Constitution by Compromise

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Constitution by Compromise: Justiciability and Democracy in Israeli Constitutionalism

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Abstract

The question of empowering the court and the limits of constitutional protection are at the heart of the debate over constitutional design in Israel. Lacking a comprehensive written constitution, Israel nonetheless has a set of basic laws which encompass many of the functions of a constitutional text making it a near-complete constitution. Nonetheless, there continues to be considerable support for the idea of a single, formally adopted constitutional text. Recently, several proposals have been brought to the forefront of political discussions through the actions of various interest groups outside the government, and energized and committed efforts by government officials and members of the Knesset. While these proposals differ in many aspects, they share similar views of the need to establish a model of judicial review that accords with Israel’s system of representative government. In this paper we focus on one particular proposed model of judicial review, the selective non-justiciability model promoted by the Israel Democracy Institute. We analyze the terms of the model of judicial review contained in the proposal and find that it encompasses three distinct compromises: a “political compromise” among competing interests; a “democratic compromise” among competing theories of representative government; and a “cultural compromise” among competing values of multicultural pluralism and universalist liberal norms. The terms of these compromises challenge the predictions of much of the comparative literature on constitutional design, and point to the complexity involved in negotiations over judicial authority under conditions of pluralism.
Israel is an example of a democratic state in a deeply-divided society. Its small population is split along several crossing dimensions, including the Jewish-Arab cleavage, the religious-secular cleavage, and the hawkish-dovish cleavage.¹ These multiple societal divides are reflected in the fragmented political system that makes it difficult to achieve agreement on questions of fundamental importance. In the past, these lines of division frustrated every attempt to draft and adopt a written constitution. Instead, over time Israel has adopted a series of Basic Laws which encompass most of the structural features of a constitution and provide a very partial charter of rights.² Based on these Basic Laws, the active Court of the 1990s, lead by Chief Justices Meir Shamgar and Aharon Barak, institutionalized and exercised its power to conduct judicial review. The Court’s actions were highly controversial, raising deep discomforts about the resulting balance between the branches of government. As a result of this unease, in recent years much of the focus of the debate over a future constitution has focused on the question of judicial review. With most of the structural elements of a constitutional system covered by the Basic Laws, the powers and limits of judicial review are among the last pieces of the puzzle that need to be worked out in order to finalize fifty years of work.

Several proposed models of judicial review are presently being debated among government offices, the Knesset, extra-governmental institutions, and in the media. Among


these proposals, two – the override model suggested in a variety of forms, and the selective non-justiciability model proposed by the Israel Democracy Institute (IDI) – offer a compromise between a regime of no judicial review and a regime of strong independent court with little reviewing restraints. Both proposals have entered the political arena. A transitional override model was suggested by the Ne’eman Committee, a committee appointed by Prime Minister Sharon to propose a draft for a Basic Law dealing with legislation; the model was adopted as the primary proposal of the Law, Constitution and Justice Knesset Committee’s first draft for a Constitution by a Wide Consensus;³ and a much more limited form was adopted by the Olmert Government in September 2008. The IDI proposal was published in 2005 as part of their comprehensive proposal for a Constitution by Consensus. This latter proposal was recently presented and discussed at the meetings of the Law, Constitution and Justice Committee (11.28.2007). The two proposals share similar views of the need for a strong form of judicial review, but both are designed to limit the scope of that review in order to safeguard the authority of the representative political structure. The override proposal builds on the existing Canadian model, and, therefore, there is an abundant body of scholarly work analyzing the model.⁴ By contrast, the IDI’s selective non-justiciability proposal is innovative. Consequently, in this article we undertake a consideration of the selective non-justiciability model from the

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perspectives of legal and democratic theory, and an evaluation of its suitability in the Israeli context.

In the first section of this paper we describe the development of judicial review and its relation to Israeli constitutionalism up to the present. This background establishes the concerns and interests that have to be negotiated for any successful adoption of a constitutional text in Israel. A brief discussion of the proposed model – the IDI’s Selective Non-Justiciability model concludes this section. In the second section, we ask how the present practice and the selective non-justiciability model compare with two “standard models” of judicial review and justiciability, the British and American. We begin with these two models because the overall structure of Israel’s system of government reflects elements of both; however, we also observe differences and parallels between the Israeli practice of judicial review and several European models.

Using this comparative discussion for context, in the third section of the article we turn to an assessment of the non-justiciability provisions in the IDI’s constitution proposal. We find that the non-justiciability provision constitutes a “compromise” in several dimensions: a “political compromise” between interested parties involved in the process of institutional design; a “democratic compromise” between competing models of judicial review in democratic systems; and a “cultural compromise” between pluralistic models of social inclusion and universalist claims of liberal constitutionalism. The first two of these compromises have to do with the

5 The models that are discussed in this article are only a few of myriad possibilities, as experimentation with constitutional design has become a global phenomenon. For a review of recent literature in comparative constitutional development, see Shannon Rossler, “Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority,” Law & Social Inquiry 32 (2007). See also Joseph H.H. Weiler, The Constitution of Europe: “Do The New Clothes Have an Emperor?” and Other Essays on European Integration (Cambridge 1999); Heinz Klug, Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction (Cambridge 2000); Peter Oliver, The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand (Oxford 2005).
structural and overall conceptual elements of the non-justiciability provision; the third appears in the selection of the specific topics that are excluded from the courts’ jurisdiction, and the place that those topics occupy in the social and political order of Israeli society. Finally, in the concluding section we consider some of the challenges and the difficult questions that the non-justiciability provision might face if it were implemented in its present form.

I. Judicial Review in Israel

A. Past and Current Judicial Practices

The Declaration of Independence (14.5.1948) guaranteed that the new State of Israel would elect a constituent assembly, which will draft and ratify a formal constitution. That assembly was duly elected in January 1949, but was soon transformed into the First Knesset. Soon after, the Knesset decided in 1950 that it would not adopt a constitution but would only start a process of passing a series of Basic Laws that would eventually form the complete constitution. This decision, the “Harari Compromise”—named after MK Izhar Harari of the Progressive party—was a convenient way to postpone disagreements on the identity of the young state. Since then eleven Basic Laws have been adopted, starting with Basic Law: The Knesset (1958).

In the absence of a comprehensive written constitutional text, the practice of judicial review has never been explicitly acknowledged in any formal legal enactment.  

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6 Transition Law, S.H. 1949, no. 1.
7 It should be mentioned that since the first years of Israel’s independence, the absence of a written constitution has not precluded Israeli courts from developing judicial review over administrative actions as well as by creative techniques of statutory interpretation to establish legal principles for the protection of individual rights. See Dotan,
Supreme Court's first rulings in 1948 (on the validity of ex-Mandate statutes) and 1969, the justices denied any claim to the authority to annul a statute for contradicting a higher norm or, after 1958, a Basic Law. The Supreme Court in that period took an unequivocal stand that it could not decide on the validity of statutes and was limited to interpreting laws. Azuz (1963) and Bazul (1963) serve as strong examples of this first period. In these cases Justice Berinson relied on the supremacy of parliament as a reason for rejecting constitutional claims, emphasizing the parliamentary constitutional order. Berinson wrote in Azuz: “The possibility of voiding a statute that was lawfully enacted is inconceivable.”

The power to conduct judicial review of legislation was finally introduced by judicial fiat. In the Bergman case (1969) the Israeli Supreme Court ushered in a judicially created pattern of judicial review when it annulled legislation that contradicted a Basic Law. In that case, the Court discussed a clause in the Party Finance Act which advantaged existing parties in public financing and thus contradicted the “equal and free election clause” of the Basic Law: The Knesset. The equal and free election clause was the only clause of that law protected by an entrenchment provision, according to which “this section shall not be varied save by a majority

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Y. “Judicial Accountability in Israel: The High Court of Justice and the Phenomenon of Judicial Hyperactivism,” Israel Affairs 8(4): 87-106 (2002). Dotan stresses the development of judicial review of administrative action in Israel from a restrained Court until the 1980's, to an activist Court during the 1980's and 1990's and to today’s ‘hyperactive’ Court—referring to the increased involvement of legal aspects in judicial consideration in administrative action.

9 H.C. 228/63 Azuz v. Azar, 17, P.D., 2541. In Azuz the Court discussed section 29 of the Judiciary Act granting the right of appeal on matters of procedure. The Court rejected the argument that the law grants only procedural rights and therefore cannot grant a material right of an appeal. H.C. 188/63 Bazul v. Minister of Interior 19(1) P.D. 337. In that matter the HCJ examined section 8 of the Legal and Governing Order Act of 1948 (“Pkudat Sidrei Shilton U’Mishpat) and ruled that the mandatory word used for statute (“Pkudah”) should be read to reflect its meaning and legislative intent to encompass any statute.
10 Azuz, H.C. 228/63 at 2547. (translation by the authors).
11 H.C. 98/69 Bergman v. Minister of Finance, 27(2) P.D. 785.
of the members of the Knesset.” Since the Party Finance Act did not pass with the needed quorum, the Court ruled that it violated the Basic Law and was consequently void.\textsuperscript{12} Understanding the far-reaching significance of this ruling, the Supreme Court later treated \textit{Bergman} a narrow precedent permitting only procedural constitutional review. Two decades later in \textit{Laor} the Supreme Court explicitly recognized the normative supremacy of the equal and free election clause over the Party Finance Act. While the ruling can be understood as creating a normative hierarchy between entrenched and not entrenched provisions, Justice Barak used this opportunity to lay down a much broader understanding of the Court’s authority to conduct judicial review. Barak wrote: “In theory there is a possibility that a court in a democratic society will invalidate a law that contradicts basic principles of the system, even if these principles are not established in a rigid constitution or in an entrenched basic law. There is nothing axiomatic in the approach that law cannot be invalidated on the basis of its content. In the invalidation of a law which severely violates basic principles, there is neither a violation of the principle of the sovereignty of the legislature, as sovereignty is always limited; nor is there a violation of the principle of separation of powers, as this principle is based on the idea of checks and balances of government. Nor is there an injury to democracy, as democracy is a delicate balance between majority rule and human rights and basic principles.…Such invalidation does not harm the judiciary, as its role is to maintain the rule of law, including the rule of law over the legislature.”\textsuperscript{13}

\textsuperscript{12} The Knesset thereafter amended the Law to include financing for new party groups. The amendment was passed by an absolute majority of the Knesset members, although it is possible that such a majority was not required since, arguably, the new Law, as amended, satisfied the requirement of equality.

\textsuperscript{13} H.C. 142/89 \textit{Laor v. the Knesset Speaker}, 44(3) P.D. 529. (translation from Salzberger, Eli M., "Judicial Activism in Israel: Sources, Forms and Manifestations". Available at SSRN: \url{http://ssrn.com/abstract=984918}).

Most importantly, the two new human rights Basic Laws not only introduced constitutional rights, but also introduced a semi-explicit endorsement of judicial review by including a “Violation of Rights” clause limiting the ability of the legislature to legislate a law which violates the rights under the Basic Laws. In addition, the Basic Law: Freedom of Occupation includes a clause which permits the Knesset to adopt a statute that contradicts its terms, but only if the statute contains an express statement to the effect that it is adopted “notwithstanding” its contradiction of the Basic Law.

Soon after, in *Mizrahi Bank* (1993), the Court was asked to consider the validity of a statute that arguably violated the right to property specified in the Basic Law: Human Dignity

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16 The two clauses are quite similar and include three limits – values of the Israeli state, a proper purpose and a right measure. A Law or regulation violating rights in the two Basic Laws has to meet these three needs.

Basic Law: Human Dignity and Liberty

“8. There shall be no violation of rights under this Basic Law except by a Law fitting the values of the state of Israel, designed for a proper purpose, and to an extent no greater than required, or by regulation enacted by virtue of express authorisation in such Law.”

Basic Law: Freedom of Occupation

“4. There shall be no violation of freedom of occupation except by a Law befitting the values of the state of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express authorisation in such Law”.

17 Section 8, Basic Law: Freedom of Occupation:

8. A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein.
and Liberty.\textsuperscript{18} The statute at issue cancelled the debts of communal villages (Kibbutzim and Moshavim) in order to overcome serious economic crises they were suffering. The Court, sitting as a rare bench of nine justices, dismissed the appeal, holding that, although the statute infringed the right to property, it met the terms specified in section 8 of the Basic Law – it was intended to further a worthy cause and was proportionate. The justices, however, each added extensive comments in which they relied on precedents from \textit{Bergman} through \textit{Laor} to recognize (Heshin dissenting) the power of the Court to conduct judicial review of legislation. Citing the American milestone decision in \textit{Marbury v. Madison},\textsuperscript{19} Justice Barak wrote: “In a system of law with a constitution, the rule of law demands protecting the constitution. Indeed, the Knesset, in its role as a constitutional assembly, had given the state the basic laws. These norms stand in a higher normative hierarchy. In order to fulfill the will of the Knesset it is needed to strike down a statute that contradicts a basic law.”\textsuperscript{20} Following this reasoning, the Israeli Supreme Court since \textit{Mizrahi Bank} has annulled three statutes.\textsuperscript{21} None of these rulings, however, referred again to the question of authority to conduct judicial review.\textsuperscript{22}

\textsuperscript{18} H.C. 6821/93 \textit{United Mizrahi Bank Ltd. v. Migdal Cooperative Village et al.}, 49(4) P.D, 221.
\textsuperscript{19} \textit{Marbury v. Madison} 5 U.S. 137.
\textsuperscript{20} Id. at 446. Translation by the authors.
\textsuperscript{21} H.C. 1715/97 \textit{Menahalei Hashkaot Bureau et al v. Minister of Finance et al.}, 51(4) P.D., 367; H.C. 6055/95 \textit{Sagie Zemach et al. v. Minister of Defence et al.}, 53(3) P.D., 241; H.C. 1030/99 p.m. \textit{Haim Oron et al. v. the Knesset Speaker et al.}, 56(3) P.D., 640.
B. Political Concerns

The debate over the adoption of a pattern of judicial review touches the fragile balance between social groups in the Israeli political system. Israel’s representative political structure is designed to reflect divisions in society, and within that system most policy decisions require the approval of a coalition representing several diverse groups.\(^{23}\) In contrast, the judicial branch is unelected, and appointed based on professional recruitment. Thus the make-up of the High Court seldom reflects the social and political balance in the country. As a result, groups that have been successful in protecting their interests through the political process -- especially religious groups -- oppose any empowerment of the judiciary. On the other hand, groups that are traditionally underrepresented and therefore have been unsuccessful in protecting their interests through the political process want a strong and professional Court.

This tension was brought to the fore after 1992. Although by then the Supreme Court had invalidated a few statutory provisions, it was still able to maintain a position outside the struggle for political power. The 1992 constitutional and electoral reforms and the two new Civil Liberties Basic Laws, however, simultaneously weakened the representative bodies and opened the way for a strengthened judiciary and thus marked a shift from a British to an American style

\(^{23}\) Israel is a parliamentary democracy governed by a strong prime minister. Because of the proportional electoral system, the Knesset is regarded as a direct reflection of the attitudes, opinions, and group identities present in society. In turn, the governing bodies of many public institutions are structured to parallel to the system of representation in the Knesset, according to a method known as the “party key.” Appointments to dozens of institutions, from the “water council” to the “Jewish Agency”, are allocated according to this method. The government is also nominated according to the party key, frequently regardless of the prime minister's preferences. Legislation formed in government is not only formally voted in the Knesset, it is also shaped and discussed in the Knesset and often is substantially altered in response to political constraints. Furthermore, contrary to the legislative picture in other parliamentary democracies where the government is the main force in initiating legislation, during the last two decades there has been a shift towards the initiation of legislation by individual members of the Knesset. Today more than half the bills that are approved are private members’ bills, some of which have far-reaching implications.
of governance and judicial review. Once the political reforms were repealed in 2001 and the parliamentary system was restored, many saw the 1992 limits on legislative powers and expansion of judicial authority as contrary to the constitutional order in a system based on parliamentary supremacy.

The increasing tension between the branches of government was illustrated in a near constitutional crisis resulting from the annulment of a law by a Magistrate court in April 2003. During the annual State of the Israeli Democracy Conference held at the Israeli President’s Residence, the then Speaker, Reuven Rivlin, stated that “the constitutional revolution led by the Supreme Court's president was in practice, maybe without consent, a revolution which today endangers the sacred essence of Israeli democracy.” Following the 2006 election, the new speaker, MK Dalia Itzik, noted in an interview to Haaretz that “she expects the judiciary to be more respectful of the Knesset, and that the Knesset would be more respectful of the justices. I

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24 During the 1990's, after a decade of electoral stalemate which reduced government stability and promoted political corruption, the Israeli political system was ripe for reform. In 1992 the Knesset, battling to enhance governability and responding to public pressure, introduced a scheme of direct election of the prime minister to take effect at the next scheduled election in 1996. This electoral reform brought about an institutional, constitutional and political change which altered the parliamentary system to a quasi presidential one referred to as "prime ministerial government." The new system strengthened the Prime Minister's control over the government and was supposed to strengthen his control over the Knesset, thus increasing his ability to govern. In fact, however, the reform achieved the opposite outcome. In practice the reform promoted the decline of the two major parties and created a divided parliament, hence ensuring fragile governing coalitions. The Prime Minister’s ability to govern declined on account of his dependence on the now more unsettled Knesset. It was during this period of quasi-presidential rule that the Supreme Court declared its authority to engage in substantive judicial review.

25 In 2001, after five years in which there were two general elections and one special election for Prime Minister, the electoral reform was repealed. In returning to the parliamentary system, however, the institutional powers that had been granted to the Prime Minister were left in place, thus generating a stronger office. These powers include his ability to dissolve the parliament and to call for reelections, and a limit on parliament’s ability to dismiss the government by a mechanism of constructive special majority vote of no-confidence. Moreover, during the five years of prime ministerial government the prime minister office grew larger, stronger and more influential. This did not change with the second constitutional reform.

26 4696/01 (Tel-Aviv-Jafa) State of Israel v. Moshe Hendleman.

believe the Court should not have the authority to strike down statutes.” In 2007, the newly appointed Minister of Justice went further to argue that the powers of the Court should be greatly reduced. This position is also reflected in the very limited form of judicial review proposed by the Minister of Justice, Daniel Friedman, and adopted by the Government Legislation Committee on September 7th, 2008.

C. Compromise or Surrender?

The basic model of judicial review contained in the selective non-justiciability model (SNJ) is similar to the override model. Like the override model, the SNJ also empowers only the Supreme Court with the power to conduct judicial review (§163(a), reprinted in the appendix). In addition, in order to enhance the legitimacy of the process the SNJ model requires a special quorum of two thirds of the sitting justices in order to strike down a statute (§163(b)). The SNJ, however, singles out specific issues of particular social concern and declares them to be outside the scope of the constitutional judicial review – a principle of selective non-justiciability (§164, reprinted in the Appendix). The specified issues are: joining a religion, including conversion, belonging to a religion or renouncing it; the authority of religious tribunals and issues pertaining to personal status; the Jewish character of the Sabbath and Jewish holidays in the public domain; maintaining Jewish dietary laws in governmental institutions; and granting

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30 Legislative Memorandum from April 12, 2007 (available in Hebrew on the world wide web at http://www.justice.gov.il/NR/rdonlyres/33DF4EA2-D227-4E82-8208-E88857CF3360/0/תזכירחוקיסודהשפיטהביקורתשיפוטית.pdf). According to the proposal, judicial review would be exercised only by the Supreme Court, sitting with a quorum of at least nine justices, and would be limited to review of claims that legislation is in conflict with the two human rights Basic Laws – Freedom of Occupation, and Human Dignity and Liberty. A decision by the Supreme Court to strike down a law because it violates the rights enumerated in those Basic Laws would require the support of at least six of the justices, and could be overturned by the Knesset by a supermajority vote of at least 61 members.
Israeli citizenship to relatives of one eligible to immigrate to Israel. Statutes addressing these issues are not subject to substantive judicial review. That is, the Court cannot strike down a statute that is in conflict with the constitution if it falls within §164(a). Although nothing in §164 deprives a Court of its authority to declare a law unconstitutional, and leave it to the other branches to respond accordingly, the non-justiciability provisions effectively erase the supremacy of the constitution (§123 to the IDI Draft). For example, section 164 trumps the equal protection clause (§17) which provides that “[A]ll are equal before the law; persons shall not be discriminated against on the basis of race, religion, nationality, gender, ethnicity, country of origin, disabilities, or on any other grounds.” Read together with §164, the equal protection provisions in effect provide that “persons shall not be discriminated against . . . except insofar as the legislature may choose to do so with respect to subjects specified in Section 164(c).”  

In addition, §164(b) states that the court “is not obligated to grant interpretive preference to the provisions of this Constitution” when interpreting statutes referring to the specified topics. The significant point to recognize is that the Court retains its jurisdiction over individual cases, it is only the question of a statute’s constitutionality that is declared to be non-justiciable. Moreover, in the process of adjudicating a case the Court can interpret a statute that respects one of the enumerated subjects and, in the process, resolve any points of ambiguity or incompleteness in the text. In the process, the Court may use constitutional guarantees of rights and liberties as principles to guide its interpretation, yet it is not obligated to favor a constitutional right over an enumerated statutory right. As a result, the Court is not deprived of its role in interpreting and shaping the law in the process of adjudicating cases, only of its

31 See appendix.
prerogative to engage in substantial constitutional review and its obligation to favor constitutional rights over legislative purposes in the process of adjudication.

In this way the IDI proposal creates two levels of constitutional protection. The first encompasses most aspects of life and establishes a normative hierarchy in which individuals have strong judicial protection against infringements on enumerated rights. The second level of constitutional protection refers to the enumerated nonjusticiable issues, to which the hierarchy of rights does not apply. These issues will be debated by the representative bodies, and the constitutionality of the outcome of those debates is not a matter for judicial determination.

This is indeed a compromise, and perhaps a very acute one. It offers liberal groups a comprehensive constitution protected by a strong and professional court at the price of leaving issues of great importance for religious groups to the political debate. Religious groups are able to maintain the current balance of power with respect to these heated issues at the expense of accepting a full constitution that includes a comprehensive bill of rights and an unrepresentative Court, and at the risk of a future political arrangement that they may find less advantageous. But the compromise between interest groups is only one dimension of the compromise that is reflected in the non-justiciability provision. The second part of this article examines the multiple dimensions of the compromise that is at work in this provision, focusing on patterns of constitutional development, comparisons of institutional design, and arguments from democratic and constitutional theories of government.
II. Comparative Context: Assessing the proposal against existing models

A. The British Standard Model: Parliamentary Supremacy and Limited Judicial Review

Israel’s basic model of government is grounded in the British “Westminster” tradition of parliamentary supremacy. In A.V. Dicey’s description of this model the British “constitution” includes written texts – usually identified as the Magna Carta, the Declaration of Rights of 1689, and the Acts of Unity of 1706-1707 (in England and Scotland, respectively) and the Act of Settlement of 1701 – but those texts serve solely to identify narrow limitations to the scope of legitimate state action. The texts provide an incomplete definition of rights, an even more incomplete description of the structure of government, and say almost nothing about government powers. The bulk of the British constitution – structure, powers, and rights – are defined extra-textually. The difference between textual and non-textual elements is explored most clearly in the distinction between laws and “conventions.” “Law” refers to principles that can be enforced by courts, while “conventions” refers to rules that political actors accept as binding on themselves. There is a parallel here to the political question doctrine of American constitutional law.

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33. “The distinction . . . between written and unwritten law does not in any sense square with the distinction between the law of the constitution (constitutional law properly so called) and the conventions of the constitution.” Dicey, *Introduction to the Study of the Law of the Constitution*, at 28.

34. Id., at 23.
constitutional law (discussed below),

but conventions are quite different from American political questions. In the American understanding, political questions are those concerning elements of the constitutional text that relate to the operations of government. In Dicey’s terms, constitutional conventions define the supreme law of the land, to which legal “laws” – the sort enforceable by courts – must be accommodated.

The key principle that derives from constitutional convention is “the legislative sovereignty of Parliament.”

In the British understanding no one – neither another branch of government nor any other political authority – can supersede the authority of Parliament, even on the basic question of the reach of its own powers. Parliament has been understood to have the authority to alter its terms of office, and to alter the foundational documents that were mentioned earlier, all without the possibility of judicial intervention. “Parliament,” writes Dicey, “is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state.”

The role of the judiciary in this model is

35 Indeed, Dicey distinguishes conventions from laws by stating that their subject “is not one of law but of politics.” Id., at 30.

36 Id., at 34.

37 “The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.” Dicey, Introduction to the Study of the Law of the Constitution, at 38. For modern explorations of the concept of parliamentary sovereignty, see Jeffrey Goldsworthy, The Sovereignty of Parliament: History and Philosophy (Oxford 2001); Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (Oxford 1984).

52 Dicey, Introduction to the Study of the Law of the Constitution, at 38, at 44.

39 “[T]he Parliaments both of England and of Scotland did, at the time of the Union, each transfer sovereign power to a new sovereign body, namely, the Parliament of Great Britain. This Parliament, however, just because it acquired the full authority of the two legislatures by which it was constituted, became in its turn a legally supreme or sovereign legislature, authorised therefore, though contrary perhaps to the intention of its creators, to modify or abrogate the Act of Union by which it was constituted. . . . The statesmen of the two countries saw fit to constitute a new sovereign Parliament, and every attempt to tie the hands of such a body necessarily breaks down Id., at 66-7 n.

40 Id., at 44-45.
curious. Since the definition of rights is a matter of convention rather than law, courts have no role in enforcing limitations on government; the only tribunal capable of reviewing Parliament’s actions is Parliament itself. On the other hand, the way we know whether something is a convention rather than a law is by virtue of the fact that courts will not enforce it. In other words, courts serve a meta-judicial function in which they decide what rules qualify as “laws” and “conventions,” and then, in their more immediate role, adjudicate the meaning of “laws” and provide for their enforcement.

Modern British practice does not square perfectly with this description. For one thing, courts have asserted much greater authority in reviewing executive actions than in reviewing Parliamentary enactments. British courts exercise broad discretion, for example, in invalidating executive actions under “heads” that encompass many of the elements of American due process; arguably, indeed, in some cases British courts are less deferential to executive authority than their American counterparts.\(^41\) The limits of that authority, however, are drawn from a variety of sources, including common law and political first principles, not from a constitutional text.\(^42\) In addition, British law has increasingly come to be subject to judicial review to test its consistency with European treaty law, especially the European Convention on Human Rights, which has been incorporated into British law by the Human Rights Act of 1998. This Act, while it does not give courts the power to exercise judicial review, does empower judges to issue “declarations of

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\(^{41}\) “An executive act is illegal if it exceeds the bounds of the statutory power granted by Parliament. It is irrational if no reasonable executive could reach that decision. It is procedurally unfair if it violates norms of natural justice, including notice, reason giving, and consideration of all relevant factors.” Lori Ringhand, “Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain,” 43 Columbia Journal of Transnational Law 865 (2005).

incompatibility” which trigger fast-track review and revisions procedures in Parliament.\textsuperscript{43} The Act itself, however, can be revoked by Parliament at any time. This emerging system of written constitutionalism exists alongside – and coexists uneasily with – the standard British model of Parliamentary sovereignty described above.

\textbf{B. The American Model: Textual Supremacy and Robust Judicial Review}

In contrast to the standard British model, the standard American model of constitutionalism features a single, authoritative written text; robust judicial review of legislation; and a clear (although by no means uncontested) understanding that the constitution is higher law capable of limiting government action.\textsuperscript{44} In all of these areas, however, the question of the scope of the courts’ jurisdiction is the subject of considerable debate. The American constitutional text describes the scope of controversies justiciable by federal courts as “cases arising under” the Constitution or federal law or “controversies” between citizens of different states, as well as a number of other specifically enumerated subjects.\textsuperscript{45} As a matter of judicially

\textsuperscript{43} See David Jenkins, “From Unwritten to Written: Transformation in the British Common-Law Constitution,” “36 Vanderbilt Journal of Transnational Law 863 (2003). The Human Rights Act of 1998, which went into effect in 2000, “requires the Government to draw Parliament’s attention to any new draft legislation which is likely to compromise civil liberties” and “directs the courts to interpret legislation compatibly with human rights whenever this is possible.” As Lairg observes, although the Act does not give British courts the power of judicial review, as a political matter “the issue of a declaration of incompatibility is very likely to prompt the amendment of defective legislation.” Lairg, “Sovereignty in Comparative Perspective” at 18. See, also Lord Irvine of Lairg, “The Development of Human Rights in Britain Under an Incorporated Convention on Human Rights,” 1998 Public Law 221 (1998). Should Parliament revoke the Human Rights Act of 1998 remedies would still be available through the European Court of Human Rights; as noted earlier, however, Parliament has the authority to alter Britain’s status with respect to that law, as well. For an argument that the Human Rights Act leads to a “strong form” of judicial review in practice, see Mark Tushnet, “New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries,” 38 Wake Forest Law Review 813 (2003).

\textsuperscript{44} In a moment of marked circularity, in the Supremacy Clause of Article VI the U.S. Constitution defines itself as the “supreme law of the land,” followed by international treaties and federal statutes.

\textsuperscript{45} “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; -- to all cases affecting ambassadors, other public ministers and consuls; -- to all cases of admiralty and maritime jurisdiction; -- to controversies to which the United States shall be a party; -- to controversies between two or more states; -- between a state and citizens of another state; -- between citizens of different states; -- between citizens of the same state
created doctrine, however, the distinction between justiciable and non-justiciable issues in the American model does not depend on whether there is a written textual source for the rule at issue. Instead, the question of justiciability depends on the operation of a series of judicially create tests that cut across the provisions of the constitutional text, and in some cases seem to supersede them outright.

The idea of limitations of justiciability was a central element of the first clear judicial statement of modern American constitutionalism, John Marshall’s 1803 opinion in *Marbury v. Madison*. In the very breath in which Marshall introduced the idea of robust judicial review to enforce the written constitutional text as supreme law, he also introduced the limiting principle of that authority, by declaring some actions as beyond the scope of judicial review. “The province of the court is, solely, to decide on the rights of individuals . . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”

From that point forward, in the standard American model written-ness was a necessary but not sufficient condition for judicial enforcement. The constitutional text contains both judiciably enforceable legal provisions and the expression of political conventions binding on actors in the other branches of government; only those portions of the text that are “legal” are claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens thereof, and foreign states, citizens or subjects.”

46 Marshall’s was not the first version of American constitutionalism articulated by members of the Supreme Court. In a series of cases decided in the 1790s, several Justices – notably James Wilson and Samuel Chase -- had shown a willingness to overturn laws based on their view that the Supreme Court was the arbiter of a pre-constitutional social contract. *See, e.g., Calder v. Bull,* 3 U.S. 386 (1798), in which Justice Samuel Chase rejected a law passed by the Connecticut legislature: “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.”

47 *Marbury,* 5 U.S. at 169-70.
judicially enforceable. The “political question doctrine” received its authoritative statement in 1962 in *Baker v. Carr.* Sixteen years later, in *Goldwater v. Carter* (1979), Justice Powell broke down the doctrine to a tri-partite examination, on the basis of which it could be decided if a question was political and, consequently, not justiciable: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?”

The reference to “prudential considerations” invite judges to look for limitations on justiciability in sources outside the text altogether. At various times courts have found reasons to limit their own jurisdiction based on considerations of the institutional interests of the judiciary without any effort to identify a textual source for the limitation of Article III’s grant of jurisdiction at all. Indeed, over time restrictions that were first justified as prudential have taken on a doctrinal gloss of constitutional necessity, suggesting that the justices feel the need for a less discretionary basis for their exercise in self-constraint.

In *Frothingham v. Mellon,* 262 U.S. 447 (1923), the Court denied taxpayer standing to challenge most categories of governmental expenditures on prudential grounds, expressing concerns about the Court’s public legitimacy and the danger of a “flood of lawsuits.” Revisiting the issue, in 1968 the Court found an exception allowing standing in the limited instance where taxpayers brought Establishment Clause challenges to expenditures by Congress under its Spending Clause authority, describing standing rules as a “blend” of constitutional and prudential considerations, and introduced both “case or controversy” and separation of powers concerns. *Flast v. Cohen,* 392 U.S. 83 (1968). Revisiting the same issue in *Valley Forge Christian College v. Americans United for Church and State,* 454 U.S. 464 (1982), Justice Rehnquist proposed that restrictions on taxpayer standing are in fact constitutionally required and imposes an unalterable external check on judicial discretion to hear cases.

The Court granted jurisdiction in *Coleman v. Miller* 307 U.S. 433 (1939), but in *Raines v. Byrd* 521 U.S. 811 (1997) the Court found no justiciable question in a challenge to the constitutionality of the Line Item Veto Act. The distinction, according to Chief Justice Rehnquist in *Raines,* was that in *Coleman* the actions of the congressional

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and has declined to review the exercise of executive discretion in deciding whether to enforce laws.  

Thus, where American federal courts, for whatever reasons, seek to decline to exercise their jurisdiction over a category of cases, they are able and willing to draw on extra-textual sources and even to limit explicit textual grants of authority by appeals to what Dicey would easily have recognized as unwritten “conventions.”  

By contrast, where American federal courts seek to assert jurisdiction over a case, it is invariably the case that they insist on finding (or asserting) a basis in the written text for the exercise of jurisdiction. This is particularly true with respect to questions involving the protection of rights, as opposed to the regulation of the exercise of government powers. In American rights constitutionalism, arguing that a right or

leadership has “nullified” a representative’s vote through a procedure in which a tie in the Kansas state legislature was broken by a vote cast by the Lieutenant Governor. According to Rehnquist, that procedure inflicted a “personal” injury on Coleman, whereas in *Raines* the only injury that could be claimed was a “wholly abstract” harm to the institution. As in *Valley Forge*, supra., Rehnquist used the language of absolute constitutional requirement rather than the exercise of institutional prudence to justify his decision, describing the issue as one of “jurisdictional standing requirements.”  

52 See *Castle Rock v. Gonzales* 545 U.S. 748 (2005); see also *Friends of the Earth v. Layldlaw*, 528 U.S. 167 (2000), Scalia, J., dissenting)  


68 In all the times in which different justices, with different agendas, have sought to identify principles of substantive due process or other unenumerated rights, they have always come back to the necessity of finding a basis in the written text for the liberties that they want to see protected – most commonly in the term “liberty” in the Due Process Clause of the XIVth Amendment. So in *Lochner v. New York*, 198 U.S. 45 (1905), the right to contract one’s labor freely was found to inhere in the term “liberty” in the XIVth Amendment, and other rights have been found on the same basis in numerous substantive due process cases thereafter; in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas found a right to privacy in “penumbras and emanations” of the Ist, IVth, Vth and IXth Amendments; in *Saenz v. Roe*, 526 U.S. 489 (1999), a right to travel was found to inhere in the words “privileges and immunities,” and so on. Remarkably, even the fact that constitutional text itself seems to specifically invite judges to look for extra-textual rights in the IXth Amendment has not altered this pattern, as justices have repeatedly denied the possibility of using that provision as the basis for a substantive right. Judge Robert Bork has famously described the IXth Amendment derisively as an “inkblot,” Justice Scalia has declared that “the Constitution’s refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them,” and no case has ever been decided on the basis of the IXth Amendment. *Troxel v. Granville*, 530 U.S. 57 (2000) (Scalia, J., dissenting); 1 *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary* 117, 289 (1989).
national government power is unconnected to the constitutional text is an accusation, not a legitimate theory of justification. And the emphasis on the importance of the existence of the Constitution as a single, authoritative, written text appears consistently in the Court’s justifications for its continued exercise of the power of judicial review.\(^{55}\)

C. Current Israeli Practice in Comparative Perspective: Written Law and Judicial Review Without a Constitutional Text

As the discussion in the first part of this paper makes clear, neither the existing Israeli model of judicial review nor the Selective Non-Justiciability (SNJ) proposal follow either the American or the British models.\(^{56}\) This may be explained, in part, by the fact that Israel’s history of constitutional development is different from those of either Great Britain or the U.S.

On the one hand, Israel did not begin with the adoption of a single, authoritative text, and even over time what emerged was not a single written constitution as in the American model so much as a more British-looking combination of various foundational texts (the Declaration of Independence, the set of Basic Laws) and judicially developed principles of constitutionalism (in Dicey’s terms, the “constitutional laws”).\(^{57}\) On the other hand, Israel has not embraced a model

\(^{55}\) One ambiguous category involves doctrines said to be derived from the “overall structure” of the constitution, rather than from any specific textual provision. These include doctrines of enumerated powers, checks and balances, separation of powers, “dual sovereignty” and “Our Federalism,” and even the commitment to textualism itself, none of which are mentioned anywhere in the text of the Constitution and several of which are arguably in tension with its provisions as written. On the distinction between “clause-by-clause” and “holistic” constitutional interpretation in the American tradition, see Ronald Dworkin, “Unenumerated Rights: Whether and How Roe Should be Overruled,” 59 U. Chi. L. Rev. 381 (1992); Richard A. Posner, “Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights,” 59 U. Chi. L. Rev. 433 (1992).


\(^{57}\) Yoseph Edrey, by contrast, makes an essentially normative argument based on the opposite conclusion; he finds that the acts of the Knesset in enacting the Basic Laws of 1992, and the subsequent actions of the Israel Supreme Court, merely ratified an existing set of political commitments which were neither created by these branches of the
of pure legislative supremacy, and there are no obvious analogues to the British practice of constitutional conventions. At present, the Israel Supreme Court operates with a clear model of judicial supremacy. If anything, in fact, there are fewer constraints on Israeli courts than on their American counterparts, especially on the question of when they may exercise authority.  

For one thing, the Israel Supreme Court seating as the High Court of Justice (HCJ) has, in the past, been willing to hear cases in which they are asked to review the exercise of prosecutorial discretion by the executive branch, even with respect to cases that in American terms would fall squarely within the areas reserved for political decision-making. In Yahav v State Attorney, the HCJ reviewed the exercise of prosecutorial discretion not to indict the sitting Prime Minister and Minister of Justice for their actions in appointing an Attorney General.

Neither of the elements of that case – the appointment of the Attorney General and the decision

government nor can be altered through any political or legal process. “[T]he Israeli legal system was able to develop [protections for human rights and judicial review] based on the following: the fact that the international community's recognition of the state of Israel came with the requirement that the state would guarantee basic constitutional human rights; the fact that both the Zionist establishment and the state of Israel accepted this resolution; and the mere fact that Israeli society considers itself democratic. If this is the case, the current Knesset may merely acknowledge or even declare these constitutional concepts, but did not create them. As such, the Knesset does not have the power to curtail, diminish, or eliminate those basic fundamental concepts.” Edrey thus describes something like a move from a British to an American model, without any change in underlying political values. The American emphasis on writen-ness is particularly evident in Edrey’s treatment of the possibility of amendment. “Only the Constitutional Assembly, a body elected by Israelis for the purpose of shaping Israel's national values and credo, might have the power to modify these concepts. Without an election of the Constitutional Assembly, Israeli society must continue, through its agents, to develop Israel's common law constitution one step at a time” Edrey, “The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements”, at 87, 121.


59 The Supreme Court also serves as a High Court of Justice (HCJ), having jurisdiction “in matters in which it considers it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal” (Basic Law: The Judiciary, section 15). Through this controversial clause, the Supreme Court’s jurisdiction is made extremely broad, limited mainly by its self restraint. In the context of judicial review see Yoav Dotan’s part in Gavison, Kremnitzer & Dotan, Judicial Activism (Jerusalem, Magnes: 2000); Levin, S. “Does standing have standing?” 39 Ha’Praklit (in Hebrew), 453 (1992); Rubinstein A. and B. Medina, The Constitutional Law of Israel (Jerusalem: Shoken, 2005), p. 174-181. See also Diver, C. “Israeli Administrative Law from an American Perspective” 4(1) Mishpat U’Mimshal (in Hebrew).
of the prosecutor not to pursue an investigation – would be subject to judicial review in the American system. The HCJ’s willingness to hear the Yahav case called into question the idea of a political question doctrine in any but the most limited sense of the phrase.\textsuperscript{60} In addition, the HCJ has not developed anything like American limitations on legislative standing, resulting in a willingness to hear procedural challenges to actions of the Knesset brought by sitting members. In \textit{Kahane v. Chairman of the Knesset} the High Court reviewed the decision of the chairman of the Knesset not to put bills presented by the plaintiff, M.K. Kahane, before the entire Knesset for considerations. Moreover, the High Court not only heard the case, but actually issued an order requiring that the bills be submitted for consideration, rejecting an argument that the operations of the Knesset were political matters not amenable to judicial review.\textsuperscript{61}

These particular examples point to a larger pattern. Where American federal courts are at least partly limited in their exercise of jurisdiction as a matter of constitutional doctrine, the Israel High Court treats all limitations on standing as purely prudential, and consequently discretionary. Moreover, in the administrative law context the HCJ maintains its discretion to sit as a court of first instance in a wide range of cases involving the validity of administrative authorizing statutes, procedures adopted by executive agency officials, and the substantive reasonableness of agency decisions.\textsuperscript{62} Thus the HCJ has demonstrated its willingness to intervene in the operations of both the executive and legislative branches. Finally, it is important to recognize that the High Court’s record is one of very little deference to legislative judgments.

\textsuperscript{60} See H.C. 2534/97, Yahav v. State Attorney, 97(2) Takdin-Elyon 320, 332-36 (opinion of Justice Orr); id. at 330-31 (opinion of Justice Goldberg); H.C. 935/89, Ganor v. Attorney Gen., 44(2) P.D. 485, 528 (opinion of Justice Barak.) In these two cases Goldberg and Barak argued against deference for prosecutorial discretion while Orr argued in favor of deference.

\textsuperscript{61} H.C. 742/84, Kahane v. Chairman of the Knesset, 39(4) P.D. 85.

\textsuperscript{62} See Gelpe, 545-46.
The Court has been described as one of the most “activist” high courts – meaning most willing to overturn executive actions or legislation approved through majoritarian processes – of any in the world.  

Armed with this broad grant of self-defined authority, Israel’s courts have continued to develop constitutional rights by engaging in broad readings of the Basic Laws. A key example is the judicial enforcement of a constitutional norm of equality. There is no reference to a principle of equality in any Basic Law, but justices have nonetheless found equality to be an implicit and judicially enforceable element of the law. In a 1998 case, the Supreme Court ordered that gender-based classifications undergo strict scrutiny. In his opinion, Justice Michael Cheshin of the Supreme Court, declared: “[Equality is] the king of principles - the most elevated of principles above all others. So it is in public law and so it is in each and every aspect of our lives in society. The principle of equality infiltrates every plant of the legal garden and constitutes an unseverable part of the genetic make-up of all the legal rules, each and every one. The principle of equality is, in theory and practice, a parent-principle or should we say a mother-principle.”

These actions have caused some commentators to speculate that Israel’s justices do not feel constrained by the written provisions of the texts of the Basic Laws, echoing the criticisms of


64 IWN v. Minister of Labor, 52(3) P.D. (1998), 630 at 650. This application of strict scrutiny to gender classifications is only one of a number of areas in which Israeli constitutional law provides greater protections for women citizens than its American counterpart. Others include the courts’ treatment of abortion, the duty of the government to make accommodations, and affirmative action. For a general description of the treatment of women’s rights and equality under Israeli law, see Frances Radday, “A Free People in Our Land: Gender Equality in the Jewish State,” Israel Ministry of Foreign Affairs available at http://www.mfa.gov.il/MFA/Government/Facts+about+Israel+-+The+State/ A+Free+People+in+Our+Land+-+Gender+Equality.htm.
“activist” judges in the United States. Nonetheless, as in the American case, Israeli justices themselves continue to appeal to a norm of textual authority. While critics may assert that they are engaged in the untrammeled creation of new legal doctrines, the justices themselves insist that they are grounding their rulings in readings of the text.

In its constitutional practice, then, the Israel Supreme Court has relied neither on an unwritten set of constitutional conventions nor on an authoritative written constitutional text. Instead, the highly autonomous Supreme Court had given constitutional effect to laws enacted by the legislature, combined with extremely powerful self asserted judicial review.

III. The three compromises of the Selective Non-Justiciability Model

Against this background, the IDI proposal to specify areas of lawmaking that are outside the scope of judicial review takes on both a particular significance in relation to past practices in Israel and elsewhere, and more theoretical interest as an innovation in democratic judicial practice. The identification of nonjusticiable topics in §164, and the structure of the relationship between the Court and the Knesset that emerges as a consequence, reflect a compromise that extends across several different dimension. First, the non-justiciability provisions represent a compromise between interested parties and institutional actors. Second, the provisions reflect a

65 Further, Yoav Dotan argues that the rulings demonstrate that written rights guarantees are less important than an empowered judiciary willing to seek outcomes consistent with a dominant ideology. Dotan finds that Israel courts have moved aggressively to develop constitutional doctrines of gender equality while principles of business freedom have been allowed to fall into abeyance. As Dotan puts it, “[t]he omission of women’s rights from the Basic Laws seems hardly to affect the ongoing process of developing pro-women’s rights jurisprudence. . . Paradoxically, the pace of development of rights in favor of businesses (and rights of property owners) has been much more restrained, and the general level of judicial activism in this field remained lower than in the field of women’s rights, despite the centrality of business rights in the constitutional text. The comparison between judicial behavior in Israel in these two fields disproves the hypothesis that the content of bills of rights is a factor that has paramount influence on judicial behavior.” Yoav Dotan, “The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel,” 53 American Journal of Comparative Law 293, 337-38 (2005).
compromise between disparate understandings of democracy and the role of the judiciary in democratic governance. Third, §164 also represents a compromise between competing pluralistic and liberal conceptions of Israeli society. We now turn to discuss each one of these compromises separately.

A. The Political Compromise: Institutional considerations in the reservation of topics as non-justiciable

While the idea that there is a category of questions that are not justiciable is common to both the American and British models, the specific identification of such subjects in a constitutional text is, as far as we know, a unique innovation. One question that immediately arises from a comparative consideration of these provisions is why parties might favor such a mechanism.

The conditions under which a constitution is formed may predict the likely scope of judicial review. A number of writers who have engaged in comparative studies of constitutional design have concluded that judicial review is, in Thomas Ginsburg’s words, an “insurance policy” against the possibility of permanent domination of the electoral system by a single faction. “Because at the time of constitutional design . . . no party can predict with confidence that it will be able to maintain power indefinitely, it makes sense for all parties to adopt judicial review as an alternative forum in which to challenge government policy, so long as they perceive that there is some probability that a court will side against electoral winners. This lowers the risk of constitution making, and helps conclude bargains that otherwise might not be made.” As a result, argues Ginsburg, the likely scope of judicial review indicates something about the
expectations of the parties to the process of constitution-making. “In situations where one party controls the drafting process and foresees that it is likely to maintain power, courts are likely to be granted a more limited scope of authority and be more difficult to access . . . By setting up a weak court, the dominant party may gain some marginal benefits in legitimacy without sacrificing policy flexibility. In contrast, where two or three parties of roughly equal strength are engaged in constitutional design, all parties are more uncertain about their ability to secure an electoral victory. They therefore may prefer a system of judicial review where a court has extensive formal powers.”\(^\text{66}\)

Alec Stone-Sweet reaches similar conclusions in his comparison of four European cases. Stone-Sweet describes a situation in Germany, Italy, and Spain in which constitutional texts were the product of negotiation. These texts share a common feature that they describe fundamental rights prior to describing the system of government. This may seem like a minor textual point, but Stone-Sweet proposes that “[p]artly in consequence, academic lawyers and some judges consider rights to possess supraconstitutional status. . . reinforced by rules governing constitutional amendment” that make it easier to alter non-rights guaranteeing provisions than rights guarantees.\(^\text{67}\) In France, by contrast, there was no similar process of bargaining. The Constitution of the Fifth Republic was “not so much the product of inter-party bargaining “ as “the choice of one political force, the entourage of General de Gaulle, acting almost unchecked.”\(^\text{68}\) The initial lack of explicit protections for rights in the French constitution, by this

\(^{66}\) Ginsburg 248.


\(^{68}\) Id., at 41.
argument, may reflect the lack of incentives by the participants in its creation to preserve checks against the possibility of future political defeat.  

It may also be important to look to legislative politics in order to determine the logic of a reservation of non-justiciable questions. Stone-Sweet argues that the structure of legislative politics dictates the likely role of constitutional courts. First, he argues that “[o]ther things being equal, the more a political system produces radical reforms, the more it will produce . . . disputes that the constitutional courts will be asked to resolve.” Second, he proposed that the likelihood of radical reforms is correlated with the extent to which the legislative process is subject to centralized control and the range of “veto points” that exist in the process. Along with other writers who have studied the question, Stone-Sweet concludes that both opposition and majority legislators may have good reason to want to delegate certain categories of questions to courts. Oppositions hope to “win what they would otherwise lose in ‘normal,’ unjudicialized processes,” while majority parties are spared the necessity of resolving questions that may be difficult or controversial or create strains on their coalitions. The seemingly natural assumption that each branch will want authority over as wide a range of questions as possible appears, on closer examination, to be less “natural” than one might think. The elaborate doctrines created by American courts to avoid hearing categories of cases is only one example of the opposite tendency in action. As Stone-Sweet describes it, “political parties thus transferred their own entirely unresolved problem – what is the nature and purpose of any given rights provision, and

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69 Ian Shapiro similarly concludes that negotiated settlements “exhibit certain characteristic forms . . . for example, they predispose the players to agree on institutional rules that limit robust oppositional politics in the new order” (Shapiro, 83).

70 Stone-Sweet, 52-54.

what is the normative relationship of that provision to the rest of the constitutional text? – to judges. This transfer constitutes a massive, virtually open-ended delegation of policy-making authority.  

Finally, the form of review may vary. Structurally, all four of the systems studied by Stone-Sweet include special constitutional courts empowered to engage in both “abstract” (in American terms, “advisory”) and “concrete” review. In France, interestingly, only abstract review is permitted, and only within 15 days of the adoption of a law by parliament. The French case also features special procedures for legislators to raise and debate questions of constitutionality in the form of privileged “motions d’irrecevailitée.” France also differs from the other cases Stone-Sweet studies in ways that make it more like the Israeli case and that weaken the case for judicial review. The state is unitary rather than federal, with a tradition of a strong national executive. The 1944 and 1958 Constitutions did not include explicit rights provisions, and in general were close to the Westminster model. The 1958 Constitution did create the Constitutional Council, which in 1971 for the first time declared a law to be unconstitutional. Thereafter, a charter of rights was read into the 1958 constitution, and the Council has treated the enforcement of those rights as part of its mandate. The French pattern thus has a good deal in common with that of Israel, with the obvious difference that in the Israeli case the process of constitutional design is being undertaken subsequent to the High Court’s assertion of its authority to recognize and protect rights.

72 Stone-Sweet, Governing With Judges, at 58.
73 In the period from 1981-87, Stone-Sweet counts 94 votes on motions as compared to 93 Council decisions. Id, at 104.
74 Id., 41
One way, then, to consider the imposition of restrictions on justiciability is as an expression of the conditions under which the process of constitutional drafting has been undertaken. The selection of specific topics for nonjusticiability suggests one of two things: either a confidence that these are areas in which parties expect to be able to secure their desired outcomes in future political negotiations or, to the contrary, an absolute confidence that an outcome whose desirability is accepted by all the drafting parties is so politically secure that it can only be rendered less secure by being subjected to review under general constitutional principles. In procedural terms, declaring a subject to be non-justiciable is to remove a potential extra-legislative veto point from the equation.\footnote{For a discussion of courts as veto points in the legislative process that help resolve some of the problems of cycling preferences proposed by social choice theorists such as William Riker, see Shapiro, \textit{The State of Democratic Theory}, at 13.}

An interesting consequence of this design is that parties who are dissatisfied with a legislative grant of jurisdiction to religious courts will have to seek redress directly through the political processes of lobbying, drumming up support, and promoting the election of like-minded candidates. In American jurisprudence, a traditional argument for an active judicial role in limiting the political role of religious authorities is that the courts provide a buffer against the dangers of divisive religious politics. “[P]olitical division along religious lines,” wrote Chief Justice Burger, “was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.”\footnote{\textit{Lemon v. Kurtzman} 403 U.S. 602 (1971)} By contrast, the drafters of the IDI proposal have concluded that it is the intervention of unelected judges, rather than competition between religious constituencies, that poses the greatest threat to the stability of the democratic process. There appear to be one of two possible
presumptions at work: either that the Knesset is less likely than the Court to arrive at a result that any of the participants find entirely unacceptable, or that the sense of grievance produced by judicial intervention is a greater danger to the legitimacy – and hence the stability – of the system than any particular outcome. We are not aware of any other case in which this conclusion has been reached, although American judges sometimes cite a reluctance to wade into contentious political disputes as a prudential reason for declining to exercise jurisdiction over a case.77

But the significance of both the nonjusticiability provision and the general model of constrained judicial review obviously extends beyond simply a discussion of negotiated outcomes and institutional arrangements. The IDI Draft Constitution is not merely a model of a constitution, it is a model of a specifically Israeli constitutionalism, the expression of a theoretical understanding of a desirable constitutional order. We therefore turn next to a brief consideration of the model of constitutionalism that is implied by the non-justiciability provision.

B. The Democratic Compromise: Non-Justiciability and Representative Government

In the preceding section we presented a few comments on the institutional model that is implied by the non-justiciability and constrained review provisions. One key observation was that the participants in the agreement seem to be more mistrustful of the Court than of the Knesset. It is beyond the scope of this article to speculate to what features of Israeli political practice – e.g. the range of veto points in the legislative drafting process, the balance of present and likely future party coalitions, or the major interest groups and constituencies whose support for the proposed constitution will be required – lend themselves to a reluctance to refer questions

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77 See, e.g., Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (“states are currently engaged in serious, thoughtful examination” of the issue, maj. opinion of Rehnquist, C.J.)
to the courts for resolution. Again, the fact that the IDI proposal was created after decades of experience of highly active judicial review may alter the terms of the equation. In this respect, however, it is worth considering the point from a more theoretical perspective. To what extent do the non-justiciability and constrained review provisions imply an adoption of traditional democratic arguments in opposition to, or in favor of, the practice of employing substantive judicial review to enforce constitutional law?

The basic – and very familiar – challenge to the practice of judicial review of legislation is that it is undemocratic, what Alexander Bickel called the “counter-majoritarian difficulty.” In Bickel’s famous words, “nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy.”

Jeremy Waldron presents some of the most powerful and impressive expressions of the democratic case against judicial review. Waldron’s proposes that the basic arguments in favor of judicial review are two: “a good decision and a process in which claims of rights are steadily and seriously considered”; that is, that courts will do better than legislatures in upholding fundamental principles to which all reasonable persons should agree, and that courts provide an opportunity for voices that would not readily gain access to public political discussions to be heard. Against these claims, Waldron’s arguments boil down to two basic points: 1) that legislatures are no less competent than courts to uphold and enforce substantive democratic norms; and 2) that legislatures reflect the will of the people – or, more accurately, the dialogues among the people – and are thus more true to democratic principle.

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78 Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (New Haven 1986), 18.

79 While Waldron has written on this subject extensively and in a wide variety of forums, in this article we focus on his article “The Core of the Case Against Judicial Review,” 115 Yale L. J. 1346 (2006) and in his book The Dignity of Legislation.

80 There is an interesting relationship between claims 1) and 2): all the cases that Waldron cites for the proposition that legislatures are as reliable as courts in safeguarding fundamental liberties are ex-Commonwealth countries
making his arguments, Waldron distinguishes between “strong” and “weak” versions of judicial review. Systems of strong judicial review involve courts that are empowered to decline to apply a statute in a particular case, modify the effect of a statute, or strike it down altogether. By contrast, a system of “weak” judicial review is exemplified by British courts’ limited authority to enforce rights through the Human Rights Act.81

Waldron’s argument depends on certain assumptions, among which the most important are “a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights.”82 Given these assumptions, Waldron is willing to accept “weak” judicial review on the grounds that “it may not always be easy for legislators to see what issues of rights are embedded” in a piece of legislation; having an outside review to call questions to the attention of legislators may therefore serve a useful function. Where there is persistent disagreement, however, a mechanism for settling a question is required. Waldron’s response, in essence, is that so long as presume the existence of legislators who are sympathetic to minority rights, there is no reason to distrust legislatures. Procedure-based – that is, democratic – arguments, however, “operate mainly to discredit judicial review while leaving legislative decisionmaking unscathed.”83 Finally, Waldron recognizes the “non-core case” of “a discrete and insular minority” with respect to whom the operation of ordinary political processes

(1349). The fact that Israel shares a similar, if less direct and more conflicted, British heritage may be a relevant consideration.

81 As was noted previously, if a British law is found to violate rights protected under the ECHR, a court may only issue a “declaration of incompatability” which “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.” That declaration, however, can then be used by a member of Parliament to initiate special legislative procedures to consider revisions to the law in question, a procedure analogous to the privilege motion in French parliamentary practice. See Waldron, “The Core of the Case Against Judicial Review,” at 1355.

82 Id., at 1360.

83 Id., at 1370, 1375.
cannot be relied upon even given the assumption that legislators are generally sympathetic to rights claims. Waldron states that this is “an excellent way of characterizing the sort of non-core case in which the argument for judicial review of legislative decisions has some plausibility,” but urges readers to beware of applying the criteria of “discrete and insular” too broadly.

Waldron’s arguments have obvious resonance for the Israeli case. Up until now, the Israel Supreme Court has embraced a form of judicial review that is exceptionally strong, yet limited by the existence of a narrow range of guaranteed rights; by contrast, the IDI Draft’s combination of justiciable guaranteed rights and non-justiciability provisions reflect a weaker or more limited form, although not so weak as the one that Waldron would prefer. In this way, as in others, the IDI model is somewhere between the American and British standard models. The comparison with the Canadian override model may be the most telling, but the non-justiciability provisions limit the judicial role to a greater extent than the override system, which gives representative bodies the final say in a constitutional conflict yet does not exclude judicial authority over questions of constitutionality altogether. The IDI Draft may also be taken to reflect the assumption that in the Israeli case there are no non-core cases of “discrete and insular minorities” vulnerable to persistent political disempowerment with respect to the topics specified as nonjusticiable. The IDI Draft also seems to reflect a shared confidence in Waldron’s assumption that with respect to those topics legislators are both motivated and able to protect

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84 The phrase in question comes from Justice Stone’s famous footnote in which he proposed that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” United States v. Carolene Products Co., 304 U.S. 144, 153 (1938). The most famous development of the argument that judicial review is especially justified as a mechanism to police the processes of political representation is presented in John Hart Ely, Democracy and Distrust.

minority rights or to protect rights claims against extra-legal political pressures. As such, the nonjusticiability rules function as a form of gag rule preventing the courts from disrupting the orderly process of ordinary political discourse by creating unnecessary conflicts.\footnote{See discussion, Gidon Sapir, “Religion and State in Israel,” at 661-63, drawing on Stephen Holmes’ description of the positive effect of gag rules as “enabling constraints.” Holmes, Passions and Constraints: On the Theory of Liberal Democracy (Chicago 1997). This is something of a reversal of the argument, as Holmes’ argument is directed at justifying courts’ imposition of gag rules on other governmental actors as a necessary element of the constitutional rule of law.}

At the same time, with respect to justiciable topics the form of judicial review that is provided by the IDI Draft obviously goes considerably farther than the “weak” version that Waldron envisions or that Britain and Canada employ. Moreover, the selection of both justiciable and nonjusticiable topics requires justification; one can equally well ask why statutes affecting religious status should be non-reviewable or why statutes affecting equal rights to employment should be reviewable. It is therefore important to consider the arguments from democracy in favor of judicial review, to see what elements of those arguments to be operating as background assumptions and on what grounds they might be set aside in the particular cases identified in §164.

One way to understand the majoritarian critique of judicial review is in terms of an understanding of courts as “agents” and the people – through their representatives – as principals. This is the basis for Stone-Sweet’s criticism of European judicial empowerment, for example, when he writes “In [Principle-Agent] terms, because constitutional and ordinary judges operate in relatively permissive environments, guided by rules that they themselves curate, it is no surprise that their activities routinely escape mechanisms of control available to their
But the use of principal-agent language does not necessarily require an embrace of the democratic challenge to judicial review. Hannah Pitkin distinguishes two versions of agency: in one, a person having a right to do something gets another to do it for him; in the other, a person makes himself owner of, and responsible for, another’s actions. Pitkin observes, “In both situations, the rights and privileges accrue to the one who is authorized, the obligations and responsibilities to the one who authorizes.” These two models of agency parallel, to a great extent, Pitkin’s two models of representation: “descriptive” and “symbolic” representation. In a case of descriptive representation, the representative stands in for the person represented and is expected to mimic their actions and characteristics. Symbolic representation is more complicated. Symbolic representation occurs when the members of the represented group agree to the meaning that is attached to an object, and use that object as the carrier of its assigned meaning.

Pitkin’s notion of agency as a form of action in which the principal takes responsibility for the actions of the agent is central to the response to the “counter-majoritarian problem” family of criticisms. The basic – and, again, very familiar – arguments in favor of judicial review are based on some version of a claim of special competency on the part of judges, who are entrusted with the performance of specialized functions by a public that thereafter accepts “ownership” of the outcomes. The argument need not be that courts are more able than legislatures to uphold substantive democratic norms, the argument that Waldron rejects out of

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87 Stone-Sweet, 136, 138. Stone-Sweet, in fact, argues that there is an antidemocratic contradiction built into the most common justifications for judicial review. “[C]onstitutional judges can fulfill these functions effectively only to the extent they in fact behave as (very powerful) ‘positive’ legislators,” and thus usurp the function of their principals.
88 Pitkin, 19.
89 Pitkin, 11
hand. Instead, the argument for special competency over specified matters may be couched in terms of a division of labor. In John Marshall’s formulation, courts’ special competency was expertise in “law” and it was “the peculiar province of the courts” to do law. The same proposition appears in the distinction between convention and law in the British context (albeit in a somewhat tautological fashion). A more modern version of the argument ties the idea of special competence directly to a conception of democratic representation.\(^90\) In the terms of Pitkin’s discussion of democratic representation, judges are symbolically representative: they neither reflect the character of those represented nor speak on behalf of particular interests, they are institutional carriers of commonly shared meaning and their authority derives from a shared public commitment to the content of that meaning.\(^91\)

The democratic case for judicial review, too, has its role in the IDI proposal. With respect to topics that are subject to the non-justiciability provisions, the Court continues to exercise its authority to review the application and interpretation of statutes and the adjudication of particular cases. Moreover, the Court remains perfectly free to issue declarative statements to the effect that a particular statute violates core constitutional principles such as equal protection,

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\(^90\) Ian Shapiro makes this point in the context of his general encouragement for reliance on “insider wisdom” whenever possible. “[O]utsiders are no more thought competent to insist that Supreme Court justices should deliberate before voting to grant or deny certiorari than to insist that managers should deliberate before investing in a new line of products” (Shapiro, 42.) By extension, the same argument provides a justification for limiting judicial review in order to preserve the insider wisdom of legislators.

\(^91\) For examples of other extended arguments of this kind see Ely, Democracy and Distrust (protecting the value of representation and fair political procedures), William Harris II, The Interpretable Constitution (Johns Hopkins, 1993) protecting a commitment to a constitution as the basis of collective identity); Lawrence Sager, Justice in Plainclothes (Yale, 2004) (protecting commitment to fundamental values as a condition of democratic deliberation); Howard Schweber, The Language of Liberal Constitutionalism (Cambridge, 2007) (protecting the commitment to particular forms of language and reasoning in constitutional argumentation). Christopher Eisgruber presents an extended argument that effectively combines both the elements of division of labor and symbolic representation. Eisgruber argues that courts should be understood as specialized agents of the people, selected to perform the task of a certain kind of moral and political reasoning that cannot be effectively carried out by representatives in the other branches of government. In this way judges no less than legislators are “representatives”; it is only that, in Hannah Pitkin’s terminology, judges are “symbolic” rather than “descriptive” representatives. Christopher L. Eisgruber, Constitutional Self-Government (Cambridge, MA 2001).
leaving it to the Knesset to respond accordingly. In this way, the Court exercises a British-style form of what Waldron calls “weak” judicial review. Outside the specification of topics in the non-justiciability provision judicial review is far stronger. There is no apparent attempt to restrict the Israel Supreme Court’s ability to hear cases of first impression, grant standing to legislators and concerned citizens, or rule on a range of topics far less limited than would be permitted under prevalent American understandings of the political question doctrine. In contrast with the British model, even without the intervention of international treaties an essentially unlimited range of matters are considered “legal” and hence judicially enforceable. And the text provides an exceptionally broad description of protected rights, rights that are judicially enforceable and provide a basis for review of legislation. All of these may be taken as expressions of support for the idea that judicial review is compatible with a substantive ideal of democratic rule, and even a recognition that under at least some circumstances judges may be in a better position than legislators – by inclination or ability – to protect that ideal against the pressures of ordinary politics.

It is important to recognize that both the democratic cases for and against judicial review are primarily written from the perspective of Anglo-American constitutionalism. This is certainly not an alien tradition for Israeli writers. Aharon Barak writes from within this same tradition, adopting a view drawn from a distinctively common law conception of the role of judges combined with a distinctively European concept of “defensive democracy.” Barak argues that the principal-agent model is too simply described if it always views the legislature as the principal and the courts as the agent. Instead, Barak uses the language of partnership, and proposes that where common law questions are concerned the judge is the “senior partner” and the legislator is the junior partner, whereas where statutes are involved the relationship is the
converse. As for the scope of the issues with respect to which the judge may act as the senior partner, these extent to the substantive protection of “thick” democratic norms of the kind identified by Justice Cheshin, and the reformation of laws to make them fit the conditions of society. This second function, in particular, is limited to cases where the “gap” between law and practice is not too great. Judges can create law “sporadically” only by making changes that are “partial, limited, and reactive”; if comprehensive changes in the system of laws are required, that is a job for the legislature.  

Where the defense of substantive democracy is involved, Barak’s view of the role of the democratic judge is less circumscribed. Democracy, in Barak’s description, contains both “formal” (procedural) and “substantive” elements, and it is the task of the judge to balance the two in the service of the “internal morality” of democratic governance. This is not merely something that judges are able to do, it appears as the “core function” of the judiciary, something that the other branches are bound to respect as an element of the principle of separation of powers, which Barak takes to be central to democracy.  

Barak’s description resonates with the attitudes of other European judges, such as G.F. Mancini. But it is not necessarily the case that this European approach is the only possibility. Michael Rosenfeld describes a typology of constitutional identities, identifying a German ethnos,

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92 Barak, 14. If anything, Barak’s approach to the role of a judge in this regard is more modest than that of the German High Court. In Soraya v. Die Welt (GFCC 1973b), that Court ruled that ordinary judges have a duty to statutes that would lead to unjust results if they were applied as written. Where “legislation has not kept up with the rapid pace of social development . . . and a changed society’s substantive notions of justice . . . One cannot blame the judge, if compelled to decide every case submitted to him and convinced that he cannot rely upon [the] future intervention of the legislature, he does not adhere to the literal meaning of the existing written law in a case where adherence would largely sacrifice justice” (quotation from case) -- so judges empowered to “reconstruct and even add provisions to the codes” (quoted at Stone-Sweet, 128)  

93 Barak, 33, 37-8.  
a French demos, an American national and a Spanish regional model of constitutionalism.\textsuperscript{95}

While the French pattern of constitutional development in some ways parallels that of Israel, the German “ethnos” model is a more apt parallel at the theoretical level. The underlying claims in the German model are that the particular historical experiences of a people are expressed in a national identity based on shared heritage, and that core constitutional principles are expressions of that identity.

There are certainly elements in Israeli constitutional development and scholarship that support an argument of this kind.\textsuperscript{96} Interestingly, these elements themselves appear most clearly in the form of compromises, as in the 1947 “status quo” letter from Ben Gurion, Fishman, and Greenbaum to the World Agudat Yisrael Organization that helped secure agreement on the wording of the Declaration of Independence by granting assurances to the religious parties on many of the same issues that are specified in §164 of the IDI’s constitution proposal. In 1980, the Foundations of Law Act, which provides that courts may rely on the “heritage of Israel” in reaching decisions, where “heritage” is understood to encompass a broad range of Jewish cultural traditions and values in addition to Halacha.\textsuperscript{97} In recognition of this ethnos-driven character of Israeli constitutionalism, Shimon Shetreet has argued for the creation of a special constitutional tribunal that would refer questions of constitutional validity to the Knesset based


\textsuperscript{96} While the Israeli judicial system was founded on the mandatory Common Law and the remains of the Ottoman judicial system, there was much influence of German trained legal scholars, practitioners, and judges, in the first few decades since independence (Rubinstein 142).

\textsuperscript{97} “Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage.” Foundations of Law, 1980, 34 L.S.I. 1981 (1979-80); see Kupat Am Bank, Ltd. v. Handles, 34(3) P.D. 57 (majority opinion by C.J. Barak holding that Jewish law refers to entirety of Jewish heritage which can inform but not dictate judicial rulings).
on a “reflection principle”; in Pitkin’s terms, something close to descriptive as opposed to symbolic representation. Specifically, Shetreet envisions such a tribunal reflecting the set of attitudes he describes as those of a “traditional Jew,” which he takes to be the majority position among Israel’s Jewish population.98

The non-justiciability provision represents a compromise between the democratic arguments for and against judicial review. Where universally applicable rights are concerned, the courts fulfill their “senior partner” role envisioned by Barak. The areas in which popular democracy is given free rein are those that involve specifically communal interests. Religious courts’ authority to settle disputes, standards for religious affiliation, dietary laws and national citizenship standards are all subjects having to do with the efforts of communities to maintain their collective identity. In Pitkin’s terms, the nonjusticiability provisions declare that these are areas in which descriptive representation is appropriate. In Ian Shapiro’s terms, these areas are left to aggregative rather than deliberative democracy.99

The existence of the relevant community is a social given as is the identification of religion as the critical basis for communal identification. This is, of course, a necessary assumption for Judaism in a Jewish state that the provisions extend similarly to Muslim and

98 "The traditional Jew, like his religious colleague, respects and upholds the Jewish tradition, but is opposed to religious coercion. He observes tradition out of a sense of obligation to the customs of his forefathers and the history of the Jewish people, but he does not adopt a rigid approach to observance. The traditional Jew may be described as a Jew who adopts conscious freedom of choice in the observance of the Jewish law and religious practice and allows himself certain freedoms that would not occur to the religious Jew. . . . This combination of tradition and freedom of choice within his traditional lifestyle also extends to the social-political level, and it is clear that it also has ramifications at the legal level.” Shetreet’s concerns are a combination of prudential concerns that the courts not overreach and a desire to consolidate judicial authority; his proposals include narrowing standing and restricting justiciability and, conversely, increasing penalties available to sanction government officials who fail to carry out judicial rulings, a pattern that he finds woefully prevalent particularly among religious officials and those involved in security and settlement activities. Shimon Shetreet, “Resolving the Controversy Over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset,” 77 Tulane L. Rev. 659, 667 (2003).

Christian communities. This observation points us toward the third compromise that is embodied in the non-justiciability provisions, the compromise between pluralism and liberalism as characterizing features of Israeli democracy.

**C. The Cultural Compromise: Pluralism, Liberalism, and the Specific Topics of Non-Justiciability in the IDI Draft**

Among the topics identified as non-justiciable in the IDI Draft, the prominence of marriage and family relationships stands out. To reiterate, Section 164(c) identifies these topics as follows: “(1) Joining a religion, including conversion, belonging to a religion or renouncing it; (2) The authority of the religious tribunals at the time of establishing this Constitution, conducting marriages and divorces according to religious law, creating partnerships and their dissolution in accordance with law, and the application of religious law to issues of personal status, which as at the establishment of the Constitution are adjudicated pursuant to the personal law of the parties.” In addition, section 164(d) provides that the Article “does not derogate from the obligation of the State to recognize marriages and divorces of couples according to their religious law and so, too, does not derogate from its obligation to establish a spousal registry according to which a partnership covenant shall be recognized pursuant to law, which shall also regulate its dissolution.”

Subsection d) appears to create a positive right that requires the creation of secular “civil unions” by the legislative and executive branches. Furthermore, this right is not created by the constitutional text but rather referenced by it; the right itself appears to be supposed to pre-exist the Constitution. In these ways, subsection d) is an emphatically liberal provision that secures
the support of the government for the exercise of individual choice. Moreover, this is presented as a justiciable question, so that if a registry of civil marriages is not maintained a litigant could seek an order from the Court requiring the government to perform its duties.

Politically, the inclusion of subsection d) reflects the drafters’ awareness of the widespread criticisms of Israel’s current religious monopoly over laws relating to marriage and family. This is not only a matter of concern with respect to rabbinic courts; the Shari’ah court system, headed by the Shari’ah Appeals Court, exercises a similar monopoly over issues of marriage, divorce, and family for Israeli Muslims and there are Christian courts that serve similar functions for Israeli Christians. The application of both Jewish and Muslim religious law has come under criticism on the grounds that these systems of religious law are incompatible with modern notions of gender equality. 100 In particular, the position taken by both Jewish and Muslim religious courts that they are not bound by civil laws – including the quasi-constitutional Basic Law: Human Dignity and Liberty – has created concerns that there is a large and important hole in Israel’s development of constitutional protections for individual freedoms.101 The Supreme Court, seating as the High Court of Justice (HCJ), however, did not accept this interpretation when it ruled in Bavli that Rabbinical courts are obligated to follow the ‘general’


101 With respect to rabbinic courts denial of an obligation to consider the effects of civil law, see Leah Lev v Regional Rabbinic Court, Tel Aviv Jaffa, et. al. 48(2) P.D. 49. With respect to Shari’ah courts in Israel, see A 191/97 (Dec. 29,1997): “The lower court’s ruling do not apply to Muslims, given that the Shari’ah Court is prohibited from ruling in accordance with laws that are not grounded in Islamic law and must only rule in accordance with the Shari’ah law”; A 194/99 (Nov. 12, 1999) takes the same position with respect to Basic Law: Human Dignity and Liberty. Ramadan, “Judicial Activism of the Sahri’ah Appeals Court in Israel,” at 277.
civil law on civil issues that are associated with the issue at stake. Also, precedents show that the HCJ is willing to intervene in decisions of the Rabinical court using principles such as the best interest of a child or principles of natural law.\textsuperscript{102}

Looking at subsections c1), c2) and d) of Section 164, we can see a third dimension of the “compromise” that is at work in the IDI Draft. In fact, we can see all three of the dimensions of the compromise at work in these subsections. The emphasis on marriage and family is easily explicable from the perspective of negotiation in the process of institutional design, reflecting the “political compromise” that was described earlier. Orthodox political parties – and Orthodox Jews in Israel in general – have chafed at the willingness of the Court to find expanded protections for civil liberties. At times, indeed, the objections seem to at least partly involve an embrace of a Waldron-style (or Bickel-style) challenge to judicial review, as in the case of large-scale protest demonstrations in 1999.\textsuperscript{103} It is reasonable to suppose that these protests, like American complaints of “judicial activism,” reflect a sense that the participants were faring less well in the courts than they might fare in the legislature. Particularly if the religious parties perceive that their presence will be a necessary element in any ruling coalition for the foreseeable future, they might reasonably conclude that the creation of an additional veto-point in the form of judicial review is contrary to their interests. In this way a religious insistence on non-justiciability for issues that are of greatest concern to their constituencies fits neatly in the model of judicial review formed by political compromise.

\textsuperscript{102} H.C. 4238/03 \textit{Levi v. The Rabbinical High Court} P.D. 58(1), 480; H.C. 982/04 \textit{Plonit v. The Rabbinical High Court} P.D. 58(6), 613

Second, the choice of these particular topics reflects the second “compromise” between the democratic critique and the democratic defense of the judiciary. The topics that have been selected to be non-justiciable, while they are of the utmost importance to the individuals involved, involve social rather than political systems. This is consistent with the concern that was identified previously. Where courts attempt to impose formal, abstract rules in a universalistic fashion across a variety of different social practices, there is a risk of severing the connections between the social and constitutional orders in the minds of the populace. By contrast, where politics is based on a distinctly descriptive form of representation in which different social groups are represented by different political actors, the connections between social and political systems are much stronger. Thus the specific identification of subjects most central to local, communal practices for the operation of the nonjusticiability provision is consistent with the second compromise that was described earlier, between different models of democratic governance.

There is yet a third “cultural compromise” that is evident in the provisions of the nonjusticiability section that pertain to marriage and family. By permitting individual citizens to choose whether to submit their marital and family affairs to the authority of religious law or, instead, to seek an alternative civil arrangements, §164 attempts to resolve a classic problem of multicultural democracy by providing what Ayelet Shachar calls “multicultural jurisdictions.” Shachar is careful to insist that an individual must retain protections against intragroup denial of rights by the provision of what William Galston calls “exit provisions.” That is, in this liberal conception of multiculturalism, the state remains an outside force capable and willing to enforce

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104 Shachar, Multicultural Jurisdictions: Cultural Differences and Women’s Rights (Cambridge 2001.)
rights by providing alternative routes to the same set of civil benefits. This attitude reflects a common thread in a good deal of the recent theoretical writings about the tensions between democracy and multiculturalism: that the preservation of the opportunity for cultural autonomy must be institutionalized in ways that ensure the ability of individuals to opt out of intragroup authority systems and provide meaningful alternatives. These multiculturalist writers nonetheless share a conception in which culture is to some degree constitutive of identity, inspired in part by the early communitarian writing of Charles Taylor. In response, writers such as Iris Marion Young call for democratic practices that recognize “difference” without institutionalizing “identities.”

One way to think about the selection of subjects is in terms of shielding social systems from the intrusions of law, with the assumption that in a system that emphasizes descriptive representation there is little danger of an intrusive political establishment attempting to drastically alter social relations. Where courts attempt to apply universalistic rights principles across different local communal practices, the tension between liberalism and pluralism is at its strongest, and the more central the practices at issue are to the community’s self-definition the

105 See, e.g., Seyla Benhabib, The Claims of Culture: Equality and Diversity in the Global Era (Princeton, 2002), at 66 (“the goal of any public policy for the preservation of cultures must be the empowerment of the members of cultural groups to appropriate, enrich, and even subvert the terms of their own cultures as they may decide.”) Will Kymlicka, (whom Benhabib criticizes), distinguishes between “the claim of a group against its own members” and external protections, or “the claim of a group against the larger society.” Kymlicka proposed that external protections should be encouraged “where they promote fairness between groups,” but that there are no good reasons to accept “internal restrictions which limit the right of group members to question and revise traditional authorities and practices.” Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford 1996), at 35, 37. Kymlicka further distinguishes “national groups” from “ethnic minorities,” and argues that only national groups are entitled to special protections for their institutions and practices that might contravene majority norms. In the Israeli case, interestingly, this would create an argument for preserving the autonomy of Shari’ah courts but not for granting the same degree of autonomy to rabbinic courts as a matter of entitlement. In either case, however, where the operation of religious courts’ authority results in limitations on the freedoms of group members, Kymlicka would reject the exercise of that authority as incommensurate with basic liberal values.

more that tension risks becoming politically destabilizing. This point goes to the heart of the balancing that is required between Israel’s identity as a Jewish and a democratic state. Some writers have argued that the two are ultimately incommensurate, and that a choice must be made between one or the other. The IDI’s proposal reflects an attempt at a compromise. The State of Israel is a pluralist state, containing religious communities – the Jewish community in particular – that are understood to have claims on the state to precede its establishment as a democracy. Those claims are social rather than formally political, however. Thus the non-justiciability provisions, with the addition of subsection d), represent a commitment to a democratic system of governance and a pluralistic social structure. At the same time, the inclusion of subsection d) along with subsection c) attempts to preserve the autonomy of individuals to choose to live outside the authority of cultural minority groups while at the same time preserving the autonomy of those groups to regulate the conduct of their members.

IV. The Compromise in Operation: Questions for the Future

There are a number of points with respect to which the terms of the compromises that are recorded in the non-justiciability provisions are not entirely clear. The first of these concerns the scope of the compromise. §164(a) states that the establishment of judicial review in §163 “shall not apply with respect to a piece of legislation which concerns” the topics enumerated in §164(c). The scope of the term “concerns” (in Hebrew “b’yachas”) is subject to interpretation. The term “concerns” could similarly be read to expand the reach of the non-justiciability provision to encompass review not only of laws that specify the authority of religions tribunals

or the rules of marriage and divorce but also laws that in operation would affect those subjects directly or indirectly. Alternatively, the term “concerning” can be read more narrowly to identify the subject matter of the laws in question, “laws regulating marriage and divorce” or “laws altering the authority of religious tribunals as that exists at the time of the adoption of this Constitution.”

It is important to recognize that under either reading, only those religious tribunals that are in existence as of the time of the adoption of the Constitution are covered by the terms of the compromise. As a result, should the Knesset decide at a subsequent date to enact legislation creating new religious courts, the terms of those laws would be subject to constitutional review under principles of equal protection, free exercise of religion, and so on. The result is something of an anomaly: the Supreme Court may not review the Knesset’s decision not to alter the existing authority of existing religious tribunals, or to refrain from creating new religious courts or expanding civil authority over matters specified in §164. The Supreme Court also may not review any future legislation that alters the existing authority of existing religious tribunals. On the other hand, the Supreme Court is fully empowered to review future legislation creating new religious tribunals or granting civil authorities concurrent jurisdiction over subjects previously reserved to religious courts and religious law.

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108 There is a possible analogy here to the Establishment Clause of the First Amendment to the U.S. Constitution, which prohibits the enactment of laws “respecting the establishment of religion.” The term “respecting” has been held to expand the scope of the prohibition beyond actual acts of establishment. “[The First Amendment’s] authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one ‘respecting’ the forbidden objective while falling short of its total realization . . . A given law might not establish a state religion but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.” Lemon v. Kurtzman, 403 U.S. 602 (1971). See also McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (Frankfurter, J., concurring).

109 This conclusion is not perfectly clear in the text, but we consider this the most plausible reading of the language.
The consequences of this difference in treatment are somewhat complicated. We will use the term “original religious groups” to be those with established religious tribunals and whose laws governing subjects such as marriage and divorce are accepted as authoritative at the time of constitutional adoption. We will use the term “new religious groups” to refer to religious communities who do not enjoy such an established status. These might be communities of a yet-to-be recognized religion, or sub-groups within recognized religions such as non-Orthodox Jews, followers of a form of *fiqh* that is not represented in current Muslim courts, or adherents of a Christian sect that does not have established tribunals in Israel as of the time of constitutional adoption. These persons would not be able to ask a court to rule that constitutional principles of equality require the creation of new religious courts to serve their communities. On the other hand, should the Knesset adopt legislation creating such courts, then the door would be opened to constitutional review of the terms of such legislation. Moreover, should such recognition be extended to the law or courts of one new religious group, other new religious groups would be able to argue that principles of equal protection require the extension of similar recognition in their cases, and that question would be fully justiciable, and whatever conclusion the Supreme Court reached would be enforceable by appropriate remedies. At that point, moreover, an irreligious person might plausibly argue that the same principles of equal protection require the creation of non-religious alternatives – again, potentially going beyond the partnership system described in §164(d) – on the grounds that from a constitutional perspective there is no difference between members of new religious groups and non-religious individuals, regardless of what special status is reserved for original religious groups.

From the perspective of the political compromise, the outcome that is described above makes perfect sense. The religious parties, confident of their ability to prevail in the Knesset,
secure their existing prerogatives against the threat of an activist Court’s desire to extend the reach of constitutional principles. The security of religious prerogatives is, if anything, strengthened by the implications of the narrow reading of “concerning” described above; members of the Knesset considering legislation that would create new religious tribunals may find a powerful disincentive in the possibility that once that door is opened, “the courts may make us provide courts for everybody.” As for the non-religious participants in the political compromise, as noted earlier it is presumably the case that they find the status quo acceptable – or at least an acceptable price to pay for securing a constitution.

As sensible as this outcome seems from the perspective of the political compromise, however, it demonstrates the complexity of the other two dimensions of the compromise. The subjects listed in § 164 were chosen because they are matters of utmost importance to individuals and communities alike. From a democratic perspective, the effect of a narrow reading of “concerning” is a peculiar and subtle form of inequality: new religious groups can appeal directly to constitutional protections against unequal treatment – “unequal” here meaning unequal vis a vis other new religious groups – while original religious groups cannot. The result is that original religious groups are institutionally favored but individually disfavored: the authority of original religious groups’ courts and religious officials is enhanced, while the constitutional rights of individual adherents are diminished. The democratic compromise favors

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110 Interestingly, this outcome can be seen as the obverse of the outcome in Romer v. Evans, 517 U.S. 620 (1996), in which the fact that supporters of laws prohibiting discrimination against homosexuals were required to seek a constitutional amendment in order to achieve their desired ends was taken to be an indication of disfavor toward homosexuals. Again, this observation points to the peculiarity of a situation in which the religious parties seek to secure their prerogatives by ensuring that they are subject to ordinary democratic politics rather than judicial protection. This aspect of the compromise finds support in recent comparative constitutional literature. Mark Tushnet argues that “weak-form judicial review . . . may indeed be the best institutional mechanism for enforcing all fundamental rights, first-, second-, and third-generation” because it brings “the advantages of competition among institutions to the process of specifying constitutional meaning.” Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton, NJ 2007), 228.
the collective institutions of civil society over individuals in the case of original religious groups, and reflects the opposite ordering of values in the case of new religious groups or irreligious individuals. Another way to think of the outcome is in terms of favoring the existing institutions of civil society while creating conditions that are not particularly favorable for the creation of new ones.

The cultural compromise reflects the same duality. With respect to original religious groups, collective rights and the prerogatives of traditional communal authority are given precedence over individual rights claims, even to the extent of restricting the kinds of exit provisions that writers such as Galston and Shachar emphasized (note the inclusion of conversion and religious identification among the topics listed in §164(c)(2).) With respect to new religious groups, or secular communities, liberal principles of individual freedom enforced by a robust system of judicial review is the order of the day. This is not an unprecedented approach to the problem of balancing multicultural pluralism with liberal universalism. William Kymlicka, for example, has proposed that “national minorities” should be given self-governing autonomy while “ethnic groups” should be governed according to liberal, universal norms. The distinction is based on history and politics. National minorities – primarily indigenous groups -- are those which already had established legal and political systems in place when the presently-dominant culture arrived. Ethnic minorities, by contrast, are groups that arrived later to an existing nation-state. Kymlicka argues that “nations” comprise separate identities, whereas “ethnic groups” merely reflect affective associations; as a result, Kymlicka ultimately comes close to concluding that multinational states are unsustainable while multiethnic states can be maintained by a shared commitment to pluralism.
Kymlicka’s categories are subject to criticism on several grounds, particularly challenges to the efficacy of his distinction between national and ethnic groups and questions about the sacrifice of individual liberties that may accompany the empowerment of national communities. Nonetheless, his reasoning resonates strongly with the strain of *ethnos*-oriented constitutionalism that characterizes Israel’s system of religious courts. Applying Kymlicka’s categories, the original religious groups occupy the position of indigenous nations within a dominant liberal democratic state, while new religious groups and secular groups are presumed to be assimilable into the general culture and have neither a need for nor an entitlement to collective autonomy established in exceptional legal accommodations. The tension that emerges from this description is not so much between the elements of Israel’s dual identity as a democratic and a Jewish state as its dual identity as a democratic and a *religious* state. With respect to the topics listed in §164(c), what is proposed in the SNJ model is more communitarian than Kymlicka’s liberal version of multiculturalism in its lack of exit provisions and its creation of spaces that the law of the Constitution does not reach.\(^{112}\)

What sets the non-justiciability provisions apart from other pluralistic models is the relationship among the various dimensions of the compromise that it embodies. Constitutions


\(^{112}\) For Kymlicka’s discussion of the limits of liberal multiculturalism, see Kymlicka, *Multicultural Citizenship*, ch. 8. It should be noted that the inclusion of a right to civil partnerships in § 164(d) ameliorates the absence of alternatives to religious courts and the rule of religious law to some degree, although it does little to resolve the problem that individuals are confronted by an either/or choice of the kind described by Shachar: “According to this logic, once individuals enter (or choose to remain within) minority communities, they are presumed to have relinquished the set of rights and protections granted them by virtue of their citizenship. ... This doctrine of implied consent assumes that those who have not used the exit option have implicitly agreed to their own subordination.” Shachar, *Multicultural Jurisdictions*, at 41-2.
can always be amended or replaced, but only by dint of great effort. The non-justiciability provisions, by contrast, leave open the possibility of changes in the balance between multicultural pluralism and individualistic liberalism by the ordinary operation of democratic politics. Should the maintenance of separate “nations” become destabilizing to the majority culture, the majority can elect representatives who will vote to change it. With respect to original religious groups, the very provisions that anchor the status quo in the constitutional text simultaneously open the possibilities for future political adjustment in response to changing demands or circumstances. Conversely, the disincentives that are built into the process with respect to new religious groups are not structural impediments akin to a supermajority requirement for constitutional amendment, they are merely aspects of the political compromise itself. The Israel Democracy Institute’s Selective Non-Justiciability model represents a solution to the problems raised by the democratic and cultural compromises that is found by making both subject to the terms of the political compromise.
Appendices

17. Equality under Law and the Prohibition against Discrimination

All are equal before the law; persons shall not be discriminated against on the basis of race, religion, nationality, gender, ethnicity, country of origin, disabilities, or on any other grounds.

123. Supremacy of the Constitution

Provisions of law shall be in accordance with provisions of the Constitution.

163. Constitutional Justicability

(a) The Supreme Court, and it alone, by a bench of no less than two-thirds of the body of Permanently Appointed Justices, may rule that a law is not valid because it is unconstitutional;

(b) Where a doubt regarding the validity of a law because of its unconstitutionality shall arise before a judicial authority, and it shall be ascertained that it is impossible to decide the matter without determining the aforesaid issue of validity, and [such judicial authority] cannot remove the doubt and affirm the validity of the law, it shall bring the issue before the Supreme Court; the issue of the validity of a law may be brought for a ruling by the Supreme Court, according to the arrangements prescribed in this Article, by a litigant through a direct appeal of the decision, as set forth at the beginning of this Subarticle;

(c) A question referred according to Subarticle (b) shall be brought before the Supreme Court with a bench of three justices. Where the Supreme Court shall rule that there is a basis for
the conclusion set forth in Subarticle (b), the issue shall be brought before a bench of no less than two-thirds of the body of Permanently Appointed Justices;

(d) Where a doubt shall arise, as set forth in Subarticle (b) during a Supreme Court hearing conducted by one justice, such justice shall raise the issue before a bench of three justices, as stated in Subarticle (c). Where a doubt shall arise, as set forth in Subarticle (b), during a Supreme Court hearing held before a bench of three or more justices, the bench adjudicating the issue shall act with the authority of the three justices as set forth in Subarticle (c);

(e) Where the Supreme Court shall rule that it should not hear the matter referred by a judicial authority or by a litigant, or where it shall have decided the issue and ruled that the law is valid, the one vested with judicial authority shall continue to hear the matter in accordance with the decision of the Supreme Court;

(f) Where the Supreme Court shall so rule in Subarticle (a), it may give any directive or relief which it deems necessary under the circumstances of the case, including ruling regarding the date as of which a provision will be repealed.

164. Constitutional Non-justicability

(a) Article 163 shall not apply with respect to a piece of legislation which concerns any of the topics enumerated in Subarticle (c);

(b) Where the court shall interpret legislation which concerns any of the topics enumerated in Subarticle (c), it is not obligated to grant interpretive preference to the provisions of this Constitution;

(c) The topics are as follows:
(1) Joining a religion, including conversion, belonging to a religion or renouncing it;

(2) The authority of the religious tribunals at the time of establishing this Constitution, conducting marriages and divorces according to religious law, creating partnerships and their dissolution in accordance with law, and the application of religious law to issues of personal status, which as at the establishment of the Constitution are adjudicated pursuant to the personal law of the parties;

(3) The Jewish character of the Sabbath and Jewish holidays in the public domain;

(4) Maintaining Jewish dietary laws in governmental institutions;

(5) Granting Israeli citizenship to relatives of one eligible to immigrate to Israel;

(d) That stated in this Article does not derogate from the obligation of the State to recognize marriages and divorces of couples according to their religious law and so, too, does not derogate from its obligation to establish a spousal registry according to which a partnership covenant shall be recognized pursuant to law, which shall also regulate its dissolution.

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