

# Platonic Judges: The Judicial Power From Deuteronomy to *Marbury*

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## I. INTRODUCTION

In American constitutional law, some of the Supreme Court’s proudest moments were the exception, not the rule. That is, they were moments of judicial activism—instances where the Court institutes sweeping change to protect individual rights or broader socio-political values.<sup>1</sup> But although *Marbury v. Madison*<sup>2</sup> formalized the province of the judiciary—to say what the law *is*—judicial activism is not the norm.<sup>3</sup> Nevertheless, the Court has become the primary interpreter of the Constitution, exercising its authority to declare laws unconstitutional ever more broadly.<sup>4</sup>

It was in this spirit of departing from the legal

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<sup>1</sup> See Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 MISS. COLLEGE L. REV. 253, 253– 54 (2002) (surveying definitions of judicial activism, including Judge Posner’s: “decisions . . . that expand judicial power over other branches of the national government or state government.”).

<sup>2</sup> See 5 U.S. 137, 177 (1803) (“It is emphatically the province and the duty of the judicial department to say what the law is.”).

<sup>3</sup> See Hellman, *supra* note 1, at 253 (describing judicial behavior labeled “activist” as “pernicious”).

<sup>4</sup> *Id.* See also Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091 (2014) (arguing that declaratory judgments, a relatively new form of judicial remedy, always have unintentionally broad effects).

status quo that the Supreme Court issued its most famous (and arguably most moral) decree: *Brown v. Board of Education*,<sup>5</sup> which invalidated racial segregation in public schools. But despite its successes, judicial activism is also the culprit behind much of the Court's anti-canon, or "the set of cases whose central propositions all legitimate decisions must refute."<sup>6</sup> These include some of the most infamous and controversial moments of American legal history: *Dred Scott v. Sanford* (refusing to extend American citizenship to people of black African descent),<sup>7</sup> *Lochner v. New York* (invalidating a law protecting immigrant laborers based on freedom of contract),<sup>8</sup> and *Roe v. Wade* (recognizing the constitutional right to privacy as extending to abortion),<sup>9</sup> for example. As a result, despite attempts to create a coherent framework for the constitutionally permissible role of activist courts,<sup>10</sup> judicial activism remains the subject of intense criticism by those who believe that an Article III "case or controversy" limits the Court to the settlement of private disputes.<sup>11</sup>

This tension undergirds debates about the appropriate role of the courts in our democratic republic. Whereas some believe in a private rights model of adjudication,<sup>12</sup> where judicial review is limited to ordinary

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<sup>5</sup> 347 U.S. 483 (1954). *Judicial Activism*, LII (2025), [https://www.law.cornell.edu/wex/judicial\\_activism](https://www.law.cornell.edu/wex/judicial_activism) [<https://perma.cc/6VKU-B74N>] (last visited Nov. 29, 2025) (describing *Brown v. Board* as a "famously positive example of judicial activism").

<sup>6</sup> Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

<sup>7</sup> 60 U.S. 393 (1856).

<sup>8</sup> 198 U.S. 45 (1905).

<sup>9</sup> 410 U.S. 113 (1973).

<sup>10</sup> See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (Harvard University Press 1980) (arguing that case-bound interpretivism is impossible, advocating for the persistence of the *Carolene Products* Footnote 4 framework and contending that positivism, interpretivism, and natural law all grapple with the appropriate roles of both activism and judicial restraint).

<sup>11</sup> See Hellman, *supra* note 1, at 257 (citing Prof. Nelson Lund, Geo. Mason) ("By judicial activism, I simply mean the practice of judges substituting their own policy views for the law.").

<sup>12</sup> RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–75 (7th ed. 2015).

litigation between private parties,<sup>13</sup> others subscribe to a public rights or declaratory model,<sup>14</sup> which also recognizes a judicial responsibility to declare and explicate public values.<sup>15</sup> The tension between these models is not unique to American law, though. In fact, ancient societies likewise grappled with how to balance authority over private adjudication and broad public rights.<sup>16</sup> In the cuneiform tradition, for example, kings established widespread legitimacy by declaring their laws as judicial precedents, relying on local councils to adjudicate private disputes.<sup>17</sup> But as governments centralized, the declaratory function of judicial power was increasingly siloed from other government functions.<sup>18</sup> Ancient Egyptian courts adopted a system that ensured new laws aligned with higher-order principles;<sup>19</sup> ancient Israelites channeled judicial power into both traditional and priestly

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<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.*

<sup>16</sup> *See infra* Part II. To be clear, I do not necessarily mean public rights in the traditional American law sense (that is, the subject of the private/public law distinction, in which rights requiring challenge to the government are “public” and rights that are challenged against other individuals are “private”). Instead, I will use “public rights” to indicate the *breadth* of a relevant judgment. For an overview of the public/private distinction, *see* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

<sup>17</sup> *See infra* Part I.

<sup>18</sup> *See infra* Part II.

<sup>19</sup> *See* Brian Muhs, *Egyptian Legal Texts*, in THE OXFORD ENCYCLOPEDIA OF BIBLE AND LAW 1:253–61 (eds. Brent A. Strawn et. al.; Oxford: Oxford University Press, 2015) (“For the most part, however, the management of the central judicial administration fell to the vizier, the highest official under the king. Petitions could be directed to the vizier, and the vizier could hear and decide such cases himself; he could refer them to a high court of which he was usually a member; or he could refer them to a local court.”); *see also* Russ VerSteeg, *Ancient Egyptian Concepts of Justice & Jurisprudence*, in LAW IN ANCIENT EGYPT (Carolina Academic 2002) (“Judges were considered ‘priests of Ma’at,’ and some wore a small figure of the goddess as a pendant around their necks to symbolize their judicial office. To the ancient Egyptians, the concept ma’at was a central overriding principle in law.”).

circuits;<sup>20</sup> and ancient Athens saw an early species of judicial review, with direct democracy determining the constitutionality of challenged laws.<sup>21</sup>

As American constitutional law increasingly relies upon the contours of English common law, history, and tradition to determine the original meaning of the Constitution's ratified text, these historical practices are increasingly relevant.<sup>22</sup> And yet, legal historical inquiries usually stop with England. As a result, the relationship between Near Eastern legal traditions and the American Constitution is undertheorized in scholarship. But that neglect is unwarranted: the legal corpus in Deuteronomy provides one of the first recognized "political constitutions," replete with insight into the proper role of a well-functioning judiciary.<sup>23</sup> Even more, Deuteronomic legists interpreting the Pentateuch—Israel's original legal foundation—grappled with strikingly modern questions about the exercise of judicial power, including the scope of judicial jurisdiction in developing access to centralized justice and the import of extra-cultural legal principles.

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<sup>20</sup> Yigal Levin & Parry Moshe, *Deuteronomy's Justice System: Real and Ideal*, THETORAH.COM,

<https://www.thetorah.com/article/deuteronomys-justice-system-real-and-ideal> [<https://perma.cc/FENK-RUWF>] (last visited Nov. 29, 2025)

("Deuteronomy describes a two-tier court system, with judges and officials (שוטרים) in the lower courts, and Levitical-Priests and judges in the upper court. But this may reflect an ideological system more than the reality of First Temple Period Israel and Judah.").

<sup>21</sup> Adriaan Lanni, *Judicial Review and the Athenian 'Constitution'*, HARV. L. SCH. PUB. L. & LEGAL THEORY (2010) (Working Paper No. 10-21).

<sup>22</sup> Darrell A.H. Miller, Second Amendment Traditionalism and Desuetude, 14 GEO. J. L. & PUB. POL'Y, 223–31 (2016).

<sup>23</sup> Bernard M. Levinson, *The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy*, 27 CARDOZO L. REV. 1853, 1888 (2006).

And while there is substantial debate as to the appropriate legal force of Deuteronomic law,<sup>24</sup> the evolution of the Jewish constitution between Exodus and Deuteronomy maps closely onto the American Constitution's conception of judicial power before and after its ratification (or alternatively, the evolution of the judicial power between ratification and Reconstruction).<sup>25</sup> At ratification, the Constitution's drafters relied on the existing colonial judicial system, shaped by English common law. In doing so, they codified that system, but only insofar as it could be squared with the constitutional text; in other words, the preexisting judicial power continued to exist, but became subordinate to the enacted law. And during Reconstruction, that principle remained supreme as the American courts' role became more broadly declaratory. Although courts began vindicating new classes of rights on a national scale, they only did so under the authority conferred by new amendments to the written Constitution and were thus confined within legislated boundaries.<sup>26</sup>

Similarly, the story of judicial power in Exodus involves a pre-existing judicial system, inherited from Near Eastern culture. But in the Deuteronomic constitution, that same system is portrayed as existing after the Sinaitic revelation of law, making that judicial power subordinate to Yahweh's declarations. And so the backdrop of Near Eastern law informs the development of Deuteronomy's judiciary, just as English common law informed the American one.

This was a familiar practice across Near Eastern history. Indeed, three features of Near Eastern judicial

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<sup>24</sup> See, e.g., Levin & Moshe, *supra* note 20; Brent A. Strawn, *Once Again on Deuteronomic "Constitutionalism": Revision, Amendment, and the Practice(s) of Reading*, in *THE POLITICS OF DEUTERONOMY* 49-78 (2025); BERNARD M. LEVINSON, *LEGAL REVISION AND RELIGIOUS RENEWAL IN ANCIENT ISRAEL* (CAMBRIDGE UNIVERSITY PRESS 2010); KEVIN MATTISON, *REWRITING AND REVISION AS AMENDMENT IN THE LAWS OF DEUTERONOMY* (Mohr Siebeck 2018).

<sup>25</sup> See generally Strawn, *supra* note 24 (arguing that Deuteronomy is akin to the American Constitution's transformative Reconstruction amendments).

<sup>26</sup> See Fallon, Jr., Manning, Meltzer & Shapiro, *supra* note 12.

power emerge as consistent: (1) each has some kind of private rights adjudication model that exists ex ante to the establishment of a formal judicial system, whether extra-cultural or stemming from natural law; (2) each limits jurisdiction, usually to private disputes—the introduction of public law coincides with centralization and expands judicial protection mostly to higher-order callings; and (3) each establishes qualifications for their judges—as the declaratory function grows, so does the need for professionalization.

Using these commonalities, I seek to establish an ancient understanding of the declaratory function—that is, the authority of the Court to declare what the law *is* for everyone within a given community, as distinguished from only assessing the law as it applies to the parties before it (the private rights function).<sup>27</sup> In doing so, the present essay attempts to ameliorate the gap in Near Eastern legal scholarship by exploring the insights it provides into a constitutional enigma: the nature of Article III judicial power.

This Essay thus pursues three goals: (1) it explores the declaratory role of courts in the biblical and ancient Near Eastern traditions, contending that judicial power exists independently of government systems; (2) demonstrates how the expansion of the judicial declaratory function consistently coincides with centralization, but remains confined by procedure and professionalization; and (3) argues that the trend of American courts issuing increasingly broad declarations of law thus has origins in religious and sacral foundations, analogous the Israelite priesthood. In this pursuit, the Essay argues that judicial activism should necessarily be limited to the protection of democracy—treating America’s “We The People” as a substitute for historical higher-order religious or sacral callings.

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<sup>27</sup> *Id.*

## II. THE BROODING OMNIPRESENCE: THE ORIGINS OF JUDICIAL POWER

Judicial power evades straightforward definition. In the American context, Article III's bare grant of authority has been the source of much legal angst: what exactly does the "judicial power of the United States" entail?<sup>28</sup> What meaningful constraints are embedded in Article III's "case or controversy" requirement and what is the proper role of an independent judiciary in fulfilling its constitutionally-committed functions?<sup>29</sup> These questions underly the procedural doctrines that ultimately come to define the nature of American judicial power: those dictating who has standing to sue (and thereby bring a "case"), defining the jurisdiction of federal courts, and establishing the scope of their authority. To this day, each remains in flux.<sup>30</sup>

And perhaps this is by design: throughout American history, the appropriate scope of judicial authority has ebbed and flowed; the procedural doctrines dictating the judicial power's reach have fluctuated with it.<sup>31</sup> Throughout history, courts (or councils performing the judicial function)<sup>32</sup> have always maintained the power to decide outcomes in private rights cases, defined as suits encompassing "the liability of one individual to another under the law as defined," like property, tort, and contract law.<sup>33</sup> The enduring nature of this authority comports with both historical practice and natural law principles: primitive adjudication requires the quick resolution of

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<sup>28</sup> *Id.*

<sup>29</sup> *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Transunion v. Ramirez*, 594 U.S. 413 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 380 (2016).

<sup>30</sup> The full bounds of Congress's authority to restrict jurisdiction have never been tested. *See* Fallon et al., *supra* note 12. Standing doctrine also continues to evolve. *See id.*

<sup>31</sup> *See id.* (describing the growth of the declaratory function as more national rights were recognized).

<sup>32</sup> *See infra* Part I.

<sup>33</sup> John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III*, 108 VA. L. REV. 1547, 1547 (2022).

disputes between private parties to provide stability, upon which mature law can build.<sup>34</sup>

But as government systems mature, the concept of “justice” facilitated by court systems expands. Courts begin enacting sweeping judgments that broadly affect the entire populace.<sup>35</sup> In American law, this declaratory function is the source of significant tension: in a system where judges are not supposed to impose their personal values onto the law,<sup>36</sup> what is the basis for declarations that broadly impose requirements onto all citizens? The idea that judges had special access to principles of justice was denounced early in American jurisprudence. Oliver Wendell Holmes famously criticized the idea that law was a “brooding omnipresence in the sky” in his *Southern Pacific Co. v. Jensen* dissent, critiquing judges that acted as “mouthpieces of the infinite” capable of divining legal meaning without reference to positive law.<sup>37</sup>

Despite this commitment to positivism in American legal tradition, which requires that courts judge only through the application of enacted law, American courts do engage in legal reasoning that is not beholden to a sovereign.<sup>38</sup> In fact, the American judicial tradition predated its Constitution, derived from colonial courts

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<sup>34</sup> Aristotle describes this as the ‘corrective justice,’ (cf. distributive justice). Hart defines justice as encompassing both distribution and compensation (‘treat like cases alike and different cases differently’). See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 196 (Oxford University Press 1980).

<sup>35</sup> See, e.g., Bray, *supra* note 4.

<sup>36</sup> “In their adjudication of disputes, judges are supposed to rely on preexisting legal rules and standards, whether or not they would personally endorse them. . . the personal values of judges do not have a special claim to legitimacy.” See Nina Varsave, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 115-16 (2021).

<sup>37</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); cf. Gerard Manley Hopkins, *God’s Grandeur*, POETRY FOUND., <https://www.poetryfoundation.org/poems/44395/gods-grandeur> [<https://perma.cc/8EMB-WQSR>] (last visited October 31, 2025) (“Because the Holy Ghost over the bent World broods with warm breast and with ah! bright wings.”).

<sup>38</sup> Danielle D’Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 928 (2023).

exercising English common law.<sup>39</sup> And within English jurisprudence, William Blackstone—author of what was arguably the most influential treatise on the laws of England—conceived of judges as “the living oracles” of the law.<sup>40</sup> Legist Thurman Arnold later reaffirmed a similar sentiment, lending credence to the idea of judges as a secular analogue to officials with moral authority, arguing that “[t]he success of the law as a unifying force depends on making emotionally significant the idea of a government of law which is rational and scientific.”<sup>41</sup>

So while the idea that judicial power derives from natural law is controversial,<sup>42</sup> the concept of judges as a secular analogue to moral authorities is not entirely novel. Indeed, natural law principles may help illuminate aspects of the judicial function that persist across time and culture. In his book *Natural Law and Natural Rights*, John Finnis argues that “judges unconscious of the limits of a methodology which suffices for normal times will respond inadequately to abnormal problems.”<sup>43</sup> Accordingly, he contends that constitutions will often “be quite silent on” significant questions, including moral judgments, and that judges will necessarily have to exercise their power to adjudicate without access to positive law.<sup>44</sup>

As an example, Finnis challenges Holmes’s idea that “the test of legal principles” comes only from “the bad man’s point of view” using contract law.<sup>45</sup> Despite being a field where private adjudication is widely accepted,

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<sup>39</sup> See *Explanation of Common Law*, LII, [https://www.law.cornell.edu/wex/common\\_law](https://www.law.cornell.edu/wex/common_law) [https://perma.cc/2GYD-WUCB] (last visited October 31, 2025).

<sup>40</sup> See Philip Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196, 1209 (1977) (quoting 1 W. BLACKSTONE, COMMENTARIES \*69).

<sup>41</sup> See THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT 49 (1935).

<sup>42</sup> See William P. Sternberg, *Natural Law in American Jurisprudence*, 13 NOTRE DAME L. REV. 89, 92 (1938) (describing natural law as capable of filling gaps in statutory law); see also Ely, *supra* note 10, at 1 (describing natural law as having “baggage”).

<sup>43</sup> See Finnis, *supra* note 34, at 275.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 322.

contract jurisprudence implicitly imposes moral duties that are not presupposed by legal systems which govern contracts, Finnis contends.<sup>46</sup> The idea that contracts are “meant to be performed” establishes a distinct “moral duty,” which serves as the basis for much of contract law.<sup>47</sup> Thus, he concludes that the idea that rules which govern private rights can be reduced to casuistic tests to be abided by the “bad man” provides an incomplete framework by which to understand law.<sup>48</sup>

Instead, the judicial function serves two goals that map onto the private adjudication– declaratory function distinction: stability and broader justice.<sup>49</sup> By deciding cases between private parties, judges provide a system that disincentivizes violent self-help and enables deals.<sup>50</sup> They also provide a mechanism by which broader principles of stability can be enforced, like which side of the road people should drive on.<sup>51</sup> In regard to justice, those existing principles can be overridden in pursuit of “other important components of the common good.”<sup>52</sup>

Given the potential reach of this authority, limits must be drawn. This is a key issue in American law: that is, how to cabin judicial discretion. Foremost, American judges are limited by their subordinacy to the written Constitution.<sup>53</sup> They are also bound by strict procedural

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<sup>46</sup> *Id.* at 323.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 324.

<sup>49</sup> This idea is consistent beyond Natural Law theory. *See* Finnis, *supra* note 34 and accompanying text (describing Aristotle and Hart’s relevant philosophies).

<sup>50</sup> *See* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4 (2014) (describing the pervasiveness of self-help doctrine in law); *see also* Finnis, *supra* note 34, at 323 (describing the foundational principle that deal-making is a moral duty).

<sup>51</sup> *See* Finnis, *supra* note 34, at 324–25.

<sup>52</sup> *Id.* at 288.

<sup>53</sup> *See* Letter From Thomas Jefferson to Wilson Cary Nicholas, 7 (Sept. 7, 1803) (on file with the Nat’l Archives) (“Our peculiar security is in the possession of a written constitution.”).

limitations.<sup>54</sup> But as Finnis points out (and judicial activism demonstrates), there are instances where positive law will provide inadequate guidance to the judge. In such cases, higher order ideals like those referenced by Blackstone would be useful *legal* tools.

To ascertain what those ideals might be in American society, it is helpful to first identify how these two functions—private and declaratory—are exercised in ancient societies.

### III. EXODUS AND THE PRIVATE RIGHTS FUNCTION IN THE NEAR EAST

Across the legal literature of the ancient Near East, the historical narrative demonstrates that the judicial power (1) exists *ex ante* to other formal government, supporting the idea that it functions as natural law; and (2) becomes subordinate to positive law once enacted.

Deuteronomy presents a straightforward example of this evolution in its divergent narrative about the development of the Israelite judicial system.<sup>55</sup> And although the system put forth in Deuteronomy was more of an ideal than the reality of legal administration in ancient Israel,<sup>56</sup> that feature is much like any other constitution, including the American one. The Supreme Court, for example, continues to grapple with how to best

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<sup>54</sup> See, e.g., American pleading standards, jurisdictional restrictions, and statutory obligations like the Federal Rules of Civil Procedure. This idea is also supported by influential American legal philosophy. Hart and Wechsler's Neutrality Principle, for example, relies upon the idea that "courts must be principled in their reasoning." See Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 966 (1994).

<sup>55</sup> Compared to the account in Exodus. See Bernard M. Levinson, *Deuteronomy's Conception of Law as an 'Ideal Type': A Missing Chapter in the History of Constitutional Law*, 65 JUDGE & SOC'Y IN ANTIQUITY 89, 93 (2005) (explaining where the two narratives diverge).

<sup>56</sup> See *id.*; S. Dean McBride, Jr., *Polity of the Covenant People: The Book of Deuteronomy*, 41 INTERPRETATION: J. BIBLE AND THEOLOGY 3, 238 (1987) ("Thus the Deuteronomic polity already exhibits what Plato proposed to us as an ideal.").

give effect to certain ill-defined constitutional principles, deeming some concepts to be “judicially unmanageable” because their ideal implementation is difficult to ascertain.<sup>57</sup> So that a constitution like Deuteronomy embodies an unrealized ideal does not detract from the legal insight it provides.<sup>58</sup>

Scholars largely agree that Deuteronomy was written after Exodus, which provides the original account of the Israelite government’s establishment. As a result, where Deuteronomy differs from Exodus, it arguably presents an intentional departure from the former text, depicting Israelite political institutions as they *ought* to be, rather than how they in-fact were.<sup>59</sup> Although there is debate as to whether these departures are legal amendments or revisions of Exodus,<sup>60</sup> the updated structure in Deuteronomy nevertheless provides insight into an evolving society.

As to the Israelite judicial system, two prominent features change from Exodus to Deuteronomy. First, the judiciary arises at a different point in the government’s development. Whereas in Exodus the judicial system emerged before the revelation at Sinai, where God conferred a legal constitution onto the Israelites,<sup>61</sup> Deuteronomy begins with the revelation and courts are developed later.<sup>62</sup> Interrogating these accounts against

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<sup>57</sup> Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 5 (2006).

<sup>58</sup> *Id.* Compare Rabbi David E. Ostrich, *Making Fences Around the Torah*, BRIT SHALOM STATE COLLEGE (2017) (describing the rabbinic practice of protecting the Torah by abiding by more demanding standards); with Jeanne M. Dennis, *The Constitutional Avoidance Doctrine: Judicial Minimalism*, CONGRESSIONAL RESEARCH SERVICE (Mar. 29, 2022) (describing the judicial canon of constitutional avoidance, which deliberately avoids deciding cases on constitutional grounds so as to protect the Constitution from erroneous application). See also Ishay Rosen-Zvi,

“Mishnah,” in *The Oxford Encyclopedia of Bible and Law* (eds. Brent A. Strawn et. al.; Oxford: Oxford University Press, 2015a), 2:53–66 (describing the Mishnah and its relationship to Leviticus 18:30).

<sup>59</sup> See *supra* note 24.

<sup>60</sup> *Id.*

<sup>61</sup> See Levinson, *supra* note 23, at 1866–68.

<sup>62</sup> *Id.*

the backdrop of Near Eastern history provides insight into what this change might mean about the nature of judicial power and its evolving role in government.

In Exodus, Moses heard disputes among the Israelites as he led them from enslavement in Egypt.<sup>63</sup> So the story goes: “Moses sat as judge for the people, as the people stood about Moses from dawn to dusk.”<sup>64</sup> Because Moses only resolved disputes “between one person and another,” his jurisdiction was functionally limited to private rights cases.<sup>65</sup>

Upon witnessing the overwhelming amount of cases that Moses had to adjudicate,<sup>66</sup> Jethro—Moses’s Midianite father-in-law—suggested that he create lower courts. “Set [trustworthy men] over them as officers of thousands, officers of hundreds, officers of fifties, and officers of tens,” he implored.<sup>67</sup> Moses listened to Jethro’s counsel; he agreed that the judicial power should be shared, both for efficiency’s sake and because concentrating judicial power in the hands of a single individual—especially without enacted law or lower courts to sustain the practice—was not “right.”<sup>68</sup> And so, as Moses led the Israelites out of Egypt, he borrowed from existing Near Eastern tradition by establishing a court system that was modeled after Midianite counsel.<sup>69</sup> In doing so, he provided rule of law for his people during a time of significant instability (as they navigated the wilderness) before there was enacted

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<sup>63</sup> Exodus 18, 13 (New Revised Standard Version).

<sup>64</sup> *Id.*

<sup>65</sup> See Exodus 18, 14–6 (answering his father-in-law “It is because the people come to me... when they have a dispute, they come before me, and I decide between one person and another.”).

<sup>66</sup> See Exodus 18, 18 (“for the task is too heavy for you; you cannot do it alone”).

<sup>67</sup> Exodus 18, 17–22.

<sup>68</sup> *Id.*

<sup>69</sup> See Levinson, *supra* note 23, at 1866. Cf. Bruce Wells, *The Covenant Code and Near Eastern Legal Traditions: A Response to David P. Wright*, 13.1 MAARAV 85 (2006) (arguing that the Covenant Code, which includes parts of Exodus, is not *directly* modeled after the Laws of Hammurabi).

law to apply.<sup>70</sup>

This account mirrors judicial practice throughout the Near East. In the cuneiform tradition, which provides some of the earliest known systems of adjudication, legal codes were introduced with lengthy prologues establishing sovereign authority.<sup>71</sup> These prologues attest to newly crowned Kings' commitments to justice and legitimized their commitments to their respective people.<sup>72</sup> And yet, no system was usually put in place for the judicial administration of the laws that follow—demands for judges and courts fell silent.<sup>73</sup> In the Code of Hammurabi, for example, the prologue details the King's divine appointment and subsequent role as guardian of the people.<sup>74</sup> But no judiciary is formed to facilitate the enforcement of the pronouncements then put forth—instead, the King conceives of his laws as judgments themselves, referring to the code as his “cases, [his] precious cases.”<sup>75</sup> Notably, his power to declare broad precedent in this way was intertwined with the divine

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<sup>70</sup> See TERENCE E. FREITHEM, *Law in the Service of Life: A Dynamic Understanding of Law in Deuteronomy*, in *A GOD SO NEAR: ESSAYS ON OLD TESTAMENT THEOLOGY IN HONOR OF PATRICK D. MILLER* 190–1 (BRENT A. STRAWN & NANCY R. BOWEN EDS., 2003) (“It is of no little import that the wilderness is the context for all Pentateuchal law.”).

<sup>71</sup> See, e.g., Martha T. Roth, “Laws of Hammurabi,” in *Law Collections From Mesopotamia And Asia Minor* (2d ed., Scholars Press 1997), 4–7, 71–72 (“The composition consists of a lengthy prologue, between 275 and 300 law provisions. The prologue stresses the gods’ appointment of Hammurabi as ruler of his people, his role as guardian, and protector of the weak and powerless”).

<sup>72</sup> *Id.*

<sup>73</sup> In Lipit-Ishtar, there seem to be two mentions of courts, which consider evidence about parentage and order divorces. See, e.g., §40(30) (“A married man who has sex with a prostitute, is then ordered by a court not to return to her, but who then divorces his wife and pays her divorce money, cannot marry the prostitute.”) (emphasis added). See also Claus Wilcke, “Laws of Lipit-Ishtar,” in *The Oxford Encyclopedia of Bible and Law* (eds. Brent A. Strawn et. al.; Oxford: Oxford University Press, 2015), 1:508–13.

<sup>74</sup> See Roth, *supra* note 72 and accompanying text.

<sup>75</sup> *Id.*

sanction of his authority as King.<sup>76</sup>

But the King's characterization of his laws as judicial decrees speaks to the earliest ideas behind judicial tradition: in more widely dispersed societies, adjudication—not statutory law—was paramount.<sup>77</sup> To maintain order, it was essential that localities vindicate injustices and settle disputes to create peace and stability.<sup>78</sup> The Hittites, for example, relied mostly on local courts made of local elders to adjudicate disputes.<sup>79</sup> Once it developed regional circuits, those too were presided over by local elders and mayors.<sup>80</sup> As ancient Near East scholar Sophie Démare-Lafont points out, ad hoc justice was generally the practice throughout ancient Mesopotamian history: “while the king was naturally the judge of his subjects, most local officials also had judicial powers as part of their administrative functions; household heads traditionally exercised jurisdiction over domestic dependents; local assemblies rendered verdicts, as did private judges.”<sup>81</sup>

These (most often) informal adjudicators heard cases much like those before Moses. They pertained to family matters, property, contracts, and lower-level crimes, with more serious or more complex crimes reserved to the king's jurisdiction once they took power.<sup>82</sup> And so, the judicial *system* itself was not comprehensively

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<sup>76</sup> See Sophie Démare-Lafont, “Judicial Decision-Making: Judges and Arbitrators,” in *The Oxford Handbook of Cuneiform Culture* (eds. Karen Radner & Eleanor Robinson 2011), 335 (“Hammurabi declared his laws as ‘fair judgments on a centralized stele that depicted an image of Samas presenting divine insignia to the King.’”).

<sup>77</sup> See *id.* at 335 (“Legislative activity, therefore, was secondary in Mesopotamian legal culture: establishing official norms was far less important than correcting injustices.”).

<sup>78</sup> *Id.*

<sup>79</sup> Harry A. Hoffner, “Hittite Laws,” in *The Oxford Encyclopedia of the Bible and Law* (eds. Brent A. Strawn et. al.; Oxford: Oxford University Press, 2015a), 1:380–89.

<sup>80</sup> *Id.*

<sup>81</sup> See Démare-Lafont, *supra* note 78, at 336.

<sup>82</sup> See, e.g., Hofner, *supra* note 1, at 380–89 (“If anyone performs a purification ritual on a person, he shall dispose of the remnants (of the ritual) in the incineration dumps.”). Higher-level crimes were most often reserved for the King.

established in early legal codes, likely because the judicial *power* was already being exercised by elders resolving private disputes within their communities.

Judicial customs endured across administrations in ancient Egypt as well, likewise demonstrating that the judicial power was not contingent upon the government or figure in power. Despite limited evidence after the New Kingdom,<sup>83</sup> scholars agree that the Great Qenbet, or high court of the New Kingdom, “survived at Thebes into that period.”<sup>84</sup> And although it was reformed to some degree, Allam concludes that “we can assume that ordinary local courts must have persisted everywhere too.”<sup>85</sup> Like those in the cuneiform tradition, these local courts were overseen by locally “esteemed inhabitants”<sup>86</sup> and dealt with cases about the fulfilment of contractual obligations, property disputes, bodily injury and lower-grade crimes.<sup>87</sup> From this, it can be inferred that judicial processes and customs like those throughout ancient Near Eastern history were maintained despite the change in the head of state.<sup>88</sup>

So in Exodus, Moses was performing the judicial task as it had existed throughout the Near East: as an elder and leader in the community, he was settling

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<sup>83</sup> See S. Allam, *Egyptian Law Courts in Pharaonic and Hellenistic Times*, 77 THE J. OF EGYPTIAN ARCHAEOLOGY 109, 115 (1991) (“The sources from later periods are nowhere near as extensive as those from the New Kingdom.”).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 110.

<sup>87</sup> See Muhs, *supra* note 19 (“The king and the king’s representatives such as the vizier and other high officials usually dealt with cases involving death, sacrilege, and crimes against the state such as treason and interference with royal revenues. Local or regional courts, by contrast, usually only interpreted and applied property or contract laws.”).

<sup>88</sup> Nick Scott, 7 *Surprising Facts About Law in Ancient Egypt*, THE COLLECTOR (2023), <https://www.thecollector.com/law-ancient-egypt/> [<https://perma.cc/6ZAT-5YEW>].

disputes between citizens.<sup>89</sup> This did depart from contemporary practice in one significant respect, though. In other contexts, judicial decision-making was almost always rendered by *groups* of several judges (unless the case reached the level of the King).<sup>90</sup> But in the Hebrew Bible, Moses exercises this authority despite not being depicted as a king.<sup>91</sup> This tracks the idea that, in exercising the judicial power *ex ante* to enacted law, Moses was both adjudicator of private rights and declarer of ideals. Regardless, the weight of such judicial power was heavy over Moses as he tried to settle every dispute on his own.

But in Deuteronomy, the order of institutions is modified. The revelation at Sinai predates the establishment of the judicial system and Jethro's advice is eliminated; instead, Moses conceives of the judicial system *sua sponte* to implement the newly established law.<sup>92</sup> Biblical scholar Bernard Levinson argues that these changes are a result of deliberate revision by legists to preserve Israel's identity during its primordial development.<sup>93</sup> But it could, too, be an expression of a changed conception of the judicial role. If the Israelite judiciary in Exodus continued to function after the Sinaitic revelation, the judicial power it exercised would change from that point forward. Rather than continuing to exercise the lawmaking power unconstrained by formal

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<sup>89</sup> Eckart Otto, "Book of the Covenant," in *The Oxford Encyclopedia of Bible and Law* (eds. Brent A. Strawn et. al.; Oxford: Oxford University Press, 2015a), 1: 69–77 (describing the types of cases that would be brought, which were much like those elsewhere in the Near East).

<sup>90</sup> See Levinson, *The First Constitution*, *supra* note 23, at 1865–66; see also Démare-Lafont, *supra* note 76, at 352 ("The risk of arbitrariness was balanced by the rules of evidence and by the fact that judges tended to operate in groups.").

<sup>91</sup> See Levinson, *supra* note 55, at 65.

<sup>92</sup> *Id.*; See Deut. 1:9–17.

<sup>93</sup> See *id.* (arguing that the two aspects of the Exodus narrative that could present challenges to interpreters—the foreign origin of the judicial system and its existence before Yahweh conferred the law on Moses—were reconciled in Deuteronomy, thus indicating that it was a deliberate revision).

law (and instead implementing local custom in their judicial decisions), the judicial power would become subordinate to the written “constitution” moving forward, just as Near Eastern court systems were expected to follow a King’s declarations.<sup>94</sup>

Indeed, the supremacy of the enacted law is confirmed in the larger context of Deuteronomy. The “canonical formula” in Deuteronomy emphasizes the written law’s primacy in the system, commanding: “You (pl.) must not add on to the word that I am commanding you (pl.), and you (pl.) must not take away from it.”<sup>95</sup> And if the emphasis in Deuteronomy is that the starting point for all Hebrew law is the text, that is likely because the judicial (and all exercise of legal authority) is subservient to it after the revelation at Sinai.

As such, the account in Exodus, where the judicial power preexists any formal law but is exercised to adjudicate private disputes, is not necessarily disrupted by the revelation of law at Sinai. Instead, the same power would continue to be exercised, but now subject to the written law as a constraint on the use of judicial power. This formulation existed across the Near East: judicial power preexisting the law, at least insofar as the “law” relies on the establishment of formal governance. First, judicial power was consistently exercised at the local level by community elders. Then, once a sovereign was put in place, he could establish centralized laws (or, in Hammurabi’s case, “cases” as judicial precedent) that the existing adjudicatory bodies would follow.<sup>96</sup> By the time Deuteronomy was written, God had made his decree—the courts were no longer operating freely, but instead were constrained by those laws.

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<sup>94</sup> See *supra* note 65.

<sup>95</sup> See Strawn, *supra* note 24, at 19; see also Deut. 4:2, 12:32 (where this command is reiterated).

<sup>96</sup> See Démare-Lafont, *supra* note 76, at 339.

#### IV. DEUTERONOMY AND THE DECLARATORY FUNCTION IN THE NEAR EAST

Thus, acceptance of judicial power and its authority was essential to laying the groundwork for Near Eastern societies, including the ancient Israelites in Exodus. But as governments in the Near East became more centralized, they increasingly *decentralized* power, limiting the authority of the sovereign to declare widely binding judicial precedents.<sup>97</sup> This declaratory function was then reallocated to those exercising judicial power in court systems, most often overseen by professional judges or priests.<sup>98</sup> So the development of mature government systems coincided with broader judicial authority.<sup>99</sup> In this way, the power to make widespread declarations about what is best for a community (beyond the resolution of private disputes) is transferred from the king to the courts or non-judicial bodies assuming the declaratory role. Most often, judges align these broad pronouncements with higher order principles to legitimize their reach, mirroring the cuneiform kings justifying their pronouncements by cabining them with descriptions of their divine authority.<sup>100</sup> To keep pronouncements disciplined to those higher principles,<sup>101</sup> procedure and professionalization become more developed as well.<sup>102</sup>

In the cuneiform tradition, the declaratory function

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<sup>97</sup> See *infra* Part II.

<sup>98</sup> See *infra* Part II.

<sup>99</sup> See *infra* Part III.

<sup>100</sup> See Roth, *supra* note 72.

<sup>101</sup> See Levinson, *supra* note 60, at 54 (“History provides important examples where the judiciary understands its role as being mandated by the law to provide a critical perspective upon the social order, calling for its transformation rather than for the maintenance of the status quo.”).

<sup>102</sup> See *infra* Part III (“For example, the principle of talion (“an ‘eye for an eye’”) represents the standard punishment for physical injury to an individual in biblical law (Exod 20:24; cf. Lev 24:15–22). Later legists broadened that principle’s application so that it might also protect due process. They stipulated that false accusation in court should also be punished “measure for measure”: the perjurer is held liable for whatever punishment his accusation would have inflicted upon the accused (Deut 19:15–21).”); see *id.* at 60.

manifested in the sovereign. Although ancient Mesopotamian kings universally purported to be backed by divine authority,<sup>103</sup> there were no religious courts.<sup>104</sup> Where temples became involved in judicial procedure, it was only because of the nature of the offence (when it related to the temple, e.g.)<sup>105</sup> or because it demanded supra-rational evidence.<sup>106</sup> But still, secular judges alone were vested with the authority to apply the law and apply it to particular cases. At the head of that system was the divinely-sanctioned king.

But only the King could pronounce universal judgments unfettered by procedure. In the Hammurabi Code, for example, the first five provisions pertain to procedural requirements for lower courts to follow.<sup>107</sup> In cuneiform legal codes, order was meaningful: having these laws first established their primacy.<sup>108</sup> As such, courts could only apply the Code's laws and declare outcomes per specific rules.<sup>109</sup> Moreover, where a case required significant moral judgment or exceeded the jurisdiction of existing laws, it would often be assigned to the King's court. The Hittite king, for example, assumed jurisdiction over "offenses serious enough to require the death penalty" and cases that lower courts "regarded as too complex or that had broad implications."<sup>110</sup>

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<sup>103</sup> See Roth, *supra* note 72.

<sup>104</sup> See Démare-Lafont, *supra* note 78, at 337.

<sup>105</sup> See Allam, *supra* note 83.

<sup>106</sup> See Keith A. Stone, "Ordeal," in *The Oxford Encyclopedia of Bible and Law* (eds. Brent A. Strawn et. al.; Oxford: Oxford University Press, 2015a) ("Since trial by ordeal is used in cases in which human forensic knowledge is insufficient, the trustworthiness of the indication relies on the immediate operation of a supernatural element . . . River ordeals are commonly cited in the Mesopotamian law codes, such as in the eighteenth-century B.C.E. Laws of Hammurapi (LH §§2, 132).").

<sup>107</sup> See Levinson, *Deuteronomy's Conception*, *supra* note 60, at 89 ("The importance of procedural law is signaled by the symbolic location assigned it by the draftsmen responsible for the Laws of Hammurabi. . ."); see also Roth, *supra* note 71, at 73.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Hoffner, *supra* note 80.

As governments centralized, this authority to declare the law was increasingly separated from the king and vested elsewhere. In ancient Egypt, priests *did* assume the role of judge, which befitted the broader judicial responsibilities that took root.<sup>111</sup> Viziers, court officials who would record dialogue at trials, were responsible for ensuring not only that the parties' dispute was reconciled per existing law, but also that the law comported with Ma'at.<sup>112</sup> In this way, adjudication went beyond the resolution of private cases: it also served the goddess of harmony, justice, and truth, who represented the broader values of Egyptian society.<sup>113</sup>

As such, the court system was designed to serve a broader declaratory function, ensuring that legal application conformed with Ma'at.<sup>114</sup> But still, Egyptian courts retained some aspects of cuneiform justice.<sup>115</sup> Although they were expected to rely on professional viziers when exercising their broader authority, judges themselves were not professional authorities, but "local dignitaries . . . deemed worthy of rendering justice,"<sup>116</sup> akin to the elder councils of the cuneiform tradition. They abided by a hierarchical system, reserving the final say on Truth (or adherence to Ma'at) to the sovereign.<sup>117</sup> And viziers, scholars believe, were not formal judicial figures but instead administrative officers ensuring judicial

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<sup>111</sup> See Allam, *supra* note 19, at 115.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; see also Versteeg, *supra* note 19, at 19.

<sup>114</sup> See Versteeg, *supra* note 19, at 21.

<sup>115</sup> That the Egyptian judiciary was not a purely declaratory body but instead still rooted in the need for stability is represented by the reorganization of the courts presented in the Edict of Haremheb. See Kurt Pflüger, *The Edict of King Haremhab*, 5 J. OF NEAR EASTERN STUDIES 260, 268 (1946) ("It would... be a mistake to think that Haremhab was impelled by 'humanitarian' motives. It was the necessity of popularizing and thereby stabilizing his regime which induced him to put an end to the unscrupulous exploitation of his weaker subjects[.]").

<sup>116</sup> See *id.* at 265 ("In the Edict of Haremheb, declares that he has 'sought out people – (4, left) – discreet (?), of good character, knowing how to judge thought[.]. I have instructed them, saying: 'Do not associate with other people. Do not take a bribe from another[.]'").

<sup>117</sup> See Versteeg, *supra* note 19, at 21.

compliance with central Egyptian authority.<sup>118</sup> Thus the King remained the ultimate declarer. Despite these similarities, though, these developments represent a trend of courts' evolving authority—from adjudicating private disputes and strict adherence to the sovereign's declarations, to arguably accessing higher-order truth itself.

This broader responsibility was cabined by procedures that limited the scope of courts' jurisdiction more stringently than in past government models. Courts would only gather when necessary, and the nature of cases was usually quite limited: the majority of them continued to deal with the fulfillment of contractual obligations, property, family law and inheritance, and penal matters.<sup>119</sup> The most egregious offenses of this nature could be heard by the Great Qenbet, a higher court which dealt with serious crimes that "exceeded the power" of local councils.<sup>120</sup> This was another example of growing judicial authority: the Great Qenbet's jurisdiction meant that a *court* oversaw the types of cases that ancient cuneiform regimes like the Hittites submitted to a king. Broad-reaching cases were similarly reallocated: rather than going to the King's court, they were the purview of the *temples*, presided over by priests who would consider agricultural, commercial, and public property matters.<sup>121</sup>

In Deuteronomy, *all* judicial authority was independent from the king—not just the declaratory role.<sup>122</sup> And the courts exercised broader authority than Moses's model of private adjudication in Exodus. Instead, Levinson describes the Deuteronomic judges' role as fulfilling the "vocation of ensuring the fullest possible alignment between any given state and the moral law of

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<sup>118</sup> See Allam, *supra* note 84, at 111.

<sup>119</sup> *Id.* at 110.

<sup>120</sup> *Id.* at 111.

<sup>121</sup> *Id.*

<sup>122</sup> See generally Levinson, *supra* note 23 (arguing that Deuteronomy is a first instance of judicial independence).

universal equality.”<sup>123</sup> These judges were responsible for interpreting the law revealed at Sinai, which would then bind the polity.<sup>124</sup>

In alignment with Near Eastern tradition, this broader judicial authority was confined by procedure and practiced by judges with more stringent qualifications than those that heard private rights cases alone.<sup>125</sup> As Levinson points out, judges in Exodus did not require special qualifications by nature of their office. Pragmatism, piety, and moral probity did not require any special training to attain.<sup>126</sup> In contrast, Deuteronomy’s requirements—“men who are wise, discerning, and knowledgeable”—implies a degree of education in the law.<sup>127</sup> Accordingly, ancient Israel reflected background near Eastern developments by relying on more professional judges as the judicial authority expanded its reach and thus warranted formalization. But the declaratory function in ancient Israel wasn’t exercised by judges alone. Indeed, the judicial council was comprised mostly of Levitical priests.<sup>128</sup> So, priests played a prominent role in legal interpretation but, were also responsible for overseeing cultic practices that were central to Israel’s society.<sup>129</sup> Moreover, Deuteronomy envisions a government where God has the ultimate declaratory power (as evidenced by the Sinaitic revelation). In this context, priests serve as intermediaries that facilitate God’s declarations. So, as

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<sup>123</sup> *Id.* at 54. *See also* McBride, *supra* note 56, at 29 (“Again, in 15:1–18 issues of broad social and economic import are addressed, with particular concern to institutionalize restrictions on the practice of debt slavery. Most important of all[,] the preservation of political stability is the judicial system legislated in 16:18–17:13. It needs to be stressed that this system is expressly grounded in the responsibility of the whole society to maintain justice[.]”).

<sup>124</sup> *Id.*

<sup>125</sup> *See* Levinson, *supra* note 18, at 67.

<sup>126</sup> *Id.*

<sup>127</sup> *See* Deut. 1:13.

<sup>128</sup> *See* Levinson, *LEGAL REVISION*, *supra* note 24, at 241.

<sup>129</sup> *See* Gilders, “Priestly Law,” *The Oxford Encyclopedia of Bible and Law* (eds. Brent A. Strawn et al., Oxford: Oxford University Press, 2015a), 2:166–75.

courts adjudicate private disputes, the Deuteronomic declaratory function was, in effect, undertaken by priests, who made the central religious judgments that affected the entire Israelite community. In doing so, priests operated under significant constraints, subject to strict procedures.<sup>130</sup> These ensured that the religious and moral law was not declared without limit; just as courts exercising broader authority were subject to procedural constraints, so too were priests who espoused the broader community vision as “mouthpieces of the infinite.”<sup>131</sup>

This interrelationship between private adjudication by courts and declarations by priestly circuits is further reflected in the Decalogue itself: if conceived as ten commandments, the first five commandments involve laws that facilitate the Israelite congregation’s relationship to God; the last five involve private conduct fit for regulation by courts.<sup>132</sup> Later, the priestly material in Leviticus 19 mirrors the first five commandments—indicating the *priests’* authority over the moral and religious laws revealed at Sinai.<sup>133</sup> As a result, the two authorities—judges and priests—were envisioned to operate in tandem in implementing the “constitution.”<sup>134</sup>

Accordingly, priests had to follow strict rules to effectively declare the law. In Leviticus 13, for example, the Pentateuch provides granular instructions that detail how to determine whether an individual is the host of a skin disease.<sup>135</sup> And while this is not the type of function a judge would play today—making what is in effect a medical diagnosis to contain the spread of contagion—it *is* a form of adjudication (reasoned decision making), which provides an illustration of the priestly declaratory function. Without modern medicine, the community relied on the priesthood to follow these processes and, in doing

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<sup>130</sup> *Id. see, e.g.*, Leviticus 13.

<sup>131</sup> *Swift v. Tyson*, 41 U.S. 1 (1842).

<sup>132</sup> *See* MOSHE WEINFELD, THE DECALOGUE: ITS SIGNIFICANCE, UNIQUENESS, AND PLACE IN ISRAEL’S TRADITION 17–18 (1990).

<sup>133</sup> Leviticus 19.

<sup>134</sup> *See* Levin & Moshe, *supra* note 20.

<sup>135</sup> Leviticus 13.

so, determine what is best for the community insofar as avoiding the spread of disease. It is thus that the priests, only after checking for rising flesh, white hair, white spots, scabs, and raw flesh; holding the patient for the requisite number of days; and meticulously examining the individual as prescribed, declare an individual clean or unclean.<sup>136</sup> Priests' relationship to the ultimate declarer (God) is likewise why Deuteronomic priests oversaw cases that required extrajudicial evidence—such cases exceeded the jurisdiction of legal courts because they required consultation with the law-giver.<sup>137</sup>

This priestly authority within the Deuteronomic polity brings to light an important feature of judicial power: that is, the authority to make moral judgments and decide what is best for a community. In the cuneiform tradition, this aspect of adjudication was inherent to the settlement of disputes.<sup>138</sup> When local councils resolved conflict in small agrarian localities, the byproduct was a limited declaration of what conduct that community would accept. But as governments expanded and centralized, such declarations became more formal to accommodate the broad- sweeping effects they might have—first using priests as judges, and later through cultic ritual by priests in the biblical tradition.

## V. THE PHANTOM LIMB IN AMERICAN JURISPRUDENCE

These frameworks may sound familiar to those practicing American law. While no single official undertook the declaratory judicial function like the Mesopotamian kings did, the American court system and private adjudication predated the Constitution. This was essential to the colonial system, which—like the Israelites fleeing Egypt—required structure in a period of instability. And so they relied on the judicial tradition that they were familiar with: the English common law.<sup>139</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *See supra* 106 and accompanying text.

<sup>138</sup> *Id.*

<sup>139</sup> Cornell Law School, *See supra* note 39.

Like Near Eastern adjudication, English common law involved the resolution of local disputes, with judges exercising significant lawmaking authority in subordination to a centralized authority (the Monarch) and (later) subject to laws enacted by Parliament.<sup>140</sup> Today, state courts in America continue to exercise this same power as it pertains to private rights, subordinate to state law enacted by state legislatures and federal law enacted by Congress.<sup>141</sup>

At Ratification, the Constitution retained the existing practice of English common law in localities (states), mirroring the Near Eastern practice of codifying existing judicial systems.<sup>142</sup> Meanwhile, the federal courts took on a status much like the judiciary as envisioned in Deuteronomy, at a later and more centralized stage of Israel's development, with broad authority over the entire nation. But just as historic governments had to consider which actors would retain authority over religious and moral decrees—the types of judgments that determine what kind of community a society will *be*—federal American law grapples with the same tension while lacking consensus as to the foundation of morality. It is thus that judicial activism faces the criticism it does: why should unelected judges make declarations that impact the entire nation? American judges do not have the

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<sup>140</sup> See Andre D.E. Lewis, Albert Roland Kiralfy, & Mary Ann Glendon, *Common Law*, ENCYCLOPEDIA BRITANNICA (last updated Mar. 3, 2024), <https://www.britannica.com/topic/common-law> (“English common law, evolving since the Middle Ages, is characterized by its basis on judicial decisions and the reports of decided cases rather than legislated codes, highlighting the judges' role in law-making. This system of law became widespread not only in England but also influenced legal systems in the United States and many Commonwealth countries. Its evolution saw the harmonization of local and regional legal practices through the decisions made in royal courts established by the Normans, fostering a common interpretation of laws across England while allowing for local variations.”).

<sup>141</sup> See *Id.*

<sup>142</sup> Toni M. Fine, Excerpt from *American Legal Systems: A Resource and Reference Guide* (Anderson Publishing 1997), <https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page>. (<https://perma.cc/7JGT-5B58>).

religious authority of priests, nor the straightforward consensus about higher ideals in other Near Eastern society. As a result, it has been harder to identify a principled approach to the declaratory role of the American judge.

Nevertheless, this function is embedded within the judicial power itself—that is, to both settle private disputes *and* declare a *telos* for their community. Judicial decision-making embeds some moral judgment, whether or not there is a clear higher-order principle to which it appeals. The most famous footnote in history crystallizes this enduring tension in American law: footnote four in the Supreme Court’s *United States v. Carolene Products*<sup>143</sup> decision lays out one potential framework, adding an additional role to the well-settled functions of the judiciary: the protection of “discrete and insular minorities.”<sup>144</sup> This construction is rooted in the idea that, when the tyranny of the majority takes over, democratic systems are eroded.<sup>145</sup> Thus, the *Carolene Products* framework is arguably grounded in a higher authority—We The People.

Despite this articulation, the appropriate scope of the judiciary’s declaratory authority remains unclear to this day.<sup>146</sup> Some argue that *Carolene Products* framework no longer achieves the ends it set out to address; today, diffuse majority interests often hold less political power than discrete and insular ones and the electorate is under-participatory.<sup>147</sup> But the commitment to democratic ideals remains, as evidenced by the widespread view that judicial restraint is a virtue.<sup>148</sup> In

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<sup>143</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, n.4 (1938).

<sup>144</sup> *Id.*

<sup>145</sup> *See Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See, e.g.*, David A. Strauss, *Is Carolene Products Obsolete?*, 2010 UNIV. OF ILL. L. REV. 1251 (2010). About half to two-thirds of the voting population participates in elections each year. *See Voter Turnout 2018–2022*, PEW RESEARCH CENTER, <https://www.pewresearch.org/politics/2023/07/12/voter-turnout-2018-2022/>.

<sup>148</sup> *See Ely, supra* note 10.

any event, such restraint ensures that the awesome power of the declaratory function is used sparingly—relying on the *electorate* to make moral judgments for the American community.

While “We The People” may not be a perfect proxy for a divine authority, it cabins judicial power where it cannot be entirely divorced from its moral function. Legal normativity is a kind of religiosity.<sup>149</sup> And as a result, though the judiciary may no longer be tied to its religious roots, it remains sacred in American culture. Parties still swear on holy texts; judges wear robes and follow courtroom rituals; and judicial independence remains essential to the judiciary’s function. So although the judicial function has changed, it has also remained the same—it declares the common good for the community, with judges serving as protectors of community ideals, subservient to something of a higher order.<sup>150</sup> It is thus that judges should adhere strictly to procedure that facilitate the ideals of democracy, just as the priests did in fulfilling their sacred duty to communicated judgments with *their* declarer—Yahweh.

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<sup>149</sup> See HAROLD BERMAN, *THE INTERACTION OF LAW AND RELIGION* 6 (Abingdon Press 1974) (“Law has to be believed in, or it will not work.”).

<sup>150</sup> See *generally* RAFAEL DOMINGO, *GOD AND THE SECULAR LEGAL SYSTEM* (Cambridge University 2016) (for a theory of how these political ideals can be reconciled with religious ideals in a secular manner).

## VI. CONCLUSION

Judicial power has existed since the foundations of society itself: the most ancient legal systems relied primarily on adjudication to create stability and ensure cooperation. And throughout significant alterations in the nature of governance, certain features of the judicial power have persisted until the modern day. As American legal analysis increasingly considers history in determining constitutional requirements, it should consider the broader declaratory role played by American judges in light of its moral–religious origins, perhaps enlightening a centuries–old debate about the appropriate role of the judge.