

# A Constitution for Israel: Lessons from the American Experiment

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Recent years have seen the emergence in Israel of a public debate over whether to adopt a formal constitution, what values and institutions such a constitution ought to enshrine, and how to go about formulating and ratifying it. While any serious answer to these questions must take Israel's unique circumstances and political tradition into account, a great deal may be learned from the experience of dozens of democratic countries that have adopted constitutions since the end of the eighteenth century. In this context, it is tempting to turn first to those Western countries that adopted constitutions after World War II, such as France, Germany, Spain, Greece, and New Zealand—nations which, at the time these constitutions were adopted, shared many of the basic political values and rules of public discourse which characterize Israel today. Likewise, one might look to the fascinating development of constitutions in South Africa and in several of the countries formerly under Soviet dominion.

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The best point of departure, however, may well be that of the world's oldest standing constitution, that of the United States, which has been in force without interruption since 1789. That the United States Constitution has guided American political life over so long a period, and in the face of repeated social upheavals and many wars, testifies to the sagacity of its authors. For this reason, the architects of numerous young democracies have turned to the American example when drafting their own constitutions. For Israel in particular, the American case carries special weight, in light of the tremendous influence that the United States, and particularly the American legal tradition, has had on Israeli life.

In what follows, I will not dwell on the specific political arrangements spelled out in the United States Constitution. These are not particularly relevant to the Israeli case, and in any event have been modified substantially during two centuries of amendment and interpretation. Instead, I will focus on the fundamental principles and assumptions which underlay that document, and which were tailored to the specific needs and traditions of the nascent American nation. In particular, I will focus on those ideas that guided the process of its drafting and ratification—a process in which a clear distinction was drawn between the founding, constitutional principles of government and the pitched battles of ordinary politics. It was this process which enabled Americans to forge a political framework that suited the nation it was meant to serve, assuring the various interests within the population that their vital needs would be protected, and that day-to-day politics could therefore be conducted with moderation and restraint.

The first part of this discussion will therefore revisit the framing and ratification of the American constitution, emphasizing the extent to which those who took the lead in the constitutional effort understood the complexities of the task before them and fashioned a process that would best address them. The second section will focus on the principles which guided the American framers, and show how these contributed to the

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enduring success of the American experiment. In considering these principles, I will rely in large part on the essays in *The Federalist*, which was penned by Alexander Hamilton, James Madison, and John Jay, three of the principal proponents of the constitution, between October 1787 and June 1788, as part of the fight over ratification. In light of the recent publication of *The Federalist* in Hebrew (to which a version of this essay served as the introduction), that source should be seen as a particularly timely reference for any discussion in Israel of the American constitutional process.<sup>1</sup>

The remainder of the essay will draw lessons for the Israeli case. As with America of the 1780s, Israeli society is deeply divided on key issues, but it has guaranteed its citizens levels of political freedom, welfare, and education unknown in the region. While Israel is host to a number of groups seeking to change the country in accordance with their own visions of the good life, they all share an interest that Israel continue to secure their basic rights. By embarking on a constitutional process that draws inspiration from the American model, I will argue, Israel has the best chance of creating the kind of common, consensual framework within which democracy can flourish. Designing and adopting a constitution is not simple, and will require negotiation and painful compromise among different groups. But if a viable and enduring constitution is to be adopted, participants in the debate will not only have to defend their own principles and interests, but also to learn to respect the positions of others. The final document must be constructed on the understanding that a shared political framework, within which every group can act despite disagreements and conflicting interests, is itself an interest essential to all of them.

Israel today, fragmented and strife-ridden, may seem farther than ever from seeing such a process through, and the sense of crisis that has enveloped the country since negotiations with the Palestinians collapsed in October 2000 tends to direct attention to issues that seem more urgent.

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But it is precisely difficult times such as these that reveal the pressing need for a constitution, and that are most likely to precipitate its creation. Only then is the need most keenly felt to forge one basic document that creates a shared political framework and offers the opportunity for fruitful debate within it. A closer look at the American case can serve to illustrate this essential political truth.

## II

**T**he story of the adoption of the United States Constitution begins shortly after independence, when in November 1777 the Continental Congress approved the Articles of Confederation. This document, which was meant to establish a common framework for the thirteen newly independent colonies, reflected the prevailing sentiments among Americans during the Revolutionary War, and in particular their antipathy to life under foreign rule. The Americans' most prized asset was their liberty; it was this which they were fighting to defend, and their experience with the British had taught them that the best defense against tyranny was to limit the ability of the government—especially a distant one, insulated from the needs and preferences of the public—to dip its hand into the citizens' pockets or to send them off to fight for causes with which they do not identify. This hostility to unwarranted government intervention found expression in the Declaration of Independence, which included a list of grievances against the British government and its abusive treatment of the local legislatures. The Americans preferred to be ruled by smaller, local governments, which were subject to the will of the voter at frequent intervals. At the same time, they understood the military and diplomatic advantages that size offered, in both war and peace, and for this reason agreed to the establishment of a

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common framework that enabled the thirteen states to act as one in foreign affairs.

Given these concerns, it is no surprise that the states insisted on ceding as little power as possible to the central authority. The Articles of Confederation granted almost complete independence to individual states, while the weak central government comprised only a unicameral legislature, the Continental Congress, in which there was equal representation from each of the states without regard to the size of their populations. The congress did not have the authority to compel member states, and was therefore unable to resolve interstate disputes or mobilize resources for its own activities. The union, as a body, had no standing army, and because the central government could not levy taxes on either states or individuals, it was virtually impossible to maintain the army necessary to win the War of Independence. Nor did things go any better in the economic sphere: In their search for solutions to economic hardship, several of the states began to print money, while others vigorously sought to collect wartime debts, a policy that struck particularly hard at farmers in the western frontier areas.

In the years following the war, these problems led to unrest in some states, of which the best-known was Shays' Rebellion in western Massachusetts in the summer of 1786. Hundreds of farmers, many of them veterans of the Revolutionary War, revolted against the collection of taxes and debts and, in an effort to sabotage the collection process, attacked courthouses and police stations, and even tried to take control of a government arsenal in Springfield. The rebels were defeated only when an army sent from Boston killed several of them, arrested the leaders, and dispersed the rest. Similar revolts took place in North Carolina and Pennsylvania. George Washington, commenting on Shays' Rebellion, expressed a view that was shared by many at the time. "What a triumph for the advocates of despotism," he wrote in a letter to Henry Lee, "to find that we are incapable of governing ourselves, and that systems founded on the basis of equal liberty are merely ideal and fallacious."<sup>2</sup>

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Although they were painfully aware of the flaws in the Articles of Confederation, the representatives of the American states had little success in altering them. Any amendment had to be approved by the legislatures of all thirteen states, giving each of them effective veto power. Since change invariably harmed the interests of one state or another, unanimous approval was extremely unlikely. The regime's weakness was well illustrated by the Annapolis Convention in 1786, which was attended by delegates from five states—the only ones that were willing to answer Virginia's call to convene in order to resolve interstate trade disputes. The participants could not reach agreement on the substantive economic issues on the agenda, but did endorse the initiative of Alexander Hamilton of New York and James Madison of Virginia, who proposed that the conference call on the Continental Congress to re-examine the Articles of Confederation. The congress, accepting the initiative, summoned representatives of all the states to a convention in Philadelphia, at which they were to offer proposed amendments to the Articles of Confederation, amendments that would be considered by the Continental Congress and, ultimately, by the states.

With the exception of Rhode Island, which opposed any initiative that might strengthen the central authority, all the states sent delegations, which included many of their most talented and famous citizens. Of the fifty-five delegates, three-fourths had served in the Continental Congress, many had been state legislators, and seven had experience as governors. Among them were the two most renowned men in America at the time, Benjamin Franklin and George Washington.<sup>3</sup>

In May 1787, the delegates convened in Philadelphia, committed to holding their deliberations until a successful resolution could be reached, or until it had been demonstrated conclusively that no such resolution was attainable. The differences were profound, and the success of the convention was anything but assured. Despite broad consensus that the Articles of Confederation had failed to meet the states' needs and that they needed

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to be strengthened if the states wanted to preserve a common framework, there was no clear indication that anything significant had changed in the constellation of interests that would enable a different outcome this time around. Moreover, there was no consensus on the critical question of whether minor changes would suffice to strengthen the confederation, or whether perhaps the entire notion of confederation ought to be reconsidered. The second option suggested a more radical solution, for the alternative idea of a federal state—one which combined states' rights with a strong federal government—was at that time a novelty.

In the end, most of the delegates came around to the view that the Articles of Confederation were simply unequal to the central problems facing the states, and would have to be replaced by a substantially stronger central authority. The opening words of the constitution drafted in Philadelphia captured the essence of this change: "We, the people of the United States of America" stood in marked contrast to the parallel phrase in the Articles of Confederation, "We, the undersigned delegates of the states...." These delegates, who had convened in order to protect the honor and interests of their respective states, in the end came to agree on something entirely different: The new constitution would define not merely a group of affiliated states, but a people, possessing common, central institutions of government.

How did it happen? A great deal of thought was invested in maximizing the likelihood of a successful outcome, which expressed itself in the manner of organization and the rules of debate at the convention. First of all, Hamilton and Madison, who stood at the head of those advocating a strong central government, developed their ideas for a constitution only after a close study of political arrangements in other lands, and after arriving at clear and explicit assumptions about human nature and the nature of American society. Second, they understood how important it was to define the convention's agenda by opening it with a presentation of their own well-developed ideas. Madison and his fellow Virginians

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submitted the first proposal, which was put forward for discussion on the convention's fourth day. This proposal, which was moved by the governor of Virginia, Edmund Randolph, called for the creation of a strong central government composed of a legislative, an executive, and a judicial authority. According to the Virginia Plan, the legislative branch would be empowered to annul state laws, to levy taxes, and to regulate interstate commerce. States would be represented in a federal House of Representatives in proportion to their populations, and the House would select from among its members a more select body, the Senate, again in proportion to population. Although important elements of the Virginia Plan were eventually rejected or significantly altered in the course of deliberations, the proposal formed the basis for the constitution that would eventually emerge.<sup>4</sup>

Moreover, proponents of a constitution went into the convention knowing that the challenge of persuading opponents and fence-straddlers alike would be a daunting one, and they prepared for it carefully. Their foremost goal at Philadelphia was to foster compromises that would enable as many delegates as possible to support the final product, and they set the rules of debate accordingly. To maximize delegates' room to maneuver and to isolate them from pressure from their constituents or from members of the Continental Congress, the deliberations were held behind closed doors, and their content was largely kept out of the press. It was also decided to conduct most of the discussions not as a formal debate, but instead as a "committee of the whole," a less formal method of decisionmaking which had its own rules—the most important being that a revote could be called on any subject. A similar spirit motivated the decision not to record the individual votes of delegates, in order to allow delegates greater freedom to change their votes later on.<sup>5</sup> The overriding goal was to allow the participants at the convention to examine the options carefully and change their minds as the deliberations progressed and new arguments were presented. Yet there was another benefit to the relatively informal method: It enabled delegates not only to weigh each issue



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on its own merits, but also to view each point in the context of the totality of the other proposals that were adopted, which was critical in facilitating compromise. Participants could consent to certain ideas on condition that other ideas were also accepted, without fearing that any point that was agreed upon would immediately become the starting point for demands that additional concessions be made.

Matters of procedure thus contributed greatly to the convention's success. In the end, however, two major issues threatened to bring down the entire effort, and likely would have, had it not been for the delegates' determination to reach a compromise that would enable the constitution's broad approval. The first stemmed from the fear of the smaller states that their power, standing, and independence would suffer greatly if representation in the legislature depended solely on population. These states supported New Jersey's proposal, which accepted most of the elements of the Virginia Plan but made representation in the legislature equal for all states, as it was in the Continental Congress. In the end, an agreement was reached that came to be known as the Great Compromise: A House of Representatives was established in which representation was determined according to population, while a second, smaller body, the Senate, would be composed of two senators from each state. In order to allay the concerns of smaller states that this arrangement would later be revised to their detriment, it was stipulated in the constitution that equal representation in the Senate would not change without the approval of every state that might suffer from such a step.<sup>6</sup>

The delegates were also sharply divided on the question of slavery. For the southern states, the effort to abolish slavery or even limit it through heavy taxation on imported slaves posed a real threat to their citizens' way of life. Southern representatives argued that slavery must be treated as the internal affair of every state, and that the central government should be denied any say. At the same time, they insisted that slaves be taken into account in considering taxation and representation.<sup>7</sup> Delegates from the northern states sought to stop what they saw as a transparent effort to

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inflate the power of the South within the representative bodies, and many forcefully opposed granting constitutional legitimacy to slavery on moral grounds as well.<sup>8</sup> Again, the constitutional effort was saved through creative compromise. The constitution makes no mention of the moral problem of slavery; it explicitly declares the import of slaves to be a federal matter, but puts a limit on how much it may be taxed. It further states that no limitations would be placed on the right of the states to import slaves until 1808. As regards taxation and representation, it was resolved to give “other persons”—that is, slaves—the value of three-fifths of a free, taxpaying citizen.<sup>9</sup>

In addition to these dramatic compromises, an additional factor contributed to the convention’s ultimate success. The constitution drafted in Philadelphia differed from the Articles of Confederation not only in its political arrangements, but also in the method it provided for ratification. While any change in the Articles of Confederation would have required the consent of the legislatures of all thirteen states, the constitution stipulated that ratification by nine states sufficed to bring it into force in those states.<sup>10</sup> This meant that an individual state, acting alone, could not hold up the entire process with its specific demands—and therefore it gave every state an added incentive to compromise and to ratify the document in the end, lest it be left out of the federation.

Moreover, the delegates determined that the constitution would have to be ratified not by the existing state legislatures, but by special constitutional conventions in every state. These conventions, elected directly by the public for this purpose, were preferred to the other two means of ratification that had been suggested: Approval by state legislatures, and referenda within each state. Both principled and pragmatic considerations were behind this decision. The proposed constitution called for a considerable reduction in the power of the state legislatures, and it was clear that the latter would be biased against such a change. Another reason not to turn to the legislatures had to do with the delegates’ desire to win the

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broadest possible public support for the constitution. This appeal to the people was rooted in the well-established political tradition of the Puritan revolution: That the people are the supreme source of authority, and government must be based on their consent. It seemed that the natural way to ratify the constitution was through popular, statewide referenda; at the same time, the framers understood the danger in entrusting the nation's destiny to the unmediated judgment of the masses, vulnerable as it was to passions and manipulations. The idea of special constitutional conventions clearly reflected the tension between the delegates' desire for broad popular support and their fear of unchecked populism.

As the convention in Philadelphia drew to a close, on September 17, 1787, the proposed constitution was signed by 39 of the 55 delegates who had attended. Still, the adoption of the proposal to ratify the constitution was presented as unanimous, because all the state delegations gave the document their support.<sup>11</sup> Many, including Washington and Madison, described this outcome as a "miracle."<sup>12</sup> In the wake of the decision, most of the delegates put aside their criticisms and adopted a firm public stance in favor of the finished constitution. The document did not entirely reflect the wishes of any one group, but the great majority of the delegates were convinced that the best possible compromise had been attained, and that it was highly preferable to the status quo. Franklin succinctly expressed this feeling immediately before the vote, when he said: "I confess that I do not entirely approve of this constitution at present.... I consent, Sir, to this constitution because I expect no better, and because I am not sure that it is not the best."<sup>13</sup>

The constitution cleared its first hurdle within a few days, when the Continental Congress agreed to pass it on to the states for ratification in the manner spelled out in the document, despite the complaints of some members that the Philadelphia convention had exceeded its mandate. The second challenge, the ratification process itself, was much more complex and protracted; it included the appointment of a special constitutional

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convention by the legislature of each state, the convening of that body, lengthy deliberations, voting, and the reporting of the outcome of each convention to the Continental Congress. In most states, the debates at the conventions were heated, and in some the vote was very close. Virginia and New York, two states vital to the success of the union, voted to ratify only after New Hampshire, the ninth and decisive state, ratified the constitution in June 1788. In Virginia, the state with the largest population, Madison had to parry the vigorous oratory of Patrick Henry—who had boycotted the Philadelphia convention on the grounds that he “smelled a rat” in its very convocation. The constitution was ratified there only at the end of June, after its supporters agreed to endorse a formal demand by the convention to add a Bill of Rights. In New York, Hamilton, with the help of John Jay, had to mobilize all his rhetorical and political abilities—it was in the context of convincing the New York public to support the constitution that Jay, Hamilton, and Madison collaborated on the series of essays known as *The Federalist*—and it may well be that only the reports from New Hampshire and Virginia tipped the scales in favor of ratification in that state at the end of July.

In early 1789, the Senate and the House of Representatives were established in accordance with the constitution, and in April George Washington was sworn in as the first President of the United States. In the meantime, Madison, who now served in the House of Representatives, introduced a series of amendments to the constitution, including guarantees of the freedom of speech, press, assembly, and religion. In September of that year, Congress voted in favor of ten of these amendments, known as the Bill of Rights. Ratification by the state legislatures—the approval of three-fourths of the states was needed for the amendments to take effect—was a lengthy process, and the Bill of Rights was incorporated as the first amendments to the constitution only in December 1791.<sup>14</sup>

The ratification of the Bill of Rights was the final act in the process of adopting the United States Constitution, and it took place more than

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four years after the Philadelphia convention, and a full decade and a half after independence. With hindsight, we now know that this was a watershed in the history of democratic government. It is doubtful whether it would have happened if not for the group of men who convened at Philadelphia, whose insight and careful planning helped produce the most enduring constitution in effect today.

### III

To what does the United States Constitution owe its longevity? A great deal has been written about the constitutional arrangements as they appear in the final document—concerning the balance achieved among branches of government, the relations between the federal government and the states, the complex mechanism for effecting amendments, and the guarantees of fundamental rights and freedoms. Prior to all these, however, was a single guiding assumption, one which underlay the entire process of drafting and ratifying the constitution, and which finds expression throughout the writings of its framers, and especially in *The Federalist*: That a successful constitutional arrangement must clearly, explicitly, and enduringly distinguish between what we may call “constitutional politics” and “ordinary politics.” This distinction is possibly the most important contribution of the American constitutional undertaking.

The constitution is based on the belief that the activity of the regular political arena, in all its complexity, must be kept separate from the parameters—the “rules of the game”—within which this activity takes place. Establishing and maintaining such a distinction is no simple matter, and even an enduring constitution of the American type cannot draw the line clearly in all cases. The framers understood this, yet they insisted

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that constitutional authority must be seen as essentially different from “ordinary” authority, and that this distinction is the source of the stability of every form of government based on the consent of the governed. The people are the source of authority for the constitution and the values and institutions it affirms, while it is their representatives who engage in ordinary politics. Although this principle lies at the heart of many of the constitution’s arrangements, its boldest expression is the supremacy of the constitution over all branches of government, and its ability to distinguish between the manner of its own adoption and amendment, on the one hand, and the decisionmaking mechanisms of ordinary politics, on the other.

In order to maintain the stability of the constitution, the founders insisted on a difficult mechanism for amendment.<sup>15</sup> In this respect, their views echo those of David Hume, and perhaps even more so those of their contemporary Edmund Burke: It was important to them that amendments to the constitution be rare.<sup>16</sup> Amendment implies defect, and frequent change is a signal to the public that the system of governance is deeply flawed. Healthy government is based, to a great degree, on the trust of the public. This trust is most firm when the governmental system is stable, not when there are incessant battles over the system’s very nature. A wise regime needs to be supported not only by the laws, but also by the tacit assumptions—the “prejudices,” to use a Burkean phrase—held by the public. Without such support, even the best-designed form of government cannot stand.

Implicit in this distinction between constitutional and ordinary politics was the belief, which underlies many of the framers’ arguments in favor of a constitution, that certain problems are endemic to representative government, and must therefore be addressed on a constitutional level. One example concerns the twin dangers involving the degree to which power is concentrated in the hands of government: On the one hand, power concentrated in the hands of too few people has a corrupting influence; on the other hand, paralysis or unchecked factionalism can

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easily result from excessive limitations on government power. Moreover, overzealous attempts to defend liberty and prevent one-man despotism, far from fostering governmental sensitivity to the needs of the public, can easily lead to tyranny backed by the masses.<sup>17</sup> It was in response to these perennial dangers to effective government that the framers sought redress on a constitutional level, rather than through ordinary politics. This took three forms in practice: First, republican institutions such as the judiciary, the electoral college, and the Senate as a solution to the threats of populism and despotism; second, the institution of checks and balances among the separate branches of government and between the federal and state levels; and third, the creation of a strong, “energetic” executive branch that is capable of acting despite these checks and balances. It was these considerations which led to most of the governmental arrangements which appear in the constitution drafted in Philadelphia.

These institutions, which all flow from the framers’ understanding that constitutional politics should be separate from ordinary politics and should concern itself with the structural problems inherent in representative government, have a great deal to do with the remarkable stability that the constitution has been able to achieve. Throughout the constitution’s long and uninterrupted reign as the governing document of the American polity, the vast majority of the political debates in the United States have been conducted *within* the constitutional structure, not *about* it. Since 1791, when the Bill of Rights was adopted as the completion of the constitution’s ratification process, only seventeen additional amendments have been accepted, an average of less than one per decade.<sup>18</sup> To be sure, some scholars have argued that the amendment mechanism makes change so difficult that it harms democracy and the efficacy of government. But it is unclear how democracy and governmental efficacy in the United States would have looked with a different mechanism, especially when one takes into account the fundamental instability that might have resulted from frequent change. At any rate, the problem is less severe than it may seem, because a subtler method of amendment has been employed

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in America, one that allows gradual change without requiring amendments in the formal document—namely, *de facto* change through judicial interpretation. Similarly, permanent institutions have been created and modified without being given constitutional expression, such as the system of political parties and the presidential cabinet. Finally, by allowing the possibility of later constitutional conventions with wide powers, the constitution offered an additional means of change, at least in principle, in cases where amendment seemed either undesirable or unlikely.

At the same time, as the founders foresaw, most of the central changes in American politics have taken place within the context of ordinary politics—in legislation, the shifting of emphases in the programs of the executive branch, and the like. The test of a well-designed constitution consists in its leaving to the public and its leaders a variety of means to effect social change, and the American constitution has passed this test with flying colors. The stability of the constitution, combined with its ability to facilitate necessary changes, has resulted in a profound loyalty among the great majority of Americans to the constitutional structure. Americans are almost universally committed to effecting change within the system, while leaving the system itself essentially unchallenged.

On this point, of course, it is impossible to ignore the Civil War. Some regard its outbreak and conclusion as the exception that proves the rule: The American constitution created an arrangement that failed only once, when some of the states decided to leave the Union rather than engage in prolonged conflicts within it. The constitution's failure, according to this view, lay in its lack of mechanisms flexible enough to contain the disagreement within its framework. However, it can as easily be argued that in the Civil War, the constitution did not "fail" the way the Articles of Confederation or the various French constitutions failed, but rather that the rupture between the sides reflected something more fundamental and inevitable. The war arose at a juncture when political visions in the North and South were so distant that they could no longer coexist within a shared framework, and so ordinary politics was simply no longer



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suitable. In other words, what failed may not have been the constitution, but the very idea of the Union. Eventually, after the decision on the battlefield, both sides continued to work jointly within the context of the *same* constitution, as amended to reflect the ban on slavery that was one of the war's principal outcomes.

The balance achieved between an “energetic” government capable of fulfilling its role and the limitation of this government by checks and balances was an additional reason for the constitution's success. The legislative branch was to keep watch on the president, preventing the possibility of authoritarian rule. At the same time, a counterbalance had to be instituted that would limit the danger of populist rule by an overly powerful legislature. The internal division of Congress into two separately elected houses, along with the active participation of the president in the legislative process through the right of veto, served this goal well. While it could be argued that this structure is too restrictive, stunting the legislative process, there are good reasons to think that such restraint has been a good thing. The American version of separation of powers, according to which full, effective power rests only with a party that controls the presidency and both houses of Congress, is very different from the situation in parliamentary democracies, where the ruling government always has, by definition, control over parliament.<sup>19</sup> The American system offers a far more structured system of checks and balances than the parliamentary system, which tends to become dependent on features such as the professional civil service and coalition politics. The American system of a strong president, balanced by the two houses of the legislature and by an independent Supreme Court, has proven capable of enabling forceful action when necessary, but without resorting to authoritarian rule. The belief of the founders as expressed in *The Federalist*, that only the strength and ambition of politicians in one branch are capable of consistently restraining the tendency of other branches to amass excessive power, has proven correct.

Not only have the institutions of American government succeeded in living in balance with one another, but that balance has proven itself able

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to shift as circumstances in the country required, without necessitating a change in the constitution. All three branches have succeeded, as the need arose, in asserting powers not explicitly granted them from the outset. Although the tendency of the branches to broaden their powers has caused problems on occasion, the branches have generally succeeded in expanding only into the realms in which they possess a real comparative advantage over the others. The Supreme Court has expanded its authority in the defense of civil rights; Congress in the determination of priorities in socioeconomic matters; and the president in the preservation of order and the use of concentrated force in the face of civil strife or foreign aggression. The constitutional system may go too far in limiting the executive branch, but in times of crisis the United States has been led by presidents who did what was necessary to address the problems facing the country.<sup>20</sup> In the final analysis, the first modern democracy has managed to survive since its inception without suffering a single military coup or other suspension of the constitution's authority. This in itself is no small feat, and the checks and balances in the constitution have contributed greatly to it.

Moreover, the constitution has succeeded in striking the proper balance between the threat of populism, on the one hand, and the danger posed by politicians' private ambitions, on the other. The main answer of the American constitution to this eternal dilemma is the republican structure. It was the founders' assumption that a certain amount of faith in the wisest and most experienced members of society is in the common interest of all members of society.<sup>21</sup> The best process of decisionmaking, it was believed, was not through popular referenda, but through the careful decisions of the people's elected representatives, or, as in the case of federal judges, through individuals appointed by those representatives. It was in this context that the founders also emphasized the importance of fostering good character among the citizenry, and, especially, of reinforcing the tendency of voters and their representatives to elect people of

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upstanding character to positions of leadership. While the American system has of course had its failings, particularly in the realm of civic equality for minorities, it is still the case that the republican principle has on the whole functioned very well throughout most of the history of the United States and succeeded in bringing into office good leaders, particularly in times of crisis: Leaders such as Abraham Lincoln, who was able to preserve the Union in its most trying hour; and Franklin Delano Roosevelt, who led the country through the Great Depression and the Second World War.

The republican principle is also at work in the houses of Congress, despite the fourfold expansion of the Senate from 26 members at its inception to the current 100 senators, and the sevenfold rise in the number of Representatives from 65 to 435. These two bodies make most of their important decisions in smaller committees, which preserve the republican element while streamlining the functioning of government. Thanks to these arrangements, the populist danger that was of such concern to the founding fathers, especially the authors of *The Federalist*, has not appeared, and, except for very limited periods, the dictates of the masses have not led to irresponsible economic policy, the outbreak of wars, systematic persecution, or the election of demagogical leaders.<sup>22</sup>

The most important test that the constitution seems to have failed, at least for most of American history, is the preservation of the rights of minorities. These rights were, according to the founders, supposed to be guaranteed by political structures that would neutralize the dangers of factionalism or arbitrariness by preventing any one group from exercising dominance over the others. The outstanding example brought by the *Federalist* authors of such a right is the free exercise of religion, which they contended would be protected by the abundance of religious groups in the United States. In their view, the sheer size and diversity of a country is also the most effective guarantee of the other rights of individuals or groups. A multiplicity of private interests will result in a general

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willingness to defend the rights of minorities, since each group will know that in certain matters it is liable to find itself in the minority. The problem with this reasoning is that the tolerance achieved is due to each group's fear of dominance by the others, and so it in fact exists only among groups that belong to the national mainstream, whose members could belong to the majority regarding certain issues, and the minority regarding others. The situation of groups that are "chronic minorities" is more difficult, because injury to them does not raise such fears among the majority. Alexis de Tocqueville's concerns about "the tyranny of the majority" certainly have had a basis in the American reality.<sup>23</sup> The rights of Indians and slaves were denied in the constitution itself, and the history of the attitude to blacks since then bespeaks the limitations of the social mechanism that the authors of *The Federalist* believed would protect the rights of the "chronic" minorities.

Attempts by the courts to solve the problem of chronic minorities, both in the constitution and in its interpretation, have generally not improved the situation appreciably. The Bill of Rights was rarely applied to blacks until after the Civil War, seventy-five years after it was adopted; even then, the enactment of the Thirteenth and Fifteenth Amendments, which banned slavery and guaranteed blacks the right to vote, did not protect blacks from a high level of systematic discrimination and segregation. Similarly ineffective was the institution of judicial review, which had been promoted by Alexander Hamilton in *The Federalist* and first asserted in practice by the Supreme Court in 1803, in *Marbury v. Madison*.<sup>24</sup> Although the courts succeeded on occasion in standing up against the widespread discrimination against blacks, they did so only rarely and at a very late stage, addressing the challenge of equal protection for blacks beginning in the 1950s—eighty years after the constitution had granted them formal equality, and nearly two centuries after the founders had declared that "all men are created equal." In the final analysis, the power of the courts to effect social change has been quite limited.<sup>25</sup>

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Yet for all that, it is difficult to deny the success of the American constitutional experiment. The founders of the United States forged a coherent and enduring supreme law, most of whose components have won broad consensus that has only increased with the passage of time. The distinction between constitutional and ordinary politics has been maintained throughout, and with it, the unparalleled stability of the American regime.

#### IV

**I**n considering how to draft and adopt a constitution, what lessons can Israel draw from the American example?

A basic insight of the American constitutional process is that a constitution must provide good answers to the most trenchant problems facing the particular society which is to be governed by it. Moreover, the constitution must reflect that society's political tradition and culture. Any discussion on the adoption of a constitution for Israel, therefore, must begin with a look at the unique problems arising from the country's social and constitutional history.<sup>26</sup>

Israel's Declaration of Independence, which was adopted unanimously by all the representatives of the nascent Jewish state on May 14, 1948, expressly stated that the form of government in Israel would be based on a constitution. The declaration also provided for temporary institutions, meant to serve until an elected Constituent Assembly adopted a constitution that would establish the permanent institutions of government. The declaration stated that Israel was a Jewish state, and promised equal civil, political, and social rights to all its citizens. Several draft constitutions for the Jewish state were prepared prior to independence. One of them,

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composed by Leo Kohn, had even been selected as the starting point for deliberations.

But a great deal changed with the War of Independence, and when elections for the Constituent Assembly were finally held in February 1949, the provisional People's Council, which had served until then as the country's legislature, transferred ordinary legislative responsibilities to the newly elected body, which it was supposed to exercise while simultaneously carrying out its mandate for crafting a constitution. In early 1950, the assembly, which had renamed itself the "First Knesset," conducted a lengthy and exhaustive debate on the subject of the constitution, which ended with an agreement that became known as the "Harari decision": The process of creating a unified, supreme constitution would be postponed, and the Knesset would pass a number of "basic laws," which would ultimately be brought together into a constitution at some point in the future. The task of crafting the basic laws and creating a constitution out of them was given to a standing committee of the Knesset, the Committee on Constitution, Law, and Justice.<sup>27</sup>

The Harari decision was the product of the first attempt by Israel to govern itself by means of a constitution serving as the supreme law of the land. Scholars may argue over whether it was the best decision to make under the circumstances, but the fact remains that no formal constitution has yet emerged from the process it started, and it is worth recalling what led the country's leaders to refrain from decisive action at Israel's original, constitutive moment.

The decision not to enact a constitution shortly after statehood has generally been attributed to the principled opposition by the religious parties to any constitution that might be seen as competing with the supremacy of the Tora. Such an explanation falls short, however. Although at no time did they give their in-principle support to adoption of a constitution for Israel, the religious parties did, in the first years of statehood when a constitution appeared inevitable, cooperate in the

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process in order to ensure that their interests would be protected. Rather, there were other factors behind the decision to postpone the framing and ratification of a constitution. The most effective opposition came from key leaders of government, particularly Prime Minister David Ben-Gurion. Ben-Gurion was of the opinion that the proportional election system, which was copied from the institutions of the *yishuv*, would not allow sufficiently effective rule, since it guaranteed that a large number of small parties would succeed in electing representatives to the legislature; he therefore did not want to enshrine it in a constitution that would subsequently be difficult to amend. He also was concerned that any constitution adopted by Israel would set up an extensive system of checks and balances that would limit the power of the government. He therefore preferred to rely on the pure parliamentary system that Israel had inherited from the Mandatory period, which gave substantial leeway to the party that dominated the government coalition—which for the foreseeable future seemed likely to be Ben-Gurion’s Mapai. Ben-Gurion consistently opposed a constitution, limitations on the legislative ability of the parliament, and judicial review of Knesset legislation that would be based on the principles of a constitution and a bill of rights. In his eyes, a young nation that was literally fighting for its life against external enemies and had, at the same time, to contend with economic hardship and massive immigrant absorption could not allow itself the luxury of severe structural limitations on the power of the government. In its first years, Israel was therefore a highly centralized state, with a limited civil society and strong governmental control over all spheres of life.<sup>28</sup> In other words, Ben-Gurion saw the prospect of adopting a permanent constitution not merely as unessential for the welfare of Israel, but as an obstacle to the governance of the country.

Moreover, many Israeli leaders were reluctant to open up the painful ideological debates that would have accompanied any serious constitutional effort, particularly in light of the other pressing matters at hand.

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Two such debates were central at the time: The controversy over whether the Jewishness of the state was essentially national and cultural, or religious in nature; and the question of whether the nation's economy should be conducted according to socialist or market-based principles. It is very telling that a third issue was scarcely ever mentioned: The status of non-Jews, especially Arabs, in the new state.<sup>29</sup> The first controversy was dealt with through a compromise known as the "status quo agreement," under which secular and religious groups reached a *modus vivendi* to which both sides adhered for some time. The second was addressed through arrangements that struck some measure of balance between a strong welfare state and private initiatives. Both sets of arrangements were not very consistent or coherent, and would not have coexisted well with enforceable constitutional declarations.

The consequence of the Harari decision was that Israel established a parliamentary democracy along the Westminster lines, including the principle of parliamentary sovereignty, according to which the legislature was considered the supreme authority. But although the general question of what system of government would obtain in Israel was resolved rather quickly, the process of enacting a written constitution through basic laws proved to be a long one, with the first such law not passing until 1958, and with a total of only nine being enacted over the state's first four decades. Moreover, these laws did not offer the kind of long-term stability one might expect from the pillars of a national constitution: Eight of the nine were enacted through ordinary parliamentary procedures and could be similarly changed. The key exception was the first such law, Basic Law: The Knesset. One of its clauses stipulated that elections to the legislature would be national (instead of regional), that they would be based on proportional representation, and that they would reflect principles of equal opportunity for all parties and voters. This clause reflected the existing situation: Ben-Gurion had failed in his attempts to move away from the system of proportional representation, and the opposition parties and small coalition partners, fearing future attempts to change the



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system, insisted on anchoring the status quo in the law, such that it could be changed only by a special majority of 61 members of Knesset (out of 120).

This “entrenchment” of the first basic law led to the beginnings of judicial review of Knesset statutes: In 1969, the Supreme Court, in the case of *Bergman v. the Minister of Finance*, overturned the Party Financing Law, which denied financing to new parties, on the basis that this law violated the principle of equality as established in the basic law.<sup>30</sup> A few commentators sympathetic to the expansion of judicial power hailed the decision as the harbinger of a new era and the end of parliamentary sovereignty; but most others, and the courts themselves, saw *Bergman* as the very rare exception. Basic laws which were not entrenched by a requirement of a special majority were seen as regular laws for all practical purposes. According to this view, their status as “basic laws” did not in itself give them superiority over other laws, and certainly did not form a basis for the judicial review of Knesset legislation.

For the first three decades of the state, there was no strong demand for a constitution. The reasons against having one were still valid, and the political framework, while not perfect, seemed adequate to the challenges facing Israel. During this time, no serious attempts were made to alter radically the political structure of the state or the protections it offered to individuals and groups within it.

But while the constitutional structure changed little over that time, the country itself underwent a remarkable transformation. Large waves of immigration changed the demographic structure of Jewish society in Israel. Israelis whose parents had immigrated from Muslim lands, now constituting more than half the Jewish population, started challenging the hegemony of the ruling elites, who were largely European in origin and Western in outlook. In 1967, Israel won a war and gained control over all of Mandatory Palestine—with the result that the debate over Israel’s borders was suddenly reopened, creating a deep and bitter division between those favoring a two-state solution and those wanting to integrate the

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whole territory under Israeli sovereignty. In 1977, Labor lost power for the first time, opening up a period of genuine competition over the reins of government. In the 1980s and 1990s, Orthodox parties grew in influence, and began looking beyond the mere protection of their way of life, to playing a major role in shaping Israel's public life and even its foreign policy. Arab citizens also became more confident and better organized, and their elites became quite vocal in challenging the Jewish nature of the state.

Thus, over the course of several decades, the divisions in Israel deepened appreciably. Political arrangements that had in the past been up to the task of containing them now began to show signs of failure. Against this background, the past two decades have witnessed a resurgence of demand for a written constitution, in the hope that such a document could help Israel create a shared political framework, lend that framework stability and effectiveness, and thereby stop the erosion of crucial public values such as the rule of law and improve the protection of human rights.

However, the process envisioned in the Harari decision did not come to fruition. By the mid-1980s, all the remaining governmental arrangements had been formulated in "ordinary" basic laws that lacked any special protection, such as Basic Law: The President of the State (1964), Basic Law: The Government (1968), and Basic Law: The Judiciary (1984). All these laws enshrined the existing arrangements at the time of their adoption, and therefore did not stir any serious controversy, since no parties saw their interests as particularly threatened by the laws' passage. At the same time, however, it was clear that the process was being led by those who saw the basic laws as contributing to an eventual constitution which would be the supreme law of the land.

Two fundamental disputes prevented the completion of the project: The question of a bill of rights, and the question of judicial review of laws passed by the Knesset. Repeated efforts to enact legislation that would deal with these issues were unsuccessful. In 1992, advocates of a constitution in the Knesset decided to split the bill of rights into several smaller

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laws, with the aim of winning Knesset approval at least for those that enjoyed broad public support. The two basic laws that were enacted that year, Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom, did not explicitly mention judicial review, but imparted to the rights enumerated in them a measure of superiority over ordinary laws. In addition, Basic Law: Freedom of Occupation was entrenched, requiring a majority of 61 members of Knesset for its amendment. Moreover, the law stated that after a two-year transition period, the principles enshrined in it would be applied to pre-existing laws—which appeared to many to mean that such laws could be overturned if found in contradiction to the new basic laws. Basic Law: Human Dignity and Freedom was not entrenched, however, and could be amended or repealed by a simple majority in parliament; moreover, it stipulated that it would not apply to laws already on the books. In addition, both laws contained a limiting clause to the effect that the general rights subsumed under the basic law could be limited, under law, if such action “befits the values of the State of Israel, is designed for a proper purpose, and to an extent no greater than required.”<sup>31</sup>

The impact of the 1992 basic laws was far-reaching and complex. On the one hand, the laws seemed to allow the court a far broader say in Knesset legislation, a fact that greatly accelerated the constitutional process. Justice Aharon Barak,<sup>32</sup> later President of the Supreme Court, went so far as to declare that a “constitutional revolution” had taken place, and that the new laws ushered in a new era, in which Israel now had an actual, functioning constitution.<sup>33</sup> In 1995, the Supreme Court issued a path-breaking decision in the case of *United Mizrahi Bank v. Migdal Cooperative Village*, in which a panel of nine justices unanimously ruled that the 1992 basic laws empowered the courts to examine whether new laws were consistent with them, and if not, to strike them down.<sup>34</sup> Since then, the court has overturned parts of only two new laws, on the grounds that they contradicted the 1992 basic laws. A lively public debate has emerged over Barak’s “constitutional revolution,” with many people arguing in support

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of the special, constitutional status of these new basic laws and of judicial review as a necessary check on the power of government. At the same time, the charged judicial and public rhetoric since the enactment of the basic laws in 1992 has also triggered a backlash in the political system, and some legislators have taken action to delay the further enactment of basic laws. They have argued that the power of judicial review must not be entrusted to a court that was originally established as a purely “professional” body; instead, a special constitutional court must be established for this purpose, whose composition will be more sensitive to the values and ideals of the Israeli people.<sup>35</sup> Their main objection has been that the Supreme Court has expanded its jurisdiction in matters of public life, and that it has consistently taken positions favoring secular, Western, and liberal values, even in the face of explicit legislation to the contrary. They further claim that the process by which judicial review was enabled was itself problematic, since such decisions should be made only in the context of a broader discussion of the constitution as a whole, rather than as an interpretation of a specific basic law.

More than half a century after its establishment, Israel still does not have a formal constitution, and many of its basic laws remain the subject of controversy. The country’s governmental structure is still, with some adjustments, based on what was inherited from the Mandate and the institutions of the *yishuv*. The only real attempt to introduce a major change in the governmental structure was the institution of direct election of the prime minister in 1992, an effort that failed resoundingly: Direct elections were repealed in 2001, and the next election in Israel will see a return to single-ballot voting and the pure parliamentary system.

Looking back, it is fair to say that the absence of a constitution throughout the period since the establishment of the state has significantly hampered the ability of the nation to resolve fundamental disagreements within a shared political framework. This is true not only for the deep ideological questions—such as the nature of the country’s Jewish character or the status of Israel’s Arab population—which do not appear

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any closer to resolution than they were fifty years ago.<sup>36</sup> It is true also for disagreements over the nature of government institutions and the relations among them. Thus there is, for example, no consensus within the political system on the correct division of authority among the various branches of government, or about the proper relationship between the national and local governments.<sup>37</sup> And despite the repeal of direct election of the prime minister, there is still no consensus as to how Israel's executive and legislature should be related, with the presidential model still having many adherents. In any case, the Israeli system clearly suffers from inadequate checks and balances among the branches of government.<sup>38</sup>

The lack of consensus over the Supreme Court's status relative to other authorities has only made the problem worse. Even before the "constitutional revolution," the court had greatly expanded the scope of its power to review governmental activity.<sup>39</sup> Since the basic laws of 1992, and even more so since the *United Mizrahi* ruling in 1995, its jurisdiction has expanded to include Knesset legislation. While some see this new authority as necessary to protect the rule of law and human rights, others see it as undermining the right of the political branches, accountable to the people and representing all groups, to debate and decide the political and social priorities of the country on their own.

In the final analysis, Israel in its sixth decade is a politically, religiously, nationally, and culturally divided society, burdened with profound disagreements over the character, institutions, and role of the state—perhaps more so than ever before. It continues to pursue its affairs under a makeshift system in which very little is permanent, and fateful constitutional decisions are made as part of ordinary politics. Any government seeking to effect meaningful, long-term change in the institutions of the state is forced to walk through a minefield of short-term interests and political posturing, both within the coalition and outside of it, one that is so perilous as to render the effort futile—even though the institutions currently in place are universally seen as inadequate. As a result, Israeli society has not yet been able to undertake the kind of

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painful compromises among its constituent groups which would be the first requirement of any effort to adopt a shared political framework that would be seen as legitimate by all.

For all its good intentions, the process of gradual passage of basic laws, augmented by a “constitutional revolution” led by the Supreme Court, has done little to fill the most important role of a constitution, which is the establishment of permanent, stable arrangements that are the product of genuine compromise, assuring each of the country’s factions that its vital interests will be protected, and that ordinary politics can therefore be conducted without the fundamental framework coming under constant review. On the contrary, the process has only deepened the suspicions in certain sectors that the power of the judiciary is being used by their opponents to make gains that could not have been secured through the political process. It seems that the only serious alternative to the current constitutional process is the adoption of a comprehensive written constitution, through a process in which all major matters of controversy are put on the table and all the sectors of society are encouraged to take part. The American experience is useful in showing us whether such a project is really feasible—and what would be required to carry it through.

## V

**T**he American constitutional process succeeded for three basic reasons: First, it was a matter of consensus that the fledgling United States required some sort of constitution, and that the extant arrangement was inadequate; second, a compromise was found that established a new, shared framework while at the same time protecting the vital interests of those groups who were most fearful of what change might mean for them;

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third, the particular process of drafting the constitution and ratifying it was one that facilitated the necessary compromises, secured robust public debate, and bestowed upon the new constitution a broad sense of legitimacy.

Given the current state of affairs, it is tempting to conclude that any effort to replicate the American success in the Israeli context is doomed from the start. Indeed, there is no shortage of voices in Israel claiming that real negotiation among the major groups of society is simply impossible. Instead of quixotic bids for a comprehensive constitution based on consensus, some of these skeptics argue, why not repair the current system through legislation and other tools of ordinary politics? Others propose to complete Israel's constitution in a way that avoids the stormy and protracted public debate which would precede any agreement by consensus, and would therefore cast doubt upon the success of any such effort. This latter view, it seems, is the primary motivation for the judicial "constitutional revolution" and its supporters in the Knesset.

My reading of the Israeli situation and the American experience suggests that the process is of the essence, and that shortcuts will be neither effective nor desirable. Of course, the success of such a process is far from guaranteed. But the same may be said for the American effort in 1787—otherwise, no one would have spoken of a "miracle at Philadelphia." There can be no guarantee of success, but this in no way absolves us of the responsibility to try. To understand why this is so, it is worth taking a closer look at the arguments that have been made in opposing such an effort.

The most popular version of the skeptical argument runs as follows: When the first Knesset accepted the Harari decision, Israel effectively passed up its only real opportunity to forge a constitution. Constitutions are usually adopted in times of crisis, at watershed moments in a nation's history, and especially in the period immediately following war or revolution. Alternatively, nations may adopt constitutions when it is clear to everyone that their system of government is unworkable, and that only a

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fundamental overhaul can preserve the state. Such was the case, for example, in the United States on the eve of the Philadelphia convention: The failings of the Articles of Confederation were serious, clear, and agreed upon.<sup>40</sup> It follows, according to this argument, that Israel missed the historical boat when it failed to adopt a constitution at its founding—and if it failed then, could it possibly succeed now, in the course of ordinary politics? And even if a constitution could cure the ills of Israeli political life, the argument continues, entrenched political interests would never allow one to be adopted.

In considering this claim, we should not forget that in 1787, the Articles of Confederation still had many strong supporters in America. Over the course of more than a century, each of the colonies had developed its own identity and a sense of being different from its neighbors. In each colony, an independent government had arisen that was dominated by a few dozen politicians, who enjoyed the power and prestige associated with controlling that colony's resources. After the War of Independence, widespread opposition to centralized power gave an ideological basis to their claims for continuing to exercise power, while the Articles of Confederation institutionalized their stature and that of the governments they controlled. In every state there were great men, such as Patrick Henry of Virginia and Samuel Adams of Massachusetts, who could eloquently defend the status quo as a matter of principle. If we did not have the benefit of hindsight, we would have to agree that the odds in 1787 were heavily against any effort to enhance dramatically the role of the central government, such as that entailed in the constitution. Yet it succeeded all the same.

Furthermore, while it is true that there are many in Israel today who oppose the adoption of a formal constitution, the idea also has numerous supporters both within the political echelons and outside of them. In recent years, the belief that the drafting and adoption of a constitution is necessary in order to help contain the divisions in Israeli society has gained in popularity. Already in 1988, two-thirds of the Israeli public



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supported the adoption of a formal constitution.<sup>41</sup> In August 2000, on the eve of the current outbreak of violence, the percentage of supporters had risen to three-fourths of the population.<sup>42</sup> Today, after more than a full year of conflict within the territories and terrorist attacks on Israel's cities, which have heightened the sense of crisis and solidarity among Israelis, support may be even greater.<sup>43</sup> For this reason, many leaders from across the political spectrum have endorsed the adoption of a constitution, provided that it is devised in a way that takes into account the views of the great majority of Israelis.

A further claim against an effort to draft a constitution has to do with the quality of leadership evident in Israel today. No constitutional process can succeed without the benefit of imaginative and decisive leaders, who are capable of advancing creative compromises and agreeing to painful ones. Without such leaders, the proponents of a constitution cannot prevail—neither in America then, nor in Israel now. According to this view, the prospects of finding in Israel leaders of the caliber of Hamilton, Madison, Washington, and Franklin are slim. And some will go so far as to see a similar crisis in leadership throughout the entire modern world.

What can one say to this? The fact is that around the world, the right individuals have often somehow emerged at the crucial moment, to provide their people with the leadership needed to adopt a constitutional solution in the face of great difficulties. Examples of this from just the past quarter-century include Adolfo Suarez in Spain after Franco's death, Pierre Trudeau in Canada in the early 1980s, and Nelson Mandela and F.W. de Klerk in South Africa during the transition to majority rule there. It is said that no man is a prophet in his own city, and Israelis find it difficult to imagine who among them would be capable of leading the constitutional charge. But Israel does have men and women who are capable of statesmanship and elevated public debate, and political entrepreneurship of the kind needed to succeed in the successful adoption of a constitution. To bring them together will not be easy, but Israel has made extraordinary efforts in the face of far more daunting challenges in

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waging war and making peace, and it seems unduly pessimistic to assume that the nation's leaders are incapable of making a similar effort to draft a constitution that will bring a sense of partnership within Israeli society and provide a greater measure of political security to all its constituent groups.

But what if Israeli society is so divided that no constitutional package will be acceptable to all the major factions? For all that disunity is a powerful incentive for adopting a constitution, it is also a major obstacle. What if a constitution just is not seen as being worth the price that one faction or another will be asked to pay?

In answer to this concern, it must be recalled that the fledgling United States, too, was a profoundly divided society. Tensions ran high between farmers and city dwellers, between easterners and settlers on the western frontier, between the North and the South. These divides were often cultural as much as ideological, and held the potential of tearing the union asunder. Nevertheless, the various groups were able to come to agreement on the constitution, because they came to appreciate its many advantages. In Israel as well, a constitution is demonstrably in the interests of all the major groups, and enlightened self-interest can bring them together regardless of how divided they appear to be.

Of course, this answer only goes so far. While in all constitutional efforts, stability and support are likely to be the fruit of painful compromise, in some countries the dividing issues seem deeper than in others, and it may be commensurately more difficult to persuade groups of what they stand to gain, particularly in light of each group's fear that its concessions will be tangible and permanent, while those of other groups will be only apparent or temporary. This is indeed the case in Israel today. And yet, it is still the case that a constitution for Israel would hold great promise for all major groups, including the Arabs and the haredim, who are the most reluctant to join in the effort. If careful attention is paid to the design of the constitution and the process of its adoption, success may yet be in the offing.

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Furthermore, the concern that some groups might take advantage of the process to make unreasonable demands, rather than compromises—a fear which could persuade some not to take part in the process at all—could be addressed in part by adopting another of the American founders’ principles: No single faction should be granted veto power over the formulation, acceptance, or amendment of the constitution. The requirement of unanimous consent of all the states for every amendment or significant decision was what eventually sank the Articles of Confederation. It was in response to this weakness that the Philadelphia convention gave any nine states the power to render the constitution operative. When powerful factions in a number of states understood that they would not be able to prevent the adoption of the constitution by the majority of their neighbors, they were far more willing to negotiate the conditions of their own entry into the union. At the same time, on the issue which was most important to the smaller states—namely, the question of equal representation in the Senate—these states were given a kind of veto power over future changes in the method of representation. Israel is not a federation of states but a single, unified country, and does not have the luxury of leaving any group completely outside the state’s jurisdiction. But the idea of not granting veto power to individual factions can have its application in the Israeli context as well; once a way is found to address the fears of all constituent parts of Israeli society (including the possibility of giving them veto power on specific issues), it may be decided that the process of adopting and amending the constitution need not require the agreement of all of them. Such an approach, in turn, may create the proper incentive for participation and negotiation by the major groups.

In Israel, certain groups are bound to oppose the constitutional process out of fear that the result might incorporate principles which are unacceptable to them—such as religious pluralism in the case of the haredim, or an acknowledgment of Israel’s Jewish-national character in the case of the Arabs. If, however, these groups’ representatives see that a large majority of Israeli society supports the constitution and is prepared

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to pass it without waiting for unanimous support, and that this majority is willing to enter into good-faith negotiations with them in order to address their concerns, they will have little choice but to take part in the negotiations in order to work out the best conditions their political standing allows them to achieve.

Once again, while it is important that no group be given veto power, it is nonetheless highly desirable that all major groups take part in the constitutional process. It is, of course, possible to pass a constitution defining Israel as a Jewish state without the consent of Israeli Arabs. After the fact, Israel's Arab citizens might even come to conclude that Israel with such a constitution is better for them than Israel without one. Even so, their nonparticipation in the drafting stage would open the door for claims that the Jewish-state clauses alienate Arab citizens and undermine the constitution's democratic validity. In such a case, the Arabs would probably intensify their efforts to strip Israel of its Jewish character, and the divide between Arabs and Jews in Israel would only deepen. For this reason, it is important that the Arabs be kept in the constitutional circle, and that they be persuaded that taking part in drafting the new constitution protects their vital interests far more than maintaining the current system.<sup>44</sup> Their participation will lend the Jewish character of the state an added legitimacy, while at the same time requiring Arabs and Jews to see how this Jewishness can be squared with the full civil and political equality of citizenship which democracy requires.

This is no less true for the haredim. It might be possible to pass a constitution against their will, but it is far better to include them in the process—even if for symbolic reasons they give only a low-profile sort of approval, in the form of an agreement not to oppose the constitution. The haredim have a great deal to gain from the confirmation of Israel as a Jewish state. The constitution would establish their right to public support of their schools, their communal autonomy, and their religious freedom. Obviously, from their viewpoint the constitution will carry a price. They will have to give their (perhaps tacit) approval to secular

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institutions, including the Supreme Court, and to accept the fact that the law of the land is not identical to the halacha. They might have to accept some redistribution of the national resources from which they currently benefit. And they will have to accept that Israel must strengthen its universal civic affiliations, and that all residents must shoulder part of the burden of public service. But some of these concessions have already begun to be made. If a way can be found to reassure the haredim that they will have a real say in the constitutional process, they may well find that the advantages of a constitution outweigh the disadvantages.<sup>45</sup>

Naturally, the most ardent supporters of a liberal, Western-style constitution for Israel will also have to pay a stiff price for a stable and successful outcome. Some of those groups seem to regard a constitution as a way of maintaining their own elite status and restraining various minority groups whose power seems to be on the rise. But a constitution that is seen as permanently institutionalizing the Western, secular-liberal vision of the good life would indeed be counterproductive, and is highly unlikely to be adopted. Both the declaration of values and the institutional framework, including the handling of judicial review and the structure of the judiciary, would have to be the subject of negotiation.

But it is a mistake to think that a constitution, by itself, can resolve the disagreements of Israeli society in favor of one faction or another. Adopting a constitution cannot excuse us from ongoing efforts to resolve the painful issues on the public agenda. On the contrary: The successful constitutional enterprise is one that secures a shared political framework within which all factions may try even harder to win support for their visions of the good life. For example, even if the constitution defines the state as Jewish, a long and difficult discussion will have to take place over what such a definition entails. The Law of Return and matters of religion and state may continue to vex the nation for years or even decades. On some issues, tentative first steps may be taken during the constitutional process, but most progress will have to wait for the debates over primary and secondary legislation that will follow. As long as there is no consensus

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in Israel on the good life, its constitution must be, in Oliver Wendell Holmes' words, "made for people of fundamentally differing views."<sup>46</sup> The adoption of a constitution is an important phase in the strengthening of the Israeli political system and in preparing the people of Israel to confront the most difficult questions facing its public life—but it will not be a cure-all for the nation's ills.

At the end of the day, we cannot be certain that any constitutional process will end in success. For that to happen, all sides will have to prepare themselves for the serious reconsideration of their vital interests that real compromise will undoubtedly entail. Israelis will have to work hard to keep an eye on the larger picture of the good of the country, or else the entire effort might end in failure, and we may even wonder whether we were not better off without it. But the chances of success are higher than many Israelis are inclined to think—surely too high for us to throw up our hands in despair before we have even begun.<sup>47</sup>

## VI

**I**f any such constitutional effort is to succeed, however, two things must become clear in our minds before we begin. First, we must develop a clear understanding of what problems a constitution is or is not supposed to address; otherwise, we may well find ourselves solving problems that do not require constitutional resolution, while leaving more crucial issues unaddressed. Second, we must develop a process of drafting, ratifying, and amending the constitution that will maximize the likelihood of producing the kind of constitution that can indeed fulfill its proper role.

In this vein, it is crucial to remember that any constitutional process must engender broad popular support for the final product. One of the main goals of a constitution is to provide a stable basis of legitimacy for

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the fundamental structure of the branches of government. Such a shared political framework, representing the commitment of the state to the welfare of all its citizens and to some of their most deeply held values, is needed in order to permit the groups within the country to promote their separate visions of the good life within the framework of ordinary politics. Of course, we cannot know for sure whether such a framework can be reached—whether Jewish and Muslim religious groups, for example, will ever be able to live with the rule of secular authorities without constantly attempting to undermine the constitutional system; or whether Arab citizens will ever accept the legitimacy of a constitution which defines Israel as a Jewish nation-state. These are questions we cannot answer now. At the same time, we assuredly will not be able to answer them before we have made a serious effort. To that end, it is worth taking a look at the basic needs a constitution for Israel will have to fulfill.

The first is that regardless of the specific forms of government adopted, the constitution itself must be the supreme law of the land. All other laws that were enacted in the past, or may be passed in the future, must be acknowledged as subordinate to its authority. Moreover, the constitution must be clearly differentiated from regular lawmaking. It must be very stable; and it must provide for its own maintenance and security. It must surely allow for its own amendment, but only with great difficulty. Only in this way will the constitution be protected against majorities that may someday try to alter it in a way that harms those who are not in power. Groups that expect to be in the minority will probably demand heavy “entrenchment” of the supreme law as a condition of their consent to a complete constitution. Otherwise, minorities may fear, and with justice, that a day will come when the constitution is taken for granted, and the majority may not recall the reasons behind the concessions they had made, and be tempted to “improve” the constitution according to their own interests. Plainly, such fears, especially among the religious sector, have contributed to the delay in adopting a constitution for Israel. Only

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by convincing them that the painful compromises that others will be making on their behalf will not be easy to reverse later on is there any chance that such groups will consent to compromising in the first place. Unless the new constitution is both supreme and firmly protected against changes in the political winds, no such agreement will ever be reached. For similar reasons, the constitution should be comprehensive, finding some sort of resolution for all the major issues of dispute, so that no element of the whole system can be altered or renegotiated once others have already been sealed into law, thus upsetting the delicate balance that has been achieved.

Finally, there is the question of what should go into the constitution. If the constitution is to serve as a unifying document, it should avoid declarations that are blatantly divisive. At the same time, if there is no basic agreement on commitments and values, what is the identity of the society constituted by the constitution? The American framers in Philadelphia had a very general, neutral preamble, as well as a “thin” institutional constitution, which did not include a bill of rights. In their mind, a bill of rights was not necessary for the creation of a successful constitution, since the protection of rights was ultimately in the hands of the individual states, and the federal government lacked the power to infringe on them in any case. But a bill of rights was added during the ratification process, because the American people, and particularly their representatives at the constitutional conventions, feared a strong central government. The dangers of countermajoritarianism and judicial review seemed to them far less significant than the danger of tyranny coming from the central government.

In Israel, however, the circumstances are different. Ideally, a constitution for Israel should in fact proclaim the shared values of the Israeli polity and provide for their enforcement. In Israel, as in every open society, these values include democracy, the rule of law, just and consistent administration, and the probity and transparency of the conduct of



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government. To this we may add a general sense of civic solidarity, and a general commitment to values such as human dignity and freedom. These are universal civilized values, shared by all the major civilizations. Such a declaration, which would have the unified backing of the major segments of Israeli society, would make the constitution into an important vehicle for instilling these values among Israeli citizens.

These values are by nature vague, in that they do not dictate any particular solution to the problems facing society. But this ambiguity is their strength: They serve to unite the citizens around important value commitments, while giving the political branches the power to make specific decisions fitting the changing needs of society. If we were to incorporate into the constitution one of the competing visions of the good life (say, the belief in the superiority of Western liberalism), the constitution would become a source of alienation of those for whom such a determination would be unacceptable.<sup>48</sup>

The same applies to a bill of rights. In principle, all groups could, and should, accept a commitment to universal human rights. However, the universality of human rights depends on their ambiguity and open-endedness. Constitutionalizing human rights, and especially giving the power to interpret their implications in an authoritative manner to a court, means that the power to adapt human rights to the structure and needs of the particular society is transferred from the public to the court. Unlike the political branches, courts are not fully representative, and they are not directly accountable to the constituent parts of the public and to their competing visions of the good life. There may be a real danger that courts will act as a power base for a particular segment of the population, undermining the interpretations of public interest and the good life held by large groups of the population. Indeed, this is the danger that has precipitated the opposition of large segments of Israeli society to granting the Supreme Court the power of judicial review over Knesset legislation. Supporters of the constitutional revolution, on the other hand, argue that

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the court is the right body to exercise review precisely because of its professional and countermajoritarian nature.

These issues are by no means unique to Israel. They exist in all democratic societies. What is unique to Israel, however, is that the debate is taking place in the absence of a clear prior constitutional arrangement. Although the question of the judiciary's role has been high on the public agenda, the real debate in Israel is a deeper one: Not whether an established Supreme Court under a clear constitutional regime should enjoy the powers of judicial review and to what extent, but what should be the very nature of our judiciary, and of the constitutional arrangements themselves. I believe that Israelis have every right to ask these more profound questions, and that any other approach would be both undesirable and unwise.

All of this ties into the last and central point. The constitution, especially in divided societies, should be based on real and painful compromises made by all parties to the negotiations. The details of the constitution should emerge from a real process of negotiations. But at the outset it seems quite clear that the question of judicial review, and the identity and structure of the body to which such powers will be entrusted, should be seen as an important subject of these compromises. On the other hand, Israel is coming to drafting a constitution after more than fifty years of "ordinary politics." It cannot design its institutions in a vacuum. It must start from what there is, and make whatever adjustments are necessary to reflect the new agreements. This will be one of the main challenges of the Israeli constitutional process.

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## VII

**H**ow could such a framework be achieved? The first thing to remember is that any draft constitution that does not take sufficient account of the interests of all important groups is unlikely to be ratified, and if it were ratified, it would be unlikely to survive. In America, the major groups eventually threw their support behind ratification because they were convinced that the constitution on the table was the best comprehensive agreement they could achieve. In reaching this point, the specific process of writing and ratifying the constitution—the means employed and not just the abstract ideals—proved to be crucial. The chances of actually implementing a constitution that fulfills the minimal needs of the major groups in society and offers a good system of checks and balances depend on the method of its drafting and ratification. The American method may not be the only way to make a good constitution, but there is much sense in it, and Israel will do well to create a constitutional process which draws upon the American model.

To begin with, a small body, with representatives from all the major sectors of Israeli society, should draft a constitution. The Knesset cannot be this body, for the simple reason that all its members attained their positions via ordinary politics, and almost all of them plan on staying there by the same means. It would make no sense for members of Knesset to be the ones to decide the rules governing ordinary politics—including the powers vested in the legislature and the method and timing of elections. However, the Knesset should be charged with appointing the members of the constitutional committee, filling it not only with scholars from different fields, but also with leaders from the entire political spectrum who will bring to the deliberations their political stature, prestige, and experience in making compromises. This body, a sort of “Constituent

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Assembly,” will draw its legitimacy from the imprimatur of the Knesset. Ideally, it will conduct itself in accordance with the standard that Alexander Hamilton set out in *The Federalist*: The adoption of a constitution, not as a result of arbitrariness, chance, and power, but out of rational discussion and decision.<sup>49</sup> At the same time, we must recall that the relative strengths of the different forces represented in Philadelphia dictated to a great degree the final results, such that power and not only ideas came into play. This is no secret, and it did not invalidate the finished constitution. On the contrary, it strengthened it.

Moreover, it is worth bearing in mind that the deliberations in Philadelphia were not detached from the American political tradition. The delegates to the convention realized that respect for this tradition—such as the American predilection for local government and property rights—was critical, both in order to adapt the constitution to society, and to ensure that the constitution would win broad legitimacy. In Israel, too, it will be necessary to take account of the Israeli political tradition, so that the document that emerges will be acceptable to the great majority of the public. Some kind of balance between the Jewish and the democratic nature of the state will have to be found. The role of religion in public life will have to be addressed, and the American solution of a “wall of separation” between church and state is not likely to succeed in Israel. Israel needs to strike a balance between the need to grant different communities autonomy, and the strengthening of civic bonds between all Israelis. Finally, Israel does not have the luxury of ignoring questions of social and economic solidarity in an era of globalization. A viable constitution will have to address all these issues.

From the American use of the “committee of the whole,” we can learn the importance of allowing delegates to reevaluate their positions continually, during all stages of deliberation, since every element of the constitutional system will be influenced by every other element. For instance, delegates are not likely to give their consent to a bill of rights as long as

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a final decision has not been reached on the question of judicial review. Supporters of judicial review will not be willing to consider limiting the jurisdiction of the Supreme Court unless they have reason to believe that they are paving the way for the inclusion of a bill of rights as a part of the constitution. Thus it must be decided from the outset that none of the tentative agreements reached in the course of negotiation will be binding until agreement is reached on the entire document.

The participants in this constitutional process will require not only the qualities of leadership and wisdom, but the greatest possible detachment from the pressures of ordinary politics and public opinion. When leaders are on the brink of great compromises, they must be able to negotiate without constantly reporting on their progress to the public. Otherwise, opponents of the process will exploit every opportunity to kill the negotiations in their infancy. To avoid this danger, careful measures will have to be taken, such as providing the delegates with alternative proposals ahead of time, and holding deliberations with absolutely minimal publicity.

In the second stage, after a constitution has been formulated in its entirety, it will have to go to the Knesset for approval. This will place a heavy burden of responsibility on the legislature. The constitution that the Knesset will be asked to consider will be, virtually by definition, one that could not have been produced within the context of ordinary politics. In Israel today, it seems unlikely that the Knesset would follow the Continental Congress' example and send the draft constitution on to the stage of ratification without introducing any changes. Nevertheless, we might hope that legislators will show restraint, with the understanding that the central decisions in the constitutional process are not theirs to make. If the Knesset were to make fundamental changes in the package it received, it would likely upset the delicate balance of compromises that have been made in the constitutional committee, thereby robbing that body's recommendations of their special legitimacy.<sup>50</sup>

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The trust that the Continental Congress placed in the constitutional convention in Philadelphia played an indispensable role in the constitution's ultimate success. But it cannot reasonably be expected that the Knesset will willingly forgo a more central role in the constitution-making process than that which the Continental Congress played. At any rate, the organization of the Israeli process is bound to differ from the American model. We may have to satisfy ourselves with the procedure followed in most of the Central and Eastern European countries that emerged as democracies after the fall of the Soviet Union. There, the parliaments reserved the right to draft the constitutions, but in most cases accepted the recommendations of external round-table committees; as a result, what reached the desks of legislators was invariably the result of compromises reached outside of ordinary politics.<sup>51</sup> Put another way, it is the extraparliamentary formulation of the constitution as a whole which is essential to any constitutional process, even if the precise role of the Israeli legislature is negotiable. In any event, the constitution must be passed by the Knesset by at least as great a majority as that which is required by the constitution in order to amend it. This condition is essential in order to maintain the document's abiding legitimacy.

In the third phase, the constitution must be ratified, in its entirety, by the public. Despite the American founders' ambivalence toward "the people," they insisted that the privilege of constitutional ratification be given to representatives elected directly by the public for this purpose.<sup>52</sup> They did not go so far as to advocate a referendum, but in the modern period, governments in many different countries, states, and provinces have in fact succeeded in placing critical decisions, such as constitutional amendments, border changes, or divisions of sovereignty, directly in the hands of the public via referenda.<sup>53</sup> The issue is still controversial, and there is still plenty of support for the framers' caution toward such referenda, but a referendum has one major advantage: It emphatically reminds us that in constitutional matters, the people are the supreme authority. A constitution that wins the support of a clear majority of the Israeli public will

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garner correspondingly broad legitimacy. Moreover, the prospect of a referendum will impress on both the constitutional committee and the Knesset the importance of crafting a document that all segments of the public are likely to support. Thus the very existence of a referendum as part of the constitutional process may have a moderating influence on parties who might otherwise be reluctant to compromise. A referendum will also sharpen the distinction between constitutional and ordinary politics in the eyes of the public, leading the people to demand that their legislators rise above narrow interests and act for the public good.

In the phase of Knesset deliberations, and especially during the preparations for the referendum, the quality of public debate will be of crucial importance. A thorough, open debate should raise the important questions rather than avoiding them, and will encourage a careful weighing of issues on the part of politicians and common citizens alike. And a debate of this sort must be founded on mutual respect: The American constitutional debate, of which *The Federalist* was part, was rarely framed in terms of good and evil, of saints and sinners. Advocates of either side did not generally label their opponents “interested parties” or “corrupt,” and certainly did not make use of the preferred Israeli political epithet, “idiot.” All sides realized that the struggle over the constitution was not the last political battle America would see, and that it was but a single moment in the life of a nation. All sides would have to live with each other afterwards. The participants in the constitutional convention understood this well, and so the debate, even when highly spirited, was generally respectful.

Israel’s leaders, too, must understand this principle, for the constitution will not bring an end to disagreement, but only provide a stable framework in which to disagree. Acceptance of a constitution will signify that all parties are aware of these disagreements; that they seek not to vanquish their opponents, but to settle their disputes in a peaceable, orderly manner. Respect and an understanding of what a constitution can and cannot do are a part of the constitutional process itself. Without

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these, the trust and mutual goodwill that the constitution is supposed to reflect are likely to seem superficial or naive.

When we examine the actual constitutional process in Israel against the background of this analysis, it is easier to identify its weaknesses. In Israel, the debate over a constitution has been conducted as though the *contents* of the proposed constitution were unimportant. The current constitutional process encourages the institutionalization of the existing system, one that reflects ordinary politics with no compromise, while adding to it a bill of rights and judicial review; the nature of the debate has been to focus far more on whether a constitution is needed, and what the easiest way is to achieve one, than on whether the existing basic laws offer Israel the right constitution for the country. But one cannot really take a position on an abstract constitution; as the American example makes clear, the public must be shown an actual document, so that they can ask whether *this* is the constitution they want. The debate in America was not over constitutions in general, but over the particular constitution hammered out in Philadelphia.<sup>54</sup> That constitution was the product of negotiated compromise, creating the checks and balances that made it so much better than the previous situation, for most people and for all states. An Israeli constitution based on the “constitutional revolution” may in fact be, for many groups, a worse outcome than the present state of affairs. The result is likely to be that entire sectors of the population will deny its legitimacy and act to undermine its public support. Such a move may indeed have consequences diametrically opposed to those intended by the constitution’s advocates.

Indeed, the current situation is a source of frustration for anyone who believes that Israel needs a proper constitutional process. Such a process does not seem likely to begin in the immediate future, and once begun it may not yield results in the short term. Nonetheless, this does not mean that we should look for shortcuts. It is not hard to sympathize with those jurists and scholars who would sidestep the process of public negotiation on the major issues and instead adopt a constitution on the basis of the



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existing basic laws. In their view, the public interest demands the establishment of a supreme and entrenched constitution, with judicial review as a power to check legislative excesses. They think the politicians' unwillingness to limit their own authority is the principal reason such a constitution has not been adopted. According to this outlook, what is important is that some constitution, even an imperfect one, be adopted; how it is adopted matters little, for the nation is likely to accept it once it is in place.

But any serious look at Israeli society reveals the shortsightedness of such a view. Such a constitution, if adopted, would enjoy the allegiance of its partisans and no one else. Those who opposed it from the start would have no reason to accept the obligations it imposes on them, in whose formulation they had no say. Distrust of and alienation from Israel's political system would only increase. In the eyes of those who were left out of the process, the difficulty of amending the constitution would be seen not as a welcome safeguard of their interests, but as an attempt by those already in power to entrench themselves and freeze the status quo—a status quo that was attained without discussion and without serious compromises. In terms of the American constitution, such a move would be analogous to the Virginia Plan being imposed on all the states, without the benefit of a Philadelphia convention. Or, more accurately, to the imposition of the Articles of Confederation, with only a few cosmetic changes.

There is a more profound reason to reject such a “constitution from above.” When the people have the final say on a constitution, as they did in the United States, they have the opportunity to choose compromise and solidarity over divisiveness. It is a conscious decision on the part of the people to invest in compromise for the sake of building the nation, a determination by the public that the compromises which the constitution entails are a price worth paying. It is only through negotiation and compromise willingly arrived at that the broader public can come to believe that it is not merely surrendering to political extortion or being forced to

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abandon its principles, but is making a wise and necessary decision to follow the only safe route to peaceful coexistence. Moreover, such a choice is in itself an important expression of respect for the variety of groups that make up Israeli society.<sup>55</sup>

If the Israeli nation is to take the crucial, unifying step of accepting upon itself a constitution, the process of its adoption will in the long run be at least as important as its contents. Only by following the more difficult path, of consensus-building and painful compromise by all parties, can Israel hope to draft and ratify a constitution that will enjoy the kind of broad legitimacy and enduring supremacy seen in the world's most successful constitutional systems.

## VIII

**F**or Israel to adopt a constitution that serves the country's needs and enjoys popular support, it is essential that the process be carried out in its entirety, without shortcuts. The Knesset must take the lead by appointing a body that will represent all the country's major groups, which will be charged with the duty of drafting a constitution. The draft constitution must create a shared political framework for the nation and draw a clear line between constitutional and ordinary politics. If the framers do their job well, the Knesset will be able to submit the constitution, with minor adjustments, to be ratified by Israeli citizens in a referendum. If the proposed constitution is indeed a good one, the people of Israel will support it overwhelmingly. And then, following its ratification, the constitution will serve as a unifying force, setting the best ground rules that can be achieved for living together in a diverse society.

Looking back on 1787, the success of the American effort to craft a constitution was not necessarily due to the specific arguments of the

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framers, but ultimately to the collective understanding that an agreement on the constitutional order was deeply needed, coupled with the American tradition of mutual respect. It is hard to imagine framing a constitution in Israel without a similar combination.<sup>56</sup> But such an understanding is not impossible; indeed, the country has proven itself equal to greater challenges than this.

The American founders set for themselves the awesome challenge of carefully and deliberately founding a new nation, in a way that had never before been attempted. Their success went beyond anyone's imagination. We in Israel would do well to learn from their accomplishment, and to repeat it, in our own way, in our country.

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## **Notes**

1. The new Hebrew edition of *The Federalist* has begun to play a role in debates over constitutional matters in Israel. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Yael Hazony, trans. Aharon Amir (Jerusalem: Shalem, 2001).

2. George Washington, in a letter to Henry Lee, a member of the Continental Congress, on October 31, 1786, cited by Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (Boston: Little, Brown, 1986), p. 45.

3. Bowen, *Miracle at Philadelphia*, p. 4.

4. Hamilton presented the convention with a proposal which, to an even greater extent than that of the Virginians, was intended to strengthen the central

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government. In light of Hamilton's plan, the Virginia Plan could be presented as a compromise or moderate solution, rather than as an extreme position.

5. Bowen, *Miracle at Philadelphia*, pp. 36-37, 40-41.

6. Constitution of the United States, Article V.

7. All the delegates to the Philadelphia convention agreed that the basis for taxation had to be identical to that of representation. This principle was a central part of the legacy of the War of Independence.

8. There were those in the South as well who opposed slavery on moral grounds. This was the position held, for example, by James Madison, yet he recognized that the abolition of slavery was politically impossible at the time.

9. Constitution of the United States, Article I, section 9; Article I, section 2. Additionally, slavery was defined as an internal problem of property laws in the southern states. As regards its "interstate" implications, the compromise on this issue balanced a defense of the status quo with a limitation of this defense to only twenty years. In accordance with this compromise, the constitution also required the return of escaped slaves to their owners. Article IV, section 2(c). For an intriguing discussion of the constitutional significance of this compromise and of the indecision of northern courts regarding this article of the constitution, see R.M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale, 1975).

10. There was a disagreement at the convention over the number of states whose votes should be required for ratification. It was clear to all present, however, that a requirement of unanimity would have given each state the right to an absolute veto. Since it was widely recognized that Rhode Island would exercise such a right, requiring unanimity was understood to be tantamount to dooming the constitution from the outset, and this option was therefore rejected out of hand.

11. Hamilton, whose participation in the convention was only intermittent, signed the constitution in the end; but the two other New York delegates (Robert Yates and John Lansing) left in protest, taking with them the vote of New York State. Hamilton therefore signed as a private individual.

12. Washington expressed his thoughts in a letter to the Marquis de Lafayette. Bowen, *Miracle at Philadelphia*, p. xvii. Madison described his view in a letter to Thomas Jefferson. Jack N. Rakove, ed., *James Madison: Writings* (New York: Library of America, 1999), p. 144.

13. Bernard Bailyn, *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification* (New York: Library of America, 1993), vol. i, pp. 3-4.

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14. A debate sprang up over whether the Bill of Rights should be integrated into the constitution proper, or listed separately as ten “amendments.” The decision to adopt the latter course highlights the important distinction between the “rules of the game,” the constitutive parameters of government, on the one hand, and basic rights on the other. The framers believed that the constitution itself should be confined to principles of government. The amendments, on the other hand, sought to enshrine ideals of universal rights in the constitution.

15. According to Article V of the constitution, an amendment can be passed only by a two-thirds vote of the members of the Senate and the House of Representatives in favor of it, followed by ratification by the legislatures (or special constitutional conventions) of three-fourths of the states in the country.

16. Hamilton, Madison, and Jay, *The Federalist*, No. 49.

17. At times, the desire for rule by a “strong man” is the consequence of the sense of paralysis that chronic factionalism can induce in a democracy. Experience teaches, however, that such a regime is not necessarily more effective in achieving the welfare of the people—though almost always more effective in repressing them.

18. For a survey of the amendments, see Sanford Levinson, “How Many Times Has the U.S. Constitution Been Amended? Accounting for Constitutional Change,” in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton, 1995), pp. 13-36.

19. Cf., for example, Bruce Ackerman, “The New Separation of Powers,” *Harvard Law Review* 113:3 (2000), pp. 642-725. Popular feeling about governmental power changes as the political landscape changes. Thus, before the Vietnam War and the Watergate scandal it was argued that the executive was too weak. In the wake of these perceived misuses of power by the president, the American people tended to feel much more sympathetic to the constitution’s system of checks and balances. See, for example, Richard Hodder-Williams, “The Constitution (1787) and Modern American Government,” in Vernon Bogdanor, ed., *Constitutions in Democratic Politics* (Brookfield, Vt.: Gower, 1988), and the many sources that he cites.

20. An outstanding example of this is the confrontation between President Franklin Delano Roosevelt and the Supreme Court during the Great Depression over the constitutionality of Roosevelt’s economic policies. The president eventually prevailed over the court, some of whose members softened their positions, obviating the need for Roosevelt to make good on his threat to “pack” the court by appointing additional justices who would support his position.

21. Even uneducated people, who might have been expected to oppose the constitution and the somewhat aristocratic principles on which it was based, acknowledged these truths at the ratification conventions. The noted historian

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Charles Beard, however, forcefully attacked the constitution and its framers, accusing them of serving the interests of capitalists and the status quo. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913).

22. This achievement is being brought into question specifically at present, when elected officials are more exposed to populism than ever because, *inter alia*, many more tools exist for determining the desires of the people, and there are more ways for people to make their preferences known. The changing dynamics of political behavior and the character of the media together contribute to the increasing dependency of political leaders on their ability to fulfill the public's wishes. The true test of leadership—the ability to lead the nation to what it needs, not what it wants—has become more difficult these days precisely because of the greater facility with which the difference between the two can be discovered and highlighted. In the past, a leader could more easily present what he thought the society needed, and hope that a persuasive argument would carry the public with him.

23. Alexis De Tocqueville acknowledges that this fear is present in all democracies, but he places special emphasis on the factors in American society that mitigate it. De Tocqueville, *Democracy in America*, pp. 250-264; cf. also his important discussion of the right to free assembly, *ibid.*, pp. 180-186.

24. Hamilton, Madison, and Jay, *The Federalist*, No. 78; *Marbury v. Madison*, 5 U.S. 137 (1803). While Hamilton did endorse judicial review, the constitution itself is silent on this issue.

25. There is currently a debate in the United States as to the extent to which the Supreme Court, as contrasted with other branches of the government, assisted the blacks in their quest for freedom and equality. See, for example, Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (New York: New York University, 1993); and Gerald A. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1993).

26. For broader discussions of Israel's constitutional history, see Gary Jeffrey Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton: Princeton, 1993); Amos Shapira, "Why Israel Has No Constitution," *St. Louis University Law Journal* 37:2 (1993), pp. 283-290; and Ran Hirschl, "Israel's 'Constitutional' Revolution," *American Journal of Comparative Law* 46:3 (1998), pp. 427-452.

27. For a discussion of the debate over the Harari decision, see, for example, Ruth Gavison, "The Controversy Over Israel's Bill of Rights," in Yoram Dinstein, ed., *Israel's Yearbook on Human Rights*, vol. xv (Tel Aviv: Tel Aviv University, 1985), pp. 113-154.

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28. See, for example, Giora Goldberg, "When Planting Trees, You Do Not Need a Constitution: On State-Building and Constitution-Framing," *State Government and International Relations* 38 (1993), pp. 29-48. [Hebrew]

29. See Gavison, "Controversy," pp. 115, 131-139.

30. *Bergman v. Minister of Finance*, HCJ 98/69, in *Decisions of the Israel Supreme Court*, vol. 23(1), 1969, p. 693. Following the decision by the court, the Knesset gave limited financing to new parties as well, but reenacted all the election laws with the required special majority of 61 Knesset members, thereby "immunizing" these laws against any subsequent judicial review.

31. Basic Law: Human Dignity and Freedom (1994), section 8.

32. The use here of the somewhat inaccurate label "justice" to refer to judges sitting on Israel's Supreme Court is itself a reminder of the complexity of comparative analyses. The unique status of the United States Supreme Court, which is the only court explicitly established by the constitution as a coordinate branch of the federal government, is reflected in the fact that of all American judges, only they are referred to as "justices." In the Israeli case, however, the Supreme Court is merely the highest court in the judicial system, and the legal status of its judges is equal to that of all other judges in Israel's civil courts. Furthermore, a large part of its docket consists of mandatory appellate adjudication. Therefore, it would seem that "judge" ought to be the preferred term; nonetheless, for the sake of clarity for the English-language reader, the term "justice" will be used throughout.

33. Cf. Aharon Barak, "The Constitutional Revolution," *Mishpat Umimshal* 1 (1992-1993), pp. 9-35.

34. *United Mizrahi Bank v. Migdal Cooperative Village*, CA 6821/93, in *Decisions*, vol. 49(4), 1995; for Barak's opinion, see Aharon Barak, "Judgment: *United Mizrahi Bank Ltd., et al., v. Migdal Cooperative Village, et al.*," in A. Gambaro and A.M. Rabello, eds., *Towards a New European Ius Commune* (Jerusalem: Hebrew University, 1999), pp. 381-516. The volume also contains a summary of the other opinions.

35. These tendencies were given practical expression in two privately sponsored bills that passed a preliminary reading in the Knesset. One, which is concerned with the constitutional process, speaks expressly of the establishment of a constitutional court. The other deals with the constitutional court itself. Supreme Court President Aharon Barak opposes the idea of a constitutional court, and has succeeded in getting support for his position from Justice Minister Meir Shitrit and President Moshe Katzav. It should be noted that support for a constitutional court is not limited to the circles that are totally opposed to a constitution, such as the haredi parties; some advocates of a constitution, too, consider such a court to be important.

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36. For details on these issues, see Ruth Gavison, *Can Israel Be Both Jewish and Democratic? Tensions and Prospects* (Jerusalem: Hakibutz Hame'uhad and Van Leer, 1999). [Hebrew]

37. It is universally agreed that the relationship between the central and local governments in Israel is slanted heavily in favor of the former. Many Israelis favor developing a sort of federalism in Israel and granting a greater degree of independence to local authorities. Apportioning governmental powers among different societal groups might also be beneficial. Since societal groups tend to cluster geographically, both goals could likely be attained by means of a single mechanism.

38. One striking example is populist economic legislation. The Israeli system allows the Knesset to pass laws with far-ranging budgetary consequences, without there being any possibility of government control or even oversight.

39. Scholars differ in their assessment of the expanded involvement of the High Court of Justice. See Ruth Gavison, Mordechai Kremnitzer, and Yoav Dotan, *Judicial Activism: For and Against: The Role of the High Court of Justice in Israeli Society* (Jerusalem: Magnes, 2000). [Hebrew]

40. This was also the case in France, which adopted the constitution of the Fifth Republic in reaction to the Fourth Republic's failure to bring to a successful resolution the war in Algeria. Charles de Gaulle made his return to head the government conditional upon a constitutional change that would allow him to take the steps required by the emergency situation that had arisen.

41. Guy Bechor, *A Constitution for Israel* (Tel Aviv: Ma'ariv, 1996), p. 114. [Hebrew]

42. Sever Plotzker, "Support for the Policy, Not the Politician," *Yedi'ot Aharonot*, Shabbat supplement, August 25, 2000.

43. The recent conflagration has heightened solidarity among Jews in Israel, but created mixed responses among Arab citizens of Israel. While some are still interested in strengthening their civic ties to the country, struggling with the complexity of maintaining their sense of citizenship in the midst of armed conflict between their people and their country, others feel inclined to intensify the tendency to break away from the state, and emphasize the tension between its existence and their own national aspirations. It is not easy to predict how they would vote on a constitution for Israel.

44. From this perspective, it would have been easier for Israel to adopt a constitution in 1948. In this respect the Americans enjoyed a great historical advantage. Possibly, if the blacks had been represented in Philadelphia, they would have preferred the compromise that was accepted over no constitution at all. They might have seen that the abolition of slavery was just a matter of time,



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and that the advantages of a constitution justified patience. It was not by chance, however, that they were not represented, nor is it obvious that their delegates would have agreed to the Great Compromise. In 1948, there were some voices that could have spoken in the name of the Arab Israelis, but it is quite clear that they did not carry any significant weight. At present, however, the Arabs are a large segment of the Israeli populace, and are well aware of their standing. For this very reason, however, a constitution passed in the first years of the state possibly might not have been capable of enduring today. Similarly, the religious status quo adopted close to the founding of the state has collapsed in the meantime.

45. As noted earlier, all of the institutional arrangements and provisions of the constitution must be planned, and ultimately judged, as a whole. The principles set forth in this article do not by themselves dictate any specific institutional arrangements. Clearly, however, the principles will have to apply to all parts of a single system. This is one of the points that will require painful compromises.

46. *Lochner v. New York*, 198 U.S. 45 (1905).

47. There is one difference between the United States then and the State of Israel now that is decidedly in Israel's favor. In the late eighteenth century, the very idea of creating a constitution out of whole cloth for a country of some four million people was considered audacious, even impossible. The basic assumptions today are the reverse. Dozens of democratic countries have adopted constitutions in the past two centuries; in most of them, despite ideological and other divisions, these constitutions have contributed to stability. Israel stands almost alone in the democratic world as a state without a written constitution. Great Britain is the only other member of this lonely club, and there, too, voices can be heard calling for a change. Israel can hardly be so exceptional that it must necessarily fail where many countries with regimes less stable and less efficient than its own have already succeeded. At the same time, the fact that Israel does have a system already in place, one which is far from perfect but also not totally inadequate, is a factor which weighs against any effort to adopt a new constitution in Israel.

48. Throughout this discussion I have assumed that Israel's constitution will have at least one non-universal value commitment: That Israel is the nation-state of the Jews. While this description is indeed difficult for non-Jews to accept, we should recall that the right to national self-determination is itself a universal right. Moreover, there are many constitutions which contain an affirmation of the nation's ethnic and cultural distinctiveness. While this element in the constitution will no doubt detract from its attractiveness to non-Jews, the fact that it contains a more effective promise of democracy and civic equality may well make this a price worth paying. After all, Israel is already a Jewish state in

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many senses, even without a constitution. With a constitution, including a bill of rights, Israel may be on the whole more hospitable to its minorities than it has been without one.

49. With all due respect to Hamilton, deliberative decisionmaking is *not* necessary for the creation of a constitution. There are many countries whose constitutional arrangements developed out of long historical processes, and were unquestionably not the result of a rational and conscious choice at a certain point in time. England, which was the source of inspiration to many of the fathers of republicanism (Montesquieu and Hume are only two of them), is a prime example.

50. If the Continental Congress, for instance, were to have tampered with the principles of representation in the Senate, or attempted to weaken the presidency, the ratification campaign might well have failed.

51. On the round-table talks, see, for example, Stephen Holmes and Cass R. Sunstein, "The Politics of Constitutional Revision in Eastern Europe," in Levinson, *Responding to Imperfection*, p. 288; Jon Elster, ed., *The Round-Table Talks and the Breakdown of Communism* (Chicago: University of Chicago, 1996); Jon Elster, Claus Offe, and Ulrich K. Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge, 1998), pp. 63-108.

52. Ratification conventions, such as were used in America, are not suitable for Israel, because Israel is not a federal country. It is also a very small country (although its population is greater than that of all thirteen founding American states together).

53. For a detailed discussion of referenda, see David Butler and Austin Ranney, eds., *Referendums: A Comparative Study in Practice and Theory* (Washington: American Enterprise Institute, 1978); David Butler and Austin Ranney, eds., *Referendums Around the World: The Growing Use of Direct Democracy* (Washington: American Enterprise Institute, 1994); and Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge, Ma.: Harvard, 1989).

54. Even so, the deliberations that took place at the state constitutional conventions made additional compromises possible. For example, the idea of adopting a bill of rights made headway at the conventions, and the ten amendments which constituted the Bill of Rights were indeed passed within four years. Without the prospect of adding amendments, the constitution that emerged from Philadelphia would never have been ratified.

55. These arguments are likewise valid against a shortcut of another type: The "private" formulation of proposals for a complete constitution, or of parts of such a constitution, and the attempt to then get them passed via the political

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system. Some proposals of this type in Israel have been quite well formulated, and have successfully responded to the need for the constitution to be of one piece, with checks and balances. They also have the advantage of arising from outside the sphere of ordinary, Knesset politics. Such efforts, however, are bound to fail because they do not involve negotiations, and they lack any substantive public support. In America, promising formulations like the Virginia Plan did not survive in the crucible of substantive negotiations intact, yet served as fine starting points for the debates that followed. For two proposals on which an Israeli discussion could profitably be based, see Binyamin Akzin, *Proposal for a Constitution for the State of Israel* (Tel Aviv: B'nai B'rith, 1965) [Hebrew]; and the constitution of the Constitution for Israel movement, carried in full in Bechor, *Constitution for Israel*, pp. 209-256.

56. At times one feels that we knew this truth in the first years of the state, and that it slipped out of our grasp. Thus it was in the debate concerning Israel's Declaration of Independence. It was obvious that this was a solemn document, and it was not fitting that its final form should be the subject of disagreement. Therefore, several important compromises were made in its text. (The most striking of these is the phrase *tzur yisrael* ("the Rock of Israel," translated in the English-language version of the Declaration as "the Almighty"), which was a compromise between those who sought to omit any reference to God and those who wanted to acknowledge the sanctity of the occasion.) In recognition of the need to compromise, the voting was divided into two stages. In the first stage, a "real" vote was taken, in which some of the participants opposed the proposed text in the hopes of getting a better one. When the document finally received a majority, a second vote was conducted in order to confirm it unanimously.