

Israel's "Constitutional Revolution": A Thought from Political Liberalism

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*In his book *The Purse and the Sword: The Trials of Israel's Legal Revolution*, Daniel Friedmann brings under critical inspection what he names as a legal revolution in Israel. Friedmann gives us, under that name, an account of a shift of certain major and sensitive state powers from elected leaders and legislators to politically insulated officials and judges. The Supreme Court's construction of two Basic Law enactments of the twelfth Knesset into a justiciable, substantive "formal constitution" for Israel figures in Friedmann's book as one component of the revolution, along with other judicial developments, including purposive interpretation of constitutional and other laws, an intensified form of common-law review of administrative actions for unreasonableness, and expansionary revisions to standing and justiciability. In all these developments, Aharon Barak took a leading part as judge and as scholar. I here consider to what extent these developments may be understood as responsive to promptings from a "political-liberal" conception of a justificational burden and need for substantive constitutional law. I reflect here on the possible pull of this conception in a political-cultural setting of a persisting widespread*

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attachment to an idea of Israel as a member of the family of liberal constitutional states, and hence on Barak's understanding of the role and responsibility of the Supreme Court. I speculate briefly about how far that pull may extend also to Professor Friedmann in his role of critic of the judicial handiwork of Barak and the Court on which he served.

INTRODUCTION

A. An Approach to the Book

The Purse and the Sword is Daniel Friedmann's critical retrospect on a chapter in recent history — still ongoing — that he styles as a “legal revolution” in Israel.¹ The tale overall, in Friedmann's uncheerful telling, is one of a decades-long process of a relinquishment of sensitive state powers, by the major elected political leaders to whom these powers had previously been entrusted, to a cadre of politically nonaccountable officials, state attorneys and others.²

As the book's title signals, a major share of its critical gaze falls upon the judicial branch of the Israeli state, and in particular the Supreme Court, as a rebuke to that Court's assumption of novel powers “to second-guess the other branches” of the state.³ Presented, as it is, with a richness of color, detail, and opinion that only an involved insider could supply, Friedmann's critique claims attention from outsiders who (like me) have followed sympathetically the part taken by Israel's Supreme Court in the course of events at hand. What follows here is a report of a reflection — or call it a theoretical inquiry — prompted by my reading of the book while in the midst of a quite different sort of scholarly engagement, briefly described below.⁴

1 DANIEL FRIEDMANN, *THE PURSE AND THE SWORD: THE TRIALS OF ISRAEL'S LEGAL REVOLUTION 2* (2016).

2 *See id.* (describing the legal revolution as a process in which “judges, state attorneys, and bureaucrats acquired powers that had previously been invested in elected officials, the prime minister, his cabinet, and the Knesset”); *id.* at 337-38, 342-43 (noting a reluctance of current elected leaders to push for a full reversion to the prior order, and surveying possible reasons for it).

3 *Id.* at 343.

4 *See infra* Part I.C.

B. A Moral Cause?

A number of features combine, in Friedmann's account, to mark the "revolutionary" Supreme Court's departure from the prior, less activist mold of the "classical" Court.⁵ These include a stepped-up level of adjudicative response to claims to minority rights and basic liberties in the face of countervailing needs put forward by state;⁶ advancement of a relatively wide-bodied mode of purpose-guided judicial application of enacted legal texts;⁷ relaxations of gateway requirements of standing and justiciability; and a newly energized application of the common law's general standard for judicial review of administrative action.⁸

Friedmann believes that these developments have not, on the whole, worked out happily for the advancement of legality, democracy, public security, social flourishing, and general political health in Israel. By contrast, my speculations here will go not to consequences — for that one needs a much closer-up knowledge and educated sense of Israeli life and politics over this period of time than I come near to having — but rather to causes. But here I mean causes of the special kind we might call "normative" or "moral." I look for promptings to the adjudicative aspects of the legal revolution in a certain set of convictions about what it means for Israel to call itself a democracy and about the responsibilities thereby devolving on the country's judiciary and specifically its Supreme Court. At the end, I speculate as to the extent to which Professor Friedmann may himself be a sharer in these convictions.

5 *See, e.g.*, FRIEDMANN, *supra* note 1, at 184-85 (referring to "the revolutionary court"); *id.* at 3 ("the classical court"). Friedmann compiles these departures as the "main features" of "the new system". *See id.* at 54-55. He does not include in this list of main features the active hand taken by the Supreme Court in the production for Israel of a "formal constitution", which I take up soon below.

Professor Friedmann is of course not alone in observing with concern a new departure by the late 20th century Supreme Court. *See, e.g.*, MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* 4-8 (2011) (noting "problematic consequences," including setbacks to liberal law and politics in Israel, from an excessive "legalization of politics").

6 *See id.* at 55 (detecting a "radicalization of certain civil rights . . . in total disregard of the price to be paid").

7 *See id.* (detecting "a new standard of legal interpretation centered on a law's purpose or intention, as that seems to the judge, rather than on the actual wording of the law").

8 *See id.* (detecting a "new rule that any decision of a public authority can be quashed on grounds of unreasonableness").

I place my inquiry in particular relation to the Supreme Court's construction, in the famed *United Mizrahi Bank* case of 1995,⁹ of two Basic Law enactments by the 12th Knesset into a substantive part of a formal constitution for Israel. I use the term "formal constitution" here as the judges in *United Mizrahi Bank* use it,¹⁰ to mean a written body of higher-law enactments by which Israeli courts are empowered (à la *Marbury v. Madison*) to revoke decisions of the Knesset (not themselves enacted in constitutional form) that are found by the judges to contravene the dictates of those enactments.

But then to narrow my focus even further, what I have most specifically in view is the account of that development vouchsafed in that case by the Supreme Court's then presiding judge, Aharon Barak. Differing in this regard from some colleagues who relied on other paths to judicial treatment of the Basic Laws as controlling (while they stand) on ordinary Knesset legislation, Barak embraced a "constituent authority" account, by which the establishment of a formal constitution for Israeli is an outcome of an exercise by the Knesset, sitting specially as a constituent assembly, of a sovereignly entrusted power to legislate formal constitutional law.¹¹

That — the onset of a formal constitution for Israel by a judicially cognized act of sovereignly authorized higher lawmaking — is the "constitutional revolution" of my title. Although of course still to this day contested in Israeli legal and political circles, that view of Israel's current constitutional situation seems to have settled widely into daily Israeli political practice and

9 CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) PD 221 (1995). In this article, I will cite to the English translation found at http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.

10 *See, e.g., id.* at 183, 209-10 (Barak, P.).

11 *See* Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349, 353, 367, 369-70 (2012) (distinguishing the "constituent authority" account from others also found in, or derivable from, judgments of the justices in *United Mizrahi Bank*, and attributing this account specifically to President Barak); *id.* at 368-70 (concisely reviewing the historical events on which Barak based the thesis of the Knesset's powers to legislate formal constitutional law for Israel).

By the logic of Barak's account, the Basic Laws must be treated as entrenched, if only to the degree that they are impervious to uprooting or alteration by implication from contrarily tending parliamentary enactments in ordinary form, and so can be revoked or amended only by Knesset action in the special form of a Basic Law. *See United Mizrahi Bank*, CA 6821/93, at 246-47 (Barak, P.). That degree of entrenchment suffices for my purposes in this article.

legal argument.¹² What may be as much to the point of this reflection, it is the view that most directly invites a sympathetic examination from precincts I inhabit, of that branch of liberal thought that these days travels under the banner of “political liberalism.”

C. A Plurality of Aims for Substantive Constitutional Law

The rumination that follows comes out of theoretical work in which I am currently engaged. I am here testing out a possible application of that work toward an understanding — or you could call it an interpretation — of Israel’s constitutional revolution and the controversy surrounding it. This ongoing work of mine engages with the multiple hopes with which liberal political societies invest the substantive parts of their “basic” or “constitutional” laws. The work differentiates between two kinds of functions we may ascribe to these laws, which I will here name as a “regulatory” and a “justificational” function.¹³ Of course, this dual classification does not in itself conjure up the entire, rich array of reasons and motives by which observers and theorists would variously explain the introduction into a country’s legal practice of a layer of substantive constitutional law.¹⁴ The classification only sorts out these sundry possible aims along one axis of differentiation among them.

12 See Weill, *supra* note 11, at 367 (“The Israeli legal academia largely contends that the Israeli Supreme Court adopted [the constituent authority] theory and thus that it best explains post-*United Mizrahi Bank* constitutional development.”); Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 29 HASTINGS CONST. L.Q. 457, 461, 499-500 (2012) (“[T]he political branches now . . . overwhelmingly comply with judicial decisions that invalidate statutes.”).

13 See also Frank I. Michelman, *Legitimacy, The Social Turn and Constitutional Review*, 3 CRITICAL Q. LEGIS. & L. 183, 184-85 (2015) (differentiating a “legitimation” from a “normative” function for constitutional law); Frank I. Michelman, *Human Rights and Constitutional Rights: A Proceduralizing Function for Substantive Constitutional Law?*, in HUMAN RIGHTS, DEMOCRACY, AND LEGITIMACY IN A WORLD OF DISORDER (G. Neuman & S. Vöneky eds., forthcoming 2018) [hereinafter Michelman, *Human Rights*] (differentiating a “proceduralizing” from a “regulatory” function).

14 See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 43-47 (2004) (advancing a “hegemonic preservation” thesis to explain the constitutionalization of substantive rights); Dieter Grimm, *Integration by Constitution*, 3 INT’L J. CONST. L. 193, 195 (2005) (advancing the thesis of an expressively “integrative” function for substantive constitutional law).

Very briefly, a constitutional bill of rights serves a “regulatory” function insofar as it constrains political outcomes over a span of time in directions preselected by the authors (whom we may or may not idealize as “the people”). It serves a “justificational” function insofar as it provides for everyone concerned a good and sufficient reason right now, in the present moment, for willing submission to the laws that issue from everyday lawmaking, not excepting laws that may run strongly against moral orientations and beliefs deeply held by substantial numbers of citizens.

Justification says (very roughly; refinement comes below): “Yes, we have divisions and disagreements in this country, but still we say that everyone here should be able to go along with the legislative outputs of the legal order in force — not just because it is a legal order in force, but *given also the assurance that those outputs may issue only in conformity to certain instructions pre-inscribed in this constitution to which we are just now pointing.*” Seeing thus how justificational force is coupled to regulatory effect, we might suppose that normally, at least, the two functions will coincide, so that the pursuit of one is also the pursuit of the other. On closer look, though, one finds that in some respects and in some contexts the two pursuits are not obviously compatible.¹⁵

My rumination will come in four parts. Part I expands on the differentiation between regulatory and justificational aims for constitutional law and briefly recounts a “political liberal” philosophical background for the justificational aim. Part II asks about the suitability of the justificational aim to the case of Israel in current conditions. Part III uses the case of the United States to illustrate how the regulatory and justificational aims may point in different directions regarding the work of judges assessing the legality and application of statutes. I show there how the idea of the justificational aim might help to explain aspects of the work of the revolutionary Supreme Court that come under critical fire from Professor Friedmann. I will then, in the concluding Part, explain why Friedmann’s work in *The Purse and the Sword* nevertheless leaves open a question of how far he might himself approve the idea of the justificational aim.

15 See, e.g., Michelman, *Human Rights*, *supra* note 13 (showing how the two functions come apart on the question of how you or I should direct our shares of control over the outcomes of constitutional politics: toward outcomes we believe to be truly right and just, or toward outcomes we believe could be found acceptable by all whose acceptance we should care about).

I. "REGULATORY" AND "JUSTIFICATIONAL" AIMS FOR SUBSTANTIVE CONSTITUTIONAL LAW

A. Regulation

I begin with a generic idea of a "basic" law, which is consistent also with the technical use of that term in Israeli legal discourse. A law, I will say, is *basic* within its legal system when its recognized purpose and effect are to set terms of intra-systemic validity for any and all further legal operations of the state, including in the first place the issuance of directly operative "ordinary" laws by the everyday legislative bodies. Some basic-law material is what we call "structural," laying down institutional and procedural forms for the issuance of legislation and so on. Other basic-law material is "substantive," laying down restrictions and requirements on the goals to be sought or effects to be wrought by operations of the state. In Israel, at least since the *Bergman* case of 1969, it has been understood that a primarily "structural" Basic Law can carry its own limited substantive implications.¹⁶ When Aharon Barak speaks of Israel's "constitutional revolution," he means an introduction for the first time into Israel's legal system (by the Twelfth Knesset's enactment, in 1992, of *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*) of substantive basic-law material going well beyond any such possible implications from structural guarantees — as seemingly accepted by the Israeli public following the Supreme Court's decision in *United Mizrahi Bank*.¹⁷

But then *why* this constitutional revolution? To what end does Israel need or want this? We may assume here that any serviceable modern political and legal order will necessarily have in place, at any given time, a set of *structural* basic laws, to lay down organizational and procedural forms for elections, legislation, and so on.¹⁸ With any necessity of that kind, Israel of course complies. Israel since its beginning has had effectively in place a structural constitution — plainly operative if not exactly "written" and including, at the start, a rule of parliamentary supremacy.¹⁹ That fact illustrates the point

16 H CJ 98/69 *Bergman v. Minister of Finance* 23(1) PD 693 (1969) (finding a discriminatory campaign-finance law to be non-compatible with the provision for "equal" elections in section 4 of Basic Law: The Knesset).

17 See CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) PD 221 (1995), at 164-66 (Barak, P.); Aharon Barak, *Foreword: A Judge on Judging*, 116 HARV. L. REV. 19, 36 n.70 (2002).

18 See HIRSCHL, *supra* note 14, at 31-32.

19 See FRIEDMANN, *supra* note 1, at 19-20 (showing also how the Supreme Court could sometimes discipline the government, or even the Knesset, while operating

that the substantive parts of constitutions are not strictly necessary to the effective operation of a political and legal order. Many theorists doubt whether a constitution for a democracy can rightly contain any substantive parts at all.²⁰ So what, after all, is the point or purpose of having them?

You might say it is obvious. The purpose is *regulatory*. It is to constrain political outcomes over the coming span of time in directions chosen by the authors. As Aharon Barak has said, “when the founders . . . enact[] a text, they [seek] to give effect to a policy.”²¹ Substantive basic laws are meant to ensure that state activities over the coming stretch of time will comport with certain policies whose content is already at least approximately known to the authors. It must then follow, from the regulatory view, that when *Basic Law: Human Dignity and Liberty* proclaims that “there shall be no violation of the property of a person” except by “a law befitting the values of the State of Israel” as “a Jewish and democratic state,” already implied are certain beliefs of the subscribers. *First*, they must take it that they already know and agree on what the mandated social condition called “no violation of the property of a person” consists in, at least approximately at the core if not precisely at the margins; and the same, then, for the condition of consistency with “the values of . . . a Jewish and democratic state.”²² And then *second*, they must take it that the establishment of this mandate in the form of a basic or constitutional law will make it likelier that *those* conditions are realized in the country of Israel over the coming stretch of time. That combination of beliefs — that linkage of semantic confidence to predictive hope — is what I mean by assignment of a regulatory function to substantive constitutional law.

B. Justification

The regulatory conception is obvious and easy to grasp. The justificational conception requires more by way of explanation. This idea has eminent

strictly within that rule); Weill, *supra* note 12, at 463.

20 See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 221-22 (1999); Michael J. Karman, *What's So Great About Constitutionalism?*, 93 *Nw. U.L. REV.* 145 (1998).

21 Barak, *supra* note 17, at 83.

22 See *Basic Law: Human Dignity and Liberty*, § 1, SH No. 1454 p. 90 (“The purpose of this Basic Law is to protect human dignity and liberty in order to establish in a Basic Law the values of State of Israel as a Jewish and democratic state.”); *id.* § 8 (“There shall be no violation of rights under this Basic Law 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.”).

support from the philosopher John Rawls, whose work is cited by President Barak in his *United Mizrahi Bank* opinion and other writings.²³

Near the start of his book *Political Liberalism*, Rawls poses the question to which his work there will be addressed. "How is it possible," Rawls asks, "that there may exist over time a stable and just society of free and equal citizens profoundly divided" not just by interests but by "religious, philosophical, and moral doctrines?" Rawls calls that "*the* problem of political liberalism."²⁴ He then immediately follows with what he sees as the same question "put another way." How is it possible, he now inquires, "that deeply opposed though reasonable [religious, philosophical, and moral] doctrines may live together and all affirm the political conception of a constitutional regime?"²⁵

So . . . seeking a possible practice of politics that can be both stable and just in a diverse modern society, Rawls advances by way of solution the idea of a "constitutional regime." And then asking again about how political majorities can hope to justify the coercive effects of their laws to dissenters no less presumptively entitled than they are to respect as reasonable and rational, free and equal citizens, Rawls proposes as follows:

Our exercise of coercive political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens [as free and equal] may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.²⁶

Rawls calls that "the liberal principle of legitimacy."²⁷ I am now calling it the justificational burden of substantive constitutional law.

I explain. Among most or all readers of this Article, it will go practically without saying that a prevailing disposition of citizens to comply with duly issued ordinary laws — most of the citizens, most of the laws, most of the time — is a socially necessary good. But of course we also know that groups of us are at any time liable to disagree intractably (in real political time) over the rightness and goodness of some of a state's policies as adopted and pursued

23 See, e.g., Barak, *supra* note 17, at 49, n.97; CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) PD 221, 270, 282 (1995) (Isr.).

24 JOHN RAWLS, *POLITICAL LIBERALISM* xx (paper ed. 1996).

25 *Id.*

26 My rendition combines two formulations in RAWLS, *supra* note 24, at 137, 217. A closely similar statement appears in JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 41 (Erin Kelly ed., 2001) (speaking of essentials that "all citizens, as reasonable and rational, can endorse in the light of their common human reason").

27 RAWLS, *supra* note 24, at 137, 217.

by law. How, then, do we sustain across our populations a justified sense of assurance that our political regime continues as a whole to be deserving of support, even in spite of your or my severe disapproval of some of the turns it takes or choices it makes from time to time?

One answer would be: by a credible establishment in the public space of a standard or test for the regime's continued wide acceptability overall, despite recurrent severe dissatisfactions with some of its substantive operations, here and there in the population. It would have to be a standard that those who accept it can furthermore conscientiously see their way clear to deeming acceptable to everyone for whose acceptance they have good moral reason to care — say, everyone deemed “reasonable.” Then each citizen could point to and cite this standard to the others in good conscience — each treating the others as equals in dignity and freedom — as a basis for reciprocating demands upon each other for a general disposition to comply with duly issued laws. According to the Rawlsian principle of legitimacy, a chief and crucial function of substantive constitutional law is to serve as such a standard or test for a modern, broadly speaking liberal society.

We can see pretty well what “reasonable,” here, must mean. We fall back on a set of perceptions that everyone supposedly could and should share: a perception, *first*, of the very great moral and practical benefits to everyone of having some decent system of law effectively in force; a perception, *second*, of the persisting facts of conflicts of interests and moral disagreements that might be reasonably and humanly understandable on all sides; and then a perception, *third*, of the commanding moral logic of a reciprocity of respect for *everyone's* quest — yours no less than mine, a woman's no less than a man's, an Arab's no less than a Jew's, a Reform Jew's or Secular no less than an Orthodox one, and so on — for a life lived in dignity, according to aims and values that a person affirms for herself or himself in conditions of freedom.

With that set of perceptions on board, we then posit the possibility of a set of basic laws for the country that meets the following condition: Each citizen can look the others in the eye and say, everyone here who shares it should be able to see also that a system constituted by *just these* basic laws — here pointing not only to the constitution's political-structural arrangements but also its substantive parts — is sufficiently worth upholding to give each of us prevailing reason to insist on each other's acceptance in practice of the system. So when someone takes exception to a given policy to be carried out by law, we can feel ourselves morally entitled to respond that the law or policy in question might be right or it might be wrong, it might be just or it might be unjust, but *it is not outside the constitution* and so it is in good moral order for us to call on you for compliance with it. In that response consists the justificational burden of substantive constitutional law.

Now, obviously, not just any substantive constitution that may happen to be in force in a given country at a given time can be allowed to shoulder the burden of justification of the force of ordinary law. It will have to be what we can call a *justification-worthy* constitution (compare: a sea-worthy ship) — meaning a constitution possessed of whatever the property is that we think can qualify for such a service a body of basic or constitutional laws. A Nazi constitution would not meet this requirement. In his proposed principle of legitimacy, John Rawls describes the requisite property in terms of the constitution's acceptability for such a service, in view of its essential content, to all reasonable and rational, free and equal citizens. Of course, Rawls is to be taken here as positing an ideal for a well-ordered society, always to be striven for if never to be perfectly satisfied.

II. APPLICATION TO ISRAEL

Some will doubt that there can possibly be, in any modern even moderately pluralized society, a body of constitutional laws that meets the Rawlsian test of deservingness of acceptance by every reasonable inhabitant. (It depends a lot on how tightly you draw the bounds on "reasonable.") In regard to the relatively secure and liberally unified society that Rawls may sometimes have perceived in the United States, he stood ready to consider that a political regime conforming to a constitution something like our own could be deemed acceptable to the reasonable reason of any citizen. But doubts of course must multiply in the case of a "rifted" society such as Israel may be counted today.²⁸

To see the difficulty, we need only take a look at *Basic Law: Human Dignity and Liberty*. Its text includes protective guarantees respecting the life,²⁹ bodily freedom,³⁰ dignity,³¹ property,³² privacy,³³ and intimacy³⁴ of a person, but not a word (beyond what a strongly purpose-minded judge might possibly dig out of "dignity," "privacy," or "intimacy") on freedoms of expression

28 See Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 *ISR. L. REV.* 216 (1999); ALESSANDRO FERRARA, *THE DEMOCRATIC HORIZON: HYPERPLURALISM AND THE RENEWAL OF POLITICAL LIBERALISM* 88-108 (2014) (seeking answers to the difficulties of producing a Rawlsian legitimation-worthy constitution in societies marked by conditions of "hyperpluralism").

29 See *Basic Law: Human Dignity and Liberty*, § 1, 4, SH No. 1454 p. 90.

30 See *id.* § 1, 4, 5.

31 See *id.* §1, 4.

32 See *id.* § 2.

33 See *id.* § 7.

34 See *id.*

or thought, of conscience or religion, or of political, economic, or familial association or assembly; not a word on equality or nondiscrimination; not a word on access to material necessities of life. The omissions are glaring by comparison with standard global texts and treaties on human rights; they are intentional; and they invite obvious explanation in terms of what we fairly may call factional political realities.³⁵ Add to them the grandfather clause exempting previously created laws from control.³⁶ Add further that the test for permitted infringement of the rights that *are* included is the serviceability of the infringing law to the values of the State of Israel as not only a “democratic” but also a “Jewish” state.³⁷

It is not obvious, to speak mildly, how a set of basic-law guarantees thus trimmed and qualified can be deemed fully justification-worthy to everyone now rightfully living in Israel, including those who belong to political, ethnic, cultural, and religious minorities there but who, by liberal precepts, are equal in freedom and dignity with everyone else.³⁸ But then, neither may it be obvious to all how unqualified guarantees of the full array of secular liberal fundamental rights, including full freedoms of entry and movement and strict religious and cultural neutrality, should be thought necessarily acceptable to Jewish citizens for whom Israel represents the supreme blessing of a Jewish homeland that seeks no harm to anyone beyond what that achievement might at a minimum require. If minorities in a country can justifiably claim a need for space for the assertion and recognition of communal and cultural identities, and so for supportive public *milieux*, then what about culturally or religiously anchored *majorities*? Why should their parallel needs be deemed any the less deserving of consideration?

35 See HIRSCHL, *supra* note 14, at 53, 82-83; FRIEDMANN, *supra* note 1, at 193.

36 See Basic Law: Human Dignity and Liberty, § 9, SH No. 1454 p. 90 (“This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law.”).

37 See MAUTNER, *supra* note 5, at 45-47 (opining that these texts enact into Israeli basic law a “compromise” with liberal values).

38 Ronald Dworkin, for one, believed it could not be so deemed. See Ronald Dworkin, *Democracy and Religion: America and Israel*, YOUTUBE (Sept. 14, 2009), <https://www.youtube.com/watch?v=AU9kUIY-xUY&t=14s>. One should recognize, of course, that the two Basic Laws of 1992 do not purport to be the final or complete list of substantive constitutional guarantees in Israel, and an eventually completed constitution might include some guarantees that have so far been omitted. The point, though, is that these remain to this day the main texts that current seekers after a substantively justification-worthy constitution in Israel have to go on.

Whatever you think might be the best answer to that question, it is a question fairly posed.³⁹ Depending on how sympathetic one's response might be, this case of Israel today may appear to pose a test for the possible limits of political-liberal ideas. Faced with this case, one might just say that the Rawlsian liberal notion of a justification-bearing regime of constitutional law — deserving of acceptance, as a regime, by every reasonable inhabitant in the light of their supposed “common human reason”⁴⁰ — may possibly fit some countries at some times, but it does not fit all countries at all times; that it has application only to countries whose conditions it fits; and that Israel is not now one of them.

The moral cost of taking that view might not, however, be trivial. There are in fact a very substantial number of non-Jewish persons living within Israel and under Israeli rule, whose basic human rights to live where they do cannot conscientiously be denied.⁴¹ To these people, by liberal lights, justification is owed for demands of their willing submission to Israeli laws that can sometimes quite severely bite on interests of theirs, including where, when, and with whom they can live, work, and travel. By the lights of Rawlsian liberalism, *all* people in Israel, as free and equal — Arabs and Jews, women and men, secular and Orthodox — are owed, on pain of eclipse of the moral legitimacy of the regime of government in Israel, a body of regime-defining laws that we can sincerely maintain should be reasonably acceptable *to them* as supposedly “reasonable and rational.”

If (and notice please that here I say “if”) a substantive constitution consisting only of the two Basic Laws of the 12th Knesset does not on the surface sufficiently meet that requirement of being reasonably acceptable to all as free and equal, that would, by liberal normative ideas that I expect many of Israel's citizens would be loath to disavow, have to be a distinctly disturbing conclusion. A perception to such an effect could press citizens to exert themselves to the utmost to make sure, for example, that in no respect not absolutely dictated by Israel's character as a homeland to Jewish people are non-Jewish people living in Israel under Israeli rule demeaned by that rule, or subjected by it to political or social disadvantage, indignity, or restriction of opportunity.

39 See LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS* 6-7 (2015) (noting the challenges posed by this question to political liberalism and human rights law).

40 See *supra* note 26.

41 Hoping to keep clear of complications of international law, I confine my attentions here to the situations of people residing and mainly living their lives within the uncontested borders of the State of Israel or say, for convenience (if such is your view), within the borders demarcated by the Green Line. I confine my attentions also to the situations of people whose perfect right in general to live where they do the reader will not see fit to doubt or deny.

Citizens so minded would accordingly greet all suggestions of a need for any sort of infringement of the equal basic rights or the equal social standing of any citizen or group of citizens with a demand for convincing proof of need. That pressure would especially devolve upon public officials, and of course that would include the judges. That pressure then might show its effects on the judges in various ways. One of them, for example, might be a noticeable uptick of muscularity in the judicial applications of a longstanding common-law-constitutional requirement of government action that is “reasonable.”⁴²

III. JUDICIAL APPLICATION OF CONSTITUTIONAL LAWS

I turn now to some resulting issues for the judicial application of constitutional laws. I will start this in the context of the United States, but the relevance to Israel should soon become clear.

Anyone familiar with American debates about judicial applications of legislative enactments will know how they move between poles (I describe them extremely roughly) of (i) sticking to the text and oppositely (ii) looking behind or beyond the text to broader considerations of purpose or motivating values.⁴³ At the constitutional level, where the age of the text may quite dramatically open possibilities of differing significations of the words to those who wrote them then and those who read them now,⁴⁴ the more text-bound approaches tend to keep company with what we call “originalism.” Interpreters are to apply the Constitution’s verbiage according to the best historical recovery they can make of the public meanings carried by that verbiage at the time it was submitted to ratification by popular votes or assemblies. An opposing “constitutional constructivist” approach⁴⁵ (sometimes called a “philosophical”

42 Compare FRIEDMANN, *supra* note 1, at 55, 75, 106, 149 (objecting, as I read him, not to that doctrine but to the scope and assurance of the revolutionary Supreme Court’s applications of it).

43 Compare *supra* note 7 and accompanying text.

44 See, e.g., Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 609-13 (1977) (reviewing a debate over whether the phrase “the freedom of speech, or of the press” in the First Amendment lays down a special, absolute rule against so-called “prior restraints” on publication (and so is not concerned, or is less intensely concerned, about the imposition of penalties following a prohibited publication)).

45 See, e.g., JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISM 20-21 (2015) (noting a connection to Rawls’s

or “moral reading” approach⁴⁶) would call upon judicial interpreters to apply the verbiage so as to make its applications conform as closely as possible to some ideal conception of the (liberally) best constitution — always within some outer bound of verbal plausibility, but without controlling reference to historical facts either of public usage or of authorial intention or expectation.

This Americanized opposition of textualist-originalist and purposive-philosophical constitutional-interpretive approaches is crude and needs refinement. It can, however, serve for present purposes. It appears to correlate quite nicely with a sorting of constitutional functions between regulation and justification. Where constitutional law is to serve as the medium of fixation by the authors — “the people,” as we like to say — of certain general aims regarding future political outcomes, the corresponding assignment to judicial appliers must be exactly, as John Rawls has written, to “protect” the higher law enacted by the people.⁴⁷ We must then expect from these appliers their best effort at extracting from the words and surrounding facts the historically enacted will of the authors. If the authors said nothing about aims for “equality” or “free speech,” then nether should the courts in their name presume to intervene on behalf of such aims.

Of course, the authorial will may move on a moderately abstract plane of “principle,” so called. Say, it would be a will to condition the validity of any later-arriving law on its due deference to a principle envisaged and named by the authors as “property of a person” — and so further on that later law’s deference to whatever *that* principle may turn out to encompass in future applications not expressly considered by the authors, in social conditions perhaps not foreseen by them. The task must thus remain one of historical-factual inquiry into what *the authors* envisaged as the gist and core of the principle thus named. If anything has become clear through experience, though, it is that inquiries of that kind will quite frequently *not* turn up clear and decisive answers either way to current controversies over the political-moral merits of various legal acts. Where they do not, they give the judges in a democracy no foothold for ruling against the choices of the state’s executive and legislative authorities.

work of a favored “constitutional-constructivist” approach to constitutional interpretation).

46 See *id.* at 80-81 (“philosophic” approach); RONALD DWORKIN, *FREEDOM’S LAW* 1-3 (1996) (“moral reading”).

47 RAWLS, *supra* note 24, at 233 (“A supreme court . . . fits into . . . dualist constitutional democracy as [an] institutional device to protect the higher law.”) (quoted by President Barak in CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, 49(4) PD 221 (1995), at 270).

Or rather, they appear to many to give no foothold in a judicial duty of “protection” (Rawls’s word) of a regulatory will of constitutional authors.⁴⁸ By seeming contrast, where the constraints of constitutional law are to supply sufficient justification *now* for willing submission by dissenters to the coercions of ordinary law, the corresponding assignment to judicial appliers must be (within some outer limit of semantic defensibility) to enforce a set of constitutional essentials that *really does* supply the needed justification. As to what “really does” supply it, though, the judges *ex necessitate* will be at least in some degree on their own. And here I will bring into the picture another liberal political philosopher whose works are well known to Aharon Barak, Ronald Dworkin by name.⁴⁹

As persuasively explained by Dworkin, any truly respectful applier of a constitutional text will read the words against a backdrop of the authors’ own supposed conception of the political-moral “upshot or point” of writing a basic-law constitution in the first place. A political community’s commitment to such a document with its particular provisions, writes Dworkin, necessarily reflects their “*prior* commitment to certain principles of political justice which, if we are to act responsibly, must therefore be reflected” in the way we now read the Constitution. A reader, Dworkin says, cannot truly show regard for either the text or “the motives of those who made it” without ascribing *to them* certain “principles of political morality which in some way represent the upshot or point of constitutional practice more broadly conceived.”⁵⁰

It seems, furthermore, that any conception of “upshot or point” ascribed to authors by a respectful interpreter will have to be one that makes good sense to the interpreter. The interpreter “proposes value for the practice by ascribing some scheme of interests or goals or principles the practice can be said to serve or exemplify.” But plausibly defensible ascriptions will differ among

48 See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); FRIEDMANN, *supra* note 1, at 193-95.

49 See, e.g., Barak, *supra* note 17, at 22-24 & n.13 (citing Dworkin in support of his claim that in many of the legal-interpretive disputes that find their ways to highest courts, responsible resolution will require of any judge a conscious “philosophy” in regard to the role of “judges in the highest courts of our democracies”).

50 RONALD DWORKIN, *A MATTER OF PRINCIPLE* 35-36 (1985). Dworkin soon thereafter would generalize the point beyond its application to “constitutional practice” to the larger social practice known as “law.” See RONALD DWORKIN, *LAW’S EMPIRE* 66, 87 (1986) [hereinafter *LAW’S EMPIRE*] (“There must be an interpretive stage at which the interpreter settles on some general justification for the practice . . . This will consist of an argument about why a practice of that general shape is worth pursuing.”); (“[l]aw is an interpretive concept. . . . Judges normally recognize a duty to continue . . . the practice they have joined.”).

interpreters, so any interpreter's choice will have to reflect that interpreter's own view of which ascription "proposes the most value for the practice — which one shows it in the better light, all things considered."⁵¹

Suppose now a political-liberal-minded judge, who finds that the "upshot or point" of the constitutionalization of substantive norms is to ensure justification — not just on the day the text is written but over some future course of political time, while that constitution remains in place — for calls among fellow citizens for willing submission to laws with which some of them may disagree profoundly.⁵² Then (passing now from Dworkin back to Rawls), today's judicial appliers must read and apply the words in the light of "political values . . . that *they [the judges] believe, in good faith . . .* all citizens as reasonable and rational might reasonably be expected to endorse."⁵³ The legal text will not be disregarded, but it will be read against the backdrop of a political-moral purpose that the judicial reader cannot simply find already *in* the text (because it indispensably informs the reading of the text) and so must of necessity bring to it.⁵⁴

It seems, then, that between the regulatory and the justificational modes of constitutional application there must always remain some gap or trace of difference in the questions presented to the applier. Alessandro Ferrara puts it well: "In . . . the first mode the interpreter of the constitution is asked to tell the public what the sovereign people *did* will, in the second to tell us what it *should* will."⁵⁵ If we are lucky with our historical contingencies — if our finding of what the people did will matches our view of what they should will — that gap will not matter in practice. Apply the constitution, then, for the sake of regulation in accordance with the authors' directions, and you will also *ipso facto* apply it with regime-justifying effect.

51 DWORKIN, *LAW'S EMPIRE*, *supra* note 50, at 52-53.

52 Compare RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 24-26 (1996), where Dworkin, for his own part, proposes as the point of substantive constitutional law the establishment of basic-structural conditions for imbuing all citizens with a warranted sense of full "moral membership" in the collectively self-governing political community, by which each can "treat himself as bound together with others in a joint effort to resolve [political] question, even when his views lose"). Dworkin, if I read him right, points straight at a justificational function for substantive constitutional law. See also *United Mizrahi Bank, CA 6821/93*, at 271-72 (Barak, P.) (endorsing this view of Dworkin's).

53 RAWLS, *supra* note 24, at 236 (emphasis added).

54 Cf. Barak, *supra* note 17, at 67-73 (on "purposive" constitutional interpretation).

55 Alessandro Ferrara, *Political Liberalism Revisited: A Paradigm for Liberal Democracy in the 21st Century*, 24 *PHIL. & SOC. CRITICISM* 681, 686 (2016).

But alas, that happy ending follows only where the constitutional authors happen to have constitutionalized all the rights whose observance is required to make a democratically and liberally justifiable regime — and none that would defeat it. What if (in our liberal-minded estimation) they have not? What if their key Basic Laws steer clear of declaring outright on rights of religious freedom and equality, rights of expression and association, and rights of nondiscrimination and equality under the law, and we (along with Professor Friedmann) understand that these parliamentarians make these evasions deliberately, for reasons of political cover?⁵⁶ Then do political liberals stand face-to-face with a morally intolerable gap between regulatory and justificational constitutional interpretation?

If so, what then would follow for responsible conduct by a judge who is himself imbued with the political-liberal idea of the justificational burden of constitutional law? Would such a judge necessarily do wrong to construe the Basic Laws as far as possible to enact a set of liberal “fundamental values” perceived as factually entrenched in the history of Israeli society at large, continuously from before the time of enactment right up until now, even if not shouted out from the rooftops of the 12th Knesset?

Perhaps Aharon Barak could stand as the figure of the judge I have in view.⁵⁷ It is Barak who writes that “without protection for human rights, there can be no democracy and no justification for democracy.”⁵⁸ It is Barak who then adds that the secure protection of human rights against passing majority opinion requires a substantive basic-law constitution (or, in free Rawlsian translation, a justification-worthy substantive constitution is indispensable for the justification of democratic rule to members of the free and equal population to whom its force extends).⁵⁹ It is Barak who by example shows us how the judge deeply moved by such thoughts might find certain dimensions of equality, say, or of freedom of expression, or even of social security, covered by Basic Law clauses on “dignity” and “liberty” that do not expressly name

56 See *supra* note 35 and accompanying text.

57 See *United Mizrahi Bank*, CA 6821/93, at 271-72 (Barak, P.); Barak, *supra* note 17, at 49-50.

58 Barak, *supra* note 17, at 20-21.

59 “Indeed it may be said of constituent authority that if it had not been established as a constitutional fact [as it has been in our history] it would have had to be invented, as a constitutional construct, since it provides the best explanation for the legal history of Israel. . . . Without it, [h]uman rights in Israel would not be elevated to constitutional supra-legislative status. The expectations of generations for a constitution and supra-legislative human rights would be frustrated. All hope for a constitution would be lost.” *United Mizrahi Bank*, CA 6821/93, at 238-39 (Barak, P.).

those dimensions.⁶⁰ It is, again, Barak who shows how such a judge also might find those dimensions already inscribed in general Israeli administrative law as a part of the “general purpose” of every state agency and hence judicially applicable through the doctrine of *ultra vires*, or through the general legal demand for “reasonableness” required of any and all administrative actions impinging on freedoms of persons.⁶¹ (Maybe these judges would speak of “purposive” instead of “philosophical” interpretation, but the spirit is very close to the same. And so, too, with Barak’s declaration in *United Mizrahi Bank* that “the Court attempts to give the best possible interpretation of the totality of national experience.”⁶²)

60 See, e.g., H CJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance*, 60(3) PD 464 (2005) (Barak, P.) (deriving from the guarantee of a right to the protection of human dignity, in Basic Law: Human Dignity and Liberty § 4 (Isr.), a constitutional obligation of the state to ensure to each person the minimum material conditions of a life lived in dignity), <http://versa.cardozo.yu.edu/opinions/commitment-peace-and-social-justice-society-v-minister-finance>. The Court in this case affirmed the existence of such a protective duty of the state. At the same time, however, the Court rejected the petitioner’s claim of a violation of the duty by a statutory reduction in allowances to the poor, owing to a lack of proof that the reductions had the effect of driving the petitioner beneath the constitutionally mandated floor of dignity, thus leading to Professor Friedmann’s objection that the correct conclusion, then, would have been to treat the matter as non-justiciable in the absence of a legislatively specified standard of adequacy. See FRIEDMANN, *supra* note 1, at 156-57. The Supreme Court did later on apply remedially the right to a basic minimum existence first affirmed in the *Commitment* case, when it nullified an Act of the Knesset excluding persons who own cars from receipt of income support. See H CJ 10662/04 *Hassan v. Nat. Ins. Institute*, 65(1) PD 782 (2012), <http://versa.cardozo.yu.edu/opinions/hassan-v-national-insurance-institute>.

61 See H CJ 6698/95 *Ka’adan v. Israel Land Authority*, 54(1) PD 258 (2000), paras. 18-23, <http://versa.cardozo.yu.edu/opinions/ka%E2%80%99adan-v-israel-land-administration>. The Court found illegal the Land Authority’s allowance of exclusion of an Arab couple from a residential community established by the Jewish Agency on land provided by the Authority. Professor Friedman joins in criticism of the decision, not, however, on the point of treating equality as a fundamental value of the state of Israel and so a part of the presumed general purpose of every state administrative authority, but rather on the point of the Court’s refusal to allow that establishment of an exclusively Jewish settlement could be a justifiable policy, consonant with a larger principle of equality, considering all the relevant circumstances. See FRIEDMANN, *supra* note 1, at 138-39.

62 See *United Mizrahi Bank*, CA 6821/93, at 271-72 (Barak, P.).

IV. CONCLUSION: CONNECTION TO THE PURSE AND THE SWORD

As we turn our minds now back to *The Purse and the Sword*, I expect you may already for some time have seen where I have been heading. In Professor Friedmann's book, the figure of Aharon Barak looms large. Friedmann brings under sharply critical inspection what he names as a legal revolution in which Barak's constitutional revolution figures as one component, along with others — including “purposive” interpretation of constitutional and other laws (as opposed to a focus on “the actual wording” of the law), an intensified form of common-law review of administrative actions for unreasonableness, and expansionary revisions to standing and justiciability — in which Barak has also played a leading role. My speculations here have gone to the matter of possible inspirations for these aspects of the judicial revolution, as they connect also to the judicial working of the two Basic Law enactments of 1992 into a justiciable, substantive, formal constitution for Israel. I have been suggesting that these aspects of the revolution may be understandable, in part, as a sign and a reflection of an unremitting pull of the political-liberal idea of the justificational burden of substantive constitutional law, in a political-cultural setting of a persisting widespread attachment to an idea of Israel as a member of the family of liberal constitutional states.

I cannot say how widely prevailing such an attachment may be among Israeli citizens today. I do know that such an attachment can perfectly well coexist with a guarded or critical view of aspects of the legal revolution. It plainly does so for some authors,⁶³ and I see nothing in *The Purse and Sword* to exclude Daniel Friedmann from its orbit.

Critics of the legal revolution in Israel might (1) reject entirely the liberal notion of the burden of justification for the force of law to the reasonable reason of every free and equal citizen of a country.

Or they might (2) accept that notion as a regulative idea, but doubt its application in every historical situation or circumstance.

Or they might (3) accept the idea of that burden in all circumstances, but still doubt whether the weight of that burden is wisely or aptly to be rested on the establishment of a special body of formal, substantive, enforceable constitutional laws — as opposed, say, to an understanding that it can only

63 See MAUTNER, *supra* note 5, at 201-03 (commending Rawlsian political liberalism as “the political theory and regime most appropriate for multicultural states such as Israel,” because it embodies “highly important humanistic values” while still allowing people “to live by their own choices and cultures”).

rest in the end in the general spirit and ethos of the day-to-day conduct in that country of politics and the rest of social life.⁶⁴

Or they might (4) accept that a formal constitutional-legal regime could and should be fashioned to bear such a justificational weight or a substantial share of it, but still doubt how far it is wise, practicable, and fitting for a state's judicial branch to take up that project upon its own shoulders or get too far out ahead of the parliamentary and executive branches of the state.

Doubts of the kinds in (3) and (4) may be greater or lesser in the mind of any given observer, depending on how one reads the relevant conditions in the countries that concern one. Bearing that point in mind, we can say that, regarding doubt (4), on the right role for Israeli courts in the constitution-making business in Israel today, the gulf of disagreement is wide and clear between Friedmann and Barak. As to the other three zones of possible divergence of views in my list of four, the extent of disagreement between these two is less clear to me. We could read Professor Friedmann's book as, in part, his chronicle of the perils of overinvestment by public actors in liberal justificational hopes for Israel and in general, and the disagreement then might extend back to zones (1) and (2). Of such a reading, though, I find myself at present unconvinced. Perhaps that is because I remain still with the hoppers.

64 See Frank I. Michelman, Address at New York University, Rawls's Constitution-Centered Propositions on Legitimacy: A Friendly Interrogation (Sep. 8, 2017) http://www.law.nyu.edu/sites/default/files/upload_documents/Michelman%20paper.pdf (setting forth such a doubt).

