON, *supra* note 112, at 496-502, 736-78.

133. *See, e.g.*, MAIMONIDES, *supra* note 126, ch. 2:1.

134.

[R]esponsa literature represents the decisions and conclusions written down by halakhic scholars in answer to written questions submitted to them. . . . The responsa represent legal decisions on concrete questions arising in daily life and served as the main vehicle for creativity and evolution of Jewish law in post-Talmudic times. This body of literature is the case law of the Jewish legal system [though it does not have the same kind of binding authority as does the case law of a particular jurisdiction in the American system], estimated to include [at least] 300,000 judgments and decisions.

ELON, *supra* note 112, at 13.

135. *See* 2 ELON, *supra* note 112, at 478-81.

*rabbanan* (“of the rabbis”).<sup>136</sup> *De-oraita* laws, those that are found in the Torah-constitution, are considered superior to and more stringent than *de-rabbanan* laws, those created by subordinate legislative authorities.<sup>137</sup> For example, while the duty to abide by subordinate legislation is always superseded by certain broad principles, such as the obligation to preserve human dignitary, normative Torah-law proscriptions take precedence over the preservation of similar policy concerns.<sup>138</sup> Similarly, subordinate legislation cannot contradict Torah-constitutional law, as the Talmud rules, “a court may not enact legislation uprooting a Biblical prohibition by permitting the performance of a prohibited act.”<sup>139</sup> While the Torah itself permits subordinate legislative authorities to enact new rules that contradict Torah-constitutional law in certain pressing circumstances,<sup>140</sup> this extraordinary power derives from the Torah-constitution itself.<sup>141</sup> This power is thus akin to the United States Constitution’s, permitting Congress to suspend the fundamental constitutional right to

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136. ELON, *supra* note 112, at 207-17.

137. *See generally* 1 R. ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 2-11 (2d ed. 1966).

138. *See, e.g.*, MAIMONIDES, *The Laws of Mixed-Kinds*, *supra* note 126, at ch. 10:29 (“Rabbinic prohibitions are always overridden by the obligation to preserve human dignity.”); *see also id.* at *The laws of Shabbos*, ch. 6:22. (“If a person is traveling at the onset of Sabbath, and he is carrying coins, he should give the purse to a non-Jew to hold for him during the Sabbath . . . for if we did not permit him to ask a non-Jew to carry the purse for him [a rabbinic prohibition] he would come to carry it himself, thereby violating a biblical prohibition.”). For an extensive discussion of the relative stringencies and leniencies associated with Biblical and rabbinic laws, see ELON, *supra* note 112, at 212-14.

139. *See* BABYLONIAN TALMUD, *Yevamoth* 89a. Subordinate legislation may, however, supplement Torah law proscriptions by prohibiting through *gezeirot* acts permitted under normative Torah rules. *See* RASHI, *Yevamoth* 89a (*Shev Val Ta’aseh*).

140. *See generally* 2 ELON, *supra* note 112, at 503-33.

141. *See* BABYLONIAN TALMUD, 2 *Yevamoth* 90b (deriving broad authority to legislate contrary to Torah law in order to restore the Jewish people to general observance of the Torah from the scriptural incident of Elijah on Mount Carmel). *See generally* 2 ELON, *supra* note 112, at 503-33.

habeas corpus in cases of war or rebellion,<sup>142</sup> and thus does not undermine the constitutional supremacy of Torah law over subordinate legislation.

These basic structural similarities provide a basis for instructively comparing Jewish and American constitutionalism. Nevertheless, there are some fundamental differences between the normative bases and functions of constitutionalism in Jewish and American law, which warrant mention. Jewish law constitutionalism is a religious life-work founded on God's command,<sup>143</sup> whereas the American constitutional experience is a fundamentally political and secular endeavor grounded in the aggregate will of "We the People" distilled through compromise and negotiation from competing normatively legitimate interests and conceptions of the good.<sup>144</sup> Thus, the Jewish legal system, viewed as a product of God's unilateral command takes shape as more than a legal system in the Western sense. Whereas the Anglo-American legal tradition might view law as a secular, public, and political institution, Jewish law is "not only a legal system," but "the life work of a religious community"<sup>145</sup> that strives to morally elevate every aspect of its adherents' public and private lives.<sup>146</sup> Jewish law, thus, is

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142. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.").

143. See Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 894 (1993). See generally ELON, *supra* note 112, at 18-19.

144. See John L. S. Simpkins, *Structuring State Constitutional Review: Comparative Perspectives*, 3 CHARLESTON L. REV. 535, 548 (2009) ("A constitution is an expression of the collective will of the people as to how they will govern themselves as well as a product of the kind of political bargaining that characterizes the law-making process.").

145. Stone, *supra* note 143, at 894.

146. See R. Isadore Grunfeld, *Introduction to R. SAMSON RAPHAEL HIRSCH, HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES* xlvii (Dayan Isidore Grunfeld trans., 7th ed. 2002) ("What the Torah desires to regulate is . . . the whole of human existence—man's sensual impulses, his needs and desires, his individual life as well as that of his family, society, and State." (quoting R. SAMSON 1 RAPHAEL HIRSCH, GESAMMELTE SCHRIFTEN 83 (1912))).

The Hebrew word that refers to individual laws and the Jewish legal system as a whole, "*halakhah*," translates literally as "the way to go." Thus, *halakhah* "plays



all-encompassing, it touches every aspect of life,<sup>147</sup> and even when the law does not directly demand a particular course of conduct, the personal discretion that remains is always colored by a moral duty to approach the choice among permissible courses of conduct from a perspective influenced by broad Torah-based principles.<sup>148</sup>

Jewish law's religious character animates several doctrines that blur the demarcation between legal command and moral-ethical obligations, a notion that lacks any parallel in the American constitutional experience. In Jewish law, for example, a religious sense of awe and trepidation animates the judicial process as human jurists face the prospect of creatively interpreting and (mis)applying God's sacred law,<sup>149</sup> which Jewish tradition views as part of the very fabric of creation.<sup>150</sup> Also, Jewish law strongly favors judicial decisions that go "beyond the letter of the law";<sup>151</sup> as guardians of religious life and the moral development of individuals and the community, Jewish law judges are

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an inseparable . . . part in Jews' commitment to the Torah, the Jewish tradition broadly conceived, which is a holistic way of life interweaving law, theology, spirituality and the cultivation of virtues." Y. Michael Barilan, *Her Pain Prevails and Her Judgment Respected—Abortion in Judaism*, 25 J.L. & RELIGION 97, 137 (2009).

147. See Levine, *supra* note 114, at 469 ("Jewish law consists of a detailed legal system, regulating both public and private life . . . [and] presents at least guidelines for virtually every aspect of ideal societal and personal behavior.").

148. See, e.g., 3 RAMBAN NACHMANIDES, COMMENTARY ON THE TORAH, *Leviticus* 19:2 (Charles B. Chavel trans., 1972) (cautioning that the strict legal boundaries of the Torah leave room for man to debase himself, to become "disgusting within the bounds of the Torah," and that therefore the Torah teaches that one should be guided by the Torah's general morality even within the sphere of conduct that the law leaves to personal discretion). See generally 1 ELON, *supra* note 112, at 141-89 (discussing the role of general moral principles in Jewish law).

149. See Jeffrey I. Roth, *Responding to Dissent in Jewish Law: Suppression Versus Self-Restraint*, 40 RUTGERS L. REV. 31, 86-91 (1987); Yuval Sinai, *The Religious Perspective on the Judge's Role in Talmudic Law*, 25 J.L. & RELIGION 357, 358, 361-67 (2009) (discussing Jewish legal decisors' aversion to issuing practical rulings due to their "fear of deciding" arising from Jewish law's Divine origin and religious character).

150. See ASHER, *supra* note 114, § 1.

151. See BABYLONIAN TALMUD, *Baba Kamma* 99b-100a; RAMBAN NACHMANIDES, *supra* note 148, *Deuteronomy* 6:18. See generally ELON, *supra* note 112, at 155-67.

supposed to not merely apply the law, but to rule with an eye towards engendering moral-ethical excellence by at times requiring more or perhaps less than the law fairly demands.<sup>152</sup> Thus, at times, Jewish law decisors may acknowledge that, strictly speaking, the law might only require an ethically minimalist course of conduct, and they may therefore maintain, “so is the *halakhah*, but we shall not instruct so,”<sup>153</sup> instead setting the ethical bar higher than legally required.<sup>154</sup> Similarly, Jewish legal discussions often revolve around a distinction between judicially enforceable legal obligations and moral duties imposed by “the laws of [H]eaven.”<sup>155</sup> This distinction between legal and moral obligations takes place within Jewish law; the duty to uphold obligations imposed by the “law of Heaven” remains a legal, albeit judicially unenforced imperative.<sup>156</sup> Also, in a number

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152. See R. JOSHUA FALK, DERISHAH, *Hoshen Mishpat* 1:2.

When it says [that judges must strive to issue] “true and honest judgments,” it means that they must rule with an eye towards the time and place so that their decisions will be “truthful,” and that they should not always rule from the strict law of the Torah because at times the judge must rule beyond the letter of the law in light of the circumstances posed by the case. When the judge does not do this, even if his ruling is legally true, it is not also “honest” in the sense that the sages taught, “Jerusalem was only destroyed because they supported their judicial decisions solely by the Torah’s law and did not go beyond the letter of the law.”

*Id.*; see also R. JOEL SIRKIS, BAYIT HADASH, *Hoshen Mishpat* 12:4 (“It is the practice of every Jewish court to compel the wealthy to perform their [moral] obligation where it is right and proper, even if the strict law does not so require.”).

153. See BABYLONIAN TALMUD, *Menahot* 31a-31b; BABYLONIAN TALMUD, *Shabbat* 12b-13a.

154. See, e.g., BABYLONIAN TALMUD, *Baba Kamma* 30b (maintaining that even though the law is that straw left by its owner in the public domain in order to be trampled into manure by the public is considered ownerless and anyone who takes possession of it may keep it; we do not teach the law as such, and if asked for a prospective advisory opinion a legal scholar should instruct the questioner not to take the straw); BABYLONIAN TALMUD, *Avodah Zarah* 37b; R. ASHER B. JEHIEL, ROSH, *Beza* 2:19.

155. See MISHNAH, *Baba Kamma* 6:4; see also BABYLONIAN TALMUD, *Baba Kamma* 55b-56a. See generally 1 ELON, *supra* note 112, at 145-48.

156. Some Jewish law authorities maintain that while duties imposed by “the law of Heaven” do not occasion judicial compulsion to force compliance, courts are nevertheless authorized to bring extra-judicial pressure to bear on recalcitrant

of areas, the sages of the Talmud acknowledged the legal possibility of what they considered morally bereft conduct, but effectively prohibited such conduct by expressing their extreme displeasure with those that might act within the letter of the law but without the religious strivings that animate the legal system.<sup>157</sup> In great contrast to Jewish law's religious foundation, American legal tradition, animated by classical liberalism, is highly secular, focusing on regulation of the public sphere by mediating between competing conceptions of the good and leaving private conduct fully to the moral discretion of the autonomous-self.<sup>158</sup> Thus, unlike in the Jewish law system, the juridical instrumentalities of the legal system enforce the law alone; they do not urge ethically laudable conduct beyond the demands of the law, and certainly do not take it upon themselves to enforce such extra-legal moral strivings.<sup>159</sup>

These fundamental differences related to the religious character of Jewish law and America's secular constitutionalism do not, as some scholars have argued,

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parties to uphold these obligations. See R. SHLOMO LURIA, YAM SHEL SHLOMO, *Baba Kamma* 6:6.

157. See ELON, *supra* note 112, at 148-54.

158. See Margit Warburg, *Globalization, Migration and the Two Types of Religious Boundary: A European Perspective*, in RELIGION, GLOBALIZATION, AND CULTURE 79, 96 (Peter Beyer & Lori Beaman eds., 2007) ("The Western idea of a secular basis for law and order stems from the Enlightenment and its confrontation with the political dominance of religion."); see also JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 44 (1990) ("When Jewish law is compared with American law, the contrast is striking. Modern legal thought compartmentalizes, insisting upon boundaries, limits, separations, and carefully defined spheres. It imposes distinctions—between secular and religious, legal and moral, public and private."); Ariel L. Bendor, *Are There Any Limits to Justiceability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience*, 7 IND. INT'L & COMP. L. REV. 311, 326-27 ("[T]he law, by its very nature, exists within defined and narrow boundaries; the *halacha*, by its very nature, extends into every human concern . . .").

159. The legal positivism of Bentham, Austin, and Hart has influenced theories of adjudication that demand judges enforce the law and not morality. Compare this approach with ELON, *supra* note 112, at 8 ("Jewish law, functioning as a legal system, itself impels recourse to a moral imperative . . . and in doing so sometimes prepares the way to the conversion of the moral imperative into a fully sanctioned norm.").

preclude meaningful comparison of the two systems.<sup>160</sup> First, it has been pointed out that American constitutionalism rests on the Jewish law constitutional narrative in a historical and cultural sense.<sup>161</sup> On this view, American constitutional theory draws heavily on its Judaic predecessor via Christianity's rediscovery of rabbinic texts following the Reformation, and it would therefore be reasonable for the latter to serve as an instructive counter-example of legal interpretation for the former.<sup>162</sup> Additionally, an instructive comparison on interpretation in Jewish and American

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160. See Levine, *supra* note 114, at 442-43. In addition to the foundational comparative hurdles outlined in this Article, drawing lessons from Jewish law for American constitutional interpretation faces important methodological difficulties. First, any attempt to equate Jewish and American constitutional interpretation threatens to impose on one system artificial jurisprudential categories borrowed from the other, thereby distorting each. See Hanina Ben-Menahem, *Postscript: The Judicial Process and the Nature of Jewish Law*, in AN INTRODUCTION TO THE HISTORY AND SOURCES OF JEWISH LAW 421, 422-35 (N. S. Hecht et al. eds., 1996) (pointing out some difficulties with applying Western jurisprudential categories to understanding Jewish law); Suzzane Last Stone, Comment, *Judaism and Postmodernism*, 14 CARDOZO L. REV. 1681, 1688 (1993). The very notion that there is a Jewish interpretive tradition "requires the collapse of distinctions [in approach] between all rabbinic periods and genres." Stone, *supra*. Jewish law has always been a diverse enterprise; the substance of the law and the jurisprudential outlook of Jewish law scholars has varied widely at different times, and at the same time in different geographical areas. See Ben-Menahem, *supra*, at 430. It would be ironic, indeed, to advocate that autonomous-textualism and interpretive pluralism are the way that Judaism approaches legal interpretation; a legal tradition that embraces a multiplicity of substantive views about what the law is can be rightly expected to include more than one jurisprudential theory about how those substantive views are derived from normative textual sources. For reviews of the differing interpretive approaches in the Jewish law tradition, see ELON, *supra* note 112, at 400-21; Stone, *supra*, at 1688-91; see also Ben-Menahem, *supra*, at 430-31.

161. See KAHN, *supra* note 2, at 16, 46-66 (1999); Fernando Rey Martinez, *The Religious Character of the American Constitution: Puritanism and Constitutionalism in the United States*, 12 KAN. J.L. & PUB. POL'Y 459, 461 (2003).

162. See ERIC NELSON, THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT 1-28 (2010); POLITICAL HEBRAISM: JUDAIC SOURCES IN EARLY MODERN POLITICAL THOUGHT (Gordon Schochet et al. eds., 2008); Andrew Murphy, *New Israel in New England: The American Jerimias and the Hebrew Scriptures*, 4 HEBRAIC POL. STUD. 128 (2009); Shlomo C. Pill, *Jewish Law Antecedents to American Constitutional Thought*, 85 Miss. L.J. (forthcoming 2016); Gordon Schochet, *Introduction: Hebraic Roots, Calvinist Plantings, American Branches*, 4 HEBRAIC POL. STUD. 99, 101-02 (2009).

constitutionalism is possible, despite the fundamental differences between these systems, because the exercise is pragmatic, not formal. The argument here is not that both American and Jewish law are constitutional systems, and that therefore the interpretive conceptions of Jewish law must also be applicable in the American context. Instead, as Part III of this Article will bear out, the contention of this Article is that constitutional interpretation in Jewish law offers an experiential model of how Gadamerian autonomous-textualism can work in practice to mitigate many of the central problems of American constitutional theory. It is on that strictly instrumental basis, rather than due to some irrefutable congruency between Jewish and American constitutionalism, that the instructive comparison set out here proceeds.<sup>163</sup>

B. *Autonomous-Text Constitutionalism in Jewish Legal Tradition*

The Jewish law constitutional tradition offers a living, vibrant example of autonomous-text constitutionalism in practice. As expected of an autonomous-text constitutional system, Jewish law constitutional tradition and practice exhibits three important characteristics. First, Jewish tradition maintains that once enacted into law, the Torah-constitution of the Jewish law system became an autonomous text, detached from the intentions of its Divine author and not susceptible to overnice formalistic constructions or one-sided impositions of the interpreter's subjective preferences.

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163. See SCHREIBER, *supra* note 5 (discussing the pragmatic value of comparative Jewish law studies despite the significant differences between any comparative object and Jewish law). The sentiment here is somewhat similar to that expressed in Bruce S. Ledewitz & Scott Staples, *Reflections on the Talmudic and American Death Penalty*, 6 U. FLA. J.L. & PUB. POL'Y 33, 37-38 (1993):

[S]imply incorporating Talmudic practice in the American legal system would not be coherent or possible. Nor would it make sense to grant normative supremacy to the Talmud, per se. The two systems are different; the two societies are different.

So, why compare them? The Talmud is a legal system that aspired to reflect God's purpose in the world. If such a system could confidently put men and women to death, then perhaps so can we. If, on the other hand, the rabbis of the Talmud agonized over execution, limited its reach, and sought to excuse where possible, perhaps we need to imitate their voices.

Second, Jewish tradition posits that interpretation of this autonomous-text Torah-constitution is a dialectic interaction between the text and interpreter, a process that is unique for each reader each time the Torah is read. Third, because interpretation of the autonomous-text Torah-constitution is a dialectic process unique to each reader, Jewish tradition maintains that constitutional meaning is pluralistic; the Torah's text lends itself to many understandings, and no one interpretation is inherently superior to any other or can claim a monopoly on textual truth.

In Jewish tradition, though the Torah-constitution was promulgated by God, once enacted into law at Mount Sinai, the Torah became an autonomous text disconnected from the intentions and understandings of its author, and transcendent of any formalistic or subjective constructions. The Torah itself indicates its autonomy from Divine intentions when it says, "for this law is not hidden from you, nor is it far away. It is not in heaven . . . it is very close to you; it is in your mouth and in your heart so that you can follow it."<sup>164</sup> In several passages, the Talmud explains this statement, "[i]t is not in heaven," as indicating that once given at Mount Sinai the meaning of the Torah was released from the intentions and understandings of its Divine author, and was instead handed to the Jewish people to construe in accordance with their own understandings.<sup>165</sup> In what is perhaps the most oft-quoted Talmudic passage in legal academic literature, the Talmud demonstrates that God has no control over how the Torah is properly understood, and that indeed, human interpreters should disregard indications of Divine intent.

Rabbi Eliezer used all the arguments in the world [to support his legal opinion], but they [the majority of the rabbis] did not accept his view. He said to them, "if the law is like me, let this carob tree prove it." The carob tree then uprooted itself and moved one hundred cubits, and some say, four hundred cubits. The rabbis replied to him, "one does not bring legal proofs from a carob tree." Rabbi Eliezer then said, "if the law is like me, let this stream of water prove it." The stream then changed course and began running upriver. The rabbis replied, "we do not bring legal proofs

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164. *Deuteronomy* 30:11-14.

165. See, e.g., BABYLONIAN TALMUD, *Bava Mezi'a* 59b; BABYLONIAN TALMUD, *Hagigah* 3b; TOSEFTA, *Sotah* 7:12.

from streams of water.” Rabbi Eliezer then said, “if the law is like me, let the walls of the study hall prove it.” The walls of the study hall then leaned inward as if to fall down. Rabbi Yehoshua said to them [the walls], “if Torah scholars debate over the law, what business is it of your[’s]?” The walls did not fall, but out of respect for Rabbi Eliezer and his legal position they did not right themselves either. Rabbi Eliezer then said to the rabbis, “if the law is like me, let Heaven itself prove it!” A voice then emanated from the heavens and said, “why do you disagree with Rabbi Eliezer, for the law is always in accordance with his view.” Rabbi Yehoshua rose to his feet and responded, “the Torah is ‘not in Heaven.’” What does it mean that the Torah is “not in Heaven”? Rabbi Yirmiyah explained, “it means that the Torah was already given to Man at Mount Sinai, and we therefore do not pay any mind to legal interpretations offered by a heavenly voice, for God already wrote in the Torah itself, ‘follow the majority view.’”<sup>166</sup>

This narrative demonstrates that *halakhic* authorities were averse to considering the God’s authorial intentions or understandings of the Torah when interpreting and applying the law; once enacted, the Torah-constitution became autonomous and its meaning was left to be determined by human interpreters.<sup>167</sup> Thus,

the [Halakhah] was entrusted to the halakhic authorities, and the Giver of the Torah Himself, as it were, accepts their decision. It would be difficult to picture a more telling illustration of the exclusive prerogative of the halakhic authorities to declare the law and of the absolute rule of law, even, as it were, over the divine Legislator Himself.<sup>168</sup>

The Talmud reports that following the recorded incident, Rabbi Natan met the Prophet Elijah and asked him how God responded to the exchange between Rabbi Yehoshua and his disputants.<sup>169</sup> Elijah responded, “[when the rabbis rejected the heavenly voice] God was laughing and saying, ‘My

166. BABYLONIAN TALMUD, *Bava Mezi’a* 59b.

167. See R. NISSIM GERONDI, DERASHOT HA-RAN NO. 7; see also R. ARYEH LEIB HELLER, *Introduction* to KEZOT HA-HOSHEN (elaborating on Gerondi’s discussion and observing that once given to the Jews, the Torah is properly interpreted according to *human* logic, and therefore many understandings of the Torah can be “true” since many competing textual meanings can concurrently accord with human reasoning).

168. ELON, *supra* note 112, at 262-63 (footnote omitted).

169. BABYLONIAN TALMUD, *Bava Mezi’a* 59b.

children have bested me, my children have bested me.”<sup>170</sup> This postscript to the Talmudic narrative indicates that God, too, desires this autonomous-text conception of His law. “God’s ‘defeat’ signifies a divine form of self-limitation that allows the human partners to the [Torah-constitution] covenant to assume responsibility for developing the content of revelation.”<sup>171</sup>

In another passage, the Talmud records an incident involving Rabba bar Nahmeini who fled to the swamps to avoid persecution by Roman authorities.<sup>172</sup> While he was hiding, the Talmud says, a dispute regarding a point of ritual purity law was taking place in heaven. God maintained that in the case under discussion the subject was ritually pure, while the rest of the heavenly assembly contended that it was impure.<sup>173</sup> All agreed to consult Rabba bar Nahmeini who was considered the preeminent expert in this field.<sup>174</sup> Ultimately, immediately prior to his death Rabba bar Nahmeini ruled, like God had argued, that the subject of the debate was indeed ritually pure.<sup>175</sup> Only then, following Rabbah’s decision, did the celestial disputants accede to God’s view that the matter was indeed ritually pure.<sup>176</sup> Like the earlier account, this second story attests to the autonomous-text characterization of the Torah-constitution in Jewish legal tradition; the text is redeemed from the intentions of its Author, and those intentions are vindicated only when confirmed by human authorities.<sup>177</sup> But this line of thought does not end with Talmudic account of the heavenly

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170. *Id.*

171. 1 THE JEWISH POLITICAL TRADITION 265 (Michael Walzer et al. eds., 2000).

172. *See* BABYLONIAN TALMUD, *Bava Mezi’a* 86a.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.*

177. *See* R. JUDAH MINZ, RESPONSA MAHARAM MINZ § 100 (explaining that God and the heavenly assembly were not disputing God’s actual intent when He wrote the Torah, for God would certainly have ultimate authority as to His own subjective intentions; rather, they were contending over the present meaning of the relevant verses in the Torah over which God does not have an interpretive monopoly).



academy's deferring to Rabbah bar Nahmeini's interpretation of the law. Maimonides in his monumental *halakhic* code, *Mishneh Torah*,<sup>178</sup> rules contrary to Rabba bar Nahmeini's view.<sup>179</sup> One of Maimonides' chief commentators explained that since Rabba issued his ruling on this matter while on his death bed, the decision issued from someone more in the next world than this one; the dictum of "it is not in heaven" therefore applies, and the ruling, though confirmed by God and the heavenly assembly, is rejected.<sup>180</sup> Ultimately, constitutional meaning is not synonymous with God's authorial intent, but is instead a product of the present reader's human understanding.

To say that the meaning of the Torah is entrusted to human interpreters is a license-grant for every individual to pragmatically impose their own views on the Torah's text. The Talmud teaches that "the Torah is only sustained through those who destroy [literally "kill"] themselves on its account."<sup>181</sup> Many commentators take this teaching as a call to aestheticism, an instruction that only those who eschew material pleasures can expect to master Torah study.<sup>182</sup> The passage can be taken in another, more metaphysical sense, however. The Talmud is also teaching that one can only come to understand the Torah if in the process he "destroys" his subjectivity and allows the Torah to speak to him before he analyzes and interprets it through the lens of his own mind. Thus, immediately after teaching that one must destroy himself in order to truly understand the Torah, the Talmud

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178. The *Mishneh Torah*, also referred to as *Yad ha-Hazakah*, is a codification of Jewish law written by Maimonides (1204) at the end of the twelfth century. See 3 ELON, *supra* note 112, at 1187-88, 1188 n.22. In Maimonides' words, the work, a labor of ten years was prepared as "a compendium of the entire Oral Law, including the enactments, customs, and decrees instituted from the days of Moses, our teacher, until the redaction of the Talmud, as expounded for us by the *geonim* in all the works composed by them since the completion of the Talmud." *Id.* at 1184-86 (discussing Maimonides' objectives in writing *Mishneh Torah*).

179. See MAIMONIDES, MISHNEH TORAH, *The Laws of Tzara'at*, ch. 2:9.

180. See R. JOSEPH CARO, KESEF MISHNEH, *The Laws of Tzara'at*, ch. 2:9 (*Baheret be-Hazi Gris*).

181. BABYLONIAN TALMUD, *Berakhot* 63b.

182. See, e.g., MAIMONIDES, MISHNEH TORAH, *The Laws of Torah Study*, ch. 3:12.

expounds the verse, “Be silent and listen, Israel,”<sup>183</sup> to mean “a person should always first learn Torah and only afterwards interpret it.”<sup>184</sup> Like Gadamer’s philosophical hermeneutics, then, Jewish tradition instructs that interpretation is not the imposition of meaning on the text by the interpreter.<sup>185</sup> Instead, the interpreter must leave himself open, indeed must subjugate his own prior notions and preconceptions, to what the Torah itself has to tell him before he can begin to expound and truly understand the text.

There is an important jurisprudential reason for why in Jewish tradition the interpretation of the Torah and the development of textual meaning is ultimately left to human readers and not to God, for why the Torah’s text is considered essentially autonomous. The underlying aim of Jewish law is to enable its adherents to morally ennoble themselves through their choosing to abide by God’s commandments.<sup>186</sup> Morality cannot be legislated, however.<sup>187</sup> If the Torah was a clear and comprehensive code of conduct whose application did not require interpretation (assuming such a thing is even possible),<sup>188</sup> adherence to its dictates would be a purely mechanical performance of no more moral quality than a

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183. *Deuteronomy* 27:10.

184. BABYLONIAN TALMUD, *Berakhot* 63b.

185. *See supra* notes 77-81 and accompanying text.

186. *See* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. L. ISSUES 1, 17 (1989) (“[The Jewish legal system] is based on the value of encouraging individuals to expand their narrow self-centeredness and reach out to a level of consideration for others: self-transcendence as a key form of moral education.”). *See generally* Shlomo Pill, *Recovering Judicial Integrity: Towards a Duty-Focused Disqualification Jurisprudence Based on Jewish Law*, 39 FORDHAM URB. L.J. 511, 530-37 (2011).

187. *See generally* Robert P. George, *The Central Tradition—Its Value and Limits*, in VIRTUE JURISPRUDENCE 24, 43-47 (Colin Farrelly & Lawrence B. Solum eds., 2008) (arguing that moral goods often cannot be realized through legal compulsion, and that to facilitate individual moral integrity the law must sometimes decline to regulate so as to enable individuals to make themselves moral).

188. *See* LON L. FULLER, THE MORALITY OF LAW 56 (1964) (“No system of law—whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute.”).

robot's following its programming. As an autonomous text that invites and demands human interaction, however, the Torah induces its adherents to participate in a "continuing revelation."<sup>189</sup> As an autonomous text, then, the Torah invites its adherents to become "partners with God in the work of creation,"<sup>190</sup> elevating their law-abiding conduct from slavish conformity to an external standard to a morally ennobling collaborative attempt to live justly and righteously within the bounds set by the Torah-constitution's text.<sup>191</sup>

As an autonomous text, the Torah-constitution is held by Jewish tradition to be interpreted by each reader through a dialectical interaction between the interpreter's unique subjective self and the text. Jewish scholars have often expressed this idea by intimating that just as every Jewish soul is unique, so too every Jew has a unique "portion" in the Torah.<sup>192</sup> On this view, the autonomous text of the Torah lends itself to many, many different explanations, each

189. See Jeffrey I. Roth, *The Justification for Controversy under Jewish Law*, 76 CALIF. L. REV. 337, 373 (1988).

190. BABYLONIAN TALMUD, *Shabbat* 10a.

191. See R. SAMSON RAPHAEL HIRSCH, COMMENTARY ON THE PENTATEUCH, *Deuteronomy* 1:17 (*Ki Hamishpat le-Elokim Hu*) ("In giving judgment [the judge] is engaged in God's work. . . . [The Torah's] [j]ustice shapes a humane way of life and gives it the form intended by the Creator at the Creation; for the whole purpose of man's creation was so that he should freely realize God's Will, and only for this purpose did the Creator place man in His world.").

192. See, e.g., 1 HANINAH BEN-MENAHM ET AL., DIALOGUE AND CONTROVERSY IN HALAKHIC SOURCES 100 (1991) (quoting *Derekh Eiz Haim*):

There are many faces to the Torah . . . for every Jewish soul has its own portion in the Torah such that there are six-hundred thousand interpretations for every aspect of the Torah corresponding to the six-hundred thousand souls divided among the Jewish people. This is what is meant when we say that the flame of the Torah is comprised of many sparks: Initially, the Torah appears like a single flame, but eventually one can discern the different kinds of light within the flame, each of which was revealed in six-hundred thousand ways to the six-hundred thousand Jewish souls.

*Id.*; see also *id.* at 99 (quoting *Introduction to BAALEI BRIS AVRAHAM*) ("The Torah is root of every soul, thus [just as there are six-hundred thousand souls] corresponding to them there are six-hundred thousand understandings such that each interpretation of the Torah is the essence of a single Jewish soul. And in a time to come, every person will be able to read and understand the whole Torah in accordance with the interpretation linked to his soul.").

unique interpretation corresponding to a unique individual's understanding of the text. Indeed, it is said that competing understandings of the Torah are "created" by each individual's unique "soul"—the essence of their character, intelligence, and way of thinking.<sup>193</sup> Thus, one eighteenth century rabbi wrote:

The Torah has already been bequeathed to us, and it is in our hands to understand it in accordance with our own mental abilities and disposition. . . . Every man understands the meaning of the holy Torah in accordance with his own disposition. If he is disposed towards kindness and charity, then he may find everything to be pure, permissible, and kosher in accordance with his mind's understanding of the Torah . . . if he his disposed toward severity, the opposite will be true.<sup>194</sup>

Another prominent Talmudist explained that "everyone's soul was present at Mount Sinai and received the Torah . . . . Each perceived the Torah from his own perspective in accordance with his intellectual capacity as well as the unique character of his particular soul."<sup>195</sup>

A similar idea is offered by Rabbi Solomon B. Isaac (Rashi), a medieval French Talmudist and the author of the foremost commentary on the Talmud.<sup>196</sup> According to Rashi, "when two scholars disagree about how to understand the law, each one saying 'thus does the law reasonably seem to me,'" neither disputant is wrong, and neither one is right.<sup>197</sup> "Each is offering his own reasoning," in accordance with how the matter appears in his own mind; "one of them gives reasons to prohibit, and the other gives reasons to permit," each analogizing and reasoning based on his own

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193. See *Introduction* to BALEI BRIT AVRAHAM quoted in BEN-MENACHEM ET AL., *supra* note 192 (explaining that every individual has the potential to understand the Torah in a completely unique way based on a textual meaning he creates through his unique soul-connected being).

194. R. LEVI YITZCHAK, KEDUSHAT LEVI, *Lekutim (Teiku)*; see also R. MEIR B. EZEKIEL IBN GABBAL, AVODAT HA-KODESH 169-71 (1901).

195. LURIA, *Introduction to Bava Kamma*, *supra* note 156.

196. See RASHI, *Ketubot* 57a (*Ha Kamashma Lan*).

197. *Id.*

understanding.<sup>198</sup> Rashi concludes by saying that with respect to such disputes we say “these and those [i.e., the decisions reached by each interpreter] are all the words of the living God”; both understandings are fundamentally legitimate.<sup>199</sup> Though different, each conclusion is the product of each interpreter’s unique understanding of the text, a product of each one’s unique self, and therefore both views are valid interpretations of the text—the living word of God. As Jeffrey Roth puts it: “Each . . . sage, depending on his or her unique perspective, receives an individual portion [in the Torah].”<sup>200</sup>

This conception of Torah-constitutional interpretation as a highly individualized process, a process that cannot produce the same epistemological results for different interpreters, is reinforced by Jewish law’s approach to the authority of precedent. In Jewish law the concept of binding precedent as we know it in the Anglo-American system is virtually nonexistent.<sup>201</sup> While good *halakhic* decisors are expected to give great respect to the scholars that preceded them, and accord earlier authorities’ rulings great deference,<sup>202</sup> in Jewish law precedent is always only

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198. *Id.*

199. *Id.*

200. Roth, *supra* note 189, at 373.

201. See Levine, *supra* note 114, at 476 (“In actual interpretation of the law, however, just as the search for truth ideally does not respect a specific interpreter as inherently authoritative, there should be no reliance on precedent in trying to arrive at the truth.”). See generally Zerach Warhaftig, *Precedent in Jewish Law*, in 6-7 SHENATON HA-MISHPAT HA-IVRI 105 (1979–1980).

202. See Levine, *supra* note 114, at 476.

Authorities in Jewish law, however, observed that in the Talmud, legal authorities who lived after the compilation of the Mishna did not dispute the rulings of those who lived before them. According to the principle articulated by Maimonides, the later authorities should have had discretion to offer their own views on matters of legal interpretation. Apparently, although not strictly bound by precedent, the later authorities nevertheless accepted as binding upon themselves the decisions of the earlier authorities.

*Id.* (citation omitted).

persuasive; it is never truly binding.<sup>203</sup> Thus, the Talmud teaches that the mediocre leader Jephtah, in his generation, is considered as authoritative as the great and preeminent prophet Samuel was in his generation;<sup>204</sup> the great scholars of each era must interpret the Torah as they understand it, not as previous—even greater—decisors have done in the past.<sup>205</sup> The reason for this lies in the notion of a unique dialectic interpretive experience, which features prominently in Jewish legal thought. Every interpreter understands the Torah's text in his own way; for him, that understanding is the true meaning of the text, and he must abide by it.<sup>206</sup> Thus, in Jewish law, a cardinal principle of judicial practice is “a judge has nothing upon which to base a decision except what

203. See TOSEFOT SANS, *Ediyot* 1:4 (“Although a minority opinion may not be accepted when initially proposed [and may be overruled by a majority of judges who disagree with that interpretation of the law], if a majority of the scholars of the next generation agree to the rationale underlying the previously rejected interpretation, that view can be established as normative law.”).

204. See BABYLONIAN TALMUD, *Rosh Hashanah* 25b.

205. See R. ASHER B. JEHIEL, *Responsa Rosh* 55:9.

That which you wrote that the elder, the great scholar, R. Isaac b. Shoshan is imbued with these [judicial] characteristics, and that therefore who can think in his heart to disagree with him; this is not a proof. Indeed, who is greater than Rashi, who enlightened the eyes of all the Diaspora with his [Talmudic and Biblical] commentaries, and yet in many places his own grandchildren, Rabbeinu Tam and Rabbenu Isaac, argue with him and refute his views. The Torah is about truth, and we cannot flatter any man [by uncritically accepting his view]. . . . And the Geonim have already decided that from the time of the [Talmudic sages] Abaya and Rava and onward, the law is in accordance with the views of the latter authority.

*Id.*; see also R. ASHER B. JEHIEL, ROSH, *Sanhedrin* 4:6.

206. See *Introduction* to 1 RESPONSA IGROT MOSHE, *Orah Hayyim*:

There is certainly reason to suppose that when making a legal decision we have not fully understood the truth of the law as it is known to God. But with respect to the search for truth in legal decision-making it already says, “it is not in heaven.” Rather, the practical legal truth is as the law appears to the scholar after he has adequately considered the matter in attempting to trace the law through the Talmud and later decisors – *this is the truth [for him] and so he must rule.*

*Id.* (emphasis added); see also Ben-Menahem, *supra* note 160 (correlating the religious character of Jewish law with legal decisors' prerogative to creatively interpret the law based on the circumstances presented in individual cases).

*his* eyes see.”<sup>207</sup> An interpreter must follow *his* interpretation—what *his* eyes see—and not what some other interpreter, even a seemingly more erudite reader, understands the Torah’s text to mean.<sup>208</sup>

Just as the interpretive experience of every interpreter is unique on account of each reader’s singular soul-being, every interpretive experience is also unique because, as Gadamer recognized, the interpreter’s experiential horizon changes in between each reading. In Moses’ final speech to the Jewish people immediately before they entered Canaan he said, “Hearken and listen, Israel; on this very day you have become a nation.”<sup>209</sup> Recognizing that the Jewish people became a nation at Mount Sinai, forty years before Moses’ farewell address, the Talmud asks, “But was it really on that day that they became a nation? Wasn’t this day at the close of the forty years spent in the desert?”<sup>210</sup> In a powerful statement of the uniqueness of every interpretive experience, the Talmud answers that “this verse is teaching us that each and every day the Torah should be as dear to the reader as the day it was first given at Mount Sinai.”<sup>211</sup> In similar vein, another Talmudic passage analogizes the Torah to a fig tree: “In the case of a fig tree, every time a person approaches it and handles it he finds a few new ripe figs; so too with the Torah—each time one studies it he finds new meaning in its words.”<sup>212</sup>

Because Jewish tradition posits that the Torah is an autonomous text not bound to any particular conception of its meaning, and because Jewish thought further understands the interpretive process as a case-specific interaction between a unique interpretive personality and the Torah’s text, Jewish law jurisprudence also maintains that

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207. See *II Chronicles* 19:6 (emphasis added); see also CARO, *supra* note 114, *Hoshen Mishpat* 8:2.

208. See R. MOSES FEINSTEIN, III IGROT MOSHE, *Yoreh De’ah* § 88 (citing BABYLONIAN TALMUD, *Bava Batra* 88a); Levine, *supra* note 114, at 477.

209. *Deuteronomy* 27:9.

210. BABYLONIAN TALMUD, *Brachot* 63b.

211. *Id.*

212. BABYLONIAN TALMUD, *Eruvin* 54a-b.

interpretive meaning is fundamentally pluralistic. The Talmud observes that “just as the face of every person is different, so too is the mind of every person unique.”<sup>213</sup> Consequently, “there are seventy faces to the Torah”<sup>214</sup>—there are as many ways to understand the Torah as there are different minds and ways of thinking among mankind—and therefore “a single [scriptural] verse can lend itself to multiple interpretations.”<sup>215</sup>

No single interpretation or understanding of the Torah is absolutely correct; there are many ways of understanding the Torah’s text, and each construction has a valid claim on the truth. “The word of God admits of many meanings, so you must not say ‘God said this intending that particular interpretation.’”<sup>216</sup> Thus, in commentating on the deep-seated, long-standing *halachic* disputations between the Schools of Hillel and Shammai<sup>217</sup> the Talmud relates that, “these and those are the words of the living God.”<sup>218</sup> Making a similar point in another passage, the Talmud explains the scriptural analogy between the Torah and a “hammer striking a stone and causing sparks”<sup>219</sup>: “Just as the hammer blow devolves into many sparks, so too the text of the Torah devolves into multiple explanations.”<sup>220</sup> Interpretive textual truth is thus an elusive concept; even if it does exist in some metaphysical sense, as a practical matter there is no single textual *truth*, only multiple truths with inherently equal

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213. MIDRASH RABBAH, *Numbers* 21; see also BABYLONIAN TALMUD, *Berakhot* 58a.

214. MIDRASH RABBAH, *Numbers* 47:2; see also BABYLONIAN TALMUD, *Shabbat* 86a; BABYLONIAN TALMUD, *Sanhedrin* 34a.

215. See BABYLONIAN TALMUD, *Sanhedrin* 34a.

216. BEN-MENAHEN ET AL., *supra* note 192, at 98 (quoting *Introduction to Baalei Brit Avraham*).

217. On the disputes between these two jurisprudential schools, see 3 ELON, *supra* note 112, at 1064-66.

218. BABYLONIAN TALMUD, *Eruvin* 13b.

219. *Jeremiah* 23:29.

220. BABYLONIAN TALMUD, *Shabbat* 88b.



claims to possessing an accurate account of what the Torah means.<sup>221</sup>

The Jewish legal tradition reinforces this interpretive pluralism by emphasizing that despite the great diversity of interpretations, all of these understandings stem from the same source—the God-given autonomous text of the Torah—and all are therefore inherently valid. Explaining the notion that contradictory understandings of the Torah can both be “the words of the living God,” Rabbi Yom Tov b. Abraham Ishbili (Ritba), a thirteenth century Spanish Talmudist and legal decisor, writes that “when Moses ascended on high to receive the Torah, for every point of law God showed him forty-nine ‘faces’ to prohibit and forty-nine ‘faces’ to permit.”<sup>222</sup> In other words, the giving of the Torah itself involved God’s revealing the potential diversity of

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221. Rabbi Moses Feinstein understood that *halakhic* truth does exist in a metaphysical sense; God Himself knows what the law really means. Nevertheless, human beings can never replicate that perfect legal knowledge, and even if they could they would be unable to prove the fact. In the realm of practical legal practice, then, we attempt to approximate the Torah’s absolute truths, and in doing so no one approximation has an exclusive claim on correct textual understanding. See generally Feinstein, *supra* note 206. Other sources indicate, however, that there is no transcendental textual truth, even from God’s omniscient vantage. Instead, textual truth is created by every interpreter. Illustrating this idea, the Talmud constructs a conversation between Moses and God. “Moses said before God: ‘Master of the World, teach me, what is the law?’ God answered him: “‘Follow the majority’; if the majority exonerates, the law is that the defendant is exonerated, if the majority holds him liable, the law is that he is liable.” JERUSALEM TALMUD, *Sanhedrin* 4:2.

222. R. OM TOV B. ABRAHAM ISHBILI, NOVELLAE RITBA, *Eruvin* 13b (*Eilu Veilu*); see also MISHNAH, *Soferim* 17:6 (“Rabbi Yanai said, ‘The Torah that God gave to Moses was given with forty-nine “faces” supporting a ruling that a thing is impure and forty-nine “faces” supporting a ruling that the thing is pure.’”); 1 THE MIDRASH ON PSALMS, *Psalms* 12:4 (Leon Nemoy et al. eds., William G. Braude trans., 1959):

Rabbi Yannai said: The words of the Torah were not given as clear cut decisions. Rather, with every word the Holy One, Blessed be He, spoke to Moses, He gave him forty-nine arguments whereby a thing might be found pure and forty-nine arguments whereby it might be found impure. When Moses asked God, “Master of the Universe, if so how shall we know the law,” God answered him, “Follow the majority”; when the majority rule it pure, it is pure, and when the majority rule it impure, it is impure.

THE MIDRASH ON PSALMS, *supra*.

understandings. “Everything that any student of the Torah would ever offer in explanation of the text was foretold to Moses at Sinai.”<sup>223</sup> Because they are all fairly encompassed in the text of the Torah understood through the varying subjective lenses of every interpreter, multiple contradictory interpretations of the Torah can all lay claim to the truth; all were part of God’s revelation of the law at Mount Sinai, no less so than the text itself. “A man might say to himself, since these decisors prohibit and these permit, for what purpose do I study?” To correct this misconception, the passage points out, the Torah has taught “they were given by a single shepherd; one shepherd bequeathed them, one God created them. Thus you must make your heart like a multi-roomed chamber in order to store in it the words of those that prohibit and of those that permit.”<sup>224</sup>

C. *Interpretation, Debate, and Resolution in Jewish Legal Theory and Practice*

Jewish law constitutionalism maintains a pluralistic autonomous-text interpretive tradition.<sup>225</sup> This expansive conception of textual understanding only holds true in a theoretical sense, however. In practice, every legal question must be decided one way or the other; a pluralistic sense of text and truth cannot devolve into a state of interpretive anarchy, every individual—qualified legal scholar and layman alike—acting in accordance with their own

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223. BABYLONIAN TALMUD, *Megilah* 19b.

224. THE TOSEFTA, *Sota* 7:12 (Jacob Neusner trans., 1979) (quoting *Ecclesiastes* 12:11); see also BABYLONIAN TALMUD, *Hagigah* 3b (“Perhaps a man will say, ‘how can I ever learn the Torah?’ Therefore it says, ‘all of them were given by one shepherd’: one God gave them; one Provider said them, from the mouth of the Ruler of All Things Blessed be He, as it says, ‘and God spoke all of these things.’”); MIDRASH RABAH, *Numbers* 15:22 (“Lest you say, ‘this one permits and that one prohibits; this one validates and this one invalidates; this one says pure and that one says impure; Rabbi Eliezer holds liable and Rabbi Yehoshua exonerates; Bet Shammai invalidates and Bet Hillel validates. To whom then should we listen?’ God therefore instructs that despite the disagreement all of these views were given by one shepherd.”).

225. See *supra* Part II.B.

understanding of the Torah.<sup>226</sup> The Torah itself thus instructs, “do not cut yourselves,”<sup>227</sup> which the *Midrash* explains as cautioning, “do not divide yourselves into different groups; rather you should all be a single unit acting in concert.”<sup>228</sup> Elaborating on this concept, R. Menachem b. Shlomo Meiri writes that this verse instructs that “this group should not act in this way [i.e., following one interpretation of the Torah] while this other group acts a different way such that it appears that they are following two separate Torahs.”<sup>229</sup> Thus, while there is a multiplicity of legitimate interpretations of the Torah, and every reader’s understanding has inherent truth-value, in practice only one opinion can prevail at any given time among a particular constituency or in a particular jurisdiction.<sup>230</sup>

To uphold the requirement that in practice “the Torah must not appear to be two Torahs” in the face of an autonomous-text interpretive tradition that prides itself on the pluralism of textual understanding, Jewish legal

226. See 3 ELON, *supra* note 112, at 1067 (“[W]hile it was thus unequivocally determined that the *Halakhah* could not tolerate pluralism in practice, the important principle was also established that in the realm of ideas, for the purpose of debate and study, ‘the words of both are the words of the living God.’”); Levine, *supra* note 114, at 472.

227. *Deuteronomy* 14:1.

228. SIFRE, A TANNAITIC COMMENTARY ON THE BOOK OF DEUTERONOMY, *Parshat Re’eh* § 96.

229. R. MENACHEM B. SHLOMO MEIRI, BEIT HA-BEHHIRAH, *Yevamot* 14a (*Zu*).

230. See *Sefer Hahinukh* § 467.

This proscription [on competing legal practices] applies only within a single group, such that the members of the group divide themselves [some following one interpretation in practice and others following a different textual understanding] . . . In such a case they must debate and deliberate until they can all agree to implement one interpretation in practice. . . . But when two duly constituted courts disagree about how to apply the law to a particular case . . . we do not say ‘do not divide yourselves’; rather, each jurisdiction follows the rulings of its own court].

*Id.*; MAIMONIDES, MISHNEH TORAH, *The Laws of Idolatry*, ch. 12:14 (“And included in this prohibition is a rule that there should not be two courts *in the same city*, each one following and ruling in accordance with its own interpretation of the law.”) (emphasis added).

tradition takes a process and institution-oriented approach to resolving legal questions.<sup>231</sup> The Torah instructs that in legal matters the law “follows the majority.”<sup>232</sup> For purposes of legal practice, in other words, interpretive indeterminacy is resolved by following the understanding maintained by a majority of the members of the decisional body regarded as authoritative within a particular jurisdiction or by a particular constituency. The Torah itself provides for this institution-oriented system of interpretive authority as follows: “[w]henever there is a legal matter that you are unable to resolve . . . you shall approach . . . the judge who will be in those days and inquire of him, and he will tell you what the law is. And you shall act in accordance with what he tells you.”<sup>233</sup> Nachmanides explains:

The Torah was given to us by Moses our teacher in writing, and it is apparent that there will never be complete agreement about how to understand or apply it in new cases. Therefore, God decreed that we should obey the High Court in all its pronouncements; whether the judges received their interpretive understanding from tradition or reached their conclusions on the basis of their own understanding of what the Torah means.<sup>234</sup>

In other words, in hard cases, where reasonable people disagree about how to act under the law based on their disparate interpretations of the Torah, the question of how to act in practice shall be resolved by the presiding judicial authority.<sup>235</sup>

While a presiding institutional interpretive authority’s judicial ruling is considered binding,<sup>236</sup> its interpretive understanding is not conclusive in a metaphysical sense. An authoritative court’s interpretation of the Torah does not establish what the autonomous text of the Torah actually

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231. See RAMBAN NACHMANIDES, *supra* note 148, *Deuteronomy* 17:11.

232. *Exodus* 23:2.

233. *Deuteronomy* 17:8-10.

234. NACHMANIDES, COMMENTARY ON MAIMONIDES’ *SEFER HA-MITZVOT* § 1.

235. See MAIMONIDES, MISHNEH TORAH, *The Laws of Apostates*, ch. 2:1-2.

236. See *Deuteronomy* 17:11 (“[A]ccoridng to the law as they tell it to you shall you act; do not veer from it whether to the left or right.”); BABYLONIAN TALMUD, *Sanhedrin* 88b.

means—as we have seen, the text means many things and no one particular thing.<sup>237</sup> The institutional decision merely establishes the current standard of practice under the law. Alternative understandings of the Torah, however, are preserved as legitimate interpretations of the law,<sup>238</sup> and may be adopted by other courts with interpretive authority over a particular jurisdiction or constituency.<sup>239</sup>

Thus, in the Jewish constitutional tradition, there is a plurality of legitimate interpretations of the Torah; indeed, every person can and should understand the Torah somewhat differently. Only one interpretation can be implemented in practice, however, and the task of mediating between competing understandings of what the Torah means is an institutional one. Jewish law prescribes that the accepted judicial authority of every jurisdiction and constituency should decide what the Torah requires in practice at any given time. This institutional statement of

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237. See *supra* notes 226-27.

238. See R. JUDAH LOEW, DEREKH HAYYIM, *Avot* 5:17 (“Even though in practice it is inconceivable for a person to act one way while [authoritative decisors] have ruled to the contrary . . . nevertheless, both views are from the Holy One, Blessed be He, who encompasses all contrary interpretations.”); RASHI, *Ketubot* 57a (*Ha Kamashma Lan*) (“When two scholars argue over how to understand the law . . . we say ‘these and those are both the words of the living God.’ Sometimes this one’s reasoning is more compelling, but at other times the other one’s reasoning is more compelling.”); R. JOSEPH HAHN, *Responsa Yosef Omez* § 51 (“Why do we record the interpretations of the Students of Shammai and of other minority views that have been rejected in practice? Because even understandings of the Torah that are rejected in practice are nevertheless considered words of Torah, for we say ‘these and those are the words of the living God.’”).

239. See MAIMONIDES, MISHNEH TORAH, *The Laws of Apostates*, ch. 2:1:

The Great Court interprets the text of the Torah in accordance with what appears correct in their eyes, and rules accordingly. But another court can rise up after them, and they may see an alternative understanding that compels them to reject the earlier court’s interpretation. If so, they must overrule the previous court and decide the case in accordance with what they understand the Torah to mean, for it says, “[Go to the judge] that will be in those days”; you are only obligated to follow the interpretation of the judges of your generation.

*Id.*; see also 1 R. MOSES B. JOSEPH TRANI, *Responsa Mabit* § 21 (explaining that institutional authority to conclusively resolve questions of legal practice rests in the established court of each community such that the prohibition of “do not divide yourselves into groups” applies only among the members of a community, but does not demand a uniformity of practice between distinct communities).

textual meaning is authoritative not because it is objectively correct—indeed it is not and may be replaced by an alternative reading of the Torah by subsequent judges sitting on the same bench—but because the Torah-constitution gave the courts the power to determine which interpretation of the Torah should prevail in practice.

### III. AUTONOMOUS-TEXT CONSTITUTIONALISM IN AN AMERICAN CONTEXT: PERVASIVE QUESTIONS AND SOME TENTATIVE SOLUTIONS

Three principle concerns drive much of the interpretive orthodoxy. The principle justifications and criticisms of textualism, historicism, and pragmatism indicate that these interpretive theories are driven by the relative value they place on the dead hand problem, the counter-majoritarian difficulty, and the need to constrain judicial decision-making. This Part tentatively considers how an autonomous-text model of constitutional interpretation driven by the Jewish law constitutional tradition might deconstruct these concerns, making it a prescriptively appealing alternative to the currently prevailing interpretive methodologies.

Part III.A discusses how autonomous-text constitutionalism might address one of the pervasive concerns of democratic constitutional theory—that of contemporary majorities being constrained by the dead hand of the past. Part III.B explores how a Jewish law-inspired autonomous-text constitutionalism might deconstruct the problem associated with unelected judges having final interpretive authority over a super-majoritarian constitution in a fundamentally democratic society. Finally, Part III.C considers how Jewish law constitutionalism deals with the competing needs for pragmatic interpretation and the maintenance of constitutional tradition and continuity.

#### A. *Democracy and the Dead Hand Problem*

America's dual commitment to republicanism and majoritarian politics on the one hand, and to fixed constitutionalism as a trump on majority preferences on the other, challenge the democratic legitimacy of the Constitution and its capacity to bind contemporary

majorities.<sup>240</sup> Pragmatists and textualists have often criticized historical interpretation on the ground that the democratic legitimacy of the Constitution rests in its acceptance by contemporary majorities, not in its long-ago ratification by a (white male) People terribly out of touch with today's world.<sup>241</sup> Non-historicists argue therefore that the Constitution cannot simply mean what its original ratifiers understood or intended it to; it must be interpreted as embodying "modern, rather than anachronistic, values."<sup>242</sup>

The Jewish constitutional tradition is not bothered by the dead hand problem, however. Although Jews' binding obligation to abide by the Torah-constitution rests on a consent-theory,<sup>243</sup> Jewish law finds no contradiction between the legitimizing consent of contemporary Jews in all corners of the globe and their duty to abide by a fundamental law accepted by a collection of recently freed slaves at a mountain in the Sinai desert 3000 years ago. Jewish law's autonomous-text tradition teaches that every individual one of the "six-

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240. See, e.g., Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192 (2008) ("[G]overning the population of the United States today according to the constitutional understandings of people long since dead should not be understood as showing respect for democratic-enactment authority.").

241. See, e.g., Brennan, *supra* note 28, at 438 ("What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time . . . . Our Constitution was not intended to preserve a preexisting society but to make a new one . . . ."); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358-60 (2007) ("[Non-originalists] are plagued by anxiety about the dead hand of the past—and think we need to update and affirm the document's underlying principles if it is to be binding on anyone living today.").

242. Peter J. Smith, *How Different are Originalism and Non-Originalism*, 62 HASTINGS L.J. 707, 714 (2011).

243. See BABYLONIAN TALMUD, *Seder Moe'd: Shabbat* 88a.

Rav Avdimi bar Chama bar Chasa said, "[Prior to the Sinaitic revelation, God suspended a mountain over them [the Jews], and said to them: 'If you accept the Torah, good; but if not this shall be your grave.'" Rav Acha bar Yaakov responded, "If so, this episode provides a strong basis for rejecting our obligation to the Torah!" Rava explained, "That is true, but they [the Jews] subsequently consented to the Torah's laws without coercion."

*Id.*

hundred thousand Jewish souls” has a unique “portion” in the Torah, and can glean a unique textual understanding of the Torah-constitution’s text.<sup>244</sup> Similarly, this tradition holds that every one of those souls was present at Sinai and agreed to accept the Torah, thus establishing a basis for the Torah’s consent-based authority through successive generations of Jews.<sup>245</sup> Whether these teaching are to be taken literally or not, they admit an important parallel between the consent-based authority of a law and the autonomous-text interpretation of that law. Through his interpretive dialectic with the Torah, every Jew—each one of six-hundred thousand souls—gains a unique understanding of the Torah, and because every Jew—in every time and every place—can and must interpretively engage the law’s text, the Torah-constitution can claim the authorizing consent of contemporary adherents as if they themselves stood at the foot of Mount Sinai.

Similarly, autonomous-text constitutionalism in the American context has the potential to neutralize the pervasive dead hand problem. “The Constitution derives its binding authority—binding on the governed and the government alike—only from the fact that it is an act of the people in their constituting capacity.”<sup>246</sup> The only way to justify our super-majoritarian commitment to the Constitution, then, is “through an ongoing, not a past, act of constituting.”<sup>247</sup> As the Jewish tradition indicates, this continuous act of constituting might be found in contemporary interpreters’ dialectic interpretation of the constitutional text. On this view, current majorities are not controlled by the dead hand of the past. Instead, contemporary interpreters understand the Constitution in their own unique ways, informed by their experience of the world, and which of these textual meanings controls constitutional practice at a given time is determined by

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244. See *supra* notes 195-97 and accompanying text.

245. See BABYLONIAN TALMUD, *Seder Moe'd: Shabbat* 146a.

246. WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 236-37 (1987).

247. GOLDFORD, *supra* note 25, at 275; see also Eskridge, *supra* note 66, at 622-23, 633 (discussing how Gadamer’s hermeneutics creates the possibility of multiple textual meanings).



institutions—our courts—which we as a society have agreed are well-suited to choosing among interpretive options.

B. *Subjectivity, Constraint, and the Counter-Majoritarian Difficulty*

Another pervasive challenge posed by American constitutionalism is what Alexander Bickel famously called the counter-majoritarian difficulty,<sup>248</sup> the tension between the democratic character of American politics and the authoritative interpretation and application of the Constitution by unelected, unaccountable judges, and the related problem of constraining judges' discretion. Textualists contend that judicial discretion is cabined and the counter-majoritarian difficulty largely diffused by limiting interpreters' ability to impose their own views on legal text, instead demanding that textual understandings be confined to the plain meaning of the law enacted by democratic legislatures. Historicists make similar claims, arguing that even if historical interpretation does not eliminate judicial discretion it at least limits it, and focuses interpreters' subjectivity on a narrow set of normatively legitimate sources of historical textual meaning.<sup>249</sup> Pragmatists argue that the counter-majoritarian difficulty is no real difficulty at all. Unelected judges are in the best position to reasonably and deliberately consider how the Constitution's text should be interpreted in order to best achieve substantive policy ends;<sup>250</sup> while the interpretive process may not therefore be a democratic one, it principally promotes the ends of the demos' desired public policy in ways that political institutions cannot.<sup>251</sup>

Jewish law's autonomous-text constitutional tradition dismantles the counter-majoritarian difficulty. Jewish constitutionalism maintains that in principle, textual truth is pluralistic, and therefore, judicial interpretations and

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248. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962).

249. See, e.g., Scalia, *supra* note 24.

250. See BICKEL, *supra* note 248, at 24.

251. See *generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-131 (1978).

applications of the law do not establish what the law means in an ontological sense.<sup>252</sup> Instead, judicial decision-making is merely an institution-focused means of deciding among competing legitimate understandings of what the law's text means at a particular time and for a particular case.<sup>253</sup> While judges are encouraged to give prior judicial interpretations by prominent and well-regarded legal authorities due deference, they are not inextricably bound by precedent; instead, every judge can and must interpret the text as he understands it, through the lens of his experiential conscious, a horizon similar to but nevertheless unique from the general interpretive tone of the place and time in which he lives.<sup>254</sup>

An autonomous-text model of American constitutionalism might similarly mitigate the counter-majoritarian difficulty by rethinking judges' roles in constitutional interpretation and adjudication, and the nature of constitutional textual truth. Taking a cue from the Jewish tradition, American constitutionalism might begin by reevaluating the nature of constitutional textual understanding. Instead of thinking of textual meaning as a definite *thing* to be discovered—in the plain meaning of the text, historical documents, or the empirical furtherance of substantive policies—constitutional interpretation should be conceived of as an individualized process that leads to an internal, organic understanding of the text. Textual meaning, in other words, should be thought of as pluralistic, something unique to every interpreter, something to which no particular interpretation can lay exclusive claim.

On this view, we might begin to consider how difficult the counter-majoritarian difficulty really is. If textual meaning is pluralistic, judges don't (can't) decide what the constitutional text means in derogation of the prerogative of contemporary majorities. Simply put, a society governed by the rule of law needs some way to decide which understanding of the text should control in practice, and society has determined that for a variety of reasons the courts as an institution, not judges as platonic philosopher-king

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252. See *supra* notes 218-29, 241-44 and accompanying text.

253. See *supra* notes 241-44 and accompanying text.

254. See *supra* notes 206-14 and accompanying text.

individuals, are that way. Unelected judges, then, don't subvert the demos' constitutional prerogative. They merely decide which legitimate understanding of the text should control in a given case, and because they are unelected and not politically accountable they can hermeneutically interact with the interpreted text better than more political interpreters who are more likely to impose their experiential horizon on instead of merging it with that of the text.

C. *A Constant Star in a Changing World: Constitutional Fidelity and Real-World Consequences*

Finally, American constitutionalism and theories of constitutional interpretation are concerned with the real-world effects of constitutional adjudication. If it is to be a constitution, the Constitution must be an enduring fundamental law that drives the political character of the United States, not merely a form of legislation albeit of supreme legal authority. But, if it is to function as such, if it really is to shape contemporary realities, it must also be shaped by them; an unbending tree is certain to break in a strong wind, while even the strongest blows cannot truly destroy a malleable metal. Pragmatists thus argue that interpreters ought to understand the text in light of the real-world impact of their understanding measured by value-laden substantive criteria. Often recognizing the inherent importance of making the Constitution work, textualists and historicists nevertheless contend that doing so is the province of the democratic branches of government; the courts should apply the law as understood through textualist or historicist interpretive methods, not surreptitiously rewrite the rules in order to further what they perceive to be important substantive policy ends. More strident opponents of pragmatism reject such result-oriented interpretation on normative grounds; legal texts have meaning, they say, and the judge's job is to find and apply that meaning, not to make up his own.

The autonomous-text constitutional tradition may offer an approach that recognizes the need to interpret and apply the Constitution with due regard for the real-world effects of that construction while still maintaining a strong respect for continuing a limiting constitutional tradition that proscribes

some conduct, their desirable impact notwithstanding. Recognizing the singularity of every interpretive experience, Jewish constitutionalism maintains that every legal decisor must apply the Torah-constitution as *he* understands it, and not simply as his predecessors construed the text.<sup>255</sup> In this sense, constitutional interpretation in Jewish law is creative and pragmatic; every interpretation creates new meaning in the Torah's text, oftentimes by reading the law through the lens of his own experience, which includes his impressions of the practical implications of the case at hand and importance of meta-principles, the equivalent of pragmatists' substantive policy goals. In this sense, interpretation in Jewish law is often casuistic; "there is . . . a tendency in *halakhah* to allow its vast store of primary and secondary principles to be moulded by the facts of the particular case."<sup>256</sup>

While legal and constitutional interpretation in Jewish law is in this sense highly pragmatic, as a religious legal system, it recognizes the prime imperative to maintain God's law rather than create a new regime out of convenience. A prime value in Jewish legal thinking is the notion that it is not the Torah that must be molded and reshaped to conform to the times, but that the times must be made suitable to the Torah.<sup>257</sup> Thus,

[i]n exercising their vast power, the halakhic authorities faced a dual task. On the one hand, they were constantly concerned about carrying forward the creativity and development of the *Halakhah*; on the other hand, they carried the enormously heavy responsibility for preserving the spirit and maintaining the direction and continuity of the *Halakhah*.<sup>258</sup>

In reconciling these conflicting pragmatic and tradition-maintaining interpretive imperatives, Jewish law asserts that, while as a formal matter, judges can and should interpret and apply the law based on their own

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255. See *supra* notes 206-14 and accompanying text.

256. DANIEL B. SINCLAIR, *JEWISH BIOMEDICAL LAW: LEGAL AND EXTRA-LEGAL DIMENSIONS* 7 (2003).

257. See generally R. Samson Raphael Hirsch, *Judaism Up To Date*, in 2 *JUDAISM ETERNAL* 213 (Isidore Grunfeld ed., 1956).

258. ELON, *supra* note 112, at 272.

understandings of the relevant texts and with an eye towards the consequences of their decisions; in practice they must proceed with the greatest caution and deference to tradition.<sup>259</sup> The Talmud indicates the awe in which current scholars should hold the textual understandings of their predecessors: “If earlier sages were like the sons of angels, we are sons of men; and if they were like the sons of men, then we are like donkeys.”<sup>260</sup> For all its potential dynamism and interpretive creativity, and despite the broad interpretive freedom held by every Jewish law decisor, interpreters of the Jewish law constitution are nevertheless constrained by “the awe with which former generations [are] regarded, the esteem in which earlier authorities [are] held, and the concomitant humility felt by later teachers in comparison.”<sup>261</sup> Thus, in Jewish constitutionalism, textual pluralism and interpreters’ duty to apply the law as they understand it “never led to a chaotic hodge-podge of ad hoc awards or to an idiosyncratic maze of [subjective] judge-made laws”<sup>262</sup> as historicists and textualists would expect.<sup>263</sup> Rabbinic decisors can and do make pragmatic decisions in individual cases when extreme circumstances warrant, but they do so with fear and trepidation, recognizing that in some sense they are playing fast and loose with God’s own law and with the constructions given to that law by past generations of venerated sages who represent a chain of tradition linking present interpreters to the revelation of the law at Sinai.<sup>264</sup>

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259. See generally Norman Lamm & Aaron Kirschenbaum, *Freedom and Constraint in the Jewish Judicial Process*, 1 CARDOZO L. REV. 99 (1979).

260. See BABYLONIAN TALMUD, *Seder Moe’d: Shabbat*.

261. Lamm & Kirschenbaum, *supra* note 259, at 129; see also 1 BEN-MENACHEM ET AL., *supra* note 192, at 41-59 (1991) (quoting numerous sources highlighting the deference owed earlier interpreters and the appropriate trepidation with which Jewish law interpreters should approach innovative and creative Torah law construction).

262. Lamm & Kirschenbaum, *supra* note 259, at 129.

263. See *supra* notes 16-18, 27-29 and accompanying text.

264. For a discussion on Jewish law’s tradition of judges’ fear and trepidation in the face of having to issue practical legal rulings involving fresh legal interpretations of God’s law, see generally Sinai, *supra* note 149, at 357. For a more complete discussion of deference and respect for earlier authorities as a meaningful constraint on creative Jewish legal interpretation, see Roth, *supra* note 149.

Taking a lesson from Jewish law autonomous-text constitutionalism, American interpretive theory might recognize the unavailability of pragmatic constitutional construction without also tossing any solid sense judicial constraint to the wind. Constitutional decision-making is, always has been, and should be healthily pragmatic in the sense that interpretation and application of the Constitution must take into account the consequences of judicial decisions considered in light of America's many cherished substantive values and objectives. But, pragmatism of this sort need not invariably lead to interpretive anarchy and a judicial autocracy. Judges should—and largely do—have a healthy regard for the past. Part of the dialectic interpretive experience is allowing the text—its language, history, purpose, development, practical experience—to shape the reader's understanding of the law. Doing so requires American judges, like Jewish law interpreters, to approach their task with due regard for what the existing constitutional tradition has to offer; to reject that impression only when its merging with their own experiential horizon absolutely demands it; and to do so with the greatest humility and deference. Judges should recognize that while autonomous-textualism instructs that their understanding is just as legitimate as any other, they are attempting to understand the very fabric of our national being, and that they must therefore proceed with the greatest caution, never allowing their personal preferences an undue voice in their dialectic interpretive conversation with the Constitution's text.

#### CONCLUSION

The experiential model of autonomous-text constitutionalism posed by Jewish law offers a hopeful account of what constitutional discourse might look like. By positing the possibility and demonstrating the workability of interpretive pluralism, the autonomous-text tradition frees debate over how a constitution should be interpreted from the all-or-nothing overtones of political argument. Jewish law's autonomous-text constitutional tradition offers the possibility of an interpretive approach that is descriptively accurate and prescriptively compelling. The key question becomes which one of many interpretively plausible

understandings should be adopted by those institutions tasked with mediating these competing interpretive perspectives, not which interpretation or interpretive theory is the *right* one. With the stakes thus significantly lowered, discussions about constitutional meaning might proceed in a more reasonable, less caustic manner.

Autonomous-text constitutionalism, to be sure, is not neat; it creates the possibility—the near certainty—of doubt about the meaning of our most highly enshrined norms. But the institutional mediation of competing views of the good inheres in the very fabric of America's political-legal culture. From the perspective of autonomous-textualism, courts' mediating among litigants competing but legitimate constitutional understandings does not meaningfully differ from legislatures' choosing among contrasting policy preferences being made by legislatures. In both cases, an accepted institution decides for purposes of present practice which conception of the good will prevail, and in neither instance does the deciding authority claim the ability to infallibly and finally pronounce transcendental political-legal truths.

Autonomous-textualism thus hearkens to the very best of America's constitutional tradition, a liberal commitment to political—and interpretive—autonomy, a respect for everyone's ability to develop their own conception of the good life, but also an account of the institutional rule of law.