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## The Rise of American Conservatism in Israel

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## THE RISE OF AMERICAN CONSERVATISM IN ISRAEL

Rafi Reznik\*

### ABSTRACT

*The American fascination with the link between interpretive methodology and political ideology rarely reaches beyond its borders. This Article offers a comparative case study, which converses with the American example—Israel. A twofold argument is offered to facilitate this conversation. First, the Article identifies a shift in the ideological climate of the Supreme Court of Israel, manifested in the rise of a new interpretive method. For the first time, the interpretive theory prevailing in Israel, Purposive Interpretation, faces a viable competitor. The Article unpacks the challenges posed by the new theory, termed Purposive Originalism, in methodology as well as underlying understanding of democratic principles. While Purposive Interpretation is conceptually and historically tied to American liberal theories, Purposive Originalism deeply resonates American conservatism, espousing variations on its three basic tenets: originalism, bright-line rules, and deference. Second, the Article contends that this development should be understood as part of a broader ideological reorientation of the political right-wing in Israel, toward American conservatism. Increasingly drawing on the philosophies and strategies of its American counterpart, the Israeli Right has adopted the compound of social traditionalism, neo-liberal economic policy, and hawkish national security stance, as well as discontent with the administrative state, synthesized under the headline of conservatism. An interpretive methodology that strives for the same values enshrined in this political project fulfills a vital role in its success. Such a convergence of judicial and political reinterpretations of conservatism marks an Israeli recreation of the dynamics that emerged in the U.S. in the 1980s, with an all-encompassing conservative backlash*

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\* S.J.D. candidate, Georgetown University Law Center. This Article is adapted from a thesis written for New York University's LL.M. in Legal Theory program. I am grateful to the Younger Comparativists Committee of the American Society of Comparative Law, for awarding an earlier draft the 2019 Honorable Mention for the Colin B. Picker Graduate Prize, as well as to participants in the YCC Conference at McGill University, the 2019 Conference of the Israeli chapter of ICON-S at Striks School of Law, the Fellows-SJD workshop at Georgetown, and the 2017–2018 Legal Theory thesis seminar at NYU, for thoughtful feedback. Thanks to Evan Bernick, Yaron Covo, Moshe Halbertal, Alon Jasper, Greg Klass, Lewis Kornhauser, Shahar Lifshitz, Menachem Mautner, Shimon Nataf, Lawrence Solum, Robin West, and the editors of the *Penn State Journal of Law & International Affairs*, for engaging with this project.

*against legal liberalism. The Israeli case thus reveals how American conservatism can be, and is indeed, incorporated into different cultural and constitutional settings.*

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## I. INTRODUCTION

Two overarching phenomena permeate high-stakes constitutional adjudication in the United States: one is the formation of two opposing ideological camps; the other is a fierce debate over interpretive methodology. The existence of both phenomena is widely recognized yet the nature of their relationship remains contested. The late Justice Scalia, for example, took pride in his adherence to a particular interpretive method, on the one hand; and willingly identified as a conservative, on the other hand—yet denied any connection between the two.<sup>1</sup> Judges who are widely considered liberal tend to favor distinctly different interpretive methods, but similarly resist attaching to them any particular ideological label.<sup>2</sup> While it seems to have escaped the bench, observers of the judiciary have nonetheless recognized that there are quite overwhelming overlaps between “conservative” judges and “originalist”/“textualist” ones, and between “liberal” judges and “living constitutionalist”/“purposivist” ones.<sup>3</sup>

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<sup>1</sup> Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 851 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)). On Scalia’s self-identification as a “social conservative,” see Ian Samuel, *The Counter-Clerks of Justice Scalia*, 10 N.Y.U. J.L. & LIBERTY 1, 2 (2016).

<sup>2</sup> See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 277–78 (2016) (arguing that while being “inevitably the lawyer I am” influences his interpretation, personal views are still “a different concept” from either politics or ideology); *Ruth Bader Ginsburg on Becoming ‘Notorious,’* NEWSHOUR, Oct. 10, 2016, available at <https://www.youtube.com/watch?v=YSEWCA2Hhmo> (upon being described as a liberal, Justice Ginsburg responded: “The label ‘liberal’ or ‘conservative’ [ . . . ] What do those labels mean? It depends on whose ox is being gored;” see also *infra* notes 125–126 and accompanying text (on liberalism and conservatism as contested concepts)).

<sup>3</sup> The most famous exception is probably Justice Kennedy: a conservative who employed evolutionary interpretivism. This was most notable in the LGBT rights decisions he authored for the Court—*Obergefell v. Hodges*, 135 S. Ct. 2071 (2015); *U.S. v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003)—yet apparent already at his nomination hearing. Morton J. Horowitz, *The Bork Nomination and American Constitutional History*, 39 SYRACUSE L. REV. 1029, 1037–39 (1988).

Notwithstanding its American idiosyncrasies, such an interpretation-ideology nexus can also manifest elsewhere. This Article offers a novel comparative case study: Israel.

For decades, Israeli judges have been employing one interpretive method only, called Purposive Interpretation (“PI”), which pertains to all legal materials. By U.S. standards, PI is a liberal theory of interpretation. This Article argues that there is a new method on the rise in the Israeli Supreme Court, hereby termed Purposive Originalism (“PO”). It is further argued that this interpretive development also signifies a shift in the Court’s political climate, calling to mind its American counterpart. For it is not only a conservative method, but more specifically, one that deeply resonates *American conservatism*.<sup>4</sup> Moreover, the backlash against legal liberalism in Israel is not confined to the judiciary, but is rather heralded by the political sphere, where a project of assimilating American conservatism has been underway for a longer period of time. Viewed under this light, it becomes clear that the current historical moment in Israel resembles in important respects the 1980s in the United States.

By comparing these two moments of convergence between political and interpretive formulations of conservatism—the American and the Israeli—this Article aims to make a threefold contribution to comparative law literature.

First, the Israeli Supreme Court is in a stage of transition, which may have significant and long-lasting ramifications for Israeli law. The Article develops a framework toward understating this doctrinal development in interpretive methodology as fulfilling a vital role in the evolution of conservative ideology. The American experience provides a useful vocabulary, although by no means sufficient, for processing this potential paradigmatic shift and constructing a discourse around it. Specifically, it sheds light on a crucial yet neglected element of American-Israeli relations: how the inspiration Israeli law draws from the U.S., and the inspiration Israeli

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<sup>4</sup> The framework of American conservatism is explicated at *infra* section III.A.

politics draw from the U.S.—two phenomena that have been studied separately—are related.

Second, at a time when American scholarship is recognizing that not as much hinges on interpretive methodology as is often assumed,<sup>5</sup> in Israel the recognition that the outcomes of highly contentious cases can and do hinge on the method by which meaning is extracted from text, is only now beginning to take shape. This moment of jurisprudential castling between the two systems may broaden the interpretive vocabularies of both and enrich their interpretive discourses.

Finally, from a broader comparative perspective, this Article promotes a deeper appreciation of how interpretive methods function within broader political projects. The Israeli example enriches and challenges recent studies on non-American originalism,<sup>6</sup> by presenting a case that expressly echoes the historical American experience. Despite cultural and historical differences, Israeli originalism assumes similar political colors as American originalism, and is similarly accompanied by a blooming conservative power outside of the judicial sphere. The Article thus joins the growing recognition that comparative inquiries cannot be divorced from cultural-genealogical processes.<sup>7</sup> At the same time, it suggests that it is precisely a comparative investigation that can best elucidate the essential components of a legal phenomenon, including in its original manifestation. Case in point: conservative interpretation.

The argument is divided into two parts, as follows. Part II focuses on the interpretive debate unfolding in the Supreme Court of Israel. It opens with a description of the prevailing theory of interpretation in the Israeli judiciary, Purposive Interpretation, and

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<sup>5</sup> Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305 (2010).

<sup>6</sup> See Jorge M. Farinacci Fernós, *Originalism in Puerto Rico: Original Explication and Its Relation with Clear Text, Broad Purpose and Progressive Policy*, 85 REV. JUR. U.P.R. 203 (2016); Kerri A. Froc, *Is Originalism Bad for Women? The Curious Case of Canada's "Equal Rights Amendment,"* 19 REV. CONST. STUD. 237 (2015); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2014).

<sup>7</sup> See, e.g., Pierre Legrand, *Negative Comparative Law*, 10(2) J. COMP. L. 405 (2015).

explains its connection to American legal liberalism (section II.A.). It is then argued that PI is currently being challenged by a new method, Purposive Originalism. Section II.B. delineates the details of PO and explains how they counter legal liberalism. Part III situates this development in the realm of American conservatism and its Israelization. First, it explores American conservatism as a comprehensive political agenda (section III.A.1.). Next, it shifts to conservative adjudication as an enterprise that strives to realize the same values, both instrumentally and intrinsically, via interpretive methods (section III.A.2.). Finally, the Article brings these discussions together. Section III.B. is the heart of this Article. It argues that PO is not only a conservative method of interpretation, but a component in an emerging movement of American conservatism assimilated into the Israeli context. This assimilation is apparent in the ideologies and strategies espoused by political, judicial, and civil society forces. These forces are linked together *ex ante*, in the process of selecting the judges to join the bench, and *ex post*, in the adjudicative potential to further the goals of conservative policymaking. The discussion proceeds in the following order: interpretive methodology (section III.B.1.); judicial appointments (section III.B.2.); the political sphere (section III.B.3.); judicial outcomes (section III.B.4.).

## II. THE RISE OF PURPOSIVE ORIGINALISM IN ISRAEL

As far as countries halfway around the world go, the United States and Israel have a very close relationship, ranging across various public spheres—politics, civil society, intellectual life. The legal sphere is no exception, and the jurisprudence of the United States Supreme Court has extensively influenced its Israeli counterpart, particularly in constitutional contexts.<sup>8</sup> However, the American debate surrounding

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<sup>8</sup> See Hadar Aviram, *Bad Role Models? American Influence on Israeli Criminal Justice Policy*, J. INT'L & COMP. L. (forthcoming), available at <https://ssrn.com/abstract=3404281>; MENACHEM MAUTNER, LIBERALISM IN ISRAEL: ITS HISTORY, PROBLEMS, AND FUTURES 380 (2019) [HEBREW]; SUZIE NAVOT, THE CONSTITUTION OF ISRAEL: A CONTEXTUAL ANALYSIS 243 (2014) [hereinafter NAVOT 2014]; Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 267, 275 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013); Yoram Rabin & Arnon Gutfeld, *Marbury v.*

interpretive methodology has been absent from the Israeli judicial climate. Grounded in the exceptional, perhaps sacred or fetishistic status of the U.S. Constitution in American public discourse, the originalist/living constitution debate is unique.<sup>9</sup> Generally, judicial disagreements in other common law jurisdiction do not revolve around interpretive methodology, and even when interpretive debates ensue, with varying degrees of U.S. influence, they do not take center stage as polarizing issues.<sup>10</sup> Accordingly, for decades Israeli judges have been using one method only for interpreting constitutional and statutory texts.<sup>11</sup>

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Madison *and Its Impact on Israeli Constitutional Law*, 15 U. MIAMI INT'L & COMP. L. REV. 303 (2007); Prina Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981). The relationship is not reciprocal, though; on the reluctance of U.S. courts to turn to foreign law, see BREYER, *supra* note 2.

<sup>9</sup> RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 147 (2014); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1 (2009); AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 133–35 (2006).

<sup>10</sup> Kim Lane Scheppele, *Jack Balkin is an American*, 25 YALE J.L. & HUMAN. 23 (2013); Jeffrey Goldsworthy, *Constitutional Interpretation*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 689 (Michel Rosenfeld & András Sajó eds., 2012). For similar discussions in other jurisdictions, see Noam Kolt, *Cosmopolitan Originalism: Revisiting the Role of International Law in Constitutional Interpretation*, 41 MELBOURNE U. L. REV. 182 (2017); Lael K. Weis, *What Comparativism Tells Us about Originalism*, 11 INT'L J. CONST. L. 842 (2013) (Australia); Leonid Sirota & Benjamin Oliphant, *Originalist Reasoning in Canadian Constitutional Jurisprudence*, 50 U.B.C. L. REV. 505 (2017); Noura Karazivan, *Constitutional Structure and Original Intent: Canadian Perspective*, 2017 U. ILL. L. REV. 629 (Canada); E. Kofi Abotsi, *Purposive Originalism in the Supreme Court: Interpretive Methodology and Problems of Certainty*, 26 U. GHANA L.J. 173 (2013) (Ghana); Yvonne Tew, *Comparative Originalism in Constitutional Interpretation in Asia*, 29 SING. ACAD. L.J. 719 (2017) (Hong Kong, India, Malaysia, Singapore); Stephen Brittain, *The Case for an Originalist Approach to Constitutional Interpretation in Ireland*, 13 TRINITY C.L. REV. 71 (2010) (Ireland); Fernós, *supra* note 6 (Puerto Rico); Gretchen Carpenter, *Constitutional Interpretation by the Existing Judiciary in South Africa: Can New Wine be Successfully Decanted into Old Bottles?*, 28 COMP. & INT'L L.J. S. AFR. 322 (1995) (South Africa); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2011) (Turkey).

<sup>11</sup> Certain judges may have taken liberties in the application of PI, but none have overtly challenged it in public law contexts. Contracts are the major site of interpretive contestation in Israel, with a school favoring a textual over a purposive approach. See DANIEL FRIEDMANN, *THE PURSE AND THE SWORD: THE TRIALS OF*



The lack of an interpretive debate makes sense in the Israeli context due to its constitutional history and culture.<sup>12</sup> In a nutshell, Israel has no full-fledged constitution, owing to the inability to reach wide political consensus at the state's founding in 1948.<sup>13</sup> Instead, it has 'Basic Laws' that were enacted sporadically by the Knesset (Israeli parliament), on a 'chapter-by-chapter' basis. Absent any special constitutional codification, these laws were not traditionally considered as equivalent of a formal constitution.<sup>14</sup> Fourteen Basic Laws have been enacted to date, the majority of which design the operation of government institutions. Two of the Basic Laws, both enacted in 1992, protect human rights and hence constitute Israel's 'Bill of Rights': Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. Both include a similar 'limitation clause' that renders a regular law invalid if it violates enumerated rights, except when "befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."<sup>15</sup> However,

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ISRAEL'S LEGAL REVOLUTION 186–88 (Haim Watzman trans., 2016). Still, ultimately some model of PI is applied to contracts as well. Jonathan Yovel & Ido Shacham, *Israeli Contract Law: An Overview*, in THE INTERNATIONAL CONTRACT MANUAL (2014), available at <https://ssrn.com/abstract=1139775>, at 10; SHIMON SHETREET & WALTER HOMOLKA, JEWISH AND ISRAELI LAW – AN INTRODUCTION 534 (2017).

<sup>12</sup> Some Israeli scholars deny any room for comparison between the American interpretive debate and Israeli law. Gideon Sapir, *Living Originalism—The Jewish Version*, 7 JRSML REV. LEGAL STUD. 49, 51 (2013); Iddo Porat, *The Use of Foreign Law in Israeli Constitutional Adjudication*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING, *supra* note 8, at 151, 158. For a different view, according to which some aspects of Israeli jurisprudence make for a paradigmatic case of originalism, see Hassan Jabareen, *The Paradigm of Originalism: Israeli Constitutional Law and Legal Thought*, 52 ISR. L. REV. 427 (2019) (reviewing ISRAELI CONSTITUTIONAL LAW IN THE MAKING, *supra* note 8).

<sup>13</sup> See HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 53–75 (2011).

<sup>14</sup> Menachem Mautner, *Protection of Liberal Rights Amidst a "War of Cultures" (Kulturkampf) between Secular and Religious Groups*, 48 ISR. Y.B. HUM. RTS. 125, 130–40 (2018); LERNER, *supra* note 13, at 75–82; GIDEON SAPIR, THE ISRAELI CONSTITUTION: FROM EVOLUTION TO REVOLUTION 18–29 (2018); NAVOT 2014, *supra* note 8, at 31.

<sup>15</sup> Basic Law: Human Dignity and Liberty, § 8, English translation available at [https://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm); Basic Law: Freedom of Occupation, § 4, English translation available at [https://www.knesset.gov.il/laws/special/eng/basic4\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic4_eng.htm). See NAVOT 2014, *supra* note 8, at 25–46.

neither these nor any other Basic Law explicitly authorize judicial invalidation of contradictory statutes. In a landmark decision from 1995,<sup>16</sup> the Supreme Court asserted the authority to strike down statutes that unlawfully infringe on constitutional rights, and the Basic Laws were thus recognized as having superior normative status. This only pertains to statutes enacted after the human rights Basic Laws, since in addition to the limitation clauses they also contain ‘savings clauses,’ protecting the validity of statutes already on the books. The Court has nonetheless ruled that all statutes, new or old, shall be *interpreted* in the light of the Basic Laws, so as to accommodate rather than conflict with them as far as the statutory language allows.<sup>17</sup> The enactment of the human rights Basic Laws, along with the Court’s declaration that they enjoy constitutional normative status and empower it to conduct judicial review of regular statutes, is termed ‘The Constitutional Revolution.’<sup>18</sup>

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<sup>16</sup> CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 1 IsrLR (1995), [https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\93\210\068\z01&fileName=93068210\\_z01.txt&ctype=4](https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\93\210\068\z01&fileName=93068210_z01.txt&ctype=4).

<sup>17</sup> The savings clause included in the Basic Law: Human Dignity and Liberty (§ 10) is absolute, while the one in the Basic Law: Freedom of Occupation (§ 10) was limited in time and expired in 2002, stating that until that point conflicting provisions shall be interpreted “in the spirit” of the Basic Law. See Rivka Weill, *Bills of Rights with Strings Attached: Protecting Death Penalty, Slavery, Discriminatory Religious Practices and the Past from Judicial Review*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY INSTITUTIONS 308 (Rosalind Dixon et al. eds., 2018). In 2017, Justice Anat Baron insinuated, in a concurring opinion denying the recognition of same-sex marriages performed in Israel (as any other form of civil marriage), that there may come a day when the normative force of the savings clause in the Basic Law: Human Dignity and Liberty “will not suffice to block constitutional processes.” HCJ 7339/15 Aguda—Israel’s LGBT Task Force v. Ministry of Interior (Aug. 31, 2017), ¶ 3 (Baron, J., concurring), *available* at <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\15\390\073\t06&fileName=15073390.t06&ctype=4>. For criticism of this opinion, see SAPIR, *supra* note 14, at 69–70.

<sup>18</sup> The term was coined by then-President of the Court, Aharon Barak, in reference to the enactment of the human rights Basic Laws, in United Mizrahi Bank, *supra* note 16. It is now commonly used to address the judicial decision as well, or to the judicial decision alone. See SAPIR, *supra* note 14, at 49–58; LERNER, *supra* note 13, at 78–82.

The contrast between this constitutional framework and the American one is stark. As opposed to the canonical status of the U.S. Constitution in the nation's culture—legal or otherwise—neither the Israeli Basic Laws nor the people who enacted them enjoy any such public recognition; far from it. In fact, a not uncommon view holds that members of Knesset (“MKs”) were “deceived” into voting, unaware of its consequences. Some of them would later decry it, claiming they had never imagined it would result in a judicial authority to strike down statutes, and had they known they would have acted differently.<sup>19</sup> The ostensible lack of explicit will to enact a formal constitution coupled with the recency of the human rights Basic Laws, obviate the empirical inclination to search for original intentions, understandings, or meanings. It also calls into question the doctrinal legitimacy to do so, and generates no such public expectation. Accordingly, the interpretive method prevailing in the Israeli judiciary, PI, is emphatically purposive.<sup>20</sup>

#### A. Purposive Interpretation

Neither the Basic Laws nor any other statute detail the method by which judges should interpret the law.<sup>21</sup> PI was developed by

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<sup>19</sup> SAPIR, *supra* note 14, at 38–48. Still, these laws have not been repealed. Furthermore, both human rights Basic Laws were amended in 1994 by a large majority, and at a time when the argument that they authorize judicial review was undoubtedly on the table, and the limitation clauses were left intact. Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 207, 214 n.13 (Denis Galligan & Mila Versteeg eds., 2013); Jabareen, *supra* note 12, at 444.

<sup>20</sup> Margit Cohn, *Comparative Public Law Research in Israel: A Gaze Westwards*, 14 *ASIAN J. COMP. L.* S11, S22 (2019) (“Israel’s non-textualist legal tradition has been supported by the absence of a full written constitution”).

<sup>21</sup> A few specific interpretive principles appear in legislation, such as the rule of lenity (Penal Law, 5737–1977, § 34U [סג34], English translation available at <https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/43289694.pdf>) and gender neutrality (Interpretation Law, 5741–1981, § 6, 35 LSI 370 (1980–81) (Isr.), available at [https://www.nevo.co.il/law\\_html/law150/laws%20of%20the%20state%20of%20israel-35.pdf](https://www.nevo.co.il/law_html/law150/laws%20of%20the%20state%20of%20israel-35.pdf)). It is also stated that statutory gaps should be filled by appealing to precedent, analogy, or “in the light of the principles of freedom, justice, equity and peace of Jewish Law and Israel’s heritage” (Foundations of Law, 5740–1980, § 1, 34 LSI 181 (1979–80) (Isr.), available at

Aharon Barak, the most influential jurist in Israeli history.<sup>22</sup> Throughout his tenure as a Supreme Court Justice (1978–2006) and President of the Court (equivalent to Chief Justice, 1995–2006), Barak, a former law professor, continued to produce a voluminous body of scholarship. His main focus in the 1980s–1990s was developing a comprehensive theory of judicial interpretation, simultaneously implemented in the Court’s jurisprudence.<sup>23</sup> PI encompasses all legal texts, and it has been adopted by the Israeli judiciary completely, such that it is the only method Israeli judges apply when interpreting constitutional and statutory texts.<sup>24</sup>

The starting point of PI is that the language of the text sets the boundaries of its interpretation, and a judge cannot give the words a meaning they cannot bear.<sup>25</sup> This is a feature of virtually any theory of judicial interpretation, and PI belongs in the group of theories

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[https://www.nevo.co.il/law\\_html/law150/laws%20of%20the%20state%20of%20israel-34.pdf](https://www.nevo.co.il/law_html/law150/laws%20of%20the%20state%20of%20israel-34.pdf) (the term “Jewish Law” was added in a 2018 amendment. See Aviram, *supra* note 8, 6 n.34). See generally SHETREET & HOMOLKA, *supra* note 11, at 49–50; NAVOT 2014, *supra* note 8, at 58–63.

<sup>22</sup> See, e.g., Tom Ginsburg, *You Shall Appoint for Yourself Judges*, JEWISH REV. BOOKS (Summer 2018), <https://jewishreviewofbooks.com/articles/3230/you-shall-appoint-for-yourself-judges> (reviewing FRIEDMANN, *supra* note 11) (“Towering over Israeli law of the past several decades is the singular figure of Aharon Barak”); FRIEDMANN, *supra* note 11, at 198 (“Barak became something of a super-chief justice, with power far greater than that wielded by any of his predecessors”).

<sup>23</sup> For a critique of the way Barak single-handedly reshaped the Israeli legal canon by “self-canonization,” see Roei Amit, *Position(ing) of a Canon*, 21 TEL AVIV U. L. REV. [YUNEI MISHPAT] 81, 89 (1998) [Hebrew].

<sup>24</sup> Nir Kedar, *Interpretive Revolution: The Rise of Purposive Interpretation in Israeli Law*, 26 TEL AVIV U. L. REV. [YUNEI MISHPAT] 737, 737–39 (2003) [Hebrew]; Rafi Reznik, *Toward an Interpretive Debate in Israel*, 12 HEBREW U. L. REV. ONLINE [MISHPATIM AL ATAR] 67, 67–68 (2018) [Hebrew], <https://lawjournal.huji.ac.il/sites/default/files/2019-01/mishpatimonline-12-067.pdf> [Hebrew]. Until the 1980s, there was no uniform interpretive method in Israel, and judges applied the interpretive framework inherited, like the law itself, from the British Mandate: an oscillation between textual and intentional approaches supplemented by common law canons. Kedar, *supra*, at 741; FRIEDMANN, *supra* note 11, at 19–21; Gad Barzilai & Ilan Peleg, *Engineering the Law and Justice Deconstruction: Ideologies of Knowledge in Law and Politics in Israel and Beyond*, 4 J. COMP. L. 205, 209–12 (2009); ELYAKIM RUBINSTEIN, JUDGES OF THE LAND: THE ORIGIN AND CHARACTER OF THE ISRAELI SUPREME COURT 192–200 (1980) [Hebrew].

<sup>25</sup> AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 102–03 (2005).

instructing judges to conduct this examination broadly, as a mere first step.<sup>26</sup> For it wishes to leave significant room for purposive considerations, which consist of three methodological stages: subjective purpose, objective purpose, and ultimate purpose. Barak stipulates that the unique aspect of his PI is the last one, which “tries to synthesize and integrate” the former two,<sup>27</sup> rather than categorically choosing one over the other, in order to give the text the best possible interpretation in light of its purpose.

*Subjective purpose* is the subjective intent of the legal text’s author, at the time the text was created. It is an empirical, historical fact.<sup>28</sup> The primary source for determining the subjective purpose is internal—the language of the text. From the text, the judge “in a reverse process” attempts to identify the author’s will as to the purposes they wished to realize at the time.<sup>29</sup> Sources accorded equal validity but lesser evidential weight are those external to the text: “the totality of circumstances related to its creation,”<sup>30</sup> primarily legislative history. The “golden presumption” is that the subjective purpose arises in its entirety from the text’s “ordinary and natural language.”<sup>31</sup>

The next, or rather parallel stage is the *objective purpose*. This is the intent of the *reasonable* author, or at a higher level of abstraction “the intent of the system.”<sup>32</sup> It is not an empirical matter, but rather “a legal construction that reflects the needs of society.”<sup>33</sup> The objective purpose is not fixed in time, it is in synch with the “fundamental values” of the system and hence dynamic and determined at the time of interpretation.<sup>34</sup> The primary source for determining the objective purpose is once again the text in its entirety. Plenty of external sources are also pertinent, including nearby texts; case law; comparative law;

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<sup>26</sup> This is one of several Dworkinian aspects of the theory. See Ronald A. Dworkin, “*Natural*” Law Revisited, 34 U. FL. L. REV. 165, 171 (1982); *infra* notes 43–57 and accompanying text.

<sup>27</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 182.

<sup>28</sup> *Id.* at 120.

<sup>29</sup> *Id.* at 135.

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

<sup>31</sup> *Id.* at 144.

<sup>32</sup> *Id.* at 148.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 154.

“general social and historical background;” and the fundamental values of the system.<sup>35</sup> In discerning the objective purpose, the interpreter uses what Barak calls “purposive presumptions,” designed to promote and integrate these fundamental values. For example, it is presumed that an individual objective purpose (the solution in a given statute to a specific social problem), does not contradict the general objective purpose (advancing democratic-constitutional principles), unless so stated in clear, explicit, and unequivocal language.<sup>36</sup>

The final stage of PI is determining the *ultimate purpose* of the text. Judges presume that both the subjective and the objective purposes are reflected in the text’s language, and seek to reconcile them: “they do whatever they can to reduce conflict” and achieve synthesis and integration of the author’s will and the system’s will.<sup>37</sup> This means that from all of the optional subjective purposes, the judge should choose the ones that accommodate the objective, and vice versa, so that conflict is avoided altogether. In cases of unavoidable clash, PI offers broad, discretionary guidelines rather than a simple formula. They take the form of continuums, along which the interpreted text needs to be situated.<sup>38</sup> Barak lists the following continuums. The legal character of the text: the more public, collectively authored the text—from wills through contracts to statutes and constitutions<sup>39</sup>—the more weight is accorded to the objective purpose.<sup>40</sup> The age of the text: the subjective purpose is weightier when the text is recent. The scope of the issue: the objective element strengthens when the issue under regulation is more comprehensive. The character of the regime: when a transition of fundamental values occurs, the objective purpose is given more weight. Specificity: rules invite a more subjective consideration than standards. And content-

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<sup>35</sup> *Id.* at 159–64.

<sup>36</sup> *Id.* at 173–81, 256.

<sup>37</sup> *Id.* at 183.

<sup>38</sup> *Id.* at 182–206.

<sup>39</sup> Administrative texts are notably absent from Barak’s scheme (similarly to Dworkin. See ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (2016)). Such texts are still interpreted using PI, with necessary adjustments. Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. PA. J. CONST. L. 581 (2001).

<sup>40</sup> BARAK, *PURPOSIVE INTERPRETATION*, *supra* note 25, at 132–35.

specific considerations: for example, in criminal matters more weight is assigned to the objective purpose than in civil issues. PI takes all of these factors into account and chooses among them via the methodological principle of balance, a term frequently used by Barak. In balancing the scales, “[p]urposive interpreters look at the life of the text from its conception (and eve before that) until the moment of interpretation.”<sup>41</sup>

PI sees judicial interpretation as a normative, teleological process that unapologetically leaves significant room for discretion, while insisting on objectivity and rationality. The basic tenets of PI are summed up by Barak with the words “language, purpose, discretion.”<sup>42</sup>

In American terms, Israeli law employs a pluralistic methodology, under a conception of all legal texts (to varying degrees) as “living documents.”<sup>43</sup> This should be of no surprise. For in both the theory’s doctrinal details and in its historical background, the intellectual orbit in which PI is situated is that of American legal liberalism. Espousing both liberalism and legalism, this intellectual movement is characterized by faith in the potential of courts, particularly the Supreme Court, to advance social reform and expand the scope of civil rights while maintaining judicial integrity.<sup>44</sup> Legal liberals were students of the movement’s academic precursor, the Legal Process school.<sup>45</sup> Barak is no exception, having studied under Henry Hart and Albert Sacks at Harvard Law School in the 1960s.<sup>46</sup>

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<sup>41</sup> *Id.* at 183.

<sup>42</sup> *Id.* at 268.

<sup>43</sup> See Barak Medina, “Foundational” Originalism? On Jack Balkin’s Living Originalism, 7 JRSLM. REV. LEGAL STUD. 1, 15 (2013). For Barak’s explicit rejection of American conservative jurisprudence, see BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 284–85.

<sup>44</sup> See LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2, 42–46 (1996); Horwitz, *Bork Nomination*, *supra* note 3. See also Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 195–98 (2019) (book review).

<sup>45</sup> KALMAN, *supra* note 44, at 50.

<sup>46</sup> See Prina Lahav, *American Moment[s]: When, How and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQ. L. 653, 657 (2009); Kedar, *supra* note 24, at 759. For Barak’s recognition of Legal Process’s

The judicial epitome of legal liberalism was the Warren Court,<sup>47</sup> where teleological interpretivism served as a cardinal tool in the advancement of a progressive agenda, viewing the Constitution as “not static [ . . . it] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>48</sup> Sympathetic to the political orientation of the Warren Court yet concerned with the absence of objective adjudicatory standards, Legal Process elevated the role of procedural and institutional rationality.<sup>49</sup> It thus hoped to reconcile the realist insight that law, including when made by courts, is a tool for the promotion of good social policy, with the subsequent concern for democratic legitimacy captured by the counter-majoritarian difficulty. Legal Process aspired to separate law from politics by emphasizing the rational social purpose that each legal text pursues, to be discerned by the democratic institution that enjoys proper competence, reason, and expertise. Legal Process thus enabled legal liberalism to also be liberal legalism, viz. an ontological and normative insistence on objective legal categories, whose moral orientation is grounded in the integrity of the democratic process.

Building on the Legal Process theories while shifting the intellectual focus to judicial interpretation, legal liberals such as Ronald Dworkin, Owen Fiss, and Bruce Ackerman positioned courts at the forefront of the protection of rights. The democratic legitimacy of this position is derived from the courts’ ability to generate legal doctrines

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influence on his interpretive approach, see BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 227–28.

<sup>47</sup> 1953–1969. There is scholarly debate over whether the Burger Court (1969–1986) should be considered liberal (*see, e.g.*, KALMAN, *supra* note 44, at 57), conservative (*see, e.g.*, MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2017)), or as a transitional phase from the former to the latter (*see, e.g.*, HERMAN SCHWARTZ, *RIGHT WING JUSTICE: THE CONSERVATIVE CAMPAIGN TO TAKE OVER THE COURTS* 42–47 (2004)).

<sup>48</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C. J.) (referring to the Eighth Amendment).

<sup>49</sup> For an overview of Legal Process, see KALMAN, *supra* note 44, at 19–47; William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994). For core Legal Process texts, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994); LON L. FULLER, *THE MORALITY OF LAW* (1964).



out of the best possible interpretation of the Constitution, which is the ultimate expression of collective morality. In lieu of Legal Process's "morality of function,"<sup>50</sup> legal liberalism argues that the Constitution demands the interpreter who gives meaning to its words to load them with substantive values of political morality. Merging the interpretive turn and the historic turn in jurisprudence, legal liberalism engaged in a "conversation between generations."<sup>51</sup>

Barak's PI draws on Legal Process and on legal liberalism, holding the courts to be a liberal-democratic institution endowed with hermeneutic-teleological expertise.<sup>52</sup> To illustrate, per PI, "interpretation is not just discovery. It is also creation. The question is what creation is best,"<sup>53</sup> and "law is a device. It is designed to achieve the social aim that lies at the core of the legal system."<sup>54</sup> Barak incorporates liberal principles into the definition of democracy,<sup>55</sup> and believes in judicial ability to give a legal utterance the most charitable meaning possible, based on the collective moral vision encapsulated in core legal texts.<sup>56</sup> The result is judicial legitimacy to uncover the fundamental values of the system and to identify the legal rights they demand to protect.<sup>57</sup>

PI is used in all Israeli courts, and is not a matter of controversy, within or outside the judiciary. To be clear, there is in Israel a fierce ongoing public debate, and specific criticism of Barak, relating to judicial activism and the growing involvement of the Court

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<sup>50</sup> KALMAN, *supra* note 44, at 30.

<sup>51</sup> *Id.* at 143.

<sup>52</sup> See also William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling between Facts and Norms*, 57 ST. LOUIS U. L.J. 865, 905 (2013).

<sup>53</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 218.

<sup>54</sup> *Id.* at 221.

<sup>55</sup> Kedar, *supra* note 24, at 760; BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 235–36; *infra* note 178.

<sup>56</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 296. For Barak's divergences from Dworkin, see *id.* at 296–97, 384–85.

<sup>57</sup> As summarized by Emma Kaufman, *supra* note 44, at 198: "the idea that constitutional rights trump other rights, and do so because they reflect the most valuable public values, is at the heart of legal liberalism."

in political questions since the 1980s.<sup>58</sup> But PI is not the target of the critics' arrows, and outside of legal circles the term has very little resonance. Instead of contestation over the method by which texts are given meaning, the discontent manifests in animosity toward discretion-conferring judicial mechanisms implemented by the Barak Court, particularly minimal threshold standards for justiciability and standing,<sup>59</sup> and open-ended standards for administrative and statutory review, such as reasonableness and proportionality.<sup>60</sup> It would not be an overstatement to say that as a strictly interpretive theory, rather than a general adjudicative framework, PI has met with more serious engagement in U.S. academia than in Israeli legal circles.<sup>61</sup> Enter Justice Noam Sohlberg.

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<sup>58</sup> See Mautner, *Protection of Liberal Rights*, *supra* note 14, at 143–48; FRIEDMANN, *supra* note 11, at 184 and *passim*; SAPIR, *supra* note 14, at 29 and *passim*. It is another question whether the narrative presented by such critics, according to which the Israeli Supreme Court is an exceedingly activist one, is accurate. For analyses more sympathetic to Barak, see Joseph H. H. Weiler & Doreen Lustig, *Foreword: A Good Place in the Middle: The Israeli Constitutional Revolution from a Global and Comparative Perspective*, 38 TEL AVIV U. L. REV. [YUNEI MISHPAT] 419 (2016) [Hebrew]; Yigal Mersel, *On Abaron Barak's Activist Image*, 47 TULSA L. REV. 339 (2011); Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Abaron Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1 (2007), [http://www.harvardilj.org/wp-content/uploads/2011/01/HILJ-Online\\_49\\_Medina.pdf](http://www.harvardilj.org/wp-content/uploads/2011/01/HILJ-Online_49_Medina.pdf).

<sup>59</sup> FRIEDMANN, *supra* note 11, at 55.

<sup>60</sup> See Alon Harel, *Skeptical Reflections on Justice Abaron Barak's Optimism*, 39 ISR. L. REV. 261, 263 n.5 (2006) (reviewing BARAK, *THE JUDGE*, *supra* note 9).

<sup>61</sup> For American engagements with Barak, see Frank I. Michelman, *Israel's "Constitutional Revolution": A Thought from Political Liberalism*, 19 THEORETICAL INQ. L. 745 (2018); OWEN FISS, *PILLARS OF JUSTICE* 175–86 (2017); SCALIA & GARNER, *supra* note 1, at 481 (listing publications by Barak as sources “that we consulted and that influenced us”); Cass R. Sunstein, *Constitutional Personae*, 2013 SUP. CT. REV. 433, 435 n.10; Sanford Levinson, *To What Extent is Judicial Intervention against Torture a “Hollow Hope”? Reflections on the Israeli and American Judicial Experiences since 2001*, 47 TULSA L. REV. 363 (2011); KENT GREENAWALT, *LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS* 329–36 (2010); Stanley Fish, *Intention Is All There Is: A Critical Analysis of Abaron Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109 (2008); Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC (Apr. 23, 2007), <https://newrepublic.com/article/60919/enlightened-despot> (reviewing BARAK, *THE JUDGE*, *supra* note 9); Robert Bork, *Barak's Rule*, 27 AZURE 125 (2007)

## B. Purposive Originalism

In a series of dissents and concurrences starting in 2016,<sup>62</sup> Israeli Supreme Court Justice Noam Sohlberg has diverged from PI to form a theory of a distinct, coherent internal logic. Although, unlike Barak, Sohlberg has yet to offer a comprehensive articulation of his theory out of context,<sup>63</sup> an inductive analysis reveals there is a competing interpretive method in the works. I have detailed the nuts and bolts of this inductive process elsewhere;<sup>64</sup> here my focus is on the political content of the emerging theory, and hence brief descriptions of the three main opinions will suffice, followed by an explication of the interpretive schema to which they give rise. Thus far, PO has been concerned with statutory interpretation.

In *Gini v. The Chief Rabbinate*, Justice Sohlberg opined, in dissent, that restaurants may not display signs attesting to their keeping

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(reviewing BARAK, THE JUDGE, *supra* note 9). For criticism of this orientation, see Ginsburg, *supra* note 22 (“Friedmann pithily captures the sentiment when he asks just who Barak’s primary audience was: the Israeli public or a bunch of professors at Yale Law School, where Barak teaches each year”). For non-American perspectives on Barak, see Daphne Barak-Erez, *Judicial Conversations and Comparative Law: The Case of Non-Hegemonic Countries*, 47 TULSA L. REV. 405 (2011); THE JURISPRUDENCE OF AHARON BARAK: VIEWS FROM EUROPE (Maartje de Visser & Willem Witteveen eds., 2010).

<sup>62</sup> HCJ 6494/14 *Gini v. Chief Rabbinate of Israel* (June 6, 2016), available at [https://supremedeisions.court.gov.il/Home/Download?path=HebrewVerdicts\14\940\064\o11&fileName=14064940\\_o11.txt&type=4](https://supremedeisions.court.gov.il/Home/Download?path=HebrewVerdicts\14\940\064\o11&fileName=14064940_o11.txt&type=4) [Hebrew] [hereinafter *Gini I*]. This case was decided by a standard panel of three, and following a decision by the President of the Court was reevaluated by an extended panel (including the original three judges), in a “further hearing” procedure. HCJFH 5026/16 *Gini v. Chief Rabbinate of Israel*, (Sept. 12, 2017), ¶¶ 18-27 (Naor, President), available at <http://elyon1.court.gov.il/files/16/260/050/c16/16050260.c16.pdf> [Hebrew] [hereinafter *Gini II*]; a brief summary of the case in English is available at Uzi Vogelmann et al., *Israel: The State of Liberal Democracy, in 2017 GLOBAL REVIEW OF CONSTITUTIONAL LAW* 151, 155 (Richard Albert et al. eds., 2018).

<sup>63</sup> In 2020, Justice Sohlberg took a first step in this direction. Noam Sohlberg, *On Subjective Values and Objective Judges*, 18 HASHILOACH 37 (2020), available at <https://hashiloach.org.il/wp-content/uploads/2020/01/hashiloach-18print.pdf> [Hebrew].

<sup>64</sup> Rafi Reznik, *Purposive Originalism: The Rise of American Conservatism in Israel* (Dec., 2018) (unpublished LL.M. thesis, New York University) (on file with author); Reznik, *supra* note 24.

of Kosher standards unless issued by the Chief Rabbinate, a state agency that employs rabbis who supervise food establishments.<sup>65</sup> The statutory provision under interpretation provides that “the owner of a food establishment shall not present it in writing as Kosher, unless given a Kosher certificate,”<sup>66</sup> a document only rabbis of the Chief Rabbinate are authorized to provide.<sup>67</sup> The majority ruled, in a 5:2 decision, that as long as said signs do not use the word *Kosher* they are not *Kosher certificates*, and hence may be displayed even if issued by others. For the law does not forbid to truthfully detail the standards of food preparation and serving restaurants keep. This interpretation was chosen as best realizing the legislative purpose: to prevent consumer fraud. Justice Sohlberg, following an extensive foray into legislative history, concluded that the legislature intended to create a monopoly over “Kosher representations,” aiming to limit the “space for fraud and deceit of consumers” by keeping an institutional standard upheld exclusively by the Chief Rabbinate.<sup>68</sup> Conversely, the objective purpose was found to favor the result reached by the majority, which minimizes the infringement on the constitutional rights to freedom of occupation of restaurant owners, autonomy of consumers, and freedom of religion of both groups.<sup>69</sup> In this clash between the subjective and objective purposes, Sohlberg concluded that the former prevails. The reasoning

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<sup>65</sup> See generally SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 213–15 (2007) [hereinafter NAVOT 2007]. On Kosher regulation in the U.S., see Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509 (2004); Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1 (1992).

<sup>66</sup> *Kashrut* (Prohibition of Deceit) Law, 5743–1983, § 3(a), 37 LSI 147 (1982–83) (Isr.), available at [https://www.nevo.co.il/law\\_html/law150/laws%20of%20the%20state%20of%20israel-37.pdf](https://www.nevo.co.il/law_html/law150/laws%20of%20the%20state%20of%20israel-37.pdf).

<sup>67</sup> *Id.* § 2(a)(1).

<sup>68</sup> Gini I, *supra* note 62, ¶¶ 45–48 (Sohlberg, J.).

<sup>69</sup> *Id.* ¶¶ 51–52 (Sohlberg, J.). Freedom of occupation enjoys constitutional status thanks to its enumeration in the Basic Law: Freedom of Occupation. Consumer autonomy and freedom of religion are not explicitly mentioned in the Basic Law: Human Dignity and Liberty, but have been derived by the Court from the constitutional right to dignity enumerated therein. Hostovsky Brandes, *supra* note 8, at 269; NAVOT 2007, *supra* note 65, at 211–12.

offered was that the legislature's original intent trumps when it is clear, and when the infringement on rights is not substantial.<sup>70</sup>

The second major exposition of PO was another state and religion 'hot potato,' *Association of Merchants v. The Minister of Interior*.<sup>71</sup> Dissenting again, Sohlberg maintained that municipalities lack authority to allow supermarkets in certain areas to open for business on Saturdays, due to a provision in the statute regulating work hours, which reads: "in days of rest [ . . . ] a shop owner shall not conduct business."<sup>72</sup> The majority, in a 5:2 decision, interpreted the provision in tandem with a neighboring one, forbidding the employment of salary employees in days of rest—except when certain exceptions are granted<sup>73</sup>—concluding that the objects of regulation are the people operating the business, in contrast to the business itself. This interpretation furthers statutory harmony and realizes underlying purposes of the legal system by facilitating effective use of local government statutes, delegating discretion to regulate certain matters, including the operation of businesses on the Sabbath, to the authority most attentive to the needs of the affected communities.<sup>74</sup> Sohlberg did not dispute that the majority's interpretation may be anchored in the statutory language. However, turning again to an array of legislative history material, he found that the legislature's intent was to force a unitary day of rest, Saturday, in the entire market. The only exception

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<sup>70</sup> Gini I, *supra* note 62, ¶¶ 54, 68 (Sohlberg, J.).

<sup>71</sup> HCJFH 3660/17 Association of Merchants and Independents v. Minister of Interior (Oct. 26, 2017), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\17\600\036\c20&fileName=17036600.C20&type=4> [Hebrew], English translation *available at* <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/General%20Association%20of%20Merchants%20and%20Self-Employed%20Persons%20v.%20Minister%20of%20Interior.pdf>.

<sup>72</sup> Hours of Work and Rest Law, 5711–1951, § 9A(a), English translation *available at* <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/36146/81476/F1584867301/ISR36146.pdf>.

<sup>73</sup> *Id.* § 9.

<sup>74</sup> Association of Merchants, *supra* note 71, ¶¶ 25–32 (Naor, President); Municipalities Ordinance (New Version), §§ 249(20), 249(21). On local government law in Israel in general, see NAVOT 2007, *supra* note 65, at 180–85.

is the operation of entertainment venues, which were excluded as a political compromise.<sup>75</sup>

The latest substantial installment in Justice Sohlberg's alternative method is *Rom v. The State of Israel*, a case dealing with the Ministry of Health's decision to forbid private, unlicensed "natural birth centers" from offering childbirth services.<sup>76</sup> The interpretive question was whether the statute mandating that institutions providing "medical treatment" obtain a hospital license, extends to delivering babies.<sup>77</sup> Concurring in judgment, in a 2:1 decision, Sohlberg answered in the affirmative.<sup>78</sup> The dissent voiced concerns about women's right to choose how to give birth, as "closely associated with the autonomy of every woman over her body,"<sup>79</sup> an objective purpose that ought to be weighty. Sohlberg found irrelevant these "ethical and medical views about the nature of giving birth."<sup>80</sup> Consequently, he held that the balance reached by the state, between "personal autonomy and

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<sup>75</sup> Association of Merchants, *supra* note 71, ¶¶ 28–33 (Sohlberg, J., dissenting).

<sup>76</sup> HCJ 5428/17 Rom v. State of Israel (June 18, 2018), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\17\280\054\j07&fileName=17054280.J07&type=4> [Hebrew]. Just like Gini (*supra* note 62), Rom too proved to be an extremely contentious decision, such that the current President of the Court, Justice Esther Hayut, ordered a "further hearing" procedure. HCJFH 5120/18 Women for Freedom of Choice in Childbirth v. State of Israel (hearing yet to be scheduled; last checked May 26, 2020). Association of Merchant was a further hearing as well, but the interpretive issues only arose in its second installment and so the decision to rehear the case had turned wholly on the substance.

<sup>77</sup> Public Health Ordinance, 1940, §§ 24A(1), 24(b).

<sup>78</sup> Rom, *supra* note 76, ¶¶ 8–9 (Sohlberg, J., concurring). There was no examination of legislative history nor could there have been, since the ordinance in question dates back to the British Mandate and was not enacted by the Israeli legislature. Possibly for this reason, Sohlberg's analysis did not include an explicit contrast of subjective and objective purposes (the judge who wrote the principal opinion, Justice Elron, grounded his conclusion entirely in an administrative rather than interpretive examination).

<sup>79</sup> *Id.* ¶ 34 (Grosskopf, J., dissenting).

<sup>80</sup> *Id.* ¶ 10 (Sohlberg, J., concurring).

paternalistic considerations regarding public health and welfare,” warrants no judicial intervention.<sup>81</sup>

Now, zooming out from these decisions to their bigger meaning, Sohlberg framed his disagreement with the prevailing theory as “not just about the question of *what* is the interpretation of the law; the root of the dispute is deeper, and it is entrenched in the question of the *way* in which the law should be interpreted.”<sup>82</sup> This challenge was met in each of the three cases with reiterations of PI principles, in attempts to counter Sohlberg’s defiance. In *Gini*, his colleagues conjured up the American interpretive debate—then an unprecedented move in the Court’s history, and now already one of several<sup>83</sup>—comparing Sohlberg’s approach to originalism. This may be perplexing to the American reader, since the new theory elevates the role of legislative history, a liberal staple in the U.S. In order to explain why the intuition is, while crudely articulated, nonetheless correct, a deeper dive is necessary—into the methodological details as well as the values they express. Beginning with the former, PO poses fundamental challenges at each stage of the PI schema. Let us flesh them out one by one.

*Subjective Purpose.* Justice Sohlberg’s theory does not dispute that language sets the boundaries for interpretation, even though, at least rhetorically, he favors a more limited textual space.<sup>84</sup> Within these

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<sup>81</sup> *Id.* ¶ 12 (Sohlberg, J., concurring).

<sup>82</sup> Association of Merchants, *supra* note 71, ¶ 2 (Sohlberg, J., dissenting) (emphases in the original).

<sup>83</sup> *Infra* notes 284, 293–302 and accompanying text.

<sup>84</sup> HCJ 6301/18 Poznansky-Katz v. Minister of Justice (Dec. 27, 2018), ¶¶ 3–5 (Sohlberg, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\010\063\m16&fileName=18063010.M16&type=4> [Hebrew] (Justice Sohlberg’s opinion ostensibly rests on the linguistic inability to read the term “temporary expulsion” into the term “removal from office”—and hence the disciplinary court for judges was not authorized to impose the former on a judge who had performed ethical misconduct. Yet Sohlberg’s reasoning was not strictly semantic, incorporating intentionalism already into the textual phase: “the legislature considered the issue and debated it. If he wanted to distinguish between ‘removal from office’ and ‘expulsion from office,’ he could have done so, like he did in other pieces of legislation. It is not neglect or mistake that led the legislature to choose this language, but conscious intention, and we are not free to read into the words what is not in them”).

boundaries, the ‘golden presumption’ that Barak’s PI uses for determining subjective purpose, is that the author’s will is fully expressed in the text.<sup>85</sup> This presumption can be rebutted if external sources indicate a conflicting will with greater reliability.<sup>86</sup> This is no longer the case with Sohlberg’s PO, which shifts the burden of proof—from the legislative history to the language. Legislative history should be given “a significant, and to my mind even conclusive, weight,”<sup>87</sup> depending on the level of its reliability in reflecting the legislature’s intent. Instead of presuming that the text exhausts the author’s intent unless proven otherwise, he presumes legislative history expresses most credibly the legislative will, and it is enough that this intent has a hold in the text. Barak’s view that “[t]here is no source more credible and more appropriate for learning about authorial intent than the text itself”<sup>88</sup> is replaced by a “bottom-up” interpretation that involves a “labor of ‘digging,’ often tedious.”<sup>89</sup> Insofar as it clearly reflects the legislature’s will, legislative history outweighs the language.

Sohlberg’s opinion in *Association of Merchants* exemplifies this shifting of the burden. After finding textual basis for each of the two opposing interpretations to the regulation of work on the Sabbath, the linguistic phase ends and the subjective purpose one begins—opening with legislative history.<sup>90</sup> Within the subjective purpose then, the text no longer plays a significant role, and the author’s will is taken to reside in external sources, that only need to find accommodation in the words. This remains true even if the words themselves draw to a different direction, as the majority in *Association of Merchants* highlights and Sohlberg does not dispute.<sup>91</sup> Once original intent, as delineated from legislative history, finds a hold in the text—PO is satisfied.<sup>92</sup>

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<sup>85</sup> *Supra* note 31 and accompanying text.

<sup>86</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 144.

<sup>87</sup> Gini II, *supra* note 62, ¶¶ 7–8 (Sohlberg, J., dissenting).

<sup>88</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 135.

<sup>89</sup> *Association of Merchants*, *supra* note 71, ¶¶ 2–13 (Sohlberg, J., dissenting).

<sup>90</sup> *Id.* ¶ 6 (Sohlberg, J., dissenting).

<sup>91</sup> *Id.* ¶ 43 (Naor, President); ¶¶ 8–9 (Barak-Erez, J., concurring); ¶¶ 5–6 (Sohlberg, J., dissenting).

<sup>92</sup> Gini II, *supra* note 62, ¶ 17 (Sohlberg, J., dissenting).



This approach signifies an openness to seeing the interpretive process as primarily an empirical-historical rather than a normative project: reasons become second to causes, and creation is tolerated only so long as it contributes to finding out what the best discovery is.<sup>93</sup> In this respect it is the mirror image of the prevailing theory—PI uses no ‘golden presumption’ in ascertaining the objective purpose, and hence assigns a-priori primacy to normative considerations, as the ‘system’s intent’ does not face the textual hurdles that the author’s intent faces.

PO levels up the subjective purpose while simultaneously leveling down the *objective purpose*. Ostensibly, Justice Sohlberg seeks to “use interpretive tools to limit the ‘clash’ between ‘the will of the legislature’ and ‘the will of the system’”<sup>94</sup>—which is exactly the task of the purposive interpreter. However, Sohlberg perceives this task very differently, for he goes on to say: “before using the ‘doomsday weapon’ of judicial review.” This refers to what led the majority in *Gini* to its conclusion: the imperative to choose, out of all the subjective purposes the language can bear, those that do not conflict with the objective ones. The latter arrive at this meeting after being infused with the fundamental values of the system, like human rights, democracy, reasonableness, “justice, morality, and fairness,”<sup>95</sup> via the “purposive presumptions.”<sup>96</sup> Sohlberg resists this infusion, in American terminology, of interpretation with construction—what PI calls “synthesis and integration”<sup>97</sup> is already an act of judicial review.

Barak too asserts that “[m]eaning and validity [ . . . ] are two separate things,” but that doesn’t stop him from urging the purposive interpreter to “make every effort to avoid recognizing a contradiction [between individual and general objective purposes], because a contradiction would place the validity of the statute in question.”<sup>98</sup>

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<sup>93</sup> Cf. PI’s opposite approach, *supra* note 53.

<sup>94</sup> *Gini* II, *supra* note 62, ¶ 20 (Sohlberg, J., dissenting).

<sup>95</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 173.

<sup>96</sup> *Supra* note 36 and accompanying text.

<sup>97</sup> *Supra* note 37.

<sup>98</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 365. A variation of the same principle in U.S. jurisprudence is the constitutional avoidance doctrine. See Rivka Weill & Tally Kritzman-Amir, *Between Institutional Survival and Human Rights*

Advocating a clearer boundary between determining the meaning of a statutory text and subjecting it to constitutional scrutiny, PO takes the “purposive presumptions” which Barak considers to be “the heart of legal interpretation,”<sup>99</sup> as an adjudicative device alien to the interpretative process. In Justice Sohlberg’s words: “the law of ought replaces the law of is.”<sup>100</sup> The upshot is that fundamental values cannot trump original intent within the interpretive process. Sohlberg made good on this promise in *Rom*. First, the role of human rights as interpretive devices was minimized in interpreting the meaning of the statutory text and determining its purpose. Second, on the basis of the interpretation already established, the legality of the balance of interests in the administrative decision was assessed.<sup>101</sup>

In the *ultimate purpose* stage, PI’s language of equilibrium, synthesis, and proportionality is supplanted by a rule-and-exceptions model. What is offered is a collision, and then a conclusive method for declaring the winner—original intent. Thus, Sohlberg rejects the discretion-conferring approach of ultimate purpose construction that relies on various continuums. One such continuum is the chronological: the weight of the objective purpose grows with the passing of time.<sup>102</sup> Justice Sohlberg clarified in *Gini* that he accepts this rule in principle, only in that case thirty-four years have passed since the enactment of the Kosher statute, and “the fundamental debate remains the same;” then as now the proper place for it is the Knesset floor.<sup>103</sup> This envelopes a turn away from the empirical element PI does embrace—not as a replacement for normative considerations, but as a source for them: the social circumstances surrounding any given statute, from the period prior to its enactment until the time of interpretation. Sohlberg, as do the other judges in *Gini*, voices harsh criticism of the Chief Rabbinate’s regulatory operation, often found to

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*Protection: Adjudicating Landmark Cases of African Undocumented Entrants in Israel in a Comparative and International Context*, 41 U. PA. J. INT’L L. 43 (2019) (comparing the doctrine in Israel and the U.S., in the context of immigration detention).

<sup>99</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 172.

<sup>100</sup> Association of Merchants, *supra* note 71, ¶ 2 (Sohlberg, J., dissenting).

<sup>101</sup> *Supra* notes 80–81 and accompanying text.

<sup>102</sup> *Supra* note 38. For a similar argument regarding American originalism, see Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295 (2008).

<sup>103</sup> *Gini II*, *supra* note 62, ¶¶ 22–24 (Sohlberg, J., dissenting).

be corrupt.<sup>104</sup> Yet, despite the recognition of a shift in the public attitude toward the legal scheme, exemplified by the “private supervision” project the petitioners take part in, and the sound basis for that shift—these facts do not suffice, because the social conflict from which the legal question stems is still unresolved.

The bar for the exception to overcome the rule is therefore very high: time need to have rendered the friction between the subjective and the objective purposes redundant. This entails a practical erosion of another of the ultimate purpose continuums: a change in the character of the legal regime. Between the enactment of the Kosher statute and its interpretation, the Constitutional Revolution occurred and seemingly elevated the status of individual rights. Per PO, this latter element, while *prima facie* retained in constitutional review, enjoys no resonance within the interpretive process.

Sohlberg’s *Association of Merchants* dissent runs further along this current in its reluctance to assign normative weight to prior interpretations of the Court to a given statute, inasmuch as they do not amount to a binding precedent that settles the legal question. In that case, concurring Justice Barak-Erez stressed that a statute should not be read as a “blank slate.”<sup>105</sup> Considering post-enactment history, as PI requires, she referred to the way the welfare law has traditionally been interpreted by courts and implemented by local governments. Sohlberg also thought the statute should not be interpreted “in a vacuum,” but he referred solely to the social background at the time of enactment of the interpreted provision (1968–1969).<sup>106</sup> Save for *stare decisis*, the empirical-historical project of PO is confined to the history leading to the creation of the text, and there it ends. This is antithetical to Barak’s view that the subjective purpose is important not so much in its own sake, but because “we need the past to understand the present.”<sup>107</sup>

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<sup>104</sup> Gini I, *supra* note 62, ¶¶ 70–72 (Sohlberg, J.); ¶¶ 1–2, 14 (Rubinstein, J.); ¶ 22 (Shoham, J.).

<sup>105</sup> *Association of Merchants*, *supra* note 71, ¶ 18 (Barak-Erez, J., concurring).

<sup>106</sup> *Id.* ¶ 8 (Sohlberg, J., dissenting).

<sup>107</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 190.

The result is that the subjective purpose should be ruled superior when it is “reliable, certain and clear,” including in the case that the legislature’s intent has no explicit basis in the statutory text but can still be accommodated with it.<sup>108</sup> Any other conclusion confuses interpretation with judicial review, continued Sohlberg, since determining the statute’s purpose, and determining its constitutionality<sup>109</sup>—are two different stages that must be divorced: “interpretation deals with the law that is; judicial review deals with the law that ought (not) to be.”<sup>110</sup> Unconstitutionality is thus a second exception to the triumph of intent. The Constitutional Revolution justifies the banishment of normative construction from the interpretive process,<sup>111</sup> because the Court’s authority to strike down statutes that offend human rights creates a binary judicial route to determine the constitutionality of a statute. Inasmuch as it is not unconstitutional, the result of the subjective purpose inquiry should prevail.<sup>112</sup>

To summarize PO from a purely methodological perspective, PI’s triangle of “language, purpose, discretion”<sup>113</sup> is replaced with a

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<sup>108</sup> Gini II, *supra* note 62, ¶¶ 7–8, 15–17 (Sohlberg, J., dissenting).

<sup>109</sup> The constitutionality of the *Kasbrut* (Prohibition of Deceit) Law was scrutinized in Gini I, as the petitioners raised an alternative argument to the interpretive one, claiming that the statute should be struck down due to its unconstitutional infringement on freedom of occupation. This argument was rejected unanimously. The reason constitutional review was conducted only on the basis of freedom of occupation and not other constitutional rights, is that Basic Law: Human Dignity and Liberty’s savings clause, unlike the one in Basic Law: Freedom of Occupation, has no expiration date (*supra* note 17). While these Basic Laws were enacted in 1992, the statute under scrutiny had already been on the books since 1983 (*supra* note 66).

<sup>110</sup> Gini II, *supra* note 62, ¶ 16 (Sohlberg, J., dissenting). *See also* Poznansky-Katz, *supra* note 84, ¶ 3 (Sohlberg, J.).

<sup>111</sup> While the distinction Sohlberg insists on is similar to that between interpretation and construction (*see* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65 (2011)), he refers more specifically to the act of scrutinizing a statute in order to determine its constitutionality, according to the tests of the limitation clause (*supra* note 15 and accompanying text).

<sup>112</sup> Gini II, *supra* note 62, ¶¶ 15–21 (Sohlberg, J., dissenting).

<sup>113</sup> *Supra* note 42.

triangle of *language, original intent, validation*.<sup>114</sup> What facilitates this scheme is the elevation of legislative history from a secondary source for the subjective purpose to the primary interpretive tool the judge has at her disposal. Thus, at the subjective purpose stage, the textual source is no longer assigned primacy; at the objective purpose stage, fundamental values are removed from the interpretive realm, instead consigned to the realm of judicial review; and at the ultimate purpose stage, the subjective purpose wins unless it is unconstitutional or obsolete. While stemming from PI and sharing its general framework, the basic governing principle of this new method is the legislature's original intent, and hence: Purposive Originalism.<sup>115</sup>

Justice Sohlberg is the first Barak challenger to devote his energy to the same aspect of the judicial enterprise as Barak himself—a comprehensive method of interpretation. Yet he is in no way engaged in an idiosyncratic project. First, because he also joins previous anti-Barak efforts championed by former members of the Court.<sup>116</sup> These were attempts to promote judicial restraint by non-interpretive means, such as limited scrutiny over executive actions,<sup>117</sup> or stricter threshold

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<sup>114</sup> On the element of validation, see *infra* notes 256–260 and accompanying text.

<sup>115</sup> It shares the title and general orientation, but not the details, of Abotsi, *supra* note 10 (defining the jurisprudence of the Supreme Court of Ghana as incorporating originalist elements into a generally purposive scheme of constitutional interpretation).

<sup>116</sup> See Isaac Roszler, *Law as a Prism into National Identity: The Case of Mishpat Ivri* 38 U. PA. J. INT'L L. 715, 744–50 (2017) (on Justice Menachem Elon); FRIEDMANN, *supra* note 11, at 184–85 (on Justice Eliezer Rivlin); Ittai Bar-Siman-Tov, *John Hart Grunis? The Jurisprudence of Chief Justice Grunis in Light of Ely's Constitutional Theory*, 9 DIN UDVARIM 67 (2015) [Hebrew] (on Justice Asher Grunis); Ely Aaronson, *Judging as Polemic*, 9 MISHPAT UMIMSHAL 497, 515–39 (2006) [Hebrew] (on Justice Mishael Cheshin. Hints of originalist tendencies have been detected in Justice Cheshin's jurisprudence. Yair Sagy, *The Ruling that Made History: A Historiographic Analysis of the Mizrahi Bank Decision*, 19 MISHPAT UMIMSHAL 325, 380 n.279 (2018) [Hebrew]).

<sup>117</sup> Sohlberg, *On Subjective Values*, *supra* note 63, at 44–55; HCJ 4374/15 The Movement for Quality Government v. Prime Minister of Israel (Mar. 27, 2016), *available* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\15\740\043\t63&fileName=15043740.T63&type=4> [Hebrew]; a summary of the case in English is available at

requirements for review.<sup>118</sup> Second, because Sohlberg has been joined by newer members of the Court who turn to American conservative jurisprudence, particularly via interpretive means. As we shall see in section III.B.2. below, some of whom, especially Justice Alex Stein, promote a very direct incorporation of such theories into Israeli law.<sup>119</sup> Unsurprisingly, legal commentators in the media have begun speaking of a “conservative camp,” spearheaded by Sohlberg.<sup>120</sup> The imperative to investigate the meaning of such a development cannot be overstated.

### III. AMERICAN-ISRAELI CONSERVATISM

There is a dialogue to be constructed between Purposive Originalism and paradigmatic shifts currently taking place in the Israeli political arena, both connoting American conservatism. Granted, no causal connection can be detected between PO and developments in American jurisprudence.<sup>121</sup> In this it differs from PI, which has been

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[http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Movement%20for%20Quality%20Government%20v.%20Prime%20Minister\\_0.pdf](http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Movement%20for%20Quality%20Government%20v.%20Prime%20Minister_0.pdf).

<sup>118</sup> HCJ 5744/16 Ben Meir v. The Knesset (May 27, 2018), ¶¶ 4–15 (Sohlberg, J., concurring), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\440\057\v17&fileName=16057440.V17&type=4> [Hebrew] (on ripeness); AAA 3782/12 Chief of Tel Aviv-Jaffa District, Israel Police v. Israeli Internet Society (Mar. 24, 2013), ¶¶ 10–12 (Sohlberg, J., dissenting), *available at* [https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\12\820\037\o07&fileName=12037820\\_o07.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\12\820\037\o07&fileName=12037820_o07.txt&type=4) [Hebrew] (on standing).

<sup>119</sup> *Infra* notes 284, 293–302 and accompanying text.

<sup>120</sup> Gil Bringer, *The Disappointing New Conservatives: Why Conservative Judges are Criticized by the Right*, GLOBES (Sept. 13, 2019), <https://www.globes.co.il/news/article.aspx?did=1001300543> [Hebrew]; Doron Nehemia, *The Ruling that Proves the Supreme Court is Beginning to Undergo Activism Rehab*, THE MARKER (Aug. 13, 2019), <https://www.themarker.com/opinion/.premium-1.7680331> [Hebrew].

<sup>121</sup> While I make no claim with respect to Justice Sohlberg’s personal motivations—and would doubt that he consciously appealed to American Conservatism—it is still very reasonable that there is such a causal connection, for several reasons. First, the explicit comparison drawn by Sohlberg’s colleagues and his own rejoinder clarify that the Justices on the Supreme Court of Israel are familiar with the American debate and find it to be a relevant point of reference for their own circumstances. Second, American jurisprudence has significant influence over Israeli

since its inception clearly immersed in American legal liberalism. Given, however, that the conservative backlash against legal liberalism in the U.S. culminated in alternative interpretive theories,<sup>122</sup> and that such a theory is being developed in Israel, this invites an exploration of the *conceptual* proximity between them. What follows is the argument that both responses share some key features, and, furthermore, that both have not presented themselves, to paraphrase Sohlberg, in a vacuum.<sup>123</sup> Rather, there is an ongoing political project in Israel whereby American conservatism serves as a source of inspiration for the political Right, on various levels. The potential transition in the judiciary which PO signals can be better understood against this backdrop, as one that echoes the transition the American judiciary witnessed over three decades ago. The analogy thus provides a framework in which to examine the state of affairs in the Israeli judiciary and a vocabulary for its evaluation. Moreover, the analogy may help, in light of the above, to predict where the Israeli debate may go from here. Even more than its emergence, the conditions surrounding PO may facilitate its success.

#### A. American Conservatism

Conservatism denotes primarily a political philosophy—prescribing how best to conduct the public life of a community, based on descriptive and normative propositions about the nature of the

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academia, which Sohlberg engages with in lectures and talks and wherefrom his clerks freshly arrive at his chambers each year. Israeli legal education has been modeled after elite U.S. law schools, and the latter are the foremost destination for advanced legal studies for aspiring academics. Lahav, *American Moment[s]*, *supra* note 46; Celia Wasserstein Fassberg, *Comment on Pnina Lahav*, *American Moment[s]*, 10 THEORETICAL INQ. L. F. 58 (2009). Third and relatedly, U.S. law has been increasingly cited in Israeli Supreme Court rulings since the 1980s, now roughly equaling the number of citations of all English commonwealth jurisdictions together (non-common law jurisdictions are seldomly cited). Cohn, *supra* note 20; Yoram Shachar, *The Supreme Court's Space of Reliance, 1950–2004*, 50 HAPRAKLIT 29, 45–52 (2008) [Hebrew]; RUBINSTEIN, *supra* note 24, at 192–215. For concrete examples, see *supra* note 8. Indeed, the growing American influence over Israeli legal education and research has induced calls for caution in importing American theories into Israeli law. Aviram, *supra* note 8; Haim Sandberg, *Cultural Colonialism: The Americanization of Legal Education in Israel*, 14 HAMISHPAT 419, 429–31 (2011) [Hebrew].

<sup>122</sup> *Infra* notes 159–167 and accompanying text.

<sup>123</sup> *Supra* note 106 and accompanying text.

individual, the collective, and the interaction between them. Derived from these general propositions are more specific directives for the organization of political and social institutions. The precise substance of these prescriptions is, however, notoriously difficult to ascertain, as conservatism has been termed “one of the most confusing words in the glossary of political thought,”<sup>124</sup> and an ‘essentially contested concept.’<sup>125</sup> This is due in part to the fact that conservatism is not just a strictly political position, but rather a more comprehensive world-view, encompassing preferences in diverse realms such as the social, the economic and the legal. Persons and groups subscribe to this world-view as a matter of identity. As such, conservatism is liberalism’s only competitor of equal scope and viability in contemporary Global North public life.<sup>126</sup>

As a category of legal analysis, Ernest Young suggests that conservatism should be separated into three distinct branches: situational (a dispositional resistance to change); political (a first-order conception of the good); and institutional (a second-order view about proper organization of societal decision-making).<sup>127</sup> Although useful, this typology is ultimately unsatisfactory, because it neglects to track the historical and analytical connections between these positions. It is precisely its insistence on treating these different conservatisms as part of one project—in spite of the inner tensions that Young

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<sup>124</sup> CLINTON ROSSITER, *CONSERVATISM IN AMERICA* 5 (2d ed. 1962), cited in Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 *IOWA L. REV.* 401, 422 n.116 (1986).

<sup>125</sup> See W. B. Gallic, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC’Y* 167 (1956) (introducing the category ‘essentially contested concept’); Simon J. Evnine, *Essentially Contested Concepts and Semantic Externalism*, 8 *J. PHIL. HIST.* 118 (2014) (applying it to conservatism); Iain MacKenzie, *The Idea of Ideology*, in ROBERT ECCLESHALL ET AL., *POLITICAL IDEOLOGIES: AN INTRODUCTION* 1, 7 (3rd ed. 2003) (same).

<sup>126</sup> Liberalism is also fraught with inner conflicts, but arguably less so. Carl T. Bogus, *Fighting over the Conservative Banner*, in *NOMOS LVI: AMERICAN CONSERVATISM* 336, 337 (Sanford V. Levinson et al. eds., 2016); but cf. Ruth Abbey, *Is Liberalism Now an Essentially Contested Concept?*, 27 *NEW POL. SCI.* 461 (2005) (discussing liberalism as an essentially contested concept).

<sup>127</sup> Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 *COLO. L. REV.* 1139, 1182–203 (2002).



identifies<sup>128</sup>—which makes American conservatism stand out, as an all-encompassing framework that joins personal beliefs, policy preferences, and institutional design into an ideology. Accordingly, the following discussion will be divided along slightly different lines. It begins by describing conservatism as a political ideology, and then delineates how the same underlying values translate into legal doctrine in the interpretive realm.

### 1. As Political Ideology

In American political life, conservatism as it is known today had emerged against the backdrop of the Cold War and reached its heyday during the Reagan administration.<sup>129</sup> In public policy terms, it is a composite of three major strands: social, economic, and national security conservatisms.<sup>130</sup>

*Social conservatism* is grounded chiefly in tradition. Skeptical of human rationality, the traditionalist view rejects abstract ideals such as individual natural rights in favor of an organic conception of social collectivity, which develops in an evolutionary fashion dictated by ancestral wisdom. Such a social order, which derives moral authority from existing tradition, custom, and culture—including social hierarchies—is preferred over a political one manufactured by application of deductive reasoning.<sup>131</sup> For social conservatism, the

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<sup>128</sup> *Id.* at 1203–09.

<sup>129</sup> Andrew J. Perrin et al., *From Coalition to Constraint: Modes of Thought in Contemporary American Conservatism*, 29 SOC. F. 285, 286–87 (2014); Julian E. Zelizer, *Rethinking the History of American Conservatism*, 38 REV. AM. HIST. 367, 368 (2010). See generally NOMOS LVI, *supra* note 126; THE DILEMMAS OF AMERICAN CONSERVATISM (Kenneth L. Deutsch & Ethan Fishman eds., 2010); GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (30th anniversary ed. 2006); JONATHAN M. SCHOENWALD, A TIME FOR CHOOSING: THE RISE OF MODERN AMERICAN CONSERVATISM (2001).

<sup>130</sup> James R. Kurth, *A History of Inherent Contradictions: The Origins and End of American Conservatism*, in NOMOS LVI, *supra* note 126, at 13, 14.

<sup>131</sup> Bruce P. Frohnen, *Law's Culture: Conservatism and the American Constitutional Order*, 27 HARV. J.L. & PUB. POL'Y 459, 461–63 (2004); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 642–59 (1994). The traditionalist strand of conservatism, championed in the U.S. by Russell Kirk and others, and often understood as exhaustive of the conservative frame elsewhere, builds on the thought of English philosopher and

good is predicated on time-honored institutions and dogmas that form a proper basis for public virtue. Social conservatism manifests mainly in cherishing ‘traditional Judeo-Christian values’ as pertaining to social institutions like religion and the family.

*Economic conservatism’s* intellectual infrastructure is very different, couched in libertarian theories of economic laissez-faire and neo-liberalism.<sup>132</sup> The goal is to promote freedom defined as the absence of coercion—therefore favoring both small government and free market. Because coercion necessarily boils down to governmental paternalism,<sup>133</sup> libertarians apply the logic of deregulation to various economic and political settings.<sup>134</sup>

Libertarianism stands in tension with traditionalism, because it assigns primacy to right over virtue, favors negative liberty, and trusts human rationality.<sup>135</sup> The third conservative school of thought, from which *national security conservatism* draws, neoconservatism, strives for reconciliation. One of neoconservatism’s notable articulators, Irving Kristol, identified its core as support for free market economy situated within a narrative of organic collectivity. Minimum bureaucratic intrusion into the individual’s affairs safeguards their liberty, yet the idea that individuals “can ‘create’ their own values and then incorporate them into a satisfying ‘lifestyle’” is met with skepticism.<sup>136</sup> Instead, values are generated by traditional institutions like “religion,

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politician Edmund Burke. See, e.g., YUVAL LEVIN, *THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT* (2013). For a survey of conflicting interpretations of Burke, see NASH, *supra* note 129, at 251–56.

<sup>132</sup> Or ‘classical liberalism,’ as opposed to the welfare liberalism advocated by scholars of legal liberalism. See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014).

<sup>133</sup> FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 11–21 (1960).

<sup>134</sup> NASH, *supra* note 129, at 238–43; Ethan Fishman & Kenneth L. Deutsch, *Introduction*, in *DILEMMAS OF AMERICAN CONSERVATISM*, *supra* note 129, at 1, 2–3; Perrin et al., *supra* note 139, at 291.

<sup>135</sup> These tensions may nonetheless be reconcilable. For instance, by suggesting that virtue can only or best be achieved by participation in the free market. See Zelizer, *supra* note 129, at 372.

<sup>136</sup> Irving Kristol, *What Is ‘Neoconservative’?*, in *THE NEOCONSERVATIVE PERSUASION: SELECTED ESSAYS, 1942–2009* 148, 149 (Gertrude Himmelfarb ed., 2011).

the family, the ‘high culture’ of Western civilization.”<sup>137</sup> Active protection of the latter is a special emphasis of neoconservatism, enshrining the use of force in service of “American ideals.”<sup>138</sup> Neoconservatism highlights strong nationalist sentiments and seeks to cultivate intra-societal cohesion through the dichotomy of friend versus foe, hence supporting militaristic agendas and hawkish formulations of patriotism.

Each of these political stances correlates at bottom with a specific set of philosophical convictions and their intellectual sources, although the nexuses are not seamless.<sup>139</sup> Thus, traditionalists cherish American exceptionalism as a preservation of entrenched values and a prudent continuation of existing practice, inspired by classical virtues of hard work and good character in a communal setting.<sup>140</sup> Local associations and communities flourish in such soil.<sup>141</sup> Libertarians, on the other hand, espouse the Lockean framework of natural rights and construe American sovereignty as aspiring to safeguard the individual against tyranny. This conception of freedom is, however, complemented by an approach to social interaction neighboring the traditionalist one. The proper climate for persons to pursue their own ends is a “spontaneous order,” which arises without top-bottom design but rather via voluntary associations and exchanges, i.e. the invisible hand.<sup>142</sup> Leo Strauss, a major influence on neoconservatism, lamented the absence of objective standards for recognizing and advancing what is naturally good in public life. He thus understood “natural rights” differently from the social contract tradition, as a universal truth about the best way to live, which was espoused by the Founding Fathers but later abandoned in favor of individualism and relativism.<sup>143</sup> The content of this framework is that “nature is essentially hierarchical,” an

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<sup>137</sup> *Id.*

<sup>138</sup> Max Boot, *Neocons*, FOREIGN POL’Y, Jan.–Feb. 2004, at 20, 24 (adding that the question of whether the U.S. should actively and forcefully export its ideals, is a matter of controversy among neoconservatives).

<sup>139</sup> See Bogus, *supra* note 126, at 336; Jonathan O’Neill, *Constitutional Conservatism and American Conservatism*, in NOMOS LVI, *supra* note 126, at 292, 319–20.

<sup>140</sup> Frohnen, *supra* note 131, at 466–69.

<sup>141</sup> *Id.* at 476; see also O’Neill, *supra* note 139, at 305–06.

<sup>142</sup> O’Neill, *supra* note 139, at 308–14; see also A. I. Ogus, *Law and Spontaneous Order: Hayek’s Contribution to Legal Theory*, 16 J.L. & SOC. 393 (1989).

<sup>143</sup> O’Neill, *supra* note 139, at 314–20.

inegalitarianism determined by substantive value properly assigned to people's lives.<sup>144</sup>

While it is unclear how solid the alliance remains in the age of Trump,<sup>145</sup> this is still the general framework in which conservative commitments are navigated and merged into a cohesive whole, as far as possible.<sup>146</sup> The major common theoretical denominators are an organic conception of society across time; emphasis on the concrete circumstances of political collectives, rooted in their time and place; and natural human inequality.<sup>147</sup> These allow all three conservatisms to efficiently coalesce in the political realm, in order to promote shared goal and oppose shared enemies. The latter consists mostly of civil rights struggles. For instance, those directed at liberating vulnerable members of the family, such as women or LGBT children, from the hold of its patriarch. If successful, such struggles push the welfare state into the household, taking over the responsibility for its members' well-being, and severing any necessary ties between a person's heritage and their chosen way of life.<sup>148</sup> Thus, despite the very different philosophical motivations—reliance on ancestral wisdom for

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<sup>144</sup> STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 70–71 (1993).

<sup>145</sup> See, e.g., Austin Bramwell, *What is Principled Conservatism?*, AM. AFF., Spring 2018, <https://americanaffairsjournal.org/2018/02/what-is-principled-conservatism/>; Corey Robin, *Triumph of the Shill: The Political Theory of Trumpism*, 29 N+1 31 (2017), available at <https://nplusonemag.com/issue-29/politics/triumph-of-the-shill>; but cf. Peter Beinart, *The Fear Driving Conservative Support for Kavanaugh*, ATLANTIC (Sept. 27, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/kavanaugh-republicans/571477> (claiming that President Trump signifies no change for conservatism: “Trumpism, at its core, is a rebellion against changes in American society that undermine traditional hierarchies”).

<sup>146</sup> Some are skeptical about this possibility and settle for an “I know it when I see it” approach. See Young, *Judicial Activism*, *supra* note 127, at 1196. In this vein, William F. Buckley suggested asking not “what conservatism is,” but “who a conservative is.” Jonathan Mendilow, *What is Conservatism? Some Signposts in the Wilderness*, 1 J. POL. IDEOLOGIES 221, 225 (1996).

<sup>147</sup> Mendilow, *supra* note 146, at 222–25. See also Kurth, *supra* note 130, at 14–15; NASH, *supra* note 129, at 235–86.

<sup>148</sup> MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 7–24 (2017).

traditionalists, moral Darwinism for libertarians,<sup>149</sup> and a quest for a nationalist common good for neoconservatives—the upshot is common discontent with redistributive schemes and progressive design of public policy heralded by espousing the vantage point of underprivileged groups. Other common causes are “tough” policies on crime and immigration, and deregulation of private ownership of firearms. In the light of the landmark originalist decision in *D.C. v. Heller*,<sup>150</sup> this latter issue epitomizes the conceptual and historical ties between political and judicial conservatism.<sup>151</sup>

The connecting link between politics and adjudication is the relevant law. The U.S. Constitution is central to all conservative strands. It advances and reconciles these visions by securing the rule of law, which guarantees the stability and certainty necessary for free transactions; protecting the boundaries of each person’s possessions and entitlements to create a secure climate for inter-subjective transactional conduct; and promising constraints on institutional planning for the entire political community, by keeping powers separate.<sup>152</sup> The Constitution facilitates a higher moral order that ought to transcend state institutions and keep personal responsibility from being shunned by top-down designs. It additionally provides a document of perpetual relevance to rely upon for guidance. As Justice Scalia asserts, it has an intrinsic “antirevolutionary purpose.”<sup>153</sup> Thus, per American conservatism, decades of progressive policies that aspired for false egalitarianism and a welfare state have distorted the original Constitution produced in the Founding era.<sup>154</sup> The way it ought to be used is rather as a vehicle for containment of change.

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<sup>149</sup> Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 658 (1990).

<sup>150</sup> *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783 (2008).

<sup>151</sup> Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511 (2010); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

<sup>152</sup> O’Neill, *supra* note 139; Greene, *Guns, Originalism, and Cultural Cognition*, *supra* note 151, at 521–22.

<sup>153</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 44 (Amy Gutman ed., 1997).

<sup>154</sup> Frohnen, *supra* note 131, at 471.

## 2. As Judicial Ideology

The most straightforward manner to adjudicate conservatively is to issue decisions whose results would be favorable to political conservatives. In this vein, scholars such as Cass Sunstein and Robin West have argued that juridical camps ultimately divide along lines of political orientation.<sup>155</sup> West concedes that conservative jurists may hold principled jurisprudential views, but they all ultimately reach similar results because their different jurisprudences justify in different ways the same conception of the good: conservatives of all strands assign high value to forms of social and private power that are grounded in communitarian wisdom and preservation of hierarchies.<sup>156</sup> They distrust centralized power so long as it is used for redistribution purposes, in lieu of “a duty to promote, protect, and encourage that form of life reflected in the community’s social structures and preexisting entitlements.”<sup>157</sup> It follows from such views that the best way to gauge judicial conservatism is by outcomes.

Empirical evidence lends support to this approach.<sup>158</sup> In tandem with the formation of modern American conservatism in the political sphere, a judicial one was formed as well. Against the backdrop of legal liberalism, by the 1980s the recognition that constitutional adjudication can hardly be politically neutral reemerged among both conservatives and progressives.<sup>159</sup> But only the former group was in power. The backlash against legal liberalism orchestrated by the Reagan administration placed an unprecedented premium, for

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<sup>155</sup> CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS* 20–23 (2009); West, *supra* note 149, at 648.

<sup>156</sup> West, *supra* note 149, at 643. *See also* Young, *Judicial Activism*, *supra* note 127, at 1187–97 (discussing political as opposed to situational and institutional conservatism).

<sup>157</sup> West, *supra* note 149, at 653.

<sup>158</sup> NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999). *See also* Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671 (2015) (arguing that alongside the left/right ideological continuum, judges’ positions on a legalism/pragmatism continuum are also empirically significant).

<sup>159</sup> West, *supra* note 149; KALMAN, *supra* note 44, at 132–33.

political purposes, first on the judiciary in general, and second on interpretive methodology in particular.<sup>160</sup> The successful campaign to “undo the Warren Court legacy,”<sup>161</sup> which resulted in a “paradigmatic shift” in American legal discourse,<sup>162</sup> was anchored in conservative interpretive methods, newly articulated in response to the liberal ones. Hence, the failed nomination of Judge Robert Bork to the Supreme Court in 1987, instilling the term originalism in the public consciousness, was nonetheless a success.<sup>163</sup> Since that time, the process of judicial appointment to the federal bench, rendered inherently political by the Constitution,<sup>164</sup> has grown increasingly divisive. The interpretive theory judges adhere to is a central manifestation of the split between conservatives and liberals.

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<sup>160</sup> See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659–60 (2009); William P. Marshall, *The Judicial Nominations Wars*, 39 U. RICH. L. REV. 819 (2005); KALMAN, *supra* note 44, at 132. Although perfected by the Reagan administration, President Nixon similarly defined the conservative judges he desired in both doctrine- and policy-oriented terms, as faithful to the Constitution and as providing tools for the strengthening of the “peace forces as against the criminal forces in our society.” Quoted in John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 945 (1973).

<sup>161</sup> Marshall, *supra* note 160, at 821. See also, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 394 (2013); Horwitz, *Bork Nomination*, *supra* note 3, at 1033.

<sup>162</sup> West, *supra* note 149, at 643.

<sup>163</sup> JONATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 168–89 (2007). See also Horwitz, *Bork Nomination*, *supra* note 3, at 1034–37 (stipulating that the controversy surrounding the Bork nomination was about a ‘Newtonian’ as opposed to an evolutionary conception of rights, no less than interpretive methodology. The legitimacy of recognizing new rights hinges on the assertion that they were always in the constitution, hence, although Bork’s nomination was rejected, “originalism and a fundamentalist view of rights triumphed”).

<sup>164</sup> U.S. CONST. art. II, § 2, cl. 2 (stating that federal judges will be appointed by the President with the confirmation of the Senate); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008) (exploring the pros and cons of elective processes to state benches). The politicization of Supreme Court judicial nominations reached a new low in 2018 with the appointment of Justice Kavanaugh. See DEVINS & BAUM, *supra* note 158, at ix–xvii; Jeannie Suk Gersen, *Brett Kavanaugh’s Damaging, Revealing Partisan Bitterness*, NEW YORKER (Sept. 28, 2018), <https://www.newyorker.com/news/daily-comment/brett-kavanaughs-damaging-revealing-partisan-bitterness-supreme-court-confirmation>.

Methodology appears as transcending policy arguments, utilizing neutral language as a basis “for attacking wide swaths of judicial doctrine at once.”<sup>165</sup> Orienting judicial integrity along interpretive methodology lines turns methodological gaps into ideological polarization, lest judges’ rulings be perceived as inconsistent, subjective, and ironically, political.<sup>166</sup> It demands methodological purism of judges on both sides. Yet if originalism and textualism are viewed, like any other judicial method, as mere vessels for effective channeling of discretion behind a veil of objectivity and constraint, then their audience may not be the legal community at all. Indeed, Margaret Lemos claims that laypeople who lack the capacity or the will to look behind the veil, are “the consumers of the shell game.”<sup>167</sup> Under this light, the link between conservatism and interpretive methods is a marriage of convenience. Methodology is chosen in order to rationalize ideology-driven results and internalize them into the legal doctrine.

But adjudication may also realize conservative values intrinsically rather than instrumentally. Three inter-related tenets lie at the crux of conservative jurisprudence in the U.S.: originalism, bright-line rules, and deference.<sup>168</sup> The unifying theme of this threefold framework is majoritarianism,<sup>169</sup> and the goal is primarily to resolve the counter-majoritarian difficulty and limit judicial discretion by requiring an adherence to the value judgments of the representative branches of government.<sup>170</sup>

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<sup>165</sup> Lemos, *supra* note 1, at 898; Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 34 (2011) [hereinafter Whittington, *Conservatism*].

<sup>166</sup> Lemos, *supra* note 1, at 902; Marshall, *supra* note 160, at 826; KALMAN, *supra* note 44, at 132.

<sup>167</sup> Lemos, *supra* note 1, at 889–90. *See also* Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144 (2016) (arguing that Justice Scalia’s contribution to constitutional jurisprudence amounts primarily to an effective articulation of conservative values, without it leading to a substantive transformation in the law or in the Court’s overall jurisprudential dispositions).

<sup>168</sup> Young, *Rediscovering Conservatism*, *supra* note 131, at 625–42.

<sup>169</sup> Young, *Judicial Activism*, *supra* note 127, at 1201.

<sup>170</sup> Charles W. “Rocky” Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64



Originalism, which applies exclusively to constitutional interpretation, was at its origin intentionalism: setting the judge on a historical quest to figure out the original intent of the Framers and restricting interpretive legitimacy to these boundaries.<sup>171</sup> It was tied by its adherents to judicial restraint, as a direct response to legal liberalism. This was also a time when the Right prevailed politically, and hence controlled the non-judicial decision-making mechanisms deferred to.<sup>172</sup> Today, originalism is a family of theories united by two core principles: that the meaning of the Constitution is fixed; and that the interpreter is constrained by it.<sup>173</sup> The most notable variation substitutes original intent with original public meaning. The interpretive endeavor is still ideally an empirical-historical one, only now the fact it tracks is meaning rather than intent.<sup>174</sup> The focus shifts to the potential understanding of the governed, whose consent legitimized political authority, at the historical moment in which this consent materialized.

In any variation, originalism is a conservative method of interpretation, because political settlements of past generations are given binding normative force.<sup>175</sup> Predicating legitimate authority on popular consent is a liberal principle, placing the judicial focus on the ordinary citizen entering the social contract instead of the expert

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RUTGERS L. REV. 1, 4 (2011); KALMAN, *supra* note 44, at 136; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989).

<sup>171</sup> See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986).

<sup>172</sup> See Lemos, *supra* note 1, at 865–69; Whittington, *Originalism*, *supra* note 161, at 391–93; Whittington, *Conservatism*, *supra* note 165, at 29.

<sup>173</sup> Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 6–9 (2015); Whittington, *Originalism*, *supra* note 161, at 377 (original meaning is “discoverable” and ought to be “authoritative”).

<sup>174</sup> E.g., RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 47–57, 133–34 (2018); Barnett, *Interpretation*, *supra* note 111, at 66 (“It cannot be overstressed that the activity of determining semantic meaning at the time of enactment required by the first proposition [the fixation thesis] is empirical, not normative”).

<sup>175</sup> O’Neill, *supra* note 139, at 302, 321–23; Whittington, *Conservatism*, *supra* note 165, at 38.

authority, and hence public meaning rather than intent.<sup>176</sup> Nonetheless, this formalization of democracy is sharply at odds with legal liberalism. For legal liberalism attunes this same principle to evolving social realities. It does not rely on a contractarian view of democracy that is devoid of substance and that remains transfixed by the settlements of past generations.<sup>177</sup> Legal liberalism strives to rule by the will of the governed while still advancing the value of progress, holding on to a belief in inalienable natural rights, and refusing to reduce ought to is.<sup>178</sup> For liberals, the normative force of consent is a rational construction; for conservatives, it is a historical fact. The Founding Fathers were committed both to the idea of progress and to the idea of tradition, and sought to implement both in the Constitution.<sup>179</sup> But these two

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<sup>176</sup> O'Neill, *supra* note 139, at 296–98; Greene, *Selling Originalism*, *supra* note 160; O'NEILL, *supra* note 163, at 3–4; Sean B. Cunningham, *Is Originalism "Political"?*, 1 TEX. REV. L. & POL. 149, 150 (1997). Some conservatives would put majoritarianism and absolute truths on one side, liberalism and consent on the other—and they may claim Locke should be situated in the first category. Thus, conservative intellectual Willmoore Kendall insisted that interpretation of the American ethos should rely on public orthodoxy rather than natural rights, the former filtered by the constitutional structure of government. Daniel McCarthy, *Willmoore Kendall, Man of the People*, in DILEMMAS OF AMERICAN CONSERVATISM, *supra* note 129, at 175, 175–76. Kendall offers a middle path between traditionalism and libertarianism, by understanding the individualist Locke as an advocate of majority rule; resisting the aristocratic tendencies of traditionalists like Kirk; grounding social truths on the American democratic tradition of the Founding Fathers, which generates virtuous representatives with “moral expertise;” and situating this framework as the opposite of “the revolutionary attempt by liberals to transform the country into an open society.” *Id.* at 179–84; *see also* Elfenbein, *supra* note 124, at 416; NASH, *supra* note 129, at 552.

<sup>177</sup> *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 630–31, 639, 656–60 (2008); KALMAN, *supra* note 44, at 135. For an attempt to reconcile originalism with a substantive commitment to a certain conception of liberty, *see* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

<sup>178</sup> Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM / LEFT CRITIQUE 178, 184–88 (Wendy Brown & Janet Halley eds., 2002); Ronald Dworkin, *The Moral Reading and the Majoritarian Premise*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 81 (Harold Hongju Koh & Ronald C. Slye eds., 1999); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 56 (1995); Elfenbein, *supra* note 124.

<sup>179</sup> Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L. REV. 3, 17–21 (2001) (on progress); J. Richard Broughton, *The Jurisprudence*

values place tensions on each other. Rationalization of history disorders and destabilizes, demanding radical changes that defy tradition.<sup>180</sup> Originalism chooses tradition over progress, by focusing exclusively on the social contract's forefather-reverential "preservation clause" rather than its intergenerational "innovation clause."<sup>181</sup> Favoring will over reason, originalism expresses "a model of history divorced from the idea of progress."<sup>182</sup>

There are analytical as well as historical ties between liberalism, progress, and secularization (all value reform), versus conservatism, dogma, and religion (all value orthodoxy). As Morton Horwitz explains, "constitutional law is the successor to religion and religious categories in an increasingly secularized society. Originalism in constitutional doctrine shares the same psychological yearning for certainty that religious fundamentalism does."<sup>183</sup> Just as conservatism as a political ideology aims to restore something of value that has been lost, namely conservatives are victims of progress,<sup>184</sup> so does originalism resist change in constitutional meaning: "Originalists are busy at restoring the ideal by narrowing the perceived gap between the ideal and the real."<sup>185</sup>

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*of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 31 (2000) (on tradition).

<sup>180</sup> David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1038–40 (1991).

<sup>181</sup> *Id.* at 1055. See also David Fontana, *Comparative Originalism*, 88 TEX. L. REV. SEE ALSO 189, 196 (2010) (finding that originalist theories tend to present themselves in countries that have "revolutionary" rather than "reorganizational" constitutions, the former "more focused on the founding moment").

<sup>182</sup> David Aram Kaiser, *Putting Progress Back into Progressive: Reclaiming a Philosophy of History for the Constitution*, 6 WASH. U. JURIS. REV. 257, 259 (2014).

<sup>183</sup> Horwitz, *Bork Nomination*, *supra* note 3, at 1033. See also MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* (2019) (exploring more recent manifestations of same idea); Mark Tushnet, *Conservative Constitutional Theory*, 59 TUL. L. REV. 910, 911 (1985) (differentiating "anticonstitutional majoritarianism" and "nostalgic originalism" from "conservative versions of liberal theories").

<sup>184</sup> COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN* 58–59 (2011) ("conservatism [is] not the Party of Order, as Mill and others have claimed, but the party of the loser").

<sup>185</sup> Adam Shinar, *Idealism and Realism in Israeli Constitutional Law*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM

Hence, an originalist method may yield outcomes associated with liberalism/progressivism as a policy matter (for example, freedom from religion), and an evolutionary method may similarly produce conservative outcomes.<sup>186</sup> Nevertheless, an evolutionary method of the legal liberalism mold cannot be intrinsically conservative. For it views the ontological status of legal meaning as always already dependent on a rational, teleological dialogue between interpreter and text.<sup>187</sup> Conversely, an originalist method cannot be intrinsically liberal, as it believes meaning to be independent of this hermeneutic dialogue.<sup>188</sup>

Originalism enables subjection of present generations to the preferences of past ones. It thereby construes society as an entity superior to the individuals comprising it,<sup>189</sup> and translates stagnation and dogma into interpretive doctrine. This facilitates a reconciliation of institutional preferences for majoritarianism with ideological positions favoring conservative values. These values can be of a more abstract nature, like order, prudence, moderation, and harmony; and more concrete, like social hierarchy (most social groups had no franchise when ratification took place), tradition (legal structures are revered just by virtue of being generated by the forefathers' will), and responsibility (don't like it? change it!). Consider the value of security. While a basic human desire and an aspiration of most political

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257, 260 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2017); *see also* Siegel, *supra* note 151, at 216–25.

<sup>186</sup> Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1268–70 (2019); Yvonne Tew, *Stealth Theocracy*, 58 VA. J. INT'L L. 31 (2018).

<sup>187</sup> *See* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).

<sup>188</sup> Solum, *Fixation*, *supra* note 173, at 20–21; Whittington, *Originalism*, *supra* note 161, at 407; Barnett, *Interpretation*, *supra* note 111, at 65; Samaha, *Dead Hand*, *supra* note 177, at 639.

<sup>189</sup> It is thus unsurprising that Justice Scalia saw the structure of government rather than the Bill of Rights as the greatest achievement of the American Constitution, confident that the tyranny of the majority is thus sufficiently curtailed and freedom guaranteed. *Ruth Bader Ginsberg & Antonin Scalia*, KALB REPORT, Apr. 17, 2014, *available at* [https://www.youtube.com/watch?v=z0utJAu\\_iG4](https://www.youtube.com/watch?v=z0utJAu_iG4); note that Justice Ginsburg is inclined to go the other way and give precedence to the Bill of Rights as the central constitutional pillar of American freedom. *Id.*

schemes,<sup>190</sup> security is held in particularly high regard by all conservatives, translating into both social values like safety,<sup>191</sup> and legal ones like certainty and stability. Jurisprudential conservatism advances all. Originalism ensures that reform is undertaken only “piecemeal and with caution,” substituting ideology with the “normative force of history” (stability).<sup>192</sup> Deference overlooks infringements on rights, allowing the government to promote national security (safety). Bright-line rules reject the premium living constitutionalists put on political morality, instead facilitating the narrower originalist prism that is content with knowing what to look for (certainty).<sup>193</sup>

Indeed, originalism is only one part of a larger adjudicative project. Both judicial and academic originalists see it as a special case of textualism,<sup>194</sup> a helpful framing for understanding how interpretation ties in to the other basic tenets of conservative jurisprudence, formalism, and deference. The “whole purpose” of a Constitution, in Justice Scalia’s mind, is to prevent change.<sup>195</sup> Scalia insisted that not only the Constitution, but also “statutes do not change.”<sup>196</sup> The twin originalist convictions, that the meaning of the law is fixed and that the judge is constrained by it, are true for statutory interpretation too.<sup>197</sup>

This framing invites the question of whether statutory textualism should also be considered a conservative theory. For the purposes of this Article, it is not necessary to provide a definitive answer to this question.<sup>198</sup> But it is necessary to address the most significant variation between constitutional and statutory variations of

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<sup>190</sup> See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 98–102 (2010) (describing the conceptualization of liberty as security in Left-leaning movements).

<sup>191</sup> Frohnen, *supra* note 131, at 474.

<sup>192</sup> *Id.* at 478–81. See also André LeDuc, *Originalism’s Claims and Their Implications*, 70 ARK. L. REV. 1007, 1074–86 (2018).

<sup>193</sup> Scalia, *Common-Law*, *supra* note 153, at 45.

<sup>194</sup> Whittington, *Originalism*, *supra* note 161, at 390; Scalia, *Common-Law*, *supra* note 153, at 37.

<sup>195</sup> Scalia, *Common-Law*, *supra* note 153, at 40.

<sup>196</sup> *Id.*

<sup>197</sup> SCALIA & GARNER, *supra* note 1, at 78–92.

<sup>198</sup> For such a discussion, see Lemos, *supra* note 1.

textualism, and that is the status of legislative history<sup>199</sup>—a central component of PO. This interpretive device has some place in any version of a purposive approach, favored by liberals. Textualists generally reject its use, yet they do embrace it in originalist constitutional interpretation, rendering them “semanticists in statutory cases, but historicists in constitutional cases.”<sup>200</sup> For even in its original-meaning rather than original-intent phase, originalism heavily relies on deliberation history to ascertain binding meaning,<sup>201</sup> as well as on other sources external to the text, read by the judge for the purpose of understanding fixed meanings at fixed times.<sup>202</sup> This constitutes a “conservative bias,”<sup>203</sup> warranting an application not only of a centuries-old moral vision, but one that took for granted the exclusion of most groups in society from the political body.<sup>204</sup> Fixed meaning is complemented by fixed political identity. Statutory textualism, on the other hand, denies the relevance of legislative history altogether,<sup>205</sup> and uses instead various canons and presumptions.<sup>206</sup>

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<sup>199</sup> On top of some conventional differences that apply more or less across the board. See ESKRIDGE & FERRELL, *supra* note 190, at 292.

<sup>200</sup> William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998) [hereinafter Eskridge, *Legislative History*]; see also Ralf Poscher, *Hermeneutics, Jurisprudence and Law*, in THE ROUTLEDGE COMPANION TO HERMENEUTICS 451, 452–54 (Jeff Malpas & Hans-Helmuth Gander eds., 2015). The more recent semanticist turn in constitutional interpretation is yet to cross the lines from academia to judicial application. Solum, *Originalism*, *supra* note 186, at 1250–62.

<sup>201</sup> Lemos, *supra* note 1, at 893–94; Eskridge, *Legislative History*, *supra* note 200, at 1301; Scalia, *Common-Law*, *supra* note 153, at 38; Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

<sup>202</sup> Post-enactment material can be considered too, in order to discern original understanding—the purpose is empirical, not normative. See Heller, 128 S. Ct. 2783, 2805 (Scalia, J.).

<sup>203</sup> Eskridge, *Legislative History*, *supra* note 200, at 1317.

<sup>204</sup> See Annaleigh E. Curtis, *Why Originalism Needs Critical Theory: Democracy, Language, and Social Power*, 38 HARV. J.L. & GENDER 437 (2015).

<sup>205</sup> Scalia, *Common-Law*, *supra* note 153, at 29; SCALIA & GARNER, *supra* note 1, at 369–90.

<sup>206</sup> SCALIA & GARNER, *supra* note 1 (listing, aside from “fundamental values,” semantic canons; syntactic canons; contextual canons; expected-meaning canons; government-structuring canons; private-right canons; and stabilizing canons). In practice, nearly all judges do consider legislative history to some extent, although liberal ones more so. Abbe R. Gluck & Richard A. Posner, *Statutory*

There is a tension here with respect to conservative principles.<sup>207</sup> On the one hand, the legislature is deemed an institution more closely attached than the judiciary to ordinary people, as its members are elected by the popular sovereign. The legislature more accurately reflects “the actual practices of society,” as Scalia put it.<sup>208</sup> This assertion is both deferential and formalist. It is an efficient way to produce clear and categorical rules, consistent with the rule of law which is “about form [ . . . formalism] is what makes a government a government of laws and not of men.”<sup>209</sup> At the same time, the conservative reverence for social hierarchies and concern for stability fosters suspicion toward legislatures. Legislation is a process of communal plan-making for the future, carrying high potential for disruption of order and flattening of natural differences.<sup>210</sup> Adjudicative law as such is a conservative project, substantively and procedurally. The morality absorbed in the judicial process is “almost invariably conventional and traditional, rather than aspirational or utopian,” as West explains, because it is “profoundly elitist, hierarchic, and nonparticipatory [ . . . ] the *antithesis* of participatory democratic politics.”<sup>211</sup> Indeed, from Blackstone through Hayek to contemporary policy-makers in developing countries,<sup>212</sup> common law adjudication

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*Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008).

<sup>207</sup> Young describes this tension as one between the situational (anti-revolutionary) and the institutional (anti-administrative state) aspects of conservatism. Young, *Judicial Activism*, *supra* note 127, at 1197.

<sup>208</sup> Scalia, *Rule of Law*, *supra* note 170, at 1184; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 854, 862 (1989).

<sup>209</sup> Scalia, *Common-Law*, *supra* note 153, at 25. *See also* Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005); Young, *Rediscovering Conservatism*, *supra* note 131, at 706–08; Scalia, *Rule of Law*, *supra* note 170, at 1178, 1184.

<sup>210</sup> *See* John Ferejohn, *Legislation, Planning, and Deliberation*, in COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 95, 100–04 (Hélène Landemore & Jon Elster eds., 2012).

<sup>211</sup> West, *supra* note 149, at 715 (emphasis in original); *see also* Broughton, *supra* note 179, at 25.

<sup>212</sup> Jeremy Waldron, *Legislation and the Rule of Law*, 1 LEGISPRUDENCE 91 (2015).

has been construed as a steady force of pre-existing tradition; an incremental evolution of order that responds to social reality from within rather than pre-planned by political authorities; and an articulation of the values of the local community, allowing its members to communicate and transact freely. The textualist utilization of common law maxims expresses such inclinations. Filtering adjudicative settlements through conventional canons accommodates the moderation-inducing features of common law. So, ultimately, it might be the case that the conservatism of textualism is simply the conservatism inherent in any common law system.<sup>213</sup>

## B. Israeli-American Conservatism

### 1. As Judicial Ideology

How does Purposive Originalism relate to American Conservatism? To begin connecting the dots, a brief recap of the central tenets of PO. It assigns legislative history conclusive weight in discerning a statute's purpose, because it is the most reliable source to point at the original intent of the legislature. Meaning is therefore considered to be fixed. An inter-related implication is that the nature of the judicial task is an empirical-historical one. Accordingly, the bar for considerations of social change following enactment is raised significantly, and overarching values lose their status as guidelines for interpretation. Continuums and balances are replaced by binary, conclusion-generating formulae, that preserve the basic constitutional order while sharpening the contours of each stage in the interpretation process. This account should ring a bell, for its basic principles are variations on originalism, bright-line rules and deference.

*Originalism*: there are both continuities and discontinuities between PO and American originalism. The former endorses the two basic tenets of the latter—that meaning is fixed, and that it constrains the interpreter.<sup>214</sup> However, it takes a different form than the American

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<sup>213</sup> Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990). *But cf.* Luban, *supra* note 180 (emphasizing the rationality of the common law as a historical rather than a historicist enterprise).

<sup>214</sup> Although PO is less stringent than American textualism, as a narrow window for temporal change is preserved (*supra* notes 102–107 and accompanying



prototype, in two major ways. First, it applies originalist methodology to statutory rather than constitutional material (thus far). Second, it is closer to intentionalism, a strand that had ushered the conservative backlash in the U.S. but has since fallen out of fashion.<sup>215</sup> Both aspects make good sense, from the perspective of conservative values, when applied to Israeli law. Statutory history is ostensibly a liberal element in the American context, as conservatives accord heavy weight to historical background only in constitutional interpretation. But the real difference is the objective of the interpretive process, whether an ‘original’ (empirical) or an ‘evolving’ (normative) kind of thing.<sup>216</sup>

Consider Scalia’s reasons for rejecting legislative intent: it is alien to traditional judicial practice;<sup>217</sup> it is dubious that any detailed and cohesive intent can be genuinely assigned to a body such as Congress;<sup>218</sup> it encourages legislators to manipulate interpretation by inserting discarded purposes into legislative protocols;<sup>219</sup> and, most importantly, “under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue

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text). A possible explanation for this gap may be that in the Jewish tradition, meaning is dynamic and religious texts constantly reinterpreted—so much so that the Talmud rather than the Bible is the central text for religious practice. By contrast, Protestantism views the biblical text, and by analogy the Constitution, as the beginning and end of all inquiry.

<sup>215</sup> Even though intentionalism “has never entirely disappeared.” Solum, *Originalism*, *supra* note 186, at 1251; *see also* Whittington, *Originalism*, *supra* note 161, at 382.

<sup>216</sup> Whittington, *Originalism*, *supra* note 161, at 389; Scalia, *Common-Law*, *supra* note 153, at 16. An alternative taxonomy, offered by Israeli scholars Shahar Lifshitz and Elad Finkelstein, suggests assessing interpretive theories according to three axes: how independent the text is from its author’s intent; whether the method of inquiry is linguistic or purposivist; and the division of labor between author and interpreter. Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 526–43 (2017). In these terms, PO can be characterized as an authorial-linguistic approach; PI a textual-purposivist one; and American originalism a textual-linguistic one. *See Id.* at 538–41.

<sup>217</sup> Scalia, *Common-Law*, *supra* note 153, at 29–30.

<sup>218</sup> *Id.* at 31–32. *See also* John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911 (2015); Kenneth A. Shepsle, *Congress is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992). I do not dwell on this point in comparing PI and PO because Barak and Sohlberg agree that legislative will exists and that it deserves some degree of consideration.

<sup>219</sup> Scalia, *Common-Law*, *supra* note 153, at 34–36.

their own objectives and desires.”<sup>220</sup> The counter-majoritarian difficulty is the fiercest common enemy of both Justice Sohlberg and American conservatism, wary of interpreting the law to mean “what it ought to mean.”<sup>221</sup> Scalia’s weapon of choice was canons, coupled with historical material in constitutional cases; Sohlberg’s is legislative history.

This choice is better suited for furthering a conservative jurisprudence in the Israeli context, as is choosing intent over public meaning, because the boundary between the constitutional and the statutory text is much blurrier. PO is on board with PI in treating statutory and constitutional texts as consecutive points on the same axis, as well as understanding subjective purpose to denote the legislature’s articulated goals rather than hidden thoughts.<sup>222</sup> This inquiry thus requires no foray into extra-legislative sources, setting PO apart from currently prevailing originalist theories which look for Constitutional communicative content fixed to the time of its utterance.<sup>223</sup> PO’s elevation of legislative history is not only due to the Basic Laws’ recency, vague normative status prior to 1995, and a matter of continuous contestation.<sup>224</sup> It is also due to the fact that these laws are enacted in the regular course of parliamentary work: in the same physical institution; by the same people, even if acting under two distinct hats,<sup>225</sup> and with the same procedure as regular statutes, including passing with no more than a simple majority—and the same goes for the amendment of most Basic Laws provisions. Israeli

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<sup>220</sup> *Id.* at 17–18. See also Scalia, *Originalism*, *supra* note 208, at 863.

<sup>221</sup> Scalia, *Common-Law*, *supra* note 153, at 22; text accompanying *supra* note 110.

<sup>222</sup> Gini II, *supra* note 62, ¶ 11 (Sohlberg, J., dissenting). Cf. Scalia, *Common-Law*, *supra* note 153, at 16–17 (“We look for a sort of ‘objectified’ intent”), to which Barak replies: “New textualism correctly points out that the legislature enacted the statute and not the intent. However, that does not mean that we cannot take the intent into consideration, in order to understand the statute.” BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 280.

<sup>223</sup> Solum, *Fixation*, *supra* note 173, at 6–9.

<sup>224</sup> *Supra* notes 13–19 and accompanying text.

<sup>225</sup> On the ‘two hats’ theory, adopted by Barak, see Mautner, *Protection of Liberal Rights*, *supra* note 14, at 127–29, 134–36; Claude Klein, *Basic Laws, Constituent Power and Judicial Review of Statutes in Israel: Bank Hamizrahi United v. Kfar Chitufi Migdal and Others*, 2 EUR. PUB. L. 225, 230–33 (1996).

constitutional law did not constitute the legal order from scratch, but was added atop, or rather shoved beneath, a pre-existing one. Pursuant to these factors and most importantly, the conservative view in Israel is to downplay rather than elevate the cultural and legal stature of the Basic Laws.<sup>226</sup>

Under these circumstances, Sohlberg's reliance on legislative will best addresses the counter-majoritarian difficulty to conservative satisfaction. Scalia's trade-off between the clarity the constitutional text lacks and the consensus it enjoys, would not work; in Israel, there is usually no difference in clarity of original meaning, and consensus favors legislation. Nor would strict reliance on canons work, because Barak's schema already incorporates them and maximizes their potential for judicial liberation.<sup>227</sup> Similarly to the beginning of American originalism, the only antidote perceived as strong enough against a powerful teleology is the will of the lawmaker, ensuring judicial objectivity, textual clarity, and public consensus, which reflect the actual practices of society.<sup>228</sup> Justice Breyer contrasts originalism with his own approach that is "concerned with the conditions of life."<sup>229</sup> The question is whose life. Whereas Barak treated the author

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<sup>226</sup> One manifestation of this downplay is the high frequency of amendments to the Basic Laws, most of which are not entrenched. Thus, the right-wing majority twentieth Knesset, which was in place in the years 2015–2019, amended the Basic Laws 13 times. KNESSET LEGAL CHAMBERS, LEGISLATION IN THE TWENTIETH KNESSET 19 (2019), available at <https://main.knesset.gov.il/Activity/Legislation/documents/Kn20Legislation.pdf> [Hebrew].

<sup>227</sup> Cf. Scalia's "profoundly liberating" use of canons. Lemos, *supra* note 1, at 899.

<sup>228</sup> *Supra* note 208 and accompanying text.

<sup>229</sup> The Annenberg Foundation Trust at Sunnylands, *A Conversation on the Constitution: Judicial Interpretation*, YOUTUBE (Apr. 20, 2014), <https://www.youtube.com/watch?v=VGKgJdW55nc>.

as dead<sup>230</sup> and the constitution as living,<sup>231</sup> Sohlberg takes steps toward resurrecting the author and killing the constitution.<sup>232</sup>

Yet not all conditions of life are created equal.<sup>233</sup> One way to explain PO's resonance chiefly in state and religion cases is as a latent contestation over the human rights Basic Laws' normative supremacy. The pieces of legislation Sohlberg defended reflect what is known as 'the status quo:' the compromise reached between the Zionist leadership and the ultra-Orthodox one toward the establishment of Israel, facilitating mutual cooperation. 'The status quo' balances competing approaches to Judaism in the public sphere, providing exclusive jurisdiction to religious courts over marriage and divorce proceedings; recognizing the Jewish Sabbath as the official day of rest; promising public institutions will provide Kosher food; and ensuring autonomous educational systems to ultra-orthodox communities.<sup>234</sup>

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<sup>230</sup> Roland Barthes, *The Death of the Author*, in IMAGE – MUSIC – TEXT 142 (Stephen Heath trans., 1977). Note that Barak does not support the death of the author overtly: "Formal democracy does not require absolute severance of the statute from its author. Such severance is not only impossible, in light of the organic relationship between legislature and statute—it is also undesirable." BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 281. It is thus his critics who level that accusation against him, for alongside this argument from "formal democracy," he also offers an argument from "substantive democracy," according to which the system's fundamental values must come into interpretive consideration as well. *Id.* at 281–82. Per PO, the latter undermines the former.

<sup>231</sup> *Supra* text accompanying note 43.

<sup>232</sup> Criticism of originalism is often formulated by reference to the control of prior generations' "dead hand" over contemporary society. Samaha, *Dead Hand*, *supra* note 177.

<sup>233</sup> Justice Sohlberg applied PI in a case he defined as "easy," citing Gini as a counter-example, where he found no tension between the objective and the subjective purposes and no deeply held public values on the line. CA 10159/16 Yoav Regional Council v. Kiryat Gat Municipality (June 20, 2019), ¶ 27 (Sohlberg, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\590\101\o14&fileName=16101590.O14&type=4> [Hebrew].

<sup>234</sup> See Daphne Barak-Erez, *Law and Religion under the Status Quo Model: Between Compromises and Constant Change*, 30 CARDOZO L. REV. 2495 (2009); PATRICIA J. WOODS, JUDICIAL POWER AND NATIONAL POLITICS: COURTS AND GENDER IN THE RELIGIOUS-SECULAR CONFLICTS IN ISRAEL 36 (2008); Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. REV. 239, 250 (2007). In both Gini and Association of Merchants, Justice Sohlberg sided with the religious institutions'

Some scholars argue that the “status quo letter” sent from the states’ leaders to the religious ones, containing these details, is “a founding fathers agreement.”<sup>235</sup> PO similarly seems to view the legal regimes grounded in this arrangement as a “small ‘c’ constitution,”<sup>236</sup> not without reason. It does not enjoy lesser public consensus than the human rights Basic Laws and it played an actual role in Israeli nation-building—it is *more original*, as a genuine chronological *origin*—despite not having any formal normative status, let alone superiority.<sup>237</sup> Instead of using principles enshrined in the Basic Laws as interpretive devices, Sohlberg uses those of ‘the status quo’ agreement, at least when deciding cases involving the “Jewish and democratic” character of the state.<sup>238</sup> As the statutes considered in PO cases also preceded the Basic Laws chronologically, PO thereby challenges the role of the savings clause precluding retroactive review. Currently, Israeli judges try, as Rivka Weill explains, “to minimize its anachronistic effects on society [ . . . the savings clause is] treated as a problematic, undesired, but necessary compromise tool.”<sup>239</sup> But PO resembles the treatment of such clauses in countries “that glorify the past,” since it treats protected laws “as a benchmark for interpreting the constitution” rather than the

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interests, and so it is worth mentioning that Justice Sohlberg is religiously observant, as are the other Justices on the panels who reached the same results, although disputing Sohlberg’s reasonings (Rubinstein in Gini and Hendel in Association of Merchants). There is a high correlation between religious identity and rulings on religious liberty issues in the Supreme Court of Israel. This is in contrast to all other political issues, where personal identity has very low bearing on judicial outcomes relative to the Supreme Courts of the United States, Canada, India, and the Philippines. Keren Weinshall et al., *Ideological Influences on Governance and Regulation: The Comparative Case of Supreme Courts*, 12 REG. & GOVERNANCE 334 (2018).

<sup>235</sup> SHETREET & HOMOLKA, *supra* note 11, at 342.

<sup>236</sup> ESKRIDGE & FERREJOHN, *supra* note 190; William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

<sup>237</sup> If this is true, it suggests an interesting rhetoric reversal of Fontana’s argument that originalism goes hand in hand with “revolutionary” rather than “reorganizational” constitutions. *Supra* note 181. For ‘the status quo,’ despite its name, is construed as a revolutionary moment, whereas the Constitutional Revolution, despite its name, is construed as a reorganizational one.

<sup>238</sup> For a normative proposal in this spirit, see SHETREET & HOMOLKA, *supra* note 11, at 343. See also Hanna Lerner, *Entrenching the Status-Quo: Religion and State in Israel’s Constitutional Proposals*, 16 CONSTELLATIONS 445 (2009).

<sup>239</sup> Weill, *Bills of Rights*, *supra* note 17, at 329–30.

other way around.<sup>240</sup> Yet it would be a mistake to think of the ‘the status quo’ as fixed in time. In fact, it is no less a dynamic framework than the Basic Laws, and the compromises it enshrines are in constant legal flux.<sup>241</sup> In practice, the idealization of the status quo via the savings clause is therefore an active, socially sensitive judicial pursuit—just like originalist interpretations of the U.S. Constitution.<sup>242</sup>

*Bright-Line Rules*: that “liberty finds no refuge in a jurisprudence of doubt”<sup>243</sup> means that to honor the law is to promote stability, predictability, and certainty. This quote originally referred to the conservative principle of stare decisis, yet the same holds true for the scope and specificity of the norms produced by stable, continuous adjudication. A strictly rule-bound decision-making stabilizes not only because standards open a space for ambiguity and hence indeterminacy and contestation, but also by obstructing fundamental challenges from receiving serious consideration: “Rules force the future into the categories of the past.”<sup>244</sup> Moreover, formalist stability may disable reactionary jurisprudential movements from overstating their case in the form of a conservative counter-revolution.<sup>245</sup> On top of that, in PO’s case, it may account for the way the chronological aspect of ultimate purpose construction is accommodated: social evolution needs to have reached a conclusive stage, such that no further public turmoil is expected. Both the social and the legal status quos deserve reverence.

Indeed, Sohlberg explicitly endorses formalism, as did Scalia,<sup>246</sup> and claims it is currently lacking. “Now is the time for a moderate return to a more formal law,” per Sohlberg, because “formalism is necessary for jurists to navigate the labyrinth of the law [ . . . ] to walk safely, step by step. [ . . . ] purposive interpretation can sometimes leave

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<sup>240</sup> *Id.* at 330.

<sup>241</sup> *Infra* note 411.

<sup>242</sup> *See, e.g.*, Siegel, *supra* note 151.

<sup>243</sup> *Planned Parenthood v. Casey*, 505 U.S. 834, 844 (1991).

<sup>244</sup> Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 542 (1988).

<sup>245</sup> *See* Young, *Judicial Activism*, *supra* note 127, at 1186.

<sup>246</sup> Scalia, *Rule of Law*, *supra* note 170.

a space of vagueness, and its result is uncertainty.”<sup>247</sup> And he kept true to his word in designing PO in practice. PI is very inclusive with respect to interpretive devices, offering a method of balancing and synthesizing them into an ultimate purpose: legislative history, plain meaning analysis, fundamental values, the legislature’s intent, canons of construction—all are welcome.<sup>248</sup> Substituting this reliance on judicial discretion and open-ended standards with a rule-and-exceptions model,<sup>249</sup> and the Barakian normative framework with an empirical one,<sup>250</sup> bright-line rules lead PO to clear and predictable resolutions to interpretive disputes.

*Deference*: “The key word,” writes Justice Sohlberg in *Association of Merchants*, is “balance.”<sup>251</sup> That is true for Barak as well, but for him balance denotes expert judges weighing legally protected rights and interests. For Sohlberg, by contrast, balance stands for democratic representatives reaching political compromises, which judges respect and validate. In said case, Sohlberg accepted the exclusion of entertainment venues from the prohibition to operate on the Sabbath, but not supermarkets, because this differentiation was a politically convenient status quo.<sup>252</sup> The realization that legislative process is driven by political compromise led Scalia to deem legislative history

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<sup>247</sup> Noam Sohlberg, *Keep the Law and Do Justice*, 8 DIN UDVARIM 13, 18–19 (2014) [Hebrew]; see also CA 8146/13 Jusha v. Aldajani Hospital (in liquidation) (July 21, 2016), [available at https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\13\460\081\g11&fileName=13081460\\_g11.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\13\460\081\g11&fileName=13081460_g11.txt&type=4) [Hebrew]. In this case, the majority ruled that a hospital owes a duty of care to the doctors who work in it, to ensure they have a professional liability insurance, explicitly drawing on American legal realism. *Id.* ¶ 2 (Hendel, J., concurring). Justice Sohlberg dissented, exhibiting another kind of formalism by objecting to the blurring of traditional boundaries between different legal doctrines (contracts and torts).

<sup>248</sup> For a critical assessment of such inclinations, see Adam M. Samaha, *Looking over a Crowd—Do More Interpretive Sources Mean More Discretion?*, 92 N.Y.U. L. REV. 554 (2017).

<sup>249</sup> *Supra* notes 102–112 and accompanying text; see also Sohlberg, *On Subjective Values*, *supra* note 63, at 42.

<sup>250</sup> *Supra* note 93 and accompanying text.

<sup>251</sup> *Association of Merchants*, *supra* note 71, ¶ 33 (Sohlberg, J., dissenting) (emphasis removed).

<sup>252</sup> *Id.* ¶¶ 28–33 (Sohlberg, J., dissenting). See also *supra* note 241, *infra* note 411 and accompanying texts.

impermissible, since judges are bound only by the purpose as and when it was given textual form.<sup>253</sup> The very same reason and same vision of judge-legislator division of labor leads Sohlberg to invite legislative history in: the text is the end product, of both the legislative and the interpretive processes.<sup>254</sup> Ending the empirical quest at the moment of enactment sets Sohlberg apart from liberals in both jurisdictions who view meaning as dynamic and evolving. It purports to express ultimate respect for the democratic representatives of the people. Sohlberg believes, like Scalia did regarding constitutional cases, that considering historical material only strengthens these commitments.

Deference asks not what the meaning of a term is, but who gets to decide.<sup>255</sup> Deference cements PO's majoritarian view of democracy, in line with American conservatism. It does so by predicating political legitimacy on past generations' consent and by putting hurdles in the way of non-legislative social progress, in a *prima facie* objective and neutral manner.

Finally, deference may also contribute to understanding which are the cases that require PO's treatment most acutely: those that deal with issues voters care deeply about, to the extent that they may play a role in their voting deliberations. Hence, they demand of the judge stringent adherence to representatives' value judgments and rigorous engagement with original legislative intents.

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<sup>253</sup> See John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33 (2006).

<sup>254</sup> *Supra* notes 84–107 and accompanying text. The only case to date in which Sohlberg struck down a statute was due to a faulty legislative process: it was enacted in such a haste that MKs had not had an opportunity to participate. HCJ 10042/16 Kventinsky v. The Knesset (Aug. 6, 2017), *available at* [https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\420\100\o23&fileName=16100420\\_o23.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\420\100\o23&fileName=16100420_o23.txt&type=4) [Hebrew]; a summary of the case in English is available at <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Quintinsky%20v.%20Knesset%20%28summary%29.pdf>. From a PO perspective, this first-ever procedural invalidation of a statute makes perfect sense, because original intent, unlike purpose, cannot formulate absent a proper legislative process in which legislators take part.

<sup>255</sup> Sanford Levinson, *Consensus, Dissensus, and Constitutionalism, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING*, *supra* note 8, at 59, 67.



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The combination of originalism, bright-line rules and deference makes good sense to judicial conservatives in Israel just as it did to American ones in the 1980s. The following reasons are provided by Justice Sohlberg for according conclusive weight to original intent as manifested in legislative history:

“Common sense (because the creator of a norm is best positioned to testify as to its purpose); [ . . . ] separation of powers (since the legislative branch creates the law, and the judge’s role is to validate the legislature’s creation); [ . . . ] objectivity and neutrality of the judicial act (which is not guided by the judge’s subjective thoughts about proper policy, but rather by the view and the decision of the legislature); promotion of legal certainty and the ability to predict the interpretation of the norm (and hence equal operation of the law).”<sup>256</sup>

These principles guiding the proposed interpretive reform are no less revealing than its methodological details, for they connote broader ideological ideals. If Barak asserts that the constitutional scheme authorizes the judge to give a statute the best possible meaning via interpretation, Sohlberg understands separation of powers as limiting judicial discretion to mere validation. This stands in sharp contrast to Barak’s view that “the judge is a junior partner in the legislative project,”<sup>257</sup> but not the other way around. Sohlberg pulls the judge out of the legislative process and brings the legislature into the judicial one. Accordingly, where Barak grants the judge the capacity to extract objective principles underpinning the legal system, Sohlberg warns of “the subjective thoughts of the judge”—this casts doubt over the whole idea of “the system’s intent:” both intents are subjective, the question is only if we favor the legislature’s subjectivity or the judge’s.<sup>258</sup> In Justice Sohlberg’s own words in *Rom*, “there is no advantage to the values we hold, as judges, over the values held by any

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<sup>256</sup> Gini II, *supra* note 62, ¶ 9 (Sohlberg, J., dissenting) (emphases removed).

<sup>257</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 285.

<sup>258</sup> Sohlberg, *On Subjective Values*, *supra* note 63, at 42, 52–53. See also Posner, *supra* note 61; Bork, *supra* note 61, at 128; Fish, *supra* note 61.

other person.”<sup>259</sup> Lastly, Barak’s injection of constitutional rights like equality into the interpretive process, is reduced by Sohlberg to fair application of the legislature’s will, whatever its content.<sup>260</sup>

PO puts an American conservative mirror in front of the liberal judicial mainstream. On the methodological front, it favors empirical over normative considerations, giving specific primacy to legislative history, because it searches for the original intent of the legislature. On the hermeneutic front, it views the meaning of the text as fixed to the time of its enactment. On the democratic front, it favors majoritarianism, which requires judicial deference and restraint via categorical rules and conclusiveness. On the epistemological front, it is skeptical about judges’ rationality, and possibly about human rationality at large. And on the policy front, it favors religious over other liberties and strives to preserve the social status quo, infused with a reasonable dose of idealization.<sup>261</sup> Instead of “bridg[ing] the gap between law and the needs of society,”<sup>262</sup> interpretation’s role is to keep things as they are.

## 2. Between Law and Politics: Judicial Appointments

While PI idealizes the judge and her interpretative endeavor (and hence is only nostalgic for the future), PO idealizes the representative and her legislative process as the best articulator of those values deeply rooted in the nation’s history.<sup>263</sup> Its understanding of tradition maneuvers between conflicting commitments to preserve and to react: keep things steady and return them to the time before the revolution.<sup>264</sup> In the political arena, the latter route is preferred.

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<sup>259</sup> Rom, *supra* note 76, ¶ 10 (Sohlberg, J., concurring).

<sup>260</sup> See also Jabareen, *supra* note 12, at 431 (per originalism, “legitimacy is equated to validity and not to rights”).

<sup>261</sup> *Supra* notes 238–241 and accompanying text.

<sup>262</sup> BARAK, PURPOSIVE INTERPRETATION, *supra* note 25, at 42.

<sup>263</sup> This is in line with American originalism despite taking place in the legislative realm. See Shinar, *Idealism and Realism*, *supra* note 185, at 260; Daphne Barak-Erez, *History and Memory in Constitutional Adjudication*, 45 *FED. L. REV.* 1, 9–11 (2017); *supra* note 192 and accompanying text.

<sup>264</sup> The turn in the Court’s jurisprudence has been given different names, depending on which element is emphasized: the *legal* revolution (FRIEDMANN, *supra* note 11, at 54–56); the *constitutional* revolution (*supra* note 18); the *interpretive*

Diligently pursuing a counter-revolution is Ayelet Shaked: a leading figure in a coalition of right-wing parties who served as Minister of Justice in the years 2015–2019. According to a 2018 profile, “even her fiercest detractors admit that she is the most effective player currently operating in Israel’s roiling political arena.”<sup>265</sup> Her number one priority as Minister was judicial appointments.<sup>266</sup> In filling judicial vacancies, Shaked’s goal was, in her own words, “to return the court to its paramount objective: interpreting the legislative branch’s norms rather than supplanting them”<sup>267</sup> by appointing “conservative judges who will influence rulings according to their positions.”<sup>268</sup> To oppose Barak’s legacy has generated political capital for prior ministers of justice and other politicians as well. Shaked’s statements are nonetheless telling, because they reveal a change in the right-wing view of governance as regards the judiciary. Not only did she seek to diversify the bench, claiming it is a closed clique of like-minded jurists who share similar backgrounds,<sup>269</sup> nor were her misgivings of a strictly jurisprudential

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revolution (Kedar, *supra* note 24); the *human rights* revolution (ASSAF MEYDANI, THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS (2011)).

<sup>265</sup> Yonit Levi, *The Woman Who Could Be Israel’s Next Leader*, ATLANTIC (Oct. 9, 2018), <https://www.theatlantic.com/international/archive/2018/10/netanyahu-challenger-ayelet-shaked/572320>. Shaked was also ranked first on the leading economic magazine *TheMarker*’s list of the most influential people in Israel for 2018. Ido Baum, *100 Most Influential 2018, #1 Ayelet Shaked: Minister of Justice*, THE MARKER (2018), <https://www.themarker.com/EXT-INTERACTIVE-1.6430642> [Hebrew].

<sup>266</sup> Omri Assenheim, *Game of Thrones*, UVDA, Nov. 22, 2017, available at [http://www.mako.co.il/tv-ilana\\_dayan/2017/Article-8a19b6c5884ef51006.htm](http://www.mako.co.il/tv-ilana_dayan/2017/Article-8a19b6c5884ef51006.htm) [Hebrew].

<sup>267</sup> Tova Tzimuki, *Two New Justices Selected for Supreme Court*, YNET (Feb. 22, 2018), <https://www.ynetnews.com/articles/0,7340,L-5126945,00.html>; see also Jonathan Tepperman, *Ministering Justice: A Conversation with Ayelet Shaked*, 95 FOREIGN AFF. 2, 5 (2016).

<sup>268</sup> Tal Schneider, “*Shaked: These Elections are a Challenge for the Right. I will Probably Run*,” GLOBES (June 16, 2019), <https://www.globes.co.il/news/article.aspx?did=1001289769> [Hebrew].

<sup>269</sup> An empirical study on the social composition of the Israeli judiciary found that various minorities are indeed under-represented among judges, but one minority that is over-represented is religious Zionism. Alon Jasper, *A Place at the Table: On the Social Composition of the Israeli Judiciary* 46–52, 80–82 (Sept., 2018) (unpublished LL.M. thesis, Tel Aviv University) (on file with author) [Hebrew].

nature or driven by personal animosity.<sup>270</sup> Rather, she framed her desirable judiciary in blunt political terms, taking pride in putting “on the table” the possibility of engaging in a debate between liberal and conservative judges, like the one raging in the U.S.<sup>271</sup> More than a call for judges to exercise restraint and stay out of the political game, her conservative agenda seeks to substitute one ideological elite with another; institute a new hegemony on the ruins of a former one.<sup>272</sup> The idea of social hierarchy is not rejected, only different people are put at the top. And the tool for their ascent is interpretive methodology.

This is significant because judges have no political affiliation in Israel. The judicial appointment process is far less political than the American one,<sup>273</sup> done by a committee comprising representatives of all branches of government as well as the Bar.<sup>274</sup> True, the Court’s growing involvement in political questions since the 1980s, primarily due to the practical erosion of the justiciability and standing doctrines,<sup>275</sup> has resulted in political attempts to curtail its independence and arguably in a decline of public trust.<sup>276</sup> This includes the appointment process becoming, since the 1990s, a matter of controversy that draws attention to the social identities of the selected judges,<sup>277</sup> and increasingly so in recent years.<sup>278</sup> Still, judges are generally

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<sup>270</sup> Jurisprudential and personal differences characterize the attitude of former Minister of Justice, Professor Daniel Friedmann, to the Barak Court. Ginsburg, *supra* note 22; MENACHEM MAUTNER, LAW AND THE CULTURE OF ISRAEL 167 (2011). Friedmann attempted during his tenure (2007–2009) to implement various agendas promoted by conservative intellectual circles, with limited success. *Id.* at 170.

<sup>271</sup> Schneider, *supra* note 268.

<sup>272</sup> See Maya Mark, *Justice, Justice Shall You Pursue*, 2 TELEM 20, 22 (2019), available at <https://telem.berl.org.il/394/> [Hebrew]. See also, on the demise of the liberal hegemony in Israel, *infra* notes 400–406 and accompanying text.

<sup>273</sup> *Supra* notes 160–162 and accompanying text.

<sup>274</sup> See NAVOT 2007, *supra* note 65, at 146.

<sup>275</sup> See Elad Gil, *Judicial Answer to Political Question: The Political Question Doctrine in the United States and Israel*, 23 B.U. PUB. INT. L.J. 245 (2014). See also *supra* note 58.

<sup>276</sup> *Id.* at 275–76; MAUTNER, LAW AND THE CULTURE OF ISRAEL, *supra* note 270, at 169.

<sup>277</sup> Jasper, *supra* note 269, at 48–52; FRIEDMANN, *supra* note 11, at 317.

<sup>278</sup> See Lahav Harkov, *Sex, Judges and Politics: Will Latest Scandal Hurt Shaked?*, JERUSALEM POST (Jan. 16, 2019), <https://www.jpost.com/Israel-News/Sex-judges-and-politics-Will-latest-scandal-hurt-Shaked-577647>; Revital Hovel, *Israeli Judicial*

not considered partisan figures, including by proxy of appointer; the Court is generally guided by a uniform professional ethos; it enjoys higher rates of public trust than most state institutions;<sup>279</sup> and the judicial branch has actively taken various institutional steps to distance itself from the political arena.<sup>280</sup> The current move, by contrast, marks judges being appointed as belonging to one of two opposed ideological camps, which correlate with the ones on the political map, and interpretation is the litmus test. Finally, what is striking about Shaked's campaign is that unlike previous attacks on the Supreme Court, it was successful.

Reminiscent of the Reagan administration in setting judicial appointments as the top of the agenda, communicating it to the public as a matter of political urgency, Shaked diligently scrutinized potential nominees to ascertain their world-views.<sup>281</sup> She was fortunate to have six out of fifteen Supreme Court Justices retire during her tenure,<sup>282</sup> and therefore presided over the selections of over a third of the current composition of Court, cementing a lasting impact. The new Justices have not defied expectations, penning opinions on stricter standing

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*Committee Member Plays Ethnic Card*, HAARETZ (Aug. 15, 2015), <https://www.haaretz.com/judicial-c-tee-member-plays-ethnic-card-1.5386998>.

<sup>279</sup> TAMAR HERMANN ET AL., THE ISRAELI DEMOCRACY INDEX 2019: SELECT FINDINGS 4 (2020), <https://en.idi.org.il/media/13847/summary-the-israeli-democracy-index-2019-en.pdf>; Shinar, *Accidental Constitutionalism*, *supra* note 19, at 227–29.

<sup>280</sup> See Jasper, *supra* note 269, at 19–24.

<sup>281</sup> Assenheim, *supra* note 266; Nahum Barnea & Tova Tzimuki, “*During My Tenure Democracy has Gotten Stronger*,” YEDIOTH AHRONOTH (Weekend Supplement, Sept. 6, 2018), <https://www.yediot.co.il/articles/0,7340,L-5342457,00.html> [Hebrew]. Accordingly, Shaked has vetoed the promotion to the Supreme Court of a celebrated district court judge, whose husband had been associated with a civil rights NGO, on “political-ideological” grounds (words of Efi Nave, former Head of the Israeli Bar Association who sat with Shaked on the judicial nominations committee. Assenheim, *supra*).

<sup>282</sup> The statutory retirement age for Judges in Israel, in all instances, is 70.

rights;<sup>283</sup> increased deference to the executive;<sup>284</sup> non-interference in religious courts' rulings, no matter their infringement on rights;<sup>285</sup> overt skepticism regarding the competence and efficiency of various bureaucratic structures;<sup>286</sup> non-justiciability of foreign relations, invoking the American political question doctrine;<sup>287</sup> harsh sentencing

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<sup>283</sup> LPA-App 8411/16 Sela v. Israel Prison Service (July 17, 2018), ¶¶ 15–25 (Mintz, J., dissenting), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\110\084\15&fileName=16084110.N15&type=4> [Hebrew].

<sup>284</sup> CA 7488/16 Seligman v. Phoenix Insurance Company Ltd. (May 31, 2018), ¶ 40 (Willner, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\16\880\074\18&fileName=16074880.R18&type=4> [Hebrew] (ruling that when a regulator's interpretation of its own rules is reasonable, "the default would be to adopt this position") (a further hearing of the case by an extended panel has been ordered, CFH 4960/18, and is currently pending; last checked May 26, 2020). In a later decision, Justice Willner explicitly framed this reasoning as *Chevron deference*, HCJ 2875/18 Association of Foreign Manpower in Construction Corporations v. Government of Israel (June 18, 2019), ¶¶ 27–28 (Willner, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\750\028\10&fileName=18028750.R10&type=4> [Hebrew]. For conservative justifications of Chevron, see Young, *Judicial Activism*, *supra* note 127, at 1199; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

<sup>285</sup> HCJ 4602/13 Jane Doe v. Regional Rabbinic Court Haifa (Nov. 18, 2018), ¶ 1 (Stein, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\13\020\046\13&fileName=13046020.E13&type=4> [Hebrew]; *see also* Yehuda Yifrach, *Israeli Ninja: The Refreshing Audacity of Justice Stein*, MAKOR RISHON (Nov. 24, 2018), <https://www.makorrishon.co.il/opinion/94181/> [Hebrew].

<sup>286</sup> AAA 6525/17 Sanlakol Ltd. v. Jezreel Valley Regional Council (Nov. 8, 2018), ¶¶ 18–25, 32 (Stein, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\17\250\065\17&fileName=17065250.F08&type=4> [Hebrew]; CApp 5894/18 Menora Mivtachim Insurance Ltd. v. Lehavot Veshertim Ltd. (Aug. 19 2018), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\940\058\18&fileName=18058940.F02&type=4> [Hebrew].

<sup>287</sup> HCJ 8542/18 Ackerman v. Government of Israel (Dec. 9, 2018), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\420\085\18&fileName=18085420.F01&type=4> [Hebrew]; a summary of the case in English is available at <http://versa.cardozo.yu.edu/viewpoints/recent-developments-israeli-law-4>.

resting on an over-emphasis on general deterrence;<sup>288</sup> and even lowering the standards for granting the necessity defense to anti-terrorism interrogators, in a decision some claim amounts to legitimization of torture.<sup>289</sup> As Shaked put it, “the entire right-wing, and certainly religious Zionism and the whole conservative camp, can no longer complain about being underrepresented.”<sup>290</sup>

A Shaked appointee who joined the Court in 2018 and merits special attention is Justice Alex Stein. A law professor who had left Israel in 2004 for an academic career in the U.S., yet continued to produce right-of-center commentary on Israeli affairs,<sup>291</sup> he was sought after by Shaked’s aides thanks to his reputation as a conservative jurist.<sup>292</sup> It was not long before the American interpretive debate resurfaced, when Justice Stein favorably invoked textualism in a 2019 concurrence. Citing Scalia and Garner,<sup>293</sup> Stein advocated an approach that “looks for the meaning of the legislated edict as a matter of empirical fact [ . . . ] only when the language is unclear should the interpreter consider the purpose of the statute and the legislative

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<sup>288</sup> CrimA 4802/18 John Doe v. State of Israel (Jan. 29, 2019), ¶¶ 34–35 (Stein, J.), *available at* <https://supremedections.court.gov.il/Home/Download?path=HebrewVerdicts\18\020\048\11&fileName=18048020.F11&type=4> [Hebrew].

<sup>289</sup> HCJ 9018/17 Tbeish v. Attorney General (Nov. 26, 2018), *available at* <https://supremedections.court.gov.il/Home/Download?path=HebrewVerdicts\17\180\090\11&fileName=17090180.J11&type=4> [Hebrew], English translation *available at* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Tbeish%20v.%20Attorney%20General.pdf>. For criticism, see Smadar Ben-Natan, *Revise Your Syllabi: Israeli Supreme Court Upholds Authorization for Torture and Ill-Treatment*, 10 J. INT’L HUMANITARIAN LEGAL STUD. 41 (2019).

<sup>290</sup> Levi, *supra* note 265.

<sup>291</sup> Netael Bandel, *Right Honorable*, MAKOR RISHON (Dec. 16, 2018), <https://www.makorrishon.co.il/magazine/dyukan/100103/> [Hebrew]; Avishai Grinzeig, *Warrior Against the Revolution*, CHANNEL 7 (Mar. 1, 2018), <https://www.inn.co.il/News/News.aspx/367447> [Hebrew].

<sup>292</sup> Ido Baum & Bini Aschkenasy, *Ayelet Shaked’s Man for Special Operations Reveals: This is How We Appointed Judges*, THE MARKER (July 19, 2019), <https://www.themarker.com/law/.premium-1.7539383> [Hebrew].

<sup>293</sup> SCALIA & GARNER, *supra* note 1.

history.<sup>294</sup> Additionally, he opined that at least some specific types of texts, presidential clemency decisions, must be interpreted according to their original public meaning, citing American originalists like Professor Solum. Justice Stein thereby referred to the concept of objective purpose with overt skepticism, denying its relevance altogether when dealing with such texts.<sup>295</sup> Indeed, in a case of statutory interpretation, Stein ignored the concept of purpose altogether, examining solely language and intent. Asking whether an anti-discrimination mandate on private parties who provide a “product” applies to apartment renting, Stein reached the radical conclusion that such an interpretation would “cross the boundaries of the language.”<sup>296</sup> In ordinary language use, he reasoned, “product” refers only to personal rather than real property; and the legislative history, which Stein seems to deem informative of the semantic meaning itself, suggests that lawmakers intended to exclude real property from the statute’s scope.<sup>297</sup>

Justice Stein supported his approach with reasons very similar to the ones Justice Sohlberg listed,<sup>298</sup> but he has yet to develop an elaborate interpretive argument. Still, in assessing the growing influence of American conservative jurisprudence over Israel, this is a pivotal addition to PO. It seems that the combination of PO with

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<sup>294</sup> LAA-App 2283/18 Local Planning and Construction Council Tel Aviv v. Yad Harutzim Properties Ltd (Jan. 1, 2019), ¶ 4 (Stein, J., concurring), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\830\022\A11&fileName=18022830.A11&type=4> [Hebrew].

<sup>295</sup> LPA-App 534/19 Ziada v. State of Israel (Aug. 20, 2019), ¶¶ 45–50 (Stein, J.), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\19\340\005\F06&fileName=19005340.F06&type=4> [Hebrew].

<sup>296</sup> LCA-App 10011/17 Mei-Tal Engineering and Services Ltd. v. Salman (Aug. 19, 2019), ¶ 9 (Stein, J., concurring), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\17\110\100\B18&fileName=17100110.B18&type=4> [Hebrew].

<sup>297</sup> *Id.* ¶¶ 3–9 (Stein, J., concurring) (*cf.* a similar move by Justice Sohlberg, *supra* note 84). The ultimate outcome of the case was nonetheless that such discrimination is forbidden, although the general scope of the ruling remains unclear owing to Justice Stein’s reasoning that is external to the anti-discrimination statute.

<sup>298</sup> *Id.* ¶ 6 (Stein, J., concurring); Ziada, *supra* note 295, ¶¶ 45–50 (Stein, J.); Yad Harutzim, *supra* note 294 ¶ 4 (Stein, J., concurring); *supra* text accompanying note 256.



Minister Shaked's campaign has opened the floodgates of interpretive contestation.<sup>299</sup> While Stein is more akin to American conservative judges in being unapologetic, at times scathing, Sohlberg is *more conservative*.<sup>300</sup> For he favors an incremental, moderate approach rather than a counter-revolution. A lecture delivered shortly after he was appointed to the Supreme Court is titled "Keep the Law"<sup>301</sup>—to honor is also to preserve, and purism, methodological or otherwise, is in tension with safeguarding a state of affairs just by virtue of its pre-existence.<sup>302</sup>

"For the first time," states a prominent cause lawyer, "we have stopped evaluating judges professionally and analyzing them with legal tools, and have started evaluating them according to their worldview."<sup>303</sup> Conservatism is a judicial force to be reckoned with. It is only natural that Justice Sohlberg is its torchbearer. Set to become the Court's president in 2028,<sup>304</sup> an expectation that he would lead the way to a conservative jurisprudence had already been present in relevant political circles.<sup>305</sup> This is but one reason why PO would be difficult to dissociate from conservative political ideology. Another one is that although Justice Sohlberg was appointed to the Supreme Court in the

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<sup>299</sup> See also *supra* note 284, *infra* note 422 and accompanying text.

<sup>300</sup> Sohlberg identified himself as a conservative thus: "I plead guilty to this label attached to me [ . . . ] conservatism is quite a natural thing in the world of law [ . . . ] as a religious man of faith I don't encounter many revolutions." Itzik Wolff, *Sohlberg on the AG Debate: There is Room for Change*, NEWS1 (Nov. 8, 2018), <https://www.news1.co.il/Archive/001-D-407661-00.html> [Hebrew].

<sup>301</sup> Sohlberg, *Keep the Law*, *supra* note 247 (the lecture was published in 2014 but delivered in October 2012, *id.*, at 13); Sohlberg began his tenure as Supreme Court Justice in February 2012.

<sup>302</sup> It is also more difficult for methodological purists to be appointed to the Israeli bench, due to the procedure's character. *Infra* section III.B.2.

<sup>303</sup> Bini Aschkenasy, *Has Ayelet Shaked Succeeded to Revolutionize the Supreme Court?*, THEMARKER (Feb. 10, 2019), <https://www.themarker.com/law/.premium-1.6917440> [Hebrew].

<sup>304</sup> The President of the Court is appointed from among its members, according to seniority. See SHETREET & HOMOLKA, *supra* note 11, at 115.

<sup>305</sup> Bandel, *supra* note 291 ("Those who favor legal conservatism look to the year 2028, when Sohlberg is expected to take the President's seat"). This is not to say that there is empirical evidence that any such expectation affects Justice Sohlberg's decisions, and he expresses no ardor as regards his expected presidency. Wolff, *supra* note 300.

same year Shaked entered national politics, 2012,<sup>306</sup> it is only after she had assumed the role of Minister of Justice that PO emerged. Furthermore, Justice Sohlberg identified himself with the political Right in 2017. The President of the Court had decided that no representative of the judicial branch would attend a ceremony commemorating fifty years of Israeli control over, and settlement in, the West Bank, due to the politically controversial nature of the event. Sohlberg, a settler, attended nonetheless “as a private citizen.”<sup>307</sup> His setting himself outside of judicial mainstream echoes in PO as well. He expressed dry irony in *Association of Merchants*, writing: “we will not paint [the disagreement] in stark colors; this is not ‘religious’ versus ‘secular’, not ‘north’ versus ‘south’ nor the periphery versus ‘the state of Tel-Aviv.’”<sup>308</sup> The very inclusion of this sentence in the opinion conveys the opposite message of the plain text, planting doubts in the reader’s mind regarding the other Justices’ biases. The most plausible audience for this message is the layperson, with whom PO seeks to communicate directly, as Scalia’s textualism does.<sup>309</sup> Specifically, the one who resides in the heartland and desires recognition of his remoteness from the concentrated elite.

### 3. As Political Ideology

#### a. *Constructing a Conservative Identity*

No political figure emblemizes the emerging Israeli conservatism better than the same Ayelet Shaked. Not only because of

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<sup>306</sup> Ayelet Shaked ran her first primaries campaign in 2012, and was sworn as MK in January 2013.

<sup>307</sup> Chen Maanit, *What Happens When a Supreme Court Justice Suddenly “Turns into” a Private Person*, GLOBES (Oct. 3, 2017), <https://www.globes.co.il/news/article.aspx?did=1001207141> [Hebrew].

<sup>308</sup> *Association of Merchants*, *supra* note 71, ¶ 37 (Sohlberg, J., dissenting). “The State of Tel-Aviv” is a familiar trope denoting an ostensible gap between the liberal city and the rest of the country. Similarly, the city’s residents are often depicted as “sushi eaters,” and Sohlberg alludes to this as well when he imagines why Tel-Avivians are so keen on having supermarkets open on the Sabbath—so that they could buy “milk and eggs and soy sauce.” *Id.* ¶ 31 (Sohlberg, J., dissenting).

<sup>309</sup> *Supra* note 167 and accompanying text.

her political stature and the bright future predicted to her,<sup>310</sup> but also because she has published a “manifesto” laying down her governance world-view.<sup>311</sup> It is a perfect illustration of how Israeli conservatism has embraced all the major tenets of American conservatism, inner contradictions included, and is trying to consolidate them into a whole bigger than the sum of its parts, within the Israeli context. The text has three foci: legislation; the judiciary; and the definition of Israel as a Jewish and democratic state.

Any legislative act, Shaked holds, is in and of itself an infringement on people’s liberty: “every time the legislature chooses to express confidence in a new normative mechanism [ . . . it] is a vote of no confidence in our ability as individuals and communities to conduct ourselves well enough without the state determining the course of our lives [ . . . ] a vote of no confidence in the power of families.”<sup>312</sup> This approach echoes, on the one hand, the neo-liberal, economic conservatism of self-governance by isolated individuals rather than central state authorities, equating deregulation with promotion of freedom; and, on the other hand, the social conservative emphasis on time-honored institutions superior to the state, particularly the family. The link between the two kinds of conservatism is strengthened when Shaked quotes Milton Friedman, who framed the Jewish tradition as one of self-reliance, leading Shaked to conclude that “the values of freedom”—as Friedman understood them—“were the hallmark of our people during two thousand years of exile.”<sup>313</sup> The result is a call for significant reduction in the number of laws passed by the Knesset, in order to let the free market roam. Incidentally, the *raison d’être* of Israel—whose national ethos was originally of a collectivist, socialist

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<sup>310</sup> Allison Kaplan Sommer, *How Ayelet Shaked Became the Most Powerful Woman in Israeli Politics*, HAARETZ (July 30, 2019), <https://www.haaretz.com/israel-news/elections/.premium-how-ayelet-shaked-became-the-most-powerful-woman-in-israeli-politics-1.7605086>; Ben Caspit, *Who Stands in the Way of Israel’s Shaked Premiership?*, AL-MONITOR (June 7, 2019), <https://www.al-monitor.com/pulse/originals/2019/06/israel-netanyahu-sara-likud-ayelet-shaked-veto-new-right.html#ixzz5qNOdEr3s>); *supra* note 265 and accompanying text.

<sup>311</sup> Ayelet Shaked, *The Path to Democracy and Governance*, 1 HASHILOACH 37 (2016) [Hebrew], English translation available at <https://hashiloach.org.il/path-democracy-governance>.

<sup>312</sup> *Id.* at 38.

<sup>313</sup> *Id.* at 40.

mold<sup>314</sup>—is reimagined as one of a night-watchman state. Upon establishment of sovereignty, so Shaked’s story goes, the collective delegated its self-reliance values to the communities, families and individuals therein.<sup>315</sup>

Moving to the judiciary, Shaked exhibits a heavily Americanized understanding of separation of powers. Describing it as a “power struggle,” she quotes Alexander Hamilton on the Court not holding the sword or the purse,<sup>316</sup> thus portraying it as a constraint on both the economy and national security. Here the substantive conservatisms are joined by an institutional one: similarly to Sohlberg, Shaked speaks of “preventing future collisions” by way of judicial deference to the other branches. For her, judicial review is nothing more than policy making by unelected judges, irrespective of the legal standards that govern it. In contrast to the Federalist Papers, Shaked takes no notice of the possibility of a law superior to legislation,

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<sup>314</sup> The Israeli national ethos has been undergoing a process of increasing neo-liberalization since the 1980s. *See, e.g.,* Ran Hirschl, *Israel’s ‘Constitutional Revolution:’ The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998) (framing the Constitutional Revolution as a legal facilitation of neo-liberalism; under this light, the current political Right builds on a foundation laid down by the Court itself). Still, Shaked’s rhetoric is extreme both in its simplicity and in its absolutism. Prime Minister Netanyahu, for example, who has championed neo-liberalism in Israel, is generally more careful to justify promotion of free market policies by appealing to collectivist, militaristic and technological needs for national strength, facilitated by a stable economy. *See, e.g.,* Benjamin Netanyahu, “Ben Gurion, We are Moving Up the Mountain”, MAKOR RISHON (Apr. 10, 2018), available at <https://bit.ly/2IML0k2> [Hebrew]. *See also*, on Netanyahu, *infra* notes 346–357 and accompanying text.

<sup>315</sup> One way this translates into policy is Shaked’s unprecedented decision to allocate funds to private courts that resolve civil disputes according to Jewish Law. Bini Aschkenasy, *Shaked: I funded Courts that Adjudicate According to Jewish Law*, HAARETZ (June 12, 2019), <https://www.haaretz.co.il/tmr/1.7363251> [Hebrew]; Mark, *supra* note 272, at 30.

<sup>316</sup> Shaked, *supra* note 311, at 44–47. This metaphor was previously highlighted by a former Minister of Justice, whose footsteps Shaked follows in opposing the legacy of Barak, Daniel Friedmann. FRIEDMANN, *supra* note 11 (the book appeared originally in Hebrew in 2013); *see also supra* note 270.

whether establishing checks and balances or a bill of rights.<sup>317</sup> The only exception is the Jewish nature of the state.<sup>318</sup>

Israel as a Jewish and Democratic state is the third topic of the article. Again, Shaked turns to American inspiration: Thomas Jefferson and Abraham Lincoln as well as John Locke.<sup>319</sup> Shaked stipulates that these figures' views on democracy actually stemmed from the Jewish tradition, which had introduced "the model of separation of powers thousands of years ago."<sup>320</sup> Ergo, enhancing the state's Jewish character will automatically promote its democratic one. Democracy is not only an outcome of Jewish tradition, but specifically one which holds that "nothing is more just or correct than the decision of the people and its representatives." Judicial restraint is nothing short of a rabbinic imperative.<sup>321</sup> This view is contrasted with that of Barak's, who "effectively turned the concept of a Jewish state into something symbolic, a concept that exists only insofar as it is completely consistent with the values of 'democracy'—and a very specific version of democracy at that."<sup>322</sup> Not only "very specific," but inferior, because

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<sup>317</sup> See Yaniv Roznai, *Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WM. & MARY BILL RTS. J. (forthcoming 2020), available at <https://ssrn.com/abstract=3488474>, at 4 ("according to some political and public views, democracy is fulfilled through elections and decision-making process[es] reflecting the majority's will, and no more. Perhaps the best example is reflected in the approach of Israel's former Minister of Justice, Ayelet Shaked").

<sup>318</sup> For concrete legal reforms in this spirit, see *supra* note 21 (making Jewish Law a positive source for filling legislative lacunae); *infra* note 358 (enacting the Basic Law: Israel as the Nation State of the Jewish People).

<sup>319</sup> Shaked, *supra* note 311, at 51. Incidentally, the drafters of the Israeli Declaration of Independence were indeed influenced by Jefferson. Yoram Shachar, *Jefferson Goes East: The American Origins of the Israeli Declaration of Independence*, 10 THEORETICAL INQ. L. 589 (2009).

<sup>320</sup> Shaked, *supra* note 311, at 51.

<sup>321</sup> *Id.* at 54. This is very far from the truth, not only in the sense that the Jewish tradition is not the source of democratic theory (see Haim Shapira, *Majority Rule in the Jewish Legal Tradition*, 82 HEBREW UNION C. ANN. 161 (2012)), but also as it is a tradition of judge-made law. Talmudic sages used broad judicial discretion, and moreover incorporated considerations of political morality into their rulings, in a quasi-Dworkinian fashion. MOSHE HALBERTAL, *INTERPRETATIVE REVOLUTIONS IN THE MAKING 186–90* (1997) [Hebrew].

<sup>322</sup> Shaked, *supra* note 311, at 50.

it did not genuinely incorporate the Jewish elements which make it a better one.

For this former Minister of Justice, judicial activism means that “the demos has been turned into a demon.”<sup>323</sup> The American Right is similarly reluctant to grant institutional authority to interpret the abstract values enshrined in the constitution. For it amounts to a “rule by judges,” which should be resisted because “[t]he tradition of this political community cannot accept the proposition that the elite make better decisions than the people.”<sup>324</sup> Shaked is not alone in wedding a “schoolyard rivalry” version of separation of powers<sup>325</sup>—yet without constitutional protections, advocating an unchecked majority rule—with the three conservative political strands: social, economic, and national security. Following a broader assimilation of American culture and values regardless of political ideology,<sup>326</sup> the Israeli Right has been increasingly borrowing various strategies and policies of Republican politics, bringing right-wing closer to becoming synonymous with conservatism of the American kind (even adopting the title “a Republican party”<sup>327</sup>). Before exploring specific instances in sections III.B.3.b–c below, it is important to consider the social backdrop for

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<sup>323</sup> Moshe Goral, *Supreme Court President Hayut: “Governance Is Not a Permit to Break the Law;” Shaked: “The Demos has Been Turned into a Demon,”* CALCALIST (Dec. 21, 2017), <https://www.calcalist.co.il/local/articles/0,7340,L-3727939,00.html> [Hebrew].

<sup>324</sup> Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1538 (1989).

<sup>325</sup> In the words of the President of the International Criminal Court, Judge Chile Eboe-Osui. Prosecutor v. Ruto, ICC-01/09-01/11, Decision on Defence Applications for Judgments of Acquittal, ¶ 385 (Eboe-Osui, J.) (Apr. 5, 2016), available at [https://www.icc-cpi.int/CourtRecords/CR2016\\_04384.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_04384.PDF).

<sup>326</sup> Cohn, *supra* note 20, at 23–24; Myron J. Aronoff, *The “Americanization” of Israeli Politics: Political and Cultural Change*, 5 ISR. STUD. 92 (2000); Uri Ram, *Citizens, Consumers and Believers: The Israeli Public Sphere between Capitalism and Fundamentalism*, 3 ISR. STUD. 24 (1998).

<sup>327</sup> Time of Israel Staff, *Pleading for Right-Wing Unity, Shaked Backs Off Key Demand in Merger Talks*, TIMES OF ISRAEL (July 25, 2019), <https://www.timesofisrael.com/pleading-for-right-wing-unity-shaked-backs-off-demand-in-merger-talks/> (“Establishing a right bloc is an urgent matter, a kind of large republican party”).

the emerging Israeli conservative movement, as a joint endeavor of political and civil society forces.

After being dominated for decades by liberal motivations, the map of civil society organizations and cause lawyering has changed: “the Right has studied the methods of the Left. The civil arena is important and must be played in. That is why in recent years right-wing NGOs and think-tanks have emerged.”<sup>328</sup> Many of them are funded by American money, promote conservative ideas, and put legal issues at the top of their agendas. A noteworthy organization is the American fund *Tikvah*, which promotes a conservative agenda through multiple avenues.<sup>329</sup> Among the projects that *Tikvah* funds is the *Hashiloach* magazine, which facilitates various intellectual efforts at reconciling the Jewish tradition with Anglo-American conservative thought, including Shaked’s treatise discussed above,<sup>330</sup> as well as the only text published by Justice Sohlberg for a wide, non-lawyer audience.<sup>331</sup> Other projects that have been financially supported by the fund include different academic programs and seminars for students, scholars, and policy-makers;<sup>332</sup> a college built on the American liberal arts model, that

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<sup>328</sup> Barnea & Tzimuki, *supra* note 281 (quoting former minister Ayelet Shaked).

<sup>329</sup> *Tikvah* describes its philosophy thus: “In its political philosophy, the Fund is Zionist. Economically, it supports the free market. Culturally, it tends towards the traditional. In civilian and religious matters, it supports individual freedom.” HASHILOACH, *About* <https://hashiloach.org.il/about> (last visited May 26, 2020). Full disclosure: the *Tikvah* fund contributed to a scholarship received by the author as an undergraduate student at Tel Aviv University.

<sup>330</sup> *Supra* note 311; see also Yoav Sorek, *A Question of Identity*, 14 HASHILOACH 43 (2019), available at <https://hashiloach.org.il/wp-content/uploads/2019/05/hashiloach-14-full-print.pdf> [Hebrew]; Benjamin Schvarcz, *To Speak Correctly about Democracy*, 7 HASHILOACH 75 (2017), available at [https://hashiloach.org.il/wp-content/uploads/2017/12/2-2-hashiloach\\_7-shcwartz-web.pdf](https://hashiloach.org.il/wp-content/uploads/2017/12/2-2-hashiloach_7-shcwartz-web.pdf) [Hebrew]; Nir Barkat, *Nine Measures of Free Hand*, 4 HASHILOACH 49 (2017), available at <https://hashiloach.org.il/wp-content/uploads/2017/05/hashiloach-4-cwb-1-barkat.pdf> [Hebrew].

<sup>331</sup> Sohlberg, *On Subjective Values*, *supra* note 63.

<sup>332</sup> See Guy Liberman, *A Fund from the Right*, YEDIOTH AHRONOTH (Weekend Supplement, Jan. 18, 2018), <https://www.yediot.co.il/articles/0,7340,L-5073031,00.html> [Hebrew]; Aviad Houminer, *Religious Zionism: From Equality and Social Justice to Ultra-Capitalism*, 77 DEOT (Dec. 2016–Jan. 2017), available at <https://bit.ly/2Bh8NUI> [Hebrew].

centers on Jewish themes and sets as its purpose “to create visionary leaders for the Jewish state and the Jewish people,”<sup>333</sup> as well as publishes translations into Hebrew of prominent conservative thinkers including Edmund Burke, Friedrich Hayek, and Leo Strauss,<sup>334</sup> a separate publishing house for contemporary non-fiction books that appeals to “an elite in construction” and aims at furthering “the intellectual revolution of the conservative right-wing,”<sup>335</sup> a website that publishes op-eds and news from classical liberal or libertarian perspectives drawing on Republican policies,<sup>336</sup> a legal forum expressly inspired by The Federalist Society,<sup>337</sup> and, most consequentially, the think-tank *Kohelet*. *Kohelet* issues policy papers, lobbies lawmakers, petitions the courts and submits amicus briefs, all advocating conservative policies in various spheres like the economy, international relations, immigration policy, and institutional design.<sup>338</sup> This think-tank also provides scholarships for Israelis to obtain an LL.M. degree from the Antonin Scalia Law School of George Mayson University,

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<sup>333</sup> Talila Neshet, *Supported by Saar, Shalem Center Gains Academic Recognition*, HAARETZ (Jan. 3, 2013), <https://www.haaretz.co.il/news/education/1.1899517> [Hebrew]. The college evolved from “an American style conservative think-tank.” Jonathan Rynhold, *In Search of Israeli Conservatism*, 7 J. POL. IDEOLOGIES 199, 204 (2002).

<sup>334</sup> The full catalogue is available at SHALEM PRESS, <https://shalempress.co.il/> (last visited May 26, 2020).

<sup>335</sup> Shibolet Press, *About*, FACEBOOK (OCT. 29, 2019), <https://www.facebook.com/shiboletpress/about/> [Hebrew].

<sup>336</sup> See <http://mida.org.il> (last visited May 26, 2020) (the website’s name, *Mida*, means both virtue and measure—two conservative values). For examples of articles published on this website, see *infra* notes 350, 361. On its sources of funding, see Hilo Glazer, *Ethics and Politics According to Baratz*, HAARETZ (May 9, 2018), <https://www.haaretz.co.il/magazine/.premium-MAGAZINE-1.6072595> [Hebrew].

<sup>337</sup> See LEGAL FORUM FOR LAW AND LIBERTY, <https://lawforum.org.il/> (last visited May 26, 2020).

<sup>338</sup> See KOHELET POLICY FORUM, *Policy Papers*, <https://en.kohelet.org.il/policy-papers> (last visited May 26, 2020). For an example of an amicus brief, see HCJ 8665/14 Desta v. Knesset (Aug. 11, 2015), ¶ 18 (Naor, President), *available at* <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\14\650\086\c15&fileName=14086650.C15&type=4> [Hebrew], English translation *available at* <http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Desta%20v.%20Knesset.pdf>.



known for its conservative orientation.<sup>339</sup> Described as “one of the most powerful and influential bodies in Israeli politics,”<sup>340</sup> *Kohelet’s* chief economic director served as one of Minister Shaked’s advisors,<sup>341</sup> as did the head of another think-tank whose self-explanatory name is The Ayn Rand Center.<sup>342</sup>

These and other efforts of similar veins help facilitate conservatism as the go-to theory of the right-wing in Israel, which has not always been the case. The equation of liberalism with the left-wing is a recent paradigmatic shift,<sup>343</sup> and the themes of conservatism have not been traditionally dominant in Israeli politics in a unified form.<sup>344</sup> The explanation provided by political science literature is that the different parties define themselves primarily by their stance toward Zionism, nationalism, and the Israeli-Arab conflict. This causes

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<sup>339</sup> Kohelet, *The George Mayson LL.M. Program*, <https://bit.ly/2XBUX53> [Hebrew] (last visited May 26, 2020). On the law school’s political orientation, see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 182–83, 205–19 (2008).

<sup>340</sup> Shuki Sade, *100 Most Influential 2018, #7 Meir Rubin: CEO of Kohelet Forum*, *THE MARKER* (2018), <https://www.themarker.com/EXT-INTERACTIVE-1.6430761> [Hebrew]. See also Rami Hod & Yonatan Levi, *How Conservative American Money Helped the Religious Right Take Over Israel*, *HAARETZ* (Sept. 21, 2019), <https://www.haaretz.com/israel-news/elections/.premium.MAGAZINE-how-conservative-american-money-helped-the-religious-right-take-over-israel-1.7846235> (“Kohelet’s people are involved in virtually every significant legislative reform enacted by Netanyahu’s government [ . . . ] Their approach—which sanctifies the settlements on the one hand, and wild, unfettered markets on the other—has become bon ton in government circles”).

<sup>341</sup> Baum, *supra* note 265.

<sup>342</sup> *Id.*; see AYN RAND CENTER ISRAEL, *About Us*, <https://www.aynrand.org.il/aboutus> (last visited May 26, 2020).

<sup>343</sup> For example, Ayelet Shaked posted to her Facebook page an excerpt from an interview with a former Minister of Justice from the major right-wing party Likud, Dan Meridor. He described his ideology as liberal, adding that for this reason he had never wanted to appoint conservative judges: “today the struggle is over issues that in the past were not under dispute.” Shaked’s caption for the excerpt was: “this is why you always voted for the Right but ended up with the Left.” Ayelet Shaked, *FACEBOOK* (Feb. 3, 2019), <https://www.facebook.com/watch/?v=2428987820487367>. See also, Mark, *supra* note 272.

<sup>344</sup> Guy Ben-Porat & Fany Yuval, *Israeli Neo-Conservatism: Rise and Fall?*, 22 *ISR. STUD. F.* 3, 8 (2007); Rynhold, *supra* note 333, at 199.

internal divisions within the right-wing, putting each of its strands at odds with at least one of the tenets of conservatism.<sup>345</sup>

However, a devout and persistent proponent of American conservatism has been operating in the Israeli political arena for several decades: Prime Minister Netanyahu, “an Israeli Republican.”<sup>346</sup> Netanyahu has been promoting neo-liberal economic policies as tied to national freedom and might; holding a hawkish-pragmatic ideology while employing a friend v. foe rhetoric with regard to Arabs, including those who are Israeli citizens; appealing to voters’ sense of personal and national victimhood and existential struggle against universalistic progressive forces; encouraging a conservative intelligentsia; and has “repeatedly stated his preference for the presidential system, where the balance of power is tilted toward the executive branch.”<sup>347</sup> Netanyahu is at home with the American right-wing, and has accordingly turned for support to “Christian fundamentalists and shrill right-wing Jewish groups” rather than the established institutions of American Jewish communities.<sup>348</sup> His “lifelong goal” is to replace “Israel’s traditional elite with one more in tune with his philosophy.”<sup>349</sup>

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<sup>345</sup> Rynhold, *supra* note 333, at 211–16.

<sup>346</sup> Marc Caputo, “*Netanyahu is Essentially an Israeli Republican*,” POLITICO (Aug. 15, 2019), <https://www.politico.com/story/2019/08/15/israel-trump-netanyahu-1465917>.

<sup>347</sup> DANI FILC, *THE POLITICAL RIGHT IN ISRAEL: DIFFERENT FACES OF JEWISH POPULISM* 55–78 (2009); *see also* Arie Krampf, *Israel’s Neoliberal Turn and Its National Security Paradigm*, 47 POLISH POL. SCI. Y.B. 227, 228 (2018); Gayil Talshir, *Populist Rightwing Ideological Exposition: Netanyahu’s Regime as a Case in Point*, 8 ADVANCES APPLIED PSYCHOL. 329 (2018), *available at* [https://file.scirp.org/pdf/AASoci\\_2018042415054624.pdf](https://file.scirp.org/pdf/AASoci_2018042415054624.pdf); Ben-Porat & Yuval, *supra* note 344; Rynhold, *supra* note 333, at 203–04, 214. On the link between conservatism and perceived victimhood, *see supra* note 184.

<sup>348</sup> Jonathan Broder, *Netanyahu and American Jews*, 15 WORLD POL’Y J. 89, 90 (1998).

<sup>349</sup> Aluf Benn, *The End of Old Israel*, 95 FOREIGN AFF. 16 (2016). In Netanyahu’s own words: “Israel is undergoing adjustment pains as it moves from adolescence to maturity. If initially its governing socialist class wanted to straight-jacket all Israelis into one European socialist prototype, they have had a hard time accepting the fact that this will not happen.” BENJAMIN NETANYAHU, *A DURABLE PEACE: ISRAEL AND ITS PLACE AMONG THE NATIONS* xvii (rev. ed. 2000).

Netanyahu's vision is now materializing, although his own political future is unclear. One manifestation of this success is the abundant use of the terms conservatism or neo-conservatism to identify currently rising political and intellectual right-wing forces.<sup>350</sup> As a label of political identity, conservatism began its ascendance with that of Netanyahu in the 1990s, and found the current historical moment ripe for gaining prominence. Through a younger generation of political leadership, Netanyahu's "long-deferred dream of remaking Israel's establishment" is coming to fruition.<sup>351</sup> It was the year 2019 that marks the first major public conference dedicated to "Israeli Conservatism."<sup>352</sup>

The term "Israeli conservatism" makes clear that the comparison must be qualified, in the light of the Jewish character of Israel, the revolutionary and socialist character of Zionism,<sup>353</sup> and other

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<sup>350</sup> See, e.g., Tomer Persico, *The Right is the New Left: Notes on the Current Political Moment*, SHALOM HARTMAN INSTITUTE (Nov. 26, 2017), available at [https://heb.hartman.org.il/Research\\_And\\_Comment\\_View.asp?Article\\_Id=1379](https://heb.hartman.org.il/Research_And_Comment_View.asp?Article_Id=1379) [Hebrew]; Eric Cohen, *Jewish Conservatism: A Manifesto*, COMMENTARY (Apr. 2017), <https://www.commentarymagazine.com/articles/jewish-conservatism-manifesto>; Yehuda Vizan, *Not Conservatives! Republicans: On the New Hasbiloach*, 8 DHAK 620 (2017), available at [http://docs.wixstatic.com/ugd/47130e\\_52dd9b257726479dbde4ca1011bb825f.pdf](http://docs.wixstatic.com/ugd/47130e_52dd9b257726479dbde4ca1011bb825f.pdf) [Hebrew]; Akiva Bigman, *Is Religious Zionism Conservative?*, MIDA (June 4, 2015), <https://en.mida.org.il/2015/06/04/is-religious-zionism-conservative>; Dror Eidar, *The Mother of All Disengagements: On the Repression of the Metaphysical in Israeli Cultural Discourse*, 21 AKDAMOT 52, 64 (2008), available at <https://www.bmj.org.il/userfiles/akdamot/21/Eidar.pdf> [Hebrew]; Simcha Rothman, *Seeds of Change: Surprise HCJ Conservative Ruling*, MIDA (June 21, 2018), <https://bit.ly/2wKOG1t> [Hebrew]; Shmuel Rosner, *How Israel Got Its Supreme Court Right*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/opinion/how-israel-got-its-supreme-court-right.html?mcubz=0>; Joshua Segev, *Justifying Judicial Review: The Changing Methodology of the Israeli Supreme Court*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING, *supra* note 8, at 105, 118–20.

<sup>351</sup> Benn, *supra* note 349, at 22; see also Ben-Porat & Yuval, *supra* note 344, at 10.

<sup>352</sup> THE ISRAELI CONSERVATISM CONFERENCE, [https://conservative.com/en\\_](https://conservative.com/en_) (last visited May 26, 2020).

<sup>353</sup> Perhaps taking after the conservative view of the American Revolution as one "not made, but prevented" (O'Neill, *supra* note 139, at 305), the new Israeli conservatism depicts the Zionist movement as dedicated to keep things as they are

variations in culture, history, demographics, political structures, etc. One major hurdle, however, has been sidestepped by Netanyahu: the national conflict. Once the occupation of the West Bank<sup>354</sup> is routinized and “managed”<sup>355</sup>—i.e. deadlock in the peace process becomes the desirable status quo—this conflict is no longer experienced as existential. Internal social issues consequently come to the fore, and there is room for an all-encompassing civil ideology to crystalize into a coherent political agenda and a compelling intellectual force.<sup>356</sup> Thus, “for the first time [neo-conservatism] has become the central political axis, disappearing the traditional struggle between right and left on territorial questions of the Israeli-Palestinian conflict.”<sup>357</sup>

*b. Moving the Rights Discourse to the Right*

The conservative project counters the liberal one, in former Minister Shaked’s words, by stopping national Zionism from “continu[ing] to bow down to the system of individual rights

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rather than shake them up. See Shaked, *supra* note 311; Chaim Navon, *Age Out of Socialism*, 77 DEOT (Dec. 2016–Jan. 2017), available at <https://bit.ly/2I7zhil> [Hebrew].

<sup>354</sup> The other area comprising the Palestinian Territories, the Gaza Strip, has arguably ceased being occupied territory with the “Disengagement Plan” of 2005 (although still effectively controlled by Israel in many respects). See Roi Bachmutsky, *Otherwise Occupied: The Legal Status of the Gaza Strip 50 Years after the Six-Day War*, 57 VA. J. INT’L L. 413 (2018); Benjamin Rubin, *Disengagement from the Gaza Strip and Post-Occupation Duties*, 42 ISR. L. REV. 528 (2009).

<sup>355</sup> See Orna Ben-Naftali, Michael Sfard & Hedi Viterbo, THE ABC OF THE OPT: A LEGAL LEXICON OF THE ISRAELI CONTROL OVER THE OCCUPIED PALESTINIAN TERRITORY, 6–17, 362–82, 399–416 and *passim* (2018); ARIELLA AZOULAY & ADI OPHIR, THE ONE-STATE CONDITION: OCCUPATION AND DEMOCRACY IN ISRAEL/PALESTINE 81 (Tal Haran trans., 2013).

<sup>356</sup> Ben-Porat & Yuval, *supra* note 344, at 15.

<sup>357</sup> Erez Tzfadia, *The Triumph of Neo-Conservatism*, HAOKETS (Jan. 30, 2013), <https://bit.ly/2I63SwK> [Hebrew]. For claims that stances toward national-territorial questions ultimately still determine positions on the political map, see Krampf, *supra* note 347; Ilan Saban, *The Political Counter-Response to the “Constitutional Revolution,”* 13 PUB. SPACE [HAMERHAV HATZIBURI] 13 (2017) [Hebrew]; Kalman Neuman, *Indeed ‘Neo-Conservatism’?*, 22 AKDAMOT 222 (2009), <https://www.bmj.org.il/userfiles/akdamot/22/Noyman.pdf> [Hebrew] (a response to Eidar, *supra* note 350).

interpreted in a universal way.”<sup>358</sup> At the same time, Shaked congratulated her religious constituents for electing her, a secular woman, thus: “the fact that I was elected to my post in an open primary shows that ‘Jewish Home’ [her former party] voters are very open and very liberal.”<sup>359</sup> Israeli conservatism walks a tightrope, navigating between staunch patriotism and the desire to reconfigure institutions, and between traditional collectivism and the valorization of individual merit. The utilization and manipulation of the language of rights in unconventional ways has proven very helpful in this endeavor, at times directly following American examples.

One such site is relaxing the regulation of private firearm possession. In August 2018, the Minister of Public Security laxed the criteria for licenses to keep personal firearm, allowing hundreds of thousands to become eligible. The reasons given were the potential contribution to public safety, since these individuals would be able to ward off terrorist attacks, and also that firearm possession is an entitlement, necessary for exercising the right to self-protection.<sup>360</sup>

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<sup>358</sup> Levi, *supra* note 265. The biggest triumph of the Right in this regard is the latest Basic Law enacted in 2018, Basic Law: Israel as the Nation State of the Jewish People. For analysis of the law, see Suzie Navot & Yaniv Roznai, *From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel*, 21 EUR. J.L. REFORM 403 (2019). The Basic Law was structured around themes antithetical to Barakian ones, and has been portrayed as the culmination of the backlash against Barak’s legacy. MAUTNER, LIBERALISM IN ISRAEL, *supra* note 8, at 118; Amit Segal, *The Rise and Fall of the Nationality Law*, MAKOR RISHON (July 14, 2018), <https://www.makorrishon.co.il/opinion/62607/> [Hebrew]. *But cf.* Jabareen, *supra* note 12, at 449 (arguing that this law merely exposes hegemonic Zionism’s exclusion of Palestinian citizens from “We, the Jewish People,” which has always been accepted by liberal jurists as well); *see also* MAUTNER, LIBERALISM IN ISRAEL, *supra*, at 174–78.

<sup>359</sup> Tepperman, *supra* note 267, at 2.

<sup>360</sup> See Ministry of Public Security, *As of Today: Graduates of Recon Rifleman 07 Training are Eligible for Firearm License* (Aug. 20, 2018), <https://www.gov.il/he/departments/news/firearm-license-criteria-expansion-2018> [Hebrew]; Josh Breiner, *Erdan Promotes: Hundreds of Thousands More Citizens to Become Eligible for Firearm Possession Licenses*, HAARETZ (July 7, 2018), <https://www.haaretz.co.il/news/politics/.premium-1.6246673> [Hebrew]. There is currently a petition pending at the Supreme Court against the new regulations. HCJ 8451/18 *The Gun on the Kitchen Table v. Minister of Public Security* (last checked May 26, 2020).

Both aspects signify a privatization of the state's authority and duty toward the citizenry, delegating responsibility to the individual. This expansion followed a surge in demand for freer gun use, framed in the language of natural rights, as there is no positive anchor in Israeli law for such a right.<sup>361</sup> A growing number of libertarian MKs reiterated,<sup>362</sup> some of whom while parroting data provided by gun advocacy interest groups that draw on the American National Rifle Association.<sup>363</sup> Among these MKs is Amir Ohana, who succeeded Shaked as Minister of Justice (2019–2020). As the first openly gay minister in Israeli history,<sup>364</sup> Ohana, like his predecessor,<sup>365</sup> navigates an appreciation of the liberal rights discourse that allowed him to gain political power, with an overtly antagonistic approach to the justice system responsible for it, which he then headed. Described as “represent[ing] the death of the liberal Israeli Right,”<sup>366</sup> Ohana, again like his predecessor, views this system “not as a moral force but as a competing interest group.”<sup>367</sup>

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<sup>361</sup> See Refael Minnes, *Carrying Weapon for Self-Defense is a Basic Right, Not a Privilege*, MIDA (March 8, 2018), <https://bit.ly/2QDKpEt> [Hebrew]; Rodena Golz, *What about the Right to Carry Firearm?*, MIDA (Oct. 14, 2013), <https://bit.ly/2K8GrFb> [Hebrew]. See also Aviram, *supra* note 8, at 38.

<sup>362</sup> A case in point is MK Amir Ohana, who headed the Knesset's firearm policy lobby and pushed for deregulation, and later became Minister of Justice (*infra* note 364–367 and accompanying text). Ohana combines libertarianism with extreme hawkish views, that deem any restraint on the military, such as judicial review, a threat to national security. The result is that natural rights are really powers allocated to Jews and withheld from Palestinians. Adam Hakim & Tom Ziv, *An Interview with Amir Ohana: “We Shouldn't be Shocked by the Idea of Disobeying the Supreme Court,”* ZAVIT AHERET (May 31, 2018), <http://www.zavitaheret.com/?p=6450> [Hebrew].

<sup>363</sup> See The Whistle, *On the Use of Firearm in Domestic Homicides* (Aug. 21, 2018), <https://www.thewhistle.co.il/feed/owxvg9E0V6> [Hebrew] (a fact-check of MK Ohana, who relied on data provided by the Association for the Promotion of Gun Culture in Israel); Hod & Levi, *supra* note 340.

<sup>364</sup> See Marcy Oster, *Israel Has Its First Gay Government Minister – Netanyahu Loyalist Amir Ohana*, TIMES OF ISRAEL (June 7, 2019), <https://www.timesofisrael.com/israel-has-its-first-gay-government-minister-netanyahu-loyalist-amir-ohana/>.

<sup>365</sup> *Supra* text accompanying note 359.

<sup>366</sup> Matti Freidman, *Amir Ohana Is Gay and Right-Wing. How Far Can He Go in Israel?*, N.Y. TIMES (June 6, 2019), <https://www.nytimes.com/2019/06/06/opinion/amir-ohana-israel-gay.html>.

<sup>367</sup> *Id.*

Other moves are at once pro-privatization, anti-universalism, and anti-elitism,<sup>368</sup> as part of a traditionalist-libertarian convergence in religious Zionism circles, which resembles the American Protestant one.<sup>369</sup> A particularly crude example is a prominent Rabbi's invocation of J. S. Mill's harm principle to oppose gay couples adopting children, claiming children's freedom is infringed upon when they are deprived of mothers.<sup>370</sup> A more sophisticated argument presented by another influential Rabbi is that religious Zionism should 'age out' of socialism and embrace free market mechanisms to remedy the "offensive monopoly of the state" over things like education and welfare.<sup>371</sup> The Rabbi reasons that the Jewish tradition is one of national unity between decentralized communities, which encourages non-coerced solidarity: "thin bureaucracy leaves room for a healthy nation and a strong society."<sup>372</sup>

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<sup>368</sup> Specifically, intellectual elitism. See RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1963). On Prime Minister Netanyahu's self-portrayal as an anti-elitist, see FILC, *supra* note 347, at 73.

<sup>369</sup> See Ravit Hecht, *This is How the Right-Wing Converted the Anti-Liberal Discourse*, HAARETZ (Aug. 2, 2018), available at <https://www.haaretz.co.il/magazine/the-edge/.premium-1.6337418> [Hebrew]; Houminer, *supra* note 332; Ram, *supra* note 326, at 29. On the emergence of a protestant-like interpretive theology in Israel, see Amnon Raz-Krakotzkin, "There is no God, but He Promised Us the Land," 3 MITAAM 71, 73 (2005), available at <https://library.osu.edu/projects/hebrew-lexicon/99995-files/99995093/99995093-03-files/99995093-03-071-076.pdf> [Hebrew]; cf. *supra* note 214.

<sup>370</sup> Shlomo Aviner, *Babies for Perverts*, KIPA (July 23, 2018), <https://bit.ly/2WtzY9q> [Hebrew].

<sup>371</sup> Navon, *supra* note 353.

<sup>372</sup> *Id.* It is not clear, however, that economic neo-liberalism is truly the zeitgeist within religious Zionism. Compare GILAD BE'ERY, *THE RELATIONSHIP BETWEEN RELIGIOSITY AND THE PREFERRED ECONOMIC REGIME IN ISRAEL* (2014) [Hebrew], available at <https://www.idi.org.il/books/5166> (finding that overall, religious people in Israel lean more to socialism and secular people to capitalism), with Houminer, *supra* note 332 (arguing that the shift in the religious Zionist elite has been stark, and its gradual trickling down can be clearly detected). Some polls indicate that "Shaked's dog-eat-dog worldview couldn't be more out of whack with how much Israelis trust and support the idea of a welfare state." Hod & Levi, *supra* note 340. Yet the same authors also mention that "the religious right has stood at the forefront of resistance to every single social justice campaign in Israel—from the massive protests in the summer of 2011, to the struggle to raise the minimum wage." *Id.* One explanation that has been offered is that this is a pragmatic strategy rather

Spiritual leaders reinterpret Judaism to create American-style social conservatism interwoven with various other conservative threads, thus offering a holistic world-view the Right has been craving.<sup>373</sup> Furthermore, this endeavor leads to similar legal initiatives, such as creating a “right to work” that undermines labor unions,<sup>374</sup> and allowing private businesses to refuse service to LGBT people, as a matter of religious liberty.<sup>375</sup> The picture drawn in these reconceptualized culture wars clearly suffers from lack of originality. It depicts a zero-sum game between PC culture on one side, tradition, common sense, and freedom on the other side.<sup>376</sup> It is also a rights discourse that works for the powerful and is not universal, as it embraces the principle of a natural hierarchy between people, and bows down to national might.<sup>377</sup> At the bottom of both axes are Palestinians, the subjugation of whose interests to those of the Jewish

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than an ideological stance: doubling down on the ideas that resonate in the secular elite would facilitate the rise of religious people into positions of power. Yair Sheleg, *Srugim Bordering on the Bourgeoisie*, 53 DEOT (Oct. 2011), available at <https://bit.ly/2IZefSz> [Hebrew]. Another explanation focuses not on *whether* a welfare state, but *for whom*. religious communities are concerned that social welfare demands would lead to a divestment of resources from West Bank settlements to low socio-economic groups within Israel. Uri Ram & Dani Filc, *Daphni Leaf's July 14th: The Rise and Fall of the Social Justice Protest*, 41 THEORY & CRITICISM 17, 23–24 (2013) [Hebrew].

<sup>373</sup> Rami Hod & Aviad Houminer, *Freedom as Explained by Smotrich*, HAARETZ (Oct. 10, 2018), <https://www.haaretz.co.il/opinions/.premium-1.6547540> [Hebrew]; Nitzan Horowitz, *Mass School Shootings? Soon in Israel*, HAARETZ (Sept. 2, 2018), <https://www.haaretz.co.il/opinions/.premium-1.6434424> [Hebrew]; Hecht, *supra* note 369.

<sup>374</sup> Ayelet Shaked, FACEBOOK (Aug. 5, 2019), <https://www.facebook.com/ayelet.benshaul.shaked/posts/2275277012590712>; *see also* Hod & Levi, *supra* note 340. On the American origins of the concept, see Cynthia Estlund, *How the Workplace Ties Liberals and Conservatives in Knots*, 93 TEX. L. REV. 1137 (2015) (book review).

<sup>375</sup> 103FM, *Smotrich: “Encouraging Single-Sex Families Ruins Society,”* MAARIV (July 2, 2018), <https://www.maariv.co.il/news/politics/Article-648425> [Hebrew]. For a positioning of such cases within a broader framework of American conservatism, see Noa Ben-Asher, *Faith-Based Emergency Powers*, 41 HARV. J.L. & GENDER 269 (2018).

<sup>376</sup> *See, e.g.*, Schvarcz, *infra* note 330.

<sup>377</sup> Hod & Houminer, *supra* note 373; Horowitz, *supra* note 373; Shaul Arieli, *Look for the Override Clause in Rabbi Kook*, HAARETZ (May 14, 2018), <https://www.haaretz.co.il/opinions/.premium-1.6078594> [Hebrew].



collective is justified from nationalist, religious, and economic perspectives.<sup>378</sup>

*c. Restraining the (Legal) Administrative State*

A crucial component of the American conservative reaction to legal liberalism is the effort to curtail the administrative state, after it gained new theoretical prominence thanks to the Legal Process school.<sup>379</sup> A similar development is underway in Israel. Specifically, various politicians on the Right, including both ministers of justice discussed above, have embarked in recent years on a fierce campaign against the powers of government lawyers and legal advisors, who are career professionals holding non-partisan positions.<sup>380</sup> Such efforts include, but are not limited to, altering appointment processes so that ministers would have personal control over them,<sup>381</sup> and sanctioning government lawyers for voicing concern over liberal-democratic principles being jeopardized for populist reasons.<sup>382</sup>

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<sup>378</sup> A case in point is the political movement Zehut [Identity], which combines a libertarian platform focused on marijuana legalization with religiously-informed, ultra-nationalist positions. <https://zehut.org.il/zehut-platform/?lang=en> (last visited May 26, 2020). See also *supra* notes 355, 362.

<sup>379</sup> *Supra* notes 49–51 and accompanying text.

<sup>380</sup> See generally YOAV DOTAN, *LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL* (2014).

<sup>381</sup> See Mordechai Kremnitzer, *Eventually the Attorney General will Also Be a Political Appointee*, HAARETZ (June 24, 2018), <https://www.haaretz.co.il/opinions/.premium-1.6201465> [Hebrew].

<sup>382</sup> Moran Azulay, Tova Tzimuki & Shahar Hay, *Shaked Demands Dismissal of Deputy AG over Criticism of Bill*, YNET (Nov. 8, 2018), <https://www.ynetnews.com/articles/0,7340,L-5392785,00.html>. Interestingly, the remarks made by a deputy Attorney General that caused Shaked to demand her dismissal, were directed against an instance of both political opposition to the administrative state, and an abuse of the vocabulary of human rights to garner power (*supra* section III.B.3.b). The Minister of Culture proposed a statutory amendment that would enable her to withdraw funds from cultural institutions that display ‘disloyalty’ to the state, despite meeting the Ministry’s professional criteria, based on the state’s right to ‘freedom of funding.’ *Id.*

The desired model for government attorneys is the American ‘Hired Gun’ one.<sup>383</sup> This same model was advanced in a 2019 concurrence by Shaked-appointed Justice Stein. Rejecting as “silencing” the Court’s established stance that the state should not defend in court an executive decision which the Attorney General thinks is illegal,<sup>384</sup> Stein alludes to the promise of returning to an idealized pre-Barak jurisprudence: “these matters are best handled like they used to be in the more distant past.”<sup>385</sup> Both the Barakian and the reactionist stances promote a unitary executive branch, but they diverge on who gets to articulate it—one approach has faith in the existence of objective legal categories and in the ability of legal professionals to identify them; the other prefers instead to have legal decisions made by the same persons who decide on substantive policy.

The latter approach has been particularly appealing to American conservatives due to its majoritarian and traditionalist character: “The unitary executive may be linked to majoritarianism through the Framers’ concern for centralizing public accountability in the President.”<sup>386</sup> Legal and bureaucratic checks on executive power are now framed in Israel, as they are in the U.S., in conspiratorial rhetoric, as emanating from the “deep state.”<sup>387</sup> While arguments both for and against the ‘Hired Gun’ model in the U.S. are made by reference to the executive’s democratic accountability,<sup>388</sup> the executive is not an elected branch in Israel, yet holds massive sway over the legislature. This trend can thus be understood in the framework of

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<sup>383</sup> Michael Asimov & Yoav Dotan, *Hired Guns and Ministers of Justice: The Role of Government Attorneys in the United States and Israel*, 49 *ISR. L. REV.* 3 (2016).

<sup>384</sup> Note that in Israel, Minister of Justice and Attorney General are separate positions: the former is a political figure, the latter is a career lawyer. See NAVOT 2007, *supra* note 65, at 168–73; FRIEDMANN, *supra* note 11, at 237.

<sup>385</sup> HCJ 5769/18 Amitai v. Minister of Science and Technology (Mar. 4, 2019), ¶¶ 7–11 (Stein, J., concurring) available at <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\690\057\z09&fileName=18057690.Z09&type=4> [Hebrew].

<sup>386</sup> Young, *Judicial Activism*, *supra* note 127, at 1198.

<sup>387</sup> See Doron Nehemia, *Don’t be Afraid of the Deep State*, HAARETZ (Dec. 23, 2019), <https://www.haaretz.co.il/opinions/.premium-1.8304551> [Hebrew] (on Israel); Jon D. Michaels, *The American Deep State*, 93 *NOTRE DAME L. REV.* 1653 (2018) (on the United States).

<sup>388</sup> Asimov & Dotan, *supra* note 383, at 4–10.

democratic backsliding.<sup>389</sup> Yet it is no coincidence that it resonates especially with religious Zionism circles,<sup>390</sup> since its rationalization also connotes multiple tenets of the American conservatism narrative. Shaked's top legal aide has provided, also in *Hashiloach*, the rationale that government attorneys are wrong to follow an independent professional ethos because their job is to serve the relevant political figure as their private client.<sup>391</sup> Viewed under this light, it becomes clearer why Justice Stein found it apt to apply Justice Holmes's quote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market,"<sup>392</sup> to powerful politicians with unlimited media access who make putatively illegal decisions. Thus, the anti-administrative state strand is merged with substantive conservative inclinations. Such moves may register as a series of shifts from rule of law to rule of men, yet their advocates rather ask *whose* will ought to rule: whether the policymaker's or the jurist's. Justice Sohlberg wishes the judge to cease being an antagonist to governability and instead become its ally.<sup>393</sup>

It is not new to portray elitist legalism as an impediment to national security. The accusation that lawyers tie soldiers' hands behind their backs in times of war is well-known, yet continuously reiterated.<sup>394</sup> Israel has been in a legal state of emergency ever since its establishment,<sup>395</sup> and executive actions of all kinds are rationalized by

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<sup>389</sup> See Nadiv Mordechai & Yaniv Roznai, *A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel*, 77 MD. L. REV. 244 (2017).

<sup>390</sup> Yitzhak Gordon, *Why Does the Right-Wing Believe Every Conspiracy Theory Against the Legal System?*, MAKOR RISHON (July 4, 2018), available at <https://www.makorrishon.co.il/opinion/59975/> [Hebrew].

<sup>391</sup> Gil Bringer, *The Silent Takeover: From Legal Advisors to "Gatekeepers,"* 11 HASHILOACH 75 (2018), available at <https://hashiloach.org.il/wp-content/uploads/2019/01/hashiloach-11d790d797d7a8d795d79fd79cd793d7a4d795d7a1.pdf> [Hebrew].

<sup>392</sup> Amitai, *supra* note 385, ¶ 10 (Stein, J., concurring).

<sup>393</sup> Sohlberg, *On Subjective Values*, *supra* note 63, at 39.

<sup>394</sup> See, e.g., Mark, *supra* note 272, at 22.

<sup>395</sup> See HCJ 3091/99 Association for Civil Rights in Israel v. Knesset (May 8, 2012), available at [https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\9\910\030\t38&fileName=99030910\\_t38.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\9\910\030\t38&fileName=99030910_t38.txt&type=4) [Hebrew]; Yoav Mehozay, *The Fluid Jurisprudence of Israel's Emergency Powers: Legal Patchwork as a Governing Norm*, 46 L. & SOC'Y REV. 137 (2012).

linkage to the war effort.<sup>396</sup> What is new is that now the operation of the government itself is also a matter of market efficiency.<sup>397</sup> Executive control over legal and administrative professionals—and most of all those who belong to both categories—is thus necessary. First, for defending inside cohesion against outside enemies. Second, for reducing invisible hand frictions. Third, because curtailing government jurists helps to justify the curtailment of judicial ones, as judicial deference to the executive branch is justified by the latter having democratic legitimacy to carry out chosen policy.<sup>398</sup>

#### 4. Between Law and Politics: Judicial Outcomes

Political questions often transform into adjudicative ones, and vice versa.<sup>399</sup> The dialectic between these two public spheres varies across time and place and takes different shapes within different cultural frameworks. In Israel, scholars have portrayed a narrative according to which an important political function fulfilled by the Barak Court, PI included, has been the preservation of power in the hands of a particular social group, in the face of multiculturalism. According to Menachem Mautner, Ran Hirschl, and others, a secular-liberal former hegemony took to the Court in response to the right-wing political ascendance since the late 1970s,<sup>400</sup> turning the judiciary into a vehicle of liberal policy-making in spite of popular will, a weapon in the culture wars.<sup>401</sup> In religious and nationalist groups especially,

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<sup>396</sup> See Netanyahu, *supra* note 314.

<sup>397</sup> Former mayor of Jerusalem, MK Nir Barkat, has made this proposition straightforwardly, advocating treating constituents as customers and governing according to the market principle of supply and demand. Barkat, *supra* note 330. See also Ram, *supra* note 326.

<sup>398</sup> See Yariv Levin, *Control of the State has Moved from the People to a Handful of Judges*, 211 HAUMA (2018) available at <https://bit.ly/2F1LZNN> [Hebrew].

<sup>399</sup> See John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 42 (2002).

<sup>400</sup> The right-wing party Likud first won the general elections in 1977 (one year before Barak's appointment to the Supreme Court), after thirty years of Labor rule.

<sup>401</sup> MAUTNER, LAW AND THE CULTURE OF ISRAEL, *supra* note 270, at 90–158 (on PI, at 93–94); RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 50–65 (2007). For a more generous description of Barak's jurisprudential enterprise, still along roughly the

Barak's Constitutional Revolution is understood as a usurpation of the constitutional framework for the benefit of one side on the political map, inadvertently consolidating those communities that oppose the liberal project.<sup>402</sup> Notwithstanding other intra-Israeli as well as global processes that may add important explanations for this turn in Israeli jurisprudence,<sup>403</sup> it is generally accepted that the Court has since become a stronghold of political liberalism, implemented by means of interpretation and construction doctrines.<sup>404</sup> One of the problems this entails is that the gap between the judiciary and the public is constantly broadening, while in politics, the liberal camp has been unable to present a compelling agenda that would return it to power.<sup>405</sup> Under this light, the rise of PO is anything but surprising.

The Barak Court hindered the rise of an intellectual conservative movement, but it could not do so forever and much less once Barak himself retired and the intellectual stature of the Court subsided. The conservative attack, starting with former incarnations of groups described above, is one of the factors Mautner mentions to explain the Court's crisis of legitimacy in the late twentieth century. Their proposed reforms of the judiciary were among those implemented by former Ministers of Justice whose footsteps Ministers

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same lines in terms of social conditions and consequences but according a higher level of liberal integrity to Barak, see Michelman, *supra* note 61.

<sup>402</sup> Mautner, *Protection of Liberal Rights*, *supra* note 14, at 144–46.

<sup>403</sup> See Weiler & Lustig, *supra* note 58, at 476–80 (on global factors); NIR KEDAR, BLUE AND WHITE LAW: IDENTITY AND LAW IN ISRAEL, A CENTURY-LONG POLEMIC 146–67 (2017) [Hebrew] (same); Moshe Halbertal, *Israel's Supreme Court and the Transformation of Israeli Society*, 11 INT'L J. CONST. L. 1111 (2013) (on local factors); Gad Barzilai, *The Supreme Court in Israeli Legal Culture*, 152 INT'L SOC. SCI. J. 193 (1997) (same). Another important explanation, which both Mautner and Hirschl discuss, is the neo-liberalization of Israeli economy. See *supra* note 314.

<sup>404</sup> See MEYDANI, *supra* note 264, at 94–105, 116–20. For claims that behind the façade of liberalism and protection of human rights there is actually an acquiescence in and legitimation of oppressive policies, at least with respect to the Palestinian population, see Jabareen, *supra* note 12; DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL (1990); Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, 24 L. & SOC'Y REV. 781 (1990).

<sup>405</sup> MAUTNER, LAW AND THE CULTURE OF ISRAEL, *supra* note 270, at 159–80.

Shaked and Ohana followed.<sup>406</sup> But never before have political, civil and intellectual forces effectively coalesced to provide solid backup for such efforts. The nexus between these conditions and PO is fourfold: the new theory is legitimized by these circumstances; it reflects them; it shares their values; and it may thrive thanks to them.

In the United States around the 1980s, not only did a comprehensive conservative political force form and not only was it joined by a judicial one, but also—this cooperation was successful. Conservative jurisprudence made conservative politicians happy.<sup>407</sup> PO's deliverance should similarly be measured in terms of political outcomes on top of judicial methodology. We have already seen how in Israel too, a conservative judiciary can yield conservative results, or gratifying dissents and concurrences.<sup>408</sup> But the role of interpretive methodology in most of these cases was not significant. The new theory has only been implemented in a handful of decisions, only one of which leading to an authoritative result that itself awaits reevaluation.<sup>409</sup> In these cases, PO exemplifies the inner dilemmas of Israeli-American conservatism more than their resolutions: between religious interests and those of the free market; localization and majoritarianism; public virtue and personal responsibility.

PO is as yet on the margins and hence it is difficult to assess its long-term effects. Note, however, that in both *Gini* and *Rom*, two different Presidents of the Court found it paramount to subject the legal reasoning presented to heightened judicial scrutiny, by ordering “further hearing” procedures.<sup>410</sup> The disruptive potential of PO within the Court is thus well recognized, as it should be. Looking forward, PO is compatible with Israeli conservative politics in at least four important ways, which defy the trajectory of PI.

First, the focus on law and religion issues positions PO against both judicial activism and social progressivism at the same time, since

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<sup>406</sup> *Id.* at 169–70.

<sup>407</sup> *Supra* notes 155–167 and accompanying text.

<sup>408</sup> *Supra* notes 283–297 and accompanying text.

<sup>409</sup> *Supra* notes 62–81 and accompanying text.

<sup>410</sup> *Supra* notes 62, 76.

the Supreme Court has been particularly active with respect to ‘the status quo.’<sup>411</sup>

Second, PO’s originalist element allows a containment of rights, a difficult task to achieve with any evolutionary theory. Vaguely worded bills of rights inevitably get broadened over time but rarely narrowed down, unless past settlements have conclusive normative force.<sup>412</sup> Sohlberg has doubted the centrality of rights to Israeli jurisprudence when he called for the enactment of a ‘Basic Law: Human Responsibility.’ Responsibility is a concept utilized by American conservatism, but which also has particular Jewish resonance.<sup>413</sup> Such a Basic Law would, in Justice Sohlberg’s opinion, reintroduce the values that governed the Israeli public sphere before the rights discourse took over, cherishing social justice, fraternity, and “restoration of original splendor.”<sup>414</sup> This seems to orient toward a civic republican rather than atomistic social vision, centered around a conception of the common good, which was indeed prevalent at Israel’s founding.<sup>415</sup>

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<sup>411</sup> See Adam S. Kramarow, *Synagogue and State: Bringing Balance to the Role of Religion in Israeli Law*, 23 J. TRANSNAT’L L. & POL’Y 157, 160 (2013–2014); see also Barak-Erez, *Law and Religion*, *supra* note 234 (showing how ‘the status quo’ has actually been undergoing constant change, mostly generated through litigation rather than legislation).

<sup>412</sup> Scalia, *Originalism*, *supra* note 208, at 855 (“why, one may reasonably ask—once the original import of the Constitution is cast aside to be replaced by the ‘fundamental values’ of the current society—why are we invited only to ‘expand on’ freedoms, and not to contract them as well?”).

<sup>413</sup> Sohlberg, *Keep the Law*, *supra* note 247. On responsibility in American Conservatism, see Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299 (1992); West, *supra* note 149, at 716. On responsibility in Jewish jurisprudence, see Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

<sup>414</sup> Sohlberg, *Keep the Law*, *supra* note 247, at 26–29.

<sup>415</sup> Israel’s founder, David Ben-Gurion, held a republican conception of citizenship, which led him to oppose the adoption of a bill of rights and focus instead on individual duties. Doron Navot & Yoav Peled, *Toward a Constitutional Counter-Revolution in Israel?*, 16 CONSTELLATIONS 429, 432 (2009).

Third, a rhetoric of clear cuts and decisiveness is abundant in political conservatism with respect to issues like the Occupation<sup>416</sup> or separation of powers.<sup>417</sup> PO joins this trend,<sup>418</sup> adding to it the decisionism of originalism. Status quo and victory are both acceptable options—compromise not so much.<sup>419</sup> Compromise is, however, what PI enshrines to facilitate its methodic and substantive liberalism. Barak’s judicial rhetoric frequently portrays his way as the middle ground between two extremes, and coupled with the inclusiveness of his method,<sup>420</sup> it creates “a position that never needs to explicitly determine questions of ideology [ . . . ] ‘balance of interest’ becomes almost synonymous with ‘adjudication.’”<sup>421</sup>

Fourth, legislative history provides judges with an avenue for instilling non-liberal interpretive principles with authority.<sup>422</sup>

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<sup>416</sup> Bezael Smotrich, *Israel’s Decisive Plan*, 6 HASHILOACH 81 (2017), available at <https://hashiloach.org.il/wp-content/uploads/2017/09/2-3-hashiloach-6-smotrich-web.pdf>, English translation available at <https://hashiloach.org.il/israels-decisive-plan/>.

<sup>417</sup> While using the vocabulary of the occupation. Former Minister of Defense, Naftali Bennett, advocated the enactment of an ‘override clause’ that would enable the Knesset to re-enact a statute that has been struck down by the Supreme Court. He claimed this would erect a much-needed “separation wall” between branches of government, alluding to the wall erected between Israel and the West Bank. Shahar Hay, *Knesset Committee Approves Override Power over High Court*, YNET (June 5, 2018), <https://www.ynetnews.com/articles/0,7340,L-5252771,00.html>. See also, on the proposal and its connection to the occupation, Arieli, *supra* note 377.

<sup>418</sup> Similar trends can be detected in American conservative jurisprudence as well. See, e.g., FRANKS, *supra* note 183; Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), <https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars> (“The abortion fight we are gearing up for departs from the realm of uneasy compromise and reëngages [sic] the clash of absolutes”).

<sup>419</sup> And hence the tension between the desired resolution for the occupation and its routinization (*supra* note 355 and accompanying text), is reconcilable.

<sup>420</sup> *Supra* text accompanying note 249.

<sup>421</sup> Amit, *supra* note 23, at 103.

<sup>422</sup> This is already taking place. A district court cited Sohlberg’s approach in a 2018 intellectual property case, in order to legitimize an interpretive appeal to Jewish Law, since it served as “one of the sources for the law” as discerned from pre-enactment legislative activity. CC (Jer) 55503-09-14 Cohen v. Ofer (Sept. 7, 2018), ¶ 897.



Interpreting a given provision of Israeli law so as to bring to fruition the values of the entire legal system, as PI requires, would give precedence to liberal values, since they are embedded in the common law system inherited from the British rule. On the other hand, the values of the legislature in a given point in time, may have a more religious or nationalistic flavor. The legislative as well as the executive branches are concerned with promoting a national project and with pursuing short-sighted political gains, whereas an essential role of the judiciary, at least at common law and definitely in Israel ever since its founding, is to safeguard individual rights and project liberal values unto society.<sup>423</sup>

This pivotal historical moment in Israeli jurisprudence has produced an avenue for the Court to address a shift in public discourse and public attitudes toward it, fill the vacuum in non-liberal jurisprudence, and possibly regain some of the public trust it has lost. But not without considerable costs, for the Israeli public and for the Court itself. An unfortunate result of the American interpretive dispute is an entrenchment of two opposing judicial camps, which correlate those on the political map. This is a corollary of the demand for methodological purism, and calls for non-absolutist approaches are growing in the U.S.<sup>424</sup> PI attempts to provide that, employing various interpretive mechanisms in ostensible harmony, while PO builds on divisions. Coupled with the growing political tendency to divide judges into two camps, the Israeli Court may consequently become more polarized and politically tainted. If Justice Sohlberg stays true to the values represented by PO and remains consistent—for a pick and choose approach would encounter the same pitfalls from which he wants to salvage the Court—then judicial integrity may be enhanced, but judicial independence weakened.

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<sup>423</sup> Mautner, *Protection of Liberal Rights*, *supra* note 14, at 146–48; MAUTNER, LIBERALISM IN ISRAEL, *supra* note 8, at 25–27. In this sense, the common law tradition reconciles liberalism and conservatism.

<sup>424</sup> See Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018); FALLON, *supra* note 174, at 142–54; Solum, *Originalism*, *supra* note 186, at 1282–88; Whittington, *Originalism*, *supra* note 161, at 388.

I doubt that the future holds such polarization for the Israeli Supreme Court. The trajectory of the interpretation-ideology nexus in Israel hinges on two related questions: what traction PO and similar views will gain, and how the liberal wing will respond. One possible liberal strategy would be to develop—rather than reiterate—PI, perhaps by breaking the U.S.-inspired cycle and appealing to the local. A fruitful avenue might be to reclaim the evolving tradition of Jewish Law,<sup>425</sup> another would be to develop a more inclusive localized philosophy.<sup>426</sup> A different strategy would be to view PO as already the Court’s way to adapt to changes in the political climate. Due to factors like the relatively uniform ethos of the judiciary and the judges’ powers in the appointment process,<sup>427</sup> the interpretive dispute might lead to a stronger judiciary. For the mere existence of a conservative minority that is intrinsic to the Court, can provide it with a veneer of pluralism. It would allow the Court to mitigate public criticism by occasionally extending a pound of flesh, in the form of a conservative victory, while retaining an overall liberal approach.

#### IV. CONCLUSION

Contrary to recent scholarship on non-American originalism,<sup>428</sup> this Article has told the story of a new originalist method that follows the same patterns of the American original, playing a role in a bigger conservative political project. I have argued that the current historical moment in Israeli jurisprudence marks a recreation of the dynamics that permeate the American discourse ever since the 1980s,

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<sup>425</sup> For such a proposal, see Menachem Mautner, *The Supreme Court – Three Phases: “Alienation”, “Confrontation”, “Containment,”* 10 L. & BUS. [MISHPAT VEASAKIM] 585, 596–98 (2009) [Hebrew]. For general discussion of Jewish Law interpretive methodology vis-à-vis modern ones, see Sapir, *supra* note 12; *Symposium: Text, Tradition, and Reason in Comparative Perspective*, 28 CARDOZO L. REV. 1 (2006); Samuel L. Levine, *Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative*, 1998 UTAH L. REV. 465; HALBERTAL, *supra* note 321.

<sup>426</sup> See KEDAR, *supra* note 403, at 186–210 (arguing that keeping a successful, evolving Jewish tradition in Israeli law does not depend on incorporating elements of *Jewish Law* into it, but rather continuing to develop the already independent and unique *Israeli Law*).

<sup>427</sup> *Supra* notes 273–280 and accompanying text.

<sup>428</sup> *Supra* note 6.

with a conservative backlash to a legal liberalism hegemony. In both countries, a judicial faith in liberal democracy produced progressive social outcomes via a teleological interpretive method. Subsequently, a massive political project rendered liberalism synonymous with left-wing and conservatism synonymous with right-wing. This occurs when social traditionalism, neo-liberal economic policy, and hawkish national security stances join hands with judicial interpretive methods centered around originalism, formalism, and deference. This framework thus offers an alternative explanation—more theoretically coherent though perhaps no less troubling—to local manifestations of populism and democratic decline. Despite significant constitutional and cultural variations, American conservatism can be, and is in fact, reproduced in other countries as well.