Self-Determined People: Liberal Zionism and the Renewal of Israeli Democracy

by

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Dedication and Acknowledgement

This thesis is dedicated to my Grandfather, Robert Schulman, who taught me two things without which this project would be impossible. The first is the importance and art of storytelling. The second is the imperative to honor the dignity of every human being.

I want to express my gratitude to the many people who have helped me navigate this long and winding road: my advisor Professor John Finn, for the constructive comments and criticisms, and for putting up with my at times creative comma usage. I also wanted to thank the other faculty members, in particular Professor Rutland and Professor Schwartz, who provided guidance and assistance.

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This thesis is the latest result of a journey that I began when I traveled to Israel for the first time at the age of seventeen. Since them I have spent six months there, including a semester in Haifa, learning about the country and its history. My travels have also taken me to the West Bank, as well as to Jordan. I cannot list here the dozens of people I met who have influenced the ideas at the heart of this project. I only wish to say thank you to everyone who shared with me a portion of their vision for the future of Israel and the people who live there.
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**Introduction**

**The Lost Brother**

One of the most significant Israeli Supreme Court cases concerned a man who was simultaneously a Jew, a Holocaust survivor and a Catholic monk. Oswald Rufeisen was born in 1922 to a Jewish family that resided in Poland. Fully enmeshed in the changes rippling through the Jewish community and the Jewish experience, he participated in Zionist youth movements during his childhood. To allow him to escape the Holocaust, his family hid him in a convent and during his time there he became acquainted with Catholicism. He survived the war, and decided to convert to Catholicism in 1946, adopting the name Brother Daniel.¹

Here his story might have ended, but Rufeisen’s conversion did not sever his connection with his Jewishness, nor did it diminish his affection for the newly created state of Israel. Rufeisen decided to immigrate to Israel in 1958 to escape a rising tide of anti-Semitism in his native Poland. He attempted to claim citizenship under Israel’s Law of Return, which provides automatic citizenship to all Jews who wish to settle there. The Israeli government denied his petition, arguing that his understanding of himself notwithstanding, his conversion to Catholicism had placed him outside the statutory boundaries of Israel’s conception of the Jewish community. Unbowed, Rufeisen sued to obtain the state’s formal recognition of an identity that he believed was an integral part of his personhood.

In its 1962 decision, the Israeli Supreme Court stated that the vagueness in the statutory definition of Jewishness must be resolved by appealing to a conception of

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Jewishness expressed in the “common parlance” of the Jewish community. In this instance, the Court held that this question of identity was not one for individual determination but rather one for group consensus. What Rufeisen called himself was deemed to be legally meaningless, and implicit in the Court’s ruling was that any efforts he might make to assimilate into the Israeli Jewish experience would be inhibited by the negative communal perception of his chosen identity. The Court, as an organ of the state, was to be the arbiter of Jewishness for the purposes of law. However, as the Court poured substance into laws through interpretation it also exerted an influence on the cultural and political landscape those laws were intended to govern. Rufeisen was quite literally excluded from the Jewish community, his identity deemed too far afield from conventional ideas of Jewishness to be recognized as legally part of the Jewish people in Israel. Not only was an identity he held dear denied to him, but his ability to gain an identity, that of an Israeli, was severely compromised by his exclusion from a community fundamental to that identity. Rufeisen eventually gained Israeli citizenship through naturalization, but was never recognized by the State of Israel as a Jew.

Rufeisen’s story received a large amount of media coverage and he was the subject of many interviews, profiles and at least one biography. His experience has been preserved in Israel’s historical memory because of its oddity; a Holocaust survivor turned Catholic Monk who wanted to move to Israel as a Jew. An interesting,

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3 See Tec, In the Lion’s Den.
anomalous case to be sure, but not indicative of anything systemically wrong with how Israeli society conceives of identity and community. I disagree. Rufeisen’s story is uniquely emblematic of the tensions and contradictions between Israel’s universal and particularistic natures, features that bedeviled the country since its founding. I think Rufeisen’s case represents Israel and Zionism at its most inflexible and illiberal, but it also contains the intellectual foundations of a new balance that could strengthen and complete Israeli democracy and revitalize the country’s Jewish identity.

Israeli citizenship is different than citizenship in purely liberal Western democracies like France or the United States because it derives its substance from a different source. In Western liberal democracies, the only legal label connoting communal membership a state is empowered to bestow on, or withhold from, an individual is citizenship, a marker that one is a full member of a political community, with all of the rights and duties implied therein. The 14th Amendment to the United States Constitution, which states “All persons born or naturalized in the United States are citizens of the United States” was passed to ensure that citizenship would be available equally to all who are born within a given geographical area, and that those individual citizens would be treated equally before the law. The United States is empowered to grant citizenship, and nothing more. In contrast, an “American” identity does not exist as a legal classification; instead it is made up of a wide-ranging bundle of linguistic and cultural traits that individuals learn, acquire and exhibit for themselves in private society. The liberal state takes no formal, legal interest in the

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identity of its citizens because the state strives for neutrality, which is to say a legally mandated lack of interest in the individual’s race, religion and ethnicity, preferring to leave these matters to personal and private self-definition.

Thus, if I tell you I am “American” that statement tells you little as a formal or legal proposition except that I was born in the United States or naturalized there. It is important to note that this distinction is by no means perfect, as few would describe the United States as a purely liberal state given its checkered history of segregation and restrictive immigration laws. The key distinction is not practice—which always results in a conflicted reality—but aspiration. Since the passage of the 14th Amendment and attendant supporting legislation the aspiration of American jurisprudence has been a citizenship based merely on the geographic location of birth, even if that goal has often eluded us. Israel, on the other hand, strives for a fundamentally different objective.

Israel confers two legal labels upon its citizenry, citizenship and nationality (Ezrahut and Le ’om in Hebrew). Crucially, one is intimately related to the other. Citizenship entitles all citizens to the same basic basket of equal rights and privileges. However, the state is also the final arbiter of national identity. Every Israeli citizen is legally classified by the state as a Jew, Arab, Druze or member of an alternative national group. These identities carry significant weight in determining an individual’s place in Israeli society. The category into which individuals are placed determines which religious courts will have jurisdiction over their marriages and divorces. It will determine whether they will be automatically drafted into the armed forces, or able to obtain a plethora of material benefits. Perhaps most crucially, what
nationality individuals are classified as determines to a great degree their ability to obtain citizenship for themselves or their family, and hence to become a full and equal member of the Israeli political community.

The intersection between citizenship and nationality is codified in Israel’s Law of Return a keystone piece of legislation passed in 1950, only two years after Israel declared its independence. The Law of Return states, “Every Jew has the right to immigrate to the country.” Therefore, if an individual is identified as part of the legally defined Jewish people he or she is dramatically more capable of obtaining the rights and privileges of Israeli citizenship than are his or her non-Jewish peers. Thus, while the citizenship laws and guarantees of countries like the United States strive to advance legal neutrality and individual rights, Israel’s citizenship laws attempt to advance the rights of Jews as a nation or ethnic group. To most effectively advance these rights, Israel felt the need to legally define the border between the Jewish Nation and other people. Toward this end, Israel has come to believe that it must enquire into the identity of every individual living in the country, as well as of those who seek to enter through its borders. This practice is seen as a necessary prerequisite for Israel’s policy of labeling individuals according to centrally determined communal definitions. Israel’s present immigration policy systematically favors those who hold Jewish identity, as defined by the State of Israel, to such a great degree that it very nearly transforms Jewish identity into a perquisite for the acquisition of Israeli citizenship and identity. In so doing, it symbolically places Israel’s non-Jewish citizens outside the national community and denies them a true sense of belonging in

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5 “Israeli Declaration of Independence,” in *Israel In the Middle East*, ed. Itamar Rabinovich and Jehuda Reinharz (Waltham: Brandeis University Press, 2008), 102.
the country of their birth.

The question that many ask is this: Can a state that clearly codifies its preference for one group of individuals over another in the most elemental and constitutive of legal arenas—concerning membership and identity—possibly look upon them with an equal gaze elsewhere? If the first question a state asks a potential citizen is “what are you” rather than “who are you,” then is equality under the law ever really a possibility?

I think this question and the argument that is implicit in it are beside the point. Ultimately, I do not think that it is the tension between individual rights and national rights that has stifled Israel’s democracy, but rather the nature of national identity itself. Acquisition of Israeli citizenship through the Law of Return isn’t a marker of Jewish identity, but rather the ratification of one’s entrance into the Jewish community as defined by the State of Israel. I want to argue that the forces that have impeded Israel’s democratic development are those that have imposed a rigid, unchanging definition of Jewishness from above rather than letting individuals define it for themselves from below. Chiefly as a result of a long line of ideological conflicts, court cases and legislative battles, the Israeli State recognizes but one form of Jewish identity and imposes it on everyone. That definition runs through Supreme Court jurisprudence and is codified in numerous statutes, the most important being Israel’s Law of Return. It is restrictive and ossified, but it is the law. It leaves no room for an

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individual to define himself or herself as a Jew (or not) for the purposes of law or the purposes of personal identity—the state makes the decision and imposes it on the citizenry.

I think Brother Daniel’s quest for citizenship and legal recognition of his identity would not have been blocked if self-definition were the preamble to legal identity. If individuals are excluded from defining Jewish identity for themselves, how can individuals aspire to acceptance into the Israeli community when the two identities are so inextricably linked? In Israel no amount of education, commitment or assimilation can overcome the stamp on a state issued-identity card. Liberalism is founded upon the rejection of the idea that heritage is destiny. Identities are individual choices, not dictates from the past. Individuals should never be seen as the unalterable products of their pasts, but rather as beings capable of shaping their own unique futures. Can liberal political structures endure when the communities they serve are constructed in such a profoundly illiberal manner? What I want to argue is that the only way for Israel to resolve the tension between its democratic and Jewish identities is through an amended understanding of the constitution and perpetuation of national communities. Benedict Anderson famously defined the nation as “an imagined political community—and imagined as both inherently limited and inherently sovereign.”

The “limited” component of national identity comes from the fact that “even the largest of them, encompassing perhaps a billion human beings, has finite, if elastic, boundaries, beyond which lie other nations. No nation imagines itself coterminous with mankind.” In Israel today it is the institutions of the state,

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representing the will of the general community, that imagine and impose these boundaries from above. I shall show that this practice is both demeaning to personal dignity and deleterious to democracy. A full synthesis between Israel’s Jewish and democratic attributes can only be achieved through the practice of self-definition. Individuals, not the state, must be accorded the power to choose who and what they are. They must be granted the power to identify with the community of their choice, and be assured that regardless of their selection they will be treated equally as a matter of public law.

The disharmony between Israel’s Jewish and democratic identities, and the question of the proper balance between the two, has been a consistent area of tension in Israeli politics and culture. Reforms that attempt to create a more harmonious balance between the two in the public sphere are frequently proposed and debated. However, an examination of the character and contours of Jewish identity in the Israeli State, and its implications for democracy, is largely absent from that scholarship. The last several decades have seen the rise of a systematic critique of Israel’s founding historical narratives and the argument that Israel must strengthen its democratic character (and, implicitly, dilute its Jewish identity) so that it can truly

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become a state of all of its citizens. These works have provoked a fierce defense of Israel’s traditional self-conception. Yoram Hazony’s work *The Jewish State: The Struggle for Israel’s Soul*, published in 2000, is an excellent distillation of the intellectual counter to the contemporary critique of the viability of Israel’s dual nature. Hazony offers a vigorous defense of traditional Zionist ideas and identifies the intellectual currents he believes are conspiring to delegitimize the idea of a Jewish state as inherently illiberal and undemocratic. Surprisingly, considering that his book is a passionate defense of the Jewish state Hazony neglects to define what he means by “Jewish state” or even what “Jewish” identity even is. He vigorously defends the Law of Return, implying that his conception of a Jewish state requires a Jewish majority. However, he never seriously engages with a question that appears central to the intellectual currents he traffics in.

A hesitancy to engage with the nature and boundaries of Jewish identity has not been restricted merely to the right of the political spectrum. Bernard Avishai’s book *The Tragedy of Zionism* and his more recent work *The Hebrew Republic* lay out a searing indictment of the ways in which Zionism and Zionist institutions have prevented the full realization of Israeli democracy. *The Hebrew Republic*’s musings on language, culture and identity drift closer to this important question, but Avishai’s fascination with language as a storehouse of cultural identity and his focus on the continued survival of allegedly archaic Zionist institutions allows him to sidestep deeper questions about identity and community. His central claim, that the continued

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survival of Zionist institutions formed the basis for material discrimination and exclusion of Israel’s Arab citizens, is a necessary but not sufficient conclusion for the repair of Israeli democracy. These institutions are not simply archaic holdovers from the past, but very real reflections of Israel’s historic political and cultural Jewish identity. The discrimination that those institutions sanction is the result of an exclusive conception of national identity, and widening the gates of inclusion into that identity will ferment far deeper cultural and democratic change in Israel than simply abolishing the Jewish Agency or reforming the Jewish National Fund.

The tendency to identify policies and laws, rather than the cultural and intellectual forces that these legal instruments were created to express and preserve, as the impediment to a more harmonious formulation of Israel’s dual identity is a common theme in scholarship concerning Israel’s democratic future. In The Unmaking of Israel, Gershom Gorenberg spends dozens of pages on settlements, democratic norms and state institutions but does not see these institutions as the expression of a particularly illiberal national identity. Laws and policies are manifestations of identity, an attempt to construct societies that more closely resemble the imagined communities individuals wish to be a part of. Reform cannot happen until the communities in question begin to understand themselves and their relationships with others differently. Peter Beinart’s The Crisis of Zionism, which was published amidst controversy, details the corrosive effect of Israel’s occupation of the West Bank on Israel’s democratic institutions and identity. Beinart attributes nearly all of Israel’s democratic shortcomings to its policy of occupation and settlement building, without seriously interrogating whether there are other sources of the
systemic racism that exists in Israeli society. He does not sufficiently interrogate how a country that calls itself democratic, and holds full and free elections could arrive at a point where 56% of Jewish high school students in Israel don’t believe that their fellow Arab citizens should be able to serve in the Knesset.\textsuperscript{10} Clearly, there are deeper questions of identity, community and belonging that hover beneath the surface, concerns that cannot be fully explained by a military occupation, no matter how brutal, or the intertwining of religion and state. These are questions that go to the core of how Israelis constitute their own identity and decide how one gains admission to the national community, and they frequently go unaddressed by Israel’s defenders and critics. It is important to recognize that the success of the American Civil Rights Movement is not best encapsulated in the landmark Supreme Court decision \textit{Brown v. Board of Education}, but rather in the belief today that “separate but equal” was an unnatural and cruel division of American from American, whereas in the late 19\textsuperscript{th} century such laws were seen as an organic expression of a natural difference. Similarly, efforts to achieve full equality in Israeli society cannot be considered complete, even with the handing down of landmark rulings such as \textit{Kaadan v. Israeli Lands Administration}. Society at large must be imbued with the understanding that individuals are not the sole product of their heritage.

I propose to refocus the discussion around differing conceptions of Jewish national identity, and their ramifications for Israel’s democratic future. I wish to situate my analysis within the analytical framework advanced by Yael Tamir in her book \textit{Liberal Nationalism}. Tamir, an Israeli intellectual and Labor Party politician,

\footnote{Peter Beinart, \textit{The Crisis of Zionism} (New York: Times Books, 2012), 23.}
attempted to construct a general theory of nationalism that would be compatible with democratic political structures and liberal notions of community. She argues that nationalism can be compatible with liberalism if it allows “individuals to lead a life which, on reflection, they have come to value, rather than a life imposed on them by history and fate. It makes no sense to ensure individuals the ability to adopt a culture they despise, or to belong to a community they do not wish to be members of.”¹¹ She places a primacy on individual choice and personal autonomy, arguing that national communities that value assimilation and accept the right of individuals to determine their own communal membership can exist harmoniously with liberal notions of democracy and equality. I will argue that Israel’s twin commitments to particularism and universalism can be simultaneously fulfilled if the individual right to determine their communal membership is similarly honored both legally and normatively.

The present conception of Jewish identity, the one currently accorded legal supremacy in Israel, is not a timeless construct but rather a very recent construction. It is an identity that was formulated in part through conversations within and between the various Zionist movements as they began to imagine and try to define the idea of a Jewish nation. I will put some of these influential Zionist texts in conversation with each other and the ideological milieu from which they arose. I will argue that the Zionist movement was animated by several conceptions of Jewish identity, some more individualistic and amenable to self-identification than others, and that these are the most impactful fault lines between the various strands of contemporary Zionism. I will attempt to show in my first chapter that as time progressed an idea of Jewishness

as immutable heritage arose as a tentative consensus, and I will elucidate some of the reasons why this agreement came about.

In my second, third and fourth chapters I will move into the history of the State of Israel proper, and show how this version of Jewish identity came to be recognized as the only legitimate form of Jewishness, and how that identity was then imposed on all Israelis. My prime method of inquiry will be the analysis of impactful court decisions and other legal instruments, as well as an investigation into their impact upon Israel’s democracy and its conceptions of constitutive identity. Court cases, particularly those handed down by Israel’s Supreme Court, represent a unique intersection between legality and identity in that these decisions ripple out through Israel’s legal and government structure, delineating the contours and shape of Israeli and Jewish identity. My analysis of the ways in which constitutional jurisprudence shapes political identity will be situated in the broader framework constructed by Gary Jacobsohn in his recent work *Constitutional Identity*. He advances the notion that a “constitution acquires an identity through experience…identity emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nations past, as well as the determination of those who seek in some ways to transcend that past.”¹² This analytical lens, I believe, is well suited to analyzing the political aspirations of a national community that simultaneously sought to honor a lengthy history while radically transcending portions of it deemed antiquated.

Courts are by nature instruments of definition, since they are called upon to

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interpret and apply laws to real-world situations, and in doing so define the practical scope, reach and definition of the law. When identity is codified in state law, it is ultimately the courts that are called upon to pour meaning into the inevitable generalities. I plan to analyze the decisions themselves, their justifications, as well as subsequent commentary and interpretation. I will demonstrate how the codification and imposition of a rigidly historical identity marginalized the hopes of certain Zionist factions for a radical reimagining of Jewish identity and, in so doing, weakened Israel’s democratic identity.

Lastly, in my conclusion, I will argue that Israel’s democratic identity can be salvaged and strengthened if the state relinquishes its monopoly on Jewishness and allows individuals to define it for themselves. More broadly, I will argue that nationalism can only be truly democratic if the identities it claims to protect and preserve are determined and shaped by individuals, rather than by the coercive power of the state. To do otherwise invites an endless parade of violations of individual rights and human dignity. I will elucidate several reforms that might aid in this process, and explain how they might strengthen democracy.

I want to clarify two things before I proceed further. Firstly, this piece is not an argument about what Judaism, or Jewish identity, should be. One of my central claims, rather, is that individuals must be free to define it for themselves. This piece is an argument about what Jewishness needs to be in order for Israel’s claim to be both Jewish and democratic to carry any real meaning for its citizens. Judaism that remains private, which is to say untethered to coercive state power, can and should define itself however the individuals who adhere to it wish. Secondly, there are many who
argue that a state that abdicates the right to define the boundaries of the national community is no longer a national state, but rather a liberal-democracy with the barest tint of national character. Some would argue that this prescription weakens the ability of Israel, and other nation-states, to define and control their national identities. I disagree. States have at their disposal a variety of mechanisms, short of exclusionary laws, to influence individual determinations about identity. The language and historical narratives taught in schools are among the most powerful of these mechanisms, but they are not the only ones. Additionally, I think this sort of control is a poor barometer of whether Israel could, under this framework, continue to call itself “Jewish.” The ultimate metric of Israel’s Jewish character is not the stringency of the identity codified into its laws but rather the lived experiences of its citizens—whether Israeli society and culture continues to have a meaningfully Jewish element. The symbols on its flag, lyrics to its anthem, language of conversation, cultural self-conception and chosen national holidays are far more indicative of the vibrancy of its national character than crude calculations of birthrates and demographic percentages. What is ultimately so pernicious about those who argue that Israel’s Jewish character is the function of demography is that such a formulation commits a dual injustice. It reduces Judaism to a bloodline, ignoring the vibrant and ever-changing cultural tradition in which so many have found so much joy; and it presupposes the failure of liberal democracy where individuals are empowered to determine the shape of their own lives, and decide what cultural idioms speak to them. The key to Israel’s survival as a Jewish-democratic state is for individuals to be able to make choices about their identities without requiring the approval or recognition of the state in which they live.
Chapter One
Like all the Other Nations?

“I have, it is true, said that until that era a Jewish state will not end our troubles or completely solve the “Jewish Problem.” But to deduce from this that there is no need for a national center in Palestine—that is possible only for the new Zionists, whose Zionism is born of anti-Semitism, and not for the old Hovevè Zion, who look to Palestine for other things besides physical ease and the solution of the “Jewish Problem” in its economic and political aspects.”

--Ahad Ha’am

Brother Daniel’s legal banishment from the ranks of the Jewish people is the result of an old argument amongst Zionism’s parents, an argument that began with the failure of emancipation and the attendant promise that Jews, upon fulfilling certain conditions, could enjoy social acceptance and full political rights in their countries of residence. It was a debate about the nature of Jewish identity, its character and boundaries, and how it ought to be constituted for political purposes. Monumental changes rippling through the Jewish community during the latter half of the 19th century and the searing disappointment at the failure of a political and social project in which so many had invested so much provided the backdrop to this dispute. These shifts in communal and individual identity led to a plethora of conceptions of how membership in the Jewish national project or political community ought to be determined, and the various schools of Zionist thought staked out contrasting positions on this issue. It is difficult to imagine a more fundamental issue in the debates around Jewish national revival than the nature of the national identity in question and who could claim membership in this community. It was this divide,

rather than divisions over economic organization or political association, that represented the most impactful division in Zionist thought.

The consequences of our tendency to paper over these debates are stark. Liberal commentators and academics widely applaud Herzl’s dream of a cosmopolitan Jewish city-state while reviling Jabotinsky’s vision of a Judaized Sparta; yet few pause to consider the possibility that the ideologies were built on a similar understanding of Jewish identity.¹⁴ Even more rarely contemplated is that the differences between Herzl and Jabotinsky, so often held up as embodying very different points on the Zionist spectrum, are for all intents and purposes unimportant. Ahad Ha’am is applauded for his fealty to the Hebrew language, but rarely is it mentioned that he advanced a fundamentally different vision of the character of the Jewish nation, and how membership in its future cultural and political community might be determined. Rabbi Abraham Isaac Kook is presented as an intellectual oddity, a bizarre fusion of nationalism and messianic religiosity. Seldom are the similarities between how he and many secular Zionists conceived of the Jewish nation explored, or the implications of those commonalities reckoned with.

In many ways this intellectual blind spot is the result of how scholarship has interpreted the writings of Zionist thinkers and shaped our understanding of the factions that existed within the movement. Scholars have largely ignored Zionism’s views on Jewish identity, preferring to study it and categorize it according to its vision for how the institutions of government and economy would be organized. This understanding has defined the terms of the debate, and shaped the taxonomy of its

study. Arthur Hertzberg’s eloquent, and totemic, exegesis on Zionist thought differentiates between various streams of Zionist ideology by looking to their vision of the future Jewish-State. Political Zionists who advocated for a secular, Europeanized state are separated from Religious Zionists who promoted a state based on Jewish law and messianic hopes. Labor Zionism is separated from Jabotinsky’s more bourgeois centered revisionist Zionism. Shlomo Avineri, writer of many influential books on Zionist thought, adopts the same tactic in his study of Zionist ideology, preferring to separate the various strands of Zionist thinking by their political orientation and plans for economic organization, rather than their view on the character and contours of the Jewish nation. Political Zionism with its vision of a secularized, Western state is separated from Religious Zionism with its view of a theocratic, messianic state. The Labor Zionism of A.D. Gordon and Berl Katzenelson, with its deeply communal, socialistic view of state and society, is separated from Revisionist Zionism that envisioned a state organized and run according to conventional bourgeois notions of property rights. The result is a body of scholarship that holds up Herzl as a paradigm of liberal virtue due to the utopic vision he outlines in Altneuland, while reviling Jabotinsky as a nationalist with fascist tendencies, because of his belief that any state must be militarily powerful and closely organized. These scholars never substantially inquire into the possibility that both ideologies rested upon a common foundation of what membership in the Jewish nation entailed.

15 Hertzberg, The Zionist Idea, 10-12.
In this chapter I advance a different understanding of Zionism, one that is more complete and less divorced from the historical context that gave rise to the movement. The omission of a discussion about Jewish identity from the study of Zionism and the debate about Israel’s future is all the more puzzling when we consider what Zionism really is: the institutionalization of Jewish identity. Zionism sought the application of a heretofore private, individual identity to a set of public institutions: the future Jewish state. Jewish identity is the very core of Zionism; it is the base upon which the political structures of the state would be built. I want to advance an understanding of Zionism as a mechanism for the reimagination and reconstitution of Jewish identity in response to a changing world. During the course of the decades of debate that constituted the Zionist movement, many intellectually and political viable conceptions of Jewish identity were proposed. Ultimately, Israel settled on one less compatible with the fundamental presuppositions of liberal-democracy, disregarding an alternative far more compatible with the liberal hopes of some of Israel’s founders.

It is odd that we so frequently overlook the importance of Jewish identity in Zionist thought, if for no other reason than the fact that prominent Zionist thinkers spend pages agonizing over it. Their works were not dry political discourses, but rather volumes that sought a deeper understanding of the individual’s place in their community and their community’s place in the world. Mosses Hess begins Rome and Jerusalem with the proclamation “Here I stand again in the midst of my people, after being estranged from it for twenty years, and actively participate…in its memories
and hopes.”

Hess’s wide-ranging and turbulent journey, from a traditional Jewish upbringing to radical socialism and finally to Jewish nationalism, is emblematic of a Jewish community very much in flux. Another question, the plural of the first (Who am I?), is also present: Who are we? While Theodore Herzl’s personal struggles with Judaism do not appear in his famous pamphlet, he does struggle with the nature of Jewish identity writ large. The question of what defines Jewish identity animates the text, and he pauses to consider the possibility that the “Jewish question” is religious, social or simply a matter for individuals to consider on their own before declaring unequivocally “we are a people, one people.”

That Herzl felt the need to consider this question at all, that he did not dismiss it as self-evident, demonstrates that the constitution of Jewish identity was central to the Zionist project. Ha’am believed that the primary purpose of the Jewish national project was the reconstitution of Jewish identity. In a letter to one of his critics, he wrote, “in order to advance the character of our people…we must establish in Palestine a center for Judaism, and that it is this center that will exert a spiritual influence on the people.” Zionism, according to Ha’am, was a transformational project whose main purpose was to catalyze a new sense of Jewish identity and community, to give spiritual succor to a population facing a hostile and oppressive modernity.

The level of introspection and reevaluation displayed by these authors and thinkers should not be surprising, as Zionism arose at a time when Jewish identity and the Jewish experience were very much in flux. The reasons why become apparent if

20 Leon Simon, Editor: *Ahad Ha’am: Essays, Letters and Memoirs*, 274.
we widen the historical lens. The French Revolution, with its promises of Liberty Equality and Fraternity, upended established notions of identity, both individual and communal. Along with the rest of the subjects of the ancient regime the National Assembly accorded Jews full citizenship in 1791. Napoleon subsequently strengthened and broadened these reforms, abolishing laws restricting Jews to the Ghetto and enforcing these reforms throughout the French Empire. These reforms were not propagated merely out of fealty to an abstract idea of equal rights, but as a tool to strengthen French national unity by lowering barriers to assimilation. Napoleon stated, in reference to his reforms, “It takes weakness to chase them [the Jews] out of the country, but it takes strength to assimilate them.”

These reforms were not extinguished with the demise of Napoleon’s empire in 1815. The Russian Empire, which previously had leveled harsh criticism at Napoleon for his policies regarding the Jewish community, abolished the Kahal (the officially recognized corporate community organization) in 1844 in a possible bid to erode the basis for a separate Jewish political and cultural identity. It did not take long for Jews to leave the Ghetto, nor did it take much time for Russian culture to penetrate these newly permeable communities. Jewish enrollment in Russian secondary schools and universities increased dramatically, reaching 8.5% of the total student body by

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23 Simon Schwarzfuchs, Napoleon, the Jews and the Sanhedrin (Oxford: Oxford University Press, 1984), 50. Additionally, Clermont-Tonnerre made the famous statement before the French Nationalist assembly “To the Jews as individuals—everything; to the Jews as a nation—nothing.” In Shimoni, The Zionist Ideology, 15.
24 Shimoni, The Zionist Ideology, 22.
A literacy study done in 1899 showed that roughly 34% of the Jews in a small Russian town in the province of Kiev claimed Russian as their most fluent language, a startling shift away from culturally “Jewish” languages such as Yiddish or Hebrew. Across Europe, old laws and linguistic barriers separating Jew from Gentile were gradually abolished as part of a larger project that came to be known as emancipation. Emancipation was premised on a grand bargain, and carried with it one critical assumption. The deal was simple: Jews agreed to assimilate and forsake loyalty to any Jewish political organization in return for individual rights and full citizenship in their respective countries. Jews agreed, in effect, to be Jewish Germans rather than German Jews. The assumption underlying emancipation, that assimilation was possible, was even more elementary, and just as powerful. Emancipation was premised on the notion that Jewish identity was a choice, and that individuals could embrace it, forsake it or change it, as they desired.

In short, assimilation, secularization and nationalism fashioned a new generation of individuals with fundamentally different Jewish experiences and new ideas about Jewish identity. These trends produced individuals distanced from religious practice and observance but still cognizant of their identity as Jews. The attachment of Herzl, Ha’am and Hess to Judaism is unquestioned, but it is also important to note that Hess spent a good portion of his life as a radical socialist, Herzl at one point argued that Jewish assimilation was inevitable and desirable, and Ha’am

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rejected his Orthodox upbringing in favor of Jewish humanism.\textsuperscript{27} New generations were being raised in Jewish communities in countries that now claimed to be national communities, and new ideas about nationhood were beginning to cause some to question old assumptions about the nature of Jewish identity. Even religion, considered the timeless glue that bound individuals to Judaism and Jews to other Jews was undergoing seismic changes. The German Reform movement, which arose in the early 19\textsuperscript{th} century, sought to modernize religious practice and downplay any political component associated with Judaism.\textsuperscript{28} Additionally, dizzying changes were confronting the physical, economic and residential assumptions of the Jewish experience. Jews were moving from shtetles and ghettos to cities, and from traditional trades to their modern, liberal progeny.\textsuperscript{29} Zionism arose at a time when, to paraphrase another Jewish provocateur, all that had been solid was melting into air, and all that had been holy was now profane.\textsuperscript{30}

These massive shifts in the social, political and cultural landscape were enough to produce new religious practices and new ideas about an individual’s place in the community. It was the undermining of the central assumption at the root of these changes that birthed Jewish nationalist thought. One of the first to articulate these ideas was Moses Hess, an individual who occupied an influential but unusual place in history. A man whose life fundamentally mirrored the turbulence of the times, he was born in 1812 into an Orthodox Jewish family that lived in the

\begin{footnotes}
\item[27] Hertzberg, \textit{The Zionist Idea}, 200-204.
\item[28] Shimoni, \textit{The Zionist Ideology}, 16.
\end{footnotes}
Rhineland. As a child he received a traditional Jewish education, though subsequently he was drawn into the intellectual upheaval that characterized pre-1848 Germany. He joined a group of left-Hegelian activists that counted amongst its members such auspicious names as Ludwig Feuerbach and Karl Marx.\footnote{Hertzberg, \emph{The Zionist Idea}, 116.} Hess worked closely with Marx, and helped him publish some of his more theoretical writings. Marx acknowledged his indebtedness to Hess, and on occasion referred to him as “my communist rabbi.”\footnote{Avineri, \emph{The Making of Modern Zionism}, 38.} The first two decades of his professional and intellectual life were spent embedded deeply in the revolutionary socialist movement.

Unlike his other Jewish compatriots, Hess continued to struggle with his Jewish identity and what it meant in the context of the politics he espoused. The result of his struggles was a relatively short work entitled \emph{Rome and Jerusalem}. Appearing in 1862, it is one of the first writings to propose the formation of a Jewish polity in Palestine.\footnote{Avineri, \emph{The Making of Modern Zionism}, 38.} Little noticed at the time of its publication, it remains noteworthy as a landmark work of proto-Zionist thinking and for its musings on the nature of Jewish identity. The book opens with a hint at the personal struggles that Hess underwent with regards to his own identity as a Jew. Crucially, he moves from the personal to the communal and begins to articulate not merely a personal struggle, but a broader political question relating to his entire community:

“While to the unprejudiced observer the question of Jewish nationalism seems quite timely, yet it appears un-reasonable to the “cultured” Jews in Germany. Here both the liberal and reactionary Jew-Hater points to the difference between the Jewish and Germanic races as an excuse for his Jew-Hatred. In Germany, the Jews have striven, since Mendelssohn, for political and social equality with their German brothers. But despite their participation in German cultural life, despite the denial of

\begin{flushright}
31 Hertzberg, \emph{The Zionist Idea}, 116.
32 Avineri, \emph{The Making of Modern Zionism}, 38.
33 Avineri, \emph{The Making of Modern Zionism}, 38.
\end{flushright}
their national culture, despite all efforts to become Germanized, it has all been in vain!”

Hess bemoans the impossibility of Jewish assimilation and claims that emancipation, which just a few decades ago promised to bring Jews unheralded acceptance and prosperity, had failed to provide a comprehensive solution to the ills afflicting the Jewish community. The context for Hess’s pessimism was a weakening of the fundamental premise upon which emancipation was built. The central claim of emancipation was that Jewish identity was protean, that an individual could embrace or forsake it at will, and that one’s Jewishness did not detract from one’s ability to be a loyal and accepted member of a national community. By and large, Hess and his contemporaries felt that they had held up their end of the bargain. Jews were some of the most enthusiastic participants in modernity, moving into liberal professions with ease and making up disproportionate percentages of the student body in national universities. In the early 19th century, Jewish families owned thirty of the fifty-two banks in Berlin. In Fin de siècle Vienna, Herzl’s adopted city, 40% of the directors of public banks were Jewish and Jews were overrepresented in the gymnasium by a ratio of three to one. They were also some of the most loyal citizens of the new, national states, believing that “acceptance of Goethe as one’s savior…was much more important and meaningful than baptism.” In other words, their lives were governed by the assumption that the surest path to acceptance and progress was to support and embrace whatever national project they lived under. The rise of the reform

34 Moses Hess, Rome and Jerusalem, 8
36 Slezkine, The Jewish Century, 67.
movement, and the changes permeating in the Jewish community only served as more evidence that Jews had done everything asked of them by emancipation and more.

It was Europe, in Hess’s view, which had failed to deliver. It is likely that Hess was deeply affected by the harsh anti-Semitic rhetoric contained in German literature and the attitudes of some German cultural elites. In 1850, twelve years before the publication of *Rome and Jerusalem*, Richard Wagner published an essay titled “Jewishness in Music” that began as an attack on Jewish composers such as Felix Mendelssohn, and then extended into an attack on Jewishness in general as harmful to German culture. The Grimm’s Fairy Tales, a totemic component of German national identity, contained stories that featured Jewish villains and anti-Semitic motifs. It is likely that Hess was also deeply affected by events such as the Damascus blood libel, which he had referenced in his earlier work. He returns repeatedly to the “Jew-Haters” who are unconvinced by the “denial of [Jewish] national culture” or the “participation in German cultural life” that emancipated and assimilated Jews offered. Instead, they only see the “difference between the Jewish and German races” and use this alleged distinction as the basis for their hateful rhetoric and exclusionary policies.

It was not simply the fact that anti-Semitism persisted that caused Hess and other future assimilationists-turned-Zionists to lose faith in the emancipationist project, but also the nature of the anti-Semitism that emerged. These new anti-Jewish tropes attacked not Jewish failure or Jewish otherness, but rather Jewish success and

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Jewish assimilation. Jews were model moderns, to such an extent that Yuri Slezkine wrote that it was in fact Max Weber’s Protestants who discovered a “humorless, dignified way to be Jewish.” Jews took to the liberal, knowledge-based economy with gusto. In Germany, 51% of Jewish scientists had fathers who were businessmen, demonstrating a sustained, intergenerational commitment to the project of modernity and upward mobility. Jews attended liberal universities in record numbers and overwhelmingly occupied bourgeois professions. In a trend that persists to this day, Jews have won 22% of all Nobel prizes ever awarded. European Jews were, miraculously, able to “lift themselves up by their own bootstraps” in a feat that should have won them the plaudits of their respective nation’s bourgeois majorities.

Instead, what emerged were cultural tropes that invoked fear of Jewish success, rather than disdain of Jewish failure. Jews were to be hated, feared and driven out not because they had failed to assimilate but rather because they had become too successful. The Protocols of the Elders of Zion, perhaps the most famous, and notorious, anti-Semitic document over produced, used the premise that a vast cabal of powerful Jews, whose loyalty was to some nebulous Jewish collective rather than their countries of residence, had acquired astronomical amounts of power via their brilliant manipulation of the levers of modernity, and now represented a threat to the honest citizenry. Herzl himself noted this tendency, attributing middle-class European anti-Semitism to the “competition” they felt from newly emancipated

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39 Slezkine, The Jewish Century, 41.
40 Slezkine, The Jewish Century, 41, 49.
This narrative was attached, not just to Jewish economic or cultural power, but to the Jewish body as well. Hitler’s anti-Semitic screeds often focused on the ease with which Jews could “pass” as Germans, and their mastery of the German language and German cultural traits. “In the course of centuries,” wrote Adolf Hitler, “their [Jews] outward appearance had become Europeanized, and had become humanized; yes, I even considered them to be Germans.” With contempt he spoke about the “absurdity of this delusion,” and the fear and disgust he felt at the idea that Jews could pass as members of the German nation.

We are accustomed in Western society to the soft racism of attributing poor outcomes to a marginalized groups’ culture, rather than to the systematic oppression they have experienced. It makes it all the more disheartening that European Jews, who succeeded spectacularly in the paradigm created for them, were still the objects of hate and disparagement. It is little wonder that Hess and his heirs felt that emancipation presented a damned if you do, damned if you don’t proposition.

It is somewhat of a stretch to read Hess’s work as a total rejection of liberalism and emancipatory ideas because Hess’s loyalty to these concepts was already tenuous. He was a radical socialist who rejected many of the assumptions of 19th century European liberalism including property rights and conventional republican government. Hess’s work, however interesting and important it is in retrospect, produced little if any reaction at the time of its publication. His fellow socialist ideologues tolerated his foray into nationalist politics as an idiosyncratic

43 Herzl, The Jewish State, 90
personal project. Perhaps more tellingly, with the exception of Heinrich Graetz, himself a thinker with proto-nationalist predilections, the Jewish intelligentsia of his day either ridiculed or ignored his work. European Jewry, it seemed, did not share Hess’s pessimism with regards to the project of emancipation. The economic prosperity of Jewish communities was improving, and Jews were making new inroads into cultural and political arenas not previously open to them. Hess’s bemoaning of emancipation’s failure seemed quaint at a time when the gates of Europe’s universities and the middle class seemed wider than ever and a man of Jewish birth could become Prime Minister of England.

Firmly ensconced in the ranks of Hess’s skeptics, though he did not know it, was a young Austro-Hungarian journalist named Theodore Herzl. Born two years before Hess’s pamphlet was published, Herzl was of the generation after Hess, one that had less personal experience with traditional Judaism and was fully embedded in the emancipationist project. His parents were assimilated German Jews, and the German humanistic tradition, rather than Judaism, was accorded pride of place in his upbringing. His Bar Mitzvah was advertised as a “confirmation,” as if to drain any allusion to a distinct religion or culture out of the ceremony. As an adult, Herzl was deeply invested in the emancipationist project, at times to an unusually extreme degree. While studying at university he became a member of a German nationalist fraternity, and once opined that the preferable solution to any lingering ire between

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Jews and other communities was a simultaneous mass conversion to Christianity.\textsuperscript{48} As zealous and dismissive as these solutions were they are resolutely emancipationist in that they were founded upon the idea that Jewish identity was mutable. It would take a series of dramatic events to reshape Herzl’s views on the nature and parameters of Jewish identity.

Herzl’s experience while covering the Dreyfus affair has been recounted countless times, and need not be spelled out here in depth.\textsuperscript{49} More consequential was the fact that the Dreyfus affair was not an isolated event. The anti-Semitic, anti-assimilationist tendencies of European society had grown stronger since Hess had penned his long-forgotten pamphlet. The Russian Empire, the polity that contained the vast majority of Europe’s Jews, was, during the 1880s and 1890s, beset by wave after wave of large, violent pogroms against Jewish communities in Warsaw, Odessa and elsewhere.\textsuperscript{50} More important than an uptick in anti-Jewish sentiment was the fact that Herzl’s disquiet was shared by an increasing number of Jewish elites, and by an ever-growing number of everyday Jews. The promises of emancipation rang increasingly hollow, as evidenced by the writings of Leon Pinsker. Pinsker, a former supporter of emancipation and member of the Russian-Jewish intellectual elite indicted emancipation as a failure and instead called for “auto-emancipation,” arguing that Jews needed to proactively build communities in Palestine where they and their identities could be safe.\textsuperscript{51} In Western Europe, Moses Montefiore was one of the first Jewish elites to show any interest in the idea of a Jewish community in Palestine,

\textsuperscript{48} Avishai, \textit{The Tragedy of Zionism}, 36.
\textsuperscript{49} Howard Sachar \textit{A History of Israel: From the Rise of Zionism to our Time} (New York: Knopf Books, 2007), 35-40.
\textsuperscript{50} Sachar, \textit{A History of Israel}, 12-13.
\textsuperscript{51} Hertzberg, \textit{The Zionist Idea}, 180.
making several visits there over the course of his life and donating large sums of money to improve the lot of the small Jewish community in Jerusalem.\textsuperscript{52}

Herzl succeeded in integrating these musings into a coherent political ideology, and did so in a way that was politically accessible to a large number of people. Herzl’s landmark polemic succeeded in crystalizing and extending Hess’s meditations into a fully-fledged political ideology. Interestingly, though Herzl had never heard of \textit{Rome and Jerusalem} and did not share Hess’s skepticism for liberal modernity, he comes to surprisingly similar conclusions regarding Jewish identity, the nature of anti-Semitism and the necessary political solution. At the beginning of \textit{The Jewish State} Herzl writes:

“We have honestly endeavored to merge ourselves in the social life of surrounding communities and to preserve the faith of our fathers. We are not permitted to do so. In vain are we loyal patriots, our loyalty in some places running to extremes; in vain do we make the same sacrifices of life and property as our fellow citizens; in vain do we strive to increase the fame of our native land in science and art, or her wealth by trade and commerce. In countries where we have lived for centuries we are still cried down as strangers…The majority may decide which are the strangers; for this, as indeed every point which arises between nations, is a question of might…In the world as it now is and for an indefinite period will probably remain, might precedes right.”\textsuperscript{53}

Hess had delivered an indictment of emancipation nearly as strong in his own work. He claimed, much like Herzl does above, that the project is destined for failure. Strikingly, his proposed solution to preserve Jewish culture and protect Jewish individuals was to accept the premise of the anti-Semites that he disparages. Hess agrees there is an intrinsic difference between Jews and Germans, and says “A Jew still continues to belong to Jewry by virtue of his racial origins even though his

\textsuperscript{52} Sachs, \textit{A History of Israel}, 11.
\textsuperscript{53} Herzl, \textit{The Jewish State}, 76.
ancestors have become apostates [converted to Christianity].”\textsuperscript{54} Hess argues that Jews are a distinct national community, and that the only way for a national community that cannot ever fully assimilate into another to survive and thrive is to found its own national polity. As odd as it appears for Hess to accept without question the main argument of those he is criticizing, it is less surprising when we consider Hess in his proper context. A Hegelian nationalist and radical socialist, Hess wasn’t so much giving up on the liberal, emancipationist project as extending his critique of bourgeoisie society to include the Jewish community’s place in it.

In contrast, Herzl delivers one of the most searing indictments of emancipation ever written, and does so as someone who is ostensibly a proponent of its values and ideals. He argues that Jews have done all that is humanly possible to demonstrate their loyalty and worth as citizens to their countries of residence, only to be met by implacable hostility and racism. He bemoans the fact that in the age of nationalism, the rights that were promised to all individuals, including the Jews, are inevitably deferred in favor of the whims of the powerful. What is curious about this passage is that, unlike Hess’s work, it delivers a fairly emphatic defense of the idea of emancipation. Herzl does not deny the fact that it would be preferable if the Jews could expect with any certainty the rights which they are owed; he merely thinks that “in the world as it is now…might precedes right.” In painting liberalism as an unattainable ideal, Herzl’s pamphlet signals the beginning of the abandonment of the idea of liberal identity structures by the Jewish intellectual elite and the Zionist movement. While the vision for a liberal, secular republic that he would sketch in \textit{The

\textsuperscript{54} Hess, \textit{Rome and Jerusalem}, 51
Jewish State and Alneuland would earn the plaudits of many, it was founded upon the assumption that individuals did not have the power to determine their own identity.

Herzl makes a concession that is rarely acknowledged by those who study his work and who venerate him as a nationalist prophet and liberal visionary. Throughout The Jewish State there is a tone of resigned acceptance to the destiny that Europe has imposed on the Jews. Herzl opines that “Jew baiting has merely stripped off our weaklings; the strong amongst us are invariably true to their race when persecution broke out against them.”

There is a sense that Jewish identity in Europe has been determined not by the autonomous actions of Jews themselves but rather by those who have imposed a collective identity upon them through persecution. Herzl repeatedly returns to the idea that the strength of Jewish national identity is due to the external pressure of continued anti-Semitism. He expressed that sentiment most clearly in the following passage: “Thus, whether we like it or not, we are now, and shall henceforth remain, a historic group with characteristics common to us all.”

Here, Herzl bares the contradiction at the core of his vision too often missed by those who study his ideology. Herzl opens his pamphlet with a defense of liberalism, and the disappointment he feels that its promise cannot be realized in the context of unending, unreasonable and inveterate European anti-Semitism. His solution, while premised on a partial abandonment of the liberal ideal, still envisions a modern, liberal state that guarantees freedom and equal rights to all. However, while Herzl envisions a liberal political structure built on choice and equal rights, the national identity that will underwrite that polity is imagined and constituted as

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55 Hess, Rome and Jerusalem, 77.
56 Herzl, The Jewish State, 92.
profoundly illiberal. It is illiberal because the assumption of identity is by and large not a choice, but rather something that individuals are born into and lack the capacity to shape in their own self-image. It is the forces of history, rather than individual human agency, which have constituted the substance and boundaries of Jewish identity. Identity, in Herzl’s construction, is exactly what his anti-Semitic tormenters say it is: racial and fundamentally impervious to reinvention. A person cannot stop being a Jew no matter their personal predilections, and by the same logic no one can become a Jew by personal identification and choice.

The topic of conversion and marriage scarcely merits a mention in Herzl’s writing, though this should not be mistaken for indifference to the topic. The idea that a large number of individuals might wish to undergo a rigorous conversion process in order to join a perpetually maligned and discriminated religious and ethnic group no doubt struck Herzl and his ideological heirs as absurd. In many ways, it was an acute awareness of the divide between the Jewish community and their gentile neighbors that caused Herzl and his disciples to deal only fleetingly with the possibility of individuals who might wish to leave one community and enter another, a concept that would become critically important after the founding of the state of Israel. A sovereign state cannot act in the same manner as a diaspora community. A diasporic minority is not responsible for the general welfare, lacks a monopoly on the legitimate use of force, and is primarily concerned with the preservation of a communal identity in the face of a hegemonic surrounding culture. A sovereign state possesses final authority, and wields hegemonic power over all of society, and must

comport itself differently than a disempowered cultural minority. It is no longer responsible merely for a particular community, but for all citizens of the state regardless of identity or creed.

It is crucially important to appreciate the consequences of the shift in Jewish identity that Herzl and Hess propose here. The passage extracted above from Hess’s work ends with the exclamation “But despite their participation in German’s cultural life, despite the denial of their national culture, despite all efforts to become Germanized, it has all been in vain.”\textsuperscript{59} The implication of this statement is clear: Jewish identity is not a choice, but rather something conferred on you by birth and reinforced by a world that believes that a Jew is always a Jew no matter the language he speaks or the religion he practices. Jewish identity, according to Hess, is both externally imposed and fundamentally deterministic. This determination also contains an inverse, one that becomes crucially important given the nature of the political project that Hess proposes. If Jewish identity is immutable and imposed by the surrounding community, than it affects those who wish to enter the community in addition to those who wish to leave it. Put simply, others may do what they want; they may speak any language they choose, but they can never be Jews, or members of a future Jewish (or Israeli) nation. One cannot proactively identity with a community, no matter one’s level of assimilation, unless that community has sanctioned your allegiance. The arbiter of identity is no longer the individual, who is allowed to decide who and what he is, but rather the community in the form of cultural taboos, courts of law or an immigration agency.

\textsuperscript{59} Hess, \textit{Rome and Jerusalem}, 8.
Herzl’s handling of an application by a man named De Jong to be a member of the Zionist organization he helped found demonstrates the practical ramification of this conception of identity. De Jong was Jewish by birth, but had decided to convert to Christianity. Apparently, he still retained a bond with the Jewish community and was impressed with the idea of Zionism, and applied for membership in a Zionist organization. Evidence of De Jong’s fealty to the cause and attachment to the Jewish nation and national project notwithstanding, Herzl answered one of his associate’s pleas for advice with the following answer: “Mr. De Jong being a Christian cannot join the [Zionist] organization. We would be grateful if he assisted as a non-member.” This decision is particularly ironic given Herzl’s earlier opinion that mass conversion to Christianity was the policy best suited to solving the Jewish problem, previously, Herzl had bemoaned the rigidity of the mainstream communal identities that he and his fellows so desperately craved to enter. Now, in an unconscious bit of tragic irony, he treated this aspiring Zionist much as he had been treated by the German culture he held so dear. Herzl’s ideology dictated that Jewish identity be bestowed by the community, not claimed by the individual. Individuals were deprived of the autonomy to decide who they were and what identities would define them. The result can only be described as rules that fail to comport with the basic presuppositions of liberalism, in both who Herzl included in his national project and who he excluded from membership. In diagnosing the exclusionary direction of the European communities in which they lived, Hess and Herzl unwittingly built towering walls around their imagined Jewish nation. This contradiction, a liberal

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ideology with an illiberal conception of identity, would go on to haunt the Zionist movement and the state that it would found, a point I will demonstrate and elaborate on in the second chapter of this thesis.

The dissonance in Herzl’s ideology renders the conventional division between the left-leaning labor Zionism of Ben-Gurion and Ze’ev Jabotinsky’s rightwing Revisionist Zionism less salient. While most academics attempt to divide them on the basis of their economic ideologies and attitudes toward militarism they share a common ideological root in Herzl’s political Zionism. It is true that Herzl defended liberalism and cosmopolitanism, whereas Jabotinsky called it “the laughing stock of all, and today…utterly discredited.” However, both agree about the nature of Jewish identity and identity in general: that it is racial and immutable. Jabotinsky wrote “what matters is that ethnic communities are distinguished from each other by their racial appearance.” It matters not that Jabotinsky states this sentiment with considerably more enthusiasm than Herzl. Both agree that identity is immutable, and that individuals lack the power to claim identities for themselves. It is up to communities and their institutions to bestow membership. When trying to bolster Herzl’s liberal credentials, many quote his disgust with the racial doctrines of the Boer’s and his proclamation that “we do not want a Boer state,” while emphasizing that Jabotinsky praised the Boars for their steadfast nationalism and reputation as fierce fighters. Yet these different sentiments mean little. Both presupposed the failure of liberal identity structures that made the doctrines of the Boers a natural

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63 Beinart, The Crisis of Zionism, 102.
alternative. In terms of their views of Jewish identity, Herzl, Ben-Gurion and Jabotinsky were cut from the same cloth. Herzl may have founded Political Zionism, but Jabotinsky was its first genuine article, stripped of pretension and internal contradiction.\textsuperscript{64}

The dissonance between Herzl’s proposed political structure and his conception of Jewish identity was all the more important because of its impact on the Jewish community. Whereas Hess’s work had faded into obscurity, Herzl prompted a continent-wide storm. Soon, Herzl was meeting with the Kaiser of Germany and other heads of state, seeking aid in his quest for the establishment of the Jewish state.\textsuperscript{65} He had not entirely convinced the Jewish community, but he did have its undivided attention. The first Zionist conference was convened in Basil largely thanks to the reverberations from the publication of Herzl’s piece. Herzl was now the face of a movement, and his ideology its founding premise. Speaker after speaker rose to pledge support for the Zionist project, and to praise Herzl’s vision and leadership.\textsuperscript{66} However, from the sidelines of the convention in Basil would come a scorching critique of Herzl’s project, and a fundamentally different vision for Jewish identity in the modern world.

Asher Ginsberg was the \textit{Haskalah} (Jewish enlightenment) personified. He grew up in a traditional, Hasidic family and initially studied in a traditional \textit{Yeshiva} before expanding his intellectual horizons to works and subjects outside of the

\textsuperscript{64}Bernard Avishai. \textit{“A Tale of Two Zionisms: On Peter Beinart.”} Review of \textit{The Crisis of Zionism} by Peter Beinart, The Nation, September 26\textsuperscript{th}, 2012. \url{http://www.thenation.com/article/170183/tale-two-zionisms-peter-beinart?page=0,2}

\textsuperscript{65}Herzl, \textit{The Jewish State}, 40-48.

\textsuperscript{66}Avineri, \textit{The Making of Modern Zionism}, 113.
traditional Jewish cannon. After an unsuccessful attempt to study in various universities, he settled in Odessa where he gradually came under the influence of the secular environment in the city and integrated himself into the Jewish intellectual community with whom he shared a desire to modernize Judaism. He lived the collision between Jewish traditionalism and Western modernity that was upending Jewish life and assumptions about Jewish identity, and was immensely conscious of the nuances and possibilities present in that collision. Personally, he was also the antithesis of Herzl. Whereas Herzl was a highly assimilated Western Jew who only took an interest in Jewish affairs after he became convinced that Jewish identity was a millstone around his and the community’s neck, Ginsberg was deeply immersed in and appreciative of both traditional and modern Jewish thought. He was deeply invested in the renaissance of the Hebrew language that was taking place in Russia, and is credited with exerting a deep and positive impact on the state of modern, written Hebrew. He published a journal, ha’shiloach, which became the most important Hebrew language journal in Eastern Europe. He remarked once, “There is one language and only one that always had been, is and forever will be bound up in our national existence, and that is Hebrew.” Whereas Herzl quickly became the face of political Zionism, whether through his speeches in Basil or his meetings with world leaders, Ginsberg wrote his essays under the pen name Ahad Ha’am, which is Hebrew for “one of the people”. Ha’am was the eastern populist to Herzl’s Western elitism.

68 Avishai, Tragedy of Zionism, 51.
69 “Avishai, The Tragedy of Zionism, 57.
Ha’am was deeply disturbed by both the content of Herzl’s program and its uncritical acclamation by the delegates at the initial Zionist conventions. His sweeping critique of The First Zionist Congress was codified in an essay entitled *The Jewish State and Jewish Problem*, which was published a few months after the convention adjourned. Of immediate note is the fact that Ha’am mimics the title of Herzl’s famous work, but adds a crucial addendum. The addition of the words *Jewish Problem* to the title of his essay made clear in succinct terms the heart of Ha’am’s criticism of Herzl’s program; namely, that it inadequately addressed the problem of Judaism and Jewish identity, and in so doing proposed a dangerous communal conception.

Ha’am’s critique was driven in part by a basic difference in experience. He was acutely conscious of the divide between Western European Jews, who made up the majority of the voices at the conference, and Jews of Eastern European countries. The divide was deep in many ways. Emancipation dated to 1791 in France, 1867 in Austria-Hungary and 1871 in Germany.71 In Russia, by contrast, full emancipation would not take place until 1917, in the midst of the Russian Revolution. The results were stark, with Western Jews more economically empowered and culturally assimilated than their eastern brethren.72 He outlined what he perceived to be the difference between the two communities thusly:

“The Eastern form of the moral trouble is absolutely different from the Western. In the West it is the problem of the Jews, in the East the problem of Judaism. The one weighs on the individual, the other on the nation. The one is felt by Jews who have had a European education, the other by Jews whose education has been Jewish. The one is a product of anti-Semitism, and is dependent on anti-

71 Sachar, *A History of Israel*, 4-8.
Semitism for its existence; the other is a natural product of a real link with a culture.”

Here, Ha’am outlines the basic divide between the two communities and begins to sketch out some of the ramifications. In the West, the problem is one of Jewish individuals who have found their Jewish identity, however flimsy, to be an impediment to full integration into their country of residence. Their Jewish identity is defined negatively, which is to say that their identity is reinforced and strengthened by their continuing experience with anti-Semitism, rather than by any kind of individual choice or agency on the part of the individual. Jews in the East, by contrast, face a more general conflict between Judaism and modernity. The Judaism that existed during the long period of Jewish isolation in the Ghetto is now coming into contact with the outside world as Jewish communities integrate with and encounter modernity. Ha’am illustrates the situation as follows:

“It is not only Jews who have come out of the Ghetto: Judaism has come out, too. For Jews the exodus is confined to certain countries, and is due to toleration; but Judaism has come out (or is coming out) of its own accord wherever it has come into contact with modern culture. This contact with modern culture overturns the defenses of Judaism from within, so that Judaism can no longer remain isolated and live a life apart. The spirit of our people strives for development: it wants to absorb those elements of general culture which reach it from outside, to digest them and to make them a part of itself, as it has done before at different periods of its history.”

The changes rippling through the Jewish experience and Jewish identity in general are clearly laid out in this passage. What is perhaps more interesting and important is that Ha’am lays out a vision of Jewish identity that is inherently dynamic, rather than static. Instead of an identity that is ultimately the product of an unchanging and unbending anti-Semitism (as Herzl proposed), Ha’am describes one

74 Herzberg, The Zionist Idea, 266.
that is the product of the desires of the community it encloses. By setting forth the possibility that Jewish identity could “absorb those elements of general culture” and “digest them” he conceives of a Jewish identity that can evolve according to the desires of those who identify with it. Zionism is not the process of transplanting a static, externally imposed communal identity to new political boundaries but rather the process of constituting and reimagining a new, modern Jewish identity that can underwrite a state and give meaning and purpose to those who subscribe to it.  

His clearest statement of this aim, and his sharp divergence from Herzl’s political Zionism, comes when he writes “…When our national culture in Palestine has attained that level, we may be confident that it will produce men in the country who will be able, on a favorable opportunity, to establish a State, which will be a Jewish State, and not merely a State of Jews.”

Ha’am is often labeled a “cultural Zionist” for his focus on the development of a Jewish Nationalist culture rather than on the founding of a Jewish polity. This label is somewhat misleading, as it might be more accurate to call him and his progeny the only truly Liberal Zionists. Zionism was not, in Ha’am’s telling, merely the effort to transplant individuals of Jewish heritage into a polity where they would constitute the majority. It is a twofold project of bringing Jewish culture and identity into the modern age, and then building a polity around that culture. Ha’am’s student Chaim Weizman, who would go on to become the first president of Israel, described the difference as between those who “sought in Zionism self-expression and not

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75 Ha’am included a fuller discussion of this aspect of his ideology in his essay *The Spiritual Revival, Selected Essays by Ahad Ha’am*, ed. Leon Simon, 288-291.
76 Herzberg, The Zionist Idea, 267.
merely rescue” and those who sought only rescue. The goal of Zionism was not merely physical transplantation but cultural reimagination.

At first glance, the phrase “liberal Zionist” seems strangely dissonant. Many assume, perhaps too easily that liberalism, with its emphasis on choice, equality and personal autonomy, is incompatible with nationalism, with its commitments to belonging, solidarity and loyalty. While nationalism is extensively discussed in this work, there will be little attempt to extensively justify liberalism’s precepts. Liberalism is taken as an essential first condition of modern Western states, and I will make little effort to justify or prove the underlying assumptions and values that constitute liberal political theory. Instead, my focus in this work is a reevaluation of Jewish nationalism, and an attempt to extract a conception of Zionism that can be infused into the liberal state without undermining its basic commitment to liberal practice or squelching the expression of Jewish national identity.

What might a truly liberal Zionism look like? Most fundamentally, it would advance a conception of Jewish national identity that carved out maximum space for individual choice. Liberals view the ability to choose as one of the most essential characteristics of human agency. This assertion shapes the liberal embrace of free markets and competitive, democratic elections, a belief that individuals can be whole and comprehensible outside of a cultural community, and that individuals can “adopt, perform or abandon…at will” identities and relations “(though not all, and probably

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77 Avishai, The Tragedy of Zionism, 59.
78 Tamir, Liberal Nationalism, 6.
not even many, at once).” It is the root of liberal thought, and it contains within it the precept that each person is allowed to define for himself or herself how best to achieve “human flourishing.” There are many varieties of liberal thought, and one of the places in which they differ is the place of individual and communal identity. However, they all share these common premises. In a liberal Zionism, individuals would be free to exit the community and enter it through assimilation or conversion. They would also be accorded the power to reshape that identity for their own purposes, rather than be shackled to historically defined understandings of their community. It would reject the idea of innate culture, preferring instead to see culture as a layer of social meaning acquired through self-reflection, education and communal discourse. It would discard the idea that authenticity is derived from an examination of the longevity of an individual’s heritage, but rather from an investigation into the sincerity of a person’s present self-conception.

A liberal Zionism would understand the national community as a source of meaningful connection between past and present, individual and community, something that situates individuals in a comprehensible context in which they can better flourish both as individuals and as part of a larger community. However, it

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81 See for example, Stephan Macedo, Diversity and Distrust: Civic Education in a Multicultural Democracy. (Cambridge: Harvard University Press, 2000)
would reject objective definitions of the Jewish nation.\textsuperscript{83} Herzl’s conception of a historically objective Jewish national entity is incompatible with a Zionism that truly aspires to synthesize itself with liberal practice. A national group shares a set of cultural characteristics, but the individuals within that community must be aware of these commonalities and have a role in shaping them.\textsuperscript{84} Herzl’s starting premise, that the Jewish national identity that constitutes the basis for Zionism was imposed upon the Jewish community by a hostile outside world is in conflict with an authentically liberal nationalist project. It offers no opportunity for members to opt out or for outsiders to gain entry and little ability for community members to reshape their identity in a way that suits their needs and desires. It places the power of personal definition in the hands of others.

Conversely, by arguing that Jewish identity is changeable and that the goal of Zionism is to reimagine it, Ha’am rejects the idea, propagated by those who clashed with enlightenment ideas, that Jews are born, not made. Ha’am embraces the essentially liberal idea that identity is a choice made by the individual. It is important to note the inversion contained within the key passage of his essay. In Herzl’s telling, the state is made Jewish by the presence of a majority of citizens of Jewish decent. Ha’am argues “When our national culture…has attained that level…it will produce men in the country who will be able…to establish a state.” In other words, the state is made Jewish by the culture that is predominant, whatever the heritage of the individuals who inhabit the state. Ha’am also returns agency over cultural definition

\textsuperscript{84} Tamir, \textit{Liberal Nationalism}, 66.
and renewal to those who are part of the cultural community. The idea that Zionism can craft a new Jewish identity not just in the Land of Israel but also in the diaspora returns to Jews the power to shape Jewish identity, and offers a pathway for outsiders to gain full membership in the cultural community. He imagines a Jewish state where it is possible to conceive of Jewishness divorced from the demographics of the state’s citizenry.

Whereas Herzl, Hess and Nordau essentially accepted Europe’s rejection of the promise of emancipation and liberalism, Ha’am offers a full-throated defense of the project within the parameters of cultural nationalism. The first three chose to accept, at least in part, the illiberal national framework of individuals like Johann Herder, while Ha’am rather notably claimed not to admire the German thinker. Ha’am’s state was liberal not only politically, in the sense of embracing universal suffrage and individual rights, but also culturally, in the sense that each individual was assumed to have the power to determine which identity applied to him and how that identity should be defined. The dissonance present in Herzl’s pamphlet is absent from Ha’am’s essay. It is important to note, however, that Herzl and Ha’am were both essentially secularists. Both were modernizers, and neither had any patience for the reluctance of religious conservatives to embrace Zionism on account of alleged conflict with theology. When a religiously inspired Zionism eventually did emerge under the tutelage of Rabbi Abraham Isaac Kook, it was (and is today) often dismissed as the atavistic ramblings of a traditional ideology struggling with an

85 Tamir, Liberal Nationalism, 51.
anomic sense of displacement.\textsuperscript{86} This characterization is both overly simplistic and incorrect. Not only was Religious Zionism a distinctly modern project, it shared a vital ideological similarity with the one that Herzl announced to the world at Basil.

Religious Zionism is the product of a complex synthesis of the modern and the traditional, but it owes its existence to an intellectual structure that is distinctly modern. Georg Hegel formulated the framework that was most influential in shaping Religious Zionist ideology. To briefly reconstruct Hegel’s framework, he argued that history had a defined direction, or \textit{Telos}, toward which it progressed. The force behind this historical progression was the dialectic, a fundamental contradiction or disagreement whose tension drove historical progression and whose resolution meant the end of “history” as he defined it.\textsuperscript{87} Human society moved through various stages of history, each solving some of the problems of the one it replaced but ultimately falling victim to its own internal contradictions. For Hegel, the engine of history was the individual’s struggle for recognition, from his individual peers to his government. The final stage of history was the universal, liberal state that would safeguard the rights of all its inhabitants.

This framework was essential to the appropriation of Zionism into a traditional Jewish understanding because if history was a process rather than an event then there was an opening for secular actors to play a role in a religious framework. Rabbi Kook synthesized these two traditions by arguing that secular Zionists, even if

\textsuperscript{86} See, for example, Avishai, \textit{Tragedy of Zionism}, pages 94-98 and Hertzberg, \textit{The Zionist Idea}, 417-419.
\textsuperscript{87} Francis Fukuyama, \textit{The End of History and the Last Man}, (New York: Free Press, 2006), 59-81.
they were personally irreligious, were the unknowing agents of the divine. He was able to do this by claiming that secular Zionism constituted merely one stage of a historical progression that would culminate, not in Hegel’s universal state or Marx’s communist utopia, but in universal human salvation. The tension that drove this progression was the contradiction between the secular and divine, a religious as opposed to secular dialectic. Hegel’s cunning of history was replaced by Kook’s cunning of the lord. In this way, Kook was able to reconcile secular Zionism with Orthodox Judaism by claiming that secular Zionists were part of a deterministic divine machinery, whether they knew it or not. Traditional Jews, under this framework, should support and aid the Zionist project, despite its secular nature, because to do so would further the ongoing process of redemption that would ultimately culminate in the arrival of the Jewish Messiah. The fact that the framework and worldview of Religious Zionism, its internal language and structure, is drawn so heavily from modern philosophy suggests strongly that Religious Zionism is an ideology born of the modern era.

However, an understanding of history was not the only thing Religious Zionism borrowed from the modern age. It also updated its view of Jewish peoplehood to conform to its vision of modernity. Despite its modern character, European nationalism was in many ways a profoundly nostalgic ideology. Part of the emotional allure of nationalism was its ability to infuse one’s own people, homeland and culture with the same historical weight and emotional reverence long felt for the

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89 Kaplan and Shatz, Rabbi Abraham Isaac Kook and Jewish Spirituality, 259.
Land and People of Israel. Nationalism turned every capital city into Jerusalem, made every people chosen and sanctified every language as Adamic. Increasingly however, intellectual currents flowed in the opposite direction. When he referred in his writings to the Zionist movement, Rabbi Kook used the Hebrew term Ruah ha-uma, which is the literal Hebrew translation of a German phrase, Volkgeist, meaning national spirit. Johann Gottfried Herder, a German philosopher and early German nationalist proposed both the term and the philosophical contention that formed its base. He postulated that each nation, by dint of its culture, language and history, possessed a distinct national spirit or character. This is a small but important shift that deserves to be recognized. The idea that the Jewish people are a distinct group with a unique character is a traditional, indeed ancient, idea within Judaism. Allusions to this line of thinking can be found scattered throughout the Hebrew Bible. In the book of Samuel the Israelites demand a king so that “we might be like all the other nations.”

The implication in this statement is that before, the Jewish nation was indeed fundamentally different from the ones that surrounded it. Even more influential is a passage from Numbers where a prophet looks down upon the Israelites and declares “[they are] a people that dwells alone, and is not counted amongst the other nations.” However, these passages, which are very influential in traditional Jewish self-definition, trace the source of this alleged distinctiveness to the unique relationship that the Jewish people supposedly have with their G-d. In Rabbi Kook’s understanding, an understanding derived from Herder and other modern nationalists,

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92 Hebrew Bible, New International Version, Book of Samuels; Chapter 8, Verse 20.
93 Hebrew Bible, New International Version, Book of Numbers 23:9
the source of the unique character of the Jewish nation was their physical and historical presence on earth, an idea strikingly modern in its orientation.

This conception of peoplehood was a key organizing concept of Rabbi Kook’s thought. For example, Rabbi Kook reinterpreted and offered commentary on various laws and commandments in light of his understanding of the “national spirit.” Seen in this light, dietary laws were a way of regulating the “qualities and temperaments” of the Jewish people so as to create a unified identity and disposition.\textsuperscript{94} Laws regarding when and how a Jewish man should shave were meant to “develop similar aesthetic feelings amongst the nation’s members.”\textsuperscript{95} To conduct oneself in this fashion fosters national spirit by creating a unified criterion of beauty. Seen in this light, the commandments are not simply a vehicle for the glorification of G-d through human action but also a way of strengthening the Jewish national spirit. The source of Jewish uniqueness was now a unique physicality and historical profile.

Religious Zionism advances a conception of Jewish identity that is strikingly similar to the notion advanced by Herzl. Rabbi Kook integrated the actions of secular Zionists by claiming that, whatever they believed about themselves, their identity was set and determined from above. He wrote, “what Jewish secular nationalists want they do not themselves know: the spirit of Israel is so closely linked to the spirit of G-d that a Jewish nationalist, no matter how secularist his intention may be, is, despite himself, imbued with the divine spirit even against his own will.”\textsuperscript{96} Kook adopts a


\textsuperscript{95} Schwartz, Religious Zionism: History and Ideology, 28.

\textsuperscript{96} Avineri, The Making of Modern Zionism, 193.
vision of Jewish identity that is devoid of choice. In Kook’s telling, it matters not whether an individual has moved to Palestine to revive the Jewish nation, build up the land or merely to escape persecution. Such people are imbued with divine purpose “even against [their] own will.” Jewish identity here is an essentially involuntary proposition, with individuals only recognized as having one real Jewish identity, the one recognized by G-d. Kook’s notion of Jewish identity is the heavenly equivalent of Herzl’s racial determinism, with the Jewish G-d taking the place of unbending European anti-Semitism as the external enforcer of the one and only Jewish identity.

Various aspects of these three strands of Zionist ideology would influence the Zionist enterprise in the decades preceding the founding of the State of Israel in 1948. Ha’am’s essay would be marginalized politically, though his emphasis on language and the culture that arose around it lived on in the Kibbutz movement and the revival of the Hebrew language. Kook’s religious Zionists played a marginal role in the prestate era, though they would become a pivotal force in the first two decades of the state. Yet it was Herzl who continued to tower over the Zionist movement. His victory was particularly decisive concerning the question of Jewish identity. When the state of Israel was declared on May 14, 1948, David Ben-Gurion issued his proclamation standing beneath a picture of Herzl.97 The new state, and the political and ideological forces that would operate it, made clear early on that they were intent on constructing a state founded on notions of Jewish identity that owed far more to Herzl and Kook then to Ha’am.

Chapter Two
Memories of the Future: Community and Identity in Israel’s Early Years

“The constitutions are the projections of an imagined future upon reality.”
—Robert Cover

For decades, the ongoing dispute within the Zionist movement over the constitution of the Jewish nation played out in speeches, articles and polemics. The establishment of the State of Israel on May 14, 1948, began a new and more formal chapter in the constitution of Jewish national identity. Zionism now commanded public authority, charged with the responsibility of governing the people who lived under its rule. Whereas before this debate involved competing ideas with few consequences beyond the intellectual, the medium would now be public laws and regulations, with real impacts on Jewish identity within Israel and the limits of liberal community. Competing ideas can certainly exist within a broader ideological movement. However, tension and contradiction can produce a conflicted polity, if for no other reason than that contradictions within constitutive ideals can manifest as inconsistent treatment at the hands of the state, or incongruity between aspirational promises and lived experience. Disharmonies in the constitutional order can sometimes provide the material for political contestation over the boundaries, character and duties of the community in question.

It was one thing to proclaim, as Israel’s Declaration of Independence did so eloquently, that the new state would be “open to the immigration of Jews from all..."

99 Gary Jacobsohn has written powerfully on the linkage between political conflict and constitutional disharmony. See, Jacobsohn, Constitutional Identity, pages 271-322.
countries.” It was quite another thing to square that promise with the possibility that
the framers of the new Israeli political order might have a different vision of national
community than certain individuals who previously believed themselves to be
members of it. ¹⁰⁰ It was rather simple to declare that the new state would ensure “full
social and political equality of all its citizens, without distinction of race, creed or
sex.”¹⁰¹ Significantly more complicated was the task of integrating this promise with
the idea that the new political order would accord some degree of primacy to Jewish
national rights or culture. Needless to say, defining just what these promises entailed,
which communities they applied to and how they could be balanced against
potentially conflicting aspirations would have major consequences for Jewish
national identity and liberal community within Israel

Arriving at a balance between conflicting communal aspirations is by no
means a problem unique to Israel. It is a common feature of constitutional design in
all liberal democracies, as is the project of constituting inclusive political
communities under constitutional regimes. The notes of constitutional discord played
in the background of Martin Luther King Jr’s famous “I have a Dream” speech as he
invoked the “promissory note,” the promises of equality made in America’s founding
documents that had gone unfulfilled.¹⁰² He demanded that America square its
aspiration for equality with the decidedly un-egalitarian reality that had prevailed, and
extend the boundaries of the American community to cover all individuals born

¹⁰⁰ Rabinovich, Israel in the Middle East, 73
¹⁰¹ Rabinovich, Israel in the Middle East, 73
¹⁰² Philip Kennicott, “Martin Luther King’s ‘I have a Dream’ Speech Check Metaphor
http://www.washingtonpost.com/lifestyle/style/revisiting-kings-metaphor-about-a-nations-
debt/2011/07/26/gIQArshBaJ_story.html
within its borders. In the 19th century, an infusion of Catholic immigrants produced a wave of nativism and anti-Catholic attitudes among native Protestants.\footnote{Stephan Macedo, \textit{Diversity and Distrust: Civic Education in a Multicultural Democracy}. (Cambridge: Harvard University Press, 2000), 61.} Their conception of religious freedom, so integral to American self-understanding, was challenged by individuals who retained ties to an institution that regularly and emphatically condemned the values at the center of American society.\footnote{Macedo, \textit{Diversity and Distrust}, 60-64.} A population accustomed to religious homogeneity was forced to confront the question of whether the protections it conferred on its members could be utilized to work toward changes in the values that supported those protections, and in so doing carve out meaningful space for different identities not only to be free from suppression, but to actively prosper.

Israel is not alone in many of the problems it confronts, but several aspects of its experience set it apart from its democratic peers and make it worthy of additional study. Israel’s founding was not imagined as the start of a new era, but rather as the restoration of a previously existing reality with a historic community at its heart. The national community was not seen as being formed anew, but rather as molded out of a preexisting diasporic community, a community that continued to exist separately and on its own terms after the founding of the state. A key question that would confront those who would begin to frame the Israeli political order was whether the new state would be a mirror of the historic community, a mechanism for the political expression of a historically defined identity.\footnote{The question of the proper role of diasporic communities in the political affairs of the nation-state with which they associate is not unique to Israel. See David Elazar \textit{The Federal Dimensions of State-Diaspora Relations}, 1991 \url{http://www.jcpa.org/dje/articles3/constdesign-}.} Could a national community exist in the State of
Israel with different parameters and standards of membership then the wider diasporic nation out of which it had been formed? Would sovereignty be interpreted as a radical break from the past, an opportunity to chart a new communal and political course? The competing visions articulated by Herzl and Ha’am live within these choices. In this chapter, I consider how Israel settled on the selection it ultimately made, and the consequences of that choice.

In short, the transformation of Zionism from an ideology that was held by a politically disempowered cultural minority to one that guided a sovereign national majority confronted its adherents with choices that they had largely been able to defer or ignore, choices that touched on the most sensitive and fundamental aspects of national identity and democratic community. These questions finally proved too contentious for the newborn state, still attempting to find its bearings and set up its own institutions, to resolve. Israel failed to ratify a constitution, depriving itself of a tool of identity formation that might have helped the young state to constitute a coherent and durable democratic identity. \(^\text{106}\) Similarly, the passage of the sweeping but vague Law of Return failed to delineate the boundaries or fundamental attributes of the Jewish nation on which the state was supposedly founded. Many words have been used to define Israel in its early years, but the best might simply be “undefined.”

\(^\text{1.htm}\) for a short discussion of other instances of diasporic integration into a political process. Additionally, the question of whether and when to devolve certain governing powers to distinct minorities within sovereign nation states has also received quite a bit of attention. See, Will Kymlicka, *Politics in the Vernacular and Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford: Oxford University Press, 1995)

\(^\text{106}\) For a full discussion of constitutions as a tool of identity formation, see Gary Jacobsohn, *Constitutional Identity* and Beau Breslin, *From Words to Worlds*, especially chapters two and three.
The resulting compromise left Israel with political institutions and newly constituted communities that offered resolutely conflicting views of identity, community and citizenship. Citizens were given a voice in shaping the direction of the state, but increasingly deprived of the agency to determine their own identities. Non-Jews were guaranteed equal rights and welcomed rhetorically into the state while at the same time confronted with institutions reminding them daily that theirs was an identity that disadvantaged them materially and separated them culturally. Freedom of religion was explicitly granted to all, but individuals were denied the ability to decide in what manner they could practice their respective religion. Democratic values were cherished, but the lack of a constitution provided no mechanism for the constitutional cleansing of authoritarian statutes left over from the British mandate. The Israel that emerged from the first decade of the state’s existence increasingly embodied the contradiction at the core of Herzl’s thinking: liberal institutions but illiberal communities.

It is worth exploring why questions of membership and definition, which had scarcely bedeviled Zionism before, suddenly became its all-consuming focus. Why did questions that before had not been major points of disagreement within the Zionist movement suddenly become some of the largest points of fracture within the new Israeli coalition? The answer is that identity and community are far more salient issues when membership obligates the community to binding commitments. From its birth in the pages of Herzl’s polemics up until the final moments of the British mandate, Zionism was a voluntarist movement within a largely voluntarist diaspora community structure. Emancipation had transformed Judaism into a private identity,
confined to homes and synagogues. Denial of membership in a particular community might have led to cultural alienation, but it did not have an impact on the individual’s fundamental rights before the law. For this reason, a formal definition of Jewishness was less important to communal membership. Different streams of Judaism formulated different conceptions of what it meant to be Jewish, and individuals gravitated toward those which suited their sensibilities. A. B. Yehoshua defines this state of affairs eloquently:

Why do we need a definition at all? Before the state was established, if we had been on a trip and had entered a restaurant in the United States or Argentina or Tashkent, and the proprietor had recognized us as Jews, come over to our table, and said, “Listen, dear guests, I too, am a Jew,” no one would have tried to examine on what basis he was defining himself as a Jew. No one would have wondered if his mother was Jewish or only his father, or whether perhaps some Jewish ancestor appeared to him in a dream and he thus decided to identify as a Jew. None of this would have been important to us; we might have found the very fact that he was identifying himself as a Jew acceptable and even pleasant, but it wouldn’t have committed us to anything.107

An unspoken subtext to Yehoshua’s analysis is that such a situation would almost certainly give rise to multiple conceptions of Jewishness. Perhaps one party of more observant travelers, seeing that the proprietor cooked on the Sabbath and served non-kosher food would have thought to themselves, “This man is not a Jew, for where we come from all Jews observe Shabbat”. Yet it is equally possible that another group of travelers would have noticed that the man wore a pendant with the Star of David and sprinkled Hebrew into the instructions he gave his children and said would have said, “Clearly this man is one of us, for in our community all Jews learn Hebrew.” As we have seen, in the diasporic communities where Zionism proliferated, there existed a plurality of conceptions of Jewishness. Just as importantly, these identities were

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often in tension with each other. Jewish religious law held that those born of a Jewish mother or who had converted through Jewish ritualistic procedure could claim Jewish identity. Political Zionists in the mold of Herzl implied that all those who had experienced anti-Semitism had some claim to membership in the Jewish nation, regardless of whether they cleared the Halachic test of membership. Already it is possible to see the tension between these two conceptions of community. Clearly, one did not need to be deemed Jewish by rabbinical authorities to be harassed on the street or the victim of a pogrom. A violent mob making its way through the Jewish Quarter in Kiev did not stop to enquire about your mother’s maiden name, or the legality of your grandparent’s marriage certificate.

Yehoshua’s last sentence is particularly instructive; he says that the patron’s identity would not have “committed us to anything.” The foundation of the sovereign state of Israel altered that paradigm. One of the essences of states, and of sovereignty, is the inescapable nature of the decrees they enact. Edicts issued by communities formed by private associations may be avoided simply by disassociating oneself from them, but the territorial extent and monopolistic claim on violence that states claim makes avoidance nearly impossible. Recognizing someone as a Jew, or even the decision to make that a matter of political consequence in the first place, had real ramifications in terms of commitments to citizenship and admittance into a community. Suddenly, how a person is labeled became a matter of legal consequence deeply relevant to that person’s well-being. Plurality and sovereignty are by no means incompatible, but as Yehoshua describes, “once the state was established, and especially once the Law of Return was passed, the need for a definition was vital,
since a Jew, through his [or her] definition as such, obtains the right to come to Israel and become a full-fledged citizen, with all that implies.”

Now that Israel was tasked with deciding who could obtain citizenship, with all of its rights and responsibilities, it needed a definition of exactly who was eligible for the package of benefits that comes with citizenship. Since Israel defined itself as a Jewish state, it became necessary to codify the boundaries of that community, and decide upon the criteria for entry.

In short, the establishment of the state of Israel presented Zionism with the problem of establishing both a democratic identity and a pluralistic national community. One of the first attempts to deal with these issues was David Ben-Gurion’s famous “Status Quo” letter to the Ultra-Orthodox World Agudat Israel organization. Ben-Gurion thought it was crucial to present a united front in favor of the Zionist position ahead of the United Nation’s fact-finding mission to the region. The Ultra-Orthodox had historically rejected the Zionist movement, viewing it as a heretical attempt to reestablish Jewish sovereignty before the coming of the Messiah, and Ben-Gurion saw the letter as an important opportunity to bring them into the Zionist coalition at an important political moment. The letter was meant to intimate the positions of the “government in waiting” represented by the Jewish Agency. Among other positions, the letter stated that the Jewish Agency would “do what can be done to satisfy the needs of the religiously observant” with regards to family law and marital affairs “to prevent a rift in the Jewish people.”

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108 Yehoshua, *Defining Who is a Jew.*
109 Rabinovich *Israel in the Middle East,* 58.
110 Rabinovich *Israel in the Middle East,* 59
It is easy to mistake the demands of the Ultra-Orthodox as marginal, when compared to the questions of military, economic and political survival that Israel was facing at the time. This impression is mistaken. Few things are more integral to the constitution of identity than family law.\footnote{Mark Brandon. \textit{States of Union: Family and Chance in the American Constitutional Order}, (Lawrence: University Press of Kansas, 2013), and Gary Jacobsohn, \textit{Constitutional Identity}, Chapter Six. Additionally, the importance of the family to societal identity was affirmed both explicitly and implicitly in United States Supreme Court cases such as \textit{Griswold v. Connecticut}, 381 U.S. 479 and \textit{Loving v. Virginia}, 388 U.S. 1} By the outbreak of the American Civil War, for example twenty-eight U.S. states, out of thirty-one, had enacted laws prohibiting interracial marriage.\footnote{Mark Brandon, \textit{States of Union}, 102.} The erection of legal boundaries around the families of the white majority ensured that blacks would never share in the familial, legal or economic benefits that would come with the establishment of legitimate familial relations with whites. A mechanism of separation and disempowerment, it also ensured the continued estrangement of the two communities (and hence the exclusion of blacks from mainstream society) by excluding legally defined members of each race from the most intimate and humanizing legal association recognized by the state: the family. As evidence of the power these unions have over the creation and perpetuation of identity, after the end of Reconstruction one of the first measures taken by southern states to exclude blacks from white society was the reinstatement and strengthening of bans on interracial marriage. Some bans were even entrenched in state constitutions.\footnote{Brandon, \textit{States of Union}, 103.}

Regulations that govern marriage, divorce and the rearing of children touch on the literal processes by which communities constitute themselves and create communal identity. It is for this reason that Ben-Gurion’s apparent willingness to
yield to the religious faction on these issues is so important. Though Ben-Gurion’s letter was, strictly speaking, nonbinding, it betrays a few tendencies that are worthy of note. Curiously, the letter was couched in the language of pluralism while hinting at future policies that would make an effort to quash it. The Ultra-Orthodox sought not the ability to practice their own customs free from state interference, a right that state was already rushing to grant them. They were concerned about the laws that would govern the Jewish community in Israel as a whole. Ben-Gurion’s letter displays a tendency to impose one faction’s conception of membership on the entire community in service to an imagined Jewish unity. The letter did not have implications just for the Jewish community, but for all religious and national groups within Israel. Given the stringency of the Orthodox conversion process and ill feeling with which the community looked upon intermarriage, it promised to be a potent tool against intermarriage and intermixture of Israel’s various communities, reinforcing the tendency to see the community one was born into as inherently separated from all others.

The vision of individual identity and communal membership that Zionism held was crystalized in Israel’s Declaration of Independence. A document often hailed for its universalist themes and appeals to peace and coexistence, it is premised on conceptions of identity that are difficult to integrate into liberal democracy. An American who sat down to read Israel’s Declaration might initially be struck by the document’s focus on history. The American Declaration is largely an appeal to universal ideas; it describes why the people whom this document represents demand their independence and to what principles they appeal to make their case. It is true
that the document contains a list of historical grievances against the King of England, but importantly it describes what King George III allegedly did, not on whom were his abuses perpetrated. The King is merely one particular enactor of oppressive and rapacious policies that are themselves the subject of universal condemnation. He may have “kept among us, in times of peace, Standing Armies without the Consent of our legislatures.” but the document’s prime focus is not on the particular enactor but rather on the universally repugnant nature of his actions.114

Israel’s Declaration, on the other hand, is largely a statement of who is declaring themselves independent.115 It makes reference to the “historic” association of Jews, their exile from Palestine, their suffering at the hands of Nazi Germany and the composition of the Hebrew Bible.116 The justification for the creation of the state of Israel, and hence the political community it signified is not an appeal to universal principles (at least not entirely) but rather an appeal to a particular historical narrative that justifies the sovereignty of a certain community of people.117 Immediately the document places the standing of non-Jewish citizens of Israel in doubt. While it welcomes the Arab residents of Palestine and bestows upon them, and all others, “full and equal citizenship” as well as representation in all future democratic institutions of the state, it does so to a group that is already, implicitly an auxiliary class of

116 Rabinovich, Israel in the Middle East, 73.
citizen.\textsuperscript{118} The state is justified based on an appeal to a particular history, a history these communities do not, at the moment, identify with. From the outset, their membership in the national community is tentative, resting on formal, legalistic guarantees rather than on a deep and mutual sense of belonging.

In addition to excluding non-Jewish members from the narrative that justifies the state’s existence, the document impeded the ability of Jewish citizens of Israel to form their own identities by shackling them to past understandings of who they were. Jewish identity is presented as a product of history, of ancient faith, national exile and European persecution. Leaving aside for a moment the differing contours of the Jewish community as defined by historical association, religious identification and persecution, it is difficult to overlook the inherently deterministic view of identity that is advanced by the Declaration. The document begins with the claim that “The Land of Israel was the birthplace of the Jewish People. Here their spiritual, religious and national identity was formed. Here they achieved independence and created a culture of national and universal significance.” This unavoidably leaves the reader with the distinct impression that Jewish identity is a settled product, the result of past interactions with a hostile world, with little room for modification or personal reinterpretation. The simple fact that the framers selected one narrative of identity formation out of many as the definite description of Jewish formation invalidates other identities, whether newer or simply different, by depriving them of the hallowed status granted by a founding document. When Ben-Gurion read the proclamation to the world, he may have thought he was saying, “This is who we are,” but it may be

\textsuperscript{118} Edelman, \textit{Courts, Politics and Culture in Israel}, 121-2.
more exact to say that he declared whom the Jews had been, and in so doing, determined who they might be in the future. The ability to compose one’s own life story, to construct a personal identity befitting an individual’s sensibilities, is a fundamental feature of liberal societies.\textsuperscript{119} Whereas the American Declaration frames a set of tools by which individuals might do this “life, liberty, and the pursuit of happiness,” the Israeli proclamation turns Israeli Jews into the standard bearers of an identity they themselves had no part in crafting, and may wish to revise.\textsuperscript{120}

Israel’s Declaration is a valiant attempt to link an explicitly nationalist understanding of community with a boldly liberal vision of society. Yet as many have noted, for nationalism to coexist with liberalism without the latter undermining the former individuals must be free to define their own identities and choose which cultural community they wish to associate with.\textsuperscript{121} It is no accident that Israel’s Declaration represented little more than an elegant restatement of Herzl’s emancipation-doubting worldview. Herzl concluded that Jewish difference, and hence Jewish identity, was the result of “hatred” and wrote, “Thus, whether we like it or not, we are now, and shall henceforth remain, a historic group with characteristics common to us all.”\textsuperscript{122} It is possible to understand Israel’s Declaration of Independence as the first institutional repudiation of Ha’am’s vision of an aspirational


\textsuperscript{120} United States Declaration of Independence Appendix A of John Finn, Donald P. Kommers, and Gary J. Jacobsohn. \textit{American Constitutional Law}. 1091-2

\textsuperscript{121} Tamir, \textit{Liberal Nationalism}, 37-39.

\textsuperscript{122} Theodore Herzl, \textit{The Jewish State}, 92.
Jewish nationalism and Hebrew culture in favor of Herzl’s externally imposed conception.

A constitution might have facilitated the creation of institutions, norms and principles that would have increased the likelihood of the adoption of an identity based not on history or shared ethnicity, but rather on the common aspirations of the individuals and communities encompassed by the new state. Declarations put forward the justification for the assumption of sovereignty and they inevitably involve the presentation of a historical narrative. That narrative is meant to justify the change the Declaration announces, whether it is presented in particular or universal terms. A constitution can provide a mechanism to frame the aspirations of the newly independent community; what they wish to achieve with their newly gained independence, and who is invited to take part in this project. To aspire is “to seek to achieve something greater than one currently has,” and Gary Jacobson goes further by delineating the role of constitutional aspiration as “a conception, implicitly or explicitly incorporated in the document, of the kind of polity the constitution seeks to preserve and become.”123 Israel’s Declaration framed the justification for Israel’s existence, and hence the normative extent of the national community, as emanating from a particular set of historical occurrences experienced by a specific diasporic community. Just as the American constitution, with the statement “We the People of the United States” announced the creation of a new political community and a shift in sovereignty from the several states to the people that inhabited them, so an Israeli

123 Beau Breslin, From Words to Worlds, 48, and Gary Jacobsohn Constitutional Identity, 142.
constitution might have aided in the transfer of normative sovereignty from the people of Israel, to the people who now lived in the State of Israel.\textsuperscript{124}

An Israeli constitution, however, was not to be. It was stymied by the same forces that settled upon the particular conception of identity announced in Israel’s Declaration. Israel’s first elections returned a Knesset dominated by David Ben-Gurion’s Mapai party, the electoral manifestation of the labor Zionist movement.\textsuperscript{125} Notwithstanding the influence that Ahad Ha’am had exercised over the Zionist movement in terms of the importance of the Hebrew language and national culture, the Zionism of Ben-Gurion’s party drew its conceptions of Jewish identity from Herzl and Jabotinsky’s political Zionism. An alliance of religious Zionist parties, some inspired by Abraham Kook’s fusion of religious messiansim and organic nationalism, won a further sixteen seats and revisionist Zionism, under the banner of Menachem Begin’s Herut party, claimed fourteen seats. In Israel’s first democratic elections, political parties that owed their ideological inspiration to Kook, Jabotinsky and Herzl held at least 76 out of 120 seats.\textsuperscript{126}

Some scholars have contended that Ahad Ha’am’s influence on the Zionist project is consistently undersold. They point to the prominence that the revival of the Hebrew language was accorded in the labor Zionist project, and the multitude of European Zionist organizations that passed resolutions in support of Ha’am’s

\begin{itemize}
  \item \textsuperscript{124} Beau Breslin. \textit{From Words to Worlds: Exploring Constitutional Functionality}. (Baltimore: Johns Hopkins University Press, 2009), 50. This interpretation of the nature of the political compact the U.S. Constitution announced was contested in the early years of the republic, but has been emphatically endorsed by the Supreme Court, most famously in \textit{McCullough v. Maryland}, 17 U.S. 316.
  \item \textsuperscript{125} Gershom Gorenberg, \textit{The Unmaking of Israel}, 29-30.
  \item \textsuperscript{126} Avishai, \textit{The Tragedy of Zionism}, 185.
\end{itemize}
programs. Cultural Zionism, they argue, was not as marginalized as is often argued. While it is true that Ha’am’s linguistic nationalism became central to the political Zionist project, his view of Jewish community was decisively rejected. The Israeli Declaration of Independence, drafted by many of the same figures now elected to the first Knesset, rejected Ha’am’s aspirational Judaism. In the years preceding the founding of the State of Israel, David Ben-Gurion frequently argued that the purpose of Zionism was not to alter Jewish identity, but rather to imbue a preexisting community with sovereign political power. The Jewish narrative that Ben-Gurion recites is almost identical to the one inscribed in the declaration that he announced to the world. On the other hand, true disciples of Ha’am such as Judah Leib Magnes, the first chancellor of Hebrew University, were marginalized because they prioritized Jewish cultural renewal over a purely national state. It was Herzl’s picture that watched over Ben-Gurion as he declared independence, not Ha’am’s.

Strictly speaking, these were not elections for Israel’s first parliament (Knesset, in Hebrew) but rather to elect members of a constituent assembly who would formulate and formally ratify Israel’s new constitution. Given Israel’s protracted and somewhat stillborn process of constitutional formation, it is often forgotten that because passage of a constitution was an issue of the highest priority for Israel’s first government, contemporary actors considered its passage a forgone conclusion. The United Nations expected new members to ratify a constitution, as nearly all states formed in the postwar period had quickly adopted one. The purpose

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of this expectation was to further guarantee that new members of the international community would comply with and advance international norms of equality and democratic procedure.\textsuperscript{130} Israel’s own Declaration of Independence promised a ratified constitution shortly after the new nation had formally set up the institutions of state. In addition, there was broad agreement amongst many of the rival political factions that a constitution would and should be passed. Ben-Gurion spoke expectantly of a future constitution in his status quo letter to the Ultra-Orthodox, while Menachem Begin argued that without a constitution “the government will be superior to the law [because if] the government wants a particular law, then that law will be adopted.”\textsuperscript{131}

Perhaps the most compelling evidence that Israel’s governing bodies intended to pass a constitution was that the Jewish Agency led by Ben-Gurion, in effect Israel’s government in waiting in the years before independence, had instructed its political secretary Dr. Yehuda Leo Kohn to prepare a draft constitution to be submitted to the constituent assembly.\textsuperscript{132} Kohn produced a draft that contained a preamble and nine chapters outlining the basic structure of state institutions and individual rights. Importantly, the document contained several important symbolic and legal mentions of the role religion would have in the new state. The preamble gave thanks to “Almighty God” for having ended the Jewish exile from the holy land. Personal status and family law was to be the domain of religious courts (Muslim and

\textsuperscript{130} Nohlen, D, Grotz, F & Hartmann, C (2001) Elections in Asia: A data handbook, Volume \textit{I}, p 123
\textsuperscript{131} Rabinovich, Israel in the Middle East, 101.
\textsuperscript{132} Avishai, The Tragedy of Zionism, 185
Christian, in addition to Jewish). Additionally, the draft stated, “future legislation in Israel shall be guided by the basic principles of Jewish law.”

The resulting constitutional debate and compromise both laid bare the deep ideological cleavages that existed within Israeli society and the Zionist movement, and revealed some unexpected commonalities. While the debate was always expected to be impassioned, the depth and breadth of disagreement surprised many veteran Mapai members. Members of the left-wing United Workers Party (Mifleget HaPoalim HaMeuhedet in Hebrew, abbreviated as Mapam) were cool to the religious framing of Kohn’s draft. The party was heavily influenced by a Marxist-Zionist ideology and had, at one point, recognized the national rights of Palestinian Arabs and argued against the partition plan, agitating instead for a binational state. They argued for a stricter separation of religion and state, an enumerated American-style Bill of Rights and the institution of civil marriage that could be performed and recognized outside the confines of religious law. The religious parties, on the other hand, were unnerved by the possibility that a secular-democratic constitution, even one with a substantial space for the intermingling of religion and state, would permanently dash their hopes, nurtured for decades, of establishing Orthodox religious law as the governing culture of the state. Emblematic of this sentiment was the following statement by a member of one of the Ultra-Orthodox parties during the constitutional debate: “Israel’s Torah is her Constitution.” A member of the usually more conciliatory national religious faction who was appointed minister of religious

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133 Norman Zucker, The Coming Crisis in Israel (MIT Press, Boston 1973), 64
134 Avishai, The Tragedy of Zionism, 185.
affairs in Ben-Gurion’s provisional cabinet told a visiting Arthur Koestler, “Israel will live according to the law of Moses, which needs not the slightest reform.” Members of the dominant Mapai were by no means united on any of these questions, and voiced a plethora of conflicting views.

The outcome of these debates is well-known. The constituent assembly voted 50 to 38 on a compromise proposed by Yizhar Harari, a member of the progressive party, to postpone the adoption of a constitution, and instead legislate a series of “basic laws” that could serve as building blocks of a future constitutional assembly. This compromise was facilitated by an alliance between Ben-Gurion’s Mapam party and the United Religious Front, which represented the interests of the various shades of Jewish Orthodoxy in the first Knesset. Subsequently, Ben-Gurion formed his first government with the United Religious Front as senior coalition partners and converted the constituent assembly into Israel’s first formal parliament. What is less well understood is the source of this historic compromise. Ben-Gurion’s decision to bring the religious parties into the coalition inaugurated a long tradition of partnership between the two factions. Most labor governments over the next several decades would be dependent upon the religious parties for their parliamentary majority. What caused Ben-Gurion and his colleagues in Mapai to prefer a coalition with Orthodoxy, with all the political and policy ramifications, rather than join forces with their brethren on the secular, socialist left?

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Many scholars attribute Ben-Gurion’s choice to simple hard-nosed politicking.\textsuperscript{138} Mapam had opposed Ben-Gurion by supporting the possibility of a bi-national state for Jews and Arabs, and hewed a pro-Soviet line that made Ben-Gurion, who sought to establish Israel as a reliable American ally, deeply uneasy. Additionally, political factions that represented the Kibbutz movement were opposed to Ben-Gurion’s desire to extend state power and institutions into areas where the Kibbutzim had previously operated autonomously. Others, such as Bernard Avishai in \textit{The Tragedy of Zionism} draw attention to the alleged “compliancy” of the “Torah-bound Rabbinate.”\textsuperscript{139} Since the religious parties were relatively agnostic on matters of economic organization and security, they offered Ben-Gurion the previously un-dreamed of chance to form a coalition with virtually no opposition on all but a few issues. Amos Elon, an Israeli writer and journalist summed up the prevailing sentiment around Ben-Gurion’s decision by saying, “He [Ben-Gurion] didn’t want to take Mapam into the government; they were philo-Soviet. He didn’t want Begin’s Herut, which he considered fascist and recently terrorist…He liked the idea of ruling without real opposition. So Ben-Gurion did the deal with the Orthodox, whose world didn’t touch him and didn’t threaten him.”\textsuperscript{140}

Elon’s summary of Ben-Gurion’s thought process is revealing, not least for what it says about Elon in addition to Ben-Gurion. He and his associates were untroubled by the thought of handing over the keys to crucial parts of Israeli society because their world “didn’t touch him.” For all of Ben-Gurion’s radical secularism,

\textsuperscript{138} See for example, Martin Edelman, “\textit{The New Israeli Constitution}.” Middle Eastern Studies 36 (April, 2000), and Bernard Avishai, \textit{The Hebrew Republic}, 40-45.
\textsuperscript{139} Avishai, \textit{The Tragedy of Zionism}, 187.
\textsuperscript{140} Avishai, \textit{The Hebrew Republic}, 43.
he was as deeply and unequivocally Jewish, with an unimpeachable family lineage and a deep knowledge of Jewish culture and religious texts. He once called a press conference to announce a new interpretation of a text he had recently hit upon.\footnote{Yorum Hazoney, \textit{The Jewish State}, 271.} His Jewish identity would never be questioned. He would never have to prove his identity was authentic. One of the reasons he felt their “world didn’t threaten him” was that he was handing over control over institutions that held little sway in his life, even if they would become crucially important to those on the fringes of the new community. Yet Elon’s defense of Ben-Gurion is also revealing, because of what it says about labor Zionism. Elon was for many years a reporter for \textit{Haaretz}, a liberal Israeli daily identified with the left-leaning labor establishment.\footnote{Avishai, \textit{The Hebrew Republic}. 43.} The contention that the Religious presented little resistance to Ben-Gurion undersells their ideological commitment and democratic mandate. They were not meek, bespectacled rabbis content to stand on the sidelines while Ben-Gurion built the state in his desired image. The source of the alleged lack of opposition between the two factions was that labor Zionism’s conception of Jewish identity mirrored the religious’ conception.

Mapam, after all did not merely present opposition on matters of security and economics, but posed a fundamental challenge to the labor Zionist worldview regarding the contours of the Jewish nation and its place within the new Israeli State. The institution of civil marriage would have meant placing a vital component of Jewish identity construction outside the reach of the religious establishment, with all the attendant consequences for intermarriage and self-conception. The passage of a codified bill of rights, rights that presumably would have applied to every citizen
equally, would have challenged many of the policy formulation soon to be enacted, such as exclusively religious marriage and confiscatory land policies, that would accord material and social privileges to those defined as Jews.\textsuperscript{143} Mapam may have spoken the language of secular social democracy, but left unspoken was an ideological program whose natural consequence was a radically different definition of Jewishness and nationality in Israel. It was a vision in which the individual was accorded far more power to define their membership in a chosen community, where movement between various cultural communities was vastly easier and depended more on individual effort and assimilation and less on the legal sanction of a religious or legal bureaucracy.

Religious Zionists, on the other hand, adhered to a definition of Jewishness that fit uneasily, at best, with liberal society. Jewish religious law, which these factions hoped would come to constitute an increasing source of inspiration for Israeli identity and public law, defines a Jew as someone who is born of a Jewish mother or has converted according to Orthodox procedure.\textsuperscript{144} The first part of this definition makes it clear that for the religious parties, Jewish identity was inherited. It was something that individuals were born with, rather than something they acquired by conscious choice. The difficulty of leaving Jewishness behind illustrates this point powerfully. A well-known teaching in Jewish religious tradition is that “A Jew, even if he has sinned, remains a Jew.”\textsuperscript{145} Thus, if a Jew converted to another religion or chose to practice idolatry, he or she continued to be regarded as members of the

\begin{itemize}
  \item \textsuperscript{143} Avishai, \textit{The Tragedy of Zionism}, 188.
  \item \textsuperscript{144} Howard Sachar, \textit{A History of Israel}, 606.
  \item \textsuperscript{145} \textit{Rufeisen v. Ministry of Interior}, 16 P.D. 2428 (1962),
\end{itemize}
Jewish community, even if they no longer were in good standing. The near impossibility of leaving behind one’s Jewish identity in the Orthodox religious context serves to emphasize the fact that religious Zionists saw Judaism as an inherited identity, rather than one acquired by choice.

The option of conversion is often cited as proof that Judaism is a community that others can join. Crucially, however, in Orthodox practice conversion is excruciatingly difficult and disputes regarding an individual’s Jewish identity are solved through the rulings of rabbis and religious judges. An individual who had not converted and yet claimed Jewish identity, or had been converted by an alternative stream of Judaism, was not accepted to be legally Jewish. Conversions were not recognized until the presiding judges of a rabbinical court decided that the individual’s claim to Jewish identity was in fact legitimate. Religious Zionists, drawing most of their vocabulary and policy program from religious law, effectively deprived the individual of any autonomy in the determination of a crucial, and legally consequential, part of his identity. In their demands for a religious definition of Jewishness, and religious courts to enforce it, religious Zionists argued for the constitution of a legally binding Jewish identity that would be the product of birth and beyond the ability of an individual to control.

This is not to say that the conception of Jewish identity and its place in the new Israeli State held by David Ben-Gurion’s Mapai was identical to the various religious parties that would constitute their main coalition partners over the first fifteen years of the state. It assuredly was not. Many if not most in the labor

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146 The Institute for Halachic Conversion, last modified in 2007. 
http://www.halakhicconversion.org/introduction_bet_din.html
establishment were secularists who had little interest in giving religious courts power over personal status issues and family law. They were also little interested in the purity of a potential immigrant’s family tree. Identification with the state, service in the army and fluency in Hebrew were far more important than the rulings of hair-splitting Orthodox judges who drew their rulings from Talmudic sources. There were, however, important similarities. In labor Zionism, there existed the vague notion that Jewish identity was imposed, whether by European anti-Semites or fellow community members, and not something one could easily exit. Was not Herzl’s founding polemic born of the anguish he felt when he discovered that his personal dream of emancipation was likely to remain a fantasy? Hadn’t the Zionist pitch to diaspora Jewry, an appeal made eerily, sadly prescient by Nazi inhumanity, been that Jewish life had no future outside of Israel, that assimilation was impossible and coexistence untenable? While the labor establishment and their junior religious partners disagreed on many of the latter’s demands, they largely spoke the same language with regards to national identity. The question was merely which lines ought to be said when, and by whom.147

Coalition politics in the founding era also had consequences far simpler and more mundane, namely the ability of the religious parties to exact concessions from the labor establishment in the years following their first coalition agreement in return for not toppling the government. One of the more consequential of these was the passage in 1953 of the Rabbinical Courts Jurisdiction law. The law effectively made Orthodox Judaism the state religion of Israel. Its provisions include the establishment

147 See Martin Edelman “The New Israeli Constitution”, 1-5 for support for this proposition along individualist-communal lines.
of (Orthodox) rabbinical courts that were empowered to decide whether an immigrant claim to Jewish identity, through conversion or family history, was in fact valid. It also reaffirmed the religious establishment’s power to preside over all marriages, divorces and burials for Jewish citizens, a community whose boundaries orthodoxy was now effectively empowered to define. The law extended orthodoxy’s control over the boundaries and entrance fees of Jewishness even deeper into Israel’s everyday cultural milieu. Official rabbinic bureaucracies were set up to determine which restaurants, hotels and other establishments could be declared kosher. To obtain a certificate that one’s establishment was accepted into the Jewish religious community, one had to meet a criterion set by Judaism’s strictest and least accommodating factions. It was one more subtle demarcation between Jewish and non-Jewish, and one more wall that those wishing to gain access to mainstream community needed to scale.

The consequences of placing family law, what some have called “the first page of the constitution,” in the hands of theocratic institutions are greater than the mere unwanted encroachment of religion into private life. There are many ways of understanding the establishment clause of the American constitution, the article that ensures state neutrality in religious affairs, but one effect of its operation is the weakening of legal, cultural and institutional barriers to intermarriage in a way that broadens the contours of communal identity. By guaranteeing that neutral state authorities would perform marriages, the establishment clause ensured that religious

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149 Avishai, The Hebrew Republic, 87.
150 Gary Jacobsohn, Constitutional Identity, 271
affiliation would not constitute a legal barrier towards the ability of individuals to create whatever family unit they chose. Later, the passage of the 14th Amendment and attendant Supreme Court ruling in *Loving v. Virginia* extended that protection to members of differing racial or ethnic groups.\(^{152}\) Not only, in the words of Aharon Barak, is “the ability of a person to shape his family life in accordance with the autonomy of his own free will…one of the most basic elements of human dignity,” but it is also “a clear expression of a person’s self-realization.”\(^{153}\) A family is both the expression of an individual’s identity and an opportunity for the constitution of new identities through the mixture of diverse backgrounds that inevitably takes place in a family with members from different cultural communities.

While these precedents, and others, have aided in the creation of a new American identity, one that is reasonably inclusive of all of its constituent parts, American jurisprudence does not run in only one direction. The interest that small communities have in preserving religious beliefs that are determined to be “true and objective,” as in the case of *Wisconsin v. Yoder*, have been held to trump the state’s interest in the universal enrollment of all students in public schools. Presumably, one aspect of this balance is a right to cultural preservation and distinctiveness over the state’s interest in the creation of a homogenous civic identity. Justice Scalia articulated similar sentiments in his dissent in the 1994 *Kiryas Joel* case.\(^ {154}\) This is

\(^{152}\) Unfortunately, the Supreme Court has thus far declined to confer the same protection on same-sex couples as it has on interracial couples. Gender remains a barrier in many states to marriages between same-sex couples. However, recent rulings such as *Windsor v. United States*, 570, U.S. 12 (2013) have begun to chip away at these restrictions.

\(^{153}\) Gary Jacobsohn, Constitutional Identity, 271.

\(^{154}\) In the case, involving the drawing of a school district to conform with the contours of the Satmar Jewish community, Justice Scalia argued in his dissent “All its residents also wear unusual dress, have unusual civic customs, and have not much to do with people who are
only to emphasize that the tension between the universal (or at least, the hegemonic) and the particular is not unique to Israel. However, in Israel these particular constitutional disharmonics were amplified by the existence of a highly distinct diasporic national community that continued to exert a gravitational pull on the new state.

Seen in this light, the failure of Israel to pass a constitution that provided for civil marriage, and the resulting passage of the Rabbinical Courts Jurisdiction Law, has profound ramifications for the constitution of Jewish and Israeli identity. The extreme hardship that is imposed on Jews and Arabs who wish to marry and start families together manifests as the continuing inability of Arab citizens of Israel to integrate their identities into a broader Israeli community. Not only does such a system constitute a denial of human dignity and a squelching of self-expression, it also reinforces the notion that these communities represent intrinsically different expressions of human identity that cannot possibly be integrated into a common understanding of membership and community. The results are all too predictable. Intermarriage between Jews and Arabs in Israel is extremely rare, and regarded in a frighteningly negative light. In 2007, over half of Jewish Israelis stated that they regarded a Jew marrying an Arab as akin to “national treason”.

Aside from the inevitable racism that such a law inevitably engendered, there was also the effect of intentionally recreating the very failure of emancipation that...
Jews had so bemoaned, but this time with Jews as the majority. Many Jewish proponents of emancipation, including Herzl in his early years, believed that intermarriage would serve to integrate Jews into the wider culture and dilute Jewish identity to the point that it would not be perceived as a meaningful or threatening difference in society. Ultimately, however, Herzl and his allies in the political Zionist movement came to the conclusion that intermarriage was impossible because a long tradition of anti-Semitism rendered the gentile world too hostile toward the Jewish community to make intermarriage, setting aside the goals of cultural preservation, a viable option.\(^{156}\) It was a predictable but cruel irony that Israeli society was now replicating the European failing that Herzl had identified, first with laws that encouraged a separation between different ethnic and religious communities and then with the racism and distrust that such laws inevitably engendered.

Israel’s failure to pass a constitution defined the contours of the Israeli State in addition to the texture of community membership. The pre-state Jewish community in Palestine (\textit{Yishuv}, in Hebrew) was governed and sustained by a series of Zionist organizations. The two most prominent were the Jewish Agency and the Jewish National Fund (JNF). The Jewish Agency served as the government in waiting and fundraising apparatus for Palestine’s Jewish community, while the JNF served as a land bank for settling Jewish collective farms and improving and reclaiming purchased lands. In the absence of a constitution and bill of rights, these institutions were absorbed haphazardly into the new Israeli State structure.\(^ {157}\) It is likely that anachronistic and parochial institutions (the JNF, for example, leases land only to

\(^{156}\) Herzl, \textit{The Jewish State}, 77-8.
\(^{157}\) Theodore Herzl, \textit{The Jewish State}, 20.
Jewish communities and holds the land it owns “in the name of the Jewish people”) such as these would have been rapidly excised from the state apparatus if a constitution with any kind of protections for equality and plurality was the law of the land. Instead, these organizations were allowed to persist, and as organs of the Israeli government no less.

Perhaps the most consequential piece of legislation passed in Israel’s early years was the Law of Return. Jewish immigration to the Jewish national home was Zionism’s core mission, its Raison d’être. Additionally, as socialism, agricultural labor and communal living became increasingly central to Zionist ideology and the social organization of the Yishuv, a steady flow of Jewish immigration became materially essential in addition to ideologically desirable. Of all of the restrictions the British placed on Jewish communal life, constraints on Jewish immigration caused the most pain and frustration. The White Paper of 1939, a British policy paper on plans for the future development of mandate Palestine, is singled out for special opprobrium because it limited Jewish immigration to 75,000 over the next five years just as World War II began.\textsuperscript{158} Many Jews who attempted to flee or immigrate were turned away by other Western democracies, and were unable to gain access to Palestine due to British restrictions. The end of World War II saw hundreds of thousands of Holocaust survivors living in displaced person camps, transforming an immigration debate into a humanitarian imperative.

Considering that the “in-gathering of the exiles” was so central to Zionist ideology, it was a foregone conclusion that one of the Israeli government’s first acts

\textsuperscript{158} Avishai, The Hebrew Republic, 34.
would be to pass a far-reaching immigration bill that would guarantee all members of
the worldwide Jewish community the right to move to Israel and take Israeli
citizenship. Yet beneath the broad agreement about the desirability of Jewish
immigration (the law would eventually pass the Knesset unanimously) stood a
potentially explosive controversy. A law that sought to envelope the entire Jewish
community in its embrace necessarily finds itself with the job of defining the borders
of that group. How was the new state to determine if an individual was truly a
member of the Jewish community, rather than one more war-weary refugee seeking
safety or a spiritual thrill-seeker looking to soak up the biblical history the new state
was beginning to rediscover? At stake were basic questions of citizenship. The Law
of Return would come to represent the primary way in which individuals would be
granted membership in the Israeli political community and, crucially, the Jewish
nation as defined by the new state. The criteria used to determine how an individual
could enter that community and be defined as a member would have a major effect
upon how identity and membership would be constituted, both for the purposes of
immigration and in everyday life.

Likely recognizing the intensely controversial nature of these questions, the
Knesset chose instead to rally around a political interest common to them all:
maximizing Jewish immigration to the new state. To do that, the Knesset adopted a
course of action well-known to politicians around the world: it punted. The Law, as
passed by the Knesset, merely stated, “vvery Jew has the right to immigrate to the
country.” The word “Jew” appears in the text of the 1950 law five times, and never

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159 Rabinovich, Israel in the Middle East, 102
once is it defined. The only hint of definition is provided in the fifth and final clause that states that the minister of immigration is responsible for the enforcement of the law and “he is empowered to enact regulations in all matters concerning its implementation.” Israel’s population registry promptly issued a regulation in July of 1950, declaring that for the purposes of the Law of Return and the bureaucratic procedure of registering people as Jews a person “Is a Jew by their own declaration (provided they are not members of another religion).” This definition ensured that legalistic wrangling would not impede the arrival of hundreds of thousands of Jewish refugees, and also helped to maximize the number of Jews eligible for immigration while postponing a cultural battle over the exact definition of the word “Jew.”

Israel’s first decade embodied the compromise and contradiction that was at the heart of the political Zionist ideology that had come to hold power. Those in power established democratic institutions and honored Israel’s founding promise of equal rights, but increasingly aided and abetted the formation of a national identity that impeded the ability of individuals to shape their own distinct character. The consequences were minority communities that were denied a full chance to culturally integrate into the new state and a cultural majority that remained shackled to an identity whose boundaries had been constituted in the diaspora. The compromise that was built was delicate, and relied upon a series of key questions remaining unanswered or unclear. It was only a matter of time before individual initiative and chance placed dramatic choices before the Israeli State, choices that would force the community to further define and constitute its boundaries.

160 Rabinovich, Israel in the Middle East, 102
161 A.B. Yehoshua, Defining Who is a Jew, Haaretz September 4th, 2013
Chapter Three
The Love of a Distant Brother
“Certainly, Brother Daniel will love Israel. This he has proved beyond all doubt. But such love will be from without—the love of a distant brother. He will not be a true inherent part of this Jewish world.”
—Justice Silberg

Many years after the failure of his landmark lawsuit, Oswald Rufeisen recounted his thinking on the matter to his biographer. Regarding his legal situation, he confided, “Citizenship had not been the aim of my efforts. I have always known that I would become a citizen one way or another…my aim was to establish a legal precedent.” While the motivation behind Rufeisen’s lawsuit may seem unimportant to the broader legal, identity and constitutional questions of identity at stake, it in fact lays bare the true nature of the disharmony present in Israel’s conflicting identities. Rufeisen did not allege that he was being denied a formal democratic right per se, naturalization provided him with a feasible pathway to legal citizenship. Rather, he sought to challenge the cultural and constitutional consensus that individual identity was determined by societal consensus or family history. He was not challenging the Jewishness of the state, only the idea that it was the institutions of the state that are empowered to affix, or revoke, that identity.

162 Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 16
163 Tec, In the Lion’s Den, 226. Rufeisen’s confidence in the matter likely had to do with his exceptional life story and record of courage during the Holocaust. His actions and undisputed love of the country made his eventual acquisition of citizenship a foregone conclusion.
164 There are some interesting parallels between the ways in which Brother Daniel interacted with a state unprepared to recognize him as part of the community, and how Frederick Douglass waged a battle to end slavery and become an American citizen. According to Wayne Moore, Douglass discovered “a form of active self-constitution: becoming a member of the polity through one’s actions and not just those of other persons.” Douglass’s quest was facilitated by a constitution that ultimately grew to include him, whereas Brother Daniel was stymied by a rigidly historical Jewish identity. Wayne Moore “Constitutional Citizenship.” In Constitutional Politics, edited by Sotirios Barber and Robert George, (Princeton: Princeton University Press, 2001), 254.
This same thread runs through many of the other contentious cases regarding identity and community that worked their way through Israel’s legal system in the middle decades of the state’s history. Benjamin Shalit, who married a non-Jewish woman and fought to have his children registered as members of the Jewish nation, took aim at a similar constitutional principle. The state did not contest the citizenship of his young children or the validity of his non-Jewish marriage. The argument was about what labels should be attached to his newborn children. Shalit argued that it was the family’s prerogative to determine this identity, while the state argued that objective criteria, determined by a state agency, must apply. In a famous case about the validity of non-Orthodox conversions to Judaism, the issue was not whether the conversion would be recognized, but whether the women’s ID card would read “converted to Judaism” or simply “Jewish.” One connotes authentic and organic communal belonging, while the other signifies a newcomer, someone whose communal attachment is different, weaker and potentially open to question. Here as well the issue was not about formal rights or equality, but rather about deeper issues of community, recognition and belonging.

While it is true that the denial or revocation of one’s formal or legal identity implicates individual dignity, autonomy and self-worth, Israel remains a state where identity carries with it material advantages and disabilities. Identity determines whether individuals are compelled to serve in the military, gaining the prestige, skills and social legitimacy that go along with service. Certain semipublic institutions, like

165 Gary Jacobsohn, Apple of Gold, 166.
the Jewish National Fund, that own, buy and lease land only open their doors to legally recognized members of the Jewish people. These policies illuminate the underlying tensions within Israel’s democratic order, conflicts that emanate from issues of membership and identity.

This chapter will analyze several landmark cases from the Israeli Supreme Court that dealt with matters of national identification, personal registration and religious conversion. It will seek to place these cases into their legal and cultural context and explicate their reasoning and practical effect. The central, organizing question in these cases was which of the various understandings of Jewish identity and community offered by the various strands of Zionist theory would be accepted as culturally and legally binding in the state of Israel. It is a widely held tenet of constitutional theory that one role of a high court is pedagogical—teaching the citizenry about the political and communal order in which they live. If the courts send the message that certain individuals fall outside the national or political community, it cannot but alter their treatment at the hands of their fellow citizens both in private and public life. The specific communal identity that judicial and legislative action constituted into the legal and cultural fabric of the Israeli State is directly traceable to Herzl’s political Zionism and represented a direct and deliberate rebuke of Ha’am’s cultural Zionist vision. The practical policy outcomes of these decisions and the intellectual pillars used to support their arguments reveal both the contradiction between a fully inclusive democratic community and political Zionism,

and the tragically unrealized potential of Ha’am’s vision to fuse a newly created Jewish cultural community with the best of liberal democracy.

Oswald Rufeisen’s landmark suit almost didn’t happen for the most elementary of reasons: Rufeisen was broke. As a poor immigrant and Catholic monk, he had almost no resources. He wrote to several contacts and friends, including the mayor of Florence and the head of the Ratisbonne Monastery in Jerusalem. Through the generosity of others Rufeisen was able to pursue his lawsuit. Yet no sooner did he acquire the money than he found that almost no one would accept it. The first few lawyers he contacted refused to represent him. He hired one lawyer who kept the case for a year before deciding not to represent him at the Court. The range of emotions that Rufeisen encountered, from puzzlement to outright hostility, demonstrated a cultural atmosphere that saw his quest as quixotic at best, dangerous at worst. In the end, Rufeisen found two lawyers, Yaron and Kushmir, who were willing to represent him. Perhaps not coincidently, they were both members of the leftist Mapam party, part of the dying political legacy of Ahad Ha’am’s vision of a Jewish state made Jewish by personal choices and lived experience; a Jewishness that defied objective definition.

Arguments were made before a panel of five Israeli Supreme Court justices, a panel that was enlarged due to the politically contentious issue at hand. Throughout the trial, the judges did not attempt to hide their personal admiration of the man who observed the proceedings quietly from a seat in a section reserved for the public. There was universal agreement on the content of Rufeisen’s character. In some ways,

168 Tec, In the Lion’s Den, 228.
this made Rufeisen the ideal test case for this issue, since there were no questions about his sincerity and the issue rested on the Court’s interpretation of the Law of Return alone. Brother Daniel was a man who had been born Jewish and was an active Zionist in his youth, a hero who had risked his life to save hundreds of Jews during the Shoah, and someone who still proudly proclaimed his Zionism and allegiance to the Jewish people after his conversion. The way Justice Silberg framed the question revealed the degree of esteem in which the Court’s members held Rufeisen personally. “Can Brother Daniel” the court asked, “be denied the burning desire of his life to be completely identified with the people which he loves and to become a citizen of the land of his dreams, not as a stranger coming from without but as a Jew returning home?” One could scarcely imagine a more favorable framing of the question. However, despite the sympathy of the members of the court, the answer, delivered “with great psychological difficulty,” was yes, by a decisive four to one vote.

The end result of the case was clear: while Rufeisen would eventually acquire citizenship through naturalization, the Court legally severed him from his Jewish identity, and therefore barred his access to the national community. The majority opinion determined that Rufeisen lay outside the legally constituted boundaries of the Jewish people in Israel. Underlying the majority opinion was a particular understanding of Jewish identity, Zionist purpose and communal membership that would have significant repercussions for the ability of individuals to stake a claim to Jewish and Israeli identity. There was, however, one issue on which both the majority

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170 Jacobsohn, Apple of Gold, 64.
and the minority agreed: the Law of Return would be interpreted according to secular, rather than religious, understandings of the term “Jew.” This secular interpretation ensured that, “the Law of Return…cannot be construed according to religious law”.¹⁷¹ Two reasons seemed to animate the Court’s out-of-hand rejection of this argument. The first was the courts evident desire to reaffirm that Israel was not a theocracy, which would have transgressed its self-identification as a democracy. Israel’s Declaration of Independence established the country as a democracy, and the first few Basic Laws passed as a result of the Hariri compromise dealt with the design of democratic institutions. To rule that perhaps the most important law for the purposes of identity formation drew its substance from theocratic sources would have severely undermined Israel’s identity as a liberal-democratic state. A possible second reason for the Court’s refusal to even consider that option was the fact that, according to Jewish religious law, the case was scarcely in doubt: Rufeisen was a Jew. He was born to a Jewish mother, and therefore met the Halachic standard for Jewishness. Even his conversion did not present an insurmountable obstacle, due to the large body of Jewish religious legal commentary stating that a Jew who sins (and conversion away from the Jewish faith was considered a sin) remains a Jew according to communal norms.¹⁷² The refusal of the Court to follow the well-worn track of religious definition allowed it to engage in a discussion about how Jewish identity would be constituted for the purposes of civil law in the State of Israel.

Despite the Court’s clear rejection of an explicitly religious definition of the term, it is clear that religious sentiments and biases were present in the Court’s

¹⁷¹ Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 1
analysis. The second paragraph of Justice Silberg’s majority opinion notes “but this sense of profound sympathy and obligation [toward Rufeisen] must not be permitted to mislead and to justify our profaning the concept of “Jew” both in name and in meaning”. 173 Jewishness, in Justice Silberg’s ostensibly secular understanding, is still something sacred, for how else could it be “profaned” by allowing it to encompass an individual who converted to another faith? Soon after, he makes reference to the “sanctified” significance of Jewish identity. Present in Silberg’s analysis is the sense that Jewish identity would be besmirched, that it would lose something highly important to its current constitution if the Court allowed someone who actively practiced Christianity to also lay claim to a Jewish identity. 174

In many ways Justice Silberg’s aversion to the idea of a Jewish Christian grew out of one of the foundational modes of his analysis: an appeal to historical continuity. Every Jew, whether he belongs to Orthodoxy or is an Atheist, is “bound, willingly or unwillingly, by an umbilical cord to historical Judaism from which he draws his language and his idiom.” 175 All modes of Jewish expression, be they ancient or modern, derive their voices from this common historical heritage. For Justice Silberg, even Zionism, so often thought of as a radical break from a long era of historical stagnation and continuity, is incomprehensible without this historic inheritance. He quotes from a submission from the state attorney who argues, “Even the national idea [Zionism]… could not sever at one stroke the ancient bonds between Israel and its Torah, between the people and it sacred law. On the contrary, national

sentiment has endeavored to tie *these very bonds* more tightly by nationalism.”¹⁷⁶ The dream of restoring Jewish sovereignty, in his conception, is incomprehensible without an intimate connection to those ancient Jewish sovereigns and the religion they passed down to us. Herzl’s understanding of Jewish continuity lives within these sentiments, given his argument that “We are one people—our enemies have made us one without our consent, as repeatedly happens in history.”¹⁷⁷

In a way, Justice Silberg transforms the historical Jewish experience into a constitution of sorts, a substitute for the still unwritten constitution of the State of Israel. The Jewish communities of the past constructed a very particular understanding of what Jewish identity could encompass, and we the people of today are not free to alter it whenever it suits us. His interpretation of this historical constitution is strikingly originialist, in the sense that we are bound to interpret Jewish identity not as we might understand it today but as the original crafters of the communal identity meant it to be understood.¹⁷⁸ In Justice Silberg’s reasoning “Only the simple believe that we are creating here a new culture…a people which is almost as old as the human race cannot start *Ab ovo.*”¹⁷⁹ A nation that based so much of its legitimacy on its “historic and traditional attachment” to its homeland must

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¹⁷⁶ Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 12
¹⁷⁸ Jack Balkin identifies a similar analytical instinct in certain schools of American constitutional jurisprudence. He terms it “Original expected application”, which asks “how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense.” Much like the formula articulated by Justice Silberg, it deprives future generations of almost their entire agency to determine the contours of their own identity. Balkin ultimately rejects this formulation as insufficiently responsive to the active role each generation plays in constituting itself. See Jack Balkin, *Living Originalism*, (Cambridge: Harvard University Press, 2011), 8.
¹⁷⁹ Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 11
necessarily hew to an originalist understanding of its identity, less its historic claims to the Land of Israel be weakened alongside its historic self-understanding.

Since it is the Jewishness of the past that defines the Jewishness of the present, and because the Jewishness of the past was not only the opposite of Christianity, but also its victim, Justice Silberg rejected the idea that one could ever hold both identities simultaneously and harmoniously. Under Justice Silberg’s originalist interpretation of this “historical constitution,” Jewish and Christian identities are polar opposites, incapable of existing together without rendering both incomprehensible. 180 Extreme doubts exist as to whether someone could share an identity with those who burned Jews at the stake during the Spanish Inquisition while also celebrating and mourning the victims of those crimes. Such an identity is historically unintelligible, and therefore the majority on the Court finds that it must be rejected. 181 The injection of disharmony into national identity also carried with it potential consequences for the physical security of the state. Israel faced existential challenges in its early years, and toleration of nontraditional and disharmonic identities ran the risk of sapping the vigor and strength of the new state. At a time when unity was of paramount importance to confront economic and foreign policy challenges, such as the economic shortages brought on by mass immigration or the persistent military threat from Egypt, a Kulturkampf between religious and secular

180 For an examination of this argument in the context of American constitutional identity, see John Finn. “Transformation or Transmogrification? Ackerman, Hobbes (as in Calvin and Hobbes), and the Puzzle of Changing Constitutional Identity.” Constitutional Political Economy 10 (1999):

181 Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 11
Jews might have decreased religious participation in the armed services and bred mistrust and ill-feeling.  

Justice Landau made Justice Silberg’s historicism even more explicit by concurring in the judgment but offering an important addendum to the logic outlined by his colleague. Going beyond an appeal to the vast expanse of Jewish history, he argued that the individuals whose guidance should be sought when seeking the correct decision in this case are “the fathers of Zionism.” It was they who outlined the vision of ingathering the Jews to their ancient home, so their understanding of the issue at hand is crucial. The fathers of Zionism, whom Landau describes as prominent political actors and intellectual contributors, assume a role analogous with that of the framers of the American constitution, whose insights are regularly sought after in questions of constitutional interpretation. In invoking their guidance, he also explicitly injected the Court into the issue of how Zionism conceived of Jewish identity. A debate, which had taken place in polemics, pamphlets and public speeches, was now being considered by Israel’s highest court. By appealing to the “Fathers of Zionism,” Justice Landau, speaking on behalf of a majority on the Court, weighed in on what had previously been an ideological disagreement but was now a legal question of the gravest concern. The Court placed itself in the position to choose

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182 This concern has resurfaced with contemporary efforts to integrate Ultra-Orthodox Jews into Israeli society. Recently passed legislation intended to end the near-universal exemption Ultra-Orthodox males receive from army service has been met with massive protests, ugly political rhetoric and a decrease in the number of Ultra-Orthodox Jews volunteering for national service. Jeremy Sharon “Haredi Enlistment in Civil Service Declines Following Passage of Conscription Law” March 26th, 2014. http://www.jpost.com/National-News/Haredi-enlistment-to-Civilian-Service-declines-following-passage-of-conscription-law-346551 Additionally, see Martin Edelman, “The New Israeli Constitution,” 20.

which conception of Jewish identity and peoplehood would become legally binding jurisprudence. This debate had started with an argument between Ha’am and Herzl, progressed to fights over constitutionalism and legislation, and was now before Israel’s highest court to have judgment passed.

Perhaps unsurprisingly, given the dominance of Herzl’s conception of Jewish identity in Israel’s founding political documents and contemporary political landscape, the majority in this case sided decisively with Herzl. In his concurrence, Justice Landau quotes from the letter Herzl wrote recommending against the admittance of a Jewish convert to Christianity to the Zionist Organization.\(^\text{184}\) This was cited as specific evidence that Herzl’s conception of Jewish identity did not include Jews who had adopted Christianity, and also to support the wider historical narrative that Justice Silberg had laid out in his opinion. So direct was the state’s appeal to the logic and wisdom of Zionism’s instigators that sections of Herzl’s *The Jewish State* were actually read into the Court’s record and entered as evidence.\(^\text{185}\) Justice Landau quotes a passage in which Herzl writes, “We still regard ourselves as belonging to the same community through our ancestral faith alone.”\(^\text{186}\) Implicit in the Court’s analysis is the idea that the foundation of the State of Israel did not present a fundamental break with Jewish self-conception. In Herzl’s writing, and the Court’s decision, is the idea that Israel was founded to provide a physical home to a people persecuted by dint of their distinct identity. In the Court’s appeal to the vast expanse of Jewish history and to Herzl’s writings is the rejection of the idea of the State of


\(^{185}\) Jackson, “Brother Daniel: The Construction of Jewish Identity in the Israeli Supreme Court”, 124

Israel as a catalyst for a new understanding of Jewish identity, and the acceptance of it as a new structure erected to protect an old one from persecution and physical harm.\footnote{187}

However much they may have wanted to, the majority could not simply ignore Ahad Ha’am. He had contributed immensely to Zionist ideology and the Hebrew language, and political parties remained in the Knesset that made his worldview their guiding ideology. In Justice Landau’s words, “modern Zionism is a synthesis of his [Ha’am’s] thoughts, and Herzl’s.”\footnote{188} So instead of neglecting him, they did their best to reframe his deep appreciation for Jewish history and culture as a judgment against those who, like Brother Daniel, supposedly abandoned it. “Jewish nationalism,” according to Ha’am, is a “grotesque creature” without Jewish religion, and those who would attempt to “free” national consciousness from “the past of the nation” might as well try to separate trees from their roots.\footnote{189} The justices that constituted the majority chose to focus on Ahad Ha’am’s deep concern for Jewishness, a concern that Herzl lacked, at least in the cultural sense. By attempting to show that both Herzl and Ha’am felt Jews to be defined by their history they

\footnote{187 We can imagine other explanations for why the High Court rendered the verdict it did in this case. One might argue that a nation in the infancy of its political development, faced by external threats, cannot afford to greatly expand its core national identity, or risk an internal culture war over basic questions of self-definition. However, an approach that emphasizes the incomplete political development of the Israeli state is insufficient for two reasons. First, this approach allows us to avoid the fundamental issue under consideration: the compatibility of the identity at the core of Jewish nationalism with liberal-democracy. Secondly, there is considerable evidence that the Israeli state was abnormally strong, centralized, and well developed for such a young polity, in both a relative and absolute sense. In this light, the fear that exterior forces might tear the state apart is less plausible. See Michael Barnett, Confronting the Cost of War: Military Power, State, and Society in Egypt and Israel, (Princeton: Princeton University Press, 1992), 64-79.}
\footnote{188 Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 20}
\footnote{189 Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 21}
attempt to create a united Zionist front, a wall against Brother Daniel’s attempted infiltration.

However, a member of his own majority undermined Justice Landau’s questionable interpretation of Ha’am. While he ultimately joined the majority, Justice Berinson spent a significant section of his concurrence lionizing Brother Daniel and emphasizing the sympathy he felt for the plaintiff’s cause. He even contradicts Justice Landau by offering a different reading of Ha’am’s views on Jewish identity that puts him in tension with Herzl. He quotes a passage in which Ha’am is asked about a Jew who “is devoted to his people, its literature…and who longs for its renaissance in its ancestral home,” yet “is a free thinker in the widest and most general meaning of the word…and refuses recognition to Him [G-d].” What is to become of this individual whom, warm feelings for his people aside, in the words of Justice Landau “cut himself off from the national past of his people?” Berinson quotes Ha’am’s reply in which he states, “This Jew is one of us…not only like the multitude who have faith, but in some sense more than they.” If Berinson is sympathetic to the petitioner, and if he disagrees with Justice Landau’s understanding of Ha’am’s views on Jewish identity, what is the argument that persuades him to join the majority opinion? Near the end of his opinion, Justice Berinson claims, his personal feelings aside, “the people themselves…have decided otherwise…for them a Jew who has embraced another religion has withdrawn himself…from the Jewish nation.”

191 Jackson, “Brother Daniel: The Construction of Jewish Identity in the Israeli Supreme Court”, 128
A deferral to popular sentiment is evident throughout the various opinions that constitute the majority judgment. Justice Silberg argues that the Court ought to construe the meaning of the term “Jew” in the Law of Return according to the “common parlance” of the Jewish community, by which he means how the term is understood by the average Jew on the street. Popular works of Jewish literature and culture, written in an approachable vernacular to ensure their accessibility drew a bright line between Jews and Christians, and often linked the entrance into any type of Christian community with a departure, often forced, from the Jewish community. The evidence of their effect can be detected in the reaction of Rufeisen’s old friends to his conversion, which oscillated between bafflement and betrayal. Even his own brother, Arieh recalls asking him “Why did you do it [convert to Catholicism]? Don’t you know what great suffering we had to go through because of Christianity?” By deferring to popular understanding, he created a de facto majoritarian test of identity, one that deprives individuals of their agency to determine for themselves the community in which they belong. Individuals are not, under the majority’s framework, entitled to define themselves, but rather are subject to the judgment of their peers if they wish for admission into the community. The consequence of the Court’s decision to defer to the masses rather than protect the rights of the defendant is that individual agency is subsumed into a legally sanctioned ability by a majority to revoke identities integral to the individuals who aspire to hold them.

194 Tec, In the Lion’s Den, 223.
In doing so the Court, and by extension Israeli society in general, assumed the unwitting roles played by the European nationalists so reviled by Hess and Herzl. Both were individuals who aspired to hold a national identity despite a religious difference, and were denied. The same sequence of events now played out before the Supreme Court of the State of Israel. Additionally, in seeking to show common ground between Ha’am and Herzl by emphasizing their appeal to history they neglected to ask a crucial question: who shapes this history? Do Jews shape Jewish history, or is Jewish identity a predetermined fate, imposed by the outside world onto the Jewish community (or by the Jewish community on certain atypical would be members) without their consent? It is on the question of historical agency that Ha’am and Herzl differ.

Justice Cohen’s solitary dissent represents a fully formed but tragically unapplied alternative to the deterministic Jewish identity offered by the majority and ultimately enshrined at the center of Israeli constitutional jurisprudence. He begins by emphasizing his agreement with several of the propositions before the Court. He agrees that the Law of Return “should not be construed according to Jewish religious law” and that converts to other religions continue to remain Jewish under Halacha. Justice Cohen emphasizes that his dissent is not based upon a desire to apply theology in place of secular law, but rather stems from a fundamental dispute on the manner of secular interpretation applied. His dissent begins by acknowledging the fraught history between the Catholic Church and the Jewish people, a history “soaked with the innocent blood of tens of thousands of martyrs” who were persecuted, tortured

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195 Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 13
and killed by the church. Justice Cohen does not dismiss history as unimportant to an understanding of contemporary identity. The Church, in Justice Cohen’s words “can no more deny its past then we can deny ours, and a Jewish Catholic will forever remain a contradiction in terms.”

Yet after a perfunctory memorial for the Jewish people’s fraught history, Justice Cohen takes a step that none of his colleagues were willing or able to take: he acknowledges the present and faces the future. Historical continuity is not the act of “remaining stagnant” but rather the process of building “on the foundations of the past...renewing and developing.” Historical continuity, in Justice Cohen’s formulation, does not imply an identity determined at one point in time and then forever unchanging, but rather one that its adherents are free to shape, renew and change. His opinion implies a return to definitional agency for Israel and its Jewish citizens. More strikingly, he alone acknowledges the changed circumstances the Jewish community finds itself in. The founding of the State of Israel was a “revolutionary event” fundamentally unmatched in the history of the Jewish people.

Whereas before the Jews were a minority “scattered and dispersed among the

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196 Rufeisen v. Ministry of Interior, 16 P.D. 2428 (1962), 14
197 Id. at 14.
199 Jed Rubenfeld and Jack Balkin have articulated a similar argument about the necessity for constitutional identities to balance their fidelity to the past with an appreciation for the changes wrought by history. Balkin does so by arguing that, “In every generation We The People of the United States make the Constitution our own by calling upon its text and principles and arguing about what they mean in our own time.” A reverence for history is retained, but the present generation is allowed to derive its own lessons from that history. Balkin, Living Originalism, 10-11. Rubenfeld’s argues that democracy should conceive of itself not simply as a project for the here and now, but one spanning great quantities of time. Such an understanding must be balanced with an appreciation that individuals have “a right not to be written upon, not to have one’s life scripted or conscripted by law, not to be made the instrument of dictation.” Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government, (New Haven: Yale University Press, 2001), 12.
nations” now they possess a state and fully fledged membership in the community of nations. As such, this change of circumstances renders “imperative a revision of the values we have long imbibed in exile.” Justice Cohen argues that the process of constituting Jewish identity, and defining its parameters and standards of entry, must change now that Jews are a majority in their own state rather than a disempowered minority. Minorities and majorities face fundamentally different situations regarding the preservation of their identity, and for a majority to continue to act as if it were a minority is to invite historical stagnation and acts of antidemocratic callousness.

Despite the majority opinion’s brief homage to Ha’am, it is only Justice Cohen who appears to have made an effort to faithfully represent Ha’am’s vision for Jewish identity in the Jewish state. In his essays, pamphlets and letters Ha’am spoke constantly of his vision of Zionism as creating a “spiritual center” that would “change the character” of the Jewish people. The purpose of Zionism was to create a new Jewish identity, and Ha’am spoke disdainfully of the western Zionists whose Zionism was born out of a fear of anti-Semitism and desired only “physical ease” in the new state they sought to build. The idea that the foundation of a Jewish state in the historic Land of Israel would have no impact on the constitution of Jewish identity would have struck Ha’am as ludicrous, as the whole point of Zionism was to effect a change in Jewish identity. In this sense, the majority opinion in Rufeisen decisively rejects the vision of Zionism and Jewish identity that Ha’am put forward.

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Furthermore, Justice Cohen discards the objective test of identity all together. Instead, he argues for a “subjective” test whereby anyone who declares that he or she is a Jew returning to Israel to settle there can do so. Such a definition may seem overly broad, and also vulnerable to abuse. What is the state to do when thousands of people with no shred of Jewish connection declare that they are Jews who wish to settle in Israel? Such a judicial test, however, is not merely the proposal of a one-person minority on the Israeli Supreme Court. Similar “subjective” tests have been judicially employed to test the sincerity of individuals in their professions of religious and personal identity. The United States Supreme Court, for example, employed a similar test when interpreting the selective service law during the Vietnam War. In *Seeger v. United States* the Court found that any religious belief occupying “a place in the life of the possessor parallel to that filled by the Orthodox belief in God” was eligible for an exemption from the draft on religious grounds.203

Aside from theoretical objections, there are practical problems that are inseparable from the implementation of a “subjective test,” not the least of which is the potential for abuse or falsification. One possible policy solution to this is to require a higher standard of proof than simply the announcement of an identity by an individual. The United States required that third parties provide testimony on the sincerity of the beliefs of those seeking exemptions, and there is no reason that Israel could not implement a similar system for borderline cases. It would not have been hard for Brother Daniel, for instance, to procure testimonials as to the sincerity of his identification with the Jewish people and Jewish cause. Unavoidably, however, a

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subjective case will inevitably lead to more abuse than an objective test. Justice Cohen eloquently lays out the case for why the benefits accrued from the constitution of a more inclusive community outweigh the negative possibilities of fraud. This is not a point of existential concern, but simply a question of which values the State should choose to prioritize.

Justice Cohen’s emotional appeal was not merely the opinion of one individual. There are indications that large sections of the Jewish diaspora sympathized with the petitioner, and the lone dissenting judge to take his side. In a 1963 edition of *Commentary Magazine*, then a fixture of the mainstream American Jewish establishment, Marc Galanter wrote a scathing criticism of the majority opinion in the case. He argued that the Court continued to behave too much like the representative of a disempowered minority, and not enough as the sovereign arm of a nation state. He argued that by appealing constantly to “the authority of popular usage” the Justices essentially created an “objective test” of Jewishness. Justice Cohen’s argument, that the term “Jew” was left undefined to allow for the widest possible range of definitions to proliferate, is praised. Clearly, the majority opinion did not represent the consensus view in Israel or among the Jewish community more broadly, and support for Justice Cohen’s dissent was palpable in communal discourse. However, the ripples that emanated out from Brother Daniel legal quandary paled in comparison to the political maelstrom that gripped Israel when the Supreme Court considered the case of the identity of a soldier’s newborn children.

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Benjamin Shalit’s story contains little of the larger-than-life drama that animated Rufeisen’s early life, but what his case lacked in personal intrigue it made up for with political drama of the first order. Shalit was a native-born Israeli Jew who married a non-Jewish woman who ultimately became a naturalized Israeli citizen. When their two children were born they sought to have them registered as Jews with the population registry. More specifically, they sought to have the children registered as “of Jewish nationality and without religion” because both parents had rejected their respective religions, identified as nonbelievers and sought to raise their children in this manner. A clerk employed by the Ministry of Interior, following the instructions of the ministry, blocked their request. The ministry’s reasoning was simple: the mother of the two children was not Jewish. Their desires frustrated, the couple appealed to the Supreme Court and presented it with a question with potentially explosive implications: whether a legal status of Jewishness could exist independently of any religious content. Or in other words, whether a secular, cultural definition of Jewishness could exist whose barriers were not guarded by Orthodox Jewish conversion procedures, but rather by simple acculturation and personal intent.

The Supreme Court understood the magnitude of the question contained in the controversy, and took the highly unusual step of convening nine out of the ten justices appointed to the Court to hear this case. The Court divided five to four in favor of the petitioner, and each judge felt compelled to contribute a separate opinions. The Shalit family was allowed to register their children in accordance with their wishes, but the favorable outcome was based largely on technical-legal grounds surrounding the

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authority of the registration clerk to reject a registrant’s declaration. The Court, seeking to avoid or minimize the inevitable political crisis sought to reframe the case as a matter of bureaucratic procedure and prerogative. The majority emphasized, “The question of who is a Jew, and whether the petitioner’s children are Jewish or non-Jewish, did not arise for decision.” The opinions of Justice Cohen and Justice Sussman also begin with the declaration that their judgment ought not to be read as a legal judgment on the boundaries of the Jewish people, but rather as commentary on bureaucratic procedure. Despite the Court’s attempt to hide behind highly technical analysis of bureaucratic execution, it was plainly visible that the Court had handed down a highly important decision for two reasons. The first was that the analytical framework that, in *Rufeisen*, had been relegated to a lonely dissent now found expression in a five-judge majority. The Court did not, however, overrule *Rufeisen*, as the situations were dissimilar enough to be treated as separate cases. *Shalit* concerned the right of parents to pass identities on to dependent children, and dealt with those who were obstinately irreligious rather than active practitioners of another religion. The second is that the Court effectively announced that Jewish identity could exist independently of religion, and could be defined by cultural identification and personal prerogative.

There are profound parallels between Justice Cohen’s *Rufeisen* dissent and the basic analytical tenets of the majority opinion in *Shalit*. An important analytical consideration for Justice Cohen in *Rufeisen* was the revolutionary effect of the founding the state of Israel on Jewish identity, and the inadequacy of continuing to

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apply old understandings to a new situation. A similar appreciation for historical change, and the evolution it brings, buttresses the majority opinions in *Shalit*. Justice Berinson argues, “The fear which apparently existed in the past that in a mixed family of Jew and Gentile the children would follow the non-Jewish faith of the gentile mother cannot and need not be a guide in the state today.” Insulated by almost an additional decade of state building, and a new sense of security from the victory in the Six Day War, the state proved more willing to consider Jewish identity in light of the changed circumstances brought about by the founding of the State of Israel. In a world in which the Jewish people live as a small minority amongst a culturally dominant majority the desire to preserve communal Jewish identity justifies certain practices to maintain Jewish identity. Those same practices, transplanted into the legal fabric of the sovereign state of Israel, are both unnecessary and unbecoming of the democratic values of personal autonomy and the right of individuals to shape their own lives, the state purports to hold.

As a national majority, Justice Berinson appears to argue, Jews in Israel need not concern themselves with assimilation and cultural dilution in the same way as in the diaspora. It is Hebrew that is now the dominant language, and Jewish culture and Jewish time that constitutes society and shapes its rhythm. The children of mixed marriages are educated in Hebrew, and sit in schools in which Jewish history is taught as their history. The lived experiences of these children will be Jewish-inflected Israeli, and in a society shaped by this cultural idiom the state need not, indeed should not, police the legal boundaries of Jewish identity, and instead should defer to the

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conscience of the individual in question, confident that the cultural content of their society will tip the scales in favor of Jewish identification. More than an act of benevolence to its citizens, policies such as this are crucial to ensuring that liberal democracy permeates all aspects of society, and are not merely the province of formal democratic procedure. Not only will national solidarity be preserved, but democracy will be strengthened. A diasporic minority that polices its identity is lauded for steadfastly preserving its unique culture. “What a majority produces,” writes Professor Shaul Magid, “when it identifies and acts as a victimized minority is tyranny.” A national majority that continues to act as if it does not possess sovereign authority inevitably shades into exclusion and discrimination.

The minority disputed this understanding of historical change. Justice Silberg, who authored the core of the majority opinion in Rufeisen, offered an emphatic defense of his analytical framework. The vast majority of Jews, he argues, continue to live outside the State of Israel and their self-conceptions have only been marginally altered by its formation. “The nation” he writes, “whose characteristics we seek is not the small group, the Israel group, which as a nation does not exist at all, but the large Jewish nation of some 13 million members.” Implicit in this claim is the idea that not only is there no independent Jewish-Israeli identity, separate from the Diaspora, but that the state of Israel does not, indeed cannot, exert influence on diasporic Jewish

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211 To this point, Gershom Gorenberg argued, “The fear sometimes expressed today on the religious right that familiarity with Arab culture will produce “assimilation” is one of many signs that the [political] right has yet to free itself of diaspora anxieties and accept that Jews have their own country. Assimilation is a legitimate concern of minorities, not of a majority.” Gorenberg, The Unmaking of Israel, 237.  
identity. It may appear that these two justices are debating history, but in reality they are debating Zionism. The question before them was whether Zionism is about transplantation or reimagination. For some, the fundamental aim of Zionism was to relocate an already defined national community in a new polity, out of reach of European pogroms, discrimination and incitement. Others believed this understanding was too narrow. They argued that the fundamental purpose of the project was to reshape Jewish national identity from something that was the product of a diasporic existence to one befitting a national majority, newly ingathered into its ancestral home. Justice Silberg hews to Herzl’s understanding that Zionism was mainly about the creation of a state to house a distinct national community whose identity had already been formed over its long and turbulent history. Justice Berinson and the majority take Ha’am’s view that the Jewish state was meant to be a “spiritual center,” an entity that could inspire diasporic communities to reach new understandings of themselves and their communities. In a letter to one of his contemporaries, Ha’am wrote, “This center [the future Jewish state] will exert spiritual influence on the people.”

Shalit is shrouded in technical legal language dealing with the finer points of bureaucratic execution, the result of a Court desperate to avoid a full-fledged political confrontation between the political and cultural institutions of Jewish Orthodoxy and the secular Zionist majority. The Court did not want to instigate a Kulturkampf. However, beneath the Court’s appeal to legal technicalities is a profound statement: that control over familial and personal identity ought to be in the hands of the

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individual and not the state. “The Law,” writes Justice Cohn, “[does not] empower him [the registration clerk] to decide upon the matter of the nationality of the petitioner’s children.” Justice Witkon further noted that the only way to spare the country “unnecessary hate” is to “effect the registration in accordance with the notification delivered.” Both of these statements resemble mundane clarifications of ministry protocol, but the implications are far-reaching. By ordering the ministry of interior to accept without question the wishes of the plaintiff, so long as they are provided “in good faith,” the Court effectively removed from the state the power to deny or reclassify the identities of citizens against their will. No longer could bureaucracies impose on the citizenry an objective identity criterion from above, the individual consciousness now governed classification more fully than it ever had before.

As admirable as this outcome was, the true legacy of the Shalit decision was the revival of Justice Cohen’s “subjective test” proposed in his minority opinion in Rufeisen, and the construction of the legal space necessary for the creation of a Jewish identity with which all citizens of the state could identify. The basis for the Jewish identity claimed by Shalit for his children had nothing to do with their heritage or religion, but rather with their intent to bring up their children as Hebrew-speaking Zionist Israelis, “in the same Jewish spirit in which I [Shalit] was brought up.” No religious identification is required, which means that theoretically alternate religious identities need not be forfeited to lay claim to this identity. Implicit in the Shalit decision was the alteration of Jewish identity by construing it more as a matter of

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acculturation and national loyalty rather than as heritage or religious belief. By the
criterion devised by the majority opinion in Shalit, non-Jewish Israelis who speak
Hebrew and identify with the state would be able to retain their distinct religious
identities while identifying fully with the national community and culture of the state
of Israel. The majority opinion in Shalit reveals fully the liberal potential of Ha’am’s
worldview, and of an inclusive Jewish-Israeli identity not governed by heritage.

For all of the attempts by the justices to harmonize the national and
democratic questions at issue in the case, the minority opinion reveals the extent to
which a finding in favor of the state inevitably sublimates democratic understandings
to rank nationalism. Justice Agranat’s dissent speaks of the “national-racial” as being
one of the defining characteristics of any national group. Justice Silberg’s angry
response to one of the petitioner’s arguments further illustrates the retreat from
democratic ideals in the dissent. One of the arguments made by Shalit was that a
definition of Jewishness derived solely from heritage, which is to say the Jewishness
of the mother, stuck too closely to the definition of Jewishness applied by the Nazis to
be granted any legal standing in a Jewish and democratic state. Justice Silberg is
openly disdainful that any individual would have the chutzpa to make such an
argument, accusing the petitioner of engaging in “masochistic pleasure” for
comparing “his own people” to Nazis.216 Justice Silberg claims that Shalit made a key
mistake, for “the impurity of Nazi lore does not lie in that it recognizes different
ethnic groups…its baseness is in its denial of any right to existence and life for the

216 Shalit v. Ministry of Interior (1969) 23 P.D. 60
“inferior” non-Aryan groups”. The sight of a Jewish Israeli Supreme Court justice affording any defense to Nazi dogma is striking enough, but it is Justice Silberg, not the petitioner, who neglects the most important detail.

The democratic dissonance that comes from the minority opinion lies not with the fact that it recognizes different ethnic groups, whose existences in Israel and across the world are beyond question, but rather in their belief that individuals are not empowered to control their own identity. The key difference between the majority and minority opinions is that the majority conceives of national identities as the subjective choices of individuals seeking to associate with a meaningful community, whereas the minority conceives them as objective identities over which individuals have no control. The argument that some individuals, by virtue of their religion or ethnicity, can be excluded from the equal protection of public law cannot exist in harmony with democratic notions of equality, as evidenced by the casual way in which one member of the minority dismissed Rousseaian thought as a viable intellectual framework upon which to build an Israeli-Jewish national community. The only way in which nationalism can coexist harmoniously with liberal-democracy is if individuals, not the state, are empowered to decide which identity they hold and to which national group they belong. The majority in Shalit should be understood as an important step in constituting a Jewish national identity that could exist in greater harmony with Israel’s democratic identity. The difficulty was that Israel’s other democratic institutions soon set to work undoing the Court’s landmark decision.

217 Shalit v. Ministry of Interior (1969) 23 P.D. 60
218 Tamir, Liberal Nationalism, 30-40.
As laudable as was the legacy of the *Shalit* decision, it was extremely short-lived. For all of the efforts of the Court to hide the impact of its decision behind technical legal language, it quickly became apparent that the Court’s attempt at modesty had not appeased the Israeli political and religious establishments. “Court ruling Murderous to Survival of People” was the headline in one prominent newspaper in the Orthodox press, whose cultural and political leaders perceived the Court’s ruling as an intolerable breach of Jewish religious law and dilution of authentic Jewish identity. Orthodox parties in the Knesset, upon which Prime Minister Golda Meir’s governing majority rested, threatened to leave the governing coalition if an amendment clarifying the contours of Jewish identity recognized by the Law of Return was not immediately passed.219

Prime Minister Meir faced a coalition crisis that was in many ways the product of the precedent-setting decision that David Ben-Gurion had made two decades before. By choosing to align the political Zionist left with Jewish Orthodoxy, he had accepted certain compromises on issues of religion and state, and ultimately forfeited the opportunity to pass a constitution. Meir now faced the consequences of that alliance, in the form of a threat to topple her government unless she caved to the religious party’s demands for a legislative redefinition of Jewish identity. She was not completely bereft of options. She could call new elections over the impasse, on a platform of defending an expansive Jewish political community, or she could ally with Menachem Begin’s new Gahal party, a product of the fusion of the old *Herut*

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219 Sachar, *A History of Israel*, 607
party and the Liberal party, and the most moderate incarnation of Begin’s political philosophy yet seen.\(^{220}\)

Ultimately, however, Meir made the same choice her mentor had made twenty years before. She preferred coalition partners who made minimal demands on the issues of economic organization and security orientation, and was prepared to make the relevant sacrifices to appease them. This time, the sacrifice was the imposition of an objective definition of Jewish identity by the Knesset. The Law of Return was amended soon after the decision in *Shalit*, and the amendment specified that a “Jew” for the purposes of the law was someone born of a Jewish mother or converted to Judaism, and not a member of another religion.\(^{221}\) The term that had been left ambiguous at the founding of the state had now been defined, and in a way that injected considerable disharmony into Israel’s democratic and Jewish identities. In addition, an amendment to the population registry law was passed that forbade the registration of any individual as Jewish by nationality if the individual was not also “born of a Jewish mother or…converted to Judaism.” When the Shalit’s tried to register their third child as a Jew, the Supreme Court cited the amended law and denied the request.\(^{222}\) It was not, however, a complete political defeat for those who aspired to a more inclusive definition of Jewish identity. The amendment also granted automatic citizenship to non-Jewish spouses and the children of mixed marriages.\(^{223}\) This was by no means a small achievement, since the ability to gain citizenship alongside their Jewish family members represented a mechanism to achieve a vital

\(^{223}\) Sachar, *A History of Israel*, 607.
basket of civil rights. Many of the justices in the minority in *Shalit* appeared confused as to why the petitioner was demanding to classify his children as a certain nationality, even though their citizenship was not in question. “I have found nothing in the material in this file, no submission of fact or argument, which suggests the petitioner or his wife have been discriminated against.”

Brushing aside the immensely consequential constriction of individual autonomy and human dignity that stems from denying an individual the right to self-identify as he chooses, the Justices in the minority show indifference bordering on ignorance regarding the amount of material discrimination non-Jews are vulnerable to in Israel. The preservation of the pre-state Zionist organizations as part of the Israeli State structure guaranteed a material disadvantage for those not classified as Jews. Lands owned by the Jewish National Fund, for example, could not be leased to non-Jews. Most jarringly, the Court appeared to recognize the relative advantage those classified as Jews enjoyed in Israeli society in a previous case. In *Hassan El Zafdi v. Baruch Benjamin and Attorney General* the Court weighed in on a custody battle over the child of a mixed marriage. The child’s mother was Jewish, and had died, and the child’s father was Muslim. According to Jewish religious law, the child was Jewish while according to Islamic law the child was a Muslim. All of this was at the heart of a complex custody battle between the father and members of the mother’s family. Justice Cohn, after addressing several technical hurdles, argued that the deciding factor was “When in the case of a child there is a choice between the law of two religions or two nationalities, one must choose that law the operation of which will

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yield greater benefit to the child.” The Court determined that the tradition that would more fully benefit the child would be Judaism, because “her interests lie in growing up and living as she does at present, and not in the home…of the appellant.”

*Shalit* concerned the ability of families to choose which identities to bestow upon their children. It was not long after the dust settled from the *Shalit* controversy that individuals seeking entry into the Jewish community forced legal consideration of the issue of conversion. While Judaism is not a proselytizing religion, conversion represents a well-defined point of entry for those born outside the community to enter it. Conversion is codified in Biblical lore, with the story of Ruth providing a sympathetic account of one women’s ardent desire to become a part of the Jewish people. Ruth’s story has been held up as evidence that there is no difference between those who are born into the community and those who enter it by choice. Modern Judaism, split among a plethora of movements, chooses to handle Judaism many different ways. Orthodox movements continue to demand traditional stringencies while more liberal movements adopt less ritualistically arduous pathways to Jewish peoplehood.

Israel handed over guardianship of Judaism to Orthodoxy in the first years of the state, but the question remained how the state would handle potential immigrants whose Jewish identity stemmed from non-Orthodox conversions. Shoshana Miller was eventually forced to find out. Born in Colorado, she converted to Judaism in a

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227 *Id. at* 280.
reform synagogue in Colorado Springs. Several years later, she decided to immigrate to Israel. Upon arriving, she requested that she be registered as a Jew on her identity card. The interior ministry initially refused. Although in the early years of the state the ministry had been controlled by left-wing parties inclined toward lenience on issues of identity and conversion, the ministry had fallen under the control of Shas, the Sephardic Ultra-Orthodox party. Shas hoped to further amend the Law of Return to contain explicit references to conversion through Halacha, and Yitzcak Peretz, the Minister of Interior, was initially opposed to registering Miller in accordance with her wishes. Rather than accept this decision, she sued. Fearful that the Supreme Court might render a sweeping verdict that would doom their chances of further restricting the entryways to the Jewish community, Peretz engaged in a tactical bureaucratic maneuver. He decided to stamp her identity card as “Jewish Convert.” By this step, he transformed Miller’s suit from one about the right to citizenship to one about identity card registration.

The Ministry of Interior justified its decision by making it universal. Under the new policy, all converts wishing to be registered as Jewish in Israel would be registered as Jews, but the word convert would be added to their identity cards. The new policy was disclosed at the Supreme Court hearing in 1986. Thus, the question the Court restricted itself to was whether the ministry could add the word “convert” after the word “Jew” on an identity card. While a seemingly trivial matter, the case touched upon core issues of democratic citizenship and Jewish identity. By

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228 Tiffany Pransky, Boundaries of Belonging, 28.
229 Tiffany Pransky, Boundaries of Belonging, 29.
differentiating between Jews by choice and Jews of birth, even temporarily, the State seemed to imply that there is an intractable difference between those born into an identity and those who seek to assimilate into it. The possibility of assimilation is crucially important in the constitution of a liberal political community, evidence that all are equal and empowered to choose their identities. The Supreme Court was asked to weigh in on the question of whether or not the state could codify a system of that would implicitly affirm the primacy of birth over autonomous choice.

There was little hesitancy in the Court’s answer to the admittedly narrow question presented. The Court unanimously ruled that Israeli law did not permit the addition of the word “convert” to identity cards. The opinion contained echoes of Shalit, in that Supreme Court President Meir Shamgar wrote that the Interior Ministry “does not have the authority to add any additional details beyond that specified in law.” Justice Elon was even more sweeping, drawing on Jewish teachings that argued no distinction should be made between converts and individuals born as Jews. To remind converts of their past demeaned their dignity, and to treat them differently violated principles of Jewish ethics as well as democratic norms. The State’s argument that the matter of classification was of little consequence was dramatically undermined when Shoshana Miller emerged weeping from the Court to proclaim that now she was free to “settle down and arrange my life.”

It was clear that the politicians who had brought the challenge understood the significance of the ruling. Peretz resigned from his ministerial post rather than

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232 Pransky, Boundaries of Belonging, 34.
234 Pransky, Boundaries of Belonging, 35.
implement the decision of the Court. The ruling constituted an emphatic defense of the idea that authentic Jewish identity originated not merely from birth but also from choice. The staunch defense of the right of individuals to change their identities, and to have that new identity honored by the State, represented an important, if marginal victory for personal autonomy in Israel. The ability to claim an identity, rather than merely be its recipient via birth or legal due process is a vitally important aspect of individual autonomy but also a key component in the creation of a national identity that could coexist with liberal democratic norms. Democracy holds at its center the idea of the malleable individual, the idea that individuals are not born, but rather continually constitute themselves through their own actions and choices.

Among the justices who joined the ruling was a young justice named Aharon Barak. He joined the Court in 1978, and had previously served as Israel’s attorney general and as a distinguished professor of law at Hebrew University. In his early years on the Court Barak began to articulate a vision of an empowered Court, a force capable of shaping Israeli society and law. Historically, the Israeli Supreme Court was limited in its powers by the lack of an Israeli constitution. No set of rights and limitations was formally elevated to a position of normative supremacy, and the Court often had to content itself with statutory interpretation. A fully-fledged notion of judicial review did not exist. However, with the passage of two potentially revolutionary additions to Israel’s system of basic laws, the moment was ripe for a fundamental reinterpretation of Israel’s democratic order.

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235 Pransky, Boundaries of Belonging, 35.
Chapter Four
A Special Key

“Indeed, according to my approach, the key to entering the state remains with the state. It has the power to determine the criteria for immigration, and also to deny it utterly. All that it is required to do is that when it uses this key—in so far as this violates a constitutional right of an Israeli spouse—it should be used in a manner that is consistent with the values of the State of Israel, for a proper purpose and not excessively.”

—Justice Aharon Barak

“Not everyone knows this,” opined Aharon Barak in 1992, “but a revolution has occurred in Israel.” That alleged revolution concerned the elevation of individual rights to a central place in Israel’s constitutional jurisprudence and the empowerment of the Supreme Court of Israel to strike down laws that did not comport with Israel’s newly liberal constitutional identity. Only a few years separated Barak’s announcement that a revolution had taken place in Israeli constitutional jurisprudence and his attempt to codify it in the landmark decision Bank Mizrachi v. Migdal Cooperative Village, Israel’s equivalent of Marbury v. Madison. In that case, Barak was able to marshal an 8-1 majority in favor of his understanding of what the Knesset had wrought with the passage of the two new Basic Laws.

Revolution, wrote Bruce Ackerman “is one of the slipperiest words in the modern political vocabulary.” It is worth examining whether the events that transpired lived up to the label Barak assigned to them. The phrase “Constitutional Revolution” is particularly dissonant to the historical ear both because of what revolutions are and what constitutions represent. Revolutions connote change,

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overthrow, rebellion and violence. They signify moments where change occurs outside accepted institutional norms precisely because the people who are revolting seek to upend established conduits of power and procedure. Constitutions, on the other hand, are meant to create bulwarks against rapid change or substantial alteration, and by their very nature eschew violence in favor of democratic deliberation. Gary Jacobson argues that a synthesis can be achieved between these two conflicting visions of revolutionary change by eschewing a focus on the method by which change is achieved in favor of the substance of the change experienced by the polity. In this vein, he proposes that constitutional revolutions can be understood as “paradigmatic displacement[s], however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity.”

A substantial enough shift in the constitutional experience is enough to trigger the revolutionary label, even absent a single shot.

It might, in fact, be even more precise to say that Israel experienced a pause, a suspension of the continuous political motion Israeli society had found itself in since 1948. David Ben-Gurion had argued against the adoption of a constitution immediately after Israel’s founding, contending that because so many of the State’s future citizens had yet to arrive, it would be improper to short circuit the ongoing Israeli revolution by prematurely codifying communal identity into law. Zionism itself had been a revolution, radically altering every facet of Jewish life, culture,

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language and economic station.\textsuperscript{241} Israeli society was full of kinetic energy, yet bereft of any tools to consolidate and entrench the gains of that revolution against even the most ordinary of legislative alterations. Jacobson has argued that to the extent that we can consider the change in Israeli constitutional jurisprudence to be revolutionary, it is best understood as an attempt to “close the door on the Israeli revolution,” freezing Israel’s constitutional evolution at a particular moment, and giving this new communal identity the chance to permeate and transform Israeli society.

Zionism was a call for a Jewish revolution, and a disagreement about what sort of community that revolution should strive to create. It proposed that Jews should cease the emancipationist project; cut the ties that bound them to their political, economic and linguistic communities; and reconstitute themselves as a national community in their historic homeland. The character of that national community however, was never fully agreed upon. Would the community be bound together by religious traditionalism or secular nationalism? Would the polity be a European city-state or a Hebrew-speaking republic? The advent of Israel’s constitutional revolution was an attempt to codify the contours and constitute the substance of that community in a manner not attempted since the founding of the State of Israel. Barak and the Court he led aspired to monumental change; the construction of a new liberal national communal identity in which all citizens could aspire to membership. A paradigm shift in the constitutional experience would demand both a newfound feeling of inclusion on the part of Israel’s non-Jewish minority and an ability by the Jewish majority to see these individuals as authentic and equal community members. It is true that the

\textsuperscript{241} Harshav, “\textit{Thesis on the Historical Context of the Modern Jewish Revolution},” 300-319.
constitutional revolution raised vital democratic rights to legal supremacy in ways that provided for the constitution of a more inclusive national community. However, the unwillingness of Justice Barak and the Court he led to assert the normative supremacy of their revolution over and above a restrictive supra-national concept of Jewish sovereignty limited the change in constitutional experience. Ultimately, an exclusionary Jewish national identity, one that enjoyed preferential status in the eyes of the Israeli State, continued to exist. This incomplete constitutional revolution, and the constitutional dissonance it produced, ultimately led to the passage and subsequent validation of statutes that discriminated against Israeli citizens by tacitly excluding them from the national community.

The sea change in Israel’s constitutional jurisprudence was initiated by the Knesset’s exercise of a peculiar power assigned to it by the compromise enacted in place of the passage of a complete constitution. Originally, the constituent assembly elected in 1949 was tasked with formulating and passing a constitution that would govern the new State of Israel. However, various disagreements prevented the passage of a constitution and made way for the Hariri compromise whereby the constituent assembly converted itself into the first Knesset and empowered itself to pass semi-constitutional basic laws. These basic laws would essentially form chapters of a future constitution, a process of gradual constitutional formation and passage designed to synchronize the process of enshrining core principles with the maturation of Israeli society. In this sense, the Israeli process of constitutional codification did embrace some aspects of Ahad Ha’am’s vision of a dynamic,

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revolutionary Jewish national identity. It left open the possibility that Israeli society could create a genuinely new national community uninhibited by entrenched constitutional provisions that might have frozen in place prior conceptions of communal identity.

Over the years, the Knesset had utilized its authority to pass basic laws nine times. Most of these laws dealt with the design of state institutions and the delineation of their functions. With the exception of the Law of Return, a statute that is not technically a basic law but is generally viewed as expressing a similar fundamental principle, none of these laws codified or expressed a vision of communal norms or identity, preferring instead to deal with institutional design. In doing this, the framers of these laws avoided contentious and politically divisive questions concerning Israel’s Jewish identity. Various factions in the Knesset had long aspired to elevate individual rights to a privileged status in the Israeli legal architecture through the passage of basic laws, but had been stymied by opposition from right-leaning and religious parties, as well as internal disagreement over the scope the protections to be granted. 243 However, in 1992 an opportunity presented itself for compromise, in the form of a proposal to split the proposed Basic Law into multiple bills, two of which were passed into law. One was Basic Law: Freedom of Occupation, which stated, “Every Israeli national or resident has the right to engage in any occupation, profession or trade.” 244 The other was Basic Law: Human Dignity and Liberty, which

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made human dignity a central value for state protection, and also enumerated a host of specific protections including privacy, property and freedom of movement.\footnote{Basic Law: Human Dignity and Liberty (1992).}

Soon after these provisions passed into law, Barak began to make the case publically and in scholarly articles that the Knesset had fundamentally altered the architecture of the Israeli State in a way that the passage of previous Basic Laws had not. His initial arguments, outlined in a speech to the University of Haifa, rest upon the normative status of the rights the laws protect and the construction of the laws themselves. These laws deal with fundamental human rights rather than institutional design, and when the Knesset singled them out for protection it entitled them to “preferred constitutional status” of the type they already enjoy in other liberal-democracies.\footnote{Barak, Aharon, “A Constitutional Revolution: Israel’s Basic Laws” (1993). Faculty Scholarship Series. Paper 3697.}

Israel, in Barak’s formulation, sees itself as a peer of these other countries, and this information allows for greater insight into the purpose of the legislation in question: to protect human rights in Israel in a similar manner to its liberal-democratic peers. Structurally, these basic laws contain safeguards against their violation or alteration that no previous basic laws possessed. The provisions of the Basic Law on human dignity state that the rights it protects may only be violated by a statute that “is directed towards a worthy purpose and only to the extent necessary.”\footnote{Barak, Aharon, “A Constitutional Revolution: Israel’s Basic Laws” .} This provision constituted what came to be called “substantive entrenchment” and, in Barak’s view, prevented the Knesset from enacting a law contradicting the principles of the Basic Law unless it met the requirements of the limitations provision.
In Barak’s formulation, the body that would be tasked with making the determination of whether or not laws met this new standard of scrutiny was the Israeli Supreme Court. An empowered Court wielding a newly created power of judicial review would thus be the mechanism for the realization of the constitutional revolution. Barak’s argument remained purely academic until the landmark *Bank Mizrachi* case. Much like its American counterpart *Marbury v. Madison*, the case is remembered less for the specific legal dispute between the parties and more for the grander arguments made about constitutional interpretation and judicial power. In 1992, the Knesset adopted the Family Agricultural Sector Law as part of an attempt to aid Israel’s agricultural sector after a period of economic crisis. The law established a body with broad powers to settle, restructure and cancel debts that had accumulated in the previous five years. This law was adopted prior to the passage of the Basic Law: Human Dignity and Liberty, and thus was exempt from its oversight. However, a subsequent amendment to the law, redefining the debts subject to the statute, was passed in 1993. It was this law that was challenged as a violation of the newly granted property rights codified in the new basic law. The suit was initially brought before a district court, which ruled that the amendment to the law was incompatible with the Basic Law and was therefore void. This represented the first time an Israeli court had struck down a statute through a process of judicial review as a result of a conflict with one of the newly passed basic laws.

The suit was appealed to the Supreme Court, which convened a panel of nine judges to hear the case. The Court considered two sets of questions, the first being

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248 United Mizrachi Bank v. Migdal Cooperative Village P.D. 221 (1995), 2,
about the exact constitutional reach of the new Basic Laws and the authority of the Court to interpret them, and the second being the much more marginal issue of whether the original agricultural relief law was in fact in conflict with the basic law. The primary argument adopted by the Court was Justice Barak’s, which was that the Knesset, by passing these two basic laws, had limited its power and framed a constitution. Eight of the nine justices concurred with his conclusion, and seven concurred with the structure of his argument. Barak based his claim on the dual nature the Knesset acquired by virtue of the Hariri compromise. The Knesset, Barak argued, is empowered to act in two capacities. Most of the time, the Knesset acts as a legislature that passes ordinary statutes according to democratic and parliamentary procedure.

However, the Hariri compromise also empowered the Knesset to act as a “constituent assembly” and pass normatively superior constitutional provisions. The source of the Knesset’s constitution power is the sovereign entity that granted it in the first place: the people. The provisions that the Knesset passes when it acts in its capacity as a constituent assembly are of a “high normative level,” trump ordinary statutes and can only be changed by another Basic Law. The Knesset thus has the power to “limit itself and thus entrench the provisions of a Basic Law.” Barak’s opinion contains a rejoinder against those who argue that limiting the power of elected officials was undemocratic. “True democracy,” Barak argues, “recognizes the constitutional power to entrench basic human rights against the power of the majority…Granting the majority the power to harm the rights of the minority is

250 Id. at 3.
undemocratic…[and] a democracy of the majority alone that is not accompanied by a democracy of values is but a formal, statistical democracy.”  

The institution empowered to actualize this vision of a constitutional democracy was the Supreme Court, which took the opportunity presented by the passage of these basic laws to assume for itself the power of judicial review, and with it the ability to strike down laws inconsistent with the Court’s vision of Israel as a “democracy of values.” The exact nature of these values could not, in Barak’s view, be sufficiently clarified by the legislature. The Basic laws in question employ “majestic generalities” concerning the importance of human dignity and freedom, but it is up to the Court to “pour content into these majestic generalities” and constitute the newly inclusive community that was heralded by the constitutional revolution. The real significance of this formulation is that by passing laws of heightened normative importance dealing with the relationship between individual citizens and their government, rather than simply the mechanics of government operation, the Knesset had laid the groundwork for a new constitutional identity. By empowering the Court to “pour content” into these undefined values, the Court set itself the task of defining the nature of these values and the nature of the national constitutional identity to which they gave rise. The Court now had the opportunity to construct a new national community bound together not by Jewish religiosity or heritage (markers that inevitably excluded a large swath of Israeli society), but rather by the common values expressed by these new constitutional provisions.

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251 Mizrahi, 5.
252 Barak, Aharon, “A Constitutional Revolution: Israel’s Basic Laws”
Needless to say, this was an expansion of judicial power that left many questions unanswered. Most immediately, the announcement of a “constitutional revolution” elevated the disharmony between Israel’s Jewish and democratic identities to a central place in legal and discourse and placed it front and center in the political life of the country. The Basic Law: Human Dignity and Liberty contained a clause stating its purpose was “to establish…the values of the State of Israel as a Jewish and Democratic State.” It should be abundantly clear that while the law seems to pretend that those values are one and the same there exists considerable scope for disharmony and disagreement. Laws that ensured Jews had preferential access to certain state lands might well further the goal of a Jewish state, but these statutes could not credibly be said to advance democratic values. Israel is periodically wracked by fears of the “demographic threat,” a scenario in which the relatively rapid growth of the country’s Arab minority overwhelms the Jewish population and creates a society that is no longer majority Jewish. Various extreme right-wing parties have advocated the expulsion of Israel’s Arab minority, either through economic incentives or sheer force, in order to safeguard against this “threat.”

Very much connected to this dispute was the nature of equality in the newly elevated constitution. The Basic Law: Human Dignity and Liberty did not contain an analogue to the 14th Amendment to the United States Constitution. Though equality had long been recognized in Israel as a fundamental democratic value under the

protection of the courts, the exact nature of its application remained undefined.\(^{255}\)

Upon first glance, it would appear as if Barak and the Court had assigned themselves a balancing act of epic proportions. In a show of judicial audacity, Barak would pass over an attempt to arrive at some golden mean and instead argue that a fundamental harmonization of these two components of Israeli identity was possible.

Few phrases are more detested in American political discourse than “separate but equal,” the reviled phrase employed in *Plessy* to justify a legal regime that endorsed separation between blacks and whites and for decades ensured that blacks would be denied their civil and human rights. The phrase symbolizes the division, deprivation and social humiliation that results when a society attempts to exclude a portion of its community from political and economic life, and by default erase them from the national identity. The exalted status in which *Brown* is held in American, and all Western, political and legal discourse only serves to emphasize how fundamental the issue of equality has become for modern democratic identity. In Israel in 1997, the Jewish National Fund (JNF) remained one the most fundamental institutional expressions of the country’s national-Jewish character. The JNF was established in 1901 to buy land in Mandate Palestine for Jewish settlement, and grew into the institutional expression of the desire of the Jewish community to own land, build a state and constitute a new national identity. Its collection (Tzedakah) boxes are ubiquitous in Jewish institutions around the world. In 2007 the organization owned 13% of all land in Israel, and it has planted tens of millions of trees all over

\(^{255}\) “But we do not have a written constitution. It is true that we too recognize the equality of citizens before the law as a fundamental principle of our constitutional regime, yet that principle has not been embodied in a written constitution or even in a provision of a basic law” Bergman V. Minister of Finance, HCJ 98/69 (1969), 6-9.
the country. As a holdover from its past as a land bank for a national movement, article twenty-three of a JNF lease states that only Jews may buy, mortgage or lease land owned by the fund.

The government of the State of Israel is an active partner of the JNF, and often allocates lands for the fund to develop. One such allocation was a piece of land in the Eron Valley region, upon which the Jewish Agency set up a settlement town named Katzir. Since the town was built on JNF land, and because the town was a special cooperative society, the town had a policy of only accepting Jews as new members and residents. In 1997, an Arab couple with two daughters applied to live in the settlement, and was immediately denied by virtue of the fact that they were Arabs and the land was for the settlement of Jews. They appealed to the high court, in a case that pitted one of the most venerated institutional expressions of Israel’s Jewish character against the most basic liberal-democratic norms. A panel of five judges, led by President Aharon Barak, heard a case that was set up to redefine the content of Israel’s Jewish and democratic identities. In a ruling that one of the lawyers for the plaintiffs called “the most important ruling in the history of the Supreme Court on the issue of equal rights for Arab citizens of Israel” and “a big step forward in the struggle for full equality” the Israeli Supreme Court ruled that the policy constituted “unlawful discrimination on the basis of nationality,” and could not survive constitutional scrutiny. The Court ruled that the principle of equality applied both to

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direct government actions and to indirect actions where the government provides land but does not itself carry out the policy of discrimination.\textsuperscript{259}

Justice Barak wrote the majority decision, and early on signaled the ambitious reach of the case by highlighting a particular aspect of the petitioner’s claims. They are not “disregarding the Jewish component” of the State of Israel, but rather submitting a “forward looking” petition.\textsuperscript{260} The petitioners are, in effect, asking for entrance into two communities; the Katzir settlement and, on a broader, more symbolic level, the new national community created by the “majestic generalities” of Israel’s new constitution. Their entrance, so they argue, need not challenge the cultural tenor of the state. The Jewishness of the state is not in question; the petitioners conceded that it can express itself legally in matters that are “fundamental” to the Jewish essence of the State, such as the Law of Return. The petitioners, the Court makes clear, do not challenge the cultural tenor of the state, but only the institutions that explicitly exclude them on the basis of their ethnic identity. The petitioners are, in essence, making an argument for a vision of Israeli society based solidly upon Ha’am’s vision: a state where the pertinent question is not the ethnic heritage of the individual, but whether the individual has imbibed the cultural milieu that is the state’s heart and soul. The petitioners argue for a state made Jewish by its culture and values, not by separation and population proportions. This was an argument that Barak and his Court were prepared to accept wholeheartedly.


\textsuperscript{260} Kaadan v. Israel Land Administration HCJ 6698/95 (2000), 8.
Barak begins with a discussion of the nature and centrality of equality as a constitutional imperative. “Equality,” writes Barak, “is one of the State of Israel’s fundamental values.” He derives this centrality from Israel’s identity as a democratic country, and the keystone passage in Israel’s Declaration of Independence which announced that the new state would “ensure complete equality of social and political rights” for all of its inhabitants. The intrinsic connection between equality and democracy, and the state’s history compels the finding that “discrimination by a public authority is prohibited.” Barak concedes that equality is a “complex concept” whose “scope is unsettled,” but according to the Court all agree that discrimination on the basis of religion and nationality violates the principle of equality. As evidence, Barak sights numerous international treaties and the constitutions of many of Israel’s democratic peers, highlighting again the implicit argument that if Israel wishes to assume an identity as a Western democracy it must define equality as such democracies do. Importantly, Barak argues that differentiation on the basis of religion or nationality is “suspect” treatment, and is therefore “prima facie” discriminatory treatment. Initially when he outlined the parameters of the constitutional revolution, Barak had implied that the standard of review would be something akin to the American notion of rationality. Now, he appears to invoke a standard of review more closely analogous with strict scrutiny, a method that would dramatically expand

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261 Kaadan v. Israel Land Administration HCJ 6698/95 (2000), 16  
262 Barak, Aharon, “A Constitutional Revolution: Israel’s Basic Laws”
the scope of individual rights under the Court’s protection. It would also significantly shrink the number of rights-constricting laws that could pass constitutional muster.\textsuperscript{263}

The centrality that Barak assigns to equality in Israel’s constitutional identity becomes vital when he turns to consider a counterargument from the state. Since the land administration was equally prepared to allocate land for the establishment of an Arab communal settlement, so the state argued, it had not committed a discriminatory act. Such logic, Barak writes, implies that “treatment which is separate but equal amounts to equal treatment.” Citing \textit{Brown v. Board}, Barak argues that such an approach is “inherently unequal” because it “sharpens the difference between [various groups of citizens] and cements feelings of social inferiority.”\textsuperscript{264} The deference to \textit{Brown} on this question was more than a nod to established democratic norms, but a critically important move from formal to substantive equality. Israel has always possessed, in one form or another, the equality that recognizes the ability to vote, speak freely and stand for elections. What it has lacked is the substantive equality that demands that individuals be included in the normatively central communal identity and the structures that perpetuate them. Equality, in the Court’s formulation, means more than the right to stand up and be counted; it also encompasses the ability to be a member of the national identity around which democratic state structures are built. Otherwise, equality is little more than a periodic way for outsiders to register their dissent, rather than a mechanism for the meaningful integration of individuals into

\textsuperscript{263} Rationality and Strict Scrutiny are two types of legal tests a court can utilize to test the constitutionality of a given statute. When the rationality test is used, all the state need do is prove that the law has a rational connection to a legitimate purpose. When strict scrutiny is utilized the state must prove that it has a compelling interest in the objective of the law, and the law is narrowly tailored or the least restrictive alternative. See San Antonio Independent School District ET AL. v. Rodriguez ET AL. 411 U.S. 1 (1973).

\textsuperscript{264} Kaadan v. Israel Land Administration HCJ 6698/95 (2000), 24.
society and the reformation of communal identities to include those previously outside their normative and constitutional limits. With this analytical maneuver, Barak and the Court attempted to construct a pathway by which all citizens could integrate into the national community, not simply its governmental structures, and a mechanism to reformulate the community to receive these new members.

It was relatively simple for Barak to argue that Israel’s democratic identity was incomplete without a substantive commitment to equal treatment, but the same laws that established Israel’s democratic self-understanding also rooted its identity as a Jewish state. The State’s second major argument was that even if land were directly allocated for the establishment of an exclusively Jewish settlement, such an arrangement would have been lawful because it would have “realized the values of the State of Israel as a Jewish state.” The State therefore indirectly afforded the Court an opening to offer an opinion on the nature of the values that made Israel a Jewish state. Barak did not hesitate to seize this opportunity and offer a vision of a Jewish identity that was fundamentally intertwined, rather than at odds with, its democratic identity.

His analysis is immediately distinguished by his interpretation of the Jewish narrative of national renewal as a call for an embrace of universal principles of justice. He cites Justice Berinson, who in a previous case argued “When we were exiled from our country and cast out from our land, we fell victim to the nations among whom we dwelled and in each generation we tasted the bitter taste of persecution, oppression and discrimination, just for being Jews…with the renewal of

265 Kaadan v. Israel Land Administration HCJ 6698/95 (2000), 26
our independence in the State of Israel, it is our responsibility to avoid even the slightest hint of discrimination and unequal treatment toward any non-Jewish, law-abiding person who lives among us." By interpreting the narrative at the heart of the creation of a Jewish state as simultaneously constituting an imperative for the embrace of equal rights, Barak incorporates ideas of equality, historical responsibility and tolerance into the Jewish narrative that stands at the base of the normative structure of Israel’s Declaration of Independence. Many of Israel’s founding politicians, as well as Barak’s predecessors, interpreted this narrative as the story of how persecution made the Jewish nation separate, different and “a nation that dwells alone.” Barak reformulates it as the justification not only for why Israel’s Jewish and Democratic identities are not at odds, but why at a certain conceptual level they constitute similar imperatives for how the political community ought to treat its members.

From Jewish history Barak moves to religious law, and comes to a different understanding of what Jewish scripture suggests than did his predecessors who decided Rufeisen or even Shalit. One of Judaism’s established foundations is that “man was created in the lord’s image.” Equality, in Barak’s understanding, is not the invention of modern democracy but rather an ancient biblical imperative. He cites a passage from Leviticus that commands, “You shall have one law, it shall be for the stranger as for one of your own country.” Time and again the jurisprudence of Israel’s highest court had attempted to balance the demands of an ancient tradition

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against democracy’s modern components. Barak eschews a similar balancing act because he advances an understanding of Israel’s Jewish character as a particularistic articulation of otherwise universal values. It is the stories that are unique, not their morals. A Jewish state, in Barak’s understanding, is distinguished by the reservoirs from which its values are drawn, not by who is charged with drawing the water.

The Court, however, does not make the claim that Judaism and liberalism are one and the same. Clearly this is not the case, or else the continuing disharmony in Israel’s national identity would have long ceased to play such a prominent role in the cultural and political life of the state. Israeli identity does inherit some unique features from its identity as a Jewish state, though the features the Court chooses to highlight are notable in that they are equally accessible to all. An integral part of Israel’s Jewish identity, so the Court argues, is that Hebrew is the principal language of the country, and the medium in which cultural idiom and most political discourse will take place. The primary public holidays of the state will reflect “the national renewal of the Jewish people,” and be primarily drawn from the Jewish tradition. Just as Hebrew will comprise the dominant medium for the creation of cultural idiom, so too will a Jewish understanding of temporal reality shape how time is divided and apportioned between work and rest, mourning and celebration. It is these forces that constitute both the soul of Israel’s Jewish identity, and those portions of it that are most compatible with democracy.

The components of Jewish identity that Barak highlights can be understood as relating to the Jewishness of space rather than the Jewishness of the citizens who

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269 Kaadan v. Israel Land Administration HCJ 6698/95 (2000), 27.
inhabit that space. No individual is barred from this new communal identity on account of his or her heritage or religious beliefs; all that imbibe the national culture are welcome as equals regardless of their identity at birth. It is true that these civic spaces are constituted in a particular way that will be more familiar to some than to others; in this respect Israel would be no different from other liberal-democracies whose institutions and societal forums are preconfigured and informed by their cultural heritage. The defining characteristic of this distinction is that while some may navigate its contours with a surer step than others, none are precluded from entering these spaces and mastering their intricacies. More to the point, the State can enact policies, one example being affirmative action, to ensure that those without the advantage of native cultural fluency are granted a fair playing field with their fellow citizens.\textsuperscript{270}

Barak’s reconstitution of Israel’s Jewish identity can be understood as the partial realization of Ha’am’s vision for a Jewish state, not merely a state of or for Jews. Absent from Barak’s vision is the idea that Jewishness is a function of heritage, replaced instead with an understanding of Jewishness as a positive embrace of a particular linguistic and cultural identity hypothetically open to all. A non-Jewish citizen of Israel who speaks fluent Hebrew and attends the Passover Seder of a close friend is no more excluded than a Jewish American who takes his or her vacations at Christmas but celebrates not with a tree and a visit to midnight mass but rather by patronizing a local Chinese restaurant. The Jewish communal identity that Barak

\textsuperscript{270} In the mid-1990s, for example, the government of Prime Minister Yitzhak Rabin enacted affirmative action policies for Arab-Israeli citizens who wished to enter the Israeli civil service. Leslie Derfler, \textit{Yitzhak Rabin: A Political Biography}, (New York: Palgrave Macmillan, 2014), 172.
describes is equally accessible to all citizens of Israel and, even more important, assumes the malleability of the individual person. Citizens cannot change their heritage, but they can learn languages and assimilate into culture. Above all, Barak’s conception of community and identity is based on liberal notions of individual autonomy and self-identification.\textsuperscript{271} Among the keys to enter is a language that can be learned, rather than a birthright that cannot be shared. It is based on the idea of a cultural membership that can be required, rather than one that is innate. Above all, people should not be encumbered or disadvantaged by their family trees.\textsuperscript{272} They should be judged purely on the identities they themselves choose to hold. It is ultimately this feature that makes plausible his attempted synthesis of Israel’s Jewish and democratic identities, and differentiates his jurisprudence from that which legally barred Brother Daniel from an identity he aspired to hold.

At the time, Kaadan was seen as Israel’s equivalent of Brown, the case that would finally acknowledge the primacy of equality and liberal identity in the Israeli State. The case brought hope to many who had felt themselves culturally and institutionally excluded from the state.\textsuperscript{273} In many respects the case fulfilled these hopes, but in one crucial yet overlooked area it did not. There are some aspects of Israel’s Jewish identity that were so foundational to the identity of the State that they went unchallenged by the petitioners and unscrutinized by Barak. Perhaps the most

\begin{itemize}
\item \textsuperscript{271} The space that the Israeli-Arab writer Sayed Kashua has carved out in Israeli society is emblematic of the possibilities and pitfalls of a culture that accepts, in part, that it can be learned in schools. Avishai, \textit{The Hebrew Republic}, 222-227.
\item \textsuperscript{272} Tamir, \textit{Liberal Nationalism}, 38-39.
\end{itemize}
sacred portion of Israel’s founding ethos and national identity is its self-described mission to end Jewish exile, and to “ingather the exiles” from the various corners of the Jewish diaspora.\textsuperscript{274} This purpose was codified in the Law of Return, and quickly became an intrinsic part of the new State’s identity. The identity codified in the Law of Return, arguably the national identity and normative community that is elevated to the highest level in Israeli jurisprudence, remained dependent on heritage rather than self-identification. While Barak was willing to redefine Jewishness within the legal borders of the state, he refused to redefine the criterion by which individuals are allowed to become members of this newly liberal community. “The Jewish nation,” Barak argued, “[was] granted a special key to enter, but once a person has lawfully entered the home, he enjoys equal rights with other household members.”\textsuperscript{275} In a country formed out of a diaspora that was engaged in a struggle with a diaspora it created identity extends beyond the political borders of any one state. When Barak endorsed the “special keys” members the Jewish nation received to enter Israel, he provided a mechanism by which individuals within the state could be torn from their newly constructed place in the national community.

It was darkly prophetic that Barak spoke of the special keys some possessed to enter the state, because the state soon found reason to bar the door. Mere months after \textit{Kaadan} was decided the Second Intifada broke out, unleashing war, terrorism and unspeakable suffering in Israel and the Palestinian territories. Israel’s response to this assault on its home front was harsh. Among many measures, legal and military, employed to provide greater protection for Israeli citizens was a decision by the

\textsuperscript{274} Rabinovich, \textit{Israel in the Middle East}, 73.
\textsuperscript{275} Kaadan v. Israel Land Administration HCJ 6698/95 (2000), 28.
interior ministry to implement a complete halt to the issuance of residency permits to Palestinian residents of the West Bank and Gaza for purposes of family unification and marriage. The justification was that several terrorist attacks had been perpetrated by individuals who were previously residents of the Palestinian territories but had received permission to live in Israel within the framework of family unification. The Knesset soon codified this policy, and it took the form of an amendment to the Citizenship and Entry Law passed in 2003.\(^{276}\) Under the policy, male residents of the territories between the ages of 14 and 35, and female residents between the ages of 14 and 25 would not receive entry permits under any circumstances, including for purposes of marriage and family reunification.

Immediately, several couples challenged the law. They were supported by the Adalah organization for the advancement of Arab rights in Israel. The petitioners in the case *Adalah v. Ministry of the Interior* alleged that the law produced two violations guaranteed in the Basic Law: Human Dignity and Liberty. By denying individuals who married residents of the West Bank and Gaza the chance to live with their spouses in Israel, the law violated the right to a family life. Additionally, the alleged that the law violated the right to equal treatment, since Israel’s culture and legal structure ensured that, if not all, then certainly a vast majority of the marriages that took place between Israeli citizens and residents of the territories involved Israeli-Arabs. Therefore, *de facto*, the only people harmed by the law are Israeli-Arabs.\(^{277}\).

\(^{276}\) Adalah v. Ministry of Interior, HCJ 7052/03 (2006), 2

The ruling that was issued in response to these claims was made up of eleven separate opinions, which lined up 6-5 in favor of upholding the constitutionality of the law. Justice Michael Cheshin, the vice president of the Court, wrote the majority opinion while President Aharon Barak authored an impassioned dissent. The paths to their respective conclusions are different at almost every turn, and Justice Cheshin chooses to begin his opinion with a peculiar parable delineating these disparities. He describes a dream in which he and Justice Barak are transported to Sir Thomas More’s famous island utopia where they are afforded an opportunity to question him about the commonalities between his legal system and the one Israel employs. “I am sorry” the patron saint of politicians and statesmen replies, “The laws of Utopia—in the position you find yourselves at present—are not for you. Not yet. Take care of yourselves, do the best you can, and live.” Justice Chesin goes on to say that the advice he imagines receiving from the famous philosopher delineates the differences in his and Justice Barak’s understanding of the law. These differences are vast. They hold different conceptions of the entitlements available to a nation at war to protect itself, different ideas of the scope of constitutional protections and dissimilar notions of the role of the judiciary in defining the scope of these rights and limitations. The portion of their dispute that I wish to focus on, and which constituted the source of the disharmony that Adalah brought back to the forefront of Israeli consciousness, concerns to what extent the state is empowered to secure a preexisting identity, in addition to its physical security.

278 Jacobsohn, Constitutional Identity, 280.
Physical security is the ostensive frame and the foundation of Justice Cheshin’s opinion. “Israel is not utopia…and a state that finds itself in a state of war with another state usually prohibits…the entry of the residents of the enemy state into its territory.”\(^{279}\) Justice Cheshin does not deny that the actions taken in response to this harsh reality cause pain. “As human beings, we can only identify with the pain of those innocent persons whose right to have a family life in Israel has been violated.”\(^{280}\) Despite this acknowledgement, he is quick to condemn and dissociate the Court from the more perverse rulings supported by that logic.\(^{281}\) However, the State has a higher purpose: to protect the society which it is constructed to safeguard and failure to do so will result in the dissolution of the very societal institutions that would have allowed these individuals to contemplate a secure and happy family life in the first place. Surely no society could have brought a constitution into existence, Justice Cheshin appears to argue, that does not allow for the State to defend its basic existence.\(^{282}\)

For all of the heated rhetoric, Barak does not dispute this basic assertion. “In many respects we are in agreement,” Barak writes, “I accept that every state…may determine for itself an immigration policy…it is entitled to restrict the entry of foreigners.”\(^{283}\) Barak says clearly that a law that mandated an individual examination for each applicant, rather than a blanket ban, would have passed constitutional muster.

\(^{279}\) Adalah v. Ministry of Interior, HCJ 7052/03 (2006), 130
\(^{280}\) Id, at 130.
\(^{281}\) Justice Cheshin is contemptuous in his dismissal of the comparison between Adalah and Korematsu. He argues, “The difference between the cases is so deafening that there is no need to explain it further”. Adalah v. Ministry of Interior, HCJ 7052/03 (2006), 224.
\(^{283}\) Adalah v. Ministry of Interior, HCJ 7052/03 (2006), 114.
because it would better balance the important security considerations against the
rights claims the petitioners presented. Barak admits that his somewhat weakened
law would have been a slightly less effective tool for fighting terror. If the
divergence between the two of them really concerned a simple calculation of
reasonable risk, one might have expected the remaining pages of their opinion to be
filled with references to the opinions of security experts and a comparative analysis of
the duties of a court to a constitution in times of crisis. Instead what emerges, tacitly
and explicitly, is not an argument over the degree of physical security the state is
entitled to provide, but rather one about the nature of communal identity, and to what
extent the state may secure that identity in the face of concrete violations of the rights
of citizens.

The dissonance emerges in the contradictory descriptions put forward of the
individuals the law bars from entering Israel. To Justice Barak, they are “Palestinian
spouses,” a few of which have and will present a security risk but the vast majority
defined by nothing more or less than their desire to join their loved ones in the
building of a shared home in a safe country. Justice Cheshin dismisses such
sentimentality. “The State of Israel…is at war...The residents of the Palestinian
territories are de-facto enemy nationals, and as such they are a group that presents a
risk to the citizens and residents of Israel.” Justice Cheshin imagines these
individuals primarily as members of a national group that is engaged in conflict with
the State of Israel, whereas Barak describes them as the loved ones of various Israeli

285 Id, at 115.
citizens. In Barak’s description, they are individuals, each with a unique marital relationship rooted in love and commitment to a citizen of Israel, while Justice Cheshin paints them as a hostile monolith devoid of individual distinction. To Barak, the nationality of the individuals in question is superseded by the individuality embodied in their desire to actualize their love and commitment to their families and, symbolically, to the state of Israel. Justice Cheshin argues that their national affiliation takes precedence over any individual desires or hopes they might possess.

This divergence in description is critically important. A loving spouse of an Israeli citizen may or may not pose a security risk, but that risk comes from malicious intention, not from personal identity. They have quite literally taken a vow of loyalty to their spouse, and by extension the State of Israel, and just as they desire to merge their life into the life of their partner so too is it plausible that they could fuse themselves into the existing linguistic and cultural institutions of the state. An “enemy national,” on the other hand, likely poses a security risk to the state and its citizens, but on a broader level cannot possibly be expected to assimilate into the broader Israeli national community. This person is an enemy, not just of the state but also of everything the state represents: its people, its culture, its language and its history. Their presence in the state, violent intentions or not, brings with it disharmony and conflict, notwithstanding the harmonious act that ostensibly moves them to request residency in the first place.

What is the source of this tension, this pain that Justice Cheshin argues gives the body politic the right to shield itself from foreign migration? “The strong and decisive intent of the state,” by his description, “in protecting the identity of society in
Israel is capable of overriding the strength of the right to family life.”

To give greater clarity to this vague description, Justice Cheshin once again makes use of a parable. This time, instead of being transported to Thomas More’s Utopic Island society, we are sent to the rather more pedestrian (though equally fictional) European country of Ruritania. At one point in its history, faced with an aging population, the country decided to encourage immigration. Yet in time these new immigrants “changed the image of the state” and “threatened the hegemony of the original citizens,” and Ruritania was within its rights to stop immigration, family concerns notwithstanding. Unlike Justice Barak, who argues that the rights of individual citizens to family life can only be burdened by security concerns ascertained on a case-by-case basis, Justice Cheshin appears to argue that these rights can also be violated by the state’s determination that individuals, by dint of their identity rather than their harmful intentions, would imperil the self-image of Israeli society.

Justice Cheshin’s brief reverie mirrored an alternative argument that the State advanced in defense of the law. In its defense of the law the State had categorically rejected the argument that demographic considerations were part of its purpose or played a role in its passage. Wartime security, it was argued, was the law’s only purpose. Despite this categorical rejection of a demographic intent, the state nevertheless argued that were the Law’s purpose demographic it would remain “consistent with the values of Israel as a Jewish and a Democratic state.” This alternative argument notwithstanding, both Barak and Cheshin were insistent that the

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demographic issue was not relevant to their decisions.\textsuperscript{291} There was good reason why both they and the government would try to minimize this issue: to do otherwise would be to impart the message to Israel’s Arab minority that they constituted a “demographic threat” which is an “unacceptable message to send to citizens of a liberal democracy,”\textsuperscript{292} Despite this, the demographic argument is not new to Israeli political discourse, nor was it wholly marginal to this case. Yassir Arafat, especially in his later years, took much pleasure in announcing that his secret weapons was “the womb of the Arab woman,” by which he meant the power of a higher Arab birthrate.\textsuperscript{293} One of the respondents named in the case is the Association for a Jewish Majority in Israel, which chose to argue that the demographic considerations implicated in the law weighed in its favor.\textsuperscript{294} In addition, two of the eleven justices, Justice Joubran and Justice Proccacia, believed that demographic considerations constituted at least an ancillary purpose for the law.\textsuperscript{295}

If the demographic argument hovered at the edges of consciousness for the judges who ruled on this matter, they stood at the forefront of the political reaction to the decision. Several Arab members of the Knesset argued publically that the decision proved that the state’s Jewish and democratic components were contradictory, while the head of the Adalah organization argued, “There is a deep-rooted consensus that

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\textsuperscript{291} Justice Barak was emphatic that, “The law is not based on any ‘demographic’ purpose.”Adalah v. Ministry of Interior, HCJ 7052/03 (2006), 14.
\textsuperscript{294} Adalah v. Ministry of Interior, HCJ 7052/03 (2006), 1.
\textsuperscript{295} Jacobsohn, \textit{Constitutional Identity}, 290.
\end{flushleft}
Jewish dominance should be preserved in the state of Israel.” These statements were not idle accusations. Five days before the Court’s decision was announced, the Israel Democracy Institute published a poll indicating that 62% of Israelis believed the government should “encourage” Arab citizens to emigrate. There is no starker indictment of the failure to create a national community in which all feel included than empirical evidence that a large majority of Israel’s citizens believe the mere presence of Arabs in Israel, regardless of their personal loyalties or cultural predilections, is so harmful as to warrant the government utilizing various means at its disposal to encourage them to leave. Only the judges know for what reasons they ultimately chose to uphold or strike down the law, but the fact that their decision was received as it was only indicates the searing tension and endemic disharmony between Israel’s particularistic and universalistic identities, and the widespread belief that the particularistic has been granted normative supremacy. Despite his protestations in his decision, Barak acknowledged in a subsequent interview “…but still the demographic issue is there.”

*Kaadan* and *Adalah* appear light years apart. One was decided during peacetime, the other during wartime. One concerned the rights of citizens in relation to other citizens, the other the right of citizens in relation to foreigners. One offered a glimpse of the potential liberal national community that Israel could construct, the other a sobering view of the dissonant reality that prevailed in Israeli society.

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reality, they are little more than two sides of the same Janus coin; one comports with notions of liberal community while the other does not. One takes individuals as products of their choices, while the other sees them irretrievably as products of the identity into which they were born. Both, however, spring from the same illiberal assumption that the gates of Israel open only to those with a Jewish birthright, and that Jewish national rights, in certain fundamental areas, ultimately trump liberal scrutiny. There is no dispute that an integral part of sovereignty is the right of states to set their own immigration policy. “All that it is required to do,” according to Justice Barak, “is that when it uses this key”…it should be used in a manner that is consistent with the values of the State of Israel.” What, then, are these values? Justice Cheshin endorsed a policy that denied access to all residents of the Palestinian Territories, even those who had entered into a marital union with an Israeli citizen. Yet while Justice Barak spends pages criticizing his colleague for trampling human rights and denying individuality, he had in fact endorsed a policy that was the mirror image of the one Justice Cheshin certified. In Kaadan Barak wrote, “It is true members of the Jewish nation were granted a special key [by the state] to enter (See the Law of Return).”

Justice Cheshin denied entry to one ethnic group, while Justice Barak endorsed the open door granted another. In Kaadan, Barak placed the Law of Return above the new liberal community that he attempted to construct within Israel’s borders, by characterizing it as a “fundamental” aspect of the State’s Jewish character.299 In so doing he effectively declared that his constitutional revolution

stopped where Jewish peoplehood, as defined by the law, began. The question that presents itself is the following: Is such an immigration policy consistent with Israel’s identity as a liberal democracy? The answer compelled by the current lived experience of Israel’s citizens is no. Underlying the Law of Return, and the evil twin of exclusion that Justice Cheshin constructs is a notion of illiberal community that is the final product of a national community constructed in Herzl’s image. The Law of Return defines Jewishness as that which our parents pass on to us, while the Citizenship and Entry Law defines otherness by virtue of one’s ethnic inheritance. When the gates of Israel swing open only to those gifted by birth with the correct heritage, how can non-Jewish citizens of Israel imagine that the State values them on an equal basis?

It is the prerogative of states to preference different groups when setting their immigration policies. However, the soul of liberalism is a conception of the protean nature of personal identity. The question is not identity itself, but whether individuals are empowered to escape or change theirs. When immigrants knock upon the gates of Israel, does society see them as transplants from their native lands, impervious to change, devoid of aspirations to reshape their lives in the context of their new community? Or does it look upon an individual who has decided to uproot his or herself from a familiar home and comfortable language, and travel a great distance to a strange society as someone who aspires to reshape his identity and is amenable to doing so in the context of Israeli national culture? Does Israel, in short, look upon immigrants the way Herzl conceived of the Zionist project, as transplants with a fully formed identity, or the way Ha’am understood them, as a project of collective
transformation? What is valued in society is inherently subjective, but it is a prerequisite for democratic society that we accept that humans can aspire to escape the station of their birth. As long as the Jewish people are legally defined as they are in the Law of Return, and that Law remains effectively impervious to constitutional scrutiny, non-Jewish citizens of Israel are at best tolerated residents rather than an organic part of the community. Non-Jewish citizens of Israel are confronted with a reality in which the births of their children provoke fear, while the births of Jewish children evoke joy. A former finance minister once remarked that cuts to the Israeli welfare system produced two positive results: an increase in the labor participation of Ultra-Orthodox Jews and a decrease in the birthrate of Israel’s Arab minority. That minister was Benjamin Netanyahu, the current prime minister of the State of Israel. When the leader of a country is cheered by the knowledge that one group of citizens will bring fewer of its children into the world, is formal democracy, let alone authentic communal acceptance possible? Israeli-Arab attempts to unite with partners or family members that share an identity but lack Israeli citizenship are quashed, while the State trips over itself to offer encouragement and subsidies to the families of Jewish citizens. When an individual is confronted with evidence that his mere existence, in the eyes of the majority, is a threat to the State’s character, the inevitable, unavoidable conclusion is that the State does not values its citizens equally, and

300 See pages 20-30, above.
certainly does not consider them part of the national community. Not only is this state of affairs in tension with liberal democracy, it is liberal democracy’s opposite.

With regards to the demographic question, Justice Cheshin wrote, “Indeed, if one day the Knesset enacts an immigration law which has as one of its purposes the preservation of the Jewish majority in the State of Israel, it is possible that the Court will be required to consider in depth the demographic factor.” It is unclear why Justice Cheshin presents as hypothetical a situation that has existed in Israel since its founding. The Law of Return, as currently constituted, is a law enacted to preserve the Jewish majority in Israel. Its aim is not to encourage assimilation into Jewish or Israeli culture—it does not even really allow for that possibility—but rather to encourage the greatest quantity of ethnic Jews to move to the State. If Israel truly wishes to live up to its identity as a Jewish and democratic State, it must reconstitute how identity is perceived and understood both within the “house” of Israel and for those who seek to enter. When a potential citizen knocks upon the door, the question that must be answered before an entry key is provided cannot be “what are you,” but rather “what have you become.”

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Conclusion

Can My People Be Your People?

It is in the Book of Exodus that G-d first appears to Moses, taking the form of a bush continually burning but never consumed. G-d tells Moses that the time has come to free the Israelite people from their bondage in Egypt, and that Moses will be the catalyst for their emancipation. Moses, perhaps fearing the response to his recounting of this fantastical event, says to G-d “Suppose I go to the Israelites and say to them, ‘The God of your fathers has sent me to you,’ and they ask me, ‘What is his name?’ Then what shall I tell them?” G-d replies to Moses, “I will be what I will be.”304 G-d’s statement to Moses has become symbolic of a Jewish tradition that places the ineffable nature of the divine at its center. The enormity of what G-d was, is and will be is simply too vast to be encompassed or represented by a name plucked from the inadequacy of human language.

Jewish tradition teaches us that humanity is inextricably linked with the force that created us, and that the divine is not the only presence in the world that should be beyond the instrumentalization of humankind. The Hebrew Bible instructs us that all individuals are created ב‐תשלום אלהים, in the image of G-d. Within each person lies a portion of that incomprehensibly vast yet intimately holy divine presence, a fact from which is derived the imperative to honor the fundamental dignity of all human life. To destroy human dignity is to make a mockery of the divine, and one way in which both are defiled is to deny the individuality of each human being. Each person contains within them their own universe of meaning, complexity and possibility.

304 Exodus 3:13-14
“Whoever saves a life” teaches the Talmud, “is considered to have saved an entire world.”\textsuperscript{305} No two human lives are alike but all are equally valuable, and part of that value comes from the recognition that each human contains within him a universe of meaning distinct from those of all others, and an endless supply of possibility and potential.

It is these Jewish values, so often highlighted by figures like Justice Barak, that form a potential common base for Israel’s Jewish and democratic identities. Liberal Democracy is premised on two fundamental assumptions: the equal worth of all human life and the inviolability of the individual person.\textsuperscript{306} While democracies the world over speak different languages, practice different religions and are informed by vastly dissimilar cultural idioms, they are united by their deference to the individual, a commitment that is honored through self-governance and the constitutional protection of certain inalienable rights. Human equality is jealously guarded, human autonomy prized and identity is left for individuals to define for themselves. While cultural communities may, and do, influence the choices individuals will ultimately make, the final decision must rest with the individual, not with a central sovereign authority. Often, imperfect reality renders a particular identity choice harmful to an individual’s legal or normative standing in the democratic order. Yet liberal democracies are united in a shared aspiration that one day individual choices regarding what religion to practice, what ethnic identity to associate with, or what sexual orientation to profess will not exclude them in either legal or normative ways.

\textsuperscript{305} Mishnah Sanhedrin 4:9, \textit{Babylonian Talmud} tractate 37a.

\textsuperscript{306} Rawls, \textit{Justice as Fairness: A Restatement} and Dworkin, \textit{Sovereign Virtue}.
from the political and cultural communities constituted by these states and the
documents that guide them.

Israel has not lived up to the Jewish or democratic imperative to treat
individuals as if they contained within them an entire world, because it continues to
insist that identity is determined by communal will and public institutions—in short
by forces apart from and outside of the individual in question. This failure belongs to
the State of Israel and not to Zionism, which advanced a framework that is
compatible with liberal democracy that has gone unutilized by the State of Israel.
These identities, in turn, function as mechanisms of exclusion for certain groups of its
citizens. Identity is complex, the individuals onto whom these identities are layered
even more so, and to attempt to force individuals to conform to a one-size-fits-all
identity is both foolhardy and demeaning. When an individual’s treatment at the
hands of the State is partially contingent on what identity he is assigned by others, the
resulting situation can only be described as blatantly discriminatory. Individuals
should not have to sue for the public recognition of a portion of their personal
identity, find their attempts to pass on familial identities to their children denied or be
stymied in their efforts to live with their families on account of a State-defined
ethnicity. Identity should be the province of individual determination. A country that
imagines itself as the heir of traditions that conceive of each individual as imbued
with endless meaning, potential and individuality cannot comport itself in any other
manner.

The disharmony in Israel’s dual identity runs deep, intensified by persecution,
discrimination, occupation and war, but the project of an authentically Jewish and
truly democratic state is not beyond saving. Israel is in urgent need of reform, and while these reforms are politically difficult they are not impossible. Some of them have been proposed in the past, others are the subjects of debate in the current Israeli Knesset. To be successful, this program of reform must be organized around the imperative that individual identity is protean, that personal identity must be determined by the person it is attached to, and that an individual’s self-professed identity must not influence his treatment at the hands of the Israeli State.

First and foremost, the State of Israel must renounce the power to confer and retract ethnic and religious identity. It is time for Israel to surrender the ability to categorize its citizens in these ways or with these terms. Israeli citizenship and nationality must be recognized as the only identity the state has the power to confer. All other categories, be they religious, national or ethnic, should be the province of personal deliberation. Citizens should be given the option of affixing the identity of their choice onto their personal identity cards, or leaving these spaces blank if they desire. The rule established in Shalit, before its abolishment by the Knesset, should be resurrected. When an individual professes a desire to be identified a certain way, that request must be accepted without question. Not only must the State halt its efforts to separate citizens from themselves, it must demolish the barriers that exist between various cultural communities within Israel. It is these walls that exist between the various cultural and religious communities in Israel, walls built of fear, mistrust and discrimination, which have stunted the development of an authentic Israeli identity that is more than a flimsy legal designation. Civil marriage, marriage that is not

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bound to the dictates of any religious or national authority, must become an option in the state of Israel. It is imperative that Muslims and Jews be able to marry each other without the need to fly to Cyprus. When thousands of couples navigate the complex but rewarding waters of raising children in an interfaith home, we will begin to be able to speak of a country that recognizes the protean nature of identity. Implicit in that identity is the right of children who are heirs to multiple traditions to choose which community they identify with, and to reshape these communities to fit their own unique experiences.

These measures will be opposed most vigorously by those who argue that one of the prime purposes of the State of Israel was to safeguard Jewish cultural and religious practice, and that to weaken the hold of the State on Jewishness is to invite the same sort of assimilation that is taking place in the Jewish diaspora right now.308 It is here that we must appreciate, as Justice Cohen did, the essential difference between Israel and the diaspora: Jews are the majority of Israel’s citizens. Hebrew is the dominant language, Jewish history is taught in public schools and the cultural idiom of conversation and self-understanding is predominantly Jewish. To speak of “Jewish assimilation” in the Jewish state is to fundamentally misunderstand what Zionism has wrought. The culture into which individuals assimilate is itself Jewish. The days of rest coincide with the Jewish Sabbath, the national holidays are derived from the Jewish calendar and the public schools impart key elements of Jewish culture and the Jewish narrative. No longer is the struggle for Jewish survival taking

place in Odessa or the Lower East Side, where English and Russian replace Yiddish and Hebrew and secular humanism takes the place of traditional Judaism. Jewishness is the resting pulse of Israeli society and abolishing the legal barriers the State has used to regulate and restrict it will not weaken or diminish it. Rather, that will strengthen it by opening up Jewishness to all who desire to identify with it, freeing it of those who wish to politely part its company and allowing it to evolve to suite the predilections of the population that embraces it.

A reform of Israel’s immigration practices in general, and the Law of Return in particular, will probably be among the most difficult of these alterations, but it is among the most essential. As painful as it will be, given the centrality of the “ingathering of the exiles” to Israel’s national narrative, the time has come to retire the Law of Return in its current form. Soon, the majority of world Jewry will reside in Israel, a titanic feat, and the remaining communities by and large will be happily assimilated citizens of prosperous liberal democracies. The new arrangement should continue to grant automatic citizenship for all Jews who are the victims of anti-Semitism or other types of persecution; Israel’s founding purpose demands no less. However, those who wish to move to Israel for economic prospects or merely on a whim must all tread the same road to citizenship. A path to naturalization should be established whereby potential citizens can qualify for citizenship after they learn Hebrew, become familiar with Israeli culture and attain a certain number of years of residency. The ethnic or religious identity of these applicants should not be a factor in their consideration for citizenship. In addition, Israel should immediately annul or modify the Citizenship and Entry Law of 2003 that bared residents of certain ages of
the West Bank and Gaza from receiving residency permits in Israel, even for family reunification. The law was extended again in 2014, even in a time of relative security. Family reunification, pending appropriate individual security checks, should never be barred on account of ethnicity.

Reforms must extend outward past the realm of the personal and into the sphere of the material. Israel must disassemble those institutions that perpetuate material discrimination against non-Jews in the Jewish state. The involvement of the Jewish Agency and the Jewish National Fund, Zionist institutions that openly serve only the Jewish inhabitants of Israel, in the urban planning and land distribution apparatuses of the State of Israel must end. Their quasi-official status in the Israeli State must be terminated. They can operate as private non-profits as all other organizations do if they so desire. Institutions whose desire is to strengthen the Jewish hold on the Land of Israel cannot drive the allocation of land, property and the economic power that comes from both. The only legitimate purpose of the allocation of resources by the State is the equal benefit of all citizens of Israel. A state that equally values all of its citizens accords them equal rights and asks from them equal responsibilities. National service should be required of all citizens equally, and individuals should be given the choice between military and civilian service. All citizens should receive equal benefits from their service. Education is integral to all of this. Israel is currently stuck in an unhappy compromise, with an education system that preserves the cultural autonomy of its minorities but that has also resulted in

material discrimination and a fractured national community. There should be one set of public schools, and they should teach Arabic in addition to Hebrew. Newly linguistically and culturally integrated schools could draw encouragement from the inspiring model of Hand in Hand: Center for Jewish-Arab Education in Israel.\(^{310}\)

Most urgently, the occupation of the West Bank, Gaza and the Palestinian people must end. I need not here recite the litany of ways in which the occupation and settlement enterprise demeans the dignity of Palestinians, imperils Israel’s democratic character and fractures Israel’s political community. Suffice it to say that while Israel wages a war upon a nation with which 20% of its citizens identify linguistically, culturally and historically true normative equality will be difficult if not impossible. The settlement enterprise must be brought to a close, and a viable and contiguous Palestinian State founded in its place.

Equality is the overriding standard to which these reforms must conform, but an outcome no less imperative is a society that internalizes the protean nature of identity. Zionism was partially the anguished cry of those who loved their native lands, native tongues and fellow citizens and yet found themselves rejected, excluded, and suspect at every turn. Israel must honor its desire for communal belonging by not continuing to be guilty of the same sins against its own citizens. Israel was founded, in the words of one Holocaust survivor moved by the plight of African refugees in Israel, “to establish a moral example.”\(^{311}\) It would be a poor example if Israel continues to inflict on its citizens the same abuse that Jews once suffered at the hands


of Europe. Zionism was not merely the right to do to others what had long been done to us, but a project that sought to integrate aspirations for national self-determination with a commitment to uphold the rights that Jews had too often been denied.

It is time for Israel to reject the notion that there is a limited quantity of justice in the world. That is the implicit argument that comes from those who say that more democracy must compromise Jewish identity, or that ending the occupation of Palestinian lands will fatally compromise Israeli security. Justice is not a finite quantity that humanity is empowered to divvy up, it is a divine imperative that all are bound to follow. The preservation of the Jewish national home need not require the demolition of other people’s homes. The reunification of Jewish families split by war and oppression does not necessitate the separation of other families. The empowerment of the Jewish people to determine their own destiny need not entail the disempowerment of individuals to determine their own identity. A Jewish nationalism that recognizes the imperative of justice and respects the divine spark at the center of every person can be compatible with the best of liberal-democratic traditions.
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