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October 2013

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### **Recommended Citation**

Galston, Miriam (2013) "Navigating the Space Between Dueling Sovereigns," *Touro Law Review*: Vol. 29 : No. 2 , Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol29/iss2/4>

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## Navigating the Space Between Dueling Sovereigns

Cover Page Footnote

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## NAVIGATING THE SPACE BETWEEN DUELING SOVEREIGNS

*Miriam Galston*\*

In *Divided Loyalties: The Problem of “Dual Sovereignty” and Constitutional Faith*,<sup>1</sup> Sanford Levinson reflects on the problems posed in the United States of America and elsewhere when a person of faith must choose between two sovereigns.<sup>2</sup> This can occur when a sovereign commands the faithful to act unjustly or when an observant adherent of a religion is asked by civil law to act in a manner contrary to the precepts of her faith.<sup>3</sup> Levinson’s illustration of the latter is the town clerk in upstate New York who was unwilling to give a marriage certificate to a same-sex couple because of the clerk’s religious beliefs opposing non-traditional religious marriages.<sup>4</sup> Conflicts of this kind are not isolated occurrences, unfortunately. Some employers connected to the Catholic Church, for example, are unwilling to finance health insurance that covers contraception,<sup>5</sup> and some pharmacists will not dispense “morning-after” or even regular birth control pills because they might induce a woman to abort a fertilized egg.<sup>6</sup> Levinson is also concerned about divided loyalties that do not involve religious beliefs, but arise from deeply held moral or other convictions.<sup>7</sup> What these situations have in common from the perspective of individuals is the conflict that necessarily accompanies

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<sup>1</sup> Sanford Levinson, *Divided Loyalties: The Problem of “Dual Sovereignty” and Constitutional Faith*, 29 *TOURO L. REV.* 241 (2013).

<sup>2</sup> *Id.* at 241, 243.

<sup>3</sup> *Id.* at 245, 248-49.

<sup>4</sup> *Id.* at 252-53.

<sup>5</sup> See George L. Blum, Annotation, *Application of First Amendment’s “Ministerial Exception” or “Ecclesiastical Exception” to State Civil Rights Claims*, 53 *A.L.R.* 6th 569, § 6 (2010) (discussing the conflict experienced by religious employers).

<sup>6</sup> See Diana Snyder, Note and Comment, *A Reasonable Time, Place and Manner Restriction: Medicare Reimbursement Law Should Require Pharmacists to Fill Prescriptions Regardless of Personal Beliefs*, 36 *AM. J.L. & MED.* 652, 655-56 (2010).

<sup>7</sup> Levinson, *supra* note 1, at 248-49.

an attempt to keep the faith with each of the competing authorities or, alternatively, a desire to mute the claims of one authority so as to give full allegiance to the other.

Levinson's remarks seem aimed less at resolving such conflicts than suggesting how we should think about the structure of the problems that arise when competing authorities vie for our loyalty, with at least one of them asserting a sacred or transcendent basis for its claims.<sup>8</sup> He adopts what can be called a "meta" approach to what he calls "meta-issues."<sup>9</sup> This can be seen by the fact that his reflections contain no specific proposals to resolve the dilemma of divided loyalties for the audience or reader to consider, much less adopt. Rather, he describes two extreme responses to the problem: Justice Brennan's complete subordination of his religious beliefs to his civic obligations as a Supreme Court Justice, and Justice Scalia's claim that he would resign from the Supreme Court if presented with a genuine conflict between binding Catholic doctrine and binding United States law.<sup>10</sup>

In general, Levinson expresses a preference for Justice Brennan's substantive readings of the Constitution, but he queries whether he should prefer Justice Scalia instead when it comes to "the ways that the two justices confronted the interplay of their religious and secular commitments."<sup>11</sup> This question invites analysis. Justice Scalia's response to the conflict calls to mind "The Akeda" of Genesis 22:1-19, because of its portrayal of unquestioning obedience to what appears to be an immoral or unjust religious command, i.e., to kill an innocent child.<sup>12</sup> In an article written in 2002, Justice Scalia discussed the reasons for his opinion that the United States Constitution does not prohibit capital punishment.<sup>13</sup> He observed that the recently published encyclical *Evangelium Vitae* adopts the position that capital punishment is never warranted to effect just retribution. It is also

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<sup>8</sup> See SANFORD LEVINSON, *CONSTITUTIONAL FAITH*, 9-16 (rev. ed. 2011) (describing Levinson's belief that, in some respects, the United States Constitution serves as a sacred document for Americans and that their faith in its teachings exhibits many of the characteristics of religious faith rather than belief in man-made positive law, potentially deepening the conflict engendered by divided political and religious loyalties, since both sovereigns make claims to transcendent authority).

<sup>9</sup> Levinson, *supra* note 1, at 241.

<sup>10</sup> *Id.* at 255.

<sup>11</sup> *Id.* at 256.

<sup>12</sup> *The Akeda*, Genesis 22:1-19 [hereinafter *Genesis*].

<sup>13</sup> Antonin Scalia, *God's Justice & Ours*, *FIRST THINGS*, May 2002, at 17.

not necessary to defend society because modern forms of incarceration make capital punishment unnecessary. Thus, the encyclical has the *practical* effect of making the Catholic Church opposed to capital punishment. Luckily for Justice Scalia, he has it on good authority that the Church's new position is not binding upon practicing Catholics<sup>14</sup> because, if it were, he says he would be forced to resign from the Supreme Court, given his understanding that the United States Constitution permits capital punishment. Justice Scalia's assertion of the need to resign, were religious doctrine to contradict what he understands as the Constitution's view of capital punishment, thus depends upon his belief in the absolute priority of a binding religious commitment over contrary civil obligations and his concomitant willingness to submit his will to God's—both of which responses are displayed by Abraham in “The Akeda.”<sup>15</sup>

Justice Brennan's response to the dilemma of dual sovereigns is actually just as unyielding as Scalia's, although he grants absolute priority to the demands of the *political* sovereign rather than the religious one.<sup>16</sup> This position is dubious because it presupposes that he could interpret the Constitution with a disembodied mind wholly independent of the man inside the black robes who was shaped, in part, by Catholic teachings.<sup>17</sup> The reader may be suspicious of the claims of both Justices, then, although for different reasons, and one wonders if Levinson's goal in mentioning only these two views is to point to the need for us to consider arguably less principled, or less dogmatic, responses to the problem of divided loyalties, i.e., responses that foresee some balancing of the claims of the competing authorities.

Another indication of Levinson's “meta” approach is that he implies that there is a distinction between the way we should think about dueling sovereigns in a country with a settled legal regime, like the United States, and one in which a constitutional document remains to be written, as is the case in Israel. From one perspective, creating a constitution affords greater flexibility than amending one, or otherwise navigating the shoals of existing competing sovereigns,

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<sup>14</sup> *Id.* at 21.

<sup>15</sup> Levinson, *supra* note 1, at 245-46; Genesis, *supra* note 12.

<sup>16</sup> Levinson, *supra* note 1, at 256.

<sup>17</sup> *See id.* at 253-54 (referring to Justice Brennan's Catholic faith); *but see* Scalia, *supra* note 13, at 18 (referring to the fact that he is “unable to jump out of my [Roman Catholic] skin” when discussing the morality of the death penalty).

because creation can provide the occasion for rational reflection about the aspirations of a particular community and the best means to achieve them. Although the creation of a constitution in Israel would hardly be working off a “clean slate,” it would obviously lack centuries of precedents and jurisprudence restricting the content that could or could not be included in a constitutional framework. Israel could also learn from developments in international law since World War II, when many nations have attempted to incorporate constitutional protections for religion and for minority populations in greater detail and in different ways than was done in the United States more than two centuries ago. If there are solutions to divided loyalties, in other words, they may be context specific, i.e., responsive to the stage of development of the society, the degree of heterogeneity of its population, the nature of their traditions, and, especially, the specific claims of potential dueling sovereigns. In the United States, for example, which assigns a very high value to individual freedom and religious and cultural tolerance, the best approach is likely to differ from the best approach in a nation that values shared community norms above all or that has a population with only a few ethnic or religious backgrounds.

On the deepest level, the dilemma for Levinson is about the faith of individuals, especially the meaning of faith when a person of faith is subject to dual or dueling sovereigns. To generalize from the specific instances he relates, he wonders whether a person of faith can compartmentalize his or her moral nature or relegate it to the private sphere in order to remain part of a political community that permits, and even perpetuates, ongoing or systemic injustices. Although the conflict between one’s religious and one’s political loyalties is the most obvious and, perhaps, the most common case of such conflicts, for Levinson the dilemma of faith goes beyond religious faith and encompasses all deeply held convictions of a fundamental kind.<sup>18</sup> Is the stance of Justice Marshall in *Antelope*,<sup>19</sup> placing positive law above

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<sup>18</sup> In addition to the *Akeda* of *Genesis*, Levinson mentions several United States Supreme Court decisions that pit two political sovereigns against one another, *see, e.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (a political sovereign against norms of justice); *Antelope*, 23 U.S. (10 Wheat.) 66 (1825) (a political sovereign against moral norms of the natural law); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (a political sovereign against transcendent norms).

<sup>19</sup> 23 U.S. (10 Wheat.) 66 (1825).

the claims of morality, or that of Chief Justice Taney in *Dred Scott v. Sandford*,<sup>20</sup> similarly disregarding the claim of justice over positive law, permissible because of their roles as judges sworn to enforce the law of the land? Would a citizen be similarly obliged, or could she rightfully claim to follow the dictates of her faith because of her status as an individual? And does her faith require her to take an active stand against injustice wherever and whenever she encounters it in order to be a person of faith, real faith, in accordance with her religious or moral commitments?

Levinson provides no answers to these dilemmas. An air of pessimism pervades his remarks. He might have noted recent efforts by persons of faith to hold their religious beliefs to the standards of their morality. For example, some observant Jews have worked successfully for the creation of new kosher certifications that attest to the sound ecological and labor practices of purveyors of kosher food as well as to the strictness of their food processing or slaughtering practices.<sup>21</sup> Others have established new Orthodox congregations that enlarge the role of women in prayer services based upon distinguishing the dictates of Rabbinic texts from traditions adopted by Orthodox Jewry while living in male-dominated societies (e.g., the Shira Hadasha movement in Jerusalem, Israel, and elsewhere).<sup>22</sup> For some people, efforts of this kind set the standard of real faith because they combine the demands of one's ritual observance and one's independent moral judgments.<sup>23</sup> For others, this standard more correctly complies with the strictures of the Torah itself.<sup>24</sup> For the latter, properly understood religious texts contain many of the precepts of moral philosophy, such as dignified treatment of workers, so there is nothing to harmonize.<sup>25</sup> Still, for others, however, a person's independent

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<sup>20</sup> 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>21</sup> Sue Fishkoff, *The Changing Notion of Kosher*, JTA (Oct. 29, 2006), <http://www.jta.org/news/article/2006/10/29/14609/Dietarychangesafoo>.

<sup>22</sup> Julie Rapoport, *The Orthodox Egalitarian Minyan: An Analysis of Women and Public Torah Reading*, HASHTA, <https://sites.google.com/site/hashtaumd/contents-1/minyan> (last visited Feb. 17, 2013); *Inclusive Halakhic Minyanim*, SHIRA HADASHA, [http://www.shirahadasha.com/Shira\\_Hadasha/Welcome.html](http://www.shirahadasha.com/Shira_Hadasha/Welcome.html) (last visited Feb. 17, 2013) [hereinafter SHIRA HADASHA].

<sup>23</sup> SHIRA HADASHA, *supra* note 22.

<sup>24</sup> Rapoport, *supra* note 22.

<sup>25</sup> See Reuven Hammer, *Tradition Today: The Wages of a Laborer*, THE JERUSALEM POST: MAG. (Nov. 17, 2011), <http://www.jpost.com/Magazine/Judaism/Article.aspx?id=245992> (stating that "proper treatment of the poor and of all workers" is fundamental to a Jewish so-

moral imperatives constitute a second sovereign, and for them, as for Levinson, the conflict is deeply felt.<sup>26</sup>

Interestingly, Levinson admits to us that he *likes* to feel the conflict. He tells us that the Reform Jewish service, which sanitizes “The Akeda” story in Genesis, is not satisfying.<sup>27</sup> The reason seems to be that he—and perhaps we—need to be reminded of moral dilemmas that are ever present in our lives and that should challenge our complacency or submission to the will of the political sovereign. It is not unreasonable for some to view newspaper stories about deportation of illegal aliens and their birthright citizen children as modern day equivalents of the expulsion of Hagar.<sup>28</sup> Immigration policy is the most obvious modern equivalent, but the nation’s treatment of the poor, disabled, and otherwise disadvantaged also does not seem very far afield. And, at times, the United States government asks its citizens to put unquestioning trust in its judgment, even in matters of life or death. In short, what Levinson calls “the ‘state project’ ” is “self-consciously idolatrous” when it seeks “the unconditional commitments formerly pledged to a divinity.”<sup>29</sup> It follows that certain contemporary conditions should be seen as creating many of the dilemmas caused by claims of competing sovereigns, even if the government does not ask for the sacrifice of our first born. Levinson’s criticism, in these remarks and elsewhere, of the great “veneration” typically accorded the United States Constitution is, in part, addressed to this problem.<sup>30</sup> Because of his assessment of the United States Constitution’s defects and the defects of the legal system it spawned, he seeks to undermine the power of its claim to the unqualified loyalty of its citizens. Hopefully, then, publicizing the United States Constitution’s defects will have the consequence of helping Americans see clearly the exact nature of their dilemma, by forcing them to examine critically the exaggerated claims sometimes made concerning the wisdom of the constitutional foundation of the United States. If Levinson is right, then perhaps the town clerk is also right in concluding that the claims of religion have priority over the claims of a very imperfect political regime, especially if they are the good

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ciety).

<sup>26</sup> Levinson, *supra* note 1, at 245.

<sup>27</sup> *Id.*; see *Genesis*, *supra* note 12.

<sup>28</sup> *Genesis* 16:6-9.

<sup>29</sup> Levinson, *supra* note 1, at 251.

<sup>30</sup> *Id.* at 242.



claims of a good religion.<sup>31</sup> The competing sovereigns, in that event, are not in fact equivalent, and our divided loyalties can be safely divided to the extent that the claims of the sovereigns can be ranked.

How dual or multiple sovereigns challenge an individual's faith (or faiths) is thus central to Levinson's personal and professional doubts. It is not, however, the sole concern of his reflections in this volume, or in his life as a Jew. As noted earlier, he is deeply, viscerally concerned about the moral, political, and social dilemmas posed by the need for peaceful coexistence among the Orthodox Jewish, non-Orthodox Jewish, and non-Jewish citizens of the State of Israel. Increasingly, a barely suppressed civil war is simmering between Orthodox and other Jewish citizens of the State, triggered by disputes over seemingly secular topics such as educational policy, women's rights, transportation, and even parking, in addition to more recognizably religious conflicts, such as who can marry, divorce, or be buried in Israel.<sup>32</sup> Settlements on the West Bank, the Green Line, and the treatment of Arab Israelis span the religious and the political, which cannot really be separated in practice in Israel because the State holds itself out as, and intends to remain, a Jewish state.<sup>33</sup> Levinson's frequent trips to Israel have increased his apprehension over the complex and possibly intractable nature of these conflicts. Israel's aspiration to be, and to remain, a democracy only accentuates the cross-cutting nature of the State's competing commitments and the citizens' dueling loyalties.<sup>34</sup>

For reasons that are not clear, Levinson appears to desire that Israel obtain a written constitution. At present, Israel has eleven "Ba-

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<sup>31</sup> See *id.* at 252 (illustrating the conflict between sovereigns as experienced by a town clerk who refused to compromise her religious beliefs).

<sup>32</sup> See, e.g., Ofrif Liviatan, *Judicial Activism and Religion-based Tensions in India and Israel*, 26 ARIZ. J. INT'L & COMP. L. 583, 605-60 (2009); Ethan Bronner & Isabel Kershner, *Israeli Women Core of Debate on Orthodoxy*, N.Y. TIMES, Jan. 15, 2012, at A1; Aron Heller, *Israeli Draft Pits Secular Jews vs. ultra-Orthodox*, YAHOO! NEWS (July 7, 2012), <http://news.yahoo.com/israeli-draft-pits-secular-jews-vs-ultra-orthodox-071228668.html> (discussing the conflict created by the exemption of ultra-Orthodox from military service); IRAC (Israel Religious Action Center)-*Fighting Gender Segregation on Public Buses* (IRAC versus the Ministry of Transportation, Egged and Dan Bus Companies), <http://www.ira.org/LegalWork.aspx?SubheadingID=66> (last visited Feb. 17, 2013) (describing organization's fight against attempts to force gender segregation in seating on public buses).

<sup>33</sup> *The Declaration of the Establishment of the State of Israel*, JEWISH VIRTUAL LIBR., [http://www.jewishvirtuallibrary.org/jsourc/History/Dec\\_of\\_Indep.html](http://www.jewishvirtuallibrary.org/jsourc/History/Dec_of_Indep.html) (last visited Feb. 17, 2013).

<sup>34</sup> See *id.* (proclaiming freedom and equality to all inhabitants).

sic Laws” and two additional legislative enactments that are considered to be superior to ordinary legislation.<sup>35</sup> Some Israelis believe that these laws, combined with Israeli Supreme Court rulings, amount to an adequate constitutional foundation for the country’s legal system.<sup>36</sup> Others believe there is a need for a more conventional document, as exists in most developed nations, and for a clearer statement of rights than is contained in the basic and constitutional legislation.<sup>37</sup> Levinson notes Arye Carmon’s description of the two-year attempt by representatives of both Orthodox and non-Orthodox Jewish communities to agree on a constitution, an effort that failed because of an inability of the various stakeholders to compromise on certain issues.<sup>38</sup> He also quotes Yitzhak Meir Levi, who observed that people are simply unable to compromise “the moment the issue touches upon the foundations of their faith.”<sup>39</sup> There is no lack of evidence that, in the present environment, there exists little inclination to compromise, especially on the part of certain groups of Orthodox and ultra-Orthodox Jews. In the face of these facts, Levinson asks if there are any “materials internal to Jewish law that might help persuade devout Jews . . . to engage in the kinds of compromises thought necessary” to reach agreement on a constitution for all the citizens of Israel.<sup>40</sup>

Levinson would do well to look to a different set of political and legal materials for help, namely, those of the United States. Levinson himself observes that the ugly constitutional compromise of 1786, which protected slavery for more than a generation, was a “rot-

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<sup>35</sup> Daniel J. Elazar, *The Constitution of the State of Israel*, JERUSALEM CENTER FOR PUB. AFF., <http://jcpa.org/dje/articles/const-intro-93.htm> (last visited Feb. 17, 2013).

<sup>36</sup> See generally Joshua Segev, *Who Needs a Constitution? In Defense of the Non-decision Constitution-making Tactic in Israel*, 70 ALB. L. REV. 409 (2007).

<sup>37</sup> See, e.g., Tony Bayfield, *A Jewish Response to a Bill of Rights and Responsibilities*, THE MOVEMENT FOR REFORM JUDAISM (June 18, 2009), <http://news.reformjudaism.org.uk/assembly-of-rabbis/a-jewish-response-to-a-bill-of-rights-and-responsibilities.html> (quoting Chief Justice Aharon Barak: “From the Declaration of Independence we learn that Israel is to be built on the principles of freedom, justice and peace and the social and political equality of all its citizens”) (internal quotation marks omitted); Arye Carmon, *First Word: Give Israel a Constitution*, THE JERUSALEM POST (June 8, 2006), <http://www.jpost.com/Opinion/Columnists/Article.aspx?id=24282> (illustrating the benefits of a written constitution).

<sup>38</sup> Levinson, *supra* note 1, at 259-62.

<sup>39</sup> *Id.* at 260.

<sup>40</sup> *Id.* at 261.

ten compromise,”<sup>41</sup> but one that made possible a country that, in the twenty-first century, could be headed by an African-American President. He omits to mention that it was still necessary to wage a civil war and to progress incrementally *after* that war for almost one hundred and fifty years before this “miracle” in the United States could occur. What could the Israeli analogue to this sequence of events possibly be? Surely no one wants a rotten compromise, in which the more tolerant segments of Israeli society surrender more than the less tolerant, making a rotten civil war inevitable if democracy for non-Orthodox Israeli Jews and Israeli Arabs is to be attained. But the more tolerant *would have to surrender more* to the less tolerant because the less tolerant have piety, that is, faith in divine texts, to buttress their view of good government. One important reason that Israel did not adopt a written constitution at its inception is that some of the Orthodox and ultra-Orthodox Jews would not agree to have a secular law with precedence over the Torah and Talmud.<sup>42</sup> Since the Jewish religion, unlike the Christian faith, dictates to its adherents their conduct for all matters in their daily lives, not just in their spiritual lives, it dictates such things as what food Jews can eat, what clothes they can wear or combine, how much of a field can be harvested and in what years, and, apparently, who has to sit at the back of the bus.<sup>43</sup> It is true that the Jewish religion requires such things as the fair treatment of strangers and workers.<sup>44</sup> Yet some of its precepts are inconsistent with the rights that Israel is arguably committed to secure. Even the Jewish principle of compromise, “*dina demalkhuta dina*, ‘the law of the land is the law,’ ” does not seem useful, since it requires Jews to recognize the practical necessity of obey-

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<sup>41</sup> See AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 1, 54-61 (2010) (Levinson attributes this phrase to Avishai Margolit, and Margolit attributes it to Albert Einstein); Geoff Nunberg, *What the Word ‘Compromise’ Really Means*, NAT’L PUB. RADIO (July 19, 2011), <http://www.npr.org/2011/07/19/138468870/what-the-word-compromise-really-means>.

<sup>42</sup> Elazar, *supra* note 35.

<sup>43</sup> See, e.g., *Deuteronomy* 22:11 (describing the prohibition against mixing wool and linen (*shatnez*)); *Exodus* 23:10-11, *Leviticus* 25:1-7 (describing the limits on harvesting (*shmitah*)); Joshua Mitnick, *From Back of the Bus, Israeli Women Fight Segregation*, WALL ST. J. (Jan. 5, 2012), <http://online.wsj.com/article/SB10001424052970204368104577136253309226604.html> (describing the controversy over seating on buses); Christina Soranno & Kim Sondey, *Orthodox Jews: A Cultural Profile*, ORTHODOX JUDAISM (Feb. 25, 2012), <http://www.orthodox-jews.com/jews.html#axzz209rrFTdt> (describing some of the religious mandates that influence daily life).

<sup>44</sup> Hammer, *supra* note 25.

ing the law of a foreign country unless that law contradicts a precept of the Torah.<sup>45</sup> In Israel, which is a Jewish State, such compromise is irrelevant.<sup>46</sup> Indeed, one could argue that *dina de-malkhuta dina* implies that when the Jews are in their own homeland, compromise relating to Jewish law is prohibited.

One part of the compromise adopted in 1786 in the United States should nonetheless be seen as a model for constitutional compromise in Israel. Levinson cites Justice Holmes' statement that constitutions are "made for people of fundamentally differing views."<sup>47</sup> Levinson then observes that "this reality is probably the best explanation for that particular form of government we call 'federalism,' whether in the United States or elsewhere."<sup>48</sup> Federalism succeeds because it acknowledges the diversity of sometimes incompatible claims made by members, or potential members, of some kind of political unity.<sup>49</sup> Federalism gives those competing claims the widest possible berth consistent with maintaining a country unified when and where necessary. One could argue that Israel is already this kind of federation, based upon the facts on the ground, because in areas other than national security, neither the secular nor the religious community consistently dominates. Although the relationships among the parties are dynamic and, in many respects, fragile, it is doubtful that attempting to force a consensus for a constitution that would delineate these relationships in a fixed way would contribute to greater stability. On the contrary, such an effort is almost certain to make the underlying conflicts more urgent and vivid in the public mind.

To reduce (no one is talking about eliminating) the tensions among the component parts, it is necessary to recognize their distinctive loyalties and agree on the least onerous set of regulations to ensure that the country is united when and where it needs to be. To a

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<sup>45</sup> See Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L.A. L. REV. 1771, 1773-74 (1996).

<sup>46</sup> See Eetta Prince-Gibson, *Progressive Rabbis Urge Greater Tolerance*, THE JERUSALEM POST, Nov. 12, 2006, available at 2006 WLNR 19687508 (quoting Aharon Barak, President of the Supreme Court of Israel, who stated that Israel is a Jewish State and must abide by "the values of a Jewish state").

<sup>47</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); LEVINSON, *supra* note 8, at 72.

<sup>48</sup> Levinson, *supra* note 1, at 257-58.

<sup>49</sup> See Mark Tushnet, *What Then Is the American?*, 38 ARIZ. L. REV. 873, 879 (1996) (explaining that the success of federalism is due to the existence of value pluralism).

certain approximation, this is what Israel already has accomplished. It has enacted basic laws which protect many of the categories of rights that could reasonably be included in a constitution.<sup>50</sup> The courts in Israel treat the basic laws as foundational, and the Israeli Supreme Court has famously used them to resolve some disputes in favor of minorities and other powerless claimants.<sup>51</sup> The courts could do much more, but their failure to be more protective probably cannot be attributed to the lack of a constitution.

In short, Israel does not need a constitution right now. Whether rotten or not, its patchwork of basic laws and judicial interpretations is likely the best compromise possible in the present circumstances. Levinson would do well to remember the lesson of *Baba Metzia*,<sup>52</sup> that “[t]he Torah is not in heaven,” and cease yearning for a perfection that exceeds the limits of the possible.<sup>53</sup>

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<sup>50</sup> See Daphne Barak-Erez, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 *CARDOZO L. REV.* 2495, 2497 (2009) (including the Hours of Work and Rest Law of 1951, which “recognized the Sabbath as the official day of rest in the country,” or the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law of 1953, which established a monopoly of Jewish law for marriage or divorce).

<sup>51</sup> See Larry Derfner, *The Jewish Tradition of Aharon Barak*, *JERUSALEM POST*, Sept. 14, 2006, available at 2006 WLNR 16127764 (explaining that “if not for the Israeli Supreme Court under Barak, Arabs-Israeli citizens and Palestinians both - would be subject to maltreatment”).

<sup>52</sup> *Babylonian Talmud, Baba Metzia* 59b.

<sup>53</sup> Levinson, *supra* note 1, at 243 (internal quotation marks omitted).