

# **Unassembled**

Tracing the Impact of Constitutional Codification on Elasticity

**Victoria Bracco**

A Senior Honors Thesis Submitted to the Political Science Department

University of California, San Diego

**28 March 2022**

## **Acknowledgments**

Dedicated to my grandfather, George McNeil, who passed away a little over one year ago and despite not being able to attend my graduation this year, is with me always, encouraging me to continue meeting obstacles head-on and inspiring me to live my life on that fine line of putting others first, but never forgetting to be proud of yourself.

Thank you to Professors Glenn Smith and Kenneth Vandavelde, who have provided the courses necessary to foster my passion for constitutional studies. Thanks to my peers, Cuan Fix, Clayton Allen, and Ashley Feng, who were essential to my revisions and to getting out of my own head. Special thanks to Professor David Wiens, who has been essential in guiding this paper to completion and provided me with the best frameworks for attacking any question or task.

# **Unassembled**

Tracing the Impact of Constitutional Codification on Elasticity

## Table of Contents

Introduction.....	3
Key Concepts & Theoretical Model .....	7
Constitutions .....	7
Written-ness & Codification .....	9
Elasticity .....	12
Theoretical Model.....	17
Potential Causal Mechanisms .....	19
Research Design.....	22
Methodology .....	22
Case Selection.....	23
The Codified Case: The Grundgesetz .....	24
Basic Legal Structure .....	24
Codification.....	24
Elasticity .....	25
Critical Juncture .....	26
The Uncodified Case: Basic Laws of Israel.....	29
Basic Legal Structure .....	29
Codification.....	29
Elasticity .....	30

Critical Juncture .....	31
Testing Section.....	33
Hypotheses .....	33
Explicit Processes Preventing Comprehensive Responses .....	33
Emphasizing a Civil Law System Prevents Comprehensive Understanding.....	36
Struggles to Recognize Implied and Emerging Constitutional Features .....	39
Conclusion .....	42
Summary .....	42
Implications & Further Research .....	43
Bibliography .....	45

## Introduction

*A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. A constitution is not the act of a government, but of the people constituting a government; and a government without a constitution is power without right. ~ Thomas Paine.<sup>1</sup>*

Constitutions authorize government by applying social and cultural customs that bind communities together, especially to capture that community's unique perspective on morality. These customs allow governments to gain legitimacy from the people and further inform the nature of their constitution and government.<sup>2</sup> Creating a constitution requires the examination of many distinctive features of communities that exist in the spheres of social, cultural, and moral beliefs and behaviors. In modern analysis and interpretation of constitutions, constitutions are either singular and self-informing, or imperfect guides to maintaining cultural and moral traditions.<sup>3</sup> In this way, constitutions are both specific and abstract; they reflect the general moral attitudes of the people and develop an exact structure to justify these moral understandings. Constitutions are, in some ways, creatures of the past meant to develop structures for keeping the future stable. The debate emerges on whether constitutions should be seen as finished projects or as works in progress that each generation gives a hand in forming.

The history of codifying laws is one of capturing legal attitudes to provide clarity to citizens, ensuring that the law is applied consistently, and providing transparency to all.<sup>4</sup>

---

<sup>1</sup> Paine, Thomas. *Rights of Man*, quoted in Parpworth, *Constitutional and Administrative Law*, 12.

<sup>2</sup> Tyler, *Why People Obey the Law*, 27-29.

<sup>3</sup> Foley, *The Silence of Constitutions Gaps*, 6.

<sup>4</sup> Meyer, "Codifying Custom." 1000, 1004.

However, codification is not without limitations as it attempts to codify social and cultural beliefs, which may run into the Dead Hand problem.<sup>5</sup> The Dead Hand problem reflects the issues of a previous generation's moral beliefs forced onto present generations, which may have grown to form different perspectives on what is morally acceptable.<sup>6</sup> To this present generation, the Dead Hand problem causes these outdated laws to be seen as illegitimate, and the longer they are imposed, the more the whole legal structure appears as illegitimate itself. This dynamic is like when Machiavelli describes the difficulties in attempting to conquer kingdoms with different languages that are culturally distinct.<sup>7</sup> Instead of these cultural distinctions occurring in regions, they occur through generational distinctions creating "temporal imperialism," in the words of Ozan Varol.<sup>8</sup> Effectively, constitutions impose the risks of the past governing the future. As constitutions are a core authority in legal structures, constitutional codification provides an appropriate avenue for analyzing the impact of codification on legal structures.

Written-ness is the dominant classification system for constitutions, but it also is one of the most criticized for not being well-designed to identify the aspects of constitutions it wishes to analyze. The classification first began as part of the debate regarding whether the U.K. truly has a constitution, with the U.K. constitution not existing in a proper documentary form.<sup>9</sup> Theorists debated that the U.K. constitution did not exist due to not having a documentary form similar to that of the United States (U.S.).<sup>10</sup> Despite the origins of written-ness to answer questions around

---

<sup>5</sup> Parpworth, *Constitutional and Administrative Law*, 250-252; Varol, "Temporary Constitutions." 409, 448.

<sup>6</sup> Varol, "Temporary Constitutions." 409, 448

<sup>7</sup> Machiavelli, *The Prince and the Discourses*, 8.

<sup>8</sup> Varol, "Temporary Constitutions." 409, 448.

<sup>9</sup> Parpworth, *Constitutional and Administrative Law*, 10, 12.

<sup>10</sup> Bryce, *Constitutions*, 12; Foley, *The Silence of Constitutions Gaps*, 3-5; Lane, *Constitutions and Political Theory*, 6,11; Tocqueville, *Democracy in America*, 430; Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, 182-183.

the U.K.'s constitutional form, the classification fails to clearly define unwritten constitutions.<sup>11</sup> This failure has become a core objection to written-ness as it does not provide significant insight into the characteristics it attempts to describe.<sup>12</sup> Composing a better classification for studying these constitutional characteristics is essential to understanding the difference between constitutions and the authority of unwritten maxims within constitutional systems.

Codification, or written-ness, has been depicted by Leslie Wolf-Phillips and Viscount James Bryce as directly affecting a constitution's elasticity.<sup>13</sup> Elasticity measures the relationship between ordinary laws and institutions' authorities compared to the constitution's authority.<sup>14</sup> Constitutions with a high degree of authority over ordinary laws and institutions impose stringent processes for which laws gain their authority and how institutions can express their authority. Constitutions with a high degree of authority then restrict the ability of institutions and their laws to adapt to different situations making their structure more rigid. Constitutions with a low degree of authority have broad restrictions that institutions and laws must follow, meaning that they are more flexible in adapting to different situations with the proper authority. Theorists like Wolf-Phillips and Viscount Bryce do not develop a precise theory to investigate their claim that codification affects elasticity; instead, only proclaim its likelihood. This question is the core task of this paper to investigate: How constitutional codification impacts a constitution's elasticity?

In the first section, I will define the research methodology of process tracing. While process tracing is gaining use in policy analysis, its development into a formal research

---

<sup>11</sup> Foley, *The Silence of Constitutions Gaps*, 3-4.

<sup>12</sup> Bryce, *Constitutions*, 5-7; Foley, *The Silence of Constitutions Gaps*, 3-4; Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, xi-xii.

<sup>13</sup> Bryce, *Constitutions*, 7-15; Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, xiv-xv.

<sup>14</sup> Bryce, *Constitutions*, 7-9; Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, xii.



methodology has been lacking until recent years. The method requires analysis of test cases to help explain what causal mechanisms impact constitutional elasticity. I will also discuss the reasoning behind the selected test cases for this study.

In the second section, I will lay out our test cases of Germany, a codified and rigid constitution, and Israel, an uncoded and flexible constitution. These two case types are selected due to their codification status, requiring one codified constitution and one uncoded. I will support their codification status by using the three-prong codification test laid out by Wolf-Phillips.<sup>15</sup> I will support their elasticity status by assessing the location of constitutional authority within their basic legal structures. This research question seeks to deepen the understanding of Wolf-Phillips, Viscount Bryce, and others who suppose codifications link to elasticity by developing a theoretical model to reveal potential causal mechanisms to explain this supposed impact.<sup>16</sup>

The third section will lay out the theoretical model this paper relies on to dissect constitutional impact. Further, the section will also define key concepts, including investigations of written-ness's usefulness as a classification, understanding conceptual features, and the operationalization of codification and elasticity. I will assert that codification provides a better structure for interpreting the characteristics written-ness attempts to focus on while removing the older classification's confusion. This section will conclude with an introduction to the three potential causal mechanisms: 1) codification creating explicit procedures which limit the ability of the constitutional structure to negotiate solutions to constitutional uncertainties; 2) codification emphasizing a Civil Law approach limiting the ability of judicial clarification on

---

<sup>15</sup> Wolf-Phillips, *Constitutions of Modern States: Selected Texts*. xii.

<sup>16</sup> Bryce, *Constitutions*, 5-7, 19-21; Wolf-Phillips, *Constitutions of Modern States: Selected Texts*. xiv.

addressing constitutional uncertainties; and 3) codification creating a focus on text removing the ability for additional aspects in answering constitutional uncertainties.

In my concluding section, I will lay out my hypotheses concerning what causal mechanisms lead codification to impact elasticity. I will analyze these events within the critical junctures of my test cases. I will also be drawing upon other regions, such as the United States (U.S.) and the U.K., to provide additional support in clarifying interactions within the test cases. I will then conclude by summarizing the results of my analysis, its implications, and advocating for further research opportunities.

## **Key Concepts & Theoretical Model**

### *Constitutions*

There are two lenses for conducting constitutional analysis. One focuses on the political system's design, such as its nature as democratic or oligarchical.<sup>17</sup> This aspect of design or content is not of focus for this paper. The second lens focuses on how these designs are presented in the form of the constitution.<sup>18</sup> The constitutional form is the core aspect of analysis which we will focus on throughout this study.

Beyond these two contexts, which provide perspectives on constitutional analysis, constitutions have a specific function in the state. Professor Anthony King captures the broad definitions of a constitution:

---

<sup>17</sup> Aristotle, *Politics*, Book VI. I.

<sup>18</sup> Lane, *Constitutions and Political Theory*. 10-11.

A constitution is the set of the most important rules that regulate the relations among different parts of the government of a given country and also the relations between the different parts of government and the people of the country.<sup>19</sup>

As well as previously stated by Finer that constitutions are:

Codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and officers of government, and define the relationships between them and the public.<sup>20</sup>

These definitions agree on two essential components of constitutions: dictating how government institutions should act and their authority; and the relationship between the government and its citizenry, typically asserting protections, including fundamental rights. These two components are referred to by asserting that a constitution lays out the basic legal structure. Generally, a constitution considers the relationships between government agencies themselves and between the government and the people. Notice, however, that Finer states a constitution must be a “code of rules,” where Professor King merely states a constitution includes “important rules” this distinction leads to the heart of what to consider when discussing the differences between codified and uncoded constitutions. Whereas the current classification model of written-ness provides an excellent foundation for this consideration, it does not go far enough to isolate the potential impacts of a codified form on constitutional implementation.

---

<sup>19</sup> King, *Does the United Kingdom Still Have a Constitution?* quoted in Parpworth, *Constitutional and Administrative Law*, 4.

<sup>20</sup> Finer quoted in Parpworth, *Constitutional and Administrative Law*, 3.

## *Written-ness & Codification*

Written-ness emerges from the significant differences embodied by comparing the U.S. and U.K. constitutions.<sup>21</sup> After the U.S. developed its constitution, countries throughout the developing world followed suit in creating documentary constitutions.<sup>22</sup> The U.K. presented an exciting question about whether they indeed had a constitution at all.<sup>23</sup> While the debate continues over the true nature of the U.K. constitution, it has become widely accepted that the U.K. constitution does exist in an unwritten form.<sup>24</sup> This classification has many issues, including its use in describing the U.K. constitution.

The accepted definition of a written constitution is a singular document that lays out a state's basic legal structure in its entirety. It is defined predominately by its documentary form.<sup>25</sup> On the other hand, the definition of unwritten constitutions is whatever is not a written or documentary constitution.<sup>26</sup> Michael Foley presents three objections to the written-ness classification: First, there is no appropriate definition for determining what an unwritten constitution is.<sup>27</sup> The unwritten constitution definition is unsatisfying as the key components that written-ness seeks out are those of unwritten constitutions, their unique form, and the influence of that form on their constitutional system. Second, Foley points out that the depiction of the U.K. constitution is confusing because the U.K. constitution is not wholly unwritten, having written components. Where written-ness aims to solve disagreements about the U.K. and U.S.

---

<sup>21</sup> Foley, *The Silence of Constitutions Gaps*, 3-4

<sup>22</sup> Colley, "Empires of Writing: Britain, America, and Constitutions, 1776-1848," 237-238.

<sup>23</sup> Foley, *The Silence of Constitutions Gaps*, 3-4.

<sup>24</sup> Colley, "Empires of Writing: Britain, America, and Constitutions, 1776-1848," 251; Foley, *The Silence of Constitutions Gaps*, 5; Parpworth, *Constitutional and Administrative Law*, 10.

<sup>25</sup> Foley, *The Silence of Constitutions Gaps*, 3; Parpworth, *Constitutional and Administrative Law*, 7.

<sup>26</sup> Böckenförde, *Constitutional and Political Theory*, 121; Colley, "Empires of Writing: Britain, America, and Constitutions, 1776-1848," 263; Foley, *The Silence of Constitutions Gaps*, 4-5; Parpworth, *Constitutional and Administrative Law*, 7, 9-10.

<sup>27</sup> Foley, *The Silence of Constitutions Gaps*, 5-6.

constitutional forms, it fails to analyze concrete differences.<sup>28</sup> The U.K. constitution contains written and unwritten components that have formal constitutional authority.<sup>29</sup> Describing the U.K. constitution as merely unwritten fails to recognize its documentary elements and analyze how the constitutional system weeds out what is considered ordinary unwritten maxims and constitutional ones. In his final objection, Foley recognizes that written constitutions may also have unwritten maxims derived from the traditions and cultural heritage of the state's social values.<sup>30</sup> Similar to the second objection, there is a struggle to identify whether these components can ever gain constitutional authority using the written-ness classification. The U.S., or any written, constitution contains a strong documentary element, but still, have unwritten customs and norms which develop as part of their constitutional system.<sup>31</sup> These unwritten aspects are especially visible within the judicial process, as Justices on the Supreme Court of the United States (SCOTUS) rely on additional information to contextualize the constitution. Methods of interpretation often demonstrate that even the foundational written case of the U.S. constitution contains unwritten aspects. All justices begin with textual analysis of the constitution, but this quickly gives way to considering the meaning of words at the time of the drafters, known as originalism, leading all the way to understand the underlying intent, ideals, and purpose of the text, known as purposivism.<sup>32</sup> These different approaches are typically described as the judicial philosophy which is used in determining the legal meaning of a statute. These approaches both do not carry constitutional authority but are binding lesser norms which spring from the constitutional design. The focus on written form overshadows the underlying analysis of

---

<sup>28</sup> Foley, *The Silence of Constitutions Gaps*, 5-6

<sup>29</sup> Foley, *The Silence of Constitutions Gaps*, 5-6; Parpworth, *Constitutional and Administrative Law*, 9.

<sup>30</sup> Foley, *The Silence of Constitutions Gaps*, 5-6.

<sup>31</sup> Foley, *The Silence of Constitutions Gaps*, 6; Parpworth, *Constitutional and Administrative Law*, 248-251.

<sup>32</sup> Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation," 82-83.

discerning the role of unwritten and written norms within the structure of either constitution. Constitutional codification presents questions as to the impact of removing the authority of these unwritten norms which can be essential for the constitution's successful application.<sup>33</sup>

The qualities that written-ness seeks to describe are significant to the study of constitutions and should not be wholly abandoned. Written-ness may seek to detangle the social and cultural influence as either included as part of the constitution or excluded as independent moral principles. Codification provides a better lens for exploring this separation, as it examines the particular system in which constitutions are crafted.<sup>34</sup> Codified constitutions are assembled as a singular, unified written instruction, which shifts the focus away from the solely documentary form present in the classification of a written constitution. Inversely an uncoded constitution is pieced together through informal and formal actions. In the words of Foley, uncoded constitutions are "unassembled" because they are not so much put together; instead, they come together.<sup>35</sup> Written constitutions are often described as codified, but the systematic quality of codification becomes overshadowed by having a documentary form associated with a constitution's written-ness.<sup>36</sup> Codification provides a method for detangling unwritten maxims within written constitutions because codification delineates a clear hierarchy of norms in which unwritten maxims are lesser norms sprouting from the constitution but without formal constitutional authority.

To categorize constitutions as codified or uncoded, we will be using a framework proposed by Wolf-Phillips. The Wolf-Phillips Test composes a three-prong approach to

---

<sup>33</sup> Parpworth, *Constitutional and Administrative Law*, 250-252.

<sup>34</sup> Foley, *The Silence of Constitutions Gaps*, 6; Wolf-Phillips, *Constitutions of Modern States: Selected Texts*. xii.

<sup>35</sup> Foley, *The Silence of Constitutions Gaps*, 6.

<sup>36</sup> Foley, *The Silence of Constitutions Gaps*, 3; Lane, *Constitutions and Political Theory*, 11-12; Parpworth, *Constitutional and Administrative Law*, 7.

dissecting a constitution's codification status. Considering "first, with the degree of codification, second, with the degree of written detail; and thirdly, with the origin of the written text of the documents."<sup>37</sup> The "degree of codification" is measured by the extent the constitution follows a statutory system of assembly. The "degree of written detail" refers to the portion of constitutional norms which flow from a document. The constitution is codified if the document is the sole creator of constitutional norms. Lastly, the origins of the documents refer to whether the drafters intended for the document to be a basic norm and lay out an entire legal structure. A constitution must pass all three prongs to be a codified constitution; it is classified as uncoded if it fails just one. Due to codification presenting a better framework for examining characteristics of interest, for the remainder of the work, I will be referring to constitutions of these characteristics as codified and uncoded constitutions, respectively.

### *Elasticity*

Viscount James Bryce develops his classifications on elasticity in response to his own dissatisfaction with written-ness. Viscount Bryce's measurement of elasticity is "the relation which each Constitution bears to the ordinary laws of the State, and to the ordinary authority which enacts laws."<sup>38</sup> Elasticity focuses on the authority of the constitution over other laws and institutions. Elasticity recognizes that the authority invested by the people is supreme over the government; breaking from the authorized constitution structure represents an unauthorized and unjust usurpation of power. Wolin describes this as a cycle of constitutions devolving into

---

<sup>37</sup> Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, xii.

<sup>38</sup> Bryce, *Constitutions* quoted in Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, xiii.

revolution, which creates a new constitution; breaking from the constitutional framework results at the beginning of this devolution and reflects constitutional rigidity and brittleness.<sup>39</sup>

Viscount Bryce asserts that the flexibility of constitutions is related to their entrenchment or amendment procedure; in other words, the mechanism which allows constitutions to be changed. Rigid constitutions have a high degree of authority, meaning that only the constitution has sufficient authority to resolve whatever issues might spring from itself. Where flexible constitutions with their low degree of authority can also have ordinary laws and institutions provide the proper authority to resolve constitutional issues. Some constitutional schemes may seem to have multiple sources of constitutional authority, but truly just push the burden of responding to constitutional uncertainties to lesser authorities that are unable to comprehensively resolve these uncertainties. These partial answers allow for the system to continue until the amendment process can garner enough support to be successful. Flexible constitutions do not see these partial answers as lesser norms and instead instill them with the same level of constitutional authority. Instead of partial answers providing a holding pattern until the appropriate path can be achieved, institutions in a flexible system repeatedly engage with each other over constitutional uncertainties entering a national negotiation on what the legitimate answer may be. Suppose a constitutional uncertainty arises regarding fair and equal voting rights; a rigid constitution would have lesser norms determine a temporary measure often upsetting many citizens because the institution's response is based on the vague language of what is "fair and equal" in the eyes of the responding institution. The hope is that the amendment process would ideally work to resolve the issue over time. This process does not allow for negotiation; instead, it leaves one institution to bear the weight of using its lesser authority to control the

---

<sup>39</sup> Wolin, "Norm and Form," 77-79.



constitution, pushing the line of what is acceptable under the regime without the clear authority to do so and without an answer on how long that norm will stay in place. More than one institution with equivalent authority to the constitution allows bargaining to begin. One path can grant a partial answer with full authority, another path can suggest something entirely different or refine the path suggested, and the original or new path can engage once more. This rapid development toward an answer may seem erratic, but it allows for a comprehensive and efficient response as institutions are forced to compromise with each other and move from partial to full solutions. Where gerrymandering under a rigid system receives a quick response to whether it is “fair and equal” no matter the initial answer it does not answer the underlying question of when gerrymandering is not constitutional. In a flexible system, the initial response has the authority to answer the underlying question and further responses allow for the development of a comprehensive authority and process for resolving uncertainties around gerrymandering. For bargaining to begin there must be two parties with the authority to negotiate, and negotiation indicates the flexibility of the system.

When more than one institution within the legal structure holds constitutional authority, the constitution is flexible because these institutions work together to respond to constitutional uncertainties. In a legal structure where only one or no institutions have the constitutional authority to resolve constitutional uncertainties, there are limited means for responding to constitutional uncertainties. Limited means for responding to constitutional uncertainties are not harmful on their face but are generally rigid. Thomas Hobbes, a prominent enlightenment theorist, argues in *Leviathan* that a singular sovereign invested with supreme authority provides efficiency in quickly responding to constitutional uncertainties without debate or deliberation.<sup>40</sup>

---

<sup>40</sup> Hobbes, *Leviathan*, Part II. Chp. 18-19.

This quick response may be seen as a benefit to elasticity, as the U.S. constitution projects how a slow process creates rigidity. The U.S. constitution divides constitutional authority giving partial authority first to the legislature requiring an amendment to pass two-third of both houses, then to a quasi-constituent assembly requiring three-fourths of state legislatures to ratify the amendment.<sup>41</sup> This quasi-constituent assembly is lethargic, taking a great deal of inertia to get the proposal through regardless of whether the situation is an emergency.<sup>42</sup> The SCOTUS may provide a quick pace response to emergencies. However, their decisions are not binding to the overall system only to lower courts and can be ignored by the Legislature or Executive demonstrated in *Worcester v. Georgia*, where both Georgia and President Jackson ignored the judiciary's decision.<sup>43</sup> Thus, no institution has full constitutional authority under the U.S. constitutional scheme.

However, in considering institutions fully vested with constitutional authority, Hobbes' belief in the singular Sovereign as elastic does not hold. Two structures can be presented in the pure form of Hobbes' theory, which invests full constitutional authority within a singular individual or a monarch or invests full constitutional authority within a single institution; we will consider both.<sup>44</sup> Monarchs have significant issues as the sole processors of power as their regimes often lose legitimacy due to pursuing selfish interests or flawed missions demonstrated under the Stuart kings. The Eleven Years Tyranny under the King Charles I reflects the loss of faith in a singular monarch due to financial strains limiting their ability to control the state and using their constitutional authority to silence the Parliament by both proroguing, or dismissing, the Parliament and engaging in the Star Chamber Trials which unjustly punished members of

---

<sup>41</sup> U.S. Const. Art. V.

<sup>42</sup> Lane, *Constitutions and Political Theory*. 114.

<sup>43</sup> *Worcester v. Georgia* 31 U.S. 515 (1832)

<sup>44</sup> Hobbes, *Leviathan*, Part II. Chp. 18-19.

Parliament for speaking out.<sup>45</sup> There is no authorized method for responding to the monarch's abuses of constitutional authority, resulting in the beginning of the English Civil War in the case of the Stuart Kings. In considering a singular institution holding constitutional authority, similar issues arise. As Viscount Byrce describes, representational schemes could deteriorate, leaving the people similarly unable to recover power.<sup>46</sup> Insufficient internal checks may allow the institution to create constitutional changes, including fundamental regime changes, and promote instability or a new constitution entirely. The ease of change that a singular institution can inflict creates brittleness within the constitution. It challenges the ability of the constitution to retain its original structure and not be covertly changed into a new constitution or façade. Moreover, Hobbes agrees that the authority of a Sovereign comes from the people.<sup>47</sup> When that constitutional authority is overstepped, the Sovereign can no longer act with authorization.

Assessing the location of constitutional authority within the basic legal structure will be how we determine elasticity. Constitutional schemes with no or one institution holding authority are inelastic or rigid. Constitutional schemes with more than one institution holding constitutional authority will be considered elastic or flexible. In analyzing institutions, we will focus on Montesquieu's model of *Trias Politica*, which reflects the three core branches of government as the Legislative, the Executive, and the Judiciary.<sup>48</sup> In examining the location of constitutional authority in the U.S. structure, it is clear from earlier arguments that the amendment procedure is rigid because it is particularly challenging to enact and creates issues for responding to emergencies. On the other hand, the U.K. places constitutional authority in its

---

<sup>45</sup> Coates, "The Private Journals of the Long Parliament"; Lamont, "Prynne, William (1600-1689), pamphleteer and lawyer," 2; Kishlansky, "Charles I (1609-1649), king of England, Scotland, and Ireland," 27-28, Morgan, *Inventing the People*, 39-54.

<sup>46</sup> Wolf-Phillips, *Constitutions of Modern States: Selected Texts*, xiv.

<sup>47</sup> Hobbes, *Leviathan*, Part I. Chp. 15.

<sup>48</sup> Ott J. *Trias Politica (Separation of Powers)*.

Parliament through its doctrine of parliamentary sovereignty and relies on its judiciary to form precedents that in turn become standing constitutional conventions that create legal norms with constitutional authority.<sup>49</sup> The above operationalization method will be referred to as the location assessment.

### *Theoretical Model*

In laying out the basic legal structure, constitutions are norm-creating.<sup>50</sup> Legal norms inform the processes which give further governmental acts, such as laws, judicial opinions, and decrees, their authority.<sup>51</sup> Hans Kelsen describes constitutional authority as being derived from a constituent assembly or divine authority, a theme consistent with enlightenment theorist Hobbes and modern constitutional theorists.<sup>52</sup> In this way, constitutions take on a supreme authority, and due to their binding nature, they become the basic norm through which the rest of the legal structure gains its authority and validity.<sup>53</sup>

Codification of constitutions affects the presentation and clarity of a state's fundamental legal norms. Codified constitutions provide transparency and clarity on how legal norms gain validity and authority.<sup>54</sup> When a situation of constitutional uncertainty occurs, codification limits the ability of the state to resolve these uncertainties. A situation of constitutional uncertainty can arise through constitutional crises, disagreement about the required process for an action to be valid, or the application of the constitution to specific situations. Unlike the clarity which

---

<sup>49</sup> Parpworth, *Constitutional and Administrative Law*, 71-75, 228-230.

<sup>50</sup> Kelsen, *Pure Theory of Law*, 8; Kelsen, *General Theory of Law, and State*, 115-116.

<sup>51</sup> Kelsen, *Pure Theory of Law*, 8, 31.

<sup>52</sup> Böckenförde, *Constitutional and Political Theory*, 121; Hobbes, *Leviathan*, Part I. Chp. 15; Kelsen, *Pure Theory of Law*, 23; Kelsen, *General Theory of Law, and State*, 259; Lane, *Constitutions and Political Theory*, 14-15, 170-173.

<sup>53</sup> Kelsen, *Pure Theory of Law*, 8, 31.

<sup>54</sup> Foley, *The Silence of Constitutions Gaps*, 8-9; Meyer, "Codifying Custom." 1000, 1004.

codified constitutions attempt to capture, uncoded constitutions provide greater fluidity in responding to constitutional uncertainties. However, uncoded constitutions can fail to present where legal norms gain their authority and how their respective processes operate, especially to those outside the state’s legal community.<sup>55</sup> The ability of constitutions to address these questions of authority concerns constitutional elasticity. Elasticity focuses on the different constitutional avenues within the legal structure to resolve situations of constitutional uncertainty.

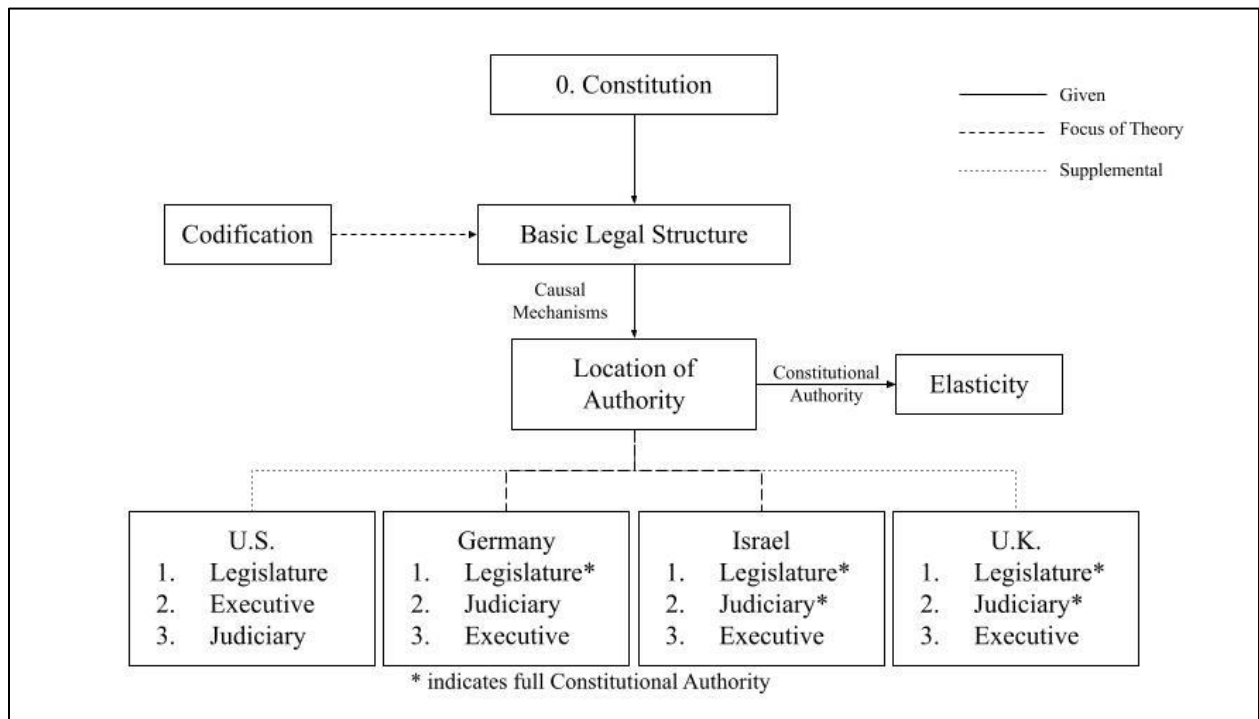


Figure 1. Theoretical Model

This theoretical model displays that codification influences the state’s basic legal structure by impacting the political community’s ability to clearly identify the institution or procedure that have the authority to respond to constitutional uncertainties. In turn, the ability of

<sup>55</sup> Foley, *The Silence of Constitutions Gaps*, 9-10; Meyer, “Codifying Custom.” 1000, 1004, 1007-8.

institutions to express authority affects the state's ability to respond to constitutional uncertainties in a manner that secures the political support of a broad segment of the populace. These uncertainties can emerge out of sudden or incremental changes. The question that this paper discusses is the mechanisms by which codification causally affects elasticity.

### *Potential Causal Mechanisms*

Hypothesis 1: Codification creates explicit processes for expressing authority which hinders flexible responses to constitutional uncertainties.

The core goal of constitutional codification is to clarify the state's internal legal structure and processes. This clarity locks constitutional powers and authorities into explicit roles within the structure. Amendment procedures often embody the explicit process of where the constitutional authority is present to adjust the constitution in response to uncertainty about constitutional issues. The U.S. amendment procedure may seem to place this authority within its legislature, but in requiring three-fourths of state legislatures to ratify a proposed amendment, the authority is outside the federal constitutions' institutions.<sup>56</sup> This authority is not a lesser or novel institution because each state has its own subservient constitutions that have its own requirements for the passage of a proposed federal amendment to be viewed as valid.<sup>57</sup> This stringent process provides significant challenges for attempting to amend the constitution during times of crisis and adapting the constitution to what current generations see as acceptable. While Germany places the amendment procedure within the legislature, requiring a two-thirds majority, the process still experiences difficulties in adopting changes that embody generational change.<sup>58</sup>

---

<sup>56</sup> U.S. Const. Art. V.

<sup>57</sup> U.S. Const. Art. IV.

<sup>58</sup> Art. 79 GG. *The Grundgesetz*.

Thus, codification creates explicit processes and institutions that have the authority to respond to constitutional uncertainties. Codifying these processes restricts negotiation between institutions to arrive at comprehensive solutions to constitutional uncertainties.

Hypothesis 2: Codification emphasizes a Civil Law system that prevents elasticity in understanding different legal perspectives and diminishing legitimacy.

Codified constitutions implicitly subscribe to a statutory structure that emphasizes the approach of a Civil Law system. Civil Law systems create rigidity in interpreting and applying the law due to language evolving throughout time. Within any society, there are multiple legal systems active, and these systems produce frameworks for understanding how one ought to utilize law in society.<sup>59</sup> The balance of these systems reflects the influence of cultural understandings of morality and justice. The two most discussed legal systems are Common Law and Civil Law systems. Codification removes the emphasis from the Common Law components of the legal structure specifically housed in the judiciary. Common Law emphasizes unwritten maxims and customs developed by judicial precedent. In contrast, Civil Law emerges from the desire to establish general and abstract components in legal codes.<sup>60</sup> Viscount Bryce saw a more direct relationship between codified constitutions and legal systems, proclaiming that a codified constitution is equivalent to a civil law constitution and an uncoded constitution to Common Law constitution.<sup>61</sup> Common Law provides that customary legal provisions inform the constitutional framework and provide elasticity in adapting laws to modern generations with implied authority. Codification cannot eliminate other legal systems from the constitutional

---

<sup>59</sup> Tamanaha, *Legal Pluralism Explained: History, Theory, Consequence*, 1-4.

<sup>60</sup> Friedman, *Legal Theory*, 515; Lane, *Constitutions and Political Theory*, 143.

<sup>61</sup> Bryce, *Constitutions*, 6-8.

structure, but codification could emphasize specific systems, such as Civil Law. This emphasis on a particular legal system can make other systems illegitimate and invalid ways of interpreting the constitution, creating a singular path to responding to constitutional uncertainties. Thus, codification creates rigidity by preventing acknowledging the multiple legal perspectives present in a constitution.

Hypothesis 3: Codification captures only what is legitimate and necessary at the time of drafting, creating legal anachronisms which restrict incremental elasticity.

Regardless of the legal system, codification implies a limitation to pure text which restricts the scope of judicial decision-making. The relationship between the government and the people is arbitrated exclusively within the judiciary. Judicial lawmaking or activism provides a window into the role of judicial officers in interpreting and applying the law to specific cases. This process is directly affected by what information should be allowed when a judicial officer decides a case. This process of interpretation happens in all legal fields but is most influential in answering constitutional uncertainties. Uncodified constitutions allow a fluid process for their constitutions to adequately understand the complete picture of constitutional questions, where codified constitution hold their statutes above all else, eliminating additional features of the situation. The latter may allow information to contextualize the language of the drafters and evidence, which may shed light on the moral beliefs which underlie the ideas captured in the constitution.<sup>62</sup> There is some disagreement about whether that is necessary to make determinations about what the constitution truly says. Uncodified constitutions allow for considering ideas that underlie the constitution's text and how normatively legal norms function

---

<sup>62</sup> Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation," 82-83.



in society.<sup>63</sup> Thus, codification focuses solely on the document's text, disregarding additional information to determine whether the constitution is working effectively to deter constitutional uncertainties and crises.

## **Research Design**

### *Methodology*

In this section, I will lay out the research design used to analyze the causal process of how constitutional codification negatively impacts constitutional elasticity. This paper is orientated toward qualitative research analysis using the process tracing model. More specifically, I will be using the inductive reasoning-based model of Theory-Building as presented by Professor Derek Beach.<sup>64</sup> I have laid a conceptual framework and operationalized key characteristics needed for identifying potential causal mechanisms. Next, I will analyze the potential mechanisms within the critical juncture moments of my test cases.

Before delving into collecting evidence from my cases, it is fitting to discuss the values and drawbacks of process tracing analysis and Theory-Building. Process tracing's primary focus is investigating the black box of causal processes or causal mechanisms. Recent developments in the field have brought about a better application of this analysis.<sup>65</sup> Process tracing has two main components; first, unpacking the causal process into parts called causal mechanisms which logically link each part of the process, and second, events or activities assessed by tracking the

---

<sup>63</sup> Sirota, "Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation," 83-85.

<sup>64</sup> Beach, *How Does It Work?*

<sup>65</sup> Beach, *Process-Tracing Methods: Foundations and Guidelines*, 1-2.

traces of supposed causal mechanisms.<sup>66</sup> These causal mechanisms are linkages between the dependent and independent variables.

More recent models of process tracing analysis occur within the sphere of public policy research.<sup>67</sup> This paper serves to find the causal mechanisms in which constitutional codification impacts elasticity and adapt this model into the realm of constitutional and legal theory.

### *Case Selection*

It is necessary to show a codified and rigid case to trace the direct effects of codification. It is also necessary to examine an uncoded and flexible case to expose the absence of these mechanisms in the opposing system and see if a similar rigidity appears in the features described. The U.S. and the U.K. cannot serve as good examples to test these mechanisms due to being core components of reaching definitions and theorizing about codification and elasticity generally. The two selected cases are Germany for the codified and rigid constitution and Israel for the uncoded and flexible constitution. These two cases share some similarities as constitutions drafted after World War II with involvement from the international community. Israel and Germany call their constitutions their Basic Law, but these documents still meet the definition of a constitution in laying out the basic legal structure of their nations. These nations chose to call their constitutions Basic Laws for two opposing reasons. Germany chose to compose a Basic Law to remove the explicit national character imposed by a constitution, setting the goal to write a formal constitution during German unification.<sup>68</sup> Israel instead wrote their Basic Law to give the state time to reclaim and develop what can be called the Jewish state.<sup>69</sup> These similarities

---

<sup>66</sup> Beach, *How Does It Work?*

<sup>67</sup> Beach, *How Does It Work?*

<sup>68</sup> Bumke, *German Constitutional Law*, 2.

<sup>69</sup> Navot, *Constitutional Law of Israel*, 20-21.

allow for a strong case comparison as their main diverging factor is their codification and elasticity status.

## **The Codified Case: The Grundgesetz**

### *Basic Legal Structure*

Germany's constitution, or basic norm, is called the *Grundgesetz*, which translates to basic law in English. The *Grundgesetz* consists of twenty-one sections and 146 articles, which describe the internal processes of the state, relevant institutions, and rights protections.<sup>70</sup> Each section contains an overview of the institution and its general functions. Amendments appear within their appropriate section and not a separate list. The *Bundestag* and the *Bundesrat* compose the legislative branch, the Federal Government represents the Executive, and the Federal Constitutional Court is the head of the judiciary.

### *Codification*

Relying on the Wolf-Phillips' test to determine codification, the *Grundgesetz* passes all three prongs; thus, it is a codified constitution. The Wolf-Phillips test requires codified constitutions to have a statutory framework, a singular written document, and the drafters intended the document to be the complete legal structure. First, the *Grundgesetz* follows a statutory structure as it has definitive sections from which articles flow.<sup>71</sup> Second, the *Grundgesetz* is the sole documentary constitution. While the Federal Constitutional Court is considered a highly pragmatic court, this is due to recognizing international laws within the

---

<sup>70</sup> *The Grundgesetz*

<sup>71</sup> *Ibid.*

*Grundgesetz* itself.<sup>72</sup> Lastly, and perhaps the most complicated requirement for Germany, the *Grundgesetz* origins set out a complete legal structure for western Germany after its division in World War II and has remained the legal structure since unification. However, Article 146 of the *Grundgesetz* states that the constitution “shall cease to apply on the day a constitution freely adopted by the German people takes effect.”<sup>73</sup> The debate surrounding whether the drafters’ intent was for the constitution to dissolve during unification is the centerpiece of Germany’s critical juncture.<sup>74</sup> Unification did occur under Article 23, which allows other states to join under the *Grundgesetz*.<sup>75</sup> Regardless, the *Grundgesetz* set out to be a complete legal structure, and Article 146 merely provides a path of dissolution of the constitution in hopes that Germany would one day reunite. Thus, the *Grundgesetz* meets the definition of a codified constitution by passing all three prongs of the Wolf-Phillips test.

### *Elasticity*

The location assessment asserts that if more than one branch has constitutional authority, it is considered a flexible constitution; the *Grundgesetz* is rigid. Only the legislature can amend the constitution requiring a two-thirds majority in both houses.<sup>76</sup> With constitutional authority placed in only one location, the *Grundgesetz* is rigid as it has limited means to respond with and to constitutional authority. The *Grundgesetz* is the highest norm, being binding and supreme over all other legal acts; even when the legislature amends the constitution, it must abide by the process outlined in the *Grundgesetz*.<sup>77</sup>

---

<sup>72</sup> Bumke, *German Constitutional Law*, 27-32.

<sup>73</sup> Art. 146 GG. *The Grundgesetz*.

<sup>74</sup> Quint, *Constitutional Law of German Unification*, 508-510.

<sup>75</sup> Art. 23 GG. *The Grundgesetz*.

<sup>76</sup> Art. 29 GG. *The Grundgesetz*.

<sup>77</sup> Kelsen, *General Theory of Law and State*, 115-116.; Art. 29 GG. *The Grundgesetz*.

## *Critical Juncture*

The international community significantly shaped the drafting of the *Grundgesetz* during the allied occupation of Germany after World War II.<sup>78</sup> The result was that the *Grundgesetz* was highly progressive, recognizing features of international law and the development of human rights.<sup>79</sup> The German Democratic Republic (GDR) also crafted a constitution resembling the Soviet Union's constitution.<sup>80</sup> Both constitutions did not recognize the division of Germany into two separate states, looking to hold that Germany had never ceased to exist as a singular state.<sup>81</sup> Both constitutions placed the goal of German unification within them, which shows the fine line that the *Grundgesetz* and the GDR constitution were walking.<sup>82</sup>

The unification of Germany did not take place under a single constitution but required the consideration of two constitutions. For the past forty years, the Federal Republic carefully set out in its treaties to prevent the recognition of the GDR as a separate German state.<sup>83</sup> The GDR took similar actions until the 1950s, when the Federal Republic entered NATO, and the GDR revised its constitution to stress closeness with the Soviet Union and recognize separation from the Federal Republic.<sup>84</sup> When the GDR gained self-determination after rebellions in 1989, it was clear that both the GDR and the Federal Republic wanted to begin the process of unification. Unification became steeped in controversy concerning how the state could come back together.

---

<sup>78</sup> Bumke, *German Constitutional Law*, 1-6.

<sup>79</sup> *Ibid.*

<sup>80</sup> Quint, *Constitutional Law of German Unification*, 483

<sup>81</sup> Quint, *Constitutional Law of German Unification*, 481-483.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Quint, *Constitutional Law of German Unification*, 483.

The GDR stressed its desire for confederation under a closer “treaty community” platform between the GDR and the Federal Republic.<sup>85</sup> Chancellor Kohl of the Federal Republic supported this position to slowly merge the states’ social, economic, and legal structures.<sup>86</sup> Despite support from both states’ leadership, the people of the GDR and the Federal Republic wanted complete unification and to no longer walk the line of having one official German state, with there technically being two. The public’s desire for rapid unification prevented the confederation from taking form.

The most likely pathway to unification then seemed to be Article 146 of the *Grundgesetz*, which provided the Federal Republic and GDR craft a new constitution and ratify it to become the new constitution of Germany. Article 146 resolved some foundational issues for the *Grundgesetz* in what some scholars, such as Peter Quint, describe as a deficit ratification process due to the exclusion of German states and people not included in its drafting.<sup>87</sup> However, the prospect of composing an entirely new constitution was problematic as there is no process laid out in Article 146. Individuals on both sides worried that the fusion of the GDR and the Federal Republic systems would lead to instability within Germany.<sup>88</sup> After adopting the new constitution, the dissolution of both states would also subscribe to the fact that the German state would end and become something new, which was something many individuals did not desire or would accept.<sup>89</sup> The timely process and complicated political path Article 146 pointed toward was ultimately seen as too costly to continue with despite its direct purpose being unification.

---

<sup>85</sup> Quint, *Constitutional Law of German Unification*, 486.

<sup>86</sup> Quint, *Constitutional Law of German Unification*, 484-485.

<sup>87</sup> Quint, *Constitutional Law of German Unification*, 510.

<sup>88</sup> Quint, *Constitutional Law of German Unification*, 509.

<sup>89</sup> Quint, *Constitutional Law of German Unification*, 481-483.

The final option, and the path taken, was unification through the addition of the GDR as a *Länder*, similar to a state in the U.S. system, through Article 23. It was clear that any path the GDR took would include amending their constitution, but Article 23 would not end the Federal Republic.<sup>90</sup> Article 23 would also allow the Federal Constitutional Court's ruling to be passed forward and ensure the continuity of the German state.<sup>91</sup> Debate surrounds whether Article 23 is a valid method of unification. Some individuals show that the Parliamentary Council's history reflects it as a valid method, and others state that Article 146 displays a clear path that drafters intended for unification.<sup>92</sup>

At the end of the process, the GDR and the Federal Republic took additional actions to ensure admission under Article 23. The Federal Republic amended its preamble and Article 146 to recognize that unification occurred.<sup>93</sup> The GDR amended its constitution to be sufficiently democratic and federal to enter the *Grundgesetz* system.<sup>94</sup> Coordination around the incorporation of 16 million new citizens and over 42,000 square miles of additional territory continued to play out after the GDR officially dissolved and entered the Federal Republic.<sup>95</sup>

---

<sup>90</sup> Quint, *Constitutional Law of German Unification*, 511.

<sup>91</sup> Quint, *Constitutional Law of German Unification*, 481.

<sup>92</sup> Quint, *Constitutional Law of German Unification*, 508-510.

<sup>93</sup> Quint, *Constitutional Law of German Unification*, 514.

<sup>94</sup> Quint, *Constitutional Law of German Unification*, 488, 508.

<sup>95</sup> Quint, *Constitutional Law of German Unification*, 531.

## The Uncodified Case: Basic Laws of Israel

### *Basic Legal Structure*

Like the German constitution, Israel's constitution is also a set of Basic Laws. The name is where the similarities end, Israel's constitution currently comprises thirteen Basic Laws. One Basic Law, the "Basic Law: The State Budget for the Years 2017 and 2018 (Special Provisions) (Temporary Provision)," was enacted temporarily and then expired under the specific instruction of the Basic Law itself.<sup>96</sup> This temporary provision was made possible by the Basic Laws piecemeal composition after the first Knesset, which had the authority of a constituent assembly, failed to draft a constitution and passed the authority to the next Knesset. Until the Basic Laws compose a complete constitution, the Knesset retains the authority of a constituent assembly.<sup>97</sup> There are some fascinating questions about what a "complete" constitution entails and when the Basic Laws are brought together, whether a new constitution will have formed and whether the previous structure will cease. Under Israel's Basic Laws, the Knesset is the Legislature, the prime minister's cabinet is the Executive, and the Supreme Court of Israel (SCI) is the head of the Judiciary.

### *Codification*

Once again, returning to the Wolf-Phillips test for codification, Israel is an uncodified constitution. The Basic Laws fail the first component of our test as they are not composed in a singular statutory form but a piece-by-piece or piecemeal fashion.<sup>98</sup> While each component is statutory, each component is also composed separately from the rest, resulting in an ongoing

---

<sup>96</sup> Israel, *Basic Law: The State Budget for the Years 2017 and 2018 (Special Provisions) (Temporary Provision)*

<sup>97</sup> H CJ 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) (Isr.)

<sup>98</sup> Sapir, *The Israeli Constitution*, 15.



constitution process. Second, the Israeli constitution relies on the state's unwritten conceptions, most apparently in the power of judicial review claimed by the SCI and their analysis of a constitutional supremacy provision in its critical juncture.<sup>99</sup> Lastly, the origins of Israel's constitution do not reflect the purpose of composing a comprehensive legal structure at the outset; due to the constitution being composed piece-by-piece, thus the entire legal structure and order are not fully defined.<sup>100</sup>

### *Elasticity*

The location assessment demonstrates that the Israeli Basic Laws vest both the judiciary and the legislature with constitutional authority. The Knesset continues to hold the authority of a constituent assembly having the power over the constitution itself.<sup>101</sup> The Knesset's authority is similar to Parliamentary supremacy, which gives the U.K.'s parliament authority on the same level as the constitution itself.<sup>102</sup> The legislatures can pass laws that become explicit components of the constitution. Israel requires two formalities in composing a Basic Law: the titling of the act as "Basic Law" and an entrenchment procedure leaving instructions on how to amend that Basic Law in the future.<sup>103</sup> The judiciary somewhat weakened the need for an entrenchment procedure during Israel's Constitutional Revolution.<sup>104</sup>

The Supreme Court of Israel (SCI), the head of the judicial branch, holds the authority to make constitutional changes. The judiciary holds this authority due to dictating what the Basic Laws mean as new Basic Laws interact with older Basic Laws. In Israel's critical juncture, the

---

<sup>99</sup> Sapir, *The Israeli Constitution*, 38-44.

<sup>100</sup> Sapir, *The Israeli Constitution*, 15.

<sup>101</sup> HCJ 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) (Isr.)

<sup>102</sup> Parpworth, *Constitutional and Administrative Law*, 71-75.

<sup>103</sup> Navot, *Constitutional Law of Israel*, 49-50; Sapir, *The Israeli Constitution*, 55-56.

<sup>104</sup> HCJ 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) (Isr.)

SCI held that the Basic Laws had reached the level of having a constitutional foundation, holding this foundation as supreme and granting the power of judicial review to the SCI.<sup>105</sup> This power may call upon the idea of judicial review in the U.S., which also was not explicitly laid out in the U.S. constitution and developed the power through the landmark case *Marbury v. Madison*.<sup>106</sup> The first difference is that the U.S. constitution explicitly lays out a supremacy clause, whereas the Basic Laws of Israel do not include such a clause.<sup>107</sup> The second is that the incomplete nature of the constitution coupled with this power of review makes the process more similar to live edits during drafting, which then gives the judiciary the authority to advise the assembly as the norm is created, where the U.S. constitution is established and can only be truly changed by the amendment process outlined.<sup>108</sup> The end of the Articles of Confederation suggests a constitutional failure to abide by amendment processes incurring a fundamental regime change, revealing a possible intersection between elasticity and stability for further studies.<sup>109</sup> This paper centers around that judicial review under the Basic Laws gives constitutional authority to the judiciary as it created its own legal norm. Thus, Israel's constitution is flexible, having two institutions holding constitutional authority.

### *Critical Juncture*

The Constitutional Revolution of 1992 will serve as the critical juncture for analyzing how Israel's uncodified constitution responds to constitutional uncertainties. The uncertainty is present in the *Bank Mizrahi* case holding that Israel has a formal constitution with supremacy

---

<sup>105</sup> Sapir, *The Israeli Constitution*, 51-53.

<sup>106</sup> *Marbury v. Madison*, 5 U.S. 137 (1803)

<sup>107</sup> U.S. Const. Art. VI § 2; Sapir, *The Israeli Constitution*, 51-53.

<sup>108</sup> Navot, *Constitutional Law of Israel*, 43-44; Sapir, *The Israeli Constitution*, 55.

<sup>109</sup> Virginia, and United States. 1784. *The Articles of Confederation*, Art. XIII.

over ordinary laws.<sup>110</sup> Essential to this ruling is the Knesset's passing of the new Basic Laws concerning Human Dignity and Freedom of Occupation. In passing the Basic Law: Human Dignity and Liberty, the Knesset purposefully did not include an explicit entrenchment clause or amendment provision, which popularly in the Knesset meant that the SCI would not have the power to strike down legislation in conflict with the Basic Law.<sup>111</sup> However, President Barak of the SCI found that the limitation clause present within the Basic Law was enough to propose a substantive entrenchment provision and that the Basic Law should gain constitutional status.<sup>112</sup> This decision led to old Basic Laws without substantive or formal entrenchment provisions gaining constitutional status.<sup>113</sup> The SCI forcibly included Basic Laws into the constitutional framework that the Knesset did not explicitly intend; the development of judicial review creates a supremacy clause through judicial decision-making.<sup>114</sup> The impact of this decision was immediate as the Knesset quickly amended the Basic Laws to allow an override of the limitation clause.<sup>115</sup> While the legislature has the power of the constituent assembly simultaneously, the SCI can use judicial review and create binding legal norms.

If the Basic Laws were considered codified, then the court would have been wholly unable to assert that the constitution came into formal existence or was supreme due to the lack of explicit text to support this assertion. The SCI's creation of judicial review displays an assertion of power through outside legal reasoning. The uncoded nature of the Israeli constitution allows for the SCI to continue moving forward in asserting the definitive legal

---

<sup>110</sup> Sapir, *The Israeli Constitution*, 39-40.

<sup>111</sup> Sapir, *The Israeli Constitution*, 36-39.

<sup>112</sup> Sapir, *The Israeli Constitution*, 50-51.

<sup>113</sup> Sapir, *The Israeli Constitution*, 52-54.

<sup>114</sup> Navot, *Constitutional Law of Israel*, 42-45.

<sup>115</sup> Navot, *Constitutional Law of Israel*, 42-45.

structure of the state and being able to dictate constitutional authority in providing such responses.

## Testing Section

### *Hypotheses*

We used our theoretical model to identify three hypotheses about causal mechanisms by which codification can affect a constitution's elasticity. The first is that codification restricts authority to explicit processes, preventing flexibility to negotiate solutions to constitutional uncertainties. Second, codification strongly implies reliance on Civil Law as a dominant legal system removing the perspectives of other legal systems, only addressing part of constitutional issues that arise. Lastly, codification limits the breadth of information in judicial decision-making, restricting the constitution's ability to overcome "temporal imperialism" or the Dead Hand problem.<sup>116</sup>

### *Explicit Processes Preventing Comprehensive Responses*

German unification demonstrates that the legislature is the only institution with authority to resolve constitutional uncertainties. The legislature amended the *Grundgesetz* before unification, seeking to erase any contradiction from unifying under Article 23 instead of Article 146.<sup>117</sup> The Federal Constitutional Court consulted on whether Article 23 and Article 146 provided potential pathways for unification; the court never considered whether the sole use of Article 23 would be permissible if the amendment of Article 146 never occurred.<sup>118</sup> The Federal

---

<sup>116</sup> Varol, "Temporary Constitutions." 409, 448.

<sup>117</sup> Quint, *Constitutional Law of German Unification*, 514.

<sup>118</sup> Quint, *Constitutional Law of German Unification*, 508, 511.

Constitutional Court is bound to answer only the necessary questions before it, not all the relevant features of the case, such as the validity of alternative paths.<sup>119</sup> Article 146 underpins the drafters' intent as the explicit path for constitutional unification but abandons these conventional notions in favor of seeing Article 23 as an explicit path for unification regardless of its legitimacy as means to accomplish this goal.<sup>120</sup> The legislature has two explicit paths for unification; one resolves the unification problem, but not the underlying uncertainties of its constitutional intent. Some former members of the GDR see Article 23 as a process of annexation instead of unification.<sup>121</sup> Thus, German unification ignores an intended constitutional path for unification and relies on an unintended but constitutional pathway. The legislature then amended its constitution to increase the legitimacy of the unintended pathway of Article 23, which diminishes the role of Article 146. This process reflects adhering to the explicit structure but demonstrates the inability of negotiation between the legislature, the judiciary, and the people to arrive at a satisfactory conclusion to the unification problem. After unification, some citizens of the GDR are still convinced that they were unjustly annexed and tension around unification persists.<sup>122</sup>

One might think that a simple solution would be the codification of unwritten maxims into the constitution directly. However, unwritten maxims often govern social relationships within the political systems. Marshall and Moodie studying these unwritten maxims have found that codifying them may erase informal qualities essential to their application.<sup>123</sup> These unwritten

---

<sup>119</sup> Bumke, *German Constitutional Law*, 23.

<sup>120</sup> Quint, *Constitutional Law of German Unification*, 508-510.

<sup>121</sup> Schweitzer, *Politics and Government in Germany 1944-1994*, 85; Quint, *Constitutional Law of German Unification*, 509-510.

<sup>122</sup> Schweitzer, *Politics and Government in Germany 1944-1994*, 85; Quint, *Constitutional Law of German Unification*, 509-510, 624-628.

<sup>123</sup> Marshall and Moodie, *Some Problems of the Constitution* quoted in Parpworth, *Constitutional and Administrative Law*, 251-252.

maxims of how to discern intent and its weight in the policy- and decision-making process are essential to composing comprehensive responses, without them the granular social and professional relations in the state are ignored. The absences of implicit paths cannot be made up through explicit ones. This is seen in the undermining of Article 146 due to it pushing against the status quo desires of the Federal Republic.

Uncodified constitutions do not have a similar explicit system for addressing constitutional uncertainties or adjusting their constitutions. Instead, multiple branches use their authorities to inquire about possible solutions within the constitutional framework; they use implied and unwritten maxims to help structure and stabilize negotiations between the branches. The U.K. demonstrates the power of parliamentary supremacy and binding judicial precedent to put both branches on equal footing but with different functions.<sup>124</sup> The Parliament assesses the need for changes, and the judiciary ensures continuity of the legal structure. Similarly, Israel's legislature can quickly amend the basic laws without any restrictive requirements, and the SCI creates a binding precedent in asserting the constitution's characteristics, both respected as equally constitutional.<sup>125</sup>

During the Constitutional Revolution, not only did the SCI create a supremacy clause, but it revealed critical information about the relationship between its legislature and judiciary. Once the Basic Law of Human Dignity and Liberty established constitutional validity, the SCI also held that it informed limitations on lesser laws creating an abstract power of judicial review trickling down to other Basic Laws thought not to have constitutional authority.<sup>126</sup> The Knesset responded to the SCI's actions by adding an override clause in the Basic Law of Freedom of

---

<sup>124</sup> Parpworth, *Constitutional and Administrative Law*, 249-250.

<sup>125</sup> Navot, *Constitutional Law of Israel*, 40-48.

<sup>126</sup> Sapir, *The Israeli Constitution*, 52-54.

Occupation.<sup>127</sup> This relationship resembles a call and response of the SCI and the Knesset to share power in constitutional editing. The power of judicial review is not equivalent to the amendment process in the Knesset, but the SCI determines how the Basic Laws interact with the rest of the legal structure, demonstrating which components have normative power. Thus, the uncodified nature of the Israeli Basic Laws points to the absence of exact structures instead of relying on flexible components of communication between two institutions to resolve constitutional uncertainties.

Thus, German unification and the Israeli Constitutional Revolution display the rise of explicit processes from codification as affecting the elasticity of their internal legal structures by erasing the implicit unwritten maxims necessary for a flexible constitutional system.

### *Emphasizing a Civil Law System Prevents Comprehensive Understanding*

Germany has a firm reliance on the Civil Law system in the origins and cultural history of the state.<sup>128</sup> While Civil Law is often associated with its Roman origins, Germany claims the cultural legacy of the Roman empire, which creates the understanding of the Civil Law system being above all others.<sup>129</sup> The *Grundgesetz* carries on this legacy in its codified nature. The absence of the Common Law structure meant to delineate power roles, limiting the ability to conduct judicial analysis from varying legal perspectives.

During unification, Germany's Federal Constitutional Court determined that Article 23 and Article 146 present valid pathways for unification. The ruling in the Federal Constitutional Court emphasizes that Article 146 may present a more explicitly constitutional path, resolving

---

<sup>127</sup> Navot, *Constitutional Law of Israel*, 45; Sapir, *The Israeli Constitution*, 79-80.

<sup>128</sup> Lane, *Constitutions and Political Theory*, 143-144.

<sup>129</sup> Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany*, 56-57, 69.

deficiencies in the initial ratification of the *Grundgesetz* and ensuring key democratic features would continue.<sup>130</sup> In the case of Article 23, the Federal Constitutional Court simply held that the GDR is recognized as “other parts of Germany” necessary for inclusion under Article 23.<sup>131</sup> As unification continues, there are noticeable underlying beliefs that Article 146 presents a transparent process of unification, bringing concerns that unification under Article 23 is an annexation as the GDR’s legal and financial character must assimilate to the Federal Republic’s systems.<sup>132</sup> The later amendments adopted by the Federal Republic recognized the accomplishment of unification but left the door open to write a new constitution through Article 146.<sup>133</sup> The amendment essentially changed Article 146 into an ideological clause rather than a codified mechanical process reducing its authority.<sup>134</sup> Despite the underlying customary legal problems in German unification, the Federal Constitutional Court never took any other approaches to tend to the GDR’s differences or remedy the difficulties of unification.

Moreover, looking at how legal precedents became effective in the GDR, it is clear that the *Grundgesetz* overrules the precedents and customary understandings in the region on issues such as abortion.<sup>135</sup> The judiciary never considered the effects of the process or their ruling on the constitutional legitimacy from a Customary or Common Law perspective; instead, it simply abandons that to be remedied by accepting the civil statute. There are features of Customary law and Common Law present in the general populace. However, the court rejected these

---

<sup>130</sup> Quint, *Constitutional Law of German Unification*, 509.

<sup>131</sup> Quint, *Constitutional Law of German Unification*, 511.

<sup>132</sup> Schweitzer, *Politics and Government in Germany 1944-1994*, 85; Quint, *Constitutional Law of German Unification*, 509-510.

<sup>133</sup> Quint, *Constitutional Law of German Unification*, 514.

<sup>134</sup> Quint, *Constitutional Law of German Unification*, 514.

<sup>135</sup> Quint, *Constitutional Law of German Unification*, 565-570.



perspectives from being included within the constitutional framework, creating rigidity between how the laws *should* interact and the realities of the German system.

Israel's constitutional framework openly relies on multiple legal systems due to the different groups which have come to impact the legal culture of the region. The reluctance to call the Basic Laws a constitution itself due to the desire to continue developing a Hebrew legal structure demonstrates the reliance on religious law.<sup>136</sup> Religious law impacts more processes within the Knesset, as it has become increasingly removed from the judiciary's interpretation of legal doctrine, relying more explicitly on the court's precedents and the implied meaning of the text.<sup>137</sup> The SCI also recognizes customary understandings of international law to inform what is a sufficient constitutional foundation citing cases from within Israel, Australia, the U.S., the U.K, Germany, India, Canada, and internationally.<sup>138</sup> The *Bank Mizrahi* ruling itself shows no evidence in the Basic Law from a Civil Law approach; this ruling shows the dominance of Common Law in Israel.<sup>139</sup> The reasoning of the SCI's opinion is only supported by Common Law precedent and interpretation based on the customary understandings of the Knesset's constituent authority.<sup>140</sup> The SCI has flexibility in determining different legal aspects of constitutional validity, including the act of amendment itself, as the SCI protects "constitutional continuity."<sup>141</sup>

While not one of our core test cases, ignoring the U.S. constitution's possible objection to this mechanism is impossible. The U.S. legal system has been described classically as a hybrid

---

<sup>136</sup> Mautner, *Law & The Culture of Israel*, 32-53; Navot, *Constitutional Law of Israel*, 20-21.

<sup>137</sup> Navot, *Constitutional Law of Israel*, 310-311 ; Sapir, *The Israeli Constitution*, 37.

<sup>138</sup> HCJ 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) (Isr.)

<sup>139</sup> HCJ 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) (Isr.)

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

Civil Law and Common Law system. This hybrid system is due to the drafter's inheritance of English Common Law practices, like Israel's history, and the desire to continue Roman legal traditions, like Germany.<sup>142</sup> The idea of *stare decisis* represents the binding nature of SCOTUS' precedent, but currently, there is a solid effort to undermine this Common Law feature in the U.S. system.<sup>143</sup> It focuses on originalist jurisprudence and reliance on the text that former justice Antonin Scalia championed.<sup>144</sup> Other effects present are the revolutionary change in the U.S. legal education system, from learning general legal philosophy to solely focusing on case law and legal codes.<sup>145</sup> Thus, while the U.S. provides a codified constitution, its reliance on Common Law and Civil Law weakens the ability to claim legal systems as a definitive causal mechanism.

Israel and Germany strengthen the assertion that codification emphasizes a Civil Law approach to constitutional decision-making. This Civil Law approach weakens the judiciary's ability to address constitutional questions that arise from related issues. The U.S. weakens this mechanism leaving the findings inconclusive but provides an exciting avenue for future research.

### *Struggles to Recognize Implied and Emerging Constitutional Features*

Israel's critical juncture demonstrates that the judiciary is active in constitutional crafting, allowing flexibility to apply legal rights. Finding that the Basic Law of Human Dignity and Liberty had constitutional validity arose from evidence outside the Basic Laws to determine the function of the Knesset, the Basic Laws, and the role of the entrenchment clause within the basic legal structure.<sup>146</sup> The SCI saw an implied status to what a complete constitution resembles and

---

<sup>142</sup> Friedmann, *Legal Theory*, 516-518.

<sup>143</sup> Barrett, "Originalism and Stare Decisis," 1922-1929; "Stare Decisis." Legal Information Institute.

<sup>144</sup> Barrett, "Originalism and Stare Decisis," 1922-1929..

<sup>145</sup> Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, 117-123, 161, 234, 249 (fn 16).

<sup>146</sup> Sapir, *The Israeli Constitution*, 50-51.

the characteristics required to be considered an entrenchment clause. Implied constitutional powers are not wholly unique to uncodified constitutions as they often appear in consideration of rights-based protections ensured by constitutions. The U.S. has long debated the authority of implied rights arising out of substantive due process case law, frequently referred to in the landmark decision *Griswold v. Connecticut*.<sup>147</sup> In *Griswold*, SCOTUS held that different rights could come together and cast a shadow of implied constitutional protection.<sup>148</sup> Israel relies on the implicit authority of the SCI itself to proclaim the realities of its constitutional protections. The development of implied rights was familiar to the SCI before the 1992 Basic Laws passed.<sup>149</sup> These implied rights took on a status of partial protection or lesser protection than fundamental or constitutional protected but prevented their infringement without reason.<sup>150</sup> In finding these implicit powers, the SCI is still bound to unwritten maxims and customs that govern judicial restraint customarily, for if they overreach, the decision would be seen as illegitimate by the people and damage the state. Thus, we can see that Israel's uncodified constitution allows the judicial branch to take in additional information to determine whether protection or power exists, allowing greater flexibility in the constitution to evolve, matching current generations.

During the unification of Germany, the Federal Constitutional Court only considered whether Article 23 and Article 146 presented a legitimate path toward unification.<sup>151</sup> The court could not consider whether the constitution prescribed a level of intent pointing to the correct method of unification. The sole focus on the text kept the Federal Constitutional Court from examining evidence of floor debates in the Parliamentary council.<sup>152</sup> The court also fails to

---

<sup>147</sup> *Griswold v. Connecticut* 381 U.S. 479 (1965).

<sup>148</sup> *Ibid.*

<sup>149</sup> Sapir, *The Israeli Constitution*, 65.

<sup>150</sup> *Ibid.*

<sup>151</sup> Quint, *Constitutional Law of German Unification*, 508, 511.

<sup>152</sup> Quint, *Constitutional Law of German Unification*, 508-510.

consider the social factors that weigh into the legitimacy of the process. The debate around abortion during unification provides additional context for the restriction of the Federal Constitutional Court, focusing solely on constitutional text and bound to their previous decision.<sup>153</sup> Abortion was legal in the GDR, but the Federal Constitutional Court held that the “state is under a constitutional duty to protect the fetus’s life.”<sup>154</sup> The GDR had a brief grace period before the Federal Constitutional Court’s holding took effect and outlawed abortion, to the dismay of many feminist organizations creating further doubts about the legitimacy of unification under Article 23.<sup>155</sup> The Federal Constitutional Court further revealed that “no constitutional amendment can change the decision of the Constitutional Court on this point.”<sup>156</sup> Codification creates a system of strict reliance on the text. The exact questions presented to the Federal Constitutional Court create an inability to expand on what constitutional unification entails or acknowledge the additional restraints that specific actions place on the GDR. The inability of the *Grundgesetz* to recognize new rights or even for the Federal Constitutional Court to change its opinion reflects enormous rigidity for addressing implied rights and an adherence to “temporal imperialism.”<sup>157</sup>

Thus, we can see that both Germany and Israel strengthen this mechanism. Germany reflects codification creating a strict reliance on the text, preventing its judiciary from changing its ruling so that not even amending the constitution is seen as a viable avenue. Israel demonstrates acknowledging implied rights without even having a formal document of rights and

---

<sup>153</sup> Quint, *Constitutional Law of German Unification*, 565.

<sup>154</sup> Quint, *Constitutional Law of German Unification*, 563.

<sup>155</sup> Quint, *Constitutional Law of German Unification*, 563-565.

<sup>156</sup> Quint, *Constitutional Law of German Unification*, 565.

<sup>157</sup> Varol, “Temporary Constitutions.” 409, 448.

after its development showing how those rights protections can be flexible by giving out different degrees of protection.

## **Conclusion**

### *Summary*

Through our analysis of the critical juncture events in Israel and Germany, all three potential mechanisms survive but with varying degrees of support. The mechanism of codification creating explicit processes that weaken its ability to respond to constitutional uncertainties finds support in both test cases. Germany was unable to recognize the implicit or intended use of Article 146, resulting in rigidity during the unification process and the perception of illegitimate actions by the Federal Republic. Israel provides a substantial foil showing the dominance of the SCI to create implied processes and reform the state's actions. The second mechanism that codification emphasizes Civil Law as the dominant legal system, which prevents the ability of the state to consider different legal perspectives restricts the state from addressing the entirety of constitutional issues. Instead, the state must respond narrowly and rigidly to the constitutional questions that arise before them. The Federal Constitutional Court's inability to consider the Customary law within the GDR creates rigidity in recognizing the effects of lesser legal norms. The SCI relies on external and internal legal systems and perspectives in the *Bank Mizrahi* decision to provide a flexible framework for defining its constitutional components. However, the U.S. provides an exception to this case, significantly weakening the mechanism's viability. Lastly, the mechanism of codification weakening judicial decision-making by excluding non-legal information affects the ability of the state to respond to constitutional anachronisms. The German case presents the issue of abortion within GDR during unification

and an inability to remedy the differences between the two states forcing the GDR region to take on the Federal Constitutional Courts ruling. This ruling cannot be changed through an amendment reflecting a severely rigid structure. On the other hand, Israel acknowledged constitutional protections without having any documentation provided and created flexible tiers of constitutional protections to adapt to the passing of new Basic Laws. Due to the relevant gap in the literature, there were no identifiable rival hypotheses to address.

### *Implications & Further Research*

Overall, the mechanisms are likely to be successful in further studies of a more in-depth qualitative or empirical nature. The explicit restraints of codification bear implications for states looking to amend their constitutions to consider edge cases or provide more malleable processes to adapt to constitutional issues as they occur. The influence of codification in emphasizing a Civil Law system provides implications for the legal changes within the U.S. that would be greatly served by additional study into the complex influences that codification may have on the legal community more generally. Understanding codifications restrictions on considering all case features has implications for states' methods to serve justice. Additional ethical codes and standards for judicial officers in both uncodified and codified constitutions may improve the ability of the state to apply legal statutes and theory consistently.

The most considerable implications are overcoming the Dead Hand problem and studying the stability of constitutions. Accepting unwritten or implied rights into codified constitutions is essential to overcoming the Dead Hand problem's legitimacy issues. The issues present within the Federal Constitutional Court's abortion holding provide significant implications on the ability of the codified constitution to adapt to modern generations and the Federal Constitutional

Court's case law to continue progressing. The questions surrounding German unification provide significant insight into understanding the continuity of a constitution within the lens of constitutional stability. The Articles of Confederation introduces an excellent foil to understanding when a fundamental regime change may result in the type of instability that causes a constitution to end.

Continuing to analyze the effects of codification on constitutional systems will only strengthen our ability to create effective and stable governments. Germany and Israel prove that both types can withstand instability and controversy, but Germany only half-answers the uncertainties which arose. While this is effective, it is concerning that the codified constitution contains more vagueness in times of crisis despite its purpose to bring clarity to the system. Where uncoded systems may seem untamable and confusing, they go beyond the explicit structure and into the normative nature of government. Research into these mechanisms will significantly inform how we may need to adjust our constitutional structures in the coming years and the best mechanism for allowing these changes to come without the instability and chaos often brought by revolutions fueled by constitutional crises.<sup>158</sup>

---

<sup>158</sup> Wolin, "Norm and Form," 77-79.

## Bibliography

Barrett, Amy Coney, “Originalism and Stare Decisis,” *Norte Dame Law Review* Vol 92, 2017, 1921-1944

“Basic Laws.” The Knesset, 2022.

[https://m.knesset.gov.il/en/activity/pages/basiclaws.aspx#:~:text=Basic%20Law%3A%20Human%20Dignity%20and%20Liberty%20\(1992\),his%20being%20a%20free%20person.](https://m.knesset.gov.il/en/activity/pages/basiclaws.aspx#:~:text=Basic%20Law%3A%20Human%20Dignity%20and%20Liberty%20(1992),his%20being%20a%20free%20person.)

Beach, Derek, and Rasmus Brun Pedersen. *Process-Tracing Methods: Foundations and Guidelines*. Ann Arbor, MI: University of Michigan Press, 2013.

Beach, Derek. *How Does It Work? Using Process Tracing Methods to Study Policy Processes - Prof Derek Beach*, MCR Epidemiology Unit. 2020,

<https://www.youtube.com/watch?v=p22Vo8v2OP4>.

Böckenförde, Ernst-Wolfgang, Künkler Mirjam, Tine Stein, Thomas Dunlap, and Böckenförde Ernst-Wolfgang. *Constitutional and Political Theory: Selected Writings*. Oxford: Oxford University Press, 2017.

Bryce, James. *Constitutions*. New York, NY: Oxford University Press, 1905.

Bunke, Christian and Voßkuhle, H.C., *German Constitutional Law* (Oxford: New York, 2019).

Colley, Linda. “Empires of Writing: Britain, America, and Constitutions, 1776-1848,” *Law and History Review* 32, no. 2 (2014): 237–66.

Foley, Michael. *The Silence of Constitutions Gaps, “Abeyances” and Political Temperament in the Maintenance of Government*. New York: Routledge, 2011.

Friedmann, Wolfgang Gaston. *Legal Theory*. New York, NY: Columbia University Press, 1967.

*Griswold v. Connecticut* 381 U.S. 479 (1965).



Grundgesetz [GG] [Basic Law], translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

H CJ 6821/93 *United Mizrahi Bank v. Migdal Cooperative Village* (1995) (Isr.)

Kelsen, Hans. *General Theory of Law and State*. United Kingdom: Lawbook Exchange, 2009.

Kelsen, Hans. *Pure Theory of Law*. University of California Press, 1967.

Lane, Jan-Erik. *Constitutions and Political Theory*. Great Britain: Manchester University Press, 1996.

Lemco, Jonathan. *Political Stability in Federal Governments*. New York: Praeger, 1991.

Machiavelli, Niccolo, and Max Lerner. *The Prince and the Discourses*. New York, NY: Modern Library, 1950.

*Marbury v. Madison*, 5 U.S. 137 (1803)

Marmor, Andrei. “Are Constitutions Legitimate?” 20 *Canadian Journal of Law and Jurisprudence* (January 2007).

Mautner, Menachem. *Law and the Culture of Israel*. Oxford, NY: Oxford University Press, 2013.

Meyer, Timothy. “Codifying Custom.” *University of Pennsylvania Law Review* 160, no. 4 (2012): 995–1069.

Navot, Suzi. *Constitutional Law of Israel*. Frederick, MD: Kluwer Law International, 2007.

O’Brien, David. *Constitutional Law and Politics*. Vol. 2 New York: W.W. Norton, 2017.

Ott J. (2014) *Trias Politica (Separation of Powers)*. In: Michalos A.C. (eds) *Encyclopedia of Quality of Life and Well-Being Research*. Springer, Dordrecht. [https://doi.org/10.1007/978-94-007-0753-5\\_3064](https://doi.org/10.1007/978-94-007-0753-5_3064)

Paine, Thomas. *Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution*. Boston: I. Thomas and E.T. Andrews, 1791.

Parpworth, Neil. *Constitutional and Administrative Law*. New York: Oxford University Press, 2013.

Perlikowski, Łukasz. "How Does One Understand the Stability of Political Regimes from a Theoretical Point of View?" *Politeja*, no. 63 (2019): 111–23.

Quint, Peter E., *The Constitutional Law of German Unification*, 50 *Md. L. Rev.* 475 (1991)

Sapir, Gideon. *The Israeli Constitution: From Evolution to Revolution*. New York, NY: Oxford University Press, 2018.

Schweitzer, Carl Christoph. *Politics and Government in Germany, 1944-1994: Basic Documents*. Providence: Berghahn Books, 1995.

Shigong, Jiang. "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China." *Modern China* 36, no. 1 (2010): 12–46.

Sirota, Leonid. "Purposivism, Textualism, and Originalism in Recent Cases on Charter Interpretation." *Queen's law journal* 47, no. 1 (2021): 78-111.

"Stare Decisis." Legal Information Institute. Cornell Law School. Accessed March 14, 2022. [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis).

Strauss, Gerald. "Reception: The New Law in Germany." In *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany*, 56–95. Princeton University Press, 1986. <http://www.jstor.org/stable/j.ctt7zvqw8.7>.

Stevens, Robert Bocking. *Law School: Legal Education in America from the 1850s to the 1980s*. Chapel Hill: University of North Carolina Press, 1983.

Tamanaha, Brian, *Legal Pluralism Explained: History, Theory, Consequences* (New York: Oxford University Press, 2021).

Tocqueville, Alexis de. *Democracy in America*. United States: Sever and Francis, 1863.

Tyler, Tom R. *Why People Obey the Law*. New Jersey: Princeton University Press, 2006.

U.S. Const. Art. IV, Art. V., Art. VI § 2.

Varol, Ozan O. “Temporary Constitutions.” *California Law Review* 102, no. 2 (2014): 409–64.

<http://www.jstor.org/stable/23784341>.

Vermeule, Adrian. *Law and the Limits of Reason*. New York: Oxford University Press, 2009.

Virginia, and United States. 1784. *The Articles of Confederation*; Richmond: Printed by Dixon and Holt.

Wolf-Phillips, Leslie. *Constitutions of Modern States: Selected Texts*. London, UNITED KINGDOM: Pall Mall, 1968.

Wolin, Sheldon S. “Norm and Form: The Constitutionalizing of Democracy.” In *Fugitive Democracy*, edited by Nicholas Xenos, 77–99. And Other Essays. Princeton University Press, 2016.

<https://doi.org/10.2307/j.ctv7n0ck0.8>.