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Abstract

This Note argues that religion and state cannot be separated in Israel. Part I presents the historical connection between the Jewish nation and the land of Israel and its impact on Israel's legal system. Part I also examines the current legal status of Jewish law in Israel. Part II discusses proposed models for resolving the religion-state conflict in Israel. Part III defends the integration of Jewish law into Israeli law, arguing that incorporating only the national and cultural elements of Judaism into Israeli policy, while ignoring its religious components, is insufficient to sustain the notion of Israel as a Jewish state.

COMPETING VISIONS OF THE JEWISH STATE: PROMOTING AND PROTECTING FREEDOM OF RELIGION IN ISRAEL

*Basheva E. Genut**

INTRODUCTION

As the only democracy in the Middle East[1] and the only Jewish State[2] in the World, Israel is faced with the concomitant task of preserving the unity of the Jewish nation and promoting and

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1. *Testimony Sept. 20, 1995, Richard A. Hellman President Christians' Israel Public Action Campaign, House International Relations Committee*, 103d Cong., 2d. Sess. (Sept. 20, 1995), *available in* WESTLAW, database CONGTMY.

> Israel is the only country in the region of the Middle East which has free and open elections, freedom of the press and freedom of religion, an independent judiciary and a free and open society . . . . This is in contrast to the surrounding nations of the Middle East, whose peoples have continued to suffer from the absence of civil and human rights while their leaders keep a firm grip on power by oppressive and feudal means.

Id.; *Testimony Apr. 25, 1994, Neal M. Sher Executive Director American Israel Public Affairs Committee, House Appropriations Subcommittee on Foreign Operations, Export Financing, and Related Programs*, 103d Cong., 2d. Sess. (Apr. 25, 1994), *available in* WESTLAW, database CONGTMY. "[Israel] is a fellow democracy in a region populated by authoritarian and extremist regimes." *Id.* 138 CONG. REC. E920-02 (daily ed. Apr. 1, 1992) (statement of Hon. Les Aucoin, reading letter written by Larry Gold), *available in* WESTLAW, database CONGTMY. "Israel, as the only democracy in the Middle East, serves as a strong bulwark of freedom against this tide [Islamic Fundamentalism] . . . ." *Id.* 138 CONG. REC. E1986-04 (daily ed. June 25, 1992) (statement of Hon. Edward J. Markey), *available in* WESTLAW, database CONGTMY. "In the Middle East millions of people live without suffrage, without civil liberties, without human rights. In this parched region, democracy can barely take hold — never mind survive and prosper — except in one oasis. That oasis for democracy . . . is, of course, Israel." *Id.*

2. Declaration of the Establishment of the State of Israel, 1 Laws of the State of Israel (L.S.I.) 3 (1948) [hereinafter Declaration]. Israel's Declaration of Independence declared Israel as the Jewish state.

> Accordingly, We, Members of the People's Council, Representatives of the Jewish Community of Eretz-Israel and of the Zionist Movement . . . by Virtue of Our National and Historic Right and on the Strength of the Resolution of the United Nations General Assembly, Hereby Declare the Establishment of the State of Israel . . . . This right is the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State.

Id. at 3, 4. The Declaration does not define what it means to be a Jewish state. GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 7 (1993). Israelis have competing conceptions regarding what functioning as a Jewish state entails. *Id.*; *See* Norman L. Cantor, *Religion and State in Israel and the United States*, 8 TEL AVIV U. STUD. L. 185, 203 (1988) (discussing competing conceptions of Israel as Jewish State).

protecting civil rights against government intrusion.[3] Often, Jewish law and individual rights clash and Israel is forced to elevate one above the other.[4] As a relatively young state, Israel is still attempting to precisely define the dimensions of its democratic nature and the parameters of the relationship between the individual and the community within its borders.[5]

In shaping Israeli policy, the Knesset,[6] Israel's legislature, and the Supreme Court of Israel have looked to older, more established democracies for guidance.[7] Israel has emulated U.S., English, and European legal principles and adopted them as its own.[8] Despite such influence, Israel's unique geography,[9] na-

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3. *See* Declaration, 1 L.S.I. at 3, 4 (Isr.) (guaranteeing that Israel is Jewish State and that freedom of religion will be protected).

4. *See* Rabbinic Courts Jurisdiction (Marriage and Divorce) Law, art. 1, 7 L.S.I. 139 (1953) (Isr.) [hereinafter Marriage and Divorce Law] (declaring application of Jewish law to marriages and divorces of Jews in Israel). Jewish law governing marriage and divorce is viewed as restrictive and forcing its application on all Jews, regardless of their individual beliefs, is considered coercive by some Israeli citizens. Shimon Shetreet, *Freedom of Religion and Freedom From Religion: A Dialogue*, 4 ISR. Y.B. ON HUM. RTS. 194, 211 (1974).

5. *See* JACOBSOHN, *supra* note 2, at 18-54 (analyzing Israeli pluralism).

6. SAMUEL SAGER, THE PARLIAMENTARY SYSTEM OF ISRAEL 1 (1985). The Knesset, translated as "assembly," is Israel's legislative body. *Id.*

7. *See* Aharon Barak, *Freedom of Speech in Israel: The Impact of the American Constitution*, 8 TEL AVIV U. STUD. L. 241, 243, 248 (1988) (discussing examples of Supreme Court of Israel utilizing U.S. cases, articles, and books). *See also* DAPHNA SHARFMAN, LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL 44 (1993) (quoting Y.S. Shapira, member of political party Mapai, regarding English influence on Israel's legal system). Shapira stated that:

> I think the fact that the vast majority received their political education as a whole or in part under the British mandatory government had a great influence . . . it is possible that if England had been different, let's say if it would have been like France or Germany, a constitution would have been considered indispensable for independence.

Id.; Amos Shapira, *Why Israel Has No Constitution*, 37 ST. LOUIS U. L.J. 283, 285 (1993) (discussing Israel's inheritance of English legal tradition).

8. *See, e.g.*, H.C. 65/51 Jabotinsky and Kook v. Weizmann, 5 Piskei Din (P.D.) 801, *translated in* 1 Selected Judgments of the State of Israel (S.J.) 75 (1951) (Isr.) (citing one English case and nine U.S. cases); H.C. 73/53 Kol Ha'am v. Minister of Interior, 7 P.D. 871, *translated in* 1 S.J. 90 (1953) (Isr.) (citing eight English cases and nine U.S. cases); H.C. 69/81 Bassil Abu Aita, et al. v. Regional commander of Judea and Samaria, 37(2) P.D. 197, *translated in* 7 S.J. 1 (1981) (Isr.) (citing five English cases, one Italian case, and two U.S. cases); H.C. 153/83 Levi v. Southern District Police Commander, 38(2) P.D. 393, *translated in* 7 S.J. 109 (1983) (Isr.) (citing three English cases, one Irish case, and nine U.S. cases); H.C. 428/86 Barzilai, Adv. v. Government of Israel, *translated in* 6 S.J. 1 (1986) (Isr.) (citing eight English cases and thirteen U.S. cases).

9. LEONARD J. FEIN, POLITICS IN ISRAEL 1 (1967). Israel is a small country consisting

tional and political experience,[10] and culture[11] distinguish it from other democracies.[12] The laws of other countries are insufficient, therefore, to address Israel's uncommon situation.[13]

For most of Israel's history, it has been in a constant state of war with its neighbors.[14] Consequently, Israel has channeled its energies primarily to maintaining national security.[15] Although still plagued with terrorist attacks and indiscriminate killing,[16] Israel is now focusing inward, examining the relationship between Jewish and secular law in its legal system and attempting to extend legislative protection to individual rights.[17]

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of approximately 8000 square miles. *Id.* Israel is one-third the size of Lake Michigan. *Id.*

10. *Id.* The roots of Israel's political institutions can be traced to the organization of the Jewish community in Palestine before the establishment of the State of Israel and Jewish law. *Id.*

11. *Id.* Most of Israel's adult citizens were born in other countries and brought diverse elements of other cultures to Israel. *Id.*

12. JACOBSOHN, *supra* note 2, at 10 (quoting interview with Avraham Ravitz *in Israeli Democracy* 23 (1990)). Ravitz, head of the Degel HaTorah religious party, stated in response to a proposed bill of rights that:

> In my opinion, the current version of the human rights bill imitates the bill of rights of those civilized nations-that club to which we like to flatter ourselves as belonging. But it is no secret that we are different from other nations of the world; we have defined Israel as a Jewish state . . . . This is made quite explicit in no less than the country's Proclamation of Independence.

Id.

13. *See* Barak, *supra* note 7 at 241-44, 247, 248 (contrasting U.S. and Israeli governmental structures and explaining limitations of U.S. experience to Israel).

14. *See* CHARLES D. SMITH, PALESTINE AND THE ARAB-ISRAELI CONFLICT 146-51, 174-78, 197-205, 227-31, 267-71 (1988) (outlining five Israeli wars: War of Independence, 1948, Suez Crisis, 1956, Six Day War, 1967, Yom Kippur War, 1973, and War in Lebanon, 1981-82); *see also* DON PERETZ, INTIFADA: THE PALESTINIAN UPRISING (1990) (discussing Palestinian uprising).

15. YEHOSHAFAT HARKABI, ISRAEL'S FATEFUL HOUR 1 (1988). "[T]he Arab-Israeli conflict is the dominant issue of Israeli life. It casts its shadow on almost all our activities-our politics, social relations, economic development, and military deployment. As such, it determines our present and our future — as individuals and as a nation." *Id.*

16. Leslie Susser, *Is Peace Beyond His Reach?*, JERUSALEM REP., Apr. 4, 1996, at 14. Commencing on February 25, 1996, Islamic militant terrorists launched four suicide bomb attacks in Israel, murdering over sixty people in only nine days. *Id.*

17. Ruth Gavison, *The Controversy over Israel's Bill of Rights*, 15 ISR. Y.B. ON HUM. RTS. 113 (1985). Israel lacks both a written constitution and an entrenched bill of rights. *Id.* Recent efforts to extend legislative protection to civil rights in Israel have escalated. *See generally* Amos Shapira, *A Proposal for Constitutional Judicial Review in Israel*, II TEL AVIV U. STUD. L. 123 (1992) (discussing Tel Aviv University professors' draft of constitution for Israel); David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?*, 26 ISR. L. REV. 238 (1992) (discussing first Basic Laws enacted which address human rights).

Public debate regarding the role that Judaism should play in the State of Israel began even before its establishment.[18] With the establishment of the State, the debate intensified, as its founders were forced to transform competing ideologies into a national policy on religion-state relations.[19] Rather than formulating a clear policy through a constitution or a bill of rights, the Knesset adopted compromises that permitted it to avoid enacting constitutionally binding laws on religion-state issues.[20] Forty-eight years later, Jewish Israelis remain divided over how to effectively balance Israel's Jewish and democratic character.[21]

This Note argues that religion and state cannot be separated in Israel. Part I presents the historical connection between the Jewish nation and the land of Israel and its impact on Israel's legal system. Part I also examines the current legal status of Jewish law in Israel. Part II discusses proposed models for resolving the religion-state conflict in Israel. Part III defends the integration of Jewish law into Israeli law, arguing that incorporating only the national and cultural elements of Judaism into Israeli policy, while ignoring its religious components, is insufficient to sustain the notion of Israel as a Jewish state.

I. *AN HISTORICAL ACCOUNT OF THE NATION OF ISRAEL AND THE STATE OF ISRAEL*

The nation of Israel and the land of Israel are inseparably connected.[22] Israel's Declaration of Independence,[23] recogniz-

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18. FEIN, *supra* note 9, at 16. Many of Israel's political institutions, including its electoral system of proportional representation, trace their roots to the severe factionalism of the Zionist movement. *Id.*

19. Bernard Susser, *Toward a Constitution for Israel*, 37 ST. LOUIS U. L.J. 939, 940 (1993). In Israel, the dilemma of religion and state impeded the establishment of a Constitution. *Id.*

20. *See* Harari Resolution, 5 Knesset Protocols 1743 (1950) (Isr.) (outlining compromise postponing enactment of constitution).

21. NADAV SAFRAN, ISRAEL: THE EMBATTLED ALLY 200 (1981). A minority of Israelis seek to establish a theocracy in Israel where the State would be governed solely by Jewish law. *Id.* At the other extreme, a minority of Israelis argue for complete separation of religion and state. *Id.* The majority of Israeli citizens fall somewhere in the middle and seek to balance Jewish and democratic values. *Id.*

22. ABRAHAM R. BESDIN, REFLECTIONS OF THE RAV: LESSONS OF JEWISH THOUGHT 120 (1979). Rabbi Joseph B. Soloveitchik writes that:

> Only in this land, our sages say, does the Shekinah [Divine Presence] dwell and only therein does prophecy flourish. This singular attribute of the land is no more rationally explicable than the singularity of the people. These are

ing this connection, begins by proclaiming Eretz Israel[24] as the birthplace of the Jewish people and tracing Jewish struggle throughout history to reestablish the nation in its ancient homeland.[25] The Knesset has incorporated Jewish law into its legal system, adding a new dimension to the historical link between the Jewish nation and its ancient homeland, and producing unique conflicts.[26] Although Israel has incorporated Jewish law as part of its system of governance, Israel is not a theocracy.[27] Rather, religion and state interact, propelling conflicts that challenge both Israel's Jewish and democratic character.[28]

A. *Historical Connection Between Judaism And The Land Of Israel*

God created the nation of Israel through his covenant with Abraham and assigned to it the land of Israel.[29] The Jews reigned in Israel, with only minor periods of interruption,[30]

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the qualities certified by our faith, and history has corroborated the singularity of both people and the land.

Id.

23. Declaration, 1 L.S.I. 3 (1948) (Isr.).

24. SMITH, *supra* note 14, at 1. In Hebrew, Eretz Israel is translated as the Land of Israel and is a term Jews have used, throughout the ages, to refer to the land that their God assigned to them in the Bible. *Id.*

25. Declaration, 1 L.S.I. at 3, 4 (Isr.).

26. *See* CHARLES S. LIEBMAN & ELIEZER DON-YEHIYA, RELIGION AND POLITICS IN ISRAEL 15-28 (1984) (discussing religious symbols, institutions, and legislation supported by Israeli Government); Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, art. 2, 7 L.S.I. 139, 139 (1953) (Isr.). "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law." *Id.*

27. *See* Declaration, 1 L.S.I. at 4 (Isr.) (guaranteeing social and political equality to all citizens regardless of religion, race, or sex).

28. LIEBMAN & DON-YEHIYA, *supra* note 26, at 28, 29.

29. *Genesis* 12:1-7. "Now the Lord said to Avram, Get thee out of thy country, and from thy kindred and from thy father's house, to the land that I will show thee: and I will make thee a great nation, and I will bless thee, and make thy name great . . . . And the Lord appeared to Avram and said, To thy seed I will give this Land." *Id.*

30. H. Tadmor, *The Period of the First Temple, the Babylonian Exile and the Restoration, in* A HISTORY OF THE JEWISH PEOPLE 157 (H.H. Ben-Sasson ed., 1976) [hereinafter Tadmor]. In 586 B.C.E. (before the Common Era), the First Temple was destroyed and the Jews were exiled. *Id.* In 538 B.C.E., almost 70 years later, King Cyrus of Persia granted the Jews permission to return to their land and to rebuild their Temple. *Id.* at 166. The Book of Ezra recounts Cyrus's edict:

> Thus says Cyrus king of Persia, The Lord God of heaven has given me all the kingdoms of the earth; and he has charged me to build Him a house at Jerusalem, which is in Judah. Whoever is among you of all His people, let his God be with him and let him go to Jerusalem which is in Judah, and build the house of the Lord God of Israel.

Ezra 1:2-3.

from approximately 1030 B.C.E. to 70 C.E.[31] The Jews were defeated by the Romans in 70 C.E.[32] and dispersed throughout the Roman Empire.[33] Throughout their long period of exile, Jews were subject to severe persecution.[34] At the close of the nineteenth century, Jewish longing to return to Israel was transformed into a political movement, Zionism.[35] The Zionist movement, realizing its goal, established the State of Israel in 1948.[36]

1. Judaism in Antiquity

That the Jewish state was established in the region now called Israel is not an historical accident, as the nation of Israel and the land of Israel are inexorably linked.[37] The nation of Israel, unlike other nations, did not form itself.[38] God called the nation of Israel into being through his covenant with Abraham, commanding Abraham to travel to the land of Israel, promising that he would make Abraham's descendants a great nation and that Abraham's descendants would inherit the land of Israel.[39] Approximately 400 years later, God covenanted with Abraham's descendants at Mount Sinai and, through Moses, delivered the Torah[40] to the nation of Israel.[41] The Torah is more than a historical account of the nation of Israel or a book of civil and reli-

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31. *See* Tadmor, *supra* note 30, at 91-182 (surveying Jewish rule in Israel during First Temple period, Babylonian exile, and Temple restoration); M. Stern, *The Period of the Second Temple, in* A HISTORY OF THE JEWISH PEOPLE 185, 185-303 (H.H. Ben-Sasson ed., 1976) [hereinafter Stern] (surveying Jewish rule in Israel during Second Temple period).

32. Stern, *supra* note 31, at 303.

33. S. Sifrai, *The Era of the Mishna and the Talmud, in* A HISTORY OF THE JEWISH PEOPLE 307, 307 (H.H. Ben-Sasson ed., 1976) [hereinafter Sifrai].

34. *See* H.H. Ben-Sasson, *The Middle Ages, in* A HISTORY OF THE JEWISH PEOPLE 355, 403 (H.H. Ben-Sasson ed., 1976) [hereinafter Ben-Sasson] (discussing persecution of Jews in Middle Ages); PAUL MENDES-FLOHR & JEHUDA REINHARZ, THE JEW IN THE MODERN WORLD 252-99 (1980) (discussing political and racial anti-Semitism in modern period); *See id.* at 484-523 (discussing Holocaust).

35. FEIN, *supra* note 9, at 12.

36. *See* Declaration, 1 L.S.I. 3 (1948) (Isr.) (proclaiming establishment of State of Israel).

37. *See* BESDIN, *supra* note 22, at 120 (discussing connection between land of Israel and Jewish nation).

38. *See Genesis* 12:1-7, *supra* note 29 (discussing God's covenant with Abraham).

39. *Id.*

40. Torah, *in* THE JERUSALEM BIBLE 1-255 (Harold Fisch ed., 1982). The Torah is the first five books of the Hebrew Bible, the Old Testament. *Id.*

41. *Exodus* 34:27-35

gious laws.[42] The Torah details a way of life for the Jewish nation, encompassing ethical teachings not merely for the individual Jew, but for Jewish society.[43] Adherence to God's covenant is considered the Jewish nation's reason for existence, without the covenant, Jewish existence is a mere delusion.[44]

The Jews reigned in Israel from approximately 1030 B.C.E. until the Babylonians exiled the Jews and destroyed their First Temple in 586 B.C.E.[45] Cyrus, King of Persia, permitted the Jews to return to Israel and rebuild their Temple.[46] Although Cyrus did not grant the Jews complete independence, he permitted the Jewish community to govern with Jewish law.[47] In 70 C.E., after the Romans defeated the Jews and destroyed the Second Temple,[48] the Jews were dispersed throughout the Roman Empire.[49] During the 1813 years of Jewish exile, Jews never ceased to long for their return to Israel.[50]

2. Jewish Exile in the Middle Ages

Jews expressed their attachment to the land of Israel through religious and social customs.[51] For example, the ninth

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42. Arthur Koestler, A Valedictory Message to the Jewish People, *reprinted in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 243-45.

> The Jewish religion is not merely a system of faith and worship, but implies membership of a definite race and potential nation .... To be a good Catholic or Protestant it is enough to accept certain doctrines and moral values which transcend frontiers and nations; to be a good Jew one must profess to belong to a chosen race, which was promised Canaan, suffered various exiles and will return one day to its true home.

Id. at 244.

43. *Id.*; JOSEPH BADI, RELIGION IN ISRAEL TODAY: THE RELATIONSHIP BETWEEN STATE AND RELIGION 13 (1959).

44. *Id.* at 14; Rabbi Abraham Isaac Kook, *Linking Life With God, in* ABRAHAM ISAAC KOOK: THE LIGHTS OF PENITENCE, THE MORAL PRINCIPLES, LIGHTS OF HOLINESS, ESSAYS, LETTERS, AND POEMS 156, 156 (Ben Zion Bosker ed., 1978). "We must attach ourselves to the divine ideals and we must always strive to realize them in life, in thought, in action and in the imagination, in life of the individual and of society, in our deepest and most zealous aspirations. *Id.*

45. Tadmor, *supra* note 30, at 157.

46. *Id.* at 166.

47. *See id.* at 166-71 (discussing Jewish return under Cyrus).

48. Sifrai, *supra* note 33, at 303.

49. *Id.* at 307.

50. Declaration, 1 L.S.I. at 3 (Isr.) "After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom." *Id.*

51. AHARON COHEN, ISRAEL AND THE ARAB WORLD 25 (1970).

day of the month of Av was declared an official Jewish day of mourning, commemorating the destruction of the Temple.[52] Daily prayers resounded with the longing to return to Jerusalem.[53] Jewish attachment to Israel was also expressed by a constant trickle of Jewish immigration, often in the face of extreme danger.[54] Jewish return was propelled by religious motivations and the Jews who settled in Israel during the Middle Ages established religious communities and centers of Jewish learning.[55]

3. Jewish Communities in Europe

In Europe, Jews lived under foreign rule and were subjected to anti-Semitism,[56] expulsion, and often death at the hands of those in power.[57] During their exile, Jews developed distinct streams of thought regarding their individual connections to the Jewish nation and to the land of Israel.[58] The contrasting polit-

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52. *Id.*

53. *Id.*

54. *Id.* In 1211, 300 Rabbis and scholars from France and England settled in Palestine and established synagogues. *Id.* In 1267, Nachmanides (Ramban), the greatest religious authority of the age, migrated from Spain to Jerusalem with a community of followers. *Id.* at 25, 26. In the thirteenth century, several groups of Jews moved to Palestine from Germany. *Id.* After Spain expelled the Jews in 1492, many Jews migrated to Palestine. *Id.* During the sixteenth century, Jewish Kabbalists migrated to Palestine and established a center of Kabbalist thought in Safed. *Id.* Throughout the eighteenth century, Jews migrated to Palestine in larger numbers and began to rebuild cities and found Jewish communities. *Id.*

55. YOSSI BEILIN, ISRAEL: A CONCISE POLITICAL HISTORY 13 (1992). Jews lived mainly in Jerusalem and other holy cities and concentrated solely on religious worship and study. *Id.* They were supported by contributions from wealthy Jews living in the diaspora and were not concerned with establishing a Jewish communal framework. *Id.*

56. WEBSTER'S NEW UNABRIDGED DICTIONARY 83 (Jean L. McKechnie ed., 1983) Anti-Semitism is defined as, "[p]rejudice against the Jews; dislike or fear of Jews and Jewish things." *Id.* Letter from Adolf Hitler to Adolf Gemlich (Sept. 16, 1919), *translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 484. Hitler wrote that:

> Anti-Semitism as a political movement cannot and should not be determined by emotional factors, but rather by the facts . . . . Hence, it follows: Anti-Semitism based purely on emotional grounds will find its ultimate expressions in the form of pogroms. Rational anti-Semitism, however, must pursue a systematic, legal campaign against the Jews, by the revocation of the special privileges they enjoy in contrast to the other foreigners living among us. But the final objective must be the complete removal of the Jews.

Id.

57. *See* S. Ettinger, *The Modern Period*, *in* A HISTORY OF THE JEWISH PEOPLE 727, 730-32, 870-90 (H.H. Ben-Sasson ed., 1976) [hereinafter Ettinger] (discussing anti-Semitism in Europe).

58. *Id.* at 805. In Western and Central Europe, Jewish equality was contingent upon their rejection of Jewish customs. *Id.* Jews seeking emancipation renounced per-

ical and social experiences of Jews in Western and Eastern Europe shaped Jews' relationships to their religion and tradition and propelled conflicting views on Jewish return to Israel.[59]

Western European Jews fought for emancipation arguing that they should be nationalized because they could contribute valuably to society,[60] not because they possessed intrinsic rights as human beings.[61] In their fight for emancipation, Western European Jews sought to relinquish their ties to Israel.[62] They hoped to gain societal acceptance by proving that they were not a separate nation, with divided loyalties, dwelling within the larger nation.[63] In Western Europe, Jews sought to integrate into mainstream society by distinguishing individual membership in the Jewish religion from the idea that the Jews constituted a nation, were loyal to that nation and would prefer to consolidate and reestablish themselves in Israel.[64]

The promise of Jewish emancipation throughout Western Europe stimulated Jewish assimilation.[65] Many countries required assimilation as a pre-requisite to nationalization.[66] Jews

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sonal ties to the land of Israel. *Id.* In Eastern Europe, Jews were severely persecuted and sustained strong religious and communal bonds. SMITH, *supra* note 14, at 27.

59. *See* Ettinger, *supra* note 57, at 777-89 (discussing Jewish communities in Western and Central Europe); *see id.* at 813-24 (discussing Jewish communities in Eastern Europe).

60. MENDES-FLOHR & REINHARZ, *supra* note 34, at 7. The emergence in Western Europe of the centralized state, from the sixteenth to eighteenth centuries, facilitated the development of mercantilism or early capitalism. *Id.* At this time, Jews in Europe had no political power and, therefore, were not perceived as a threat by rulers. *Id.* Rather, they possessed requisite skills to assist rulers in developing national treasuries and economies. *Id.* Jews introduced a novel criterion for determining the legal status of the Jew in Europe, suggesting that they should be nationalized because of their utility. *Id.*

61. *Id.* at 8.

62. John Toland, *Reasons for Naturalizing the Jews in Great Britain and Ireland, reprinted in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 12.

> Another consideration that makes the Jews preferable to several sorts of People, is, their having no Country of their own, to which they might retire, after having got Estates here; or in favor of which, they might trade under the umbrage of our naturalization. . . . [b]ut the Jews having no such Country, to which they are ty'd by inclination or interest as their own, will never likewise enter into any political engagements, which might be prejudicial to ours.

Id.

63. *Id.*

64. *Id.*

65. Ettinger, *supra* note 57, at 807.

66. *See, e.g.*, The French National Assembly, Debate on the Eligibility of Jews for Citizenship, *translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 103 (stating that

seeking emancipation attempted to rid Judaism of traditional laws that set them apart, thereby preventing them from integrating into the non-Jewish world.[67] The first comprehensive reform to Judaism was instituted in Hamburg, Germany in 1817:[68] ancient Hebrew prayers were translated to German, the synagogue service adopted church-like qualities, including organ music that desecrated the Sabbath, and all prayers mentioning the Messiah[69] and Jewish longing to be redeemed from exile and restored to their homeland were omitted.[70] Jewish reform was met with widespread opposition from Orthodox Jewish communities throughout Europe.[71]

At the same time that Western European countries were nationalizing their Jews, Eastern European countries embarked on

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to acquire citizenship, Jews must relinquish national distinctiveness and judicial autonomy); Joseph II, Edict of Tolerance, *translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 34 (declaring that Jews could be useful to State by sending their children to Christian schools); Ettinger, *supra* note 57, at 805 (discussing Hungary's policy denying Jews equal rights while they observed customs setting them apart from their surroundings).

67. MENDES-FLOHR & REINHARZ, *supra* note 34, at 141. *See* ROBERT M. SELTZER, JEWISH PEOPLE, JEWISH THOUGHT: THE JEWISH EXPERIENCE IN HISTORY 580-618 (1980) (discussing Jewish religious reform).

68. The New Israelite Temple Association, Constitution of the Hamburg Temple, *reprinted in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 145.

69. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1130 (Jean L. McKechine ed., 1983). Messiah is defined as, "in Judaism, the promised and expected deliverer of the Jews." *Id.*

> One of Judaism's fondest hopes and most fervent prayers is for the coming of the messiah. The messianic age is humankind's ultimate goal and reward-the time when there will be eternal reward for anyone who has ever lived, and when all the ills and evils that beset the world will be gone, replaced by complete peace and perfection.

RABBI WAYNE DOSICK, LIVING JUDAISM: THE COMPLETE GUIDE TO JEWISH BELIEF, TRADITION, AND PRACTICE 43 (1995). Jewish tradition affirms that the messiah will be a descendant of King David, gain sovereignty over the land of Israel, gather the entire Jewish nation in Israel, restore complete observance of the Torah, and bring peace to the world. RABBI JOSEPH TELUSHKIN, JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE AND ITS HISTORY 545 (1991).

70. MENDES-FLOHR & REINHARZ, *supra* note 34, at 142.

71. *See* The Hamburg Rabbinical Court, These are the Words of the Covenant, *translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 150 (stating that learned men in Germany, Poland, France, Italy, Bohemia, Moravia, and Hungary join to abolish reforms instituted by ignorant individuals unversed in Torah and to reaffirm necessity of Jewish law and Israel); Moses Sofer, A Reply Concerning the Question of Reform, *translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 153 (discussing central role of Jewish law to Jewish survival and condemning reformers.)

a century-long phase of Jewish oppression and forced isolation.[72] Russian authorities forced Jews to live in designated areas[73] and prohibited Jews from participating in Russian society.[74] The isolation and concentration of Eastern European Jewry, however, facilitated the continuity of strong religious and communal bonds.[75] Jews remained committed to Israel and yearned for the day when all Jews could return to their ancient homeland.[76] The earliest stirrings of Zionism[77] were championed mainly by religious Jews from Eastern Europe[78] who were concerned with adherence to Jewish law, particularly the Jewish duty to settle in Israel.[79]

4. The Pre-State Period

During the century preceding the establishment of the State of Israel, Jews espoused distinct ideas regarding Jewish return to the land of Israel and the goals of the Zionist movement.[80] They were united, however, by their rejection of Jewish exile and their common goal of establishing a safe haven for Jews from persecution.[81] Jews emigrated to Palestine and lived under Ottoman,[82]

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72. SMITH, *supra* note 14, at 27.

73. *Id.* In 1790 and 1791, Russia passed laws creating the Pale of Settlement, stipulating that Jews were confined to living in former Polish territories and other areas of Southwest Russia. *Id.*

74. *Id.* Jews were only permitted to integrate into Russian society if they converted to Christianity. *Id.*

75. *Id.* *See* W.F. ABBOUSHI, POLITICAL SYSTEMS OF THE MIDDLE EAST IN THE 20TH CENTURY 212 (1970) (stating that since Jews were exiled from Israel in approximately 63 C.E., they dreamed of returning to what they believed was their promised land).

76. *See* Declaration, 1 L.S.I. at 3 (Isr.) (discussing Jewish longing to return to Israel).

77. Theodor Herzl, *A Solution of the Jewish Question, reprinted in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 422-26. Herzl defined Zionism by stating that:

> I am introducing no new idea; on the contrary, it is a very old one. It is a universal idea — and therein lies its power — old as the people, which never, even in the time of bitterest calamity, ceased to cherish it. This is the restoration of the Jewish State.

Id. at 422.

78. ARTHUR HERTZBERG, THE ZIONIST IDEA 32, 33 (1972). The first theoreticians of Zionism appeared in the 1850's and 1860's. *Id.* at 32. At the time, their work had little influence and was quickly forgotten. *Id.* Zionism reemerged in the 1880's and 1890's. *Id.* at 33.

79. *Id.*

80. *See, e.g.*, Ettinger, *supra* note 57, at 891-938 (discussing contrasting Zionist ideologies); HARKABI, *supra* note 15, at 70-83 (contrasting Mainstream and Revisionist Zionism); SAFRAN, *supra* note 21, at 14-23 (discussing Zionist movement).

81. PAUL JOHNSON, A HISTORY OF THE JEWS 375 (1987).

and then British rule,[83] until they established the Jewish State.[84]

a. Zionist Ideologies

At the close of the nineteenth century, against the background of both Jewish persecution and acceptance, Zionism was transformed from a formless longing to return to Israel into a political movement.[85] The Zionist movement was factionalized,[86] as Zionists debated which political strategies would hasten autonomy, whether political independence should be the movement's primary goal, whether physical settlement should be elevated over political negotiations, and if independence was attained, whether Jewish law should serve as the country's foundation.[87] Despite internal disagreements, Zionists encouraged all Jews to emigrate to Israel, regardless of their individual beliefs.[88] Approximately 385,000 Jews emigrated to Israel, in five waves, from 1881-1939.[89] Each wave of immigration, Aliya,[90] was pro-

82. *See* SMITH, *supra* note 14, at 11-37 (discussing Ottoman rule in Palestine from 1517-1914).

83. *See id.* at 42-135 (discussing British Mandate in Palestine from 1914-48).

84. *See* Declaration, 1 L.S.I. 3 (1948) (Isr.) (establishing State of Israel).

85. FEIN, *supra* note 9, at 12.

86. *See* Ettinger, *supra* note 57, at 891-938 (discussing Zionist ideologies); *see supra* note 80 and accompanying text (discussing competing Zionist ideologies and goals).

87. FEIN, *supra* note 9, at 14.

88. *See* SAFRAN, *supra* note 21, at 22 (discussing Zionists' task of encouraging Jewish immigration to Israel).

89. SMITH, *supra* note 14, at 28. From 1881 until 1884, the first series of attacks, or pogroms, were waged against the Jews of Russia. *Id.* Peasant groups, tolerated and even encouraged by Russian authorities, pillaged Jewish communities, looting, raping, and killing Jews. *Id.* The pogroms shattered any remaining hope of Jewish acceptance in Russia and propelled the first Aliya, a vast emigration movement of approximately 40,000 Jews to Palestine. *Id.* Jewish immigrants of the first Aliya were inspired primarily by religious motives. *Id.*

FEIN, *supra* note 9, at 17-18. During the second Aliya, between 1904 and 1913, approximately 40,000 Jews emigrated to Palestine. *Id.* at 17; Ettinger, *supra* note 57, at 921. The second Aliya was also comprised of Russian Jews, however, their motivations were not purely religious. FEIN, *supra* note 9, at 17. Rather, they had been influenced by socialist ideologies and viewed themselves as heralds of a new socialist order. *Id.*; Ettinger, *supra* note 57, at 921.

Thirty-five thousand Jews emigrated to Palestine during the third Aliya between 1919 and 1922. FEIN, *supra* note 9, at 18. The third Aliya was also comprised mainly of Russian Jews. *Id.* These Jews, however, had strong roots in the Zionist movement before they arrived in Palestine and were better prepared than the Jews of the first and second Aliyot (plural of Aliya) to cope with the harsh conditions they met upon arrival. *Id.* at 19. They opened schools and universities, founded Israel's major labor union, employed new agricultural techniques, and created institutions for communal self government. *Id.* The Jews of the third Aliya were primarily concerned with developing a

pelled by distinct religious, social, and political forces and the Zionists of each Aliya contributed uniquely to the Jewish community in Palestine and to the establishment of the State of Israel.[91]

Theodor Herzl founded political Zionism.[92] As an assimilated, secular Frenchman, he originally advocated Jewish emancipation as the solution to anti-Semitism and Jewish persecution.[93] After witnessing the persistence of anti-Semitism in France, the birthplace of liberalism and Jewish emancipation, Herzl sought to employ a new vehicle to end Jewish suffering.[94] He rejected political assimilation and argued that only Jewish sovereignty could ensure freedom for the Jewish nation.[95] For

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new social order. *Id.* at 20. Although they viewed political independence as necessary, they first sought to create a self reliant community based on cooperative enterprise and voluntarism. *Id.*

The fourth Aliya was comprised of 60,000 Polish, middle class immigrants. *Id.* at 21. The fourth Aliya was triggered by increased anti-Semitism in Poland and by a new, more restrictive immigration policy in the United States. *Id.* By the end of the fourth Aliya only 17% of Palestine's population was Jewish. *Id.* at 22. Zionists were concerned and hoped to stimulate an increase in Jewish immigration. *Id.*

Zionists' concerns were quieted by the 225,000 Jews that returned to Palestine during the fifth Aliya between 1932 and 1939. *Id.* For the fist time, substantial numbers of Jews came from Central Europe. *Id.* Many Jews of the fifth Aliya were professionals and contributed widely to the existing Jewish communities. *Id.* By 1939, Jews comprised 30% of Palestine's population, and were a force to be reckoned with. *Id.* The leadership of the Zionist movement had shifted to Palestine and their demand was clear: the establishment of an independent, Jewish State in Palestine. *Id.*

90. FEIN, *supra* note 9, at 9. In the Jewish tradition, immigration to Israel is called Aliya which literally means to go up or ascend. *Id.*

91. *See id.* at 16-22 (outlining five waves of immigration); Ettinger, *supra* note 57, at 918-38 (discussing implementation of Jewish institutions during waves of Aliya); *supra* note 89 (discussing contributions of Zionist pioneers to Jewish community in Palestine).

92. *See* Declaration, 1 L.S.I. at 3 (Isr.) (referring to Herzl as father of Zionism).

93. Herzl, *supra* note 77, at 423.

94. Ettinger, *supra* note 57, at 898.

95. Herzl, *supra* note 77, at 423. Herzl stated that:

> We have honestly striven everywhere to merge ourselves in the social life of surrounding communities, and to preserve only the faith of our fathers. It has not been permitted to us. In vain we are loyal patriots, in some places our loyalty running to extremes; in vain do we make the same sacrifices of life and property as our fellow-citizens; in vain do we strive to increase the fame of our native land in science and art, or her wealth by trade and commerce. In countries where we have lived for centuries we are still cried down as strangers . . . . We are one people — our enemies have made us one in our despite, as repeatedly happens in history. Distress binds us together, and thus united, we suddenly discover our strength. Yes, we are strong enough to form a state and a model state.

Herzl, the primary goal of the Zionist movement was to establish a Jewish state.[96]

Rabbi Abraham Isaac Kook, leader of religious Zionism,[97] argued that the land of Israel was an integral part of the soul of the Jewish people.[98] Rabbi Kook rejected the notion that Jewish return to Israel should be encouraged on purely nationalistic grounds.[99] He viewed the Zionist movement as a vehicle to promote adherence to the Torah.[100] By aligning the religious community with the Zionists, Rabbi Kook believed that Torah could be infused into the Zionist movement.[101] Religious Zionists worked with secular Zionists before the State of Israel was established and continued to serve as their partner in government after a Jewish state had been secured.[102]

Ahad Ha-am, the leader of cultural Zionism, argued that the primary goal of the nationalist movement should be to revive Jewish spiritual unity.[103] Ahad Ha-am believed that preserving Judaism was the only means of strengthening the Jewish nation and political attempts to establish a state should be subordinated

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Id.

96. NOAH LUCAS, THE MODERN HISTORY OF ISRAEL 71 (1975).

97. Rabbi Zadok Ha-Cohen Rabinowitz, The Zionists are not our Saviors, *translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 432-34. Many religious Jews opposed Zionism, claiming that only God could redeem the Jewish nation and return them to Israel. *Id.* Rabbi Zadok Ha-Cohen argued that Zionist creation of a state, modeled after other states, demeans the Torah and will propel the Jewish nation's destruction. *Id.*

98. Rabbi Abraham Isaac Kook, The Land of Israel, *translated in* HERTZBERG, *supra* note 78, at 419. Rav Kook stated that:

> Eretz Israel is not something apart from the soul of the Jewish people; it is no mere national possession, serving as a means of unifying our people and buttressing its material, or even spiritual, survival. Eretz Israel is part of the very essence of our nationhood; it is bound organically to its very life and inner being.

Id.

99. *Id.*

100. JOHNSON, *supra* note 81, at 547, 548.

101. *Id.* at 548.

102. *Id.*

103. LUCAS, *supra* note 96, at 27. Ahad Ha-am wrote, "We must liberate ourselves from the inner slavery, from the degradation of the spirit caused by assimilation, and we must strengthen our national unity until we become capable and worthy of a future life of honor and freedom. All other aims are still part of ideas and fantasies." Ahad Ha-am, *The First Zionist Congress, translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 430. *See generally* SELECTED ESSAYS OF AHAD HA-AM (Leon Simon ed., 1962) (discussing Ahad Ha-am's approach to theoretical and practical problems of Jewish people).

to the task of creating a spiritual center of Judaism in Israel.[104] Insisting that Jewish survival was contingent upon reversing assimilation, Ahad Ha-am fought vehemently against separating the national and religious elements of Judaism.[105]

Mainstream Zionism mandated that before the Jews could establish a political state in Israel, they had to first build a strong Jewish community and solid economic and social foundations for a Jewish state.[106] Mainstream Zionists sought to create Jewish agrarian and working classes who would labor together to build the Jewish homeland.[107] They viewed the establishment of statehood as a long process of struggle to build Jewish national assets in Israel.[108]

Vladimir Jabotinsky, leader of the Revisionist Zionist movement,[109] argued that to overcome exile and its negative effects on the Jewish nation, Jews must establish a state immediately.[110] Revisionist Zionists claimed that Jews needed to be imbued with the fighting spirit and to reclaim the land that was rightfully theirs.[111] They argued that establishing a state was a pre-requisite to developing economic and social foundations and advocated the use of force as a means of gaining control.[112] Jabotinsky argued that mainstream Zionists were dreamers, lacking the revolutionary thrust that was necessary to establish a state.[113]

b. The Jewish Community in Pre-State Palestine

Unlike their predecessors,[114] the Zionists who emigrated to Palestine during the five Aliyot created a communal framework

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104. *See* Ahad Ha-am, *supra* note 103, at 430-32 (discussing subordination of political objectives to revival of Jewish spiritual unity).

105. Ahad Ha-am, On Nationalism and Religion, *translated in* HERTZBERG, *supra* note 78, at 262. " 'National Religion' — by all means: Judaism is fundamentally national, and all the efforts of the 'Reformers' to separate the Jewish religion from its national element have had no result except to ruin both the nationalism and the religion." *Id.*

106. HARKABI, *supra* note 15, at 71.

107. *Id.*

108. *Id.*

109. *Id.* at 70.

110. Vladimir Jabotinsky, *What the Zionists-Rvisionsists Want, translated in* MENDES-FLOHR & REINHARZ, *supra* note 34, at 462-65. "The first aim of the Zionist movement is establishing a majority on both sides of the Jordan River." *Id.* at 462.

111. HARKABI, *supra* note 15, at 72.

112. *Id.*

113. LUCAS, *supra* note 96, at 73, 74.

114. BEILIN, *supra* note 55, at 13. Early Jewish immigrants were concerned solely

for the growing Jewish community.[115] Under Ottoman rule, from 1517 to 1914,[116] religious minorities, including the Jewish community, were granted judicial autonomy in matters of personal status including: marriage, divorce, family maintenance, and education.[117] This system, termed the millet system, granted religious minorities living within the Ottoman empire the freedom to safeguard their individual religious laws.[118] The Jews of the first two Aliyot, who emigrated to Ottoman controlled Palestine, established religious courts that strictly applied Jewish law.[119] After the First World War, the British Government gained control of what was then Palestine under the mandatory scheme enacted by the League of Nations.[120] The British preserved the millet system in Palestine and religious authorities continued their governance over matters of the personal status of their adherents.[121]

The Jews of the third, fourth, and fifth Aliyot arrived in British controlled Palestine between 1919 and 1939 and were met with hostility from the Arab population.[122] With the increase in Jewish immigration, Jewish-Arab tension mounted and clashes broke out between the two communities.[123] In 1917, the British government issued the Balfour Declaration[124] supporting the es-

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with religious observance, not with building political and social foundations for a Jewish state. *Id.*

115. *See id.* at 16-36 (discussing Zionists' political, social, and agricultural enterprises in pre-state Palestine).

116. *See* SMITH, *supra* note 14, at 11-37 (discussing Ottoman rule in Palestine).

117. Itzhak Englard, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185, 196 (1984).

118. *Id.*

119. *Id.*

120. *See* LEAGUE OF NATIONS COVENANT art. 22 (outlining mandatory scheme). *See also* Terms of the British Mandate for Palestine confirmed by the Council of the League of Nations, LEAGUE OF NATIONS O.J. 1007-12 (1922) (outlining terms of British Mandate over Palestine).

121. The Palestine Order in Council (1922-1947), Paragraph 83, III Laws of Palestine 2569 (1934). The Palestine Order in Council states that:

> All persons in Palestine shall enjoy full liberty of conscience and the free exercise of their forms of worship subject only to the maintenance of public order and morals. Each religious community shall enjoy autonomy for the internal affairs of the community subject to the provisions of any ordinance or order issued by the High Commissioner.

Id.

122. Ettinger, *supra* note 57, at 997.

123. *Id.*

124. The Balfour Declaration (1917), *reprinted in* RUTH LAPIDOTH & MOSHE HIRSCH, THE ARAB-ISRAELI CONFLICT AND ITS RESOLUTION: SELECTED DOCUMENTS 20

tablishment of a homeland for the Jews in Palestine.[125] British statesmen were deeply sympathetic to the Zionist cause because they possessed religious, Christian interests in the land of the Old Testament and were burdened with guilt over Europe's treatment of the Jews.[126] The Balfour Declaration sparked increased Arab hostility toward the Jewish community[127] and the intermittent riots continued.[128]

The British Government appointed a commission to investigate the causes of the riots and to propose policies to ease Jewish-Arab tensions.[129] The Shaw report, published in 1930, identified Zionist immigration and their purchasing of Arab lands as the source of the riots.[130] The British responded by issuing a series of White Papers, limiting Jewish immigration.[131]

World War II had begun and the British sought to resolve the crises in Palestine in a manner favorable to the Arabs, in the hopes of fostering Arab support for continued British rule of Palestine.[132] The British entered World War II with the knowledge that their policies had not only failed to resolve Jewish-Arab tension in Palestine, but also had failed to secure the support of either community for continued British rule.[133] British reversal of their favorable policy towards the Zionists, through the issuance of the White Papers, failed to satisfy the Arabs and outraged the Zionists.[134]

(1992). The Balfour Declaration is a letter written by British Lord Arthur James Balfour addressed to Lord Walter Rothschild, then honorary president of the Zionist Federation of Great Britain and Ireland, declaring that, "His Majesty's government view with favor the establishment in Palestine of a national home for the Jewish People, and will use their best endeavors to facilitate the achievement of this object." *Id.*

125. *Id.*

126. SMITH, *supra* note 14, at 55.

127. *Id.*

128. SMITH, *supra* note 14, at 87, 88. Major riots, for example, broke out between Arabs and Jews in 1928 and 1929 over access to the Western Wall. *Id.* The Western Wall is the last remnant of the Second Temple, the holiest Jewish site to Jews and a focal point of religious and national pride. *Id.* According to the Muslim belief, the area behind the Wall is the third-holiest site, where the Prophet Muhammad ascended to heaven. *Id.* The Wall itself is considered holy because Muhammad tethered his horse to it before his ascent. *Id.*

129. *Id.* at 90.

130. *Id.* *See* SAFRAN, *supra* note 21, at 29 (indicating Arab hostilities were propelled by increase in Jewish immigration).

131. SMITH, *supra* note 14, at 92.

132. *Id.* at 103.

133. *Id.* at 108.

134. *Id.*

In 1941 Adolf Hitler implemented his plan to exterminate the Jewish race.[135] As the massive slaughtering of Jews coincided with British restrictive immigration policies, Zionist leaders facilitated the illegal immigration of thousands of Jews into Palestine.[136] British officials interceded and attempted to transfer illegal refugees to the island of Mauitius in the Indian Ocean.[137] Jews became increasingly bitter at Great Britain's inhumane policies and began to attack British installations.[138]

5. The Establishment of the State of Israel

By the conclusion of World War II, Hitler had succeeded in exterminating two thirds of Europe's Jewish population, approximately six million Jews.[139] Conflicts between the Jews and the British over Jewish immigration continued as did conflicts between the Jews and the Arabs and the Arabs and the British.[140] In February of 1947, the British thrust the Palestine problem into the hands of the United Nations,[141] openly denouncing the Jewish call for statehood.[142]

In June 1947, the U.N. Special Committee on Palestine ("UNSCOP") convened in Jerusalem to discuss recommendations regarding Palestine.[143] The Zionists, interested in presenting a unified front, wanted to prevent a situation where representatives of Jewish Orthodoxy would openly express opposition to the establishment of a Jewish state.[144] On the eve of the Commission's arrival, the Zionists consolidated and passed the Status Quo Agreement, a series of four promises assuring the religious leadership that the principal arrangements regarding religious-state issues that existed prior to independence would be main-

135. Ettinger, *supra* note 57, at 1025, 1027.

136. *Id.* at 1048, 1049.

137. SMITH, *supra* note 14, at 115.

138. *Id.*

139. *Id.* at 112.

140. *See* Ettinger, *supra* note 57, at 1011-14 (discussing Arab revolt against Jews and English); *Id.* at 1044 (discussing Jewish terrorism against British).

141. *Id.* at 1052. British Foreign Secretary Ernest Bevin announced that because the British were unable to resolve the conflicts between the Jewish and Arab populations in Palestine, they decided to refer the problem to the United Nations. *Id.*; *see* SAFRAN, *supra* note 21, at 31 (stating that British deferred Palestine problem to United Nations on April 2, 1947, after failure of Arab-Jewish-British conference).

142. SMITH, *supra* note 14, at 135.

143. Ettinger, *supra* note 57, at 1052.

144. SHARFMAN, *supra* note 7, at 70.

tained if the Jews secured an independent state.[145] Ultimately, the Knesset absorbed British Mandatory legislation regarding personal status into Israeli law.[146]

On November 29, 1947, the United Nations adopted the Partition Resolution,[147] dividing Palestine into two independent states, Jewish and Arab respectively.[148] The Zionists accepted the Partition Resolution.[149] The Arabs, however, rejected partition,[150] refusing to recognize the United Nations' legitimacy in deciding the fate of Palestine.[151] Arab-Jewish clashes increased and six months later, on May 14, 1948, Ben Gurion, Israel's first Prime Minister, proclaimed the establishment of a Jewish state.[152] The next day, five Arab countries simultaneously invaded Israel.[153]

The State of Israel was established through the labor of all Zionists, regardless of the ideologies propelling their respective struggles.[154] The realization of their collective goal, however, did not resolve the movement's internal conflicts over religion-state issues.[155] In fact, the establishment of a Jewish state heightened their differences as they were faced with the immediate

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145. LIEBMAN & DON-YEHIYA, *supra* note 26, at 32. The Status Quo Agreement provided that:

> (1) Saturday would be set aside as a national day of rest, (2) dietary laws (Kashrut) would be observed in all kitchens under government auspices, (3) religious courts would maintain exclusive jurisdiction over marriage and divorce laws and (4) the existing autonomous religious educational systems would be recognized by the future state.

Id.

146. The Law and Administration Ordinance art. 11, 1 L.S.I. 7, 9 (1948) (Isr.).

147. *On the Future Government of Palestine [the "Partition Resolution"]*, G.A. Res. 133, U.N. Doc. A/519, at 131-51 (1947).

148. *Id.*

149. *The Acceptance of the Above Resolution by the Representatives of the Jewish Community in Palestine*, U.N. GAOR, 2d Sess., Ad hoc Comm. on Palestine Question, U.N. Doc. A/364, at 12-19 (1947).

150. *The Rejection of the Above Resolution by the Arab States and the Higher Arab Committee*, U.N. GAOR, 2d Sess., Ad hoc Comm. on Palestine Question, U.N. Doc. A/364, at 5-11 (1947).

151. *Id.*

152. Declaration, 1 L.S.I. 3 (1948) (Isr.).

153. Ettinger, *supra* note 57, at 1058.

154. *See, e.g.*, SAGER, *supra* note 6, at 1-21 (discussing Zionist contributions to State of Israel); BEILIN, *supra* note 55, at 16-36 (discussing Zionist enterprises in pre-state Palestine); FEIN, *supra* note 9, at 15-16 (stating that Israel owes not only its establishment, but also foundation of many of its institutions to Zionist Organization).

155. *See* Susser, *supra* note 19, at 940 (stating that differences over religion-state issues was most critical factor impeding enactment of constitution in Israel).

task of implementing their ideologies into a national policy.[156] Their differing conceptions of the Jewish State impacted on Israeli political development from its inception.[157]

B. *Israel's Legal System*

Israel's Declaration of Independence[158] ("Declaration") contains contradicting promises, guaranteeing that Israel will be a Jewish state and, at the same time, that freedom of religion will be protected.[159] Israel lacks both a constitution and a bill of rights dictating the status of Jewish law relative to civil rights.[160] Rather, the State of Israel is a parliamentary democracy where the voice of the legislature is supreme.[161]

1. The Declaration of Independence

Israel's Declaration begins by proclaiming Eretz Israel as the birthplace of the Jewish people and tracing Jewish struggle throughout history to reestablish the nation in Israel.[162] The Declaration cites the sacrifices and the accomplishments of the Zionist pioneers,[163] the Balfour Declaration,[164] the U.N. Partition Resolution,[165] and the massacre of millions of Jews in Europe[166] as the moral and legal foundations of the State.[167] The Declaration also ensures that every Jew can freely emigrate to Israel.[168]

At the same time, the Declaration promises that the State

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156. *Id.*

157. *See* SAGER, *supra* note 6, at 1-21 (discussing pre-state Jewish community's influence on political system in Israel).

158. Declaration, 1 L.S.I. 3 (1948) (Isr.).

159. *Id.* at 3, 4.

160. Baruch Bracha, *The Protection of Human Rights in Israel*, 12 ISR. L. REV. 110, 111 (1982). As a result, civil rights do not enjoy normative superiority over ordinary laws passed by the legislature. *Id.*

161. *Id.*

162. Declaration, 1 L.S.I. at 3, 4 (Isr.).

163. *Id.* at 3; *See supra* notes 85-113 and accompanying text (discussing Zionist pioneers).

164. Declaration, 1 L.S.I. at 3 (Isr.); *see supra* notes 124-27 and accompanying text (discussing Balfour Declaration).

165. Declaration, 1 L.S.I. at 4 (Isr.); *see supra* notes 147-51 and accompanying text (discussing U.N. Partition Resolution).

166. Declaration, 1 L.S.I. at 4 (Isr.); *see supra* note 139 and accompanying text (discussing Holocaust).

167. Declaration, 1 L.S.I. at 3, 4 (Isr.).

168. *Id.* at 4.

will be based on freedom, justice, and peace as envisioned by the prophets of Israel and will safeguard complete equality of social and political rights to all of its inhabitants regardless of religion, race, or sex.[169] The Declaration guarantees freedom of religion, conscience, language, education, and culture.[170] Consequently, the dual commitment to create a Jewish state and to provide civil liberties, including freedom of religion and conscience, is built into the foundation of the State of Israel.[171]

2. Constitutional Question

Although the founders of the State of Israel intended the State's political life to be governed by a constitution,[172] Israel has yet to enact a formal, written constitution.[173] Israel's Declaration expressly states that the permanent and elected governmental organs of the State would be established under a constitution to be drafted by an elected constituent assembly.[174] Although a constituent assembly was elected, it dissolved itself before drafting a constitution and transformed itself into Israel's first Knesset,[175] some of whose members advocated postponing the development of a constitution.[176]

From the State's inception, the question of whether to

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169. *Id.*

170. *Id.*

171. *See id.* at 3, 4 (articulating conflicting guarantees in Declaration).

172. *Id.* at 4.

173. *See* Bracha, *supra* note 160, at 111 (stating that Israel lacks constitution). Only seven countries in the United Nations lack a written constitution: Israel, New Zealand, Oman, Qatar, Saudi Arabia, the United Arab Emirates, and the United Kingdom of Great Britain and Northern Ireland. MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL 133 (1994).

174. Declaration, 1 L.S.I. at 4 (Isr.). The Declaration states that, "We hereby declare that as from the termination of the Mandate at midnight . . . and until the setting up of the duly elected bodies of the State in accordance with a Constitution, to be drawn up by a Constituent assembly. . . ." *Id.* The Constituent Assembly's sole task was to adopt a constitution. SAGER, *supra* note 6, at 25.

175. Constituent Assembly (Transition) Ordinance art. 3, 2 L.S.I. 81 (1949) (Isr.). Some constitutional scholars believe that, presently, the Knesset does not have constitutive powers. Gavison, *supra* note 17, at 118. They argue either that the Knesset's constitutive powers expired with the enactment of Basic Law: The Knesset or that they elapsed after the first Knesset disbanded without enacting a constitution. *Id.* Others assert that Israel's Declaration of Independence obligates the Knesset to enact a constitution because the portion of the Declaration regarding the constitution was accorded the force of law. *Id.*

176. Zeev Segal, *A Constitution Without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1, 20 (1992).

adopt a constitution sparked both public and internal political debate in Israel.[177] Those that opposed the immediate drafting of a constitution argued that a formal constitution would thwart the development of the State.[178] Upon establishment, Israeli society was composed of a young community awaiting the ingathering of Diaspora[179] Jews.[180] Developing a constitution before Diaspora Jews' arrived, critics argued, would have precluded the State from affording the entire potential population an opportunity to participate in the constitutive process.[181]

The prospect of a constitution raised the additional dilemma of reconciling the state of emergency[182] that Israel faced from its inception with the protection of human rights.[183] Israel declared a state of emergency because it was surrounded by Arab countries that had proclaimed as their main policy objective the destruction of the Jewish State.[184] A constitution would have had to take into account security requirements necessary to cope with hostile Arab countries and the war they immediately waged upon the Jewish state, and invest the government and military authorities with far-reaching emergency powers.[185] Because such emergency powers would inevitably have encroached upon individual rights,[186] opponents argued that adopting a constitution, while the very existence of the country was threatened, would preclude the Knesset from fully recognizing the scope of civil liberties that it wished to protect.[187]

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177. Stephen Goldstein, *Protection of Human Rights By Judges: The Israeli Experience*, 38 ST. LOUIS. U. L.J. 605, 605 (1994).

178. Shapira, *supra* note 7, at 285.

179. WEBSTER'S NEW UNABRIDGED DICTIONARY 504 (Deluxe 2d ed. 1983). Diaspora is defined as "the dispersion of the Jews after the Babylonian exile." *Id.*

180. Shapira, *supra* note 7, at 285. Hundreds and thousands of new immigrants came to Israel in the 1940's and 1950's from all corners of the Earth. *Id.*

181. *See, e.g., id.* (articulating ingathering of exiles argument); Susser, *supra* note 19, at 940 (discussing ingathering of exiles argument).

182. Gavison, *supra* note 106, at 138 n.75. A state of emergency in Israel is created by a government proclamation. *Id.* The Government issued such a proclamation on May 19, 1948, and it has been in force ever since. *Id.*

183. Shapira, *supra* note 7, at 286.

184. HARKABI, *supra* note 15, at 2, 3. Arab States viewed the destruction of Israel, not as merely an aspiration, but as a practical, tangible goal. *Id.* at 2. Arab countries organized their societies, developed their economies, and built their military forces around this goal of destroying Israel. *Id.*

185. Shapira, *supra* note 7, at 286.

186. *Id.*

187. *Id.*

Ultimately, the most persuasive argument advanced for delaying the adoption of a written constitution, however, was that drafting a constitution would divide the nation over the unresolved dilemma of religion and state in Israeli society.[188] Adopting a constitution would force the Israeli Government to take a formal position on the role that Jewish law would be afforded in the new State, a position that would be difficult to later alter.[189] Profound, irreconconcilable differences in world view between secular and Orthodox Jews existed and continue to exist and could not be solved by compromise or linguistic formulations.[190] Adopting a position, either way, would have deepened the cultural rifts in Israeli society between Orthodox and secular Jews.[191] Opponents of enacting a constitution argued that as the State was in the midst of a bitter struggle for its physical survival, the Israeli people had to remain unified and channel their energies, exclusively, to matters of national security.[192]

The first Knesset accepted a compromise and adopted the Harari Resolution on June 13, 1950.[193] Rather than drafting and adopting a constitution immediately, the Knesset, according to this resolution, charged the Constitutional, Law and Justice Committee with preparing a proposed constitution, piecemeal.[194] The Knesset directed the Committee to draft chapters called "Basic Laws."[195] Upon completion, the Basic Laws were to be unified in one doctrine that would later serve as Israel's Constitution.[196]

Because nothing distinguishes Basic Laws from ordinary

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188. *Id.*; Susser, *supra* note 19, at 940.

189. Shapira, *supra* note 7, at 285.

190. Susser, *supra* note 19, at 940.

191. *Id.*

192. *Id.*

193. 5 Knesset Protocols 1743 (1950) (Isr.). The Harari Resolution states that:

> The first Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft constitution for the State. The Constitution shall be composed of separate chapters so that each chapter will constitute a Basic Law by itself. Each chapter will be submitted to the Knesset as the committee completes its work, and all the chapters together shall be the State's constitution. *Id.*

194. *Id.* According to the Harari Resolution, chapters of the Constitution were to be drafted one at a time. *Id.*

195. *Id.*

196. *Id.*

Knesset legislation, they have no constitutional status in Israel.[197] Basic laws can be altered by legislation adopted by a regular Knesset majority.[198] Once the Knesset alters a Basic Law, courts do not have judicial review of the amending statute.[199] One exception, however, allows for limited judicial review of amending statutes.[200] Several Basic Laws have been adopted with entrenched provisions that require a special majority of the Knesset to be overturned.[201] These entrenched clauses have enabled the Supreme Court to invalidate ordinary legislation passed subsequent to a Basic Law when such legislation is inconsistent with an entrenched provision and has not been passed by the requisite special majority.[202]

3. Israel's Political Structure

The State of Israel is a parliamentary democracy that recognizes the voice of the people as sovereign.[203] Israel's Government is comprised of three branches: the legislature, the executive, and the judiciary.[204] Israel's legislature, the Knesset, is a parliamentary body composed of 120 members.[205] The Knesset legislates law, solves fiscal and economic problems, and addresses internal and external policy, the state budget, culture, education, health, and social welfare.[206] The Knesset is a multiparty body elected by a proportional party-list system in which the entire country forms one constituency.[207] Citizens vote for a particular party and parties are allotted seats in the Knesset pro-

197. Susser, *supra* note 19, at 940.

198. *Id.*

199. Segal, *supra* note 176, at 20.

200. *Id.* at 21.

201. *Id.*; Susser, *supra* note 19, at 940.

202. Segal, *supra* note 176, at 21. Entrenchment clauses curb the Knesset's supremacy to change laws at its will. *Id.* The Supreme Court has recognized the Knesset's constitutive powers to bind itself and future Knessets through entrenchment provisions. *Id.*

203. ERVIN BIRNBAUM, THE POLITICS OF COMPROMISE: STATE AND RELIGION IN ISRAEL 87 (1970).

204. *See* ASHER ARIAN, POLITICS IN ISRAEL: THE SECOND GENERATION 155-85 (1985) (describing three branches of Israeli Government).

205. JOSEPH BADI, THE GOVERNMENT OF THE STATE OF ISRAEL 65 (1963).

206. *Id.*

207. BIRNBAUM, *supra* note 203, at 38, 39. The system of proportional representation was used in the Zionist Organization and in the Jewish Community Organization under the British mandate. *Id.* at 38; *see* FEIN, *supra* note 9, at 16 (stating proportional representation is direct carryover from severe factionalism of Zionist Organization).

portionate to the percentage of votes they receive.[208] Citizens do not elect specific Knesset members, rather the parties themselves appoint leaders as their representatives to the Knesset.[209]

Rarely, is a single party in Israel able to constitute a majority on its own.[210] Parties must negotiate and build coalitions to form a controlling bloc that ultimately selects the members of the executive branch of the Government.[211] Through coalition building, smaller parties are empowered, as larger parties compete for their alliance.[212] Large parties often bow to the demands of smaller fringe groups to facilitate a majority.[213] Israel's executive branch is called the "Government," and is comprised of the Prime Minister, the President, and additional Ministers.[214] The Knesset selects the Government,[215] whose ministers are drawn from the leadership of the political parties that form the majority coalition.[216] After the Government is formed, it must present itself to the Knesset for a vote of confidence.[217] The Knesset and the Government are closely bound to one another and the work of the Government is contingent upon continued Knesset support.[218]

Two concurrent judicial systems exist in Israel, the civil and the religious court systems.[219] The civil courts are divided into

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208. BIRNBAUM, *supra* note 203, at 39. Contrary to the U.S. majority system, proportional representation assures that no vote is wasted. *Id.* Parties with only a small percentage of votes are represented in the Knesset. *Id.* They receive fewer seats, however, than parties that attract a higher percentage of votes. *Id.*

209. *Id.*

210. *See id.* at 31 (stating that single parties do not gain majority in national elections).

211. SAGER, *supra* note 6, at 132.

212. ARIAN, *supra* note 204, at 86. Coalition building has increased the power of the religious parties, relative to their strength in the community. *Id.* Religious parties are consistently the third largest winners in Knesset elections and serve as the coalition partner of the largest party. *Id.* In return for the support of the religious bloc, the largest party satisfies many of their demands. *Id.*

213. *Id.*

214. *Id.* at 164.

215. Basic Law: The Government art. 3. (1992) (Isr.). In an amendment to Basic Law: The Government, the legislature instituted popular election of a Prime Minister and directed Israel's Prime Minister to appoint the Ministers that form the Government. *Id.* This new system will be implemented in the 1996 elections. *Id.*

216. ARIAN, *supra* note 204, at 158.

217. Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1, 15 (1993).

218. ARIAN, *supra* note 204, at 158-59.

219. HENRY E. BAKER, THE LEGAL SYSTEM OF ISRAEL 197 (1968).

four levels: (1) municipal courts,[220] (2) magistrates' courts,[221] (3) district courts,[222] and (4) the Supreme Court.[223] In addition, four religious court systems operate in Israel: (1) Rabbinic (Jewish), (2) Shari'a (Muslim), (3) Christian, and (4) Druze.[224] Religious courts exercise exclusive jurisdiction over the personal status of their adherents.[225]

C. *Judicial Treatment of Civil Rights*

In Israel, civil rights are protected by judge-made law.[226] The Supreme Court, through case law, has created an unwritten constitution establishing fundamental freedoms in Israel that are commonly protected by written constitutions in other democracies.[227] Although the Supreme Court has established case law protecting civil rights, the Knesset, through the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law[228] ("Marriage and Divorce Law"), has vested exclusive jurisdiction over the personal status of all Jews in Israel in Rabbinical courts.[229] Rabbinical courts strictly apply Jewish law and many secular Jews in Israel view the application of Judaism's restrictive rules as an infringement on their civil rights, particularly in the area of freedom of religion.[230]

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220. *Id.* Municipal courts have criminal jurisdiction over violations of municipal regulations and by-laws and other specific offenses committed within the municipal area. *Id.*

221. *Id.* at 198. Magistrates' courts, established in all districts and subdistricts, possess limited jurisdiction in both civil and criminal matters. *Id.*

222. *Id.* District courts have unlimited jurisdiction as courts of first instance in all civil and criminal matters not within the jurisdiction of a magistrates' court. *Id.* Parties can appeal municipal and magistrates' court decisions to the district courts.

223. *Id.* at 199. The Supreme Court, Israel's highest court, has jurisdiction as an appeals court from the district courts in all civil and criminal matters; it sits as a Court of Civil Appeal or as a Court of Criminal Appeal. *Id.* The Supreme Court also serves as a court of first instance, sitting as the High Court of Justice, over matters that it deems necessary to grant relief in the interests of justice, and which are not within the jurisdiction of any other court. *Id.* at 199, 200.

224. SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 106 (1994).

225. *See* BAKER, *supra* note 219, at 207-10 (discussing jurisdiction of religious courts in Israel).

226. Goldstein, *supra* note 177, at 605; Bracha, *supra* note 160, at 112-13; Barak, *supra* note 7, at 242.

227. Goldstein, *supra* note 177, at 608; Bracha, *supra* note 160, at 11.

228. Marriage and Divorce Law, 7 L.S.I. 139 (1953) (Isr.).

229. *Id.*

230. *See* Shetreet, *supra* note 4, at 211 (arguing that specific applications of Jewish

1. The Supreme Court

With no written constitution or entrenched bill of rights to guide and bind the Knesset, the Supreme Court has injected guarantees of civil rights into the constitutional arena by interpreting laws under the presumption that the Knesset does not intend to curtail civil liberties.[231] Only when the Knesset clearly and unambiguously expresses an intent to infringe on civil rights and the law passed is not open to more than one interpretation will the Court uphold the law and permit the infringement.[232] By strictly adhering to this presumption, the Supreme Court, in numerous cases,[233] has developed a body of law protecting civil rights as if a written bill of rights existed.[234] Israeli citizens enjoy many of the same civil liberties as citizens of the United States.[235] The Israeli Supreme Court, in its quest to protect civil rights, has based many of its decisions on U.S. constitutional law.[236] The Israeli Supreme Court follows a model of interpreta-

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law in Israel are coercive and violate freedom of religion); SHARFMAN, *supra* note 7, at 69 (stating that freedom from religious coercion is one of main civil rights issues in Israel).

231. Segal, *supra* note 176, at 3. This presumption enables the Court to ensure that civil rights will be protected. *Id.* Only a clear and unequivocal intention by the legislature to curtail basic freedoms can overcome this presumption. *Id.* Over the past 40 years, the Court has succeeded in modifying the ordinary meaning of statutory provisions so that they will be consistent with the concept of civil rights. *Id.*; *see* Bracha, *supra* note 160, at 114 (discussing presumption); Shapira, *supra* note 7, at 287-88 (discussing presumption).

232. Segal, *supra* note 176, at 3; Bracha, *supra* note 160, at 114.

233. *See* H.C. 148/79 Saar v. Minister of Interior and Police, 34(2) P.D. 169 (Isr.) (protecting freedom of demonstration); H.C. 448/85 Daher v. Minister of Interior, 40(1) P.D. 701 (Isr.) (protecting freedom of movement); C.A. 165/82 Kibbutz Hatzor v. Rehovot Tax Assessor, 39(2) P.D. 70 (Isr.) (protecting freedom of property).

234. Bracha, *supra* note 160, at 112-13; The role of the Supreme Court has shifted from merely resolving disputes between private citizens to safeguarding the rule of law. Netanyahu, *supra* note 217, at 2. The Supreme Court's reluctance to enter the arena of public controversy has been replaced by liberal rules of standing and justiciability, enabling the Court to enter matters in the political arena. *Id.* Petitioners who raise arguments indicating corruption on the part of a government authority or raise constitutional problems are permitted to bring an *actio popularis* despite a lack of personal interest. *Id.* at 3. The public's trust and faith in the Court, apparently, has been enhanced by its involvement in political matters. *Id.* at 23.

235. A.M. Apelbom, *Common Law a l'Americaine*, 1 ISR. L. REV. 562, 565 (1966). Next to U.S. courts, the Israeli Supreme Court utilizes U.S. jurisprudence more than any other court in the common law world. *Id.*

236. *Id.*; *see supra* note 8 and (citing specific cases where Israeli Supreme Court cited U.S. decisions); *see also* Barak, *supra* note 7, at 243 (citing examples of Supreme Court of Israel relying on U.S. cases, articles, and books).

tion, termed the "Background Understanding Model."[237] According to this model, Israel is founded on democratic values, recognizing many unwritten rights, including: freedom of expression,[238] freedom of demonstration,[239] freedom of movement,[240] freedom of association,[241] freedom of property,[242] and the right to a fair trial.[243]

The foundation for the judicial protection of civil rights, Israel's Declaration, states that Israel will ensure complete social and political rights to all its inhabitants.[244] Although not a legally binding document,[245] Israel's Declaration embodies the principles and national aspirations underlying the foundation of the State.[246] Accordingly, the legislature and the judiciary look to the Declaration for guidance when considering the rights and freedoms that should be conferred on Israeli citizens.[247] The Supreme Court established those principles enumerated in the Declaration as part of the judge-made constitution in its 1953 case, *Kol Ha'am v. Minister of Interior*,[248] considered the most important constitutional decision in Israeli law.[249] In *Kol Ha'am*, Israel's Minister of the Interior suspended the publication of *Kol Ha'am*, a communist newspaper, under the 1945 Emergency

237. Segal, *supra* note 176, at 4.

238. *Kol Ha'am*, 1 S.J. 90 (1953) (Isr.).

239. *Saar*, 34(2) P.D. 169 (1979) (Isr.).

240. *Daher*, 40(1) P.D. 701 (1985) (Isr.).

241. H.C. 253/64 Jaris v. District Commissioner of Haifa, 18(4) P.D. 673 (Isr.).

242. *Hatzor*, 39(2) P.D. 70 (1982) (Isr.).

243. Segal, *supra* note 176, at 4.

244. *See* Declaration, 1 L.S.I. at 4 (Isr.).

245. H.C. 10/48 Zeev v. Gubernik, District Commissioner, Urban District of Tel Aviv and Another, 1 P.D. 85, *translated in* 1 S.J. 68 (1948) (Isr). The Declaration "[c]ontains no element of constitutional law which determines the validity of various ordinances and laws or their repeal." *Id.* at 71-72. The Declaration's sole purpose was to affirm the establishment of the State in order to gain recognition under international law. *Id.* at 71.

246. *Id.* at 71-72. "[The Declaration] gives expression to the vision of its people and its faith." H.C. 262/62 Perets v. Kfar Shmaryahu Local Council, 16 P.D. 2101, *translated in* 4 S.J. 191 (1962) (Isr.). The Declaration "[l]aid down the way of life of the citizens of the State, and its principles must guide every public authority in the State." *Id.*

247. *Perets*, 4 S.J. at 191 (Isr.).

248. *Kol Ha'am*, 1 S.J. 90 (Isr.).

249. Segal, *supra* note 176, at 21. "It has been said that this development 'constitutionalized' Israeli law by introducing judicial supervision of primary legislation." *Id.*

Regulations,[250] for criticizing the Government and, therefore, causing a situation likely to endanger public peace.[251]

Although the suspension appeared lawful on its face,[252] Supreme Court Justice Agranat invalidated the order, holding that because the action involved the fundamental right of freedom of speech, the legislation was to be interpreted to minimize the infringement.[253] If the Knesset wished to infringe on a fundamental human right, it had to do so expressly.[254] Justice Agranat further explained that the basic concept of democracy, exhibited in the Declaration, would serve as the Court's principal guide in its attempt to interpret and give meaning to existing laws.[255] *Kol Ha'am* demonstrates how the Supreme Court, guided by the presumption that human rights must be protected, is able to interpret legislation that appears to infringe on human rights in a manner consistent with the promotion and protection of essential rights.[256] The Supreme Court found the basis for protecting the right to freedom of speech not in a constitution or in a bill of rights, but rather in the democratic nature of the State of Israel.[257]

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250. Defense (Emergency) Regulations, 1945, Palestine Gazette No. 1442, at 1055 (Supp. 2, 1945).

251. Segal, *supra* note 176, at 21.

252. Goldstein, *supra* note 177, at 611. The 1945 Emergency Regulations gave the Minister of the Interior authority to suspend any newspaper that, in his opinion, is likely to endanger public peace. *Id.*; Defense (Emergency) Regulations, 1945, Palestine Gazette No. 1442, at 1055 (Supp. 2, 1945). The Minister of the Interior asserted that because the legislation provided for his personal discretion, his action was not subject to judicial review. Goldstein, *supra* note 177, at 611. At the very most, he argued that the Court could only review his decision as to bad faith. *Id.*

253. *Id.* at 115.

254. *Id.* at 108.

255. *Kol Ha'am*, 1 S.J. at 105 (Isr). Justice Agranat stated:

> The system of laws under which political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover, the matters set forth in the declaration of Independence, especially as regards the basing of the state 'on the foundations of freedom' and the securing of freedom of conscience, mean that Israel is a freedom-loving State. It is true that the Declaration 'does not consist of any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws' . . . but insofar as it 'expresses the vision of the people and its faith' . . . we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State.

Id.

256. *Id.*

257. *See* Declaration, 1 L.S.I. at 4 (Isr.) (guaranteeing civil rights); *see supra* notes 244-36 and accompanying text (discussing adherence to Declaration principles).

2. Rabbinical Courts

Despite the Supreme Court's active approach in the promotion and protection of civil rights,[258] many Israeli citizens complain that their Government encroaches on their right to freedom of religion, particularly in the areas of marriage and divorce.[259] Because religious coercion stems from primary legislation explicitly stating that Jewish law must govern the marriages and divorces of all Jews in Israel,[260] there is little room for the Supreme Court to reinterpret the Knesset's intent.[261] Because the Declaration provides only guiding principles and not legally binding norms,[262] the judiciary cannot invalidate Knesset legislation even if a particular law violates principles articulated in the Declaration.[263] In addition to being expressly legislated by the Knesset, laws granting jurisdiction to religious courts, generally, and Rabbinical courts, particularly, reinforce a deeply rooted system of governance in the region.[264] This system was employed in Palestine by the Ottomans[265] and by their British successors.[266] In 1948, the Israeli legislature passed the Law and Administration Ordinance[267] stating that the law in existence at the time of Israel's establishment as a state would remain in force, thereby facilitating the continuance of the religious court system and separate autonomous communal development.[268]

Israel acknowledges the many communities that live within

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258. *See* Bracha, *supra* note 160, at 126 (characterizing Supreme Court's approach as active).

259. *See* Shetreet, *supra* note 4, at 211 (arguing that specific applications of Jewish law in Israel violate freedom of religion).

260. Marriage and Divorce Law art. 2, 7 L.S.I. at 139 (Isr.).

261. Cantor, *supra* note 2, at 209.

262. *See Gubernick*, 1 S.J. at 71-72 (Isr.) (stating that Declaration does not have constitutional weight and does not determine validity of laws).

263. Cantor, *supra* note 2, at 209.

264. *See* Englard, *supra* note 117, at 196-97 (discussing millet system instituted by Ottoman Empire); *see supra* notes 117-21 and accompanying text (tracing status quo in Israel to Ottoman Empire).

265. *See* Shetreet, *supra* note 4, at 196-97 (describing millet system instituted by Ottomans.)

266. *See* Terms of the British Mandate for Palestine, confirmed by the Council of the League of Nations, LEAGUE OF NATIONS O.J. arts. 10, 15, 16 (preserving autonomy of religious communities).

267. The Law and Administration Ordinance, 1 L.S.I. 7 (1948) (Isr.).

268. *Id.* art. 11, 1 L.S.I. at 7 (Isr.); *see* LIEBMAN & DON-YEHIYA, *supra* note 26, at 37 (arguing that Israeli legislature maintained mandatory scheme to preserve harmony between religious and secular Jews and to avoid making decisions of binding nature).

its borders and recognizes that their distinct cultures and religious laws mandate differential treatment.[269] The Israeli Supreme Court's treatment of bigamy exemplifies its conclusion that it order to guarantee equality, the differences that exist between communities can not be ignored.[270] In *Yosifof v. Attorney General*, Yosifof, an Israeli Jew convicted of the felony of bigamy, argued that because Israeli law permitted Muslims to marry more than one wife but prohibited Jews from doing the same he was discriminated against unfairly.[271] The Court rejected Yosifof's claim.[272] Supreme Court Justice Landau explained that the Court must examine the issue in the context of the social realities of the State.[273] He argued that because communities possess distinct laws and customs, they must be treated differently.[274] In determining whether differential treatment is discriminatory, Justice Landau stated that the inquiry must focus on whether the law discriminates against a community, not an individual.[275]

In 1953, the Knesset passed the Marriage and Divorce Law,[276] expanding the authority of Rabbinical courts relative to their authority under Mandatory law.[277] Presently, all issues re-

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269. *See* JACOBSOHN, *supra* note 2, at 30 (discussing exemption of Christian communities to Pig Raising Prohibition Law which reflects majority's desire not to offend religious minority).

270. *See* Yosifof v. Attorney General, 5 P.D. 481, *translated in* 1 S.J. 174, 185 (1951) (Isr.) (holding that bigamy was legal for Muslims, but illegal for Jews).

271. *Yosifof*, 1 S.J. at 185 (Isr.).

272. *Id.*

273. *Id.* Justice Landau explained that:

> A legislature does not operate in a vacuum, but is faced with an actually existing social state of affairs with its various manifestations, and must formulate legal forms to meet that situation, and also direct its development in the future. As far as the institution of marriage is concerned, the legislator found himself confronted, as raw material, with a reality consisting of varied outlooks which were fundamentally different. It found that the population of the country was not homogeneous, but that it consisted of different peoples and communities, each with its own laws and customs. Can we say that the Mandatory legislature committed a breach of the principle of nondiscrimination because it did not impose its will on the existing situation but to some extent yielded to reality?

Id.

274. *Id.*

275. *Id.* at 187.

276. Marriage and Divorce Law, 7 L.S.I. 139 (1953) (Isr.).

277. Amnon Rubenstein, *Law and Religion in Israel*, 3 ISR. L. REV. 380, 387 (1967). During the Mandatory period, Jews were subject to the jurisdiction of Jewish authorities only if they were voluntary members of the registered Jewish community. *Id.* at 388.

garding the personal status of Jewish citizens and residents in Israel are under the exclusive jurisdiction of Rabbinical courts.[278] The Marriage and Divorce Law did not afford the Jewish community a privileged position over other religious communities,[279] however, it extended Rabbinical jurisdiction to all Jews in Israel, regardless of whether they voluntarily opted to be a member of the Jewish community.[280] As jurisdiction was vested in Rabbinical courts by the Knesset, a secular legislature, Jewish law is imposed on all Jews in Israel by the Government and not by the rabbis.[281]

This exclusive assignment of jurisdiction over matters of personal status to the Rabbinical courts has been criticized by secular Jews as an infringement on the religious freedom principles outlined in the Declaration.[282] Judaism has three distinct streams: Orthodox,[283] Conservative,[284] and Reform.[285] Each interpret the biblical commandments in different ways.[286] The Israeli Government, however, lists the Jews as a single community, disregarding their distinct approaches to religious practice.[287] The Rabbinical courts in Israel are solely Orthodox and govern according to Halacha,[288] the traditional interpretation and appli-

278. Marriage and Divorce Law, art. 1, 7 L.S.I. at 139 (Isr.).

279. Druze Religious Courts Law, 17 L.S.I. 27 (1962) (Isr.). The Druze Religious Courts Law similarly expanded Druze court jurisdiction by replacing voluntary membership in the Druze community with membership in the Druze religion. *Id.* art. 4, 7 L.S.I. at 27 (Isr.). The law states, in language identical to the Marriage and Divorce Law, that "[m]atters of marriage and divorce of Druze in Israel who are nationals or residents of the State shall be under exclusive jurisdiction of the court." *Id.*

280. Marriage and Divorce Law, art. 1, 7 L.S.I. at 139 (Isr.). "Matters of Marriage and Divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts." *Id.*

281. *Id.*

282. *See* Shetreet, *supra* note 4, at 211 (arguing that religious legislation violates citizens' freedom of religion).

283. *See* DOSICK, *supra* note 69, at 61-62 (discussing Orthodox Judaism).

284. *See id.* at 62-63 (discussing Conservative Judaism).

285. *See id.* at 62 (discussing Reform Judaism).

286. *See The State of Jewish Belief, in* 42 COMMENTARY 71, 71-160 (1966) (surveying theological differences between Orthodox, Conservative, and Reform movements). *See generally* WALTER JACOB, QUESTIONS AND REFORM JEWISH ANSWERS (1992) (discussing Reform movement's approach to specific Jewish practices).

287. LIEBMAN & DON-YEHIYA, *supra* note 26, at 24. The religious courts that govern the Christian and Muslim communities in Israel are split into several denominations. *Id.*

288. Saul Lubetski, Note, *Religion and State: Does the State of Israel Provide the Forum for the Revival of the Jewish Legal System?*, 26 N.Y.U. J. INT'L L. & POL. 331, 333 n.7 (1994). There are two main sources of Jewish Law: the Torah, written law, comprised of the

cation of Jewish law throughout Jewish history.[289] The majority of Israeli Jews, however, are not religiously observant.[290] The Rabbinical courts, therefore, apply norms accepted by a religious minority to all Jews in Israel.[291]

D. *Interaction: The Status Quo*

Religion and state interact at several levels in Israeli law.[292] The present status of Jewish law in Israel is based on the premise that Israel must remain a Jewish state and that national unity must be preserved.[293] This interactive approach recognizes both the need to protect citizens' rights to freedom of religion and conscience and the need to retain Israel as the homeland of the Jewish people.[294]

1. Treatment of Judaism Under Israeli Law

In Israel religion and state interact at three levels: the symbolic level,[295] the institutional level,[296] and the legislative level.[297] The majority of Israeli citizens do not oppose the interaction of religion and state at the first two levels.[298] Many secular Israelis, however, oppose interaction at the third level, arguing that religious legislation is coercive and violates religious freedom.[299]

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first five books of the Bible, and the Talmud, oral Law. *Id.* Traditionally, Jews believe that both the written and oral law were revealed to Moses at Mount Sinai. *Id.* The Oral Law was later codified by Rabbinic scholars through a process of commentaries and debates known as Halacha. *Id.*

289. Marriage and Divorce Law, art. 2, 7 L.S.I. at 139 (Isr.). "Marriages and divorces of Jews shall be performed in Israel in accordance with Jewish religious law." *Id.*

290. LIEBMAN & DON-YEHIYA, *supra* note 26, at 3. According to sample surveys, 40% of Israeli Jews defined themselves as secular, 40% as traditional, and only 20% as religious. *Id.*

291. Marriage and Divorce Law, art. 2, 7 L.S.I. at 139 (Isr.).

292. LIEBMAN & DON YEHIYA, *supra* note 26, at 15-28 (discussing three levels of interaction between religion and state).

293. *Id.* at 29.

294. SAFRAN, *supra* note 21, at 200.

295. LIEBMAN & DON-YEHIYA, *supra* note 26, at 15-18. Symbols derived from Jewish religious tradition are frequently utilized by the Israeli Government. *Id.*

296. *Id.* at 18-19. Religious institutions are supported by the Israeli Government. *Id.*

297. *Id.* at 24. Religious legislation consists of administrative regulations that compel citizens to adhere to Jewish law. *Id.*

298. *Id.* at 24.

299. SHARFMAN, *supra* note 7, at 69.

a. Religious Symbols

On the symbolic level, religion and state are closely linked.[300] The symbol of the State of Israel, for example, is a seven-branched candelabrum, chosen for its association as a religious symbol.[301] Biblical verses are engraved on public buildings, inscribed on banners in state parades and ceremonies, and frequently quoted by political leaders.[302] The founders of the State intentionally utilized religious symbols to emphasize Israel's Jewish character.[303] Because all Jewish symbols derive from Judaism, it would be impossible to separate religion from state on a symbolic level without denying, or at least ignoring, the Jewish nature of the State.[304] Furthermore, there are virtually no protests to this practice, even from those who support an increase in the separation of religion and state.[305] The absence of objection indicates that most Israeli Jews support Israel as the Jewish State and do not wish to totally divorce Judaism from the State of Israel.[306]

b. Religious Institutions

The Knesset has conferred governmental status on many religious institutions, Jewish and non-Jewish alike.[307] Orthodox

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300. *See* MERETZ: THE POWER TO MAKE A DIFFERENCE (translation of synopsis of Meretz Party Platform) (stating that Jewish heritage and law are cornerstones of Israeli national culture and are given expression in state symbols). *See also* Sager, *supra* note 2, at 1 (stating that name of Israel's legislature, "Knesset," derives from "Knesset Gaudily," the supreme legislative authority of the Jews in the fourth and fifth centuries).

301. MAJOR KNESSET DEBATES: 1948-1981, at 220-21 (Natanel Lorch ed., 1993). During Knesset debates over the flag and symbol of the State of Israel, D. Pinkas, member of the Mizrahi party, stated that:

> First of all, I would like to express my approval of the Government's choice of the candelabrum as the State emblem. I regard this as a fortunate decision since the candelabrum always served as a symbol of true Judaism . . . . It links us with our great past in this country, and will, I hope, serve the purpose of illuminating our path, like the pure light of the candelabrum.

Id.

302. LIEBMAN & DON-YEHIYA, *supra* note 26, at 16.

303. *Id.*

304. *Id.*

305. *Id.* Cantor, *supra* note 2, at 217. Tel Aviv University Professors' draft constitution began with the premise that Israel does not aspire to complete separation of religion and state. *Id.*

306. LIEBMAN & DON-YEHIYA, *supra* note 26, at 16.

307. *Id.* at 18. These institutions include the chief rabbis and Chief Rabbinical Council, local chief rabbis, local religious councils and rabbinical courts. *Id.* at 18-19. The Ministry of Religion and the Ministry of the Interior also fund many religious insti-

rabbis exercise an institutional monopoly over Jewish institutions.[308] The central issue debated at the institutional level is the degree of autonomy granted to religious institutions, and the extent of the State's authority to oversee the operations and structure the policy of such institutions.[309] The case of religious education in Israel highlights this controversy.[310] The non-Orthodox Israeli public does not protest government funding of religious schools; in fact, the funding of Jewish education is assumed to be a function of the Government.[311] The secular public merely asserts that the State should have the power to supervise religious education in these schools.[312]

c. Religious Legislation

The third level of interaction between religion and state, religious legislation, sparks public debate and receives vehement objection.[313] Religious legislation is composed of laws and ordinances that compel the public to obey religious commandments, signifying the State's imposition of Halacha on all Jews, regardless of their religious beliefs.[314] A primary example of religious

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tutions and the Ministry of Education and Culture provides for a state religious school system that parallels the state's secular school system. *Id.* at 19. The State also funds Muslim and Druze religious courts as well as other Islamic institutions and services. *Id.* Generally, the funding of Muslim and Druze institutions are not contested and remain outside the sphere of the religion-state debate. *Id.*

308. *Id.*

309. *Id. See* Cantor, *supra* note 2, at 217 (noting that Tel Aviv University professors' draft for constitution provides for continued governmental support of religious institutions).

310. Cantor, *supra* note 2, at 207. The State supports religious education. *Id.* Both non-religious and religious public schools are funded by the State. *Id.*

311. LIEBMAN & DON-YEHIYA, *supra* note 26, at 21.

312. *Id.* at 22.

313. *Id.* at 24. Some argue that opposition to religious legislation stems from the personal discomfort or inconvenience that it causes, rather than from an objection to religious coercion. *Id.* This explains why non-observant Jews who are opposed to certain types of religious legislation accept religious legislation on a purely symbolic or institutional level. *Id.*

314. *See, e.g.*, Days of Rest Ordinance, 1 L.S.I. 18 (1951) (Isr.) (declaring Sabbath and Jewish holidays as official days of rest). Nationally, the law prohibits the operation of sectors of the economy that had not operated on Sabbath during the Mandate period, such as transportation. LIEBMAN & DON YEHIYA, *supra* note 26, at 39; Pig-Raising Prohibition Law, 16 L.S.I. 93 (1962) (Isr.) (prohibiting raising and slaughtering of pigs). Slaughtering is defined as "any killing for the purpose of eating." *Id.* art. 8, 16 L.S.I. at 95 (Isr.); Foundations of Law, 34 L.S.I. 181 (1980) (Isr.) (mandating that Court employ principles of freedom, justice, and peace of Israel's heritage when no guidance from statutes or case law is available).

legislation, the Marriage and Divorce Law, declaring that marriages and divorces of Jews in Israel shall be performed in accordance with Jewish religious law,[315] is a source of controversy because Jewish law in the areas of marriage and divorce is viewed as too restrictive and as an infringement on personal liberty by non-observant Jews.[316]

2. The Marriage and Divorce Law

Two facets of the application of Jewish law regarding marriage in Israel are criticized by citizens as constituting religious coercion: (1) all marriages must be performed in Orthodox ceremonies;[317] and (2) Jewish law prohibits specific unions, including intermarriage and the marriage of Cohanim[318] to divorcees and widows.[319] Jewish couples in Israel have developed several methods to cohabit legally despite Jewish law's restrictions on marriage.[320] Although the Supreme Court has refused to recognize civil marriage ceremonies,[321] marriages performed in private ceremonies are recognized by both the Supreme Court and

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315. Women's Equal Rights Law, 5 L.S.I. 171 (1951) (Isr.). Even before the passage of the Marriage and Divorce Law, the rabbinic courts were granted authority over marriage and divorce through Article 5 of the Women's Equal Rights Law, which stated that, "This Law shall not affect any legal prohibition or permission relating to marriage or divorce." *Id.* art. 5, 5 L.S.I. at 172 (Isr.).

316. SHARFMAN, *supra* note 7, at 80. Rigorous debate surrounded the passage of this law. *Id.* at 78. At the time, acting Prime Minister Moshe Sharet argued that it was a supreme necessity for the unity of the Jewish people and the ingathering of the exiles. *Id.*

317. Cantor, *supra* note 2, at 205. Conservative and Reform Jews are free to perform their own marriage rituals, but must participate in an Orthodox marriage ceremony to secure official state recognition of their marital status. *Id.*

318. SHARFMAN, *supra* note 7, at 80. Cohanim are Jews descended from the High Priest Aaron. *Id.*

319. *Id.*

320. *See* Menashe Shava, *Civil Marriages Abroad: Validity in Israel*, 9 TEL AVIV U. STUD. L. 311, 311 (1989) (discussing Supreme Court's recognition of "Cyprus weddings," marriages performed outside of Israel); Pinhas Shifman, *Family Law in Israel: The Struggle Between Religious and Secular Law*, 24 ISR. L. REV. 537, 539-42 (1990) (discussing civil courts' circumvention or religious law, including recognition of private marriage ceremonies and marriages performed outside of Israel).

321. Rogozinsky v. State Of Israel, 26 P.D. 129 (1971) (Isr.). Non-Orthodox Jews demanded recognition of civil ceremonies, claiming that forcing them to undergo a religious ceremony violated their religious liberty. *Id.* The Court denied their request, ruling that the Knesset had clearly intended to impose Jewish religious law on the marriage of every Jew. *Id.* Furthermore, the Court claimed it could not endorse civil marriage without legislative guidance. *Id.*

the Rabbinical Council.[322] These private ceremonies must be performed according to Jewish law, but are performed without the agency of the Rabbinate.[323] For example, the Court created an exception in the legislative framework when the issue of a marriage between a Cohen and a widow arose in *Rodnitsky v. Rabbinical Court of Appeals*.[324] The Court ordered the official recognition of a private ceremony, holding that the law vesting jurisdiction in the area of marriage to the Rabbinical courts did not intend to apply the full scope of Jewish law.[325] Supreme Court Justice Landau explained that enforcement of a purely religious-based prohibition on marriage would constitute coercion of conscience,[326] and that it was incumbent on the Court to interpret the law in a way that would prevent a clash with the fundamental principle of freedom of conscience.[327]

Marriages that take place outside of Israel are also officially recognized.[328] The Supreme Court ordered the Ministry of Internal Affairs to register marriages of Israeli couples who married outside the State.[329] Thus, marriages between Jews and non-Jews, or marriages conducted by Conservative and Reform rabbis can be legally recognized, provided they are conducted outside the State of Israel.[330]

Non-observant Jews also view Jewish law regarding divorce as an infringement on personal liberty.[331] From a Halachic standpoint, the consequences of failing to adhere to Jewish law in matters of divorce create the most severe danger to national unity.[332] If a woman fails to obtain a legal, Jewish divorce, her children from a subsequent marriage or relationship are considered mamzerim[333] and are only permitted to marry other

322. Rodnitsky v. Rabbinical Court of Appeals, 24(1) P.D. 704 (1970).

323. SHARFMAN, *supra* note 7, at 80.

324. *Rodnitsky*, 24(1) P.D. 704 (1970).

325. *Rodnitsky*, 24(1) P.D. at 704.

326. *Id.* at 712.

327. *Id.*

328. SHARFMAN, *supra* note 7, at 79-80.

329. H.C. 143/62 Funk and Schlesinger v. Minister of Internal Affairs, 17 P.D. 225 (1963) (Isr.).

330. *Id.*

331. SHARFMAN, *supra* note 7, at 79.

332. Lubetski, *supra* note 288, at 369.

333. Shetreet, *supra* note 4, at 211. A mamzer is defined as "a child born to a married woman from a man not her husband." *Id.*

mamzerim.[334] In order for a couple to divorce under Jewish law, the husband must, of his own free will, deliver a decree of divorce, or *Get*, to his wife.[335] In Israel, today, there are husbands that refuse to divorce their wives.[336] Women, therefore, are forced to agree to their husbands' demands, including economic concessions, in order to obtain divorces.[337]

II. *Models For Religion And State*

Jewish Israelis advocate differing solutions to the religion-state dilemma in Israel.[338] A small minority of religious Jews seek to establish Jewish law as Israel's constitution.[339] A minority of both religious and secular Jews advocate complete separation of religion and state, similar to the U.S. model.[340] Between these two extremes lie the majority of Israelis.[341] Some Jews defend the status quo, while others seek to implement greater compromises to guarantee freedom from religious coercion.[342] Most Israelis support some level of interaction between religion and state.[343] They disagree, however, regarding which aspects of Jewish law the State should recognize.[344]

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334. *Id.*

335. *Deuteronomy* 24:1. The requirement of a *get* is derived from the Bible:

> When a man has taken a wife and married her, and it comes to pass that she find no favour in his eyes, because he has found some unseemliness in her: then let him write her a bill of divorce, and give it in her hand, and send her out of his house.

Id.

336. SHARFMAN, *supra* note 7, at 79. Rabbinic courts may give a judgment of "compulsory divorce," and district courts can imprison a man until he grants his wife a divorce. *Id.* Rabbinic courts, however, rarely issue such judgments and even when they do, the problem is not always solved. *Id.* There have been cases where men chose to remain in prison rather than grant their wives divorces. *Id.*

337. *Id.*

338. LIEBMAN & DON-YEHIYA, *supra* note 26, at 28-30 (discussing proposed solutions).

339. EMANUEL RACKMAN, ISRAEL'S EMERGING CONSTITUTION 46 (1955).

340. *See* BIRNBAUM, *supra* note 203, at 281 (outlining secularists' argument for separation); YESHAYAHU LEIBOWITZ, JUDAISM, HUMAN VALUES, AND THE JEWISH STATE 180 (1992) (articulating religious argument for absolute separation).

341. SAFRAN, *supra* note 21, at 200.

342. *Id.*

343. *See id.* at 209 (indicating that two-thirds of Jews favor some link between religion and state); *see* LIEBMAN & DON-YEHIYA, *supra* note 26, at 16 (arguing virtually no Jews oppose interaction at symbolic level); *id.* at 15 (stating most Israelis view Judaism as relevant to public order and political system).

344. JACOBSOHN, *supra* note 2, at 38; *see* LIEBMAN & DON-YEHIYA, *supra* note 26, at 29 (arguing that secular Jews desire maintenance of national unity and historical con-

A. *The Extreme Positions*

Israelis that advocate instituting a theocracy in Israel are concerned only with adherence to God's commandments.[345] They posit that the only way to preserve the Jewish nation is by preserving Jewish law.[346] Theocrats maintain that freedom of religion and conscience must always be subordinated to Jewish law.[347] Israelis at the other extreme, however, advocate complete separation of religion and state both to enhance Israel's democratic nature and to rescue Judaism from the political arena.[348]

1. Theocracy

The theocratic model, advocated by a small minority of Orthodox Jews, is not seriously considered by the Israeli Government.[349] The theocratic position maintains that the State of Israel must function as a religious entity governed solely by Jewish law.[350] Jewish law, therefore, would function as Israel's constitution.[351] For theocrats, the preservation of the Jewish nation is synonymous with the preservation of the Jewish religion and the State of Israel is viewed as the only appropriate place for the reinstitution of Jewish law.[352]

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tinuity of Jewish nation, but seek alternative modes of Jewish identity, outside confines of Halacha).

345. RACKMAN, *supra* note 339, at 46.

346. LIEBMAN & DON-YEHIYA, *supra* note 26, at 72.

347. *See* RACKMAN, *supra* note 339, at 46 (discussing member of Agudat Israel Party, Meir David Lowenstien's, argument that adherence to Jewish law should not be matter of individual conscience).

348. *See* BIRNBAUM, *supra* note 203, at 280-82 (discussing secularists' argument for separation); LEIBOWITZ, *supra* note 340, at 174-84 (discussing religious argument for separation).

349. *See* RACKMAN, *supra* note 339, at 35-49 (discussing parties' official statements during constitutional debate and noting that suggestions to institute Jewish law as Israel's constitution were disregarded).

350. *Id.* at 46.

351. *Id.*; 4 Knesset Protocols 745 (1950) (Isr.), *translated in* SHARFMAN, *supra* note 7, at 41 (articulating Knesset Member, Meir David Lowenstien's, demand that Jewish law serve as Israel's constitution).

352. 4 Knesset Protocols 812 (1950) (Isr.), *translated in* SHARFMAN, *supra* note 7, at 41. Objecting to the enactment of anything other than Jewish law in Israel, Minister of Welfare Yitzhak Meir Levin stated that:

> [D]o you think that what our enemies failed to do, what blood and fire failed to do, you will succeed in doing through the power of the state? No you won't! You still do not understand the Jewish soul. It will awaken and burst into a great flame. If in the Holy Land, of all places, we want to turn things

Theocrats oppose the belief that Jewish identity can take many forms and argue that Israel's connection with Judaism cannot be merely cultural or nationalistic.[353] They posit that even within the most secular Jew lies a spark of holiness that a religious state would reawaken and that it is Israel's responsibility to implement Jewish law and serve as an example of adherence to its precepts.[354] According to theocrats, the function of the Israeli Government should be to enforce Jewish law throughout the State.[355] They view the Jewish State as a vehicle for achieving the transcendent objectives of the Jewish religion.[356]

2. Absolute Separation

Although the slogan, "separation of religion and state," is injected into Israeli public debate on occassion,[357] no political party has actually adopted it as a policy position.[358] Complete separation of religion and state is a minority position, extreme and uncommon, and it is not clear what proponents of this position intend when they argue for its implementation.[359] Numerous works have been published detailing the negative impact of the integration of religion and politics in Israel on both Jewish law and the political system.[360] Aside from addressing the infirmities of the present system and urging the untangling of religion from the political arena, however, few undertake the task of

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> upside down and to make the life of religious Jews unbearable . . . . Don't we have anything else to do besides starting a Kulturkampf, which, God forbid, might destroy us and the state?

Id.

353. 4 Knesset Protocols 729 (1950) (Isr.), *translated in* SHARFMAN, *supra* note 7, at 40. Leader of the National Religious Party, Zerah Warhaftig, argued that replacing the Jewish Bible with a constitution would weaken the connection between the Jewish nation and its religious laws, thereby, decreasing the worldwide status of the Jewish people. *Id.*

354. LIEBMAN & DON-YEHIYA, *supra* note 26, at 72.

355. Englard, *supra* note 117, at 188.

356. *Id.*

357. LEIBOWITZ, *supra* note 340, at 174. The slogan is raised as a theoretical position in secular circles. Its advocates do not regard it as a serious political demand to be realized in the present. *Id.*

358. *Id.*

359. LIEBMAN & DON-YEHIYA, *supra* note 26, at 15.

360. *See, e.g.*, LEIBOWITZ, *supra* note 340, at 158-84 (arguing that interaction of religion and state corrupts Judaism); SHARFMAN, *supra* note 7, at 69-92 (arguing that religious legislation is coercive); Shetreet, *supra* note 4, at 207-15 (concluding that enforcement of specific religious norms violates freedom of religion).

elaborating how, precisely, religion and state should be separated, what role Judaism should play in the new system, and how the ramifications of total separation should be dealt with.[361]

Two groups advocate separation of religion and state:[362] a minority of extreme religious and secular thinkers.[363] Their reasons for advocating separation, however, are distinct.[364] The Orthodox separatist position is based on the notion that politics exploits and corrupts religion.[365] Yeshayahu Leibowitz, a leading religious scholar advocating separation, explains that the purity of religion must be saved from the political organ of the State.[366] Leibowitz believes that holiness consists only of the observance of the Torah and its commandments, and any assertion that the founding of the State of Israel, a political and historical event, is embedded in holiness is unjustified.[367] Israel came into existence through the common efforts of Jewish patriots, religious and secular alike, and patriotism, he asserts, is a secular human motive and not a sanctified undertaking.[368]

Leibowitz claims that the Government utilizes religion, not for religious purposes, but to gain power.[369] Absent complete separation of religion and state, Leibowitz argues that religion becomes a political tool, used to gain concessions from religious groups and to advance secular, political objectives.[370] Leibowitz describes the present situation, a secular state, recognizing reli-

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361. LIEBMAN & DON-YEHIYA, *supra* note 26, at 15.

362. *See* Lubetski, *supra* note 288, at 352-55 (outlining secularist and ultra-Orthodox arguments for separation).

363. *See* BIRNBAUM, *supra* note 203, at 280-82 (discussing secularist position); LEIBOWITZ, *supra* note 340, at 174-84 (discussing religious position).

364. *See* BIRNBAUM, *supra* note 203, at 280-82 (discussing secularists' argument that religion corrupts politics); LEIBOWITZ, *supra* note 340, 174-84 (arguing that politics corrupts religion).

365. LEIBOWITZ, *supra* note 340, at 174.

366. *Id.* at 159. Advocates of religion-state interaction justify the legislation of Jewish law in Israel by maintaining that it is indispensable to a decent social order. *Id.* "Justification of religion, is, in effect, its vulgarization." *Id.*

367. *Id.* at 175. *But see* ROGER FRIEDLAND & RICHARD HECHT, TO RULE JERUSALEM 148-49 (1996) (advance uncorrected proof on file with *the Fordham International Law Journal*) (outlining Rabbi Kook's argument that secular Zionists were sacred part of Jewish messianic redemption).

368. LEIBOWITZ, *supra* note 340, at 175. The founders of the State of Israel did act not under the guidance of the Torah and its precepts and neither does the State of Israel. *Id.*

369. *Id.* at 176.

370. *Id.*

gious institutions and supporting them with government funds, as neither aiding nor imposing religion.[371] What is imposed is not true religion, but rather only specific religious provisions deemed appropriate by political, not religious authorities.[372] This system rejects the guidance of Jewish law and replaces it with arbitrary choices fueled by political negotiation.[373] It serves political ends and not God, thereby degrading religion.[374] Leibowitz believes that when religion ceases to shield itself with administrative status, its strength will be revealed and it will be better equipped as both an educational and influential force.[375]

Separation also will allow the religious community to control religious institutions in the interest of religion.[376] The rabbinate would be empowered to speak with the voice of Jewish law about all religious issues, not only those authorized by the State.[377] Leibowitz asserts that the religious community can support its own agencies and institutions, without aid from the Government.[378] Leibowitz concludes, however, that should the community decide to accept governmental aid, it would be entitled to such support even after the separation of religion and state because the community is comprised of taxpayers who share the burden of the State.[379]

Secularists who call for separation believe that separation is the only way to protect freedom of religion and conscience, as it would prevent the religious minority from imposing religious law on the public at large.[380] Shulamit Aloni, leader of the Citizens Rights Movement,[381] articulates the secularist argument, arguing that the people of Israel should not be confused with the

371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.* at 177.
376. *Id.*
377. *Id.* Presently, the rabbinate, as a governmental agency, must refrain from making public statements on urgent religious issues including religious education. *Id.*
378. *Id.*
379. *Id.* at 177, 178.
380. BIRNBAUM, *supra* note 203, at 281.
381. Sarah Honig, *Aloni Rejects Overtures to Return to Meretz*, JERUSALEM POST, Feb. 9, 1996, at 2. Aloni founded the Citizens Rights Movement ("CRM") over two decades ago. *Id.* The CRM was a breakaway faction from the Labor party and is now the mainstay of the three-way coalition which comprises the Meretz party. Sarah Honig, *Shula Blew It, and She Did It Her Way*, JERUSALEM POST, Jan. 26, 1996, at 9.

State of Israel and that although the people of Israel may voluntarily undertake to be guided by religious law, the State must be a purely secular entity with purely secular ministries.[382] Furthermore, Aloni argues that the State should be prohibited from legislating that the Government take an interest in religious issues, even when a Knesset majority supports such an interest.[383]

The separation of church and state in Western democracies, in general, and in the United States,[384] in particular, is based on the notion that democratic political systems cannot deal effectively with religious issues.[385] The injection of religion into the political arena, it is argued, has two primary adverse effects: the stability of the political system is threatened by religion and religion is undermined and corrupted by the political system.[386] The First Amendment of the U.S. Constitution,[387] for example, which separates church and state, is a product of early U.S. history and was passed to eradicate persecution against non-members of the established church.[388]

The centuries immediately preceding the colonization of the United States were wrought with turmoil, civil strife, and persecution.[389] Established sects, determined to preserve their religious and political power, jailed, cruelly tortured, and even killed those with opposing religious beliefs.[390] The offenses meriting these punishments included: speaking disrespectfully regarding the views of ministers of government-established churches, failing to attend these churches, expressions of nonbelief in their doctrines, and neglecting to pay taxes and tithes

382. 15 Knesset Protocols 1571 (1966) (Isr.), *translated in* BIRNBAUM, *supra* note 203, at 281.

383. *Id.*

384. *See* U.S. CONST. amend. I (separating religion and state).

385. LIEBMAN & DON-YEHIYA, *supra* note 26, at vii.

386. *Id.*

387. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.*

388. Everson v. Board of Educ. of Ewing Tp., 330 U.S. 1, 33 (1946) (Rutledge, J., dissenting). "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at one the refined product and the terse summation of that history." *Everson*, 330 U.S. at 33.

389. *Id.* at 8.

390. *Id.* At various times and places Catholics persecuted Protestants, Protestants persecuted Catholics, Protestant sects persecuted other Protestant sects and they all, from time to time, persecuted Jews. *Id.* All of this took place with government support. *Id.*

to support them.[391]

Although a significant number of settlers came to the United States specifically to escape religious persecution, they brought the practices of the old world with them and religious persecution began to flourish in the new world.[392] Individuals and companies designated to the make the laws that would govern the colonies were armed with charters, granted by the English Crown, authorizing them to establish churches which all colonists, believers and non-believers alike, were required to support.[393] All dissenters were compelled to pay tithes and taxes and to support government-sponsored churches whose ministers sought to strengthen the established religion by encouraging hatred of all non-believers.[394]

The persecution of the religious sects not in power aroused the indignation of colonists who wished to preserve freedom and liberty for all individuals.[395] A movement to strip the Government of all power to tax, support, assist religious groups, or interfere with the beliefs or practices of any individual or group developed.[396] Their efforts culminated in the adoption of the Establishment Clause of the First Amendment, a provision embracing religious liberty.[397]

The metaphor of a wall of separation between church and state represents a central principle in U.S. constitutional thought: the State should not involve itself in matters on the other side of the wall, matters relegated to the private sphere.[398] This principle incorporates more than religious freedom.[399] Its protections from government intervention encompass considerations of race and ethnicity, in accordance with the precepts of

391. *Id.*

392. *See* LEONARD LEVY, THE ESTABLISHMENT CLAUSE 1-26 (1994) (discussing colonial establishments of religion); *id.* at 27-78 (discussing state establishments of religion).

393. *Everson*, 330 U.S. at 8.

394. *Id.*

395. *Id.* at 11.

396. *Id.* No single group of colonists can be credited for the protests that eventually resulted in the adoption of the First Amendment. *Id.* Colonists from Virginia, where the established church was a dominant force in political affairs, however, propelled the movement and served as its leaders. *Id.*

397. U.S. CONST. amend. I.

398. JACOBSOHN, *supra* note 2, at 28.

399. *Id.* at 29.

modern constitutionalism.[400] Thus, the Government is prohibited from making an individual's adherence to a religion or membership in a specific race or ethnic group relevant to his or her standing in the political community.[401] Rather, the political community in the United States is based on a universal standard of equality.[402] Rights inhere in the individual, not the group, and the Government is charged with protecting those rights.[403] One of the effects of the Establishment Clause, therefore, is to facilitate and encourage assimilation, to replace ascriptive recognition with individual equality.[404] Members of groups are viewed as U.S. citizens irrespective of their other group affiliations and the force uniting the U.S. citizens is their common national aspirations.[405]

The U.S. Supreme Court's treatment of bigamy highlights its assimilative approach toward community.[406] The U.S. Supreme Court, in *Reynolds v. United States*,[407] upheld a federal statute criminalizing bigamy.[408] The Court addressed whether the petitioner, a member of the Mormon faith, which permits bigamy, should be exempted from the statute.[409] The Court concluded that every civil government has the right to determine whether bigamy or monogamy should be enforced and held that the petitioner could not be exempted from the prohibition on bigamy.[410] Ten years later, the Supreme Court explained that exempting members of religions that permitted bigamy would shock the moral judgment of the community.[411] The Court must have been referring to the nation at large when it used the word community, as the institution of bigamy could not

400. *Id.*

401. *Id.* at 28-29.

402. *Id.* at 29.

403. *Id.* at 21.

404. *Id.* at 30. Religions construct walls to protect themselves from the outside world; separating religion and state prevents governments from protecting these walls and, therefore, from protecting specific religious interests. *Id.*

405. *Id.* at 9; SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 24 (1981). Huntington argues that without the values that constitute the American creed, U.S. citizens have nothing vital in common. *Id.*

406. JACOBSOHN, *supra* note 2, at 30.

407. Reynolds v. United States, 98 U.S. 146, 166 (1879).

408. *Reynolds*, 98 U.S. at 166.

409. *Id.*

410. *Id.*

411. Davis v. Beason, 133 U.S. 333, 341 (1889).

shock or offend the morals of religious communities that permitted bigamy.[412]

B. *Proposed Religion-State Compromises*

The majority of Israelis wish to retain the Jewish character of the State of Israel while, simultaneously, curbing religious coercion.[413] They offer a range of possibilities to eradicate existing religious coercion resulting from the application of Jewish law in Israel.[414] Some defend the status quo.[415] Others advocate additional steps toward separation through implementing an interest analysis test[416] or by supporting only those religious laws that serve primarily secular purposes.[417] In addition, many Israeli scholars advocate the revival of the constitutional project and the establishment of legislative protection of civil rights as the only means of solving religious-state conflicts.[418]

1. Defending the Status Quo

Examining the status quo in the context of the Marriage and Divorce Law highlights the dimensions of conflict, propelled by the competing conceptions of Israel as a Jewish state.[419] Proponents of the existing system argue that so long as non-Orthodox Jews are not forced to adopt Orthodox beliefs, there is no significant breach of religious liberty.[420] They claim that Orthodox marriage ceremonies can be regarded as a mere formality imposed by the State, no more offensive than a com-

412. JACOBSOHN, *supra* note 2, at 32.

413. SAFRAN, *supra* note 21, at 200.

414. *See* Shetreet, *supra* note 4, at 214-27 (advocating secular primary purpose test); Lubetski, *supra* note 288, at 363-70 (advocating interest analysis test and discussing its application).

415. *See* SAFRAN, *supra* note 21, at 209 (stating that two-thirds of Jewish Israeli public favor status quo).

416. *See* Lubetski, *supra* note 288, at 363-70 (presenting interest analysis approach and its application).

417. Shetreet, *supra* note 4, at 214. The secular primary purpose test maintains that if a law serves a primarily secular purpose, it is not considered coercive, even if a religious purpose is incidentally served. *Id.*

418. *See* Shapira, *supra* note 17, at 125-27 (discussing proposed draft of constitution); Kretzmer, *supra* note 17, at 240-49 (discussing first Basic Laws enacted which protect civil rights).

419. *See* Cantor, *supra* note 2, at 205 (characterizing Marriage and Divorce Law as clearest tension between religion and state in Israel).

420. *Id.* at 206.

pulsory civil ceremony might be to a religious person.[421] The Orthodox rabbi would simply be regarded as the State's marriage registrar.[422]

Supporters of the status quo maintain that all Jewish legal prohibitions on marriages and divorces must be upheld, arguing that disrupting the existing system will open the floodgates to a mass of intermarriages, which would threaten the continuity of the Jewish nation.[423] Advocates of maintaining the status quo also contend that any compromise would endanger national unity,[424] and that freeing divorce laws from the jurisdiction of the Rabbinical courts would irreparably divide the nation.[425] This argument, that a change in the status quo would endanger the unity of the Jewish people, has proven to be politically effective because national unity is a rational objective that garners consensus among Israeli political parties.[426]

2. Interest Analysis

Implementing an interest analysis test would serve to balance the competing interests of Jewish law and rational, valid governmental objectives.[427] According to this test, Jewish law would be given priority where religion has an overriding interest in fostering the continued growth of the Jewish community and government objectives would be served absent an overriding religious interest.[428] In the context of the Marriage and Divorce Law, the harm that would result from not adhering to Jewish law

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421. *Id.*

422. *Id.* The same sources would concede that Orthodox marriage ceremonies would constitute religious persecution if Christians or Muslims were forced to marry in like circumstances. *Id.*

423. 44 Knesset Protocols 1834 (1966) (Isr.); M. Porush, leader of religious party Agudat Israel, *translated in* BIRNBAUM, *supra* note 203, at 282. "The Torah and religion are the essence of our existence. Every thought that borders on separation of religion and state is identical with the separation of the soul from the body. Our people is not a people except by virtue of its Torah." *Id.*

424. *See* Englard *supra* note 117, at 422, 423 (discussing danger to national unity). *But see* LEIBOWITZ, *supra* note 340, at 180 (arguing that national unity would not be effected).

425. LIEBMAN & DON-YEHIYA, *supra* note 26, at 26. A large part of the population would regard the offspring of any second marriage, performed absent a legal Jewish divorce, as mamzerim, and, therefore, would be restricted from marrying them. *Id.* This could ultimately lead to the creation of two Jewish nations in Israel. *Id.*

426. Englard, *supra* note 117, at 202.

427. Lubetski, *supra* note 288, at 364, 365.

428. *Id.* at 365.

would have to be weighed against the governmental interest of preventing religious coercion.[429]

The result of this test would provide for civil marriages in Israel where the consequences of such marriages would not lead to the birth of a mamzer.[430] For example, civil marriages between a Jew and a non-Jew or between a Cohen and a divorcee or widow could be permitted because children born to either of these marriages are Halachicly permitted to marry other Jews and do not advance the danger of the creation of two Jewish nations in Israel.[431] Only in a case where a union could produce a mamzer, who is restricted from marrying other Jews, would national unity be affected sufficiently to elevate a religious interest above the governmental objective to protect freedom of religion and conscience.[432]

3. The Secular Primary Purpose Test

Israeli legal scholar, and Minister of Religious Affairs, Shimon Shetreet, supports the integration of religion and state, but argues that only those religious norms which have been adopted by the society at large can be enforced without violating religious freedom.[433] Minister Shetreet argues that if religious legislation passes a secular primary purpose test,[434] synonymous with acceptance by enlightened members of society, it should not be considered coercive.[435] For example, that Jewish holidays and the Sabbath are national days of rest in Israel could constitute religious coercion.[436] Because the law could be attributed to a primarily secular purpose, the enactment of a uniform day of rest, however, that Jewish law is legislated by the State would not be sufficient to invalidate the law.[437]

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429. *See id.* at 368-70 (discussing application of interest analysis to Marriage and Divorce Law).

430. *Id.* at 370.

431. Getsel Ellinson, *Civil Marriage in Israel: Halakhic and Social Implications*, 13 TRADITION 24 (1972).

432. Lubetski, *supra* note 288, at 370.

433. Shetreet, *supra* note 4, at 214. Shetreet argues that religious freedom is violated only when norms that are not accepted by a consensus of society are enforced. *Id.*

434. *See id.* at 214 (defining secular primary purpose test).

435. *Id.*

436. Days of Rest Ordinance, 1 L.S.I. 18 (1948) (Isr.).

437. *See* Shetreet, *supra* note 4, at 214 (making same argument regarding Sunday as U.S. day of rest).

Minister Shetreet maintains that the application of Jewish law in the areas of marriage and divorce constitutes religious coercion.[438] He argues that because the majority of Israeli citizens oppose the Marriage and Divorce Law, it conflicts with religious freedom.[439] Minister Shetreet continues to explain that several religious norms exist that should be adopted by official state institutions despite their lack of societal consensus.[440] He argues, for example, that the military's adherence to Jewish dietary laws[441] is justified not because a majority of Israelis support it, but because it is a symbol that forges a bond with the history of the Jewish people.[442] The continued existence of Israel as a Jewish state, Minister Shetreet argues, requires government authorities to preserve Jewish symbols and values.[443]

4. Toward A Constitution

A constitutional revolution has begun in Israel.[444] Many legal scholars assert that the only way to effectively address the obstacles that the present system places in the path of protecting civil rights, while at the same time retaining the Jewish character of the State, is by completing the task assigned to the nation in Israel's Declaration, the adoption of a constitution.[445] While the enactment of Basic Laws resulted in some progress toward drafting a constitution, the progress was minimal.[446] Basic Laws merely addressed structural issues defining the form of government to be instituted in Israel and the powers of the Government's branches.[447] All issues of contention that originally thwarted the adoption of a constitution were ignored by the Knesset.

The development of a judge-made constitution in Israel

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438. *Id.* at 215, 216.

439. *Id.* at 216.

440. *Id.*

441. Kasher Food for Soldiers Ordinance, 2 L.S.I. 37 (1948) (Isr.). This law ensures that all Jewish soldiers in the Israeli Defense Army will receive kasher food. *Id.* art. 2, 2 L.S.I. at 37 (Isr.).

442. Shetreet, *supra* note 4, at 216, 217.

443. *Id.* at 216.

444. Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 355 (1995). The constitutional revolution began with the enactment of two Basic Laws on human rights. *Id.*

445. *Id.* at 323.

446. *Id.* at 316.

447. *Id.* at 312.

caused many to question whether a written constitution was necessary, or even desirable.[448] Because the judiciary took such an active stance in promoting basic freedoms and was successful in protecting numerous civil rights, scholars pointed to the advantages of an unwritten constitution.[449] Scholars argued that because an unwritten constitution is free from precise textual definitions that often limit rights, it is better equipped to safeguard freedoms in light of changing circumstances.[450] Although many were at first satisfied with leaving the protection of human rights to the judiciary, discontent with the Knesset[451] and with the limited scope of judicial review allotted to the Court,[452] propelled the notion that the time was ripe to revive the constitutional project.

Because certain rights were so controversial, including freedom from religious coercion, a proposal was made to enact human rights provisions gradually,[453] following the chapter by chapter approach outlined in the Harari Resolution.[454] The notion behind this proposal was that after initial legislation was passed protecting less controversial rights, the issue of religion and state, a more controversial issue, would receive serious attention in light of the progress that would have already been achieved.[455] In March 1992, the Knesset passed the first two Basic Laws addressing civil rights: Basic Law: Freedom of Occupa-

448. *Id.* at 318.

449. *See* Segal, *supra* note 176, at 3 (describing Supreme Court's role in protecting civil rights); *see supra* notes 231-45 and accompanying text (discussing judicial protection of civil rights).

450. Barak-Erez, *supra* note 444, at 318.

451. *Id.* at 321. The 1980's marked years of instability in the Knesset where coalition forming increased. *Id.* With the increase in coalition agreements, the relative power of small parties also increased. *Id.* Small interest groups made demands, including illegitimate demands, and ruling party politicians bowed to these demands because they needed the support of these small parties to reach the delicate majority needed to form a government. *Id.* The professional community and the public at large grew skeptical of the legislature when they believed that ruling parties elevated the need for forming a majority to insure their own power base above public fairness and the will of the people. *Id.* at 321, 322.

452. *See* Bracha, *supra* note 160, at 112-20 (discussing judicial review in Israel).

453. Amnon Rubenstein, *The Struggle Over A Bill Of Rights For Israel, in* DANIEL J. ELAZAR, CONSTITUTIONALISM: THE ISRAELI AND AMERICAN EXPERIENCES 139, 139, 140 (1990). Amnon Rubenstein, Knesset member and prominent constitutional law professor, proposed this plan hoping that reaching consensus on the definition of a few rights would stir the dynamics of the constitutional project. *Id.* at 139, 140.

454. Harari Resolution, 5 Knesset Protocols 1743 (1950) (Isr.).

455. Barak-Erez, *supra* note 444, at 323.

tion[456] and Basic Law: Human Dignity and Freedom.[457] Although these Basic Laws codified several important rights, they ignored others for fear of opposition from religious parties.[458] The problem of religion and state, therefore, was not addressed.[459]

Another method employed to advance the constitution project was the introduction of a private bill, never passed, entitled Basic Law: Human Rights.[460] This bill similarly neglected to address the issue of religion and state in Israel.[461] Amnon Rubenstein, one of the drafters of this bill, explained that addressing religious issues would have precluded the bill from passing.[462] Rubenstein agreed to exempt all issues of family law and personal status, preserving the exclusive jurisdiction of the Rabbinical courts.[463] He addressed his intentional exemption only by expressing his hope that the two sides could work out a satisfactory solution in the future.[464]

III. *ISRAEL MUST PROTECT THE CONTINUITY OF THE JEWISH NATION AND JEWISH NATIONAL UNITY*

Although some non-observant Jews complain that the integration of religion and state in Israel constitutes religious coercion, Israel should not separate religion from state. Israel was established as a Jewish state and one of its functions is, and should remain, to promote the continuity of the Jewish nation and to protect Jewish national unity, at least, within its borders. Advocates of the extreme positions fail to recognize the importance of both Israel's Jewish and democratic nature, and there-

456. Basic Law: Freedom of Occupation, Sefer Hakhinukh (S.H.) 90 (1994) (Isr.).

457. Basic Law: Human Dignity and Freedom, S.H. 150 (1992) (Isr.).

458. Barak-Erez, *supra* note 444, at 325.

459. *Id.*

460. Rubenstein, *supra* note 453, at 141.

461. *Id.*

462. *Id.* Amnon Rubenstein wrote:

> Needless to say, we have a very touchy problem with regard to the religious issue. From the first, both Shulamit Aloni and I, who represent the strong opposition to the present status quo in matters of religion, accepted the notion that if we insist on the universality of the law with regard to all issues, it would not have a chance.

Id.

463. *Id.*

464. *Id.* Amnon Rubenstein wrote that, "[G]iven the good will on both sides, I think we can work out some sort of satisfactory solution . . . ." *Id.*

fore, do not effectively address the existing conflict.[465] Advocates of compromise, who recognize that Israel must protect civil rights while retaining its Jewish character, disagree as to which aspects of Judaism merit governmental enforcement and seek to repeal those laws originally enacted to maintain the continuity of the Jewish nation and preserve national unity, including the Marriage and Divorce Law.[466] The re-establishment of Jewish sovereignty in Israel was foreshadowed by thousands of years of Jewish history where Judaism bound the Jewish nation together, often only through persecution, despite individuals' attempts to renounce their Jewish heritage. As a Jewish state, Israel has the responsibility of supporting Judaism and enacting those aspects of Jewish law that ensure the survival not only of the Jewish nation, as a collection of individuals, but also as a Jewish community.

A. *Dismissing the Extremes*

Both the theocrats and the separationalists seek to advance their own interests while discarding the positions of their opposition.[467] Recognizing that preserving the unity of the Jewish nation is an instrumental function of the Jewish State and protecting individual rights is critical to the democratic State of Israel, extreme positions that disregard either of these essential governmental responsibilities must fail. Instituting either a theocracy in Israel or strictly separating religion from state is not a viable option for a government striving to protect both civil rights and religious interests.

1. Dismissing Theocracy

Enacting Jewish law as Israel's constitution would not merely fail to remedy the the plight of non-observant Jews in Israel, it would heighten the conflict and increase complaints of

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465. *See supra* notes 349-55 and accompanying text (discussing theocratic model); *supra* notes 357-412 and accompanying text (discussing proposals for absolute separation).

466. *See supra* notes 427-31 and accompanying text (outlining interest analysis approach); *supra* notes 433-43 and accompanying text (discussing secular primary purpose test); *supra* notes 444-64 and accompanying text (advocating revival of constitution project).

467. *See supra* notes 345-405 and accompanying text (outlining theocratic and separatist positions).

religious coercion.[468] Because Jewish law is not merely a system of belief for the individual, but dictates measures to govern all aspects of society,[469] it can not provide the scope freedom of religion that some Israeli citizens seek. Rather than addressing the concerns of non-observant Israeli citizens, the theocratic approach focuses solely on preserving Jewish law for the Jewish nation, regardless of its consequences for the individual.

2. Dismissing Absolute Separation

Despite that non-observant Jews in Israel argue that the existing position of Jewish law in Israel's legal and political system curtails their freedom of religion, divorcing Judaism from the State of Israel would dramatically change the character of the State and deny Israel's unique history and tradition. Furthermore, it would violate specific principles outlined in the Declaration assuring that Israel is, and will remain, a Jewish state.[470]

Advocates of separating religion and state that point to the United States as the paradigm of a thriving democracy, separating religion and state and fiercely protecting freedom of religion, fail to recognize the limitations of the U.S. experience to Israel. Separation of religion and state was enacted in the United States to combat religious persecution supported by the Government. Because Israel is comprised of a majority of Jewish citizens, it maintained autonomous communal religious institutions, in part, to ensure the Arab community equality. If complaints of religious coercion were expressed by the Arab minority in Israel, Israel's dilemma would be more similar to the persecution in the United States that propelled the enactment of the Establishment Clause. Israel, however, does not share the history or national experience of the United States. Minorities in Israel are not persecuted at the hands of the majority. Furthermore, no single religion is supported by the Government at the expense of any other. Rather, all religions are recognized and supported by the Israeli Government. Applying the U.S. solution to the Israeli problem, therefore, must ultimately fail, as it

468. *See supra* notes 349-55 and accompanying text (discussing theocratic model).

469. *See supra* notes 42-44 and accompanying text (discussing Judaism as religion for community, not merely individual).

470. *See* Declaration, 1 L.S.I. at 3, 4 (Isr.) (discussing establishment of Israel as Jewish state).

does not address the unique facets of the Israeli dilemma:[471] government responsibility for the maintenance or religion, in general, and religious coercion among members of the majority, in particular.

In the United States, attributes of nationhood flow directly from the political conception of the state. To be a U.S. citizen is to embrace certain political principles. The United States is a case of a state creating a nation.[472] Israel's establishment, on the other hand, was the antithesis of the U.S. founding. The State of Israel is an example of the political expression of a people already formed.[473] The argument among the majority of Jews in Israel is over which dimensions of Judaism should receive public recognition, not whether such recognition is legitimate.[474]

One legal scholar, Professor Jacobsohn, draws distinctions between the U.S. and Israeli approaches toward community through their contrasting treatment of bigamy.[475] Unlike the United States, Israel, as the cradle of three religions, accepts the responsibility of protecting the religious interests of religious communities. The Knesset provides different protection to each community, therefore, in order to facilitate equality,[476] a notion that has been rejected in the United States.[477]

Separation of religion and state in the United States has facilitated the advancement of Jewish individuals, but not the continuity of the Jewish nation. The Jewish community in the United States is not unified.[478] Orthodox and Reform leaders vehemently oppose each other on a wide array of religious issues

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471. Shetreet, *supra* note 4, at 205. Ben Gurion stated that:

> The convenient solution of separation of Church and State, adopted in America not for reasons which are anti-religious but on the contrary because of deep attachment to religion and the desire to assure every citizen full religious freedom, this solution, even if it were adopted in Israel, would not answer the problem.

Id.

472. JACOBSOHN, *supra* note 2, at 37.

473. *Id.*

474. *Id.* at 38.

475. *See id.* at 31-35 (contrasting U.S. and Israeli courts' treatment of bigamy).

476. *See supra* notes 270-74 and accompanying text (discussing Israeli Supreme Court's treatment of bigamy which highlights Israel's recognition of distinct religious communities).

477. *See supra* notes 406-11 and accompanying text (discussing U.S. Supreme Court's refusal to exempt Mormons from laws prohibiting bigamy).

478. Stewart Ain, *Fightin' Words*, JEWISH WEEK, March 29, 1996, at 14. A Reform leader stated that, "[i]t is all very well to sloganize that 'we are one'. . . but in fact we

including intermarriage and the definition of who is a Jew. Recently, the Reform movement adopted the doctrine of patrilineal descent which violates Halacha by accepting as Jews children born to Jewish fathers.[479] The Reform movement is not keeping records of those Jews which the Conservative and Orthodox communities would not consider to be Jewish. It is quite possible that in two generations observant Jews will be forced to separate themselves entirely from the Reform community because they will be unable to ascertain who is Jewish for the purposes of marriage. This fragmentation of the Jewish community is precisely the situation that the laws in Israel were enacted to prevent.

B. *Analyzing Compromise*

Advocates of compromise recognize the Israeli Government's responsibility to both preserve national unity and to protect civil rights.[480] Legal scholars disagree, however, as to the balance that should be struck between these competing interests. Although several suggested solutions theoretically seem to adequately give force to both religious and secular concerns, applying these solutions to practical conflicts, such as the Marriage and Divorce Law, exposes their flaws.

1. Attacking The Status Quo

Clearly, in the context of the Marriage and Divorce Law, the compromise achieved by the civil courts, the recognition of private marriage ceremonies and marriages that are conducted outside the State,[481] is an attempt to preserve the symbolic value of religious marriage, while at the same time creating outlets to ease the restraints of religious prohibitions. Although it does make circumventing the law possible, it is wrought with contra-

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have ceased to be one and I strongly advise that we recognize that fact and proceed." *Id.*

479. Gary Rosenblatt, *Quick Fix Judaism Doesn't Work*, JEWISH WK., Mar. 29, 1996, at 5.

480. *See supra* notes 427-63 and accompanying text (discussing three proposed compromises: interest analysis approach, secular primary purpose test, and revival of constitutional project).

481. *See supra* notes 320-29 and accompanying text (discussing civil courts' circumvention of Jewish law).

diction and fails to formulate a clear policy on the role religion should play in the area of marriage.

Although recognizing marriages that take place abroad and in private ceremonies does not remove Jewish law from the political arena, it creates a situation where the dangers that Jewish law seeks to avoid can flourish.[482] Developing methods to circumvent Jewish law erodes the law, but it does not destroy it, as outwardly, the law of the State continues to accord legal force to religious law.[483] The question that needs to be asked is whether the interests served by maintaing Jewish laws without full enforcement are important enough to justify merely providing loopholes in the existing system to prevent religious coercion and not changing the actual law.

2. Flaws in Determining Which Jewish Laws Protect Jewish Continuity and National Unity

Arguably, the interest analysis approach[484] was the very test employed by the founders of the State of Israel, resulting in the status quo. As the religious parties originally sought to enact Jewish law as Israel's constitution, they agreed to the status quo precisely because it preserved Jewish law in those areas that they deemed closely linked with national unity and the preservation of the Jewish nation. That the suggestion to reapply an interest analysis test has been raised exemplifies that citizens' perceptions regarding what fosters national unity and the perpetuation of the Jewish nation is changing. For example, when the status quo was adopted, preventing the loss of Jews to intermarriage was perceived as critical. If the interest analysis test were to be reapplied and civil marriages to be instituted in Israel,[485] it is likely that at a later date yet another application of this test would be sought. Instituting civil marriages suggests that the only the birth of mamzerim contributes to the demise of Jewish unity, while the consequences of intermarriage will not.

Arguments labeling specific Jewish precepts as instrumental

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482. *See supra* notes 423-24 (discussing threats to continuity of Jewish nation and to national unity).

483. Shifman, *supra* note 320, at 542.

484. *See supra* notes 427-31 and accompanying text (discussing interest analysis approach).

485. *See supra* notes 430-31 and accompanying text (advocating institution of civil marriages in Israel).

to the preservation of the Jewish nation are subjective as factions within Judaism interpret the binding nature of precepts differently.[486] One must understand, however, that religious Jews do not argue for the legislative enactment of Jewish law to bind themselves. Despite the secular laws of the State, religious Jews will continue to live within the confines of Halacha. They argue for the implementation of Halacha precisely to bind those Jews who would not otherwise adhere to Jewish law. The very nature of this system is coercive, but advocates of maintaining the status quo deem the minimal coercion justified because the interest it protects is the very preservation of the Jewish nation.

Furthermore, the question remains as to whether religious authorities or secular politicians should be charged with determining which laws have an overriding religious interest. Indeed, the answer to this question will impact critically on the ultimate laws adopted. Not only is there dissention between religious leaders on the meaning of several Biblical commandments, but also there are several matters for which there is no settled Halacha at all.[487] Rather, a continuum of opinion exists as to the true nature of the meaning of these Jewish precepts.[488] A secular legislator cannot enact a law containing two conflicting, undecided opinions and would, therefore, be required to resolve the dispute himself.[489] If the secular legislator, who possesses no Halachic authority and may not feel compelled to protect religious interests, decides Halachic questions then Halacha will be compromised and the legislator's decision, although rooted in religious law, will not be recognized by religious communities.[490] The very nature of the Halachic process provides the framework for this situation to flourish. Jewish law is so controversial that it is possible to find support for almost any desired outcome.[491]

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486. *See supra* notes 283-85 and accompanying text (discussing Orthodox, Conservative and Reform Judaism and their approaches to Biblical commandments).

487. Izhak Englard, *The Problem of Jewish Law in a Jewish State*, 3 ISR. L. REV. 254, 267 (1968).

488. *Id.*

489. *Id.* In Halachic codifications, two conflicting approaches to a law are often enacted. *Id.*

490. *Id.* at 268.

491. *Id.* Justice Silberg commented that:

> Our legal material is so rich and so controversial that in fact one can find precedent for any desired view. Obviously for the Dayan [religious judge] this does not facilitate a decision in the actual case he is trying, but it certainly eases for the codifying legislator the choice of the abstract principle. For the

While religious authorities seek to curb their practices to Jewish law, the secular legislator could merely choose the opinion most desirable to suit secular, rather than religious needs.[492]

3. Flaws in the Secular Primary Purpose Test

Minister Shetreet's secular primary purpose test[493] avoids addressing the central issue of the Israeli dilemma regarding religion and state: what does being a Jewish state entail. That Israel is a Jewish state that recognizes religion, suggests that it can legislate laws to protect religious interests without assigning the laws a secular purpose.[494] Merely retaining all laws that serve a secular purpose, while discarding those that only protect religious interests, would be tantamount to an absolute separation of religion and state. Furthermore, underlying the validity of the secular primary purpose test is the notion that laws fashioned to serve only religious needs should not be upheld. If Israel is to continue to exist as a Jewish state and as a safe haven from persecution for all Jews, it must protect at least those Jewish laws that are essential to the preservation of the Jewish nation.

Minister Shetreet's exception to the secular primary purpose test, the allowance of religiously based laws that foster a bond with the past of the Jewish people, despite the absence of societal consensus,[495] fails to clearly articulate how to determine which laws should be afforded this privileged status. Minister Shetreet labels the Marriage and Divorce law coercive,[496] while maintaining that statutes protecting Jewish dietary laws in the military should be permitted according to this exception. The consequences of eradicating Rabbinical courts' jurisdiction over

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codifier's function is different from that of a deciding judge: the latter is obligated to find the accepted opinion, whereas the former is allowed to chose the desirable one.

Id.

492. *Id.*

493. *See supra* notes 433-42 and accompanying text (outlining secular primary purpose test).

494. *Yosifif*, 1 S.J. at 195 (Isr.) In his concurring opinion, Supreme Court Justice Silberg commented that Israel views, as its resposibility, "the maintenace and regulation of particular forms of living and cultural values in which that particular section of the community is interested, and which it holds dear." *Id.*

495. *See supra* notes 440-42 and accompanying text (discussing exception to secular primary purpose test).

496. *See supra* notes 438-38 and accompanying text (labeling Marriage and Divorce Law coercive under secular primary purpose test).

the marriages and divorces of Jews, however, would be so severe that, despite a lack of societal consensus, the Marriage and Divorce Law should be upheld. The Marriage and Divorce Law facilitates a crucial bond with Jewish history and Jewish identity by preventing intermarriage and preventing the creation of two separate Jewish nations within Israel. Unfortunately, Minister Shetreet does not address why the link to Jewish history is fostered to a greater extent by adherence to dietary laws than by adherence to laws that dictate who, in fact, is Jewish and who Jews are permitted to marry.[497]

4. Redefining the Constitution Project

Although the constitution project[498] recognizes the importance of individual liberties and of maintaining the Jewish character of the State, it avoids making principled decisions on the issue of religion and state that might alienate religious parties.[499] The gradual approach of extending legislative protection to civil rights, which advocates for enacting a constitution propose,[500] could, indeed, produce legislative protections of less controversial rights. Without a definitive policy regarding the role that religion should play in Israel, however, it is unlikely that the mere momentum of the constitution project would propel a solution to this intricate and emotionally charged dilemma.

CONCLUSION

Despite the multi-faceted dimensions of the conflict surrounding religion-state issues in Israel, the Knesset must articulate a clear role for Jewish law in Israel's legal system. While Supreme Court decisions that facilitate the circumvention of Jewish law prevent percieved religious coercion, they confuse, rather than illuminate the role that Jewish law should be afforded in the Jewish State. Satisfying both secular and religious Jews in Israel is a difficult task as harmonizing Jewish law with complete freedom from religious coercion is impossible.

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497. Shetreet, *supra* note 4, at 215-17.

498. *See supra* notes 444-63 and accompanying text (discussing efforts to enact constitution and bill of rights).

499. *See supra* notes 461-63 and accompanying text (discussing exemption of religion-state issues).

500. *See supra* notes 453-54 and accompanying text (advocating gradual approach to legislative protection of civil rights).

Although it is unlikely that a consensus among the Jewish nation will ever be reached on issues of Jewish nationalism, Jewish law, and their relationship to each other, the State of Israel must continue to strive toward unifying a divided Jewish community, perpetuating the continued existence of the Jewish nation, and serving as a light unto all other nations, while minimizing government encroachment on individual freedoms.