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Divided Loyalties: The Problem of “Dual Sovereignty” and Constitutional Faith

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**DIVIDED LOYALTIES:
THE PROBLEM OF “DUAL SOVEREIGNTY” AND
CONSTITUTIONAL FAITH**

Sanford Levinson^{*}

It is a great honor—but also a daunting challenge—to have been asked to deliver the inaugural lecture of the new Jewish Law Institute at Touro Law School. That it is a great honor is obvious; that it is also daunting comes from the fact that I am scarcely an expert in Jewish law. Thanks largely to my contact, over what is now a quarter-century, with the Shalom Hartman Institute in Jerusalem, I have become decidedly interested in various aspects of Jewish law, including its methodology, and I am part of a weekly Talmud study group at the University of Texas Law School, but neither of these qualifies me as an expert. Indeed, my immense gratitude to David Hartman and his colleagues over the years is based on the fact that I have so much to learn and they have so much to teach me.

It would therefore be foolish in the extreme to attempt a talk delving into a particular issue of Jewish law. What I shall do instead, is elaborate on some of the ways that I find myself constantly thinking of what might be termed “meta-issues” that arise in my joint study of, and intellectual confrontation with, Jewish law and American constitutional law. After all, I have been teaching different aspects of American constitutional law for over thirty-five years, and thinking intensely about it for even longer, given that I wrote my PhD dissertation on Justices Holmes and Frankfurter. When in law school, I had an epiphany about the role played by the United States Constitution within American civil religion and how there might be

^{*} W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. This was originally delivered as a lecture at Touro Law School on Monday, October 10, 2011, just after Yom Kippur. I am extremely grateful to Professor Samuel Levine and to former Dean Lawrence Raful for their invitation to speak and for their hospitality while visiting Touro.

helpful analogies to be drawn between our approaches to that Constitution and those taken by more standard-form religions to *their* fundamental documents, whether the Torah, the Christian Scriptures, or the Koran.

I should note, incidentally, that more recently I have become extremely interested in American *state* constitutions and the implications of the fact that few, if any, Americans “venerate” those constitutions in the way they do the national constitution. Although the intellectual issues of “interpretation” may be quite similar, there may be a fundamental difference regarding our willingness to engage in serious criticism of what might be termed the *givens* of a particular constitution—or aspects of a religious tradition—depending on the degree to which we venerate it. My own view is that we ridiculously “over-venerate” the United States Constitution, which I regard as seriously defective in a host of ways. We would be better off if we had the same degree of emotional disengagement as I suspect most of us from our respective state constitutions.

I elaborated some of the analogies between traditional religion and civil religion in my book *Constitutional Faith*,¹ originally written between 1986 and 1987.² In that book I argued that one could discern analogues to the very different approaches taken by Protestantism and Catholicism toward, first, the source of what might be termed edification, and, second, the presence (or absence) of an institution authorized to give definitive interpretations and thus settle religious controversies.³ Thus “protestant constitutionalism” was highly text centered and/or committed to the legitimacy of constitutional interpretation outside the Supreme Court, indeed, outside *any* court.⁴ “[C]atholic’ constitutionalis[m],” on the other hand, paid far more attention to tradition and emphasized the presence of institutional settlement via the Supreme Court.⁵ As I noted in the book, I could have as easily used analogies within Judaism: Rabbinic Judaism can certainly be viewed as analogous to Catholicism in the emphasis placed

¹ SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (rev. ed. 2011).

² See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1st ed. 1988) (showing the first edition to have been published by Princeton University Press in the year 1988).

³ *Id.* at 29-30.

⁴ *Id.* at 47.

⁵ *Id.* at 35.

on tradition and relative de-emphasis placed on text alone.⁶ Judaism, of course, had its Karaite “Protestants,” but, for better or worse, they were successfully suppressed by the end of the first millennium.⁷ And the Romans, by destroying Jerusalem in 70 C.E., assured that there would be no institutional authority to compare with the Papacy.⁸ Perhaps it should occasion no surprise that my own constitutional proclivities are “Catholic” with regard to giving full weight to the development of our constitutional norms and “Protestant” with regard to rejecting the supremacy of the Supreme Court. But, as already suggested, that may be simply to say that my overall stance to the Constitution reflects what Judaism implicitly taught me. I discovered *Baba Mezi’a* 59b only as an adult, but its message that the Torah is “not in heaven” surely helps to explain my lack of sympathy for originalist arguments.⁹ If even God no longer controls the interpretations to be given Jewish materials, then why should we care what Madison or Hamilton might think if, miraculously, they could be revived today and asked what they really meant, or intended, by some phrase in the Constitution?

Constitutional Faith has just been republished by the Princeton University Press.¹⁰ It contains a new afterword in which I explain why I have substantially lost any faith that I may have had in the United States Constitution.¹¹ But that would be the subject for quite a different lecture. In this lecture, however, I want to engage in some further explorations of the tensions generated by the encounter of American constitutionalism and Judaism.

I have written two essays, both published in the *Cardozo Law Review*, on what it means to identify someone as a “Jewish lawyer”¹²

⁶ *Id.* at 27.

⁷ LEVINSON, *supra* note 2, at 25.

⁸ LEVINSON, *supra* note 1, at 200 n.64.

⁹ Babylonian Talmud: *Tractate, Baba Mezi’a* 59b (quoting *Deut.* 30:12) (internal quotation marks omitted). This debate, about the so-called “oven of ‘Aknai,” contains a famous series of rejections of the interventions from heaven in favor of the authority of the rabbis below. *Id.*

¹⁰ See LEVINSON, *supra* note 1 (showing that *Constitutional Faith* has been reissued in 2011).

¹¹ *Id.* at 246.

¹² Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1579 (1993) (internal quotation marks omitted).

or a “Jewish judge.”¹³ I call the first of them my Sandy Koufax article, inasmuch as I built the essay around the question of what exactly one means by identifying Koufax as the pre-eminent “Jewish pitcher” in major league history “(just as the earlier Hank Greenberg had presented himself as [the greatest] Jewish batter).”¹⁴ One reason, presumably, is that Koufax notably chose to observe Yom Kippur rather than pitch for the Dodgers in the first game of the World Series.¹⁵ So a certain level of practice, whether or not accompanied by belief, is enough, particularly in the United States, to earn a particular adjective, in this case, “Jewish.” However, no one is likely to suggest that Koufax “pitched like a Jew,” which means, among other things, that his Jewish identity was presumably irrelevant to his professional practices while engaged in pitching.¹⁶

The second essay explored the extent to which it was helpful to identify Justices Brandeis, Cardozo, Frankfurter, Goldberg, or Fortas as “Jewish Justices,” at least if the implication was that the adjective helped to explain their handiwork as judges.¹⁷ Since then, of course, Justices Ginsburg, Breyer, and Kagan have joined the Court, but the question about adjectival significance remains.¹⁸ Can one discern explicitly Jewish influences on their respective conceptions of judging and deciding cases, or, as with Koufax, is the importance of their religious identity limited to their presumptive refusal to work on Yom Kippur?

So am I a “Jewish law professor”? I presume so, even though I generally identify myself as a “secular Jew.” Nevertheless, not only have I just observed, like almost all of you, the High Holidays, whether or not I “believe in” what the liturgy pronounces, but I have also cancelled my class at Yale Law School that would have taken place on the first day of Rosh Hashanah (and was thanked by a stu-

¹³ Sanford Levinson, *Who Is a Jew(ish Justice)?*, 10 CARDOZO L. REV. 2359, 2369 (1989) (reviewing ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988)).

¹⁴ Levinson, *supra* note 12, at 1579-81.

¹⁵ *Id.* 1579-80 (citation omitted).

¹⁶ *Id.* at 1582 (internal quotation marks omitted).

¹⁷ Levinson, *supra* note 13, at 2360 (internal quotation marks omitted).

¹⁸ See John M. Scheb II et al., *A Supreme Court Without Protestants: Does It Matter?*, 94 JUDICATURE 12, 14 (2010) (noting that the current Supreme Court is made up of six Catholic justices and three Jewish justices, but zero Protestants, and analyzing the question of whether or not it matters).

dent for having done so). But I also know that the liturgy has formed me in deep ways, even if it is principally by providing a set of questions with which I constantly contend and feel disturbed by. Whether paradoxically or not, I get a certain sustenance from renewed confrontation that is absent in a liturgy that attempts to smooth over some of the difficulties presented by Judaism. I learned once more, while attending with my son-in-law's family what were otherwise lovely Rosh Hashanah services at a Reform temple in Connecticut, that I *want* to be reminded, every year, of Abraham's expulsion of Hagar and then his acquiescence to the command that he slay Isaac.¹⁹ I was decidedly uncomfortable reading instead an anodyne substitute from the beginning of B'resheet praising God the Creator, chosen, I was told, because children attending the services find it too disturbing to read about the *Akedah*.²⁰

Why are the traditional readings so powerful? The answer is that both raise, clearly and tersely, the problem that should obsess any lawyer or moral philosopher, secular or religious. What is the meaning of "sovereignty," and what is the relationship between "sovereign authority" and an individual presumably subject to such authority who nevertheless legitimately believes that the sovereign is commanding what can only be described as perhaps grotesque injustice, as was the case with Hagar? The *Akedah* goes well beyond a judgment of injustice, for, unlike Hagar's expulsion, there is no explanation—Sarah's jealousy—or promise that she and her son Ishmael will in fact be taken care of and even eventually prosper.²¹ The *Akedah* is simply a demand for submission, with no explanation demanded or given.²²

What is the meaning of "faith," whether religious or secular-constitutional, in a sovereign that is no longer assumed to be absolutely just? One might, of course, simply forego any independent inquiry about justice by proclaiming that justice is whatever the sove-

¹⁹ See *Akedah*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0001_0_00627.html (last visited Feb. 21, 2013) (describing Abraham's obedience to God in sacrificing his son).

²⁰ See *id.* (explaining that even some adults reject the *Akedah* for the implications it makes).

²¹ LOUIS A. BERMAN, *THE AKEDAH: THE BINDING OF ISAAC* 8-9 (1997).

²² *Id.* at 33.

reign authority says it is, period, end of discussion. Perhaps that is the grim meaning of Job, though, frankly, it seems far easier to view God as simply terrorizing Job in order to test his bet with Satan about Job's willingness, when placed under sufficient pressure, to renounce God; Job, of course, does not,²³ but, frankly, does that make any sense in terms that ordinary people can understand?

Perhaps the most moving image in the Torah is Abraham contending with God over the justice of destroying Sodom.²⁴ But, of course, that is *not* the portion that we are asked to contemplate on Rosh Hashanah. Instead, we are given two portions that are quintessentially about submission to Divine will and the suspension of ordinary ethical judgment.²⁵ I will return to them presently, after speaking a bit of some central dilemmas posed by our civil religion.

As it happens, in teaching a first-year constitutional law course at Yale during the Fall 2011 semester, I was immersed, once again, in my own wrestling with the implications of such canonical cases as *McCulloch v. Maryland*²⁶ and *Fletcher v. Peck*.²⁷ During that semester, for whatever reason my course turned into an extended examination of a single word, "sovereignty." Justice John Marshall begins *McCulloch* by referring to Maryland as a "sovereign state,"²⁸ and the mystery posed by *McCulloch* (and Marshall) is what can possibly be meant by this. After all, the most basic meaning of the case is the fact that Marshall interprets the Constitution as stripping Maryland of an elemental power of sovereignty, which is to levy taxes against whatever entities it wishes within the State of Maryland.²⁹ And, notably, he cannot point to anything in the *text* of the Constitution that requires such an outcome.³⁰ Instead, he derives it from the

²³ See *id.* at 74 (explaining that Satan is to blame for the tests given to Job by "taunting God to put to the test a man of righteousness").

²⁴ See Yeshayahu Leibowitz, *Comment to Exploring the Parasha*, THE ADULT CENTRE FOR LIBERAL JEWISH LEARNING, <http://www.kolel.org/pages/5763/vayera.html> (last visited Feb. 21, 2013) (exploring the case of Sodom where Abraham argued with God about the injustice of punishing innocent people).

²⁵ BERMAN, *supra* note 21, at 155-57.

²⁶ 17 U.S. (4 Wheat.) 316 (1819).

²⁷ 10 U.S. (6 Cranch) 87 (1810).

²⁸ *McCulloch*, 17 U.S. (4 Wheat.) at 400.

²⁹ See *id.* at 436-37 (stating that the taxation law passed by the Maryland legislature violated the Constitution).

³⁰ *Id.* at 426.

“texture” of the Constitution and the fact that formerly independent states have now agreed to join a distinctly new federal Union, with the necessary diminution of sovereignty that entails.³¹ A possible solution of the Marshallian mystery, of course, is to refer to the notion of “dual sovereignty,” the exercise of power by two (equal?) governments over the same territory and people.³² The notion of a single sovereign is scarcely unproblematic, and doubling that number only makes things ever more complicated.³³

Fletcher, ostensibly about the state’s duty to honor its contracts even if they are the product of legislative corruption,³⁴ takes us even closer to my topic today. The majority, through Marshall, based its invalidation either on the pure text of the Constitution—the Contract Clause of Article I, Section 10—or on “general principles which are common to our free institutions.”³⁵ But consider the effective introduction of Justice Johnson’s concurring opinion in that case.³⁶ He does “not hesitate to declare that a state does not possess the power of revoking its own grants.”³⁷ But he writes his own separate opinion because he bases that conclusion “on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”³⁸ This is obviously a remarkable statement, though it is scarcely unprecedented. It is, after all, the basis of Plato’s famous discussion in the *Euthyphro*,³⁹ which asked whether justice consists

³¹ *Id.*

There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

Id.

³² *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (“Dual sovereignty is a defining feature of our Nation’s constitutional blueprint.” (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991))).

³³ See, e.g., JEAN BETHKE ELSHTAIN, *SOVEREIGNTY: GOD, STATE, AND SELF* (2008) (discussing the issues posed by the concept of sovereignty).

³⁴ *Fletcher*, 10 U.S. (6 Cranch) at 131.

³⁵ *Id.* at 139.

³⁶ See *id.* at 143 (Johnson, J., concurring) (declaring that states do not have the power to revoke grants on their own).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Plato, *Euthyphro* (Benjamin Jowett trans., 380 B.C.E.), available at

of whatever is commanded by God or, instead, whether it is independent of God and therefore allows us to evaluate God's own acts by comparing them to the criteria we use to measure justice.⁴⁰

Whatever one thinks of Johnson's invocation of truly transcendental norms, it should be clear that the dominant strands of the American Constitution have gone in quite different directions. They are, rightly or wrongly, far more positivistic. In *Antelope*,⁴¹ a case about slavery—a principal focus of my course, for reasons that should now be obvious—Marshall took pains to distinguish between the roles of the “jurist” and the “moralist.”⁴² As I tell my students, if a judge posits such a distinction, you know immediately which choice he or she will make. Indeed, we are told again and again by judges that their duty is to be faithful enforcers of the law. “It is not the province of the court,” Chief Justice Roger Taney wrote in *Dred Scott v. Sandford*,⁴³ “to decide upon the justice or injustice . . . of these laws.”⁴⁴ Even if we are properly repelled by *Dred Scott*, is it a separate question whether we equally reject Taney's description of the judge's limited role? One might hope that law will be congruent with justice or morality, but that is only a contingent possibility, unless one accepts a notion of “natural law” that simply refuses to label as “law” anything that violates basic morality.⁴⁵ But for those who reject the identity of law with morality, it is, presumably, the lawyer's

<http://classics.mit.edu/Plato/euthyfro.html> (last visited Feb. 21, 2013).

⁴⁰ *Id.*

⁴¹ 23 U.S. (10 Wheat.) 66 (1825).

⁴² *Id.* at 121-22.

⁴³ 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁴⁴ *Id.* at 405. He further stated:

The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

Id.

⁴⁵ See, e.g., Kenneth Einar Himma, *Natural Law*, INTERNET ENCYCLOPEDIA OF PHIL. (Apr. 20, 2001), <http://www.iep.utm.edu/natlaw/> (internal quotation marks omitted) (“According to natural law moral theory, the moral standards that govern human behavior are, in some sense, objectively derived from the nature of human beings and the nature of the world. While being logically independent of natural law legal theory, the two theories intersect.”); see also ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (reprt. 2004).

(and judge's) duty to give precedence to the law, perhaps accompanied by a plea that the legislature pass a corrective statute or even that the complex machinery of constitutional amendment should be revved up. Or, if the lawyer-judge rejects obedience to the law, he or she must acknowledge the commission of civil disobedience, which may be morally admirable but, nevertheless, constitutes, by definition, defiance of the law.

The obvious question is why anyone should “venerate” a constitution—or a legal system—that produces what might be termed “too many instances” of incongruence between law and justice? No one can expect perfect congruence, but how much imperfection—and about what issues—constitutes a breaking point? And what should our response be to a system that may generally be acceptably just, but is monumentally unjust with regard to a single issue of overwhelming importance? It is of no coincidence that the classes I taught only the week before my initial presentation of these remarks segued into an unplanned discussion of Justice Thurgood Marshall's famous 1987 declaration that he was *not* particularly interested in celebrating the bicentennial of the United States Constitution.⁴⁶ *His* Constitution, he suggested, began in 1868, with the addition of the Fourteenth Amendment (not to mention the Thirteenth Amendment that in 1865 formally abolished slavery), and not a 1787 document that significantly entrenched the power of slave-owners and led to such excrescences as *Prigg v. Pennsylvania*⁴⁷ and *Dred Scott*.⁴⁸

⁴⁶ See Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (rejecting his invitation to celebrate the bicentennial of the constitution).

⁴⁷ 41 U.S. (16 Pet.) 539 (1842). It is worth quoting in full a recent description of *Prigg*:

Prigg v. Pennsylvania could easily be called the worst Supreme Court decision ever issued. The human tragedy of the decision is breathtaking. In an opinion by Justice Story, the Court reversed the criminal prosecution of a slave catcher who had kidnapped and sold into slavery a woman, Margaret Morgan, who likely was not a fugitive slave, and her two children, who assuredly were not. The Court's holding was that the Fugitive Slave Clause prohibited states from subjecting slave catchers to a state-sanctioned civil process, except to prevent “breach of the peace, or any illegal violence.” Under the logic of the opinion, however, the kidnapping could not itself be outlawed as “illegal violence.” Put otherwise, violence against blacks was “legal” violence; “illegal” violence was violence against whites. The decision abided the constant threat of enslavement experienced by free brown-skinned

Why should the Constitution be celebrated—or deemed “sovereign” over us—if it is fundamentally unjust? Obviously, the metric by which we judge the Constitution, as hinted by Johnson, must come from *outside* the Constitution itself.⁴⁹ We stand in judgment over the Constitution, rather than accept as “justice” whatever the Constitution is thought to require, permit, or prohibit.

Even as I have been asking my class to wrestle with such questions about interpreting—and becoming loyal to—our foundational national document, I have also on occasion been reminded of the centrality of “sovereignty” to the Jewish liturgy. Before returning to the Rosh Hashanah liturgy, consider only what many believe to be the single central proclamation by Jews, no doubt embedded within the memory of any now-“secular Jew” who was ever *Bar Mitzvahed* or otherwise spent any time in a synagogue. That is the *Sh’ma*, part of every single service, including, of course, the powerful and moving conclusion of the Yom Kippur service.⁵⁰ A widely used *Siddur* comments that the *Sh’ma* serves as the occasion for the community to “formally affirm God’s sovereignty, freely pledging Him our loyalty.”⁵¹ The Rosh Hashanah service is especially replete with references to God as King and sovereign, most notably, perhaps, as part of the Shofar service, which one commentator analogizes to the sounds of “trumpets blown at a coronation.”⁵² It is, obviously, no small matter to recognize someone as sovereign and, even more, to pledge unblinking loyalty.

Americans in both the North and the South. By constitutionally forbidding states from preventing private violence against blacks, *Prigg* worked a simultaneous assault on due process and on equal protection, the twin pillars of the modern Fourteenth Amendment. As mentioned above, *Prigg* virtually made *Dred Scott* a fait accompli.

Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 428 (2011) (footnote omitted).

⁴⁸ Marshall, *supra* note 46.

⁴⁹ See *Fletcher*, 10 U.S. (6 Cranch) at 144 (Johnson, J., concurring) (“[S]ecurity of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult . . . for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals . . .”).

⁵⁰ Shira Schoenberg, *The Shema*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Judaism/shema.html> (last visited Feb. 21, 2013).

⁵¹ Jules Harlow, ed., *Siddur Sim Shalom* 284-85 (1985), *quoted in* LEVINSON, *supra* note 1, at 218-19 (internal quotation marks omitted).

⁵² Rabbi Avraham Fischer, *Rosh Hashanah*, TORAH INSIGHTS (Sept. 27, 2003), <http://www.ou.org/torah/ti/5764/rh64.htm>.

The most obvious question raised by the *Sh'ma* most easily disappears if one simply affirms an atheistic creed, i.e., there exists no God who can claim to be sovereign and, therefore, no one to whom loyalty is owed. One need not wrestle with any questions of theodicy because they have been pretermitted by answering in the negative an earlier ontological question: "Does God exist?" Even if one takes this approach to religion, it scarcely helps with regard to what some regard as "sublimated religion," the transfer, beginning sometime in the sixteenth century, of the emotions of faith and loyalty directed to traditional religious institutions to the state. This, after all, is part of the importance of Carl Schmitt's choosing to title one of his most important books *Political Theology*.⁵³ As Yale professor Paul Kahn argues in a recent meditation on Schmitt,⁵⁴ one of the most important and, for obvious reasons, reprehensible and troublesome figures in twentieth-century jurisprudence,⁵⁵ the sacrifice that is the central issue of the *Akedah* is repeated, with far greater bloodthirstiness and frequency, in the claims of modern states that membership involves the duty to kill and, if necessary, to accept the reality that one will be killed in turn, in order to defend the state and its ostensible interests.⁵⁶ One might very well describe one aspect of the "state project" as self-consciously idolatrous inasmuch as it tries to transfer to itself—and to manufacture through education, ritual, and other practices—the unconditional commitments formerly pledged to a divinity.

Yet, of course, at least so long as the world does not become wholly secular, the problem of "dual sovereignty" continues. Within American federalism, we are used to asking to what degree the City

⁵³ CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 2005).

⁵⁴ PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (Dick Howard ed., 2011).

⁵⁵ See Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1825-26 (2000) (calling Schmitt "the most prominent legal scholar and political thinker to lend his active support to the Nazi regime").

⁵⁶ See SHALOM SPIEGEL, *THE LAST TRIAL: ON THE LEGENDS AND LORE OF THE COMMAND TO ABRAHAM TO OFFER ISAAC AS A SACRIFICE: THE AKEDAH 47-49* (Judah Goldin trans., 1967) (making the obvious, but oft-forgotten, point that we must not only confront Abraham's willingness to sacrifice Isaac, but Isaac's own willingness to submit to the command of his father).

of New York in 1837 or the states of Georgia, Alabama, and Arizona in 2012 can enforce their own policies on immigration, as against these policies being exclusively within the jurisdiction of the national government.⁵⁷ But we must also ask about the potential—and often actual—tension between the sovereignty claimed by the state and that perceived to be commanded by God. Recently the *New York Times* placed on its front page a story about a town clerk in upstate New York who refused to provide a marriage license to a lesbian couple.⁵⁸ “God doesn’t want me to do this, [she asserted,] so I can’t do what God doesn’t want me to do, just like I can’t steal, or any of the other things that God doesn’t want me to do.”⁵⁹ How precisely ought one respond to such a claim? Does one say that this is a misunderstanding of what God actually wants believers to do? Given that the clerk in question is a “self-described Bible-believing Christian,”⁶⁰ one might quote from Paul’s Letter to the Romans, Chapter 13: “Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.”⁶¹ “Consequently, [whoever] rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.”⁶² I suppose one might quibble about whether a low-level bureaucrat like the town clerk can claim to be one of the “governing authorities” or, instead, whether she is enjoined by Paul to accept her subordinate position in a distinct hierarchy whose basic rules are to be set by legislatures and governors, with constitutional questions presumptively to be settled by judicial authorities. Within Judaism, perhaps one cites

⁵⁷ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012); *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317, 1321-22 (N.D. Ga. 2011) *aff’d in part, rev’d in part, and remanded by Ga. Latino Alliance for Human Rights v. Alabama*, Nos. 11-14535, 11-14675, 2012 WL 3553613, at *1 (11th Cir. Aug. 20, 2012); *Hispanic Interest Coal. of Ala. v. Alabama*, 11-14535, 2012 WL 3553613 (11th Cir. Aug. 20, 2012); see also *Arizona v. United States*, available at SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/arizona-v-united-states/> (last visited Feb. 21, 2013).

⁵⁸ Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES (Sept. 27, 2011), <http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html>.

⁵⁹ *Id.* (internal quotation marks omitted).

⁶⁰ *Id.*

⁶¹ *Romans* 13:1.

⁶² *Romans* 13:2.

the principle *dina de-malkhuta dina*—the law of the land is binding, even if, arguably it violates religious norms short of renouncing God.⁶³

Whatever else may explain such arguments, whether drawn from Paul or the Talmud, one might believe that it is certainly advisable, from a prudential basis, for members of religious communities governed by political authorities who do not share their faith commitments to assure those authorities that they are not “sectarians” who will defy—or, even worse, seek to overthrow—the regime in power. God may be sovereign, but, apparently, the sovereignty is shared with earthly political authorities who are in no way willing to recognize a Divine competitor. It would be dangerous to claim otherwise, at least in public.

But I take it that all of us believe that there must be some limits to political authority, even if we might disagree on the source of such limitations. If we are religious—or even secularists sympathetic to claims of religious “free exercise”—we will be reluctant to accept the complete swallowing up of Divine sovereignty in obeisance to earthly authority. Within the American legal community, this issue has, for better and for worse, been most especially explored with regard to the nomination of Roman Catholics to the United States Supreme Court.

Consider on the one hand the eloquent words of Columbia historian Istvan Deak, writing in 1989 of various responses to *The Incomprehensible Holocaust*: “Roman Catholicism represents a beautiful anachronism in our age of crazed nationalism; virtually every devout Catholic preserves in his heart some remnants of his denomination’s transnational loyalty and the duty of Catholics to defy immoral laws.”⁶⁴ There is little in this comment, especially if we assume it to be true, that should give comfort not only to “crazed nationalists,” but even to more ordinary senators concerned that a judge

⁶³ *Dina De-Malkhuta Dina*, JEWISH VIRTUAL LIBR., http://www.jewishvirtuallibrary.org/Jsource/judaica/ejud_0002_0005_0_05228.html (last visited Feb. 21, 2013).

⁶⁴ Istvan Deak, *The Incomprehensible Holocaust*, THE N.Y. REV. OF BOOKS (Dec. 21, 1989), <http://www.nybooks.com/articles/archives/1989/sep/28/the-incomprehensible-holocaust/?pagination=false>, quoted in Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, in SANFORD LEVINSON, *WRESTLING WITH DIVERSITY* 192 (2003).

will adopt Marshall's or Taney's view of the priority for the properly behaving judge of "law" over "morality."

So what do we make of an exchange in 1957 during the Senate Judiciary Committee hearings involving the nomination of William J. Brennan, a Catholic from New Jersey, to the Supreme Court?⁶⁵ For what it is worth, there is no doubt that Brennan was picked by Eisenhower, just before the 1956 elections, *because* he was a Northeastern Catholic and would therefore presumably appeal to potentially wavering Catholic voters—Eisenhower was worried about losing to Adlai Stevenson.⁶⁶ In any event, a Catholic senator from Wyoming, Joseph O'Mahoney, asked, at the request of members of the basically anti-Catholic National Liberal League, whether Brennan would "be able to follow the requirements of your oath [to the Constitution] or would you be bound by your religious obligations?"⁶⁷ Brennan answered as follows: "[W]hat shall control me is the oath that I took to support the Constitution and the laws of the United States and so act upon the cases that come before me for decision that it is that oath and that alone which governs."⁶⁸ Some thirty years later, during an interview with a former law clerk, "[h]e was asked if he 'ever had difficulty dealing with [his] own religious beliefs in terms of cases.'"⁶⁹ Brennan's response was "that he had, in 1956, 'settled in [his] mind that [he] had an obligation under the Constitution which could not be influenced by any of [his] religious principles.'"⁷⁰ However, Brennan stated that "he would 'as a private citizen' do 'what a Roman Catholic does . . . to the extent that that conflicts with

⁶⁵ See LEVINSON, *supra* note 64, at 210-11 (questioning what to make of William Brennan's nomination).

⁶⁶ *Justice Brennan Memorials: Resolution Adopted by the Bar of the Supreme Court of the United States to Record Our Deepest Respect and Affection for Justice William J. Brennan, Jr.*, BRENNAN CTR. FOR JUST., <http://www.brennancenter.org/justice-brennan-memorials> (last visited Feb. 21, 2013).

⁶⁷ LEVINSON, *supra* note 64, at 210 (quoting *Nomination of William Joseph Brennan: Hearings Before the Committee on the Judiciary*, 85th Cong., 1st Sess. 32-34, available at <http://www.princeton.edu/aci/cases-pdf/aci3.brennanhearings.pdf>).

⁶⁸ *Id.* at 211 (quoting *Nomination of William Joseph Brennan: Hearings Before the Committee on the Judiciary*, 85th Cong., 1st Sess. 32-34, available at <http://www.princeton.edu/aci/cases-pdf/aci3.brennanhearings.pdf>).

⁶⁹ *Id.* (second alteration in original) (quoting Jeffrey T. Leeds, *A Life on the Court*, N.Y. TIMES (Oct. 5, 1986), <http://www.nytimes.com/books/97/07/06/reviews/brennan-interview.html>).

⁷⁰ *Id.* (alteration in original) (quoting Leeds, *supra* note 69).

what I think the Constitution means or requires, then my religious beliefs have to give way.’”⁷¹

What do we think of Brennan’s response? Are we at all tempted to share Thomas Shaffer’s view that Brennan is an “idolater,” substituting worship of the State—or its Constitution—for the proper worship of God?⁷² Contrast Brennan’s response with comments made by Justice Scalia in a speech, tellingly titled “God’s Justice and Ours,”⁷³ about his view of the relationship between his Catholicism and his conception of judging, particularly with regard to the death penalty.⁷⁴ Scalia agrees with Justice Blackmun that Supreme Court Justices are part of the “machinery of death.”⁷⁵ But, unlike Blackmun, Scalia believes that the Constitution clearly countenances capital punishment.⁷⁶ Any declaration to the contrary would be unfaithful to the Constitution he is pledged to interpret faithfully. Thus, Scalia has written: “It is a matter of great consequence to me . . . whether the death penalty is morally acceptable. As a Roman Catholic—and being unable to jump out of skin—I cannot discuss that issue without reference to Christian tradition and the Church’s Magisterium.”⁷⁷ As it happens, Scalia asserts that the Church’s general opposition to the death penalty has not become “binding” on the faithful, who are therefore permitted to disagree, as Scalia clearly does.⁷⁸ If, on the other hand, the Church defined opposition as a constitutive belief of Catholics, then he would, without hesitation, remain faithful to the Church, which speaks with distinctly higher authority than does a Constitution that can claim only the backing of “We the

⁷¹ *Id.* (quoting Leeds, *supra* note 69).

⁷² LEVINSON, *supra* note 64, at 215 n.64.

⁷³ Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS (May 2002), <http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32>.

⁷⁴ *See id.* (“But while my views on the morality of the death penalty have nothing to do with how I vote as a judge, they have a lot to do with whether I can or should be a judge at all.”).

⁷⁵ *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).

⁷⁶ LEVINSON, *supra* note 64, at 252 (indicating that Scalia “personally shares what he terms the more ‘traditional’ view, which is to view ‘rulers,’ even those produced by a democratic political process, as sufficiently the instantiation of God’s authority to be allowed to impose capital punishment”).

⁷⁷ *Id.* (internal quotation marks omitted).

⁷⁸ *Id.* at 253 (quoting Scalia, *supra* note 73) (internal quotation marks omitted).

People” as its foundation. Since he would not violate his oath to the Constitution by lying as to what he thinks it permits, he would feel forced to resign in order to avoid collaboration with what the Church would have defined as sin.⁷⁹

For his pains, Justice Scalia was denounced by Princeton historian Sean Wilentz.⁸⁰ Scalia had criticized the “tendency of democracy to obscure the divine authority behind government.”⁸¹ Wilentz responded that Scalia’s view has “no appreciable place in our constitutional history because the framers rejected it They had an idea that sovereignty rested with a free people”⁸² I presume that I am not alone in much preferring Justice Brennan to Justice Scalia as an interpreter of the United States Constitution, but does that preference extend to the ways that the two Justices confronted the interplay of their religious and secular commitments? Note, incidentally, that Justice Scalia in no way asserted that he would be licensed to enforce the views of the Catholic Church if in conflict with the Constitution. Instead, he said that he would be forced to leave the bench should such a conflict present itself.⁸³ Should he be condemned or admired for acknowledging the ultimate sovereignty of the Church, whose self-characterization is that it is the rock personally chosen by Jesus to instantiate Divine teachings?⁸⁴

There have been eight Jewish Justices, beginning with Louis Brandeis and now including three members of the current Court.⁸⁵ None of them, I think it is safe to say, was or is so observant that there might be genuine conflict between their commitments as Jews and fidelity to their oaths of office as Justices. Even if Yom Kippur in 2011 had not fallen on a Saturday, one can be confident that the

⁷⁹ Scalia, *supra* note 73.

⁸⁰ See LEVINSON, *supra* note 64, at 254 (showing that Wilentz disagreed with Scalia’s view because it was rejected by the Framers).

⁸¹ Scalia, *supra* note 73.

⁸² *Id.* (first alteration in original) (internal quotation mark omitted).

⁸³ LEVINSON, *supra* note 64, at 252.

⁸⁴ See *id.* at 254-55 (choosing not to defend Scalia, but stating that “one should think long and hard before sacralizing ‘democracy’ or ‘popular sovereignty’ the way that Wilentz does”).

⁸⁵ *Jewish Supreme Court Justices*, JEWISH VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/US-Israel/justices.html> (last visited Feb. 21, 2013); Marc Tracy, *Justice Kagan: The Supreme Court Gets Its Eighth Jewish Member*, THE SCROLL (Aug. 5, 2010), <http://www.tabletmag.com/scroll/41837/justice-kagan>.

Court would not have heard oral arguments (even if a member of Americans United for Separation of Church and State would have brought suit—though where?—arguing that recognition of Yom Kippur would have violated the Establishment Clause). It would be an interesting intellectual exercise to try to imagine a reasonably plausible legal controversy within the United States that might generate a tension between the joint commitment of a “Jewish justice” to the dual sovereignty of God and the Constitution.

Those of us interested in comparative constitutional law are well aware that at least some national constitutions solve this tension by proudly proclaiming their embeddedness within a given religious tradition.⁸⁶ This can be done in a quite subtle way, as through the Greek Constitution is being presented “In the name of the Holy and Consubstantial and Indivisible Trinity.”⁸⁷ Other constitutions, including, among others, those of Saudi Arabia and Pakistan, are considerably less subtle. Thus the constitution of the Islamic Republic of Pakistan begins with the statements, among others, that “sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust; . . . the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.”⁸⁸

Preambles assert basic commitments that presumably underlie the constitutional text to follow.⁸⁹ Justice Holmes once notably stated that constitutions are made for persons with fundamentally different views.⁹⁰ I will note that this reality is probably the best explanation for that particular form of government we call “federalism,” whether

⁸⁶ U.S. Comm’n on Int’l Religious Freedom, *The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of the Majority Muslim Countries and Other OIC Members* 9, available at [http://www.markswatson.com/USCIRF%20Constitution%20Study%202012%20\(full%20Text\).pdf](http://www.markswatson.com/USCIRF%20Constitution%20Study%202012%20(full%20Text).pdf) (last visited Feb. 17, 2013).

⁸⁷ THE CONSTITUTION OF GREECE. pmbl.

⁸⁸ CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN. pmbl.

⁸⁹ See BLACK’S LAW DICTIONARY 553 (3d ed. 2006) (defining “preamble”).

⁹⁰ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (“[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”).

in the United States or elsewhere. There would be no good reason for a truly homogeneous nation to fragment into various sub-units with significant degrees of autonomous power rather than accept happy membership in a unified “nation-state.” Rather, it is because of the reality of multi-culturalism, along many different potential dimensions, that federalism is rightly thought to be the only practical way of achieving any kind of political unity, even if it be relatively minimal.

A standard division in many countries, of course, involves religion, whether we focus on religious multiplicity or a quite different split between the religious and the secular. How, as an empirical matter, and ought, as a normative one, the contending parties work with one another to create a new political system and constitution that express its goals and basic understandings. These questions boil down to the degree that one can, or ought, to expect genuine *compromises* among the contending parties.

Especially illuminating in this regard is a remarkable book, *Constitution by Consensus*,⁹¹ published in 2007 in the aftermath of over two years of intense meetings and debates among a group of diverse Israelis about what form a written constitution for that country might take, especially given the insistence by almost all contemporary Israeli Jews that Israel has a joint identity as both a *democratic* and a *Jewish* state.⁹² It is, of course, a truth, notorious or otherwise, that Israel remains in the exceedingly small group of countries that has no canonical written constitution.⁹³ There are various explanations for this fact, but surely a principal one is the division present in Israel from its very beginning between religious and secular Jews. The group that contributed to *Constitution by Consensus* was not so diverse as it might well have been; it included no Israeli Arabs, for example.⁹⁴ But it certainly drew from both the secular and sectarian Jewish communities, as well as from strong nationalists and more

⁹¹ ISRAEL DEMOCRACY INST., *CONSTITUTION BY CONSENSUS* (Uri Dromi et al. eds., 2007), available at http://en.idi.org.il/media/1529178/ConstitutionByConsensus_Draft.pdf (last visited Feb. 17, 2013).

⁹² *Id.*

⁹³ *Id.* at 79.

⁹⁴ Nadim N. Rouhana, “*Constitution by Consensus*”: By Whose Consensus? (7 ADALAH’S NEWSL.), Nov. 2004, at 2, available at <http://www.adalah.org/newsletter/eng/nov04/ar1.pdf> (“Indeed, Arabs have been made completely absent from the debate on the constitution, and from all constitutional efforts and exercises in Israel.”).

cosmopolitan liberals.

The chair of the group, Arye Carmon, refers to “compromise as an integral element” of resolving the “existential need in Israel now.”⁹⁵ The first section of the book is a group of essays titled “I Believe,” in which the participants write quite candidly of their mixed feelings regarding their common enterprise.⁹⁶ Not surprisingly, the word *compromise* reappears often in the various statements and in a final collective statement acknowledging that necessary “compromises and concessions will be painful” in order to achieve the goal.⁹⁷ There is, however, no guarantee that compromises—because they *are* painful—will in fact take place. There is only the expression of a strong belief that a failure to compromise may be fatal to the future of the Israeli project, however defined.

Perhaps Israelis should listen carefully to President Obama, as he defended his own compromise with Senate Republicans after the November 2010 elections that, among other things, extended all of the Bush-era tax cuts for two years.⁹⁸ Castigated by many members of his own party, the President answered them at a news conference, noting that the United States is:

[A] big, diverse country and people have a lot of complicated positions[;] it means that in order to get stuff done, we’re going to compromise. . . . This country was founded on compromise. I couldn’t go through the front door at this country’s founding. And if we were really thinking about ideal positions, we wouldn’t have a union.⁹⁹

⁹⁵ Arye Carmon, *Introduction to ISRAEL DEMOCRACY INST., CONSTITUTION BY CONSENSUS* 17, available at http://en.idi.org.il/media/1529178/ConstitutionByConsensus_Draft.pdf.

⁹⁶ *Id.* at 21.

⁹⁷ *Id.* at 104.

⁹⁸ See John Fritze, *Obama Defends Tax Compromise with GOP*, USA TODAY (Dec. 8, 2010), http://www.usatoday.com/news/washington/2010-12-07-obama-tax-cut_N.htm (“‘I’m not here to play games with the American people or the health of our economy,’ Obama said during a news conference. ‘My job is to do whatever I can to get this economy moving.’”).

⁹⁹ Kori Schulman, *President Obama on the Middle Class Tax Cuts and Unemployment Insurance Agreement: “A Good Deal for the American People,”* THE WHITE HOUSE BLOG (Dec. 7, 2010), <http://www.whitehouse.gov/blog/2010/12/07/president-obama-middle-class-tax-cuts-and-unemployment-insurance-agreement-a-good-de>.

Think carefully about what he is saying: It was worth engaging in what the Israeli philosopher Avishai Margalit has termed a “rotten compromise” with slave-owners in order to get the good of the Union.¹⁰⁰ It would presumably have been a profound error for anti-slavery delegates, whatever the purity (and correctness) of their own views, to reject compromise and thereby risk the almost certain dissolution of the Union.

Return to Israel and consider the following statement made by the Israeli Minister of Welfare, Yitzhak Meir Levi, in 1948 to the Knesset during the debate over whether the new country should adopt a written constitution:

The Jewish people are willing to resign themselves to many things, but the moment the issue touches upon the foundations of their faith, they are unable to compromise. If you wish to foist upon us this type of life or a constitution that will be contrary to the laws of the Torah, we will not accept it!¹⁰¹

This was similar to the views of another speaker, who warned his fellow parliamentarians, meeting in their joint role as a potential constitutional convention that “the experience of drafting a constitution would necessarily entail a severe, vigorous uncompromising war of opinions. A war of spirit, which is defined by the gruesome concept of *Kulturkampf*.”¹⁰² This was not, he suggested, “a convenient time for a thorough and penetrating examination of our essence and purpose” inasmuch as “there is no room for any compromises, any concessions or mutual agreements, since no man can compromise and concede on issues upon which his belief and soul depend.”¹⁰³

“These turned out to be winning arguments, inasmuch as Israel did not in fact adopt a canonical written constitution.”¹⁰⁴ Fur-

¹⁰⁰ Avishai Margalit, *Obama and the Rotten Compromise*, THE N.Y. REV. OF BOOKS (Dec. 7, 2009), <http://www.nybooks.com/blogs/nyrblog/2009/dec/17/obama-and-the-rotten-compromise/> (internal quotation marks omitted).

¹⁰¹ HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 63 (2011) (quoting Minister of Welfare Rabbi Yitzhak Meir Levi, 4 *Knesset Record* 812 (1950) (in Hebrew)).

¹⁰² *Id.* at 64 (quoting Meir-David Levonstein (Agudat Israel), in *Knesset Record*, *supra* note 101, at 744).

¹⁰³ *Id.*

¹⁰⁴ SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISES

thermore, “[a]s Arye Carmon and his associates emphasize, Israel will get a constitution in the twenty-first century only if those like Levi agree to compromise in return for a similarly anguished compromise from their secular opponents.”¹⁰⁵

Anyone familiar with the Israeli-Palestinian dimension of Middle East politics knows that anguished compromises will have to be made by both sides to achieve any lasting reasonably peaceful solutions, but this is true even if everyone at the negotiating table is relentlessly secular. The compromises would be measured, and then either accepted or rejected, by reference to presumed empirical criteria, including the ability to sell them to their respective publics. We could justifiably condemn one or the other side if we believed either that it was relying on demonstrably false empirical assumptions or was simply cowardly in being unwilling to take to its “bases” what cold logic dictated to be a reasonable settlement.

How does the situation change, if at all, if the basis of disagreement is not different readings of “facts on the ground,” but, rather, different readings of the metaphysical universe, so that, like the town clerk in upstate New York, one simply states that one is submitting to the Sovereign of the Universe in rejecting what those with different commitments view as “necessary and proper”? With the town clerk, as already suggested, one can perhaps cite Paul or the principle of *dina de-malkhuta dina*. What relevance do those notions have when one is discussing *not* a government in being, with its appointed ministers and laws, but, rather, the *creation* of a new system of government that will itself authorize what will count as legitimate law, especially in a self-styled “Jewish state”?

Are there materials internal to Jewish law that might help persuade devout Jews like those quoted by Professor Hanna Lerner in her book, tellingly titled *Making Constitutions in Highly Divided Societies*, to engage in the kinds of compromises thought necessary by Professor Carmon and his colleagues? Is it relevant to quote *Gittin* 59b “the whole of the [Torah] is also for the purpose of promoting peace”?¹⁰⁶ If not, is the enterprise of Israeli constitutionalism doomed to eternal failure, with whatever dire implications that might

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¹⁰⁵ *Id.*

¹⁰⁶ Babylonian Talmud, *Gittin* 59b.

suggest for the general project of seeking peace through constitutional ordering in that particular “highly divided society”?