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Claremont McKenna College



**Shifting Priorities? Civic Identity in the Jewish State and
the Changing Landscape of Israeli Constitutionalism**

Submitted To
Professor George Thomas

by
Mohamad Batal

for
Senior Thesis
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Abstract:

This thesis begins with an explanation of Israel’s foundational constitutional tension—namely, that its identity as a Jewish State often conflicts with liberal-democratic principles to which it is also committed. From here, I attempt to sketch the evolution of the state’s constitutional principles, pointing to Chief Justice Barak’s “constitutional revolution” as a critical juncture where the aforementioned theoretical tension manifested in practice, resulting in what I call illiberal or undemocratic “moments.” More profoundly, by introducing Israel’s constitutional tension into the public sphere, the Barak Court’s jurisprudence forced all of the Israeli polity to confront it. My next chapter utilizes the framework of a bill currently making its way through the Knesset—Basic Law: Israel as the Nation-State of the Jewish People—in order to draw out the past and future of Israeli civic identity. From a positivist perspective, much of my thesis points to why and how Israel often falls short of liberal-democratic principles. My final chapters demonstrate that neither the Supreme Court nor any other part of the Israeli polity appears particularly well-suited to stopping what I see as the beginning of a transformational shift in theory and in practice. In my view, this shift is making, and will continue to make, the state’s ethno-religious character the preeminent factor in Israeli Constitutionalism and civic identity.

Acknowledgements

The list of people I would like to thank is much longer than this one, and what I would like to say to them is far more intimate. However, I will give it a shot. First and foremost, I would like to thank my formal reader, Professor George Thomas, as well as my informal reader, Professor Gary Gilbert, for taking the time to provide me with one of the most enriching educational experiences of my life. I should emphasize that Professor Thomas has long had this sort of impact on my academic career, and I am deeply indebted to him for that. Additionally, I would not be here without the never-ending encouragement I received from my family, my dear friend and mentor Jessica Block, as well as Sean Cheng, who always believed in the power of exponential functions. Lastly, I would like to credit Professor Ilai Saltzman, Professor Gary Jacobsohn, Eli Etzioni, Connor Bowen, Kaamil Hussain, Campbell Streater, Carly Medina, Wael Batal, Melissa Muller, and Susan Layden for their invaluable advice and support throughout the process.

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Introduction: The Fundamental Tension in Israeli Constitutionalism

“The vagueness of the reference to ‘Israel's heritage’ was deliberate, with the result that different judges could interpret the Jewish tradition in different ways, religious and secular, liberal and communitarian. The provision demonstrates the dominance of Jewish culture in the Israeli polity, of the unity between the ‘political center’ and one of the communities it incorporates; but its meaning is ultimately deferred for subsequent judicial interpretation.”¹

- Gary Jeffery Jacobsohn, *Apple of Gold*

With regard to its constitutional foundations, Israel is an enigma. What I mean by this can be made clear by a comparison to the American constitutional scheme. While the latter is practically defined by conflict—as Madison put it, “Ambition must be made to counteract ambition”²—the differences between Republicans and Democrats, conservatives and liberals, Federalists and Antifederalists ultimately fall within what Gary Jacobsohn calls “a broader consensus of agreement on political fundamentals.”³ It is precisely this sort of consensus that remains elusive in Israeli Constitutionalism. Students of comparative constitutionalism have often asked if Israel can maintain its commitment to being a Jewish state while consistently upholding liberal democratic principles.⁴ In attempting to answer this question, we should first

¹ Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton, NJ: Princeton University Press, 1994), [53-54].

² James Madison, Federalist No. 51, ed. Charles R. Kessler and Clinton Rossiter (New York City, NY: Signet, 2003)

³ Jacobsohn, *Apple of Gold*, [115].

⁴ In *Constitutional Identity*, Jacobsohn offers a different version of this question: “Most conflict in Israeli society runs along a definitional fault line emphasizing one fundamental question: Is the essential character of the state comprehensible mainly as the embodiment of democratic—basically Western—attributes, or as the fulfillment of the national ambitions of a particular people?” See Gary Jeffrey Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010), [272].

look to the Declaration of the Establishment of the State of Israel,⁵ which, much like its American counterpart, is best understood as an attempt to affix a certain “political-moral character” to the government.

What exactly is this “political-moral character,” and how should principles from a declaration of independence be understood in relation to the state and its polity? In the American context, Abraham Lincoln offers a compelling interpretation:

All this is not the result of accident. It has a philosophical cause. Without the Constitution and the Union, we could not have attained the result; but...there is something back of these, entwining itself more closely about the human heart. That something, is the principle of ‘Liberty to all’...The expression of that principle, in our Declaration of Independence, was most happy, and fortunate...[It] has proved an ‘apple of gold’ to us. The Union, and the Constitution, are the picture of silver, subsequently framed around it.⁶

Although Lincoln never used this vivid imagery in a public address, his rich understanding of the Declaration of Independence as a source of guiding principles strongly informed his approach to American government. He is not alone in this approach—in discussing the institutional framework of the Israeli government, David Ben-Gurion wrote, “The legal and democratic system we wish to fortify is designed to give effect and permanence to [the Israeli Declaration of Independence].”⁷ While the two founding documents have crucial differences, each is an attempt to introduce and outline “the intellectual contours for

⁵ Throughout this paper, I will refer to this as the “Israeli Declaration of Independence.”

⁶ Abraham Lincoln, “Fragment on the Constitution and Union,” Teaching American History, accessed May 11, 2017, <http://teachingamericanhistory.org/library/document/fragment-on-the-constitution-and-union/>.

⁷ David Ben-Gurion, *Rebirth and Destiny of Israel* (New York City, NY: Philosophical Library, 1954), [375].

constitutional discourse about how these societies arrange their fundamental rules and governing practices.”⁸

In both cases, the apple of gold is the polity’s conceptual core; it offers guiding principles for how the government should seek to build a political system—its picture of silver. And although there remains ample room for interpretation, the principles point toward a certain structure of government. However, the Israeli Declaration of Independence is not so straightforward. As I suggested above, it has two conceptual cores that lie in fundamental tension with one another. The two passages I point to below are not necessarily incoherent, but in practice, constructing a “Jewish State” has often conflicted with the thoroughly liberal principles to which Israel commits itself in this second passage. The Israeli Declaration begins:

The Land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books... [This is] the Jewish State.⁹

A few paragraphs later, however, the Israeli founders strike a very different tone:

The state of Israel...will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.¹⁰

⁸ Jacobsohn, *Apple of Gold*, [5].

⁹ "The Declaration of the Establishment of the State of Israel," Provisional Government of Israel, last modified May 14, 1948, accessed May 11, 2017, https://www.knesset.gov.il/docs/eng/megilat_eng.htm.

¹⁰ *Ibid.*

Each of the sections is internally consistent, and on its own either of them could lay a principled foundation for constructing a state's picture of silver. However, in Israel, the regime-defining question is one of competing visions and constitutional priorities. As Jacobsohn puts it, "How one sees the Jewish state...will be decisive in determining the extent to which...liberal sentiments assume interpretive prominence."¹¹ Different parts of Israeli society see the Jewish state—as well as *who* and *what* is Jewish—in very different ways, and as Jacobsohn reminds us, there is no single "Zionist vision."¹² He goes on to assert: "The autonomous, neutral state of liberal constitutional theory does not present an altogether appropriate model for the Israeli polity."¹³

This type of assertion lies at the center of a great deal of the literature on Israeli Constitutionalism. In fact, this is precisely what sparked my interest in the topic; in many ways, I consider myself a classical liberal when it comes to constitutional structure, normative commitments, and aspirational principles, so as I learned more about the Israeli case, my initial approach was to demonstrate the ways in which the state's "Jewish" identity undermined liberal-democracy.¹⁴ At the time, my goal in diagnosing these "illiberal" or "undemocratic moments" was to issue an analytical, normative rebuke of "thick" state religion that

¹¹ Jacobsohn, *Apple of Gold*, [7].

¹² *Ibid.*

¹³ *Ibid.*, 36

¹⁴ More specifically, it was Gary Jacobsohn's 1993 book *Apple of Gold*—and to some extent his later works, *Wheel of Law* (2005) and *Constitutional Identity* (2013)—that inspired me to delve into the study of Israeli Constitutionalism. While Professor Jacobsohn continues to directly influence my framing of the topic, as is evident from how frequently I have cited his work, particularly in my first two sections, I believe his most significant contribution to my project is the doors he opened for my own exploration.

threatened my beloved liberal-democratic principles. After doing so, I endeavored to provide several different approaches for resolving this tension in favor of my preferred principles and constitutional structure. Not surprisingly, none of them appeared particularly promising, but fortunately, education intervened. In addition to my theoretical background in nationalism and state-building,¹⁵ reading authors like Yael Tamir,¹⁶ Sammy Smooha,¹⁷ and Ahmet T. Kuru¹⁸ has vastly complicated my understanding of equality, constitutionalism, and government more generally. For this, these scholars (and many others) have my deepest gratitude.

As far as categorization is concerned, I have concluded that none of the many shorthand labels for describing Israel's socio-political system is particularly useful, because all of them inevitably overlook state-specific nuance. One might respond that these theoretical frameworks should merely serve as a starting point, not an all-inclusive definition. Yet by this logic, I am not sure why we should rely upon arbitrary categories such as liberal-democracy and ethnocracy. In this vein, a bucket of white paint serves as a useful heuristic. Let us assume that the bucket of white paint represents the ethnocratic or ethno-national "ideal type," and that a nearby can of black paint represents the liberal-democratic one.

¹⁵ For this I am indebted to Professor Kristin Fabbe, whose course entitled "Nations, Nationalism, and State-Building in the Middle East" provided me with a strong theoretical foundation in these topics, and I have since seen civic identity and state institutions through a new lense. More than this, Professor Fabbe has been a kind and caring mentor as well as an academic and intellectual inspiration ever since I took her 8:10 am class during the spring of my Freshman Year.

¹⁶ Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1995).

¹⁷ Sammy Smooha, "The model of ethnic democracy: Israel as a Jewish and democratic state," *Nations and Nationalism* 8, no. 4 (2002)

¹⁸ Ahmet T. Kuru, *Secularism and State Policies toward Religion: The United States, France, and Turkey* (Cambridge, MA: Cambridge University Press, 2009)

As you start to drip black paint into the bucket, stirring all the while, at what point does it become “black”? If you have a gallon of white paint and you’ve only added a tablespoon of black paint, is the resulting color black? And what if you dump in the entire can? There would obviously be a noticeable difference between these two mixtures, but describing it would be difficult if you could only say either that they are black or that they are white. Applying this concept to my project, instead of attempting to argue that the proverbial “color” of the Israeli polity is either not quite black or not quite white, I will adopt a different paradigm which seeks to describe the actual shade of gray that one sees in this unique mixture.¹⁹

In short, the purpose of my project has changed significantly. My aim is to describe the evolution of Israeli civic identity and Constitutionalism in an interesting and informative way, while placing these elements of the Israeli polity into contemporary context. Overall, while I have retained the illiberal/undemocratic “moment” terminology, I am decidedly uninterested in reprimanding the Israeli polity for departing from liberal-democratic principles in favor of the state’s Jewish identity—although in many cases, I would have personally preferred that they resisted those ethno-national tendencies. As opposed to offering policy proposals or prescribing moral remedies, in this thesis, I seek to approach the core tensions in Israeli Constitutionalism from a more

¹⁹ I owe this formulation, and a great deal more, to Professor Gary Gilbert. Although I was unable to add him as a second reader, Professor Gilbert went above and beyond, reading countless drafts and coming in specifically to discuss complex topics regarding Judaism and Israeli society. Professor Gilbert’s expertise and advice have shaped this project more than it would be reasonable to expect, but I am most thankful for his time and care throughout the process.

positivist perspective. At the outset, I am happy to concede that I may not do so perfectly. Moreover, I should note that while I take pains to avoid normative finger-wagging, much of my analysis can quite easily be leveraged to criticize various actors or institutions for violating minority rights and human rights, as well as for undermining substantive equality. I do not view this as a shortcoming of my project, but rather as a potential extension of it.

* * *

In what follows, I will first outline the evolution of Israeli constitutionalism, particularly as it relates to the historical foundations of judicial review and what I call a protracted “tug-of-war” over foundational principles. As I hope to make clear, this push and pull was largely veiled in the realm of theoretical abstractions about constitutional priorities; up until Barak’s “constitutional revolution” in 1992, there was a degree of consensus that the state’s Jewish identity should, in practice, come before its liberal-democratic one. Somewhat similar to the American “second founding,”²⁰ it took Israel several decades to confront the tensions and contradictions lying dormant in its foundational texts. I will conclude chapter 1 by formally introducing the concept of an illiberal or undemocratic “moment,” in addition to drawing out an important caveat regarding this framework in the context of Israeli history.

Next, I will hone-in on an important piece of legislation currently making its way through the Knesset entitled, “Basic Law: The Nation-State of the Jewish

²⁰ For an excellent discussion of the Second Founding, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 2000)

People.” As is clear from its name, in several ways, the bill elevates the state’s Jewish identity at the expense of its liberal-democratic principles. An assessment of this legislation’s likely impact on belonging, civic identity, and the perpetuation of second-class citizenship lie at the core of my second chapter. Drawing on concrete provisions of the bill as well as contemporary policies, this section illustrates the Israeli polity’s desire to prioritize its social and legal identity as a Jewish State at the expense of liberal-democratic principles to which it is also committed.

Chapter 3 is situated within this context, and my goal in this section is to assess whether the Israeli Supreme Court can be an effective countervailing force—a true and reliable guardian of liberal-democracy. If it is in a position to defend these principles, to what extent can it play this “democratizing” role, and how should it go about doing so? While proponents of liberal-democracy might balk at these manifestations of judicial restraint, a deeper understanding of Israeli Constitutionalism suggests what initially seems counter-intuitive. I argue that both approaches were actually quite prudent, and in fact, varying degrees of deference are *necessary* for maintaining any space at all the Court’s defense of liberal-democratic principles in the future. Indeed, as reflected by his opinion in *Ka’adan*, perhaps Barak was implicitly aware of limitations on the Court acting as “republican schoolmaster,” an approach that is especially intractable within “rifted democracies” like Israel. For a number of reasons, I believe that in the Israeli context, the prospects for this pedagogical approach are quite grim. This is especially true in the present moment. Due in part to the changing politics of

Supreme Court appointments, as well as the contemporary socio-political landscape, recent rulings have undermined liberal-democratic principles, resulting in a lack of judicial protection for Israeli minorities in several important contexts.

As I will explain in chapter 4, even in “landmark” cases where justices like Aharon Barak sought to uphold liberal-democratic principles, the Court’s language was actually quite tepid. Beginning with the famous *Ka’adan* decision in 2000, the High Court of Justice’s approach to segregation and discrimination in land allocation also fell short of liberal-democratic principles.²¹ This was partially due to ineffective enforcement, but more importantly, the Court’s assertion of liberal principles was deeply lacking in force. Moreover, when the Court upheld the “Admissions Committees Law” in 2014, the majority invoked the “ripeness” doctrine, a jurisprudential approach that has not been seen in Israeli Constitutionalism—and certainly not majority opinions—until very recently. In a brief subsection at the end of this chapter, I quickly examine three important Court cases from the past decade. First, I will demonstrate that the Court has maintained a somewhat more activist approach in cases relating to African refugees beginning in 2013, but I predict that judicial protection of liberal-democratic principle—namely, in this instance, human rights—may be temporary, even in this limited realm. The next case I discuss is the Court’s 2011

²¹ Throughout this thesis, I will almost exclusively be discussing cases that come to the Israeli Supreme Court under its jurisdiction as the High Court of Justice, because it is in this capacity that the national judiciary acts as a constitutional court. For simplicity’s sake, I chose to use the more general, more universal term, although it is admittedly less precise.

decision to uphold the “Nakba Law,” which significantly limits political expression and contributes to the erasure of the Palestinian historical narrative surrounding Israel’s founding. Finally, I turn to the Court’s 2015 decision in the “Boycott Case,” which articulated a thoroughly impoverished understanding of equality as part of the basis for a ruling which powerfully undermined the freedom of political expression. Aside from the Court’s (potentially temporary) protection of African refugees, all of the decisions that I discuss have both demonstrated and contributed to the development of a more deferential jurisprudence.

In my conclusion, I endeavor to widen the scope of my project. I attempt to discern whether the state’s legal system, its political structure, and the Israeli polity itself is experiencing a more fundamental shift that transcends the tension between the state’s two foundational sets of principles. In other words, to what extent does the recent emphasis on Israel’s “Jewishness”—in the context of illiberal or undemocratic moments, the nation-state bill, and the Court’s declining influence—represent a departure from what came before it? Are we witnessing the beginnings of a transformational moment in the Israeli constitutional scheme that consistently and pervasively prioritizes the state’s Jewish identity? These are some of the most interesting questions in the study of modern Israeli Constitutionalism. Resisting the urge to prognosticate on when illiberalism in Israel will reach a “critical mass”—which is not the norm in the literature on this topic—I once again shift the paradigm. Under my more state-

specific approach, if there is such a transformational shift, we will probably never know for sure.

Chapter 1: Barak's "Constitutional Revolution" and the Tug-of-War over Foundational Principles

"A constitution is not the act of a government, but of a people constituting a government."²²

- Thomas Paine

In this chapter, I aim to trace major points in Israel's constitutional evolution through 1995, taking particular care to draw out the legal basis for the Court's broad powers of judicial review. As I hope to make clear, while Chief Justice Barak based his "constitutional revolution" upon Basic Law: Human Dignity and Liberty, his transformative interpretation hardly reflected the Knesset's intentions and expectations. Indeed, the context surrounding this legislation and Barak's legal reasoning in *United Mizrahi Bank v. Migdal Cooperative Village* (1995) both indicate that an enormous degree of activism was necessary to establish the Court's broad powers of judicial review. Nevertheless, Barak's jurisprudence reflects a critical juncture in the Israeli polity's tug-of-war over constitutional principles: in practical terms, the state's foundational constitutional tension had been largely dormant to this point, but Chief Justice Barak's rulings brought it to the fore. As the rest of my thesis will demonstrate, the Barak Court's jurisprudence has had far-reaching impacts on the Israeli polity, and its consequences will continue to be felt for years to come. I will conclude this chapter with a brief note on what I call illiberal or

²² Thomas Paine, *Rights of Man* (New York City, NY: Penguin Books, 1985), [185].

undemocratic “moments,” explaining how they fit in with the history of the Jewish State.

A. Tracing Israel’s Constitutional Evolution

Israel has one of the most complex and interesting processes of constitutional evolution of any liberal democracy. The story begins with the Israeli Declaration, which called for the drafting of a constitution “not later than the 1st October 1948.” Two years later, however, there was still no consensus on which principles should guide the constitutional framework—should Israel adopt the Torah as its constitution, or should it codify a traditional liberal democratic document which endorsed civil liberties in tension with Jewish law? In a third camp were those who opposed any constitution at all, including David Ben-Gurion, Israel’s preeminent Founding Father. As he put it, “Do we need a Constitution like the American? By all means let us profit from the experience of others and borrow laws and procedures from them, provided they match our needs.”²³

In keeping with Lincoln’s metaphor from my introduction, the Israeli Founders could have picked an apple of gold or simply ignored the tree altogether. However, another option presented itself: in 1950, the First Knesset adopted a compromise known as the Harari Resolution.²⁴ Instead of writing a single document, this piecemeal approach stipulated that the “constitution” of

²³ David Ben-Gurion, *Rebirth and Destiny of Israel* (New York City, NY: Philosophical Library, 1954), [370].

²⁴ Named for Knesset Member Yizhar Harari, the Resolution’s sponsor.

Israel would be composed of a series of Basic Laws to be created over time by the Constitution, Law and Justice Committee. Ultimately, the goal was to consolidate these Basic Laws—which were seen as superior to ordinary legislation and required a special majority to repeal—into a single document to be presented to and ratified by the Knesset.²⁵ The process has taken much longer than anticipated.

However, in Jacobsohn’s words, the claim that Israel has no written constitution “turns out to be at best a half-truth. [In 1993] what the country lack[ed was] a formal bill of rights and judicial review over legislation.”²⁶ After the Harari Resolution, the next major step in Israel’s constitutional evolution came in *Bergman v. Minister of Interior* (1969), and it deals with the latter of these two omissions: judicial review. This decision revolutionized the Israeli legal system by introducing *de facto* judicial review for primary legislation. Yet as Amos Shapira puts it, “Although the *Bergman* decision speaks the language of restraint, it actually engages in judicial activism *par excellence*.”²⁷ In this respect, comparing *Bergman* to *Marbury* rings true in two different ways: first, both cases laid the foundation for judicial review in their respective polities, and second, both Justices writing the decisions would likely have been horrified to learn how their opinions have been construed by judicial supremacists. Chief Justice John Marshall “might have seen fit to enter a vigorous disclaimer”²⁸ if he

²⁵ "Harari Proposal Passes, Ending Prospects for an Israeli Constitution," Center for Israel Education, accessed May 11, 2017, <https://israeled.org/harari-proposal-constitution/>.

²⁶ Jacobsohn, *Apple of Gold*, [14].

²⁷ Amos Shapira, "Judicial Review without a Constitution: The Israeli Paradox," *Temple Law Quarterly* 56 (1983): [414].

²⁸ Jacobsohn, *Apple of Gold*, [124].

foresaw the implications of *Marbury*, but Melville Nimmer explains why Justice Mosche Landau's opinion was more far-reaching than that of his American counterpart: "Where Chief Justice Marshall declared an Act of Congress void because it was in conflict with the Constitution, Mr. Justice Landau...declared an Act of the Knesset void despite the fact that Israel has not yet adopted a written constitution."²⁹ Though Justice Landau was skeptical of judicial activism, one might not come to that conclusion based on his jurisprudential legacy.

Additionally, *Bergman* laid the foundation for *Kach Party Faction v. Hillel* (1985), another major Israeli Supreme Court case. This decision explicitly relied on Chief Justice Marshall's argument for judicial supremacy as fundamentally linked to the separation of powers. Chief Justice Barak is often credited with (or criticized for) driving a major shift in the role of the Israeli Supreme Court, and one might argue that it began with *Hillel*. In his opinion for the Court, Barak wrote:

It is the responsibility of this Court to act as the ultimate interpreter of the Constitution...These words are not special to a legal system in which there is a formal constitution, and which recognizes judicial review of the lawfulness of legislation. These words are fundamental truths in every legal system in which there is an independent judicial branch.³⁰

However, there was no guarantee that Israeli society—let alone the Knesset or the executive authority of the state—would agree with Barak's characterization.

Indeed, despite this opinion, Jacobsohn advocates judicial restraint. In his words,

²⁹ Melville B. Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution," *Columbia Law Review* 70 (1970): [1218].

³⁰ *Kach Party Faction v. Hillel* (1985)

“Developing a de facto bill of rights through statutory interpretation and administrative review does not entail the degree of certainty or finality that is involved in judicial review of primary legislation.”³¹ In his view, “all constitutions are an attempt to ‘freeze’ certain principles,”³² and since there remains no final settlement of regime principles, the Court should avoid making normative “judgements of finality.”³³ In settling these principles, Jacobsohn suggests that it may have made sense to postpone the constitutional decision until a much larger percentage of Jews resided within Israel, given the burgeoning immigrant population at the time and the fact that the state understood itself to be representing the Jewish people at large (whether or not Jews themselves, particularly in the diaspora, recognize this as valid).³⁴

Yet Chief Justice Barak did precisely the opposite, and in 1992, he attempted to “close the door” on the Israeli constitutional revolution.³⁵ In my view, doing so was not wholly unreasonable. For example, consider the fact that Americans’ “more successful venture in 1787 was not attributable to any massive

³¹ Jacobsohn, *Apple of Gold*, [132].

³² Gary Jeffrey Jacobsohn, “After the Revolution,” *Israel Law Review* 34, no. 2 (July 2000): [140].

³³ Jacobsohn, *Apple of Gold*, [132].

³⁴ Indeed, between 1990 and 1995 the average annual growth rate was a staggering 3.5%, and immigrants—many of them from the Former Soviet Union—accounted for 56% of the increase over that six year time-span; both of these figures are among the highest of any period since the state’s founding. See this report from the Israel Central Bureau of Statistics (CBS) for a more detailed breakdown of population growth in Israel up until the last decade, “Israel in statistics 1948-2007,” and the CBS website (<http://cbs.gov.il/reader>) for more recent population data. Israel’s population has continued to grow at a rapid pace, although a much smaller percentage of growth is due to immigration; according to the Jewish Policy Center, Israel’s fertility rate is higher than any other country in the developed world, and a report released by the CBS in late 2016 indicates that it has reached parity with the birth-rate of Arabs in Israel—dispelling (or at least curtailing) worries about a *necessarily* bi-national state in the future. According to the Jewish Virtual Library, as of 2016 an estimated 44% of Jews in the world reside in Israel.

³⁵ Jacobsohn, “After the Revolution,” [140].

infusion of new members into their ranks; rather, it resulted from specific lessons learned from actual experience under the earlier constitutional structure.”³⁶ Moreover, while the American Founders may not have been dealing with as divisive a political climate as that of 1992 Israel, the act of constitutional creation did involve employing certain principles to bring about unity of purpose despite deep ideological divisions. As is clearly evidenced by the sections that sanction slavery, the American Constitution “manifests a clear set of moral compromises.”³⁷ In short, waiting for the right time to “freeze” Israel’s constitutional principles may have ensured practically perpetual ambivalence.

In 1992, the Israeli Knesset enacted two Basic Laws in an effort to create a written Bill of Rights in Israel. The first was entitled “Basic Law: Human Dignity and Liberty,” and it included rights to property, movement to and from Israel, liberty, dignity, and privacy. The second was called “Basic Law: Freedom of Occupation,” and this was the only freedom it protected. As Gideon Sapir points out, the omission of “several important human rights, such as equality, freedom of expression, and freedom of religion...was not an unintentional mistake but a deliberate act.”³⁸

While the passage of these Basic Laws was indeed an important event, they were only subsequently elevated to revolutionary significance by the Israeli Supreme Court. In Jacobsohn’s words, “The revolutionary content of the acts

³⁶ Jacobsohn, *Apple of Gold*, [103].

³⁷ Jacobsohn, *Apple of Gold*, [104].

³⁸ Gideon Sapir, "Constitutional Revolutions: Israel as a Case-Study," *International Journal of Law in Context* 5, no. 4 (December 2009): [36].

inheres less in the actual substantive changes introduced by the enactments than it does in the possibilities latent within them for creative judicial intervention in the unresolved dilemma of regime definition.”³⁹ Also known as the *Gal* decision, *United Mizrahi Bank v. Migdal Cooperative Village* (1995) definitively secured substantive judicial review of legislation as a political reality in Israel, in addition to reconceptualizing the status of certain fundamental rights to a level of normative superiority. As Jacobsohn notes, “Most [Israeli Supreme Court] cases are decided by three- or five-judge panels, depending on the importance of the case.”⁴⁰ However, in hearing this appellate case, the Court convened an expanded panel of nine judges. While each of them wrote a separate opinion, Chief Justice Barak most fully elucidated the Court’s position; indeed, Barak’s ruling in *Gal* is widely regarded as his single most important piece of constitutional jurisprudence.

The basic facts of the case are as follows: in 1992, the Knesset adopted the Family Agricultural Sector (Arrangements) Law in order to address a serious economic crisis by helping rehabilitate the agricultural sector. Among other things, the Law established a body called the “rehabilitator,” designed to settle, restructure, and even cancel debts incurred up until the end of 1987.⁴¹ Later that year, the Knesset passed Basic Law: Human Dignity and Liberty, which many MKs believed was a fairly innocuous piece of legislation. In fact, this Basic Law

³⁹ Jacobsohn, “After the Revolution,” [140].

⁴⁰ Jacobsohn, *Apple of Gold*, [70].

⁴¹ *United Mizrahi Bank v. Migdal Cooperative Village* (1995). For full decision in English, see http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf

was not even adopted by a majority of the Knesset; of the parliamentary body's 120 members, only 32 voted in favor of the bill. Because this constituted a majority of those present, the Basic Law was passed.⁴² In 1993, the Knesset saw fit to amend the agricultural rehabilitation Law, redefining which debts this Law could address and stipulating that debts incurred up until 1991 were now within the scope of the Law. The appellants argued that the Amendment violated their property rights under section 3 of Basic Law: Human Dignity and Liberty without meeting section 8's requirement that rights set out in the Basic Law could not be violated except "by means of a law that corresponds to the values of the State of Israel, which serves an appropriate purpose, and to an extent that does not exceed what is required."⁴³

Barak's opinion first established that the Knesset serves two purposes: it enacts ordinary laws as a legislature, but when it approves Basic Laws, it acts as a constituent assembly. In turn, this latter category of legislation enjoys supra-legislative and quasi-constitutional status.⁴⁴ The next question was whether the agricultural rehabilitation Law was unconstitutional. The Court unanimously held that while the Law did in fact violate the appellants' section 3 property rights, this violation was justified under section 8 of the Basic Law.⁴⁵ In other words, Barak's opinion in *Gal* established the legal basis for broad judicial review without directly challenging the specific law at issue in the case. Given the fact

⁴² Professor Shlomo Slonim in Richard A. Posner, "Judicial Review, a Comparative Perspective: Israel, Canada, and the United States" (2010) p. 2422

⁴³ For the unofficial English translation of the Basic Law, see <http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf>

⁴⁴ *United Mizrahi Bank v. Migdal Cooperative Village* (1995).

⁴⁵ *Ibid.*

that this case and the jurisprudence based upon it are what provided Israel with its “constitutional revolution,” it appears that this maneuver was quite prudent.

However, Barak’s ruling was also an instance of extraordinary judicial activism. Michael Eitan, who was in the Knesset at the time, offers a striking first-hand account of the parliamentary process leading up to the Basic Law’s enactment:

I clashed with the Chairman of the Constitution, Law and Justice Committee [Uriel Linn] when he brought the law to the final reading and I can testify personally that the word "constitution" was not mentioned by anyone of the members of the Knesset...It's the first time I hear that a country can get a constitution retroactively. At the time of the legislation, the members of the Knesset did not know that they were adopting a constitution for the State of Israel, nor did anyone else. How do I know? In the newspapers the day after the enactment of the law, no one mentioned it.⁴⁶

It seems awfully strange that a constituent assembly could pass a constitution—or, at the very least, a Bill of Rights—without knowing that they were doing so. It seems stranger still that nobody else in Israel knew this was happening. Although it powerfully impacts the entire Israeli polity, it appears that only the Barak Court was aware of this “revolutionary” moment. This is because the Justices, in fact, *created* it.

In order to establish broad judicial review as an element of Israeli jurisprudence, Basic Law: Human Dignity and Liberty required a great deal of judicial activism. Despite the fact that the Basic Law received only 32 of 120 votes

⁴⁶ Richard A. Posner, “Judicial Review, a Comparative Perspective: Israel, Canada, and the United States” (2010) p. 2422

in the Knesset, a few months after its passage, Barak made a bold (and at the time, puzzling) assertion:

The new legislation passed by the Knesset limits the Knesset and subordinates it to the fundamental principles. From this point on the Court cannot only interpret a statute that is contrary to the fundamental principles, it can also nullify it...the people have given its judges a powerful tool. Now that the people have given us tools, we shall do the work.⁴⁷

Barak's claim that "the people" granted the Israeli Supreme Court its broad powers of judicial review is shaky at best. However, one should recognize that the text of the Basic Law is in fact quite broad, so if the Knesset possessed constitutional authority when approving it, Justice Barak's jurisprudence may be justified.

In any case, what is most important about the "constitutional revolution" is the fact that it represents a critical juncture for the Israeli polity. To this point, the state's core constitutional tension had been largely dormant, because in reality, the Israeli polity consistently prioritized the state's Jewish identity. However, Barak's body of jurisprudence gave Israel's largely theoretical set of liberal-democratic principles significant practical purchase. This meant that in several important contexts, the Jewish State was now forced to come to terms with *all* of its constitutional commitments. In issuing his opinion, Chief Justice Barak hoped to affirm a particular political reality, which, if it were broadly accepted, would lead to the achievement of constitutional politics.⁴⁸ However, the process of political redefinition requires much more than a landmark Supreme

⁴⁷ Ibid.

⁴⁸ Jacobsohn, "After the Revolution," [144].

Court decision, or even a slew of them; it must be a collective venture.⁴⁹ In fact, Barak himself seemed to recognize this:

The judge is not the only musician within the grand legal orchestra, and his playing must be in harmony with the rest of the music...The existence of a constitution conferring rights on the individual has not yet been sufficiently clarified in Israeli society.⁵⁰

Thus, the process of “composing” the Israeli polity remains incomplete, even after the 1992 constitutional revolution. While Chief Justice Barak did much to advance liberal democratic principles in Israel’s constitutional jurisprudence, in practice, the competing apple of gold still regularly undermines them. As I will explain below, this is no accident. However, it is also crucial to note that by introducing Israel’s constitutional tension into the public sphere, the Barak Court’s jurisprudence forced all of the Israeli polity to confront it. As I will ultimately suggest, I believe that this civic engagement is likely to lead Israel to continue to highlight its Jewish identity in practice, but more profoundly, it also might force the polity to genuinely weigh how much it values its status as the “Jewish State” against the substance underlying liberal-democratic principles.

B. Brief Note on Illiberal and Undemocratic Moments:

At its foundation, the Zionist movement that led to Israel’s establishment was dedicated to creating a state for the Jewish people that would be guided by Jewish history and principles. In other words, when the state was founded in

⁴⁹ Bruce Ackerman, *We the People, Volume 1: Foundations* (Cambridge, MA: Belknap Press, 1993), [203].

⁵⁰ Aharon Barak, “The Role of a Supreme Court in a Democracy,” *Yale Law School Legal Scholarship Repository*, Faculty Scholarship Series ser., 1 1, 2002, [10].

1948, this ethno-religious national identity was inexorably linked to Israel's *raison d'être*, and even today, it seems impossible that the two can be fully separated.⁵¹ The state's ethno-religious national identity includes a medley of latent forces which, when activated, will prioritize the state's Jewish character. Despite what different actors in Israeli society may say about the state's commitment to liberal-democratic principles, Israel's ethno-national identity remains robust, and its manifestations often compromise what it means to be a liberal-democratic state.

For example, Israeli settlement construction in the occupied West Bank represents an extended and fundamentally illiberal moment, and there is a clear link between this ongoing violation of international law and the fundamental tenets of Zionism.⁵² The settlers believe that the entire territory is the land of the Jewish people, and as such, it should all be part of the Jewish State. To them, Hebron is no different from Tel Aviv, and Nablus is no different from Haifa. It should be emphasized that this understanding is not an aberration, or even an innovation, for that matter; settlements in the occupied West Bank are part and parcel with Israel's ethno-religious national identity. The 1967 War did not create

⁵¹ Indeed, while UN Resolution 181 includes a commitment to several important liberal-democratic principles, one could argue that by explicitly creating both a Jewish State and an Arab State, the international community inherently accepted that membership in each of them would be at least in part ethnically-based.

⁵² It is important to note that this formulation discusses the practice of settlement construction merely in order to describe the underlying reasons for illiberal or undemocratic moments; however, the Israeli policies that sanction and encourage this ongoing violation of international law are crucial to understand in their own right. Moreover, the protracted nature of occupation may itself constitute an undemocratic moment; for a detailed and compelling account of this topic, see Dan Horowitz and Moshe Lissak, *Trouble in Utopia: The Overburdened Polity of Israel* (New York City, NY: State University of New York Press, 1989). Nevertheless, both settlement construction and occupation are largely outside the purview of this paper.

a new ideology—it merely enabled the Zionist vision to better manifest as political reality.⁵³

⁵³ Some Israeli politicians, and many religious nationalists want to formally advance this vision, and it does not appear wholly implausible. As Education Minister and Diaspora Affairs Minister Naftali Bennett recently put it, “I am determined to advance the issue of sovereignty [over settlements]. It is a plan six years in the making and I really think that the rare constellation of a right-wing government in Israel, a favorable administration in DC and an international situation that enables it, should allow us to proceed after 50 years.” See *The Jerusalem Post*, “Despite US Pushback, Bennett Determined to Advance Sovereignty Over Settlements,” February 23, 2018, Accessed April 23, 2018, <http://www.jpost.com/Arab-Israeli-Conflict/Despite-US-push-back-Bennett-determined-to-advance-sovereignty-over-settlements-542470>.

Chapter 2: Israel as the Nation-State of the Jewish People

“Israel is a Jewish state. It isn’t a state of all its nations. That is, equal rights to all citizens but not equal national rights...There are places where the character of the State of Israel as a Jewish state must be maintained and this sometimes comes at the expense of equality...without violating the full rights of the Arab residents of Israel...there is a place to maintain a Jewish majority even at the price of violation of rights.”⁵⁴

- Israeli Minister of Justice Ayelet Shaked, 2018 Speech to Knesset

“The proposed Basic Law is built on a fundamental misunderstanding: The fact that Israel is the national homeland of the Jewish people does not justify violating the fundamental rights of non-Jews. On the contrary: in terms of justice and fairness, the fact that Israel is a national homeland for the Jewish people requires the state to be extra scrupulous in protecting equality...in order to compensate for the inevitable exclusion that stems from the definition of the state as a Jewish state.”⁵⁵

- Professor Mordechai Kremnitzer

A. History of the Proposed Basic Law

On August 3rd of 2011, Avi Dichter, a member of the right-wing Kadima Party, introduced a bill to the Israeli Knesset entitled “Basic Law: Israel as the Nation-State of the Jewish People.” According to Dichter and his colleagues, the passage and subsequent interpretation of Israel’s two normative Basic Laws—one of which focused on securing “Human Dignity and Liberty” and the second on

⁵⁴ Revital Hovel, "Justice Minister: Israel Must Keep Jewish Majority Even at the Expense of Human

Rights," *Haaretz*, Last modified February 13, 2018, Accessed April 23, 2018, <https://www.haaretz.com/israel-news/justice-minister-israel-s-jewish-majority-trumps-than-human-rights-1.5811106>.

⁵⁵ Mordechai Kremnitzer and Shiri Krebs, "License to Discriminate: A Jewish and Undemocratic State,"

The Israel Democracy Institute, Last modified November 11, 2012, Accessed April 23, 2018, <https://en.idi.org.il/articles/9830>.

“Freedom of Occupation”—helped secure the place of democracy in the state’s legal code, but Israel’s Jewish character was not sufficiently anchored in the law.⁵⁶ In this vein, it is important that the signatories insisted that this bill also be passed as a Basic Law; as I will explain shortly, this would afford it quasi-constitutional status and require a special majority to repeal. The proposed legislation has gone through several iterations, but the most recent version has already passed a first reading and is likely to be fast-tracked in the coming weeks.

One of the bill’s central tenets is the assertion that the “Right of national self-determination in the State of Israel is unique to the Jewish People.” Immediately after this provision, the text mandates, “This Basic Law and all other laws shall be interpreted in conformity with this provision.” Often referred to as the “supremacy clause,” this sentence reflects the author’s intent not only to change the law, but to change the way the law is *interpreted*.⁵⁷ As I will explain below, especially since Chief Justice Barak’s “constitutional revolution” in the 1990s, the Court has repeatedly struck down laws and policies it viewed as illiberal or undemocratic. In large part, the nation-state legislation was designed to counteract what many Israeli politicians see as an overly activist Supreme Court. In fact, much of the Israeli polity agrees. According to the Israeli Democracy Index, an annual survey of Israeli public opinion, in 2017 only 57% of Jewish Israelis and 54% of Arab Israelis expressed trust in the Supreme Court,

⁵⁶ Naomi Sussmann, *Basic Law: Israel— Nation-state of the Jewish People*, Translated by Elisheva

Goldberg, Molad, The Center for the Renewal of Israeli Democracy, 2011, Accessed April 23, 2018, <http://www.molad.org/images/upload/researches/Basic-Law-Jewish-State-English.pdf>.

⁵⁷ Available for download at the Israeli Justice Department’s website:

<http://www.justice.gov.il/StateIdentity/InformationInEnglish/Pages/BasicLawBills.aspx>

down from 70% among all Israelis in 2003.⁵⁸ Below, I will assess whether—and to what extent—distrust, accusations of judicial activism, and the Court’s ideological bias are warranted, but at this juncture, what is important to note is the fact that this ethos *has developed*.

This effort to alter the basic structure of the Israeli legal system is significant in other ways as well, and in particular, several additional provisions are worth highlighting. If passed, the bill would have downgraded Arabic from its status as an official language alongside Hebrew to a language with “special standing,” allowed communities to segregate on the basis of religion, and mandated that judges in Israeli courts consult Jewish religious law (*Halakha*) in cases where existing law offers no solutions. Moreover, it would grant constitutional permanence to the Israeli national anthem (*Hatikvah*), Israeli flag, and the state symbol—each of which is rife with exclusionary symbolism, as I will discuss below—as well as the Law of Return and a mandate to teach “the history of the Jewish people, its heritage and its traditions...in all educational institutions serving the Jewish public.”⁵⁹

The legislation was largely formulated by the Institute for Zionist Strategies, and it immediately ignited fierce debate within the parliamentary

⁵⁸ I also suspect that Jewish- and Arab-Israelis have declining trust in the Court for different reasons: Jews because of a perceived sense of activism, and Arabs because of a lack thereof. However, both groups clearly do not hold the Court in as high regard as they used to. As I will demonstrate in Chapter 3, this downward trend extends all the way back to the beginning of Barak’s “constitutional revolution” in 1992. For the statistics provided above, see the 2003 Israeli Democracy Index <https://en.idi.org.il/media/6323/index2003-eng.pdf> and the 2017 edition <https://en.idi.org.il/media/9837/israeli-democracy-index-2017-en-summary.pdf>

⁵⁹ Available for download at the Israeli Justice Department’s website: <http://www.justice.gov.il/StateIdentity/InformationInEnglish/Pages/BasicLawBills.aspx>

body and the public sphere. To put matters in familiar terms, the passage of this initial version would have emphatically demonstrated the preeminence of Israel's identity as a "Jewish State" over its commitment to liberal democracy. However, in 2011 the more conservative Members of Knesset (MKs) pushing for its approval soon realized that it was too radical to be passed as written, and in the wake of intense public backlash, several MKs formally withdrew their support for the bill before the Kadima Party chairwoman ultimately instructed Dichter to "shelve" it.⁶⁰ The chairwoman was obviously making a political calculation, choosing "damage-control" in the face of backlash against a proposal that was too radical for the political moment. Since then, this Basic Law legislation has reemerged on several occasions, taking different forms each time.

For example, in 2013 two different versions were submitted to the Knesset, one of which was proposed by Likud MK Ze'ev Elkin and the other by members of each of the three right-wing coalition parties—Likud MK Yariv Levin, far-right Jewish Home MK (and future Justice Minister) Ayelet Shaked, and Yisrael Beytenu MK Robert Ilatov. In late 2014, Prime Minister Netanyahu's cabinet promised to support these bills in a preliminary reading "on the condition" that proponents of both bills allow the administration to draft a government-sponsored version based on fourteen guiding principles.⁶¹ Israel's democratic

⁶⁰ Sussmann, *Basic Law: Israel— Nation-state of the Jewish People*, Translated by Elisheva Goldberg, Molad, The Center for the Renewal of Israeli Democracy, 2011, Accessed April 23, 2018, <http://www.molad.org/images/upload/researches/Basic-Law-Jewish-State-English.pdf>.

⁶¹ Haviv Rettig Gur, "An Idiot's Guide to the Nation-State Controversy," *The Times of Israel*, December 1, 2014, Accessed April 23, 2018, http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/an_idiots_guide_to_the_nation-state_bill.pdf.

character, and the way that term is understood in the nation's socio-political and legal framework, are central elements of my discussion below.⁶² Thus, for the purposes of this thesis it is particularly important to note that Netanyahu's list of principles implicitly affirmed democracy was an inherent part of the state's *identity*—describing Israel as a “Jewish and democratic state”—whereas in both of the proposed bills, the state's rhetorical commitment to democracy is comparatively watered-down: “The State of Israel has a democratic form of government.”⁶³ Defining the state as democratic implies that the polity values democracy in its own right, while the more muted version suggests proceduralism and an instrumental approach to democracy.

In early 2017, another iteration of the bill was approved by Netanyahu's cabinet for a preliminary reading, and the sponsors have been trying to garner coalition support since then. On March 13th of this year, coalition MKs struck a deal that would practically guarantee the bill's passage by removing some of its more contentious provisions.⁶⁴ It is worth delving into the specifics of this near-final version, because a discussion of the future Basic Law's implications—as well as the commentary and debate surrounding it—will help frame the rest of my discussion.

⁶² Interestingly, both Netanyahu's list of principles and the two 2013 bills purport to rely upon principles contained in the Israeli Declaration of Independence, demonstrating the salience of the fundamental tension I discussed above.

⁶³ Haviv Rettig Gur, “An Idiot's Guide to the Nation-State Controversy,” *The Times of Israel*, December 1, 2014, Accessed April 23, 2018, http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/an_idiots_guide_to_the_nation-state_bill.pdf.

⁶⁴ In part, the bill was moderated because it had to be fast-tracked due to Netanyahu's threat of early elections. The threat stemmed from a coalition impasse on a different issue, but the prospect of starting from scratch during the next Knesset session—and with new MKs—was sufficient to speed up negotiations on the nation-state bill.

In an effort to gain support for this latest version, Likud MK Amir Ohana, chairman of the special committee on the nation-state bill, requested one major departure from previous formulations: the removal of the *Halakha* provision.⁶⁵ As I noted above, this clause would have required courts to consult Jewish religious law in cases where legal precedent and the legislation in question offered insufficient guidance, and as such, it was deeply unpopular among many moderates—let alone the very vocal ideological left. Hoping to garner votes, the bill’s advocates also dropped the provision that would explicitly “constitutionalize” the Law of Return, replacing it with more general rhetoric emphasizing that Israel is open to “Jewish aliya and the ingathering of exiles.”⁶⁶ This almost certainly assuaged some important concerns on the left. However, the coalition’s most significant concession was the removal of the so-called “supremacy clause” mentioned above. The clause might have given the nation-state law—and the State’s Jewish identity—precedence over even other basic laws, which was obviously quite appealing to conservative MKs seeking to alter the very basis of the Israeli legal system. Thus, the committee must have concluded that holding on to the “supremacy clause” would prevent passage of the legislation in the given timeframe, so they decided to bite the bullet.

⁶⁵ Jonathan Lis, "Knesset Panel Backs Version of Nation-state Bill That Doesn't Mention 'democracy'," Haaretz.com, March 13, 2018, accessed April 23, 2018, <https://www.haaretz.com/israel-news/knesset-panel-backs-version-of-nation-state-bill-without-democracy-1.5905853>.

⁶⁶ "Gutted Jewish Nation-state Bill Heads to First Reading in Knesset," The Jerusalem Post | JPost.com, March 14, 2018, accessed April 23, 2018, <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Gutted-Jewish-nation-state-bill-heads-to-first-reading-in-Knesset-544957>.

Despite these concessions, the legislation marks a major turning-point in Israel's history. In a powerful sense, it seeks to re-define the Israeli polity while simultaneously laying the groundwork to re-structure some of the state's basic political structures and priorities. Specifically, the nation-state bill was designed to 1) impact the limits of judicial interpretation and 2) re-interpret the phrase "Jewish and Democratic" as it relates to the Israeli constitutional scheme. With regards to the first of these two goals, MK Ohana called the near-final version "the law of all laws," in part because of the impact it would have on the Israeli Supreme Court. In drawing this out, he spoke in the language of individual and collective rights, which are often at the crux of the Court's most high-profile cases: "It is the most important law in the history of the State of Israel...[it] says that everyone has human rights, but national rights...belong only to the Jewish People."⁶⁷ Moreover, after the compromise was made, MK Dichter (author of the original nation-state bill) was quick to point out that removing the "supremacy clause" would not make the future basic law *weaker* than any of its quasi-constitutional counterparts.⁶⁸ Far-right Justice Minister⁶⁹ Ayelet Shaked, an ardent supporter of the legislation, explicitly stated that the nation-state bill "is a tool that we want to give the [Supreme C]ourt for the future."⁷⁰ In short, as the

⁶⁷"Gutted Jewish Nation-state Bill Heads to First Reading in Knesset," The Jerusalem Post | JPost.com, March 14, 2018, accessed April 23, 2018, <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Gutted-Jewish-nation-state-bill-heads-to-first-reading-in-Knesset-544957>.

⁶⁸Jonathan Lis, "Knesset Panel Backs Version of Nation-state Bill That Doesn't Mention 'democracy'," Haaretz.com, March 13, 2018, accessed April 23, 2018, <https://www.haaretz.com/israel-news/knesset-panel-backs-version-of-nation-state-bill-without-democracy-1.5905853>.

⁶⁹ While Shaked's formal title is Minister of Justice, I will refer to this position's incumbent as the Justice Minister throughout this paper.

⁷⁰Revital Hovel, "Justice Minister: Israel Must Keep Jewish Majority Even at the Expense of Human Rights," Haaretz.com, February 14, 2018, accessed April 23, 2018,

judiciary weighs competing principles and priorities in the future, there remains room for interpretation, but when this bill becomes (basic) law, those on the right will have a very powerful constitutional weapon at their disposal.

The second major driving force behind the nation-state legislation is closely bound up with the first. In an attempt to re-interpret the phrase “Jewish and Democratic,” proponents of this bill are seeking to elevate Israel’s Jewish identity above its competing liberal-democratic one. Whether their efforts will lead to a lasting *resolution* of the foundational tension in Israeli constitutionalism by establishing the preeminence of Israel’s “Jewishness” remains to be seen, but there are clear indications that this bill attempts to shift the balance in that direction.⁷¹ In making this point, allow me to highlight several provisions of the nation-state bill that were not abandoned in the negotiating process.

The effort to elevate Israel’s Jewish identity is most obviously discerned from the provisions anchoring the current state symbol, flag, and national anthem as part of the constitutional structure.⁷² In a manner similar to the demotion of Arabic from an official language to one with “special standing,” these provisions send a message that some people “belong” more than others. True, the flag and anthem have been in place since 1948, and Hebrew has long been held in high regard in the Israeli state, but affording them quasi-constitutional status

<https://www.haaretz.com/israel-news/justice-minister-israel-s-jewish-majority-trumps-than-human-rights-1.5811106>.

⁷¹ It is true that these goals would have been more *emphatically* achieved were it not for the compromise discussed above, but that is beside the point.

⁷² Although the text of the near-final version has not yet been disseminated to the public, these provisions are found in Article III of the original bill.

implies an important sense of permanence. Moreover, those that the state has chosen to exclude in these different ways are the same group of people: non-Jews. However, let us pause for a moment to elucidate the nature of this exclusion and its normative implications. In the following subsections, I hope to demonstrate how theory and comparative constitutionalism can inform a pragmatic discussion around this specific piece of legislation.

B. American Group Rights, Israel's Brand of Pluralism, and Civic Identities

In drawing out the Israeli model of pluralism, let us begin by comparing group rights in Israel with those codified in the United States. In most cases, the modern American model of pluralism takes the individual as the relevant unit of analysis. The 1960s involved a transformative shift that all but cemented the individual rights approach; indeed, as Jacobsohn puts it the Civil Rights Movement demanded “the delegitimation of group membership as a criterion in the making of public decisions about individuals. Indeed, the underlying aspiration...[is] the replacement of ascriptive recognition with a universal standard of transcendent equality.”⁷³

Of course, there are a few major exceptions to this individual rights-focused pluralism, including the U.S. government's approach to Native Americans. In 1968, Congress passed the Indian Civil Rights Act, which granted Americans of Indian descent the same rights and duties as the rest of the American polity. However, many Native Americans (somewhat justifiably)

⁷³ Jacobsohn, *Apple of Gold*, [18].

viewed this as a “cultural assault,” because grafting the individual rights schema onto the Native Americans’ legal tradition effectively undermined their way of life. For example, equal protection standards surrounding sexual discrimination might subvert “tribal determinations of membership based on patrilineal criteria.”⁷⁴ Congress was sensitive to the concern that extending civil rights to Native Americans had a distinctly assimilationist character. In a 1978 opinion, Justice Marshall pointed to Congress’s deliberate, “selective incorporation,” which was part of an effort to accommodate the “unique political, cultural, and economic needs of tribal governments.”⁷⁵ As Jacobsohn aptly points out, this application of group-rights jurisprudence enabled “the tribe to defend its cultural autonomy in the face of widespread pressures to conform to societal norms and behavior.” To this end, certain tribes have also been granted formal legal protection in matters like marriage and divorce, hunting privileges, and education.⁷⁶

However, it is important to note that in the United States this is a constitutional anomaly, not a widely applied legal norm.⁷⁷ By and large, the American system preserves pluralism by protecting individual rights. With regards to religion in particular, the Constitution’s Establishment Clause helps maintain a horizontal boundary between church and state, ensuring that religion is almost entirely irrelevant to a person’s standing in the political community.⁷⁸

⁷⁴ Jacobsohn, *Apple of Gold*, [20].

⁷⁵ *Santa Clara Pueblo v. Martinez* (1978)

⁷⁶ Jacobsohn, *Apple of Gold*, [21-22].

⁷⁷ *Ibid.*, [23]

⁷⁸ *Ibid.*, [28]

As such, in the United States, the power of religious groups is largely confined to the space of civil society—they do not enjoy categorically different legal protection.

On the other hand, Israeli pluralism affirms a central place for group rights in the legal system, especially among different religious groups. This is not at all unusual for Middle Eastern countries, past or present; as I suggested earlier, it is endemic to the region. One historical precursor to Israel's pluralistic configuration is the Ottoman *millet* system. Because the Empire included so many different ethno-religious groups, the Ottomans avoided assimilation (and thus conflict) by constructing a legal system that “perpetuat[ed] the separate existence of particular communities.”⁷⁹ When they succeeded the Ottomans in 1917, the British maintained this communal system, and in 1948, Israel adopted a similar approach.⁸⁰ For example, the state has no mechanism for civil marriage, since quasi-independent courts exercise jurisdiction over marriage, divorce, adoption, and inheritance for each religious community. Indeed, there are a myriad of contexts in which Israeli law defers to cultural autonomy, although I will not discuss them at length here. Suffice it to say that in the aforementioned cases and several others, ethnoreligious groups in Israel “compete with the state for the right to exercise coercive authority” over individuals whom they view as members.⁸¹

⁷⁹ Jacobsohn, *Apple of Gold*, [26].

⁸⁰ Natan Sachs and Brian Reeves, "Tribes, Identity, and Individual Freedom in Israel," Center for Middle East Policy, last modified March 31, 2017, accessed May 11, 2017, https://www.brookings.edu/wp-content/uploads/2017/03/cmep_20170331_tribes-of-israel.pdf.

⁸¹ Michael Walzer, "Pluralism in Political Perspective," in *The Politics of Ethnicity*, by Michael Walzer, et al. (Cambridge, MA: Belknap Press, 1980).

One would certainly not say the same about the United States, as this sort of competition is at odds with a conception of pluralism that deals primarily in the language of protecting *individual* rights from the state. In rejecting the notion that Israel should mandate compliance with various parts of Jewish law, H.L.A. Hart—one of Britain’s most distinguished legal philosophers—had this to say:

Where it impinges on moral judgment and denies desirable human liberties, I would subordinate the cultural aspects to the liberal principles, which are *prima facie* principles. Giving cultural consideration absolute priority would lead to a substantial retreat from the liberal conception of human rights and individual liberties.⁸²

In a narrow sense, this is a normative rebuke of Israel as a *de jure* Jewish State, but it could also function as a liberal basis for repudiating group-rights pluralism more broadly.⁸³ Indeed, Hart might say that by walling off separate communities in this manner, Israel is flirting with moral relativism, and this might have positively nefarious consequences. As Will Kymlicka and Raphael Cohen-Almagor suggest, “Some things lie beyond the ability of liberal democracies to tolerate.”⁸⁴ By letting a particular group’s cultural views usurp broader normative principles, the state might be forced to accept a dangerously patriarchal culture where parents do not teach their daughters how to read, for example. In this vein, Kymlicka and Cohen-Almagor continue, “Democracy cannot endure norms that

⁸² Interview in *Israeli Democracy*, 1987

⁸³ Whether treating different groups differently should be considered illiberal is somewhat nebulous, particularly in the hard cases. For a fuller examination of this question, see section five below.

⁸⁴ Will Kymlicka and Raphael Cohen-Almagor, “Democracy and Multiculturalism,” in *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin*, ed. Raphael Cohen-Almagor (London, EN: Ashgate Publishing, 2000), [99].

deny respect to people and that are designed to harm others, although they might be dictated by some cultures.”⁸⁵

However, the Israeli Supreme Court has largely been able to avoid this slippage into hands-off relativism. For example, in *Dalal Rassi v. Attorney-General* (1953), a teacher in an Arab school had inflicted severe corporal punishment on a student, and the defendant invoked cultural autonomy in an argument before the Court. After stating that “the Court will always give full consideration to the effect of customs and traditions which have been accepted by [a given group] as forming part of their way of life,” they applied a national standard for severe corporal punishment, stating that punishments “are not matters affecting merely an individual...or a particular section of the community. They affect the State as a whole, the community as a whole.”⁸⁶ The legal reasoning here is clear and emphatic, and it begins to explain the evolution of the Israeli polity. Yet while the avoidance of relativism is somewhat comforting from a liberal-democratic point of view, the trouble with group rights in Israel arises from the basic, pervasive linkage between Judaism and full citizenship.

Nationality in Israel is decisively not synonymous with citizenship; being a part of the Israeli nation involves being part of a specific ethno-religious group. In the same vein, being a part of the state—which merely requires the formal, procedural elements of citizenship—is not the same as being a part of the nation. There is a powerful argument to be made that in terms of one’s attachment to the

⁸⁵ Ibid.

⁸⁶ Jacobsohn, *Apple of Gold*, [32].

political community, only Jewish Israelis can be members of the nation in full standing. As Jacobsohn eloquently puts it, “Where religion...is so fundamentally entwined in conceptions of national identity, the insistence...that there be no ‘governmental entanglement’ in religion has an air of unreality about it.”⁸⁷ Taking this a step further, Jacobsohn later asserts:

Whatever the degree of ethnoreligious autonomy (and legal equality) in Israel, it is not accompanied by real equality among officially recognized groups. Israel's Jewish community obviously enjoys a privileged status in a state whose *raison d'etre* is that it be the homeland for the Jewish people.⁸⁸

In other words, because it turns on constitutional self-understandings, nationality is not necessarily equivalent to citizenship. In a significant sense, Arab-Israelis (and other non-Jewish Israelis) are automatically outsiders by virtue of who they are, and because the “who” is based on ascriptive characteristics, their status is something they cannot change. Again, a comparison to the American understanding of citizenship proves useful in drawing out this point.

As Philip Gleason puts it, “The United States defined itself as a nation by commitment to the principles of liberty, equality, and government on the basis of consent, and the nationality of its people derived from their identification with those principles.”⁸⁹ As Jacobsohn is careful to point out, “resources, public and private, are committed to the task of converting a country of immigrants into a

⁸⁷ Jacobsohn, *Apple of Gold*, [29].

⁸⁸ *Ibid.*, 35

⁸⁹ Philip Gleason, "American identity and Americanization," *Harvard encyclopedia of American ethnic groups* 32 (1980), [59].

national community.”⁹⁰ In stark contrast, an Israeli citizen’s “Jewishness” determines whether she is truly a member of the nation, and that polity is, to some extent, uninterested in welcoming anybody into the national community if they were not born into it. This is precisely what is at issue in the nation-state bill’s most famous provision: “The right of national self-determination in the State of Israel is unique to the Jewish people.”

Yael Tamir’s work is particularly useful here. She defines the right to national self-determination as “the right to preserve the existence of a nation as a distinct cultural entity,” and allows for some degree of cultural deference in pursuit of this end. Tamir goes on to insist that nationalism—even ethno-religious nationalism—is not only *compatible* with liberalism, but that the underlying bonds it creates can even *enrich* it. However, it is crucial to understand that this argument relies on important limitations for what this cultural deference can entail; if the state ties a robust sense of belonging to a particular ascriptive identity, this falls outside the scope of what Tamir calls “liberal nationalism.”⁹¹ Hypothetically, if Israel were entirely (or almost entirely) made up of Jewish citizens, the state may have been able to maintain a “thick” state religion while remaining true to liberal democratic principles. However, this is not the case. There are many other ethnic and religious groups with deep, profound ties to the land, and excluding them or actively seeking the erasure of important elements of these groups’ identities cannot be reconciled with

⁹⁰ Jacobsohn, *Apple of Gold*, [13].

⁹¹ Tamir, *Liberal Nationalism*, [57-77]

democracy properly understood. In other words, being a liberal state for only some of your citizens is a contradiction in terms, no matter which way you slice it.⁹²

In this respect, Will Kymlicka and Raphael Cohen-Almagor develop a very useful distinction between *formal* and *full* citizenship. In their words:

Israel is a binational state [and] the liberal formula they seek to advance is 'live and let live'...Formally, the Israeli-Palestinians are considered to enjoy equal liberties as the Jewish community, [but] in practice they do not share and enjoy the same rights and burdens. Moreover, they have to live with some limitations on their freedoms, which the Jewish majority does not.⁹³

Securing purely formal citizenship for some and full citizenship for others violates the principle of equal citizenship, and thus, is almost by definition illiberal.⁹⁴ Moreover, as I alluded to above, it is unclear whether an Arab-Israeli could even become Jewish through conversion—Jewish in terms of becoming a member of the community and assuming full citizenship—if she wanted to.⁹⁵ In

⁹² The notion of being a liberal state for only some citizens evokes memories of a dark time in American history. Up until the Civil Rights Movement, America was a fundamentally different state for its black citizens, and this fact alone, in my view, meant that it was far from a liberal democracy.

⁹³ In Chapter 3, I will take up some governmental limitations on Israeli-Palestinians' freedoms, as well as the restrictions on the freedoms of Palestinians in the West Bank and the Gaza Strip. For this quote and more on full and formal citizenship, see Kymlicka and Cohen-Almagor, "Democracy and Multiculturalism," [91].

⁹⁴ In an opinion piece for the New York Times, Israeli-Palestinian Yousef Munayyer described his journeys home with his wife, a Palestinian from Nablus. As he put it, "The laws conspire to separate us." See Yousef Munayyer, "Not All Israeli Citizens Are Equal," The New York Times, last modified May 23, 2012, accessed May 11, 2017, <http://www.nytimes.com/2012/05/24/opinion/not-all-israeli-citizens-are-equal.html>.

⁹⁵ Asked if a Christian or Muslim Arab could become a Jew, most Israelis would likely recognize that the barrier is, for all intents and purposes, impermeable. Technically, a non-Jew can convert to Judaism (even qualifying for the Law of Return), but nevertheless she may not be treated as fully or "truly" Jewish. There are many instances where this is the case. For recent discussions of this phenomenon, see Shmuly Yanklowitz's New York Times piece "Judaism Must Embrace the Convert," Patrick Beaulier's "Three reasons converts to Judaism are treated poorly" in the Times of Israel, as well as Senior Rabbinic Fellow and adjunct law professor Dov Fischer's op-ed "What Every Prospective Convert to Judaism Deserves To Know." To be sure, there are also many

this vein, there are two landmark Israeli Supreme Court cases that endeavor to answer the question “Who is a Jew?”

Commonly referred to as the “Brother Daniel” case, the first major judicial pronouncement on Judaism was *Rufeisen v. Minister of Interior* (1962), which helped elucidate who is *not* a Jew under Israeli law.⁹⁶ Born to a Jewish mother, Oswald Rufeisen was a hero in Israel. During World War II, he spent years working in Poland as an interpreter for the German police, courageously posing as a Silesian Christian in order to save hundreds of Jews from the Nazi death camps.⁹⁷ Eventually, he was discovered and thrown in prison, but he managed to escape, and found refuge in a convent. Here, he converted to Christianity, and eventually joined the Carmelite order in the hopes that he would someday serve in Palestine. However, when he attempted to claim his automatic citizenship under the Law of Return,⁹⁸ his request was rejected by the minister of interior.

instances when converts are fully welcomed and integrated into the community; the problem is that it can go either way, and thus a convert cannot reliably know what sort of treatment she will receive. This uncertainty is compounded by the weighty burden of conversion, both in terms of performing the necessary rituals—an especially heavy burden under the Orthodox definition of conversion—as well as the often profoundly difficult and deeply personal task of abandoning one’s previous religious identity. This is a great deal to ask from an Israeli citizen, especially considering the fact that many of those that are born Jewish do not have to endure anything near these costs to become a member of the nation. In my view, these factors rule out the substantive possibility of non-Jews joining the Jewish-Israeli community.

⁹⁶ *Oswald Rufeisen v. The Minister of Interior* (1962)

⁹⁷ For an in-depth and fascinating account of Rufeisen’s life, see Nechama Tec’s *In the Lion’s Den: The Life of Oswald Rufeisen*.

⁹⁸ Passed on July 5th, 1950, The Law of Return gives Jews the right to live in Israel and to gain Israeli citizenship. It is a fundamental tenet of the Jewish State, but in discussing equal citizenship, the Law of Return is somewhat illiberal in its own right. First, it only grants automatic citizenship to Jews (as we will see, on a purely ascriptive basis), but more strikingly, it involves less stringent provisions than naturalized citizens must endure. For example, in accordance with the Nationality Law of 1952, persons acquiring citizenship through naturalization must both declare loyalty to the state of Israel and renounce their prior nationality. See Jacobsohn, *Apple of Gold*, [84].

In his testimony before the Israeli Supreme Court, Rufeisen argued that his nationality was still Jewish. In his words, “If I am not a Jew what am I? I did not accept Christianity to leave my people. It added to my Judaism. I feel as a Jew.”⁹⁹ Interestingly enough, if the Court had adopted the Orthodox definition of Judaism, Rufeisen would have had no trouble establishing his “Jewishness,” as nothing could change the fact of his birth to a Jewish mother. Unfortunately for him, the Court elected to adopt a secular understanding, which was to be derived from an intuitive notion of the “ordinary simple Jew” in “common parlance.”¹⁰⁰ Again, Jacobsohn explains this well:

Whatever the Court’s own views of the matter might be, the only definition that counts is the one that expresses itself in ‘the common parlance’ of the Jewish community. [The Court] concluded that the communal understanding of the term does not include a Jew who has become a Christian...History, as employed by the Court, possesses a cold logic of exclusivity—you are either a part of it or you are not...the conditions and criteria for fraternity....ultimately depend on the manner in which people connect to a communal past.¹⁰¹

In delivering their verdict, the judges were clearly distressed at the prospect of denying Brother Daniel entry into the Israeli polity. However, they were well aware that the case would set a powerful precedent, and the Court worried that granting him citizenship would effectively “erase the historical and sanctified [meaning] of the word ‘Jew.’”¹⁰² In the words of Justice Silberg, “Certainly Brother Daniel will love Israel. This he has proved beyond all doubt. But such love will be from without—the love of a distant brother. He will not be a true

⁹⁹ Jacobsohn, *Apple of Gold*, [64, 67].

¹⁰⁰ *Oswald Rufeisen v. The Minister of Interior* (1962)

¹⁰¹ Jacobsohn, *Apple of Gold*, [65-66].

¹⁰² *Oswald Rufeisen v. The Minister of Interior* (1962)

inherent part of the Jewish world.”¹⁰³ For the Court, the bottom line was that Brother Daniel renounced his Judaism when he converted.

Of course, deciding who is *not* a Jew doesn’t necessarily point to a positive definition. Five years later, *Shalit v. Minister of Interior* (1970) did just that. Benjamin Shalit was a native-born Israeli Jew, and his wife was a non-Jewish naturalized Israeli citizen. The two were nonbelievers, and they sought to have their two children registered as “of Jewish nationality and without religion” in the Population Register. When a clerk of the Ministry of Interior refused to register them in this way, the Shalits sued.¹⁰⁴ At its core, the case involved deciding whether the status of “Jewishness” could be separated from any religious content: Did the fact that the Shalits were non-believers mean they were not Jewish under the law?

The significance of this decision did not escape the Supreme Court, and this was the first time in Israeli history that the judiciary convened a tribunal of nine justices—all of whom contributed opinions. Although the Court ruled in Shalit’s favor, the decision was largely on technical grounds. Still, the decision prompted an incendiary response from Orthodox Jews in the Knesset, who threatened to bring down the coalition government. Soon afterwards, the Knesset passed a law directly addressing the Court’s decision, amending the Law of Return to define a Jew as “a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion.” As a

¹⁰³ Ibid.

¹⁰⁴ *Shalit v. Minister of Interior* (1970)

result, the notion that religion and nationality could be separated was effectively rejected.¹⁰⁵

Together, *Rufeisen* and *Shalit* form a membership test that subordinates present intention to past affiliation.¹⁰⁶ There are ways in which Israel's "Jewishness" might have been brought into the fold *without* trampling on liberal or democratic principles. In other words, I reject H. N. Hirsch's categorical assertion that, "The longing for community is a chimera—romantic, naive, and in the end, illiberal and dangerous."¹⁰⁷ But as Jacobsohn reminds us, "The critical constitutional question for Israel involves a determination of the strength of its communitarian commitment."¹⁰⁸ We should avoid a heavy-handed rejection of "thick" culture, but we should also guard against the illiberal tendencies it may bring. In Israel, what matters is *who* you are, not *what* you profess. In a 1988 article, Liebman captured the problem:

Community, on the other hand, is personal. Built on status, on past performance and future expectations, on degrees of kinship ties, on loyalty and commitment, it suggests that not all are equal. Since membership in the community of Israelis is defined by Jewish identity, the non-Jewish minorities, almost by definition become second-class citizens.¹⁰⁹

Moreover, there remains a question of whether converts can ever be Jewish in the full sense of the term, insofar as the religion is a source of bonding or group-identification. All of this points to the conclusion that the barrier to entry into the

¹⁰⁵ *Ibid.*, 70-71

¹⁰⁶ *Ibid.*, 14

¹⁰⁷ H. N. Hirsch, "The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community," *Political Theory* 14, no. 3 (1986): [424].

¹⁰⁸ Jacobsohn, *Apple of Gold*, [41].

¹⁰⁹ Charles S. Liebman, "Conceptions of 'State of Israel' in Israeli Society," *The Jerusalem Quarterly* 47 (Summer 1988): [102].

national community in Israel is near-impermeable for anybody who was not born Jewish. No matter how thoroughly Arab-Israelis might wish to be part of the nation that governs them, they are at best tolerated—*belonging* as a member in full standing is simply not a substantive option.

C. Back to the Bill

Now that we have established a normative and theoretical framework for the problem of Israeli civic identity, let us return to the nation-state bill's symbolically exclusionary provisions. The flag, of course, is white with a Star of David in the middle and two blue stripes running along the top and bottom. The association with the Star of David is a clear demonstration of the state's Judaism, but the blue stripes symbolize a subtler, if ultimately similar, allusion. Among European Jews, the most common Jewish prayer shawls (known as the *tallit* in Hebrew) were white with the flag's iconic light blue stripes, which is where Israel Belkind, founder of the Bilu movement, got the inspiration for the Zionist Flag he first flew in 1885.¹¹⁰ A series of adaptations ensued, but Belkind's flag—and its religious symbolism—was ultimately the basis for the Israeli flag adopted in

¹¹⁰ It is important to address a pernicious and commonly-held alternative account of the stripes on the Israel flag—the notion that they represent either the Jordan River and the Mediterranean Sea or, even more strikingly, the Euphrates River and the Nile. Of course, what is implicit in either of these assertions is the notion that Israel aspires to conquer vast swaths of land by stealing them from Arab neighbors, in continuity with the narrative of theft and displacement associated with Israel's founding. For example, part of Hamas's 1998 Charter reads, "The Zionist plan is limitless. After Palestine, the Zionists aspire to expand from the Nile to the Euphrates" (Source: The Avalon Project at Yale Law School). Although the Charter cites "The Protocols of the Learned Elders of Zion" as proof of these ambitions, I have come across no evidence to suggest this is even remotely true. It is but one example of the fabricated histories that people on either side of this extremely personal and pervasive conflict tell themselves to reinforce their own preexisting constructs of victim and villain.

1948.¹¹¹ The state symbol is a seven-branched menorah with olive branches on either side and the word “Israel” at its base, implying that Judaism is both an inherent part of the Israeli national ethos and that the religion is, in a powerful sense, representative of the state itself.¹¹² Once again, it is not difficult to see why non-Jewish Israelis have difficulty identifying with this state symbol, and the nation-state bill elevates both the flag and the menorah to constitutional significance for the first time in Israeli history.

However, of all the nation-state’s symbolic provisions, the most pervasive form of exclusion might be the national anthem, “*Hatikvah*.” As opposed to the state symbol or the flag, a state’s national anthem requires active participation in certain contexts, and that is especially problematic when the lyrics systematically alienate one of the state’s large minority groups.¹¹³ The anthem’s Hebrew title directly translates to “The Hope,” and some of its most commonly quoted phrases should explain the culture of exclusion in this context: it invokes “the hope two thousand years old,” and the “yearning of the Jewish soul” to be “a free nation in

¹¹¹Elon Gilad, "How Israel Got Its Flag and What It Means," Haaretz.com, April 10, 2018, accessed April 23, 2018, <https://www.haaretz.com/israel-news/.premium-how-israel-got-its-flag-and-what-it-means-1.5381190>.

¹¹² To suggest that a symbol with such a long and complex past is simply representative of “Judaism” is a gross historical oversimplification. However, a more detailed discussion of the menorah is beyond the scope of this paper. For further reading, see Steven Fine’s fascinating book entitled, “The Menorah: From the Bible to Modern Israel.”

¹¹³ In fact, in the Israeli context, “*Hatikvah*” actually alienates *two* large minority groups: Arab-Israelis as well as the Ultra-Orthodox community, which sees the national anthem and the “Zionist state” as responsible for the secularization of the Jewish people. As Margalit and Halbertal put it, they believe the state has transformed the Jewish people’s “Historical identity from a religious one to a national one” (497). However, I will focus on the first of these two groups in this paper. See Avishai Margalit and Moshe Halbertal, “Liberalism and the Right to Culture,” *Social Research* 61, no. 3 (Fall 1994).

our land, the land of Zion and Jerusalem.”¹¹⁴ The anthem clearly connects with Jewish Israelis, as it evokes their long and troubled history in a powerful way.

However, tracing one’s culture and lineage to the land of Zion is not unique to the Jewish people. And while Arab-Israelis are not legally required to sing the national anthem, its words completely ignore their history—and to some extent the very fact of their existence as citizens of Israel—although for this minority, *this land is also their land*.¹¹⁵ Moreover, the lyrics preclude Arab-Israelis from substantive connection to the state following a major national tragedy or celebration; in these contexts, enabling this sort of fellow-feeling would otherwise help bind Israeli citizens together, but the exclusion of one people’s entire historical and cultural narrative only highlights the “formal” nature of their citizenship.¹¹⁶ Avishai Margalit and Moshe Halbertal capture the problem with Israel’s anthem succinctly and powerfully: “the Arab community...is not included in Israel’s civil religion.”¹¹⁷

This exclusion is not merely theoretical, and indeed, it has impacted the way some Israelis see certain public officials, as well as how those officials (and

¹¹⁴Ethan Bronner, "Anger and Compassion for Justice Who Stays Silent During Hymn," The New York Times, March 04, 2012, accessed April 23, 2018, <https://www.nytimes.com/2012/03/05/world/middleeast/anger-and-compassion-for-justice-who-stays-silent-during-zionist-hymn.html>.

¹¹⁵Haaretz Editorial, "Israel Should Consider Altering Its Anthem to Include Non-Jews," Haaretz.com, January 11, 2018, accessed April 23, 2018, <https://www.haaretz.com/1.5200360>.

¹¹⁶Benedict R. OG. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2016).

¹¹⁷ It is important to see the phrase “Israel’s civil religion” in the context of this essay; Margalit and Halbertal are not offering a simple tautology that anybody who is not Jewish cannot be part of the state religion, Judaism, in Israel. Rather, for them, civil religion is problematic because Judaism is an ethno-religious element of one’s identity, and as I suggested above, it is an effectively immutable ascriptive characteristic that, when prioritized, often systematically alienates one particular group of citizens. See Margalit and Halbertal, “Liberalism and the Right to Culture” [497].

Israeli members of their minority group) see the polity as a whole.¹¹⁸ For example, in 2001 Saleh Tarif, the first non-Jewish cabinet minister in Israeli history, refused to sing “Hatikvah.” As an Arab member of the Druse community, he commented, “Do you really think I could stand there and sing, ‘So long as within our breasts the Jewish heart beats true? It is the Jewish anthem, it is not the anthem of the non-Jewish citizens of Israel.’”¹¹⁹ In a similar vein, after Ghaleb Majadale became Israel’s first Muslim minister in the Israeli cabinet in 2007, he said, “I fail to understand how an enlightened, sane Jew allows himself to ask a Muslim person with a different language and culture to sing an anthem that was written for Jews only.”¹²⁰ Enlightened and sane or not, many prominent Jewish politicians have done exactly that, even berating non-Jewish officials for their silence. When the first Arab-Israeli to sit on the Supreme Court, Justice Salim Joubran, refused to sing the anthem during the chief justice’s retirement ceremony, far-right Yisrael Beiteinu MK David Rotem called for his resignation. In Rotem’s words, Justice Joubran “spat in the face of Israel,” and the MK went on to assert that those who object to the Zionist hymn “can find a state with a more appropriate anthem and move there.”¹²¹

¹¹⁸ In turn, this has impacted the way these public officials—as well as members of the minority groups to which they belong—see the Israeli polity.

¹¹⁹ “Behind the Headlines: Not All Israeli Arabs Cheer Appointment of Druse Minister,” last modified May 6, 2001, accessed April 23, 2018, <https://archive.jta.org/2001/03/06/archive/behind-the-headlines-not-all-israeli-arabs-cheer-appointment-of-druse-minister>.

¹²⁰ “Majadale Refuses to Sing National Anthem,” Ynetnews, accessed April 23, 2018, <https://www.ynetnews.com/articles/0,7340,L-3377681,00.html>.

¹²¹ Ethan Bronner, “Anger and Compassion for Justice Who Stays Silent During Hymn,” *The New York Times*, March 04, 2012, accessed April 23, 2018, <https://www.nytimes.com/2012/03/05/world/middleeast/anger-and-compassion-for-justice-who-stays-silent-during-zionist-hymn.html>.

Fortunately, some prominent Israeli officials like Reuven Rivlin (Knesset Speaker at the time, now President of Israel) and Vice Prime Minister Moshe Ya'alon came to Joubran's defense. Indeed, in 2016 President Rivlin publicly supported altering the national anthem so that non-Jewish Israelis who serve their country can identify with its lyrics. Responding to an Arab high-school student, Rivlin said, "The question you are asking needs to be on the national agenda in the next generation or two. This is a dilemma we can't ignore...I await the day that every Israeli citizen can identify with the State of Israel."¹²² However, while symbolic exclusion absolutely undermines the citizenship of non-Jews in Israel, the nation-state bill also both creates and reinforces several other, more concrete examples of second-class citizenship. As former Minister Majadele put it, "Before we talk about symbols, I want to talk about equal education for my children. It's more important that my son would be able to buy a house, live with dignity...the Arabs are not in a mood to sing right now."¹²³ In chapter 3, I will discuss the allusion Majadele is making to disparities in political rights between Arab-Israelis and their Jewish counterparts. But for now, let us continue our discussion of the nation-state bill.

Jewish citizens' privileged status in Israel is quite clear when it comes to education, and the future Basic Law cements that privileged status as part of the state's basic structure. In Arab schools within Israel, students must learn Hebrew

¹²² Editorial, "Rivlin: Rethink National Symbols, Anthem to Be More Inclusive for Arabs," The Times of Israel, accessed April 23, 2018, <https://www.timesofisrael.com/rivlin-national-symbols-anthem-may-be-more-inclusive-for-arabs-in-generation-or-two/>.

¹²³ "Majadele Refuses to Sing National Anthem," Ynetnews, accessed April 23, 2018, <https://www.ynetnews.com/articles/0,7340,L-3377681,00.html>.

and study Jewish subjects, but there is no corresponding requirement for biculturalism in Jewish schools, where exposure to Arab history and culture is extremely limited. As of this moment, based on available information about the near-final version, the section of the nation-state bill that reads “the history of the Jewish people, its heritage and its traditions shall be taught in all educational institutions serving the Jewish public” has not been dropped.¹²⁴ Read within the context of the rest of the bill (particularly the next Article on the “Preservation of Culture, Heritage, and Identity,” which I will discuss below) as well as the current state of affairs in Israeli education, the legislation appears poised to transform what may have been a *de facto* erasure of the Palestinian or Arab narrative into an enduring and constitutionally mandated one.¹²⁵

Again, a comparison to the American system is helpful in demonstrating why the Israeli approach undercuts liberal-democratic principles. In schools across the country, non-Jewish Israelis are taught that the Jewish history is the history of the Israeli nation, and if you fall on the wrong side of it—a matter in which you have little to no choice—you are not truly Israeli. In an American school, the parallel case would be something like this: what is important about George Washington is the fact that he was white and Christian, and you can only claim him as part of your heritage if you too are white and Christian. Of course, this is not what one learns about Washington, but what is less obvious is the fact

¹²⁴ "Basic Law: The National Home." Accessed April 23, 2018.

<http://www.justice.gov.il/StateIdentity/InformationInEnglish/Documents/BasicLawBill.pdf>.

¹²⁵ To be sure, whether this comes to pass depends on the Court’s interpretation of this provision, their ability to push back on the government in this realm, and how it is weaved into official state policies.

that this is not accidental. Like the rest of our Founding Fathers, any individual can claim Washington as informing her identity, and thus her connection to the nation, by accepting the ideas he represents. The American apple of gold and our picture of silver both ensure that even as an ascriptive “outsider” you can choose to adopt the American Creed.¹²⁶

Consider Samuel Huntington’s argument in “The Hispanic Challenge,” for example, where he warns against “the persistent inflow” of Mexicans and other Latinos. Huntington bends over backwards to insist that it is not these immigrants’ ascriptive differences that separate them from “real Americans,” but rather their resistance to the specific values—Protestant individualism, work ethic, and the rule of law, among others—that have built the American dream. In other words, Huntington’s worry is not merely that there are too many immigrants, but that they refuse to endorse American culture. What gives this claim “bite” is that the immigrants actually have a substantive choice to do the opposite.

The final provision I will discuss in this section is Article IV’s demotion of Arabic from one of the state’s official languages (alongside Hebrew) to a language with “special standing.” The meaning of this provision is somewhat unclear, but

¹²⁶ Of course, some national holidays in the United States are linked to Christianity or monotheism more generally—for example, Christmas and “In God We Trust” are not things with which vast swaths of our country can identify. However, these signals are hardly so pervasive as the ones in Israel, and the (roughly) 80-20 split between Jewish-Israelis and Arab-Israelis is very different from the United States’ cultural heterogeneity. Whereas Christmas excludes everybody who is not Christian, a broad and varied group in America, Israel’s symbolic exclusion is repetitive and directed at members of one ethnic group.

the phrasing in the original nation-state bill looks like this:

IV Language

1. Hebrew is the state language.
2. Arabic shall have a special standing in the state; those who speak Arabic shall have access in their own language to State services, all as prescribed by law.

The first thing to notice here is both implicit and obvious: Hebrew is presented as *the* state language, to the exclusion of any other. Second, the legislation is careful to emphasize that the practical, day-to-day implications of this change will be minimal: Arabic-speakers will still be able to acquire State services by using their own language. Although the full text of the latest draft has not yet been released to the public, the *Jerusalem Post* recently reported that some of the phrasing had shifted: “Arabic has a special status in the state [and] its speakers have a right to language accessibility in state services.”¹²⁷ Explicitly granting Arabic-speakers a *right* to language accessibility is a significant rhetorical change from stating that they “shall have access” to state services in their language “as prescribed by law”—laws, of course, can change fairly easily, especially if they do not tread on any specifically enumerated rights. Moreover, the *Post* reports that this draft includes a new sub-article stating that the Basic

¹²⁷ "'Jewish Law' Clause Dropped from Nation-state Bill," The Jerusalem Post | JPost.com, February 21, 2018, accessed April 23, 2018, <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Jewish-law-clause-dropped-from-nation-state-bill-543168>.

Law will not detract from the current status of the Arabic language.¹²⁸ However, the language provision was one of the left's primary points of criticism immediately after the 2018 compromise was reached.

The obvious question is: Why? It is important to note that the Arabic language is already invisible in most public spaces in Israel, so the practical consequences were never very important.¹²⁹ The most important element of this provision remains its symbolic significance. Arabic was an official language in the region even prior to the British Mandate, when Hebrew was elevated to that status.¹³⁰ Moreover, the Israeli legislature established the two languages as equal under the law with the Law and Administration Ordinance, enacted immediately after Israel's establishment.¹³¹ Setting Hebrew apart from all other languages as "the language of the state" undermines what Avishai Margalit and Moshe Halbertal call Israeli-Arabs' "right to culture" at an important national and cultural crossroads.¹³² This provision of the nation-state bill is intended to convey that those with a historical and cultural connection to the language of Judaism "belong" in the state more than those who do not.¹³³ Despite the softened

¹²⁸ "'Jewish Law' Clause Dropped from Nation-state Bill," The Jerusalem Post | JPost.com, February 21, 2018, accessed April 23, 2018, <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Jewish-law-clause-dropped-from-nation-state-bill-543168>.

¹²⁹ Jonathan Cook, "Israeli Parliament Endorses 'nation-state Bill' for First Reading," Israel News | Al Jazeera, March 15, 2018, accessed April 23, 2018, <https://www.aljazeera.com/news/2018/03/israeli-parliament-endorses-nation-state-bill-reading-180315192911365.html>.

¹³⁰ Muhammad Amara, "The Vitality of the Arabic Language in Israel from a Sociolinguistic Perspective," last modified October 2006, accessed April 23, 2018, <https://www.adalah.org/uploads/oldfiles/newsletter/eng/oct06/ar2.pdf>.

¹³¹ Fania Oz-Salzberger and Yedidia Z. Stern, *The Israeli Nation-state: Political, Constitutional, and Cultural Challenges* (Boston: Academic Studies Press, 2014), [171]

¹³² Margalit and Halbertal, "Liberalism and the Right to Culture," [507].

¹³³ Consider a similar case in the United States: for years, conservatives have attempted to pass laws codifying English as the official language of the state. While this is partially based on a

rhetoric, the near-final iteration of this legislation, which will soon become a Basic Law, still sends exactly the same message.

From a historical perspective, there appears to have been a tug-of-war over the primacy of Hebrew in Israeli society. Interestingly enough, this is most obvious in the Supreme Court's jurisprudence. In "Israel as a Nation-State in Supreme Court Rulings," Aviad Bakshi and Gideon Sapir describe how during the state's early years, the Court clearly awarded Hebrew a "senior status." Specifically, they cite *Khaa v. Jerusalem Municipality* (1955), *El-Chuari v. Chairman of Nazareth Municipality Election committee*, and *Chalaf v. The North County Committee for Planning and Construction* to demonstrate that for nearly forty years following Israel's establishment, Arabic did not enjoy equal status with Hebrew.¹³⁴ These cases demonstrate this trend, because in each of them, in order to receive a remedy from the Court the petitioner had to prove that the failure to publish in Arabic actually prevented a citizen from having access to the relevant information.¹³⁵

Bakshi and Sapir go on to describe how this trend changed beginning in the early 1990s, when the Court eroded the status of Hebrew. In *Jerusalem Community Burial Society v. Kastenbaum* (1992), Justice Barak held that the rights of a deceased person and her relatives outweighed the interest of protecting the status of Hebrew. This decision is quite understandable, however,

political strategy of subtle discrimination, it is also intended to send a message to people that do not speak English: "You're not welcome here."

¹³⁴ The authors simply cite these latter two cases as "1960s" and "1970s," respectively, and neither decision is easily accessible (particularly to somebody who cannot navigate the HCJ's Hebrew website, ironically enough).

¹³⁵ Oz-Salzberger and Stern, *The Israeli Nation-state*, [171-172]

when viewed within the Court's desire to protect human dignity. Eighteen months after this ruling, the Court was again forced to consider the special status of Hebrew as a "national value." However, in this case the Court prioritized the freedom of commercial expression instead of human dignity. In *Engineers v. Nazareth Eilit Municipality* (1993), commonly known as the *Re'em* case, the Court struck down a municipality bylaw that mandated private posters on city bulletin boards reserve at least two-thirds of their space for Hebrew. The final case they cite, *Mareei v. Savek* (1999) comes before the Court as a result of almost unbelievable circumstances:

The Knesset Elections Law requires the use of a Hebrew letter on the paper ballots in the general elections. A similar arrangement also applies in the elections to the Local Authorities. Towards the end of the 1990s, the court was requested to determine the outcome of elections in a certain local authority that were decided by one vote. One paper ballot on which there was only a handwritten Arabic letter for a given ticket, without the addition of a Hebrew letter on it, had been counted in these elections. Justice Heshin determined, with the majority opinion, that the main purpose of the legislation is the realization of the voter's will, so one is required to respect the wish of the voter who expressed his opinion in the Arabic language. This ruling, too, erodes the senior status granted by the legislature to the Hebrew language.¹³⁶

As the authors put it, in all three cases, "Opposite the *right* to freedom of speech, Barak set the *interest* in nurturing the Hebrew language as a national value, but he determined that on balance, the right takes precedent."¹³⁷ In other words, it appeared that the Court was swinging back in the direction of liberal-democratic principles.

¹³⁶ Oz-Salzberger and Stern, *The Israeli Nation-state*, [173]

¹³⁷ *Ibid.*, 172.

Yet in 2002, Adalah—The Legal Center for Arab Minority Rights in Israel, petitioned the Supreme Court to regularize the use of Arabic in Israeli court proceedings. This was quite an alarming request, as demonstrated by the fact that the Court advised the organization to withdraw its petition, and it soon did so. The case was entitled *Adalah v. Courts Administrator*, and it was ultimately unpublished. While it is not as definitive as the cases cited above, at the very least, this represents a counter-swing away from “eroding” the status of Hebrew. In this context, the nation-state bill’s provision on state languages can be understood as reifying this more recent trend, which is compounded by contemporary structural dynamics affecting the Supreme Court. It is these dynamics to which I now turn.

Chapter 3: Between Judges, Politicians, and the People—Structural Barriers to Judicial Activism

“What can the court contribute to the solution of an ideological dispute such as this which divides the public? The answer is— nothing, and whoever expects judges to produce a magic formula is merely deluding himself in his naiveté.”¹³⁸

- Justice Landau

“This much I think I do know, that a society so riven that the spirit of moderation is gone, no constitution can save. That a society where that spirit flourishes, no constitution need save. That a society which evades its responsibility by thrusting upon the court the nurture of that spirit, in the end will perish.”¹³⁹

- Judge Learned Hand

“The Supreme Court is not the enemy of the people. It's important to understand that hurting the Supreme Court is hurting democracy, and hurting democracy means hurting disadvantaged populations.”¹⁴⁰

- Justice Salim Joubran

In this chapter, I will argue that the Israeli Supreme Court is not, and never has been, well-positioned to act as a “republican schoolmaster” for the state. Moreover, if the Court hopes to protect liberal-democratic principles within Israel’s current socio-political climate, it appears that the judiciary’s only option is to exercise restraint in all but the most egregious cases. To some extent, this will help protect the Court’s broad power of judicial review—which remains intact, at least in principle—from encroachment by the Knesset. Nevertheless, if the rest of the Israeli polity is moving towards reliably and consistently prioritizing the state’s Jewish identity over its liberal-democratic commitments,

¹³⁸ Asher Felix Landau, *Selected Judgments of the Supreme Court of Israel: Volume 5* (Jerusalem: Transaction Publishers, 1971) [80].

¹³⁹ Jacobsohn, *Apple of Gold*, [121].

¹⁴⁰ Tova Tzimuki, "Retired Supreme Court Justice Joubran: I can't sing Israel's anthem," YNet News, last modified January 31, 2018, accessed April 23, 2018, <https://www.ynetnews.com/articles/0,7340,L-5078736,00.html>.

with certain exceptions, the Court will have to acquiesce in the long run. While I will not definitively assert that we are witnessing the beginnings of a transformative shift in Israeli Constitutionalism—one that establishes the preeminence of the state’s Jewish identity—I would not be surprised if this is how tomorrow’s historians characterize the contemporary evolution of the state’s socio-political system.

A. The Changing Politics of Appointments and the Move Towards Restraint

In addition to the factors described in the previous sub-section, the changing politics of appointments will make the Supreme Court much less likely to overrule government policies via judicial review. Indeed, the revamped appointment process is the preeminent structural mechanism for reigning in judicial activism. The new framework drastically reduces the Court’s influence on selecting Justices while also powerfully politicizing the appointment process. In relation to the first of these two factors, future policies may continue to erode the sitting justices’ influence on Court appointments. As I will argue, each of these developments contributes to the Court’s movement toward judicial restraint, and this shift away from activism is clearly demonstrated by the ideological bent of nominees and selections to the Court in recent years. Examining the evolution of the appointment process will provide necessary context for understanding the significance of the most recent structural changes, and it will also help set the stage for discussing the ways in which further politicizing the Court might shape future jurisprudence.

First, we should establish the basic factors involved in the appointment process. Under Israeli law, the Judicial Selection Committee is in charge of making permanent appointments to the Supreme Court. This nine-person committee is made up of the chief justice, two other sitting justices (appointed on a rotating basis), two government Ministers, two MKs, and two representatives of the Israeli Bar Association. The Knesset traditionally selects one member of the opposition and one member of the coalition government, meaning that in theory, the two will neutralize one another, and most of the time, the Bar representatives support the sitting justices.¹⁴¹ For much of Israeli history, when it was announced that the Supreme Court justices would support a particular candidate, the rest of Committee served as nothing more than a rubber stamp.¹⁴²

However, times have changed. Between 2004 and 2007, six justices retired from the Court after reaching the mandatory retirement age of seventy: Theodor Or, Dali Dorner, Eliahu Mazza, Jacob Turkel, Mishael Cheshin, and, of course, Aharon Barak himself. As Friedmann puts it, “All these were central figures, and, without them, the [C]ourt looked somewhat anemic.”¹⁴³ More importantly, “The unreserved confidence and respect that the Supreme Court had previously enjoyed among the public and politicians had evaporated. Under the Barak court, the appointments procedure became controversial.”¹⁴⁴

¹⁴¹ Richard A. Posner, “Judicial Review, a Comparative Perspective: Israel, Canada, and the United States” (2010) p. 2396

¹⁴² Minister Michael Eitan, see Richard A. Posner, “Judicial Review, a Comparative Perspective: Israel, Canada, and the United States” (2010) p.2397

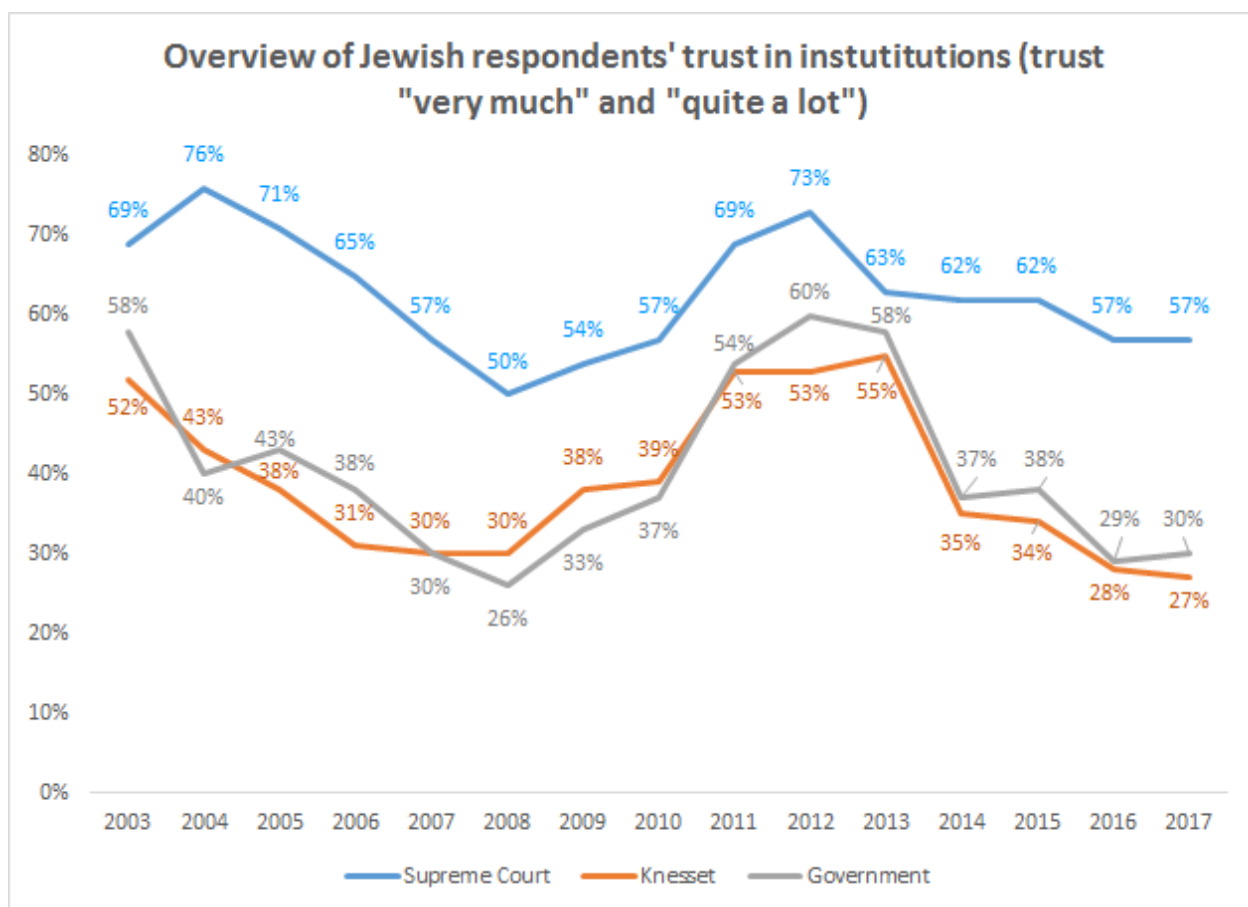
¹⁴³ *Ibid.*, 2

¹⁴⁴ *Ibid.*, 2

The declining public trust in the Supreme Court has a clear empirical basis. Unfortunately, while the Israeli Democracy Institute has consistently asked about trust in institutions, the only available data is presented in a segmented fashion—sometimes only discussing Jewish public opinion, and other times describing views of the entire population—making a single figure difficult to construct. Nevertheless, by looking at data from Jewish respondents, the trends regarding Israeli public opinion should be clear enough. In 1995, 85% of Jewish respondents in Israel said they trusted the Court “fully,” while 10% trusted the institution “somewhat,” and only 5% said they did not trust it.¹⁴⁵ This is quite a high baseline, although answers cannot be directly compared with later data because public trust is measured by different categories. By 2003, this group’s faith in the institution dropped markedly, and the trend continued through 2008. Below, I have reconstructed a graph illustrating this trend, which I present alongside public opinion regarding both the Knesset and the government as a whole for context.¹⁴⁶

¹⁴⁵ Ephraim Yuchtman-Yaar and Yochanan Peres, *Between Consent and Dissent: Democracy and Peace in the Israeli Mind* (Lanham, MD: Rowman & Littlefield Publishers, 2000), [39]

¹⁴⁶ Figure constructed by author based on disaggregated data from 2016 and 2017 Israeli Democracy Index reports. See <https://en.idi.org.il/centers/1159/1519>



Again, the downward trend in the early 2000s is quite clear, even absent data points from earlier in Barak’s term, which would make the drop-off appear significantly more striking. Another survey shows that during the middle of Barak’s term in 2000, 71% of Jewish respondents said they trusted the Court, and 71% of Jewish respondents agreed that the courts perform their tasks fairly; just seven years later, this figure plummeted to a mere 48%.¹⁴⁷ Finally, in 2017, when asked whether they believe the power of judicial review over Knesset legislation

¹⁴⁷ Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press, 2013), [164].

should be taken away from the Supreme Court, 58% of the general public did not agree while a shockingly high 36% agreed.¹⁴⁸

Due to a combination of declining public trust and the loss of several key justices, the judiciary was vulnerable. Several structural components of the Supreme Court appointment process have been altered in the past decade, and some of the most transformational changes were either initiated or supported by former Justice Minister Daniel Friedmann, who served from 2007-2009. While there had been many draft bills and resolutions attempting to increase the government's influence on the Court, in his 2016 book "The Purse and the Sword: The Trials of Israel's Legal Revolution," Friedmann details precisely how he helped bring about a significant and lasting shift in the appointment process. Because justice ministers tend not to last long in today's Israel, the status quo put the sitting justices at a powerful structural advantage. As Friedman writes, "New elections were on the horizon," and as "has happened at other junctures when the high bench found itself facing an independent-minded justice minister. All they needed was a bit of patience. But this time, it didn't work."¹⁴⁹

One distinctive characteristic of the old selection process in Israel was the practice of making temporary appointments. Essentially, the justice minister has the power to make one-year appointments to the Court without requiring the approval of the Judicial Selection Committee, provided that he or she had the

¹⁴⁸ See 2017 Israeli Democracy Index at <https://en.idi.org.il/media/9837/israeli-democracy-index-2017-en-summary.pdf>

¹⁴⁹ Daniel Friedmann, "Changes in Appointments to the Supreme Court," in *The Purse and the Sword: The Trials of Israel's Legal Revolution* (New York, NY: Oxford University Press, 2016), [317].

chief justice's approval. Additionally, only sitting District Court judges were eligible for these temporary appointments. Up to three or four District Court judges could be cycled through for short periods of time to fill a Supreme Court vacancy before a permanent appointment was made. As Friedmann notes, this arrangement was unique to Israel's highest court, making it something of an anomaly in a comparative constitutional context.

And this, it seems, is for good reason. Indeed, Friedmann points to several worrying implications of this procedure, although I will only highlight three. First, this would disrupt the work of the District Court, due to the judge's absence as well as the fact that temporary judges who did not then secure a permanent position often felt publicly insulted, driving some of the District Court's top judges to resign. Second, the revolving-door phenomenon created perverse power dynamics among supposedly equal judges, and this tiered system often led temporary justices to defer to their permanent counterparts in hopes of reaching that status. As Friedmann puts it, "Their independence of judgement was open to question."¹⁵⁰ While this second factor was extremely problematic, insofar as it corrupted the judges' impartiality, from Friedmann's point of view, the third factor was just as pernicious.

The chief justices instituted a "rule" under which no District Court judge could be appointed to the Supreme Court without having first served in a temporary capacity. This rule was of course not imposed on Supreme Court appointees who did not begin in the lower courts, meaning "judges with years of

¹⁵⁰ Friedmann, "Changes in Appointments," [318]

experience on the bench needed to undergo an ‘apprenticeship’ when men and women who had never served as judges took up their gavels directly.”¹⁵¹ On its face, this arrangement seems somewhat arbitrary, but it had important implications for the appointment process more broadly. While the apprenticeship “rule” (perhaps better-termed “tradition”) had no basis in law, on Friedmann’s account, it helped “the justices wield nearly exclusive power over appointments” in practice.¹⁵² In essence, this arrangement granted the chief justice *de facto* veto power over the appointment of judges from the lower courts, in addition to the substantial power the Court already exercised on the Judicial Selection Committee, where sitting justices held three of the nine seats.

As Justice Minister, Friedmann set out to dismantle the temporary appointment regime. Initially, he decided that the appointment procedure as a whole needed to be codified, and when he submitted a proposal that did away with temporary appointments, the Justice Minister felt immediate pushback. Ehud Barak first asked Prime Minister Olmert to demand Friedmann withdraw the bill, and when Olmert refused, Barak called Friedmann himself. The Justice Minister saw no reason to acquiesce, given that Barak had not been particularly cooperative and the Ministerial Committee on Legislation (to whom Friedmann had submitted the bill) overwhelmingly supported his proposal.¹⁵³ However, Labor representative Shalom Simhon suggested a compromise and Friedmann agreed, staving off legislative reform at least for the time being. Nevertheless,

¹⁵¹ Friedmann, “Changes in Appointments,” [318]

¹⁵² Friedmann, “Changes in Appointments,” [318-319]

¹⁵³ Friedmann, “Changes in Appointments,” [319]

Friedman continued to refuse temporary appointments, and he recommended that his successor, Yaakov Neeman, continue this policy. Although Chief Justice Beinisch refused to support any District Court judges who hadn't served temporarily, more and more top-rate judges from the lower Court agreed to have their names put forward for consideration. Understandably, most of the District Court judges had always despised the arrangement, but now they saw a real possibility that the system requiring "trial runs" would come to an end.¹⁵⁴ In practice, this put an end to temporary appointments, taking a substantial degree of appointment power away from the sitting members of the Court.¹⁵⁵ The Israeli Supreme Court is one of the busiest in the world, so when retirements open up enough vacancies on the bench, other members of the Judicial Selection Committee can now force the hand of the three sitting justices.¹⁵⁶

Another important reform that occurred during Friedmann's tenure was a bill submitted to the Knesset's Constitution, Law, and Justice Committee. Authored by Likud MK Gideon Sa'ar, the proposal would require that Supreme Court appointments only be made with seven of the Selection Committees nine votes. The Justice Minister decided to support the bill, and Amendment No.55 to the Courts Law was enacted.¹⁵⁷ As Friedmann points out, this meant that neither the sitting justice minister nor the chief justice could push through an

¹⁵⁴ Ibid., 323

¹⁵⁵ Ibid., 320

¹⁵⁶ In 2010, Justice Elyakim Rubinstein commented that in the previous year, the Court had heard over 11,000 cases. To make matters worse, due to political haggling, controversy, and elections, there had not been any appointments in over a year, leaving a twelve-justice Court to handle this incredibly high caseload. See Richard A. Posner, "Judicial Review, a Comparative Perspective: Israel, Canada, and the United States," *Cardozo Law Review* 31, no. 6 (2010), [2412].

¹⁵⁷ Posner, "Judicial Review," [2396].

appointment without approval from the other, since both of them could almost always count on support from two other committee members. Thus, a three-person bloc could effectively veto any candidate not to their liking.¹⁵⁸ In practice, this reform forces negotiation as well as some degree of compromise and consensus between the Selection Committee's two major players. It also carves out a space for maintaining some of the Court's influence over permanent appointments; without this law, ending the temporary appointments regime would have left the three sitting justices with exactly as much leverage as any other member of the committee.

Nevertheless, the changing dynamics have, overall, much diminished the Court's power in Supreme Court appointments. When Justice Minister Neeman forced Chief Justice Beinisch to appoint Neal Hendel—a candidate she previously categorically rejected, even for a temporary position—as part of a three-appointment compromise, “It was apparently the first time in the history of the Supreme Court that a chief justice was compelled to accept the appointment of a candidate she emphatically opposed.”¹⁵⁹ Whether or not this was in fact the first time a chief justice had been strong-armed, it has happened several times since, with potentially serious consequences.

For a concrete demonstration of this new reality and how it reflects the changing politics of Israeli Supreme Court appointments, let us examine a few recent appointments as well as the appointees' respective ideological leanings

¹⁵⁸ Friedmann, “Changes in Appointments,” [323]

¹⁵⁹ Friedmann, “Changes in Appointments,” [324].

and legal approaches. In February of 2017, the Judicial Selection Committee appointed David Mintz, Yael Willner, Yosef Elron, and George Kara to replace four outgoing justices on the 15-member Supreme Court. These justices were selected from a shortlist of 27 candidates, and three of the four were on right-wing Justice Minister Ayelet Shaked's list of preferred candidates. Her top pick was likely David Mintz, former district judge of Jerusalem and a staunch conservative, but she was also pleased with the appointments of Yosef Elron and Yael Willner; the former has a track record of judicial restraint, and the latter is known as a (relatively moderate) religious Zionist.¹⁶⁰ Voting as a bloc, the three Supreme Court justices serving on the Judicial Appointments Committee were unable to advance any of their preferred nominees. The final selection, George Kara, is a well-known Christian Arab judge from the Tel Aviv District Court, and for a variety of reasons he was seen as a compromise candidate.¹⁶¹ Of course, the 2017 round of appointments dramatically shifted the Court's ideological makeup in Shaked's preferred direction; the Court became considerably more non-activist, conservative, and nationalist. The Justice Minister hailed it as a historic day, commenting, "Finally, a humane and judicious selection that is needed as a mirror for the Israeli people."¹⁶²

¹⁶⁰ Raoul Wootliff, "4 New Supreme Court Judges Tapped, as Right Starts to Shift Bench," *The Times of Israel*, February 23, 2017, accessed April 23, 2018, <https://www.timesofisrael.com/new-supreme-court-judges-tapped-as-right-looks-to-shift-bench/>.

¹⁶¹ Raoul Wootliff, "4 New Supreme Court Judges Tapped, as Right Starts to Shift Bench," *The Times of Israel*, February 23, 2017, accessed April 23, 2018, <https://www.timesofisrael.com/new-supreme-court-judges-tapped-as-right-looks-to-shift-bench/>.

¹⁶² I will soon return to the claim that these selections "mirror" the desires of the Israeli people, but for now, suffice it to say that Shaked's choice of metaphor is both intentional and informative.

This movement toward a less-interventionist, more conservative, and more nationalist Supreme Court continued in February of this year. In different ways, Justice Uri Shoham and Justice Yoram Danziger are both considered judicial activists, and upon their retirement, the Judicial Selection Committee appointed Alex Stein and Ofer Grosskopf to the Court. Stein was Justice Minister Shaked's top choice, and for good reason; he is a very widely respected legal scholar, and some conservatives believe he will be able to take apart the underpinnings of Barak's "constitutional revolution" by crafting dazzling legal opinions advocating judicial restraint.¹⁶³ Alongside the "anti-Barak," Grosskopf is experienced and well-respected in his own right. Given that he was at the top of Supreme Court President Esther Hayut's list, Grosskopf fills the spot of one outgoing activist judge. Yet as was true in 2017, this round of appointments made the Court more conservative overall, potentially even putting liberals at a six to eight disadvantage on some issues.¹⁶⁴

This is not necessarily a bad thing. Indeed, if the Chief Justice was allowed to effectively control future appointments, as has largely been the case up until quite recently, it seems less likely that the Court would see much diversity in background or legal approach. However, the Israeli Supreme Court is one of the few reliable guardians of liberal-democratic principles in Israel, and insofar as the Court moves markedly toward judicial restraint due increased political

¹⁶³ Yonah Jeremy Bob, "Supreme Court Gets More Conservative with Appointment of Two New Justices," Jerusalem Post, last modified February 22, 2018, <http://www.jpost.com/Israel-News/Supreme-Court-gets-more-conservative-with-appointment-of-two-new-justices-543418>

¹⁶⁴ Bob, "Supreme Court," Jerusalem Post.

involvement in appointments, equality and minority rights are unlikely to win out at the expense of the state's Jewish identity.

Moreover, there may be additional structural changes that further diminish the Court's influence on the appointments process in the very near future. On several occasions, Justice Minister Shaked has threatened to advance a proposal allowing permanent appointments with only a simple majority on the Selections Committee.¹⁶⁵ As I mentioned above, the current seven vote requirement has allowed the Court to retain some degree of sway beyond their three seats on the Committee. Without it, Shaked would effectively have her pick of the litter in future appointments. However, when Shaked threatened to advance the bill (perhaps as a negotiation tactic, perhaps not) in 2016, Chief Justice Miriam Naor issued a fierce response, issuing a formal letter to the Justice Minister that read, in part:

Submitting this bill at the current time represents...“placing a gun on the table”...It means that...the constitutional “rules of the game” will be changed...Therefore, I must inform you—with the support of [Court] Vice President Rubenstein and Justice [Salim] Joubran—that we have no intention to continue at this time with the dialogue...to formulate a list of candidates and regarding possible agreements.¹⁶⁶

By presenting a unified front, the Committee's three sitting justices were able to call Shaked's bluff. However, there is no guarantee that the bill will not rear its head again in the future. In addition to the structural power she would gain,

¹⁶⁵ Editorial, "Justice minister bids to reshape Supreme Court," Times of Israel, last modified November 1, 2016, accessed April 23, 2018, <https://www.timesofisrael.com/justice-minister-bids-to-reshape-supreme-court/>

¹⁶⁶ Marissa Newman, "Chief justice slams minister over bid to change selection process for judges," The Times of Israel, last modified November 3, 2016, accessed April 23, 2018, <https://www.timesofisrael.com/justices-snob-minister-over-bid-to-limit-their-power-to-select-judges/>

which future justice ministers would also enjoy, Shaked has already cut a deal with the Bar Association in order to allow Yisrael Beytenu MK Robert Ilatov to fill the seat of “opposition MK.”¹⁶⁷ Ilatov’s views of the Court are quite similar to those of the current justice minister, demonstrated by the fact that he submitted the same proposal Shaked had threatened in March of 2016, even later joining the coalition. In effect, the bill would allow Shaked to take advantage of the fact that the Selections Committee has two coalition MKs instead of the traditional arrangement, which reserves one seat for an opposition MK.

Whether it is the proposal I have described above or one that takes a different form, politicizing Supreme Court appointments in a nation that is otherwise ruled by a unicameral legislature could very well lead to a lasting and illiberal tyranny of the majority.¹⁶⁸ Israel is unlikely to see a considerably more liberal coalition government in the near future. If conservative politicians can consistently select justices that will sanction their policies, who will remain to protect minority rights in Israel—or liberal-democratic principles more broadly—especially when they come into conflict with the state’s Jewish identity? The consequences of such an arrangement will be swift as well as devastating, and they will be felt for years to come.

As I have demonstrated, a set of underlying socio-political factors have contributed to a distinct pattern: in many, though not all, recent high-profile

¹⁶⁷ Yonah Jeremy Bob, "Shaked, Hayut Battle Over Future of High Court," Jerusalem Post, last modified February 21, 2018, accessed April 23, 2018, <http://www.jpost.com/Israel-News/Shaked-Hayut-battle-over-future-of-High-Court-543206>.

¹⁶⁸ See Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago, IL: University of Chicago Press, 2002).

cases, the Court's decisions have become more moderate (or, depending on one's point of view, more recalcitrant). This move towards restraint is driven, in part, by the loss of key justices, the public's declining trust in the Court, as well as the judiciary's decreased bargaining power relative to both the justice minister and the Knesset itself. The following sub-section is situated within this context, and it endeavors to uncover the appropriate course of action for the Israeli Supreme Court. As I will suggest, judicial restraint is the Court's best option in all but the most egregious cases. However, while this is indeed the national judiciary's most prudent course of action, it will still likely lead Israel to highlight its identity as the "Jewish State" at the expense of liberal-democratic principles to which it has long been committed.

B. Judicial Activism and Social Change in Rifted Democracies

As is clear from the selection of quotes at the beginning of this chapter, the proper role of any state's highest court is an incredibly complex question with no universal answer. Of course, the lack of a "silver bullet" solution is characteristic of many big political questions; politics is messy, as is constitutionalism. It is, however, worth investigating the Israeli Supreme Court's best course of action given the state's underlying constitutional arrangements and the way they interact with present-day circumstances. This section will argue that Israel is best described as what Ruth Gavison calls a "rifted democracy," and as I hope to make clear, this makes the model of a pedagogical Supreme Court ill-suited to the Israeli polity. This is especially true in the current socio-political climate. In other

words, looking to the Court as a “republican schoolmaster” in the Jewish State was never particularly likely to succeed, but contemporary perceptions of excessive judicial activism have made it even less viable.¹⁶⁹ Before explaining why the Barak Court was wrong to adopt a pedagogical approach to the Israeli polity, I will draw out what this model entails by examining its roots in American constitutionalism and constitutional theory.

The pedagogical Supreme Court involves two primary components: the first is the Court’s role in highlighting and promulgating its understanding of civic virtue, and the second turns on the Court’s capacity to drive social change. To be sure, these components are deeply interrelated, and they are both necessary if the Court wishes to engage in tangible civic education. The former, which I will discuss first, is hardly an original strategy for liberal democracies looking to safeguard their foundational principles—for example, consider Ralph Lerner’s famous piece “The Supreme Court as Republican Schoolmaster.”¹⁷⁰ First, Lerner explores evidence for the claim that the U.S. judiciary acted as “teachers to the citizenry” from the very beginning of our nation’s history. In support of this claim, he examines evidence that the Founders who thought most coherently about the place of the Supreme Court in the proposed government expected it to engage in “high political education.”¹⁷¹ On the question of the Court’s proper role in a democratic system of government, Lerner had this to say:

¹⁶⁹ As I will explain shortly, the term “republican schoolmaster” is most often attributed to Ralph Lerner.

¹⁷⁰ Ralph Lerner, “The Supreme Court as Republican Schoolmaster,” *The Supreme Court Review*, 1967.

¹⁷¹ Lerner, “The Supreme,” [129].

An adequate judiciary in a democratic regime must be at once upright and subtle...The consequence of so regarding the judge is to thrust him—and the whole machinery of justice—into the role of an educator, molder, or guardian of those manners, morals, and beliefs that sustain republican government.¹⁷²

This is the core of Lerner's argument, and as he explains, it raises foundational questions about how the Framers expected to sustain and perpetuate a republican regime.¹⁷³ During the Virginia ratification debates, for example, James Madison posed the following question to Patrick Henry: "Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure."¹⁷⁴ It appears that Madison believed the American polity needed at least a foundational basis in moral purity. However, in attempting to secure the republican form of government for posterity, the Founders did not blindly rely on the virtue of the people; it was necessary but not sufficient to this long-term goal.

Those who attended the Philadelphia Convention repeatedly discussed adopting a "Council of Revision" which, if codified, would have granted the executive and several members of the national judiciary a qualified veto over every act of the legislature.¹⁷⁵ This idea was successfully challenged on the basis that "judges should do—and only do—what they are trained for."¹⁷⁶ But instead of allowing this objection to undercut the necessity of safeguarding "the legal and

¹⁷² Ibid., [128].

¹⁷³ Lerner, "The Supreme," [156].

¹⁷⁴ Jonathan Elliot, "Debates of the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, together with the Journal of the Federal Convention," *The North American Review* 99, no. 204 (July 1864): [536-537].

¹⁷⁵ Lerner, "The Supreme," [174].

¹⁷⁶ Ibid., [177].

political principles of the regime,” Lerner deftly utilizes this logic to reach a more nuanced conclusion. He claims that the very characteristics of the judiciary which Hamilton described in *Federalist No. 78* make the courts uniquely suited to perform this safeguarding function. The strength of Lerner’s argument arises from the fact that he envisioned the judges acting *indirectly* as “faithful sustainers and guardians of the regime”—that is, only when the regime’s principles were implicated in a specific judicial case.¹⁷⁷ Of course, this fits very nicely with the Justiciability Doctrine, and bounding the Court in this way has certainly gone a long way towards ensuring that the American Supreme Court retains broad public confidence, a necessary factor for it to act as a “republican schoolmaster.”

However, although this argument for a pedagogical Court is quite powerful, it is not foolproof. While the American constitutional framework seeks to insulate the Court from public opinion, the justices are not wholly detached from the nation’s political reality. In Jacobsohn’s words:

The power to restrain the majority through the exercise of judicial review presupposes the existence of a moral consensus that is embodied in a constitution...[The] legitimacy [of judicial review] inheres in its furtherance of those ideas that nourish the American conception of nationhood... [Therein] lies a critical, perhaps the critical difference with the Israeli constitutional scene, in which the source of interpretive disagreement over the first principles is itself foundational.”¹⁷⁸

Here we have a natural segue to Ruth Gavison’s discussion about “The Role of Courts in Rifted Democracies” such as Israel. In these societies, if the Court

¹⁷⁷ Lerner, “The Supreme,” [177].

¹⁷⁸ Jacobsohn, *Apple of Gold*, [119-120].

hopes to retain public confidence, it should be somewhat more reluctant to engage in judicial activism. As she puts it, “The role of the courts in democracy is not just one of jurisprudence or an analysis of the concepts of ‘democracy’ and ‘court’. It is a normative-political question.”¹⁷⁹ While normative considerations should be the courts’ preeminent concern, within rifted democracies in particular, the judiciary should avoid determining specific arrangements and priorities, especially in areas of social controversy where the grounds of judicial activism remain nebulous.¹⁸⁰ The paradigmatic example of this sort of controversy might be the fundamental tension in Israeli society between Israel as a Jewish state and a liberal democratic one.

More generally, the prevailing political landscape lies at the heart of a national judiciary’s ability to drive social change, and while this does not strictly include public opinion, the views of the state’s citizens are an important determinant of the Court’s success in this realm. As is often the case, Tocqueville may have put it best:

The power of the Supreme Court Justices is immense, but it is power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it...The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.¹⁸¹

¹⁷⁹ Ruth Gavison, "The Role of Courts in Rifted Democracies," *Israel Law Review* 33, no. 2 (April 1999): [218].

¹⁸⁰ *Ibid.*

¹⁸¹ Alexis de Tocqueville, *Democracy in America*, [137].

The image in this final clause is both eloquent and powerful, and as I will explain shortly, it captures a great deal of the contemporary situation in Israel. The Israeli Supreme Court is, in a significant sense, attempting to steer out of an almost overwhelming current—a political landscape that aims to prioritize the state’s Jewish identity while paying little heed to its liberal-democratic principles. Before making this argument, however, it is important to consider whether judges can consistently and reliably drive social change. Moreover, I will attempt to elucidate the conditions under which the Courts are better able to do so.

In “The Hollow Hope,” Gerald N. Rosenberg explores the American Supreme Court’s ability to bring about social change. This is a complex problem to say the least, because as he puts it, “We Americans want courts to protect minorities and defend liberties, *and* to defer to elected officials.” For Rosenberg, this means the American political system must carve out a space between what he calls the “Dynamic Court” and the “Constrained Court.”¹⁸²

By concentrating on social reform litigation in the spheres of civil rights, abortion, and women’s rights, Rosenberg relies heavily on empirical data to determine what conditions are most conducive to the courts driving political and social change with a nationwide impact—“significant” reform such as *Brown* and *Roe*¹⁸³—and in the end, he comes to an interesting conclusion. In discussing both

¹⁸² Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University of Chicago Press, 1993), [2-3].

¹⁸³ Rosenberg, “The Hollow Hope,” [2-3].

the “judicial path” and the “extra-judicial path” of social reform through Court decisions, Rosenberg’s book contends that due to the constraints on judicial efficacy, courts are generally ineffective in driving major social change. Moreover, he focuses on the U.S. Supreme Court, which, compared to its Israeli counterpart, appears far better suited to this task, given our agreement on our nation’s political fundamentals.¹⁸⁴ Thus, while Rosenberg does not specifically take up the Israeli case, one can extrapolate that this rifted Supreme Court is at least as unlikely to create social change as its American counterpart—and likely more so. In Lerner’s words, “That problem—the proper connection between judicial power and public opinion—remains live and urgent, if mocking of final formulations.”¹⁸⁵

The late Robert Bork once claimed that Chief Justice Barak’s Court was “the most activist, antidemocratic court in the world and... may, unless a merciful providence intervenes, foreshadow the future of all constitutional courts in the Western world.”¹⁸⁶ Of course, this is somewhat hyperbolic; in fact, from 1995-2016, the Israeli Supreme Court rejected 86.9% of constitutional petitions against the government.¹⁸⁷ Nevertheless, as I mentioned earlier, the Court receives a large number of these petitions each year, and the core of Bork’s assertion comports with Gavison’s account of rifted democracies. Even if public

¹⁸⁴ As I mentioned in my introduction, “political fundamentals” in this context does not refer to differences between Republicans and Democrats, Conservatives and Liberals, or Federalists and Antifederalists. It refers to our nation’s most basic principles, which are, for the most part, both coherent and foundational.

¹⁸⁵ Lerner, “The Supreme,” [129].

¹⁸⁶ At one point Jacobsohn quips, “Barak is the anti-Scalia.” See Jacobsohn, *Constitutional Identity*, [154] As I mentioned in the previous section, with Justice Alex Stein, we may in turn have the anti-Barak.

¹⁸⁷ Maoz Rosenthal, Gad Barzilai, and Assaf Meydani, “Judicial Review in Constitutional Courts: Individual Preferences and Judicial Policy-Making” (unpublished manuscript, 2017).

perceptions did not fully comport with the empirical reality, what matters is the political landscape combined with the fact that activism is especially difficult in societies that have yet to resolve foundational constitutional questions.¹⁸⁸ These factors are interrelated and mutually reinforcing. In short, even overreach based on defending (one of) a regime's fundamental principles may powerfully undermine the standing of the national judiciary, which will in turn cripple the Court's capacity to safeguard those very principles in the future. While Chief Justice Barak helped establish judicial review as a powerful way to protect liberal-democratic principles, I also believe it is fair to say that his "constitutional revolution" is partially responsible for the widespread and dangerous criticism leveled against the Court, as well as the festering distrust in the judiciary.¹⁸⁹ If Barak was indeed the state's republican schoolmaster, his students have offered some vigorous pushback.

In turn, the Court has begun issuing considerably more moderate rulings in recent years, resisting activism in several recent cases where the government was clearly violating crucial liberal-democratic principles. On some occasions, the justices are forced to adopt somewhat tortured legal logic in order to protect their broad powers of judicial review, which the justices, even the most conservative jurists among them, almost universally maintain. As former Justice Minister Daniel Friedmann puts it:

From the Supreme Court's point of view, the situation is a sensitive one...It has to walk a fine line between the principles it proclaims

¹⁸⁸ Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, DC: AEI Press, 2003), [13].

¹⁸⁹ Gavison, "The Role," [216].

and the fear that rulings that elected officials and the public fiercely oppose may impel the Knesset to pull the rug out from under [it].¹⁹⁰

This final clause is particularly important. Because the Court bases its power on Basic Law: Human Dignity and Liberty, the constitutional basis for judicial review in contemporary Israel can be easily revoked by a simple plurality vote to amend this legislation in the Knesset.¹⁹¹ One of the only reasons the Israeli Parliament has not gutted the national judiciary is the Court's recent trend of restraint, in addition to the government's increased power in appointments and the fact that doing so would undermine the appearance of a framework based on the separation of powers. Politicians do care about appearances, and if the Court's constitutional authority were revoked, the Israeli political structure would lose any semblance of a mechanism for counteracting the state's illiberal and undemocratic tendencies.

Chapter 4: Examining the Evidence for Judicial Restraint

In my final chapter, I will examine a few recent cases that powerfully demonstrate the Court's contemporary shift toward judicial restraint. While I will spend most of this chapter discussing one case study—namely, land allocation—through an analysis of the “Admissions Committee Law” as well as two Supreme Court cases, I will conclude by briefly broadening my scope. In this final

¹⁹⁰ Friedmann, “Changes in Appointments,” [342]

¹⁹¹ Ibid.

subsection I will suggest that although the Court's protection of African refugees constitutes one potential exception, the recent trend of increased judicial restraint has powerfully undermined liberal-democratic principles in several other important contexts. These include the Court's 2011 decision to uphold the "Nakba Law," its 2012 decision to uphold the law prohibiting family reunification, and its 2015 decision to uphold most parts of the "Boycott Law."

A. State-Sanctioned Discrimination and Segregation in the Allocation of Land

Although I have already discussed it quite extensively in chapter 2, the nation-state bill also serves as a useful point of departure for discussing land allocation in Israel. Specifically, the piece I am concerned with is found in Article IX of the original version: "The State may permit a community, including the members of a single religion or the members of a single nationality, to establish separate community settlements."¹⁹² This provision is an almost explicit response to a landmark Supreme Court case entitled *Ka'adan v. Israel Lands Administration* (2000), which dealt with discrimination in land allocation as well as state-sanctioned segregation.

The petitioners, Adel and Iman Ka'adan, were two Arab Israeli citizens who wanted to move from their impoverished village in the Lower Galilee to the prosperous settlement of Katzir two kilometers up the hill, in hopes of granting their two daughters access to an adequate education system and, more generally,

¹⁹² Again, for the 2011 version of the nation-state bill, see <http://www.justice.gov.il/StateIdentity/InformationInEnglish/Documents/BasicLawBill.pdf>

a better life.¹⁹³ However, the Ka'adans' request to build a home was immediately denied by the Katzir Cooperative Society because they were Arabs, and the settlement—built by the Jewish Agency for Israel—was for Jews only.¹⁹⁴ A few months later, the Ka'adans enlisted the help of the Association for Civil Rights in Israel (ACRI). Because the land had been initially allocated by the Israel Lands Administration, a state institution that owns 93% of the land in Israel, the Ka'adans argued that the decision was discriminatory and unlawful.¹⁹⁵ ACRI approached the Tel-Eron Local Council—the local committee which managed the Katzir Communal Settlement—on behalf of the Ka'adans, and when the family was denied recourse, ACRI filed a complaint with the Minister of Construction and Housing as well as the Director of the Israeli Lands Administration.¹⁹⁶ Finally, after receiving no response to these complaints, ACRI petitioned the Supreme Court to mandate that the Katzir Cooperative Society grant the Ka'adans' request.¹⁹⁷

The Ka'adan controversy began in April 1995, and it took almost five years of appeals, hearings, and Supreme Court equivocation¹⁹⁸ before the Court issued

¹⁹³ Steven V. Mazie, "Israel's Higher Law: Religion and Liberal Democracy in the Jewish State," *Journal of Church and State* 48, no. 3 (2006) [235].

¹⁹⁴ *Ka'adan v. Israel Land Administration*. For full decision, see

<http://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration>

¹⁹⁵ "Comments on the Supreme Court's Decision in the Kaadan Case," Adalah: The Legal Center for Arab Minority Rights in Israel, last modified April 2, 2000, accessed April 23, 2018, <https://www.adalah.org/en/content/view/6040>.

¹⁹⁶ *Ka'adan v. Israel Land Administration*. For full decision, see

<http://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration>

¹⁹⁷ Mazie, "Israel's Higher Law," [235].

¹⁹⁸ In fact, when the Court first spoke in 1998, Chief Justice Barak said, "This is one of the most difficult and complex judicial decisions that I have ever come across." Instead of issuing a ruling, Barak asked the parties involved to "do everything possible to find a practical solution to the petitioner's problem," further demonstrating the Chief Justice's hesitation to involve the Court in the issue of discrimination in land allocation. See Mazie, "Israel's Higher Law," [235].

a decision. Four of the five sitting justices sided with the petitioners. Writing for the Court, Chief Justice Barak held that, “Every authority in Israel—and first and foremost the government, its authorities and employees—is required to treat all individuals in the State equally.”¹⁹⁹ According to Barak, equality is implicit in Basic Law: Human Dignity and Liberty; although the quasi-constitutional legislation never explicitly mentions the word, throughout, it speaks of rights that are universal to “every Israeli citizen” or “every human being.”²⁰⁰ Indeed, this is quite a strong textual argument. Moreover Chief Justice Barak asserted that equality was a “basic constitutional principle” in Israel’s political scheme, citing the state’s Declaration of Independence and its guarantee of complete equality regarding social and political rights. Naturally, this understanding would preclude the kind of discrimination at issue in *Ka’adan*.

Moreover, in this landmark decision, Chief Justice Barak explicitly cited several international human rights declarations and conventions as well as the holding in *Brown v. Board of Education* that “‘separate but equal’ policy is ‘inherently unequal.’”²⁰¹ However, in qualifying his reference to the famous American desegregation case, Chief Justice Barak added an important caveat, writing, “Occasionally, separate treatment may be considered equal, or in the alternative...separate treatment may be justified, despite the violation of

¹⁹⁹ *Ka’adan v. Israel Land Administration*.

²⁰⁰ For the unofficial English translation of the Basic Law, see <http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf>

²⁰¹ It is important to remember that as an empirical matter, the education systems and budget allotments in Arab municipalities were, and still are, vastly inferior to their Jewish counterparts. Of course, Chief Justice Barak’s invocation of the legal reasoning in *Brown* turned on the assertion of a principle that was *prior* to an assessment of facts on the ground. See *Ka’adan v. Israel Land Administration*.

equality.”²⁰² In drawing this out, he pointed to *Avitan v. Israel Land Administration*, a case when the Court upheld the ILA’s decision to lease land exclusively to Bedouins as they transitioned to permanent housing. This was done in order to prevent “forced assimilation” by preserving the Bedouins’ way of life and thus their identity as a specific cultural group.²⁰³

In Barak’s view, two factors distinguished the *Avitan* case from *Ka’adan*. First, he asserted that the result of the ILA’s separation policy in the latter case was not benevolent but discriminatory; as Barak writes, “In actuality, the State of Israel only allocates land for Jewish communal settlements...[the ILA policy] today, in practice, grants Arabs treatment that is separate but not equal.”²⁰⁴ Second, Barak demonstrated that this segregation was not protecting a distinct cultural entity as it was in *Avitan*. Whereas Bedouins can be said to share a nomadic way of life, the fact that “any Jew in Israel” can live in Katzir makes the case fundamentally different. As Barak puts it, “No defining feature characterizes the residents of the settlement, with the exception of their nationality, which, in the circumstances before us, is a discriminatory criterion.”²⁰⁵ To summarize this second point: in *Ka’adan*, the respondents’ desire to preserve a space for “Jews” in Katzir was not specific enough.

²⁰² Steven Mazie astutely points out that Barak may have been better served by citing a less famous but more directly relevant American Supreme Court case: *Buchanan v. Warley* (1917). This decision prohibited residential segregation by race, even if a racial zoning ordinance was intended to the “keep the peace” between different groups. See Mazie, “Israel’s Higher Law,” [236].

²⁰³ In fact, the Court called the ILA’s action in this case “special, positively discriminating treatment.” One can easily perceive the parallels between this case and the American decision to preserve Native American group rights, discussed in Chapter 1.

²⁰⁴ See *Ka’adan v. Israel Land Administration*.

²⁰⁵ *Ibid.*

Using this amalgamation of legal reasoning, on March 8th in the year 2000, the Barak Court ruled that “that the State was not permitted, by law, to allocate state land to the Jewish Agency, for the purpose of establishing the communal settlement of Katzir on the basis of discrimination between Jews and non-Jews.”²⁰⁶ Chief Justice Barak was careful to emphasize that they state could not discriminate directly or indirectly, which seemingly added weight to his pronouncement. At the time it was handed down, some saw the *Ka’adan* decision as a monumental step forward for minority groups that had long been denied equal treatment by the state; as the ACRI’s Dan Yakir put it, “This is the most important ruling in the history of the Supreme Court on the issue of equal rights for Arab citizens of Israel, and it is a big step forward in the struggle for full equality.” Naturally, others saw it as the beginning of the end for the Jewish State. However, a closer reading of the decision itself uncovers several crucial qualifications that powerfully detract from the case’s “revolutionary” credentials.

In this respect, it is telling that the Court sought to “reach an appropriate balance” in issuing its decision, weighing their principled assertion of equality under the law against the costs that would be incurred by the Jewish Agency, the Katzir Cooperative Society, and the settlement’s Jewish residents, should the Court grant the petitioners’ request. If the Court is asserting that discrimination in land allocation is based on faulty legal reasoning and is thus unlawful, the cost of correcting course should not be relevant. The Court’s next qualification follows from this, and it is perhaps the most obvious: immediately after the quote

²⁰⁶ Ibid.

provided above, the Barak Court merely mandated that the state *consider* the petitioners' request "on the basis of the principle of equality, and...factors relevant to the matter."²⁰⁷ By requiring so little, the Court's new constitutional jurisprudence was rendered toothless by the Court itself.²⁰⁸

Beyond the "landmark" decision's tepid legal pronouncement, there was little in the way of substantive change. Eventually the Ka'adans received a formal, vaguely-worded rejection from the Katzir admissions committee, which justified this decision based on the notion that it would be difficult for them to integrate into the community's social scene.²⁰⁹ Even more striking than the Ka'adans' rejection is what came next: an internal document surfaced in September of 2003, revealing that the Jewish Agency for Israel had simply decided to ignore the *Ka'adan* decision and quietly return to the status quo. Written in July 2000, the document stated that, seeing as Barak's ruling closed any legal loopholes, the agency would instead try "not to make any noise in the system, and continue to do what we have been doing."²¹⁰ In light of these two developments, the Ka'adans

²⁰⁷ See *Ka'adan v. Israel Land Administration*.

²⁰⁸ It should also be noted that the Court ruled that the petition was "forward-looking," meaning the Court would ignore past discrimination in the allocation of land by the state. Of course, this element of the Court's decision may also have been a simple acknowledgement of limitations within the 1992 Basic Law: Human Dignity and Liberty. As Article 10 stipulates, "This Basic Law shall not affect the validity of any law that existed prior to the inception of the Basic Law." Again, see the unofficial english translation on the Knesset's website <http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf>

²⁰⁹ Of course, worries about the social tensions caused by desegregation would hardly make the Warren Court reconsider their decision in *Brown*. It was in spite of this backlash (which was likely much more violent than what would have happened in Katzir) that the Court saw fit to declare a constitutional principle and demand its immediate enforcement. This is part of what made it a transformative moment in American history.

²¹⁰ See Mazie, "Israel's Higher Law," [237].

and ACRI again petitioned the Supreme Court, asking that the ILA be forced to offer the Arab-Israeli family a plot a land in Katzir at 1995 prices.

The ILA negotiated a compromise with the Ka'adans before the Court was able to rule on this petition, and by late-2007, Adel Ka'adan finally began building a house on the land he bought in Katzir.²¹¹ After much bureaucratic foot-dragging²¹² and political backlash powerful enough to make it into international news,²¹³ the Ka'adans had won their decade-long legal battle. Understandably, many saw this as a watershed moment for equality in Israel. But this is not where the story ends.

In March of 2011, the Knesset enacted Amendment No. 8 of the Cooperative Societies Ordinance, or, as it is more often called, the Admissions Committees Law. This legislation allows small communities located on state lands in The Negev or Galilee to screen new residents, granting admission committees like the one in Katzir nearly full discretion in determining who is allowed to reside in their communities. Specifically, the Law applies to 434 small communities in Israel, which collectively make up 43% of all residential areas in the state.²¹⁴ Supporters of the Admissions Committee Law often highlight clause 6C(C), which prohibits the rejection of a candidate “for reasons of race, religion,

²¹¹ Hila Raz, "Of Little People and Landmark Decisions," Haaretz, last modified November 27, 2008, accessed April 23, 2018, <https://www.haaretz.com/1.5066206>.

²¹² Tom Segev, "A Decade of Dreams Down the Drain," Haaretz, last modified September 29, 2005, accessed April 23, 2018, <https://www.haaretz.com/1.4876246>.

²¹³ See http://articles.chicagotribune.com/2002-07-10/news/0207100326_1_adel-kaadan-arab-galilee-jewish-state and <https://www.nytimes.com/2002/07/15/world/israel-backs-off-bill-to-curb-arab-home-buying.html>

²¹⁴ "Israeli Supreme Court upholds 'Admissions Committees Law' that allows Israeli Jewish communities to exclude Palestinian Arab citizens," last modified September 17, 2014, accessed April 23, 2018, <https://www.adalah.org/en/content/view/8327>.

gender, nationality, disability, personal status, age, parenthood, sexual orientation, country of origin, political-party opinion or affiliation.”²¹⁵

These protections would certainly be comforting from a liberal-democratic point of view, if not for the fact that they must be understood within the context of the Law as a whole. Indeed, section 6C(A) provides alarmingly vague reasons for justifiable exclusion, stipulating that admissions committees are entitled to reject candidates who do not fit into “the social-cultural fabric” or are “not suitable for the social life of the community.”²¹⁶ This ambiguity openly invites admissions committees to interpret the clause as they please, despite the fact that these same bodies had long been engaged in explicit discrimination.²¹⁷ Below, in my analysis of the Court’s 2014 decision on this Law, I will explain why this is problematic from a liberal-democratic point of view. For now, suffice it to say that the Admission Committees Law lays the legal groundwork for “Jews-only” settlements in the Negev Desert and the Lower Galilee²¹⁸ while merely paying lip-service to liberal-democratic principles. The Law’s “anti-discrimination” clause in

²¹⁵ See "Law to Amend the Cooperative Societies Ordinance (No. 8), 5771-2011," accessed April 23, 2018, https://www.adalah.org/uploads/oldfiles/upfiles/2011/discriminatory_laws_2011/Admissions_Committees_Law_2011_English.pdf for Adalah’s full English translation of the Law.

²¹⁶ See section 6C(A)4 and 6C(A)5 of the Admissions Committees Law of Ibid.

²¹⁷ In fact, an expert on Israel history told me that the language I quoted above is used fairly often in Israeli parlance, and the same words may have been used in order to engender discrimination in other instances.

²¹⁸ The Lower Galilee is a majority-Arab region of Israel with sizeable Druze and Bedouin populations, and this fact is not lost on the Jewish-Israelis forming these communities. Indeed, it is long-standing government policy to encourage migration to this part of the country in order increase the region’s Jewish population—in fact, there is even a popular term for this phenomenon: the “Judaization of the Galilee.” See Gazhi Falah, "Israeli 'Judaization' Policy in Galilee," Jstor, last modified 1991, accessed April 23, 2018, <https://www.jstor.org/stable/pdf/2537436.pdf?refreqid=excelsior:845274330d06b5cc7349b95859884473>). For a demographic breakdown by region, see 1. "CBS, STATISTICAL ABSTRACT OF ISRAEL 2013," accessed April 23, 2018, http://www.cbs.gov.il/shnaton64/sto2_17.pdf.

6C(C) is a thinly veiled attempt to create the *appearance* of respect for minority rights, while carving out a space for discrimination that, when it occurs, is near-impossible to prove.

After all, what does it mean to be “incompatible” with a community’s social-cultural fabric? The 2011 Law doesn’t ask for much specificity beyond the committee’s subjective determination. Much like the Jewish Association for Israel did almost a decade earlier, admissions committees could return to business as usual. However, the Admissions Committees Law is different in one important way: instead of maintaining the *de facto* status quo, it allows *de jure* discrimination.²¹⁹ In practical terms, this means that 43% of Israeli land is inaccessible to the state’s minority Arab population. Making Arab-Israelis second-class citizens in this context is state-sanctioned. Indeed, *it is the result of legislation* by the Israeli government, though the vague conditions for rejection make it a seemingly indirect form of systematic exclusion.

Both Adalah and ACRI submitted petitions to the Court, asking the judiciary to strike down the Law on the basis that it sanctions discrimination and is thus unconstitutional. The Court convened an expanded panel of nine Supreme Court justices to discuss the case, ultimately issuing a decision in *Uri Sabah v. The Knesset* (2014). In a 5-4 split, the Court dismissed the petitions, stating, “We cannot determine at this stage whether the law violates constitutional rights.” While the dissenting opinions ultimately prove most convincing, the judicial

²¹⁹ Admittedly, the *de jure* sanction of discrimination requires manipulating the legal language through interpretation, but the fact remains that what was previously *de facto* policy now has a basis in the law.

reasoning in the case as a whole helps illuminate some important dynamics at play in the contemporary Israeli Supreme Court.

In his majority opinion, Chief Justice A. Grunis's legal reasoning relied heavily upon "the ripeness doctrine," which had been introduced into Israeli constitutional law just three years earlier in *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance* (2011).²²⁰ One should note that Grunis insisted that his use of the ripeness doctrine was not an "avoidance technique" for skirting adjudication on important constitutional questions.²²¹ On his view, when it is unclear how the law will be applied in practice, and when no administrative decision has been made on the basis of the law under review or when there are no petitioners that have been directly affected by it, the ripeness doctrine justifies the rejection of a petition. In this vein, when applying this doctrine to the Israeli justice system the Chief Justice outlined two more formal criteria for its exercise. First, the Court must determine whether it was presented with a sufficient factual foundation for ruling on the questions raised by the constitutional petition in question. As part of this initial screening process,²²² the Court should consider whether any petitioners have been directly impacted by

²²⁰ As I will explain later in this chapter, the *Alumni Association* case upheld the constitutionality of the "Nakba Law" on this basis. For detail on the ripeness doctrine in Israeli jurisprudence, see Justice Hanan Melcer's majority opinion in *Uri Avneri v. The Knesset* (2015), another case I will briefly discuss below.

²²¹ Unfortunately, an English translation of the full decision is not available at this time. For this reason, I have decided to rely upon the Court's official summary of the ruling, translated from the original Hebrew to English by Adalah. See "The Supreme Court of Israel HCJ 2311/11, 2504/11 Sabah v. The Knesset." Accessed April 23, 2018.

https://www.adalah.org/uploads/oldfiles/Public/files/English/Legal_Advocacy/Petitions/2014/SCT-Admissions-Committees-Decision-Eng-Summary-Sept-2014.pdf.

²²² Pun intended.

the law, and it should also evaluate to what extent a particular law's implementation is *necessary* for judging its constitutionality.

The second criterion is essentially an exception to the requirement of sufficient factual basis; in other words, the Court should determine whether there are other reasons for adjudicating the petition before the law is implemented.²²³ Chief Justice Grunis called this the "chilling effect" exception, an explicit reference to an element of American Supreme Court jurisprudence that is most often invoked in first amendment cases, but which has also been used to protect other constitutionally-protected individual rights in the United States.²²⁴ In the context of *Sabah*, this meant determining whether the law's very existence would discourage Arabs from even attempting to gain entry into an otherwise exclusively Jewish community.

The roots²²⁵ of the ripeness doctrine itself can also be traced back to the U.S. Supreme Court. Although the doctrine had been loosely applied to "administrative determinations" before *Abbott Laboratories v. Gardner* (1967), "ripeness" became a clearly outlined element of Supreme Court jurisprudence in *Abbott*.²²⁶ In its decision, the Court fashioned a two-part test for determining

²²³ See "The Supreme Court of Israel HCJ 2311/11, 2504/11 Sabah v. The Knesset." Accessed April 23, 2018. https://www.adalah.org/uploads/oldfiles/Public/files/English/Legal_Advocacy/Petitions/2014/SCT-Admissions-Committees-Decision-Eng-Summary-Sept-2014.pdf.

²²⁴ The "chilling effect" was first referenced in a constitutional context by Justice Felix Frankfurter in *Wieman v. Updegraff* (1952). See "The Chilling Effect in Constitutional Law"

²²⁵ Pun also intended.

²²⁶ For more reading on the early history of the ripeness doctrine, I will suggest the same work Justice Harlan pointed to: See 3 Davis, *Administrative Law Treatise*, c. 21 (1958) and Jaffe *Judicial Control of Administrative Action*, c. 10 (1965)

ripeness challenges to federal regulation, and it appears quite similar to Chief Justice Grunis' two criteria. As Justice Harlan wrote in his majority opinion:

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.²²⁷

Of course, in the United States, not only does one need legal standing in order to bring a case before the Court, but cases that lie outside Article III's narrow boundaries for original jurisdiction must rise through the appellate process.²²⁸

However, the above-described concern with "premature adjudication" is clearly analogous to one of Chief Justice Grunis' arguments for dismissing petitions against the Admissions Committees Law; both petitions were submitted just days after the legislation was initially passed, meaning they did not (and could not) include sufficient evidence of harm caused by the Law. Proof of a hidden

²²⁷ See full decision at "Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)." Accessed April 23, 2018.

<https://supreme.justia.com/cases/federal/us/387/136/case.html>.

²²⁸ U.S. Constitution, Article III, Section 2: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects...In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

mechanism of discrimination would be possible only after the legislation was implemented.²²⁹ Absent this factual foundation, the Chief Justice refused to rule on the constitutionality of the Admissions Committees Law, in order to avoid “entangling” the Court in adjudication regarding abstract or hypothetical discrimination.²³⁰ While Chief Justice Grunis emphasized that rejecting the petition did not signal an expression of the Court’s opinion vis-a-vis the law’s constitutionality, the effect of their decision meant that the Law would be upheld, at least for the time being.²³¹

In his dissenting opinion, Justice Salim Joubran challenged the Chief Justice’s conclusion largely on the basis that he had mischaracterized the case’s factual foundation. Without directly challenging the “ripeness doctrine” or its two criteria, Justice Joubran ultimately asserted that sections 6C(A)(4) and 6C(A)(5), the extremely vague provisions allowing for exclusion, should be revoked.²³² After

²²⁹ See "The Supreme Court of Israel HCJ 2311/11, 2504/11 Sabah v. The Knesset." Accessed April 23, 2018.

https://www.adalah.org/uploads/oldfiles/Public/files/English/Legal_Advocacy/Petitions/2014/SCT-Admissions-Committees-Decision-Eng-Summary-Sept-2014.pdf. (page 2).

²³⁰ In American constitutional law, there are important disagreements about how the “ripeness” test should be applied to determining a case’s justiciability, and these arguments are in turn based on differing understandings of the Court’s jurisdiction under Article III. See Gene R. Nichol Jr.’s Gene R. Nichol, Jr, "Ripeness and the Constitution," accessed April 23, 2018, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4503&context=uclev>. for an interesting discussion of the Burger Court’s approach to this question. This paper also demonstrates the evolution of the Court’s own understanding of its purview from assessing whether a litigant’s “legal interest” is protected by law or by the Constitution; to a constitutional standard of “injury in fact” which “in no way depends” on the substantive issues litigated; to requiring at “an irreducible minimum...actual or threatened injury” for justiciability. For the reader who is short on time, the legal language I have just quoted is from *Joint Anti-Fascist Refugee Committee v. McGrath* (1951); *Association of Data Processing v. Camp* (1970); and *Valley Forge v. Americans United for Separation of Church and State* (1982), respectively.

²³¹ See "The Supreme Court of Israel HCJ 2311/11, 2504/11 Sabah v. The Knesset." Accessed April 23, 2018.

https://www.adalah.org/uploads/oldfiles/Public/files/English/Legal_Advocacy/Petitions/2014/SCT-Admissions-Committees-Decision-Eng-Summary-Sept-2014.pdf. (page 2)

²³² See *Ibid* (page 3).

recognizing that admissions committees could be justified in theory, Joubran began by asserting that the legal barriers built by these particular committees are built on disputed ground. This, he said, should inform the basis for legitimate exclusion on this land.

Moreover, he asserted that the admissions committees should be viewed within their historical context. For many years, both before and after *Ka'adan*, allowing these committees to exercise their discretion in fact created a hidden mechanism that both anchors and perpetuates a pre-existing discriminatory reality.²³³ In this vein, Justice Joubran challenged the Chief Justice's application of the "ripeness doctrine," on the basis that the Admissions Committees Law does not present something new.²³⁴ Attorney Bishara, one of Adalah's lawyers, put it well: "The law is functioning the same way it did previously as a policy, deterring...especially Palestinian Arab citizens of the state from applying for housing in these towns for fear of rejection."²³⁵ In other words, the Court already had the necessary evidence it needed to rule on whether this legislation would be discriminatory. And as I suggested above—based on a careful analysis of the Law itself—the oversight mechanisms that were ostensibly aimed at preventing discrimination would *almost certainly* prove insufficient. If this is true, the

²³³ See Suzie Navot's "The Constitution of Israel: A Contextual Analysis" (p. 244)

²³⁴ See "The Supreme Court of Israel HCJ 2311/11, 2504/11 Sabah v. The Knesset," (page 2-3)

²³⁵ See "Israeli Supreme Court upholds 'Admissions Committees Law' that allows Israeli Jewish communities to exclude Palestinian Arab citizens," last modified September 17, 2014, accessed April 23, 2018, <https://www.adalah.org/en/content/view/8327>.

decision should be reversed on the basis of the “chilling effect” cited by the Chief Justice himself.²³⁶

However, due in part to the Court’s ruling, the Admissions Committees Law will result in the protection and promulgation of Israel’s Jewish identity in these communities. As I have demonstrated above, the Law does so at the expense of liberal-democratic principles—in this case, primarily freedom of movement, equality, and freedom from discrimination. However, the *Sabah* decision will create other important ripple effects. With respect to the evolution of Israeli constitutionalism, one should return to the Chief Justice’s legal reasoning: the “ripeness doctrine” itself. As anybody who decries the Court’s rampant activism will tell you, the doctrinal judicial restraint implicit in assessing “ripeness” is practically unheard of in the Court’s modern history.

Returning to my point of departure, recall the provision of the nation-state bill which has survived in substance, if not in exact language, since it was written in Article IX of the original version: “The State may permit a community, including the members of a single religion or the members of a single nationality, to establish separate community settlements.”²³⁷ The future Basic Law will remove all doubt, if any remains, that the Israeli government can lawfully discriminate in allocating land on the basis of religion, ethnicity, or any number

²³⁶ In other words, if Arab-Israelis were not attempting to gain entry into all-Jewish communities because they were near-certain that those evaluating their applications could now legally turn them down on the basis of their religion or nationality—as they had long-done in practice—this would constitute a “chilling effect” on the very action that is necessary to trigger evidence of discrimination under this new Law.

²³⁷ “Basic Law: The National Home.” Accessed April 23, 2018.
<http://www.justice.gov.il/StateIdentity/InformationInEnglish/Documents/BasicLawBill.pdf>.

of other factors. As Justice Minister Shaked recently put it, one “purpose of the nation-state bill” is to prevent “a ruling like the one in the *Ka’adan* case in 2000.”²³⁸

The legislation flies in the face of Chief Justice Barak’s liberal-democratic understanding of Basic Law: Human Dignity and Liberty, eviscerating an already thoroughly de-fanged legal precedent. After the Knesset has granted the Admissions Committees Law (and future laws like it) quasi-constitutional status, the Court will have quite a difficult time overturning *Sabah*, even if a petitioner brought precisely the post-2011 evidence Chief Justice Grunis deemed necessary to establish a factual foundation of discrimination. Under the pretext of “preserving culture, heritage, and identity,” the future Basic Law will make the above-described state-sanctioned discrimination and segregation effectively untouchable. Since the very beginning of the controversy roughly two decades ago, the Supreme Court and the Knesset have effectively prioritized Israel’s Jewish identity over its liberal-democratic commitments in the context of land allocation and segregation. Whatever their intentions, in practice, these institutions were acting in concert.

B. Briefly Broadening the Discussion

To some extent, judicial activism has continued to protect liberal-democratic principles in one important context: the Knesset’s amendments to the

²³⁸ Revital Hovel, "Justice Minister: Israel Must Keep Jewish Majority Even at the Expense of Human Rights," Haaretz, last modified February 13, 2018, accessed April 23, 2018, <https://www.haaretz.com/israel-news/justice-minister-israel-s-jewish-majority-trumps-than-human-rights-1.5811106>.

Prevention of Infiltration Act of 1954. In order to address the wave of African refugees crossing into Israel through the Sinai Peninsula, the most comprehensive set of modifications was passed by the Knesset in 2012. The Israeli government disputes the fact that this group of nearly 60,000 people are indeed refugees, instead referring to them as “infiltrators.” While this is troubling in its own right, the most important constitutional questions have concerned how the government has treated this vulnerable population. In September of 2013, the Court convened a panel of nine judges and voided most of the amendments, including a provision that empowered the state to hold “infiltrators” in custody for up to three years without trial. Even after the Knesset passed an alternate version which limited the custody period to one year, in addition to several other changes, the Court again voided the amendments almost exactly one year after the first ruling. Finally, after there were several vocal calls to amend Basic Law: Human Dignity and Liberty, the Court upheld most provisions of the Knesset’s third set of amendments.²³⁹ While the Court’s first two rulings were especially encouraging from a liberal-democratic perspective, it is not clear that the judiciary will always be able to defend human rights in this manner.

The broader trend of judicial restraint makes it appear especially likely that these types of judicial protections will be enjoyed only temporarily. With respect to the Court’s recent inaction in the face of other powerfully illiberal state policies, two cases that I briefly alluded to above prove particularly interesting: *Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance*

²³⁹ Friedmann, “Changes in Appointments,” [339-341]

(2011) and *Uri Avneri v. The Knesset* (2015). The former amounts to a judicial sanction of the “Nakba Law,” which empowers the Minister of Finance to withhold public funding from institutions that either commemorate Israel’s Independence Day as an occasion for mourning or hold an event that challenges the existence of Israel as a Jewish and democratic state. This law clearly violates freedom of expression, while also contributing to the erasure of deeply personal Palestinian narratives of displacement and expulsion during May of 1948.²⁴⁰

In the latter case, the Court largely upheld the “Boycott Law,” which stipulates that anybody who knowingly issues a public call to boycott Israel or any company associated with the state may be liable to civil suit. The legal reasoning in *Avneri* is particularly troubling: writing for the majority, Justice Melcer initially admits it is difficult to dispute that this Law violates the freedom of expression, but he later adopts an impoverished, purely formalistic understanding of this liberal-democratic principle. When Melcer writes that “a boycott silences...discourse,” he refuses to recognize that the boycott itself *is discourse*. Moreover, he claims that calling for or participating in a boycott against the State of Israel, even if it is limited to a boycott against Israeli settlements, amounts to “political terror.”²⁴¹ In both cases, there are clear indications that the Court’s decisions were at least partially influenced by political

²⁴⁰ For an English translation of the full decision, see <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Alumni%20Association%20of%20the%20Arab%20Orthodox%20School%20in%20Haifa%20v%20Minister%20of%20Finance.pdf>

²⁴¹ For an English translation of the full decision, see <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Avneri%20v.%20Knesset.pdf>

considerations, which is completely consistent with my discussion in the previous chapter.

* * *

Earlier in this paper, I argued that the key issues in Israeli Constitutionalism have largely stemmed from the lack of clarity regarding which of Israel's two main constitutional principles would win out when they came into conflict.²⁴² Indeed, the tug-of-war between liberal-democracy and Israel's status as a Jewish State has practically defined the nation's constitutional history to this point. Yet in the rest of my paper, I hope to have demonstrated why this may not remain the case for long. From the nation-state bill's exclusion of Arab-Israelis and its erasure of the Palestinian narrative to contemporary cases and shifting dynamics in the Supreme Court, the evidence suggests that Israel may be at the start of a fundamental shift which will resolve the state's foundational constitutional tension in favor of its Jewish identity. However, there is no way to know for sure. For now, this transformation remains hypothetical, and in Israel, the search for constitutional coherence continues.

²⁴² Jacobsohn, *Apple of Gold*, [135].

Conclusion: A Transformational Shift? It Could Be

“To the extent that all branches (and, we might add, citizens) were involved in the common enterprise of attempting to realize constitutional ideals, they all ha[ve] a responsibility to defend, in appropriate ways, their best understanding of these ideals.”²⁴³

- Gary Jacobsohn

As a result of Israel’s resounding victory in the 1967 War, the state tripled the amount of territory under its control, unleashing a nascent sense of messianic redemption that remains a part of Israeli national identity. Six years later, the jolt of the Yom Kippur War threw all of the state’s institutions into question, prompting a period of profound national reflection. When Menachem Begin was elected Prime Minister in 1977, his Likud party unseated the secular, left-leaning Labour coalition which, having ruled Israel for almost thirty years, previously seemed untouchable. The common thread between these events is that each of them helped drive a “transformational shift” within the Israeli polity; in different ways, all three of them led to fundamental and lasting changes in Israeli society. In my final section, I will evaluate whether we may be witnessing the beginning of such a transformational moment while further explicating how I understand the meaning of that phrase.

Based on my discussion in chapter 2, one might ask whether the nation-state bill currently making its way through the Knesset falls into the category of “transformational shifts.” Of course, the answer to this question will depend in

²⁴³ In context, this quote describes Abraham Lincoln’s understanding of the American constitutional system, suggesting his deep consideration and profound respect for the separation of powers. In keeping with a Madisonian understanding, Lincoln denied that there should be a judicial monopoly on constitutional interpretation, and instead, that it was an enterprise for the entire polity. In my view, this common enterprise is at the heart of the American constitutional project properly understood. See Jacobsohn, *Apple of Gold*, [132].

part on the implementation of this legislation, as well as subsequent socio-political developments. However, it may also have a great deal to do with what came *before* the bill's passage. In other words, based on the factors I listed in chapter 3 and chapter 4,²⁴⁴ it is not unreasonable to assert that we may be witnessing the beginning of a transformational shift that resolves the fundamental tension in Israeli Constitutionalism. To determine whether this is indeed the kind of shift I am talking about, one must answer the following question: In the coming years, will we see a consistent and pervasive prioritization of the state's Jewish identity over its liberal-democratic principles?

This question is an enticing one, but its ambiguities must first be more closely examined. For some, answering this question in the affirmative implicitly requires meeting a certain illiberal or undemocratic *threshold*. However, as I suggested in my introduction, I am not very interested in the formalistic process of categorization. I believe it demands that one sacrifice nuance for broad applicability, both in the context of initial delineation (which I described in my introduction) and in determining whether there is a shift like the one I am describing. Beginning with the former, as I alluded to in my introduction, two countries can never fully satisfy the same set of "categorization conditions." This is why, after one categorizes the United States as a "Western liberal-democracy," that is not nearly enough information to understand our politics, principles, or Madisonian constitutional order. In a similar vein, elucidating Israel's socio-political reality and painting a full picture of its constitutional principles are

²⁴⁴ And many other factors that I have not discussed.

based on state-specific realities. In terms of re-categorizing a state, which happens through transformational shifts as I understand them, the same logic applies. I intentionally chose somewhat ambiguous language in my framing of a transformative shift; predicting whether Israel will “consistently and reliably” prioritize its Jewish identity is a better approach than prognosticating regarding which criteria are necessary for triggering a more rigid threshold. Labels are not particularly useful when dealing with questions as fundamental and nebulous as those that arise within the study of evolving civic identity and changing constitutional principles.

So where does this leave us? If we are inevitably forced to blur the lines in both categorizing and (if necessary) re-categorizing any given state, why draw them in the first place? Where does comparative constitutionalism fit into my framing? Properly understood, transformative shifts often involve slow, subtle movements along parallel political, social, and legal tracks. I believe the process is already underway in Israel, although I cannot state precisely when this transformation will occur. I also believe that showing humility in this realm is entirely appropriate. However, I do not spurn theoretical categorization altogether; we can still analyze whether certain policies, socio-political dynamics, and elements of jurisprudence share *characteristics* of either the liberal-democracy or ethnocracy ideal type. Yet we must treat these characteristics as what they are: disaggregated, theoretical reference points. Between these two ideal types is a vast spectrum of gray, and this is where every *real* liberal-democracy or ethnocracy lies. By examining a state’s inner workings, we can

assess to what extent it satisfies the medley of characteristics on the disaggregated theoretical list mentioned above, and in the process, we can learn *precisely* where this state lies on the spectrum I've just described.²⁴⁵ This certainly seems better than trying to fit a square peg into a round hole. Comparative constitutionalism is very well-suited to teasing out this socio-political nuance, and in fact, I believe that is one of the field's greatest strengths. I hope this is reflected in my arguments above. Based on the trends I have examined, as well as my presentation of Israeli constitutionalism itself, I believe these ethnocratic characteristics will continue to manifest more often and in different ways during the coming years. Again, this evidence does not tell us when a transformative shift will happen, but it does suggest that one might already be underway.

One may argue that definitive Supreme Court jurisprudence could resolve this question for the Israeli polity. On this understanding, if the Court clearly states that Israel has no obligation to uphold one set of its core constitutional principles—whether this takes the form of a single landmark case, or, as is more likely, a larger body of jurisprudence—this would in effect settle the theoretical tug-of-war that has defined Israeli Constitutionalism to this point. Of course, a transformational shift that leaves little to no room for Judaism in Israel is almost incomprehensible, implying that this “change” would necessarily involve

²⁴⁵ In fact, I have done so in this paper: the violation of human rights, state-sanctioned and systematic exclusion, diluting the substance of equality and citizenship, and an ascriptively-based “tyranny of the majority” are all components of an ethnocratic society. However, the Israeli polity still reflects many aspects of a liberal-democracy as well. Again, my paradigm can accommodate all of these state-specific characteristics.

abandoning the state's other core set of commitments—namely, its liberal-democratic ones.

To be sure, it appears likely that the Court's jurisprudence will help determine how Israeli society views its foundational constitutional commitments, and whether it *changes* them in the coming years. However, even if the Court were somehow granted the formal power to determine constitutional priorities, when it settled on any given substantive changes, they would not be immediately reflected in Israel's constitutional foundations. In other words, the process of constitutional evolution does not merely turn on Court decisions; it also concerns the rest of the polity. Ironic as it may be coming from him, in this vein, one is reminded of Chief Justice Barak's elegant and powerful assertion presented above: "The judge is not the only musician within the grand legal orchestra, and his playing must be in harmony with the rest of the music."

Nevertheless, the Supreme Court might be part of this transformational shift, if it came to pass. In fact, based on the increasingly intertwined nature of politics and legal interpretation in Israel, and the polity's evolving civic identity, I believe that it will. However, given that the shift would involve every part of the Israeli polity, one must also look to other would-be defenders of democracy. At least initially, it appears as if a few different socio-political developments could plausibly prevent this transformational shift. For example, the state-of-affairs resulting from cooperation between the Court and the Knesset may at some point prove unacceptably undemocratic for many Israelis, leading to the mobilization of civil society. After all, the Court is far from the only actor capable of civic

education, and liberal-democratic principles can, to some extent, be promulgated entirely outside of its purview. In this scenario, artists, activists, and educators would unite to push back against the forces driving the above-described transformational shift.

While this is certainly possible, we should remain realistic; public opinion polling from 2016 has revealed some sobering figures. As Shibley Telhami reported, 79 percent of all Jewish-Israelis said Jews deserve “preferential treatment in Israel.”²⁴⁶ Even more alarmingly, 48 percent of all Israeli Jews agreed with the statement “Arabs should be expelled or transferred from Israel”—and this includes a majority of every non-secular Jewish group.²⁴⁷ Nevertheless, if there were a major shift in the public’s orientation, one might argue that the Court would feel emboldened to revive the interinstitutional conflict²⁴⁸ characteristic of the Barak Court, challenging the legislature in defense of liberal-democratic principles. However, it seems much more likely that history will repeat itself, with the Knesset once again using political pressure to force the Court to back off. As I demonstrated in chapter 3, the Court cannot effectively curtail this societal amendment of constitutional principles. Even if united with a powerful civil society movement, these groups do not seem very likely to succeed in this venture.

²⁴⁶ Shibley Telhami, “How Israel’s Jewishness Is Overtaking Its Democracy,” *The Washington Post*, last modified March 8, 2016, accessed May 11, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/08/how-israels-jewishness-is-overtaking-its-democracy/?utm_term=.77760465014b.

²⁴⁷ *Ibid.*

²⁴⁸ Asli U. Bali and Hannah Lerner, “Constitution Writing, Religion, and Democracy,” (2017) p. 21

Another factor might arise in the socio-political realm that could help mitigate the negative impacts of this transformational shift. A major change in the conditions that create frictions between various ethnic groups may ease much of the tension in Israeli society, even if the state resolves its foundational constitutional tension in favor of its Jewish identity. One potential manifestation of this would be the resolution of the Israeli-Palestinian Conflict, along with the creation of a Palestinian State with broad and legitimate authority. While it is technically possible, unfortunately, this scenario also does not seem likely. The Conflict's intractability goes well beyond the difficulty in finding the specific provisions that would result in "the deal of all deals." As a senior Israeli official told me in an interview, members of "Israeli society...don't want to be defined by the threats we face, but we have to take those threats seriously."²⁴⁹ Indeed, Israelis and Palestinians are each enmeshed in their own historical narrative, and in large part, both groups believe they are the victims and the others are the villains. While an assessment of these two national histories is beyond the purview of this paper, suffice it to say that they are a fundamental piece of each nation's identity. In other words, Israelis and Palestinians understand themselves in relation to the Conflict, and it is unclear what their identities would look like in its absence.

Based on the contemporary state of the Israeli polity, as well as several structural factors, neither of these approaches appears likely to succeed in

²⁴⁹ Interview with Israeli official, April 16, 2018.

mitigating the transformational shift I have described.²⁵⁰ Thus, the constitutional question of core principles may well be answered in the coming years. I believe I have highlighted several factors that will almost definitely be involved in this transformational shift. The most obvious is the presented in chapter 1: the history of the Jewish people and their civic bonds will be a key factor in such a shift, and the underlying imperative of Zionism, which remains a latent and powerful force in some parts of Israeli society, may also prove quite important. My discussion in chapter 2 is not as certain to be a direct driver of this transformation. To be sure, if Israel indeed resolves its foundational constitutional tension in favor of its “Jewishness,” the nation-state bill would certainly be an important part of that story; nevertheless, I strongly suspect that when historians speak of this transformational shift, if it happens, they will not begin their account in 2018, or even 2011, when the future Basic Law was first introduced. Instead, they would likely see the legislation as indicative of the socio-political trends and evolving constitutional arrangements I discussed in chapters 3 and 4. As they might put it, the nation-state Basic Law is nothing but foam atop the wave of policy, Supreme Court jurisprudence, and public opinion that has been swelling in this direction for at least two decades.

²⁵⁰ Of course, I have only listed the circumstances that I believe are most likely to curtail this shift, and I am happy to concede that I may have overlooked some other path towards avoiding it. However, if the reader can think of more plausible scenarios, she still must demonstrate why they might work better than the extenuating circumstances I have raised.

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