

# The Court That Packed Itself

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*The Supreme Court is a body of great power. Once on the court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest possible manner...?*

—Charles Lund Black<sup>1</sup>

It is an axiom of democratic theory that the judicial branch of government should not itself be “democratic.” Courts are not supposed to represent the popular sentiment of the day, but rather to serve as a bulwark against the excesses of majority rule. Yet there is something different about Israel’s Supreme Court. It is, perhaps, the least democratic and most “counter-majoritarian” of all high constitutional courts in democratic countries: Its justices are appointed to a permanent position without the approval of any elected body—not the Knesset, not the government, not the directly elected

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prime minister. Nor can they be removed or disciplined by the citizens' elected representatives. Rather, they are selected by a Judicial Selections Committee, a body whose composition includes a few elected officials, but whose majority consists of senior members of the legal establishment, who are appointed by that same establishment. And three of this committee's nine members are always, by law, sitting Supreme Court justices, whose influence over the committee's decisions is nearly absolute. In other words, in Israel the judiciary selects itself.

For decades, the judicial selection process attracted little attention or criticism. The courts had to be protected, it was believed, against the pressures of a political culture not known for its deeply held democratic traditions. The rule of law, in the early decades of the state, needed all the help it could get, and the creation of an independent judiciary was given top priority. But since the current selection process for Supreme Court justices was introduced in 1953, the courts have grown much more powerful than they originally were. Executive actions have come under judicial review on a routine basis, often being reversed for reasons that are barely recognizable as having to do with law. In 1992, the Knesset handed the court the power to strike down legislation which does not conform with Israel's character as a "Jewish and democratic" state, while leaving it up to the court to decide what those terms meant. Procedural rules concerning standing and justiciability, meant as a check on judicial excess, have likewise been reinterpreted into oblivion.<sup>2</sup> The result of these changes, combined with the Supreme Court's alternate role as the High Court of Justice (a court of first instance for the redress of grievances against the government), is that the Supreme Court has become a potent factor in making policy. In effect, the court has extended an open invitation to Israeli citizens who are troubled by any issue of public policy—from improper implementation of government decisions, to the appointment of an unqualified government official, to the passage of a law which seems to violate a right which itself has no basis in written law—to turn to the unelected courts rather than to their elected representatives in the Knesset as the easiest way to effect change.

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Yet while its power has grown, the court has become, after decades of self-selection, distant from and unrepresentative of the citizenry. It is only natural that a group of expert justices, given the right to choose their own replacements, will prefer to appoint judges who are similar in outlook, temperament and background to themselves. As a result, the Israel Supreme Court is characterized today by a pronounced intellectual and professional homogeneity. Nearly all the justices are professional jurists, the products of Israel's close-knit and intellectually monolithic legal education system. Few of them possess serious formal training, much less expertise, in any field outside of law. Because of the judiciary's insulation from the social fabric of Israel, court and country are moving independently of one another in everything concerning basic values and assumptions, drifting apart, with no institutional means of keeping them together. Unless something is done to make the composition of the court more appropriate for the nation it is serving, Israel may find itself facing a severe crisis of faith in the judicial system—and without public faith, no judicial system can long function.

## II

Every democracy that accords its judiciary a substantial role in constitutional affairs must find a way to balance two competing principles: Judicial *independence*, which demands that judges be protected from external pressures that may compromise the integrity of their rulings; and judicial *accountability*, which requires that judicial decisions respond to the fundamental, constitutive values of the nation whose laws they are interpreting.

Proper adjudication demands that judges be insulated from external pressures. Since judicial decisions frequently help or harm the fortunes of political actors—politicians, interest groups and so forth—it is imperative that judges never be dependent on their graces. Judges must also be free to act contrary

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to public opinion, since they alone can prevent majorities from violating individual or minority rights to achieve a popular aim. To ensure judicial independence, most democracies provide lifetime tenure and a guaranteed salary for the justices of their highest court; the idea being that judges who have reached the peak of professional accomplishment, and whose position and salary are guaranteed, will not easily be pressured into abandoning their role as defenders of law and justice.<sup>3</sup>

Yet “law” and “justice” are themselves problematic terms. Adjudication, and especially constitutional interpretation, is not merely a matter of combining technical proficiency with professional integrity. Rather, judges are constantly faced with the limitations of the written law, and are forced at every turn to apply their own conceptions and values in formulating their decisions. In the process, they often find themselves creating new legal categories—effectively writing the law with their own hand.

This fact, that judges often do not merely apply the law but actually create it, has been universally recognized by legal scholars throughout the world, including in Israel. As the American constitutional scholar Archibald Cox has put it, “that the [U.S.] Supreme Court plays a partly political role—that it makes public policy under the doctrine of judicial review—is all too obvious.”<sup>4</sup> Yitzhak Engard, a professor of law at the Hebrew University who now sits on Israel’s Supreme Court, has written that the process of balancing values “contains basic elements of legislation, because of the weighing of interests, and the value judgments involved in prioritizing them, which precedes the formulation of the legal norm.”<sup>5</sup> Or, in the words of the current president of Israel’s Supreme Court, Aharon Barak: “The judge is not a mirror reflecting the legal picture, but rather an artist who creates the picture with his own hands.”<sup>6</sup>

As makers of law, supreme courts inevitably make decisions on issues in which competing values—often the values which are most hotly disputed among the citizens—are pitted against one another. High court justices decide which values are to be expressed in the law, and these decisions are dependent in large part on their personal ideas of what is good for the country,

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rather than their professional analysis of legal texts. As Yale University legal scholar Charles L. Black noted, “it has been a very long time since anybody who thought about the subject to any effect has been possessed by the illusion that a judge’s judicial work is not influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great question of his time.... It would be hard to find a well-regarded modern thinker who asserted the contrary.”<sup>77</sup> Thus, legal scholars Jeffrey Segal and Harold Spaeth have shown that while the form of judicial decisions adheres closely to legal models, their content is better described in the context of overarching ideologies. In the American context, for example, “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist voted the way he did because he is extremely conservative; Marshall voted the way he did because he is extremely liberal.”<sup>78</sup>

The influence of the justices’ ideological outlook upon the law, then, is a pronounced one, and will be more pronounced to the degree that they are asked to rule on questions of a constitutional nature. Because such cases turn on abstract principles, they contain the greatest amount of ambiguity, and therefore demand the exercise of wide individual discretion in resolving them. At the same time, these cases also have the broadest impact, since they are essentially enshrining values into law. In addition, courts that are motivated by a philosophy of judicial activism, and therefore make decisions that could otherwise be left to the judgment of elected officials, further amplify the impact of the justices’ worldview upon the law of the land.

The composition of the highest court is therefore of paramount importance, since it determines whether the picture these “artists” are “creating” will reflect not only their own belief system, but also that of the nation which will have to live by their rulings. The question then becomes: How does a nation ensure that the small body entrusted with the task of constitutional judgment really reflects its basic values? How do we prevent the cloistered Supreme Court from becoming a judicial ivory tower, isolated from the

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public's beliefs and aspirations, without opening it up to the direct pressure of public opinion? How, in short, can we create an accountable judiciary without compromising its independence?

### III

The solution adopted by nearly all democratic nations is to give representative bodies the leading role in selecting highest-level judges, while ensuring that the latter are protected from external pressures once they are appointed. The original model for democratic judicial screening procedures is the one set forth in the United States constitution more than two hundred years ago, and still practiced today. In arriving at this procedure, the framers were aware of the need to balance independence against accountability: An independent judiciary, they believed, was a necessary “bulwark against the will of the majority run wild,” as well as the indispensable protection for the people against legislative and executive abuse.<sup>9</sup> At the same time, they considered it essential to prevent the judiciary from evolving into a closed aristocracy that would impose its values against the wishes of the people.<sup>10</sup> They struck a balance by giving Supreme Court justices lifetime tenure, but designing a judicial appointments procedure that was open to the public and controlled by the executive and legislative branches of government.<sup>11</sup>

Under the American system, all appointees to the federal bench, including the Supreme Court, are nominated by the democratically elected president, and subject to confirmation by the Senate, whose members are chosen by popular votes within each state. The president's nominee appears before the Senate to give testimony in a public hearing that is open-ended, and that affords senators a full opportunity to inquire into any aspects of the nominee's qualifications, experience, judicial philosophy and ideological orientation that they deem relevant. The hearing consists of a freewheeling question-and-answer session, which may last for hours, days or weeks,

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followed by open debate among the senators, and finally the vote to confirm or reject the nomination. In the view of American constitutional scholar Herman Schwartz, the Senate confirmation proceeding obligates each senator to “ensure that a judicial nominee will further and not undermine the senator’s vision of the Constitution.... The nominee’s social, political, and judicial beliefs are all relevant....”<sup>12</sup> The history of American judicial selection supports this contention: As Schwartz has noted, over the course of two hundred years, “one in five nominations” to the Supreme Court “has been rejected by the Senate, often for philosophical or political reasons; of some twenty-nine rejections or withdrawals under fire, almost a third were because of the nominee’s views on public issues.”<sup>13</sup>

The continual replacement of retiring Supreme Court justices with new ones who must clear a series of democratic hurdles has provided a natural corrective, steering the court over time in the same direction as the nation’s overarching values. For example, as a broad public consensus formed around the economic programs of Franklin Delano Roosevelt in the 1930s and 1940s, the President earned Senate approval for new Supreme Court nominees who shared the nation’s overwhelming support for New Deal policies. Likewise, as conservative family values made their comeback and the excesses of egalitarianism came to be understood in the 1980s and early 1990s, the Supreme Court nominations of that time shifted the balance on the court as well. Over the decades, the court has been involved in a number of highly controversial decisions, but has maintained the respect of the overwhelming majority of the American people nonetheless. One reason for its success has been that citizens who are unhappy with the decisions of a particular court understand that, in the long run, democratic means can bring about a change. The Supreme Court is insulated from day-to-day pressures, but the common man does not feel that he is helpless to shape its character in the long run.

The wisdom of the American system of judicial selection has convinced virtually every democratic country in the world to follow suit. While democracies vary greatly in their approaches to the role of the constitutional courts,

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and to the particular means for selecting court justices, what has united them is the belief that if the country's highest court is to retain its attentiveness to the constitutive values of a living, evolving nation, the lead in selecting the justices of that court must be taken by the people's elected representatives. In some cases, it is the legislature that chooses the justices of the top court. In Germany, for example, half of the justices of the Federal Constitutional Court are selected by the upper house of parliament (the Bundesrat) while the rest are chosen by a committee of the lower house (the Bundestag). In Switzerland, the Federal Court's members are selected by the parliament, which is obligated to ensure adequate representation for the country's three linguistic sectors. In other countries, the democratically elected executive branch plays the leading role. In Sweden, for example, all the members of the highest court are selected by the government. A similar process is in place in Australia, Canada, Belgium and Norway, where justices are formally selected by the monarch or his representative, but nomination or approval of justices is left up to the government. In Japan, the fifteen justices of the Supreme Court are selected by the government; as an additional means to ensure that their views reflect the nation's values, they must also be approved by the electorate in the first general election following nomination.<sup>14</sup> A number of countries have opted to follow a mixed model such as that of the United States, in which the legislature and executive are both involved. In France, for example, three of the nine members of the Constitutional Council are appointed by the nation's president, who is the country's elected chief executive. Another three are appointed by the president of the National Assembly, which is one branch of France's bicameral legislature, and three by the president of the Senate. In Austria, half the members of the Constitutional Court are chosen by the federal government, the other half by parliament.<sup>15</sup>

The same pattern repeats itself throughout the democratic world. In addition to the countries mentioned above, elected officials play the dominant role in appointing justices in the Czech Republic, Denmark, Greece, Hungary, Ireland, Italy, Macedonia, Poland, Portugal, Spain, Slovakia and Slovenia, as well as in the former-Soviet republics of Estonia, Latvia, Ukraine,

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Belarus and Russia. Outside of Europe and North America, as well, new and established democracies alike have explicitly placed in their constitutions provisions that assign the power of appointment to elected officials. This is the case, for example, in Argentina, Bolivia, Brazil, Costa Rica, South Africa, South Korea, Uruguay and Venezuela.<sup>16</sup>

Around the world, democracies have developed a variety of judicial selection processes, each according to the particularities of its traditions and constitutional makeup. What unites them all, however, is the basic commitment to a democratically accountable judiciary, and the understanding that even if the unique problems of justice mean that judges must be granted complete independence once in office, the constitutional court as a whole must be held accountable to the nation through a selection process dominated by the people's elected representatives.

#### IV

In Israel, by contrast, judges are selected by—themselves. There is no trouble balancing judicial independence with accountability, because no real effort is made to provide for accountability. While the committee which appoints judges appears, at first glance, to represent the interests of a variety of parties, including elected representatives, a closer look at its makeup and functioning reveals that it is, in fact, a recipe for the domination of the process by the justices sitting on the Supreme Court.

Under the Basic Law: The Judiciary, all civil and criminal court judges, including Supreme Court justices, are appointed by a nine-member Judicial Selections Committee.<sup>17</sup> The committee is made up of the president of the Supreme Court, two other Supreme Court justices chosen by the court, the justice minister, an additional minister appointed by the government, two Knesset members, and two representatives of the Israeli Bar Association. In other words, a majority of the Judicial Selections Committee's members—

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the three justices and the two Bar representatives—are not chosen by the Israeli public, and are not accountable to it.

This mixture of representative and unrepresentative members results in a body whose decisions are completely unrepresentative of the public sentiment. This becomes clear when we examine the way competing interests are positioned on the committee. The four politicians all represent diffuse interests. By tradition, one of the Knesset members represents the government and the other the opposition, which means the two are more likely than not to disagree when matters of ideology are at stake. The justice minister is the single member of the government *least* appropriate for representing popular interests against the views of the justices, since he is usually a lawyer himself, advised by the judicial establishment and often beholden to it;<sup>18</sup> he is therefore likely to disagree with the other government minister, whose principal loyalty is to the government and to the values of the electorate that put that government in power.<sup>19</sup> The five representatives of the legal establishment, however, have their interests neatly lined up: The three justices will naturally become a single voting bloc, protecting the interests and prevailing views of the Supreme Court itself. Moreover, it is safe to assume that the selection of the two junior justices to the committee will have been heavily influenced, if not dictated, by the court president, himself a member of the committee. As for the representatives of the Bar Association, they are seen within their own fields as inferiors in the legal hierarchy, of which the judges are the apex, and it is they who will pay a price for failing to represent the very same values that the judges are defending.<sup>20</sup>

In practice, the three justices on the committee do vote as a bloc, and it is their vote which almost always determines the outcome. A good illustration of this point is the 1995 appointment of State Attorney Dorit Beinisch to the Supreme Court. In 1993, her appointment was considered and rejected because she was regarded by the Supreme Court justices to be less qualified than the other candidates. The vote at the time was five to four against, with the five negative votes coming from the three justices, led by Supreme Court President Meir Shamgar, and the two Bar Association representatives. At the

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time, the daily newspaper *Ha'aretz* reported that the justices presented a united front despite “persistent rumors” of sharp differences of opinion among them.<sup>21</sup> Two years later, her appointment was again considered, but by this time Shamgar had retired and been replaced by Aharon Barak, a long-time personal friend of Beinish. Even though her qualifications had not substantially changed (she was still State Attorney), the vote this time was nine to zero in favor of her nomination.<sup>22</sup> Later, Barak himself admitted that it was he who had “initiated” Beinish’s appointment.<sup>23</sup> Effectively, this meant that Barak’s appointment as Supreme Court President shifted five of the nine votes on the committee, and reversed the previous decision. The importance of this particular appointment should not be underestimated: By tradition, the presidency of the court—an office substantially more powerful than that of the chief justice of the United States Supreme Court<sup>24</sup>—is given to the justice who has served longest on the Supreme Court. When Barak retires at age seventy in the year 2006, Beinish will replace him as president. In other words, just two years after Beinish was rejected for a position on the court due to her lack of qualifications, Barak was able to hand-pick her as his successor.

Sometimes, of course, the forces do not line up as predicted; yet even then, the three-justice bloc almost always carries the day. A case in point is the appointment of Hebrew University law professor Yitzhak Englard to the Supreme Court in July 1997. This time, it was the Bar Association representatives who, in a rare show of independence, opposed the nomination because Englard—a longtime personal friend of Barak and the father of Barak’s intern—had never served as a judge or even as an attorney. The justices stood behind Barak’s pick, and the nomination was passed after Barak reportedly cut a deal with two politicians on the committee, promising future appointments which furthered their own ideological interests.<sup>25</sup> The Beinish and Englard appointments serve to illustrate the decisive sway the three-justice bloc has over the committee’s decisions. As legal scholar Martin Edelman summed it up, “By established practice, appointments to the Supreme Court require an affirmative vote of all three justices on the panel.”<sup>26</sup> Indeed, it is

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almost unheard of that a nominee to the high court would be either approved or rejected over the objections of the justices on the committee.

The influence of the justices is so evident that defenders of the system do not even bother to deny it; instead of conceding what amounts to a stunning affront to democratic principle, they seize upon it as a venerable tradition. Yitzhak Olshan, who was the Supreme Court's president from 1953-1965, relates with pride that during his tenure, there was little dissent in the selection of justices. "Throughout the entire period, all the committee's decisions were agreed upon almost unanimously. In most cases there was cooperation between the justices, the attorneys and the justice minister."<sup>27</sup> And Moshe Ben-Ze'ev, who served as attorney-general from 1963-1968, has observed that "it is hard to imagine the appointment of a judge, and certainly not of a Supreme Court justice, that contradicts the united opinion of the three Supreme Court justices on the committee. I hope that this is an unwritten rule—if not, I think it should be enshrined in law."<sup>28</sup>

This remarkable statement can be fully understood only by taking a look at the way the current system came to be, and the degree to which the legal and judicial establishment has acted to protect this accumulation of power in its own hands. Under the Courts Ordinance in effect following the establishment of the State of Israel in 1948, justices were nominated by the justice minister, approved by the government and confirmed by the Knesset, a system similar to that which is practiced in most democratic countries.<sup>29</sup> Attorney-General Elyakim Rubinstein has characterized the early system as "an appropriate arrangement which permitted the executive branch to appoint judges to the Supreme Court—but placed confirmation power in the hands of the legislative branch, similar to the American practice."<sup>30</sup> Yet these safeguards proved inadequate to instill a norm of democratic control over the judicial selection process. While the country's institutions were in flux and the public's attention was distracted from constitutional considerations, the legal establishment wasted no time in claiming for itself the right to absolute control over the selection process. The first justice minister, Pinhas Rosen, was able to recommend none other than his own law partner, Moshe Smoira, to

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be the first president of Israel's Supreme Court in 1948.<sup>31</sup> Throughout the spring and summer of 1948, Rosen and Smoira carried on an intense correspondence, hammering out an agreed list of candidates to fill the remaining seats on Israel's first Supreme Court. During the first years of the state, all but one of the candidates on Smoira's list became Supreme Court justices, including a number who were rejected when first nominated.<sup>32</sup>

Together with Rosen, the justices on the newly constituted Supreme Court embarked upon a broad campaign to eliminate legislative supervision of the judiciary. In 1951, Rosen introduced legislation, which he had prepared in consultation with the justices, that would effectively seal off the judiciary from the political system. "It is the lot of all enlightened peoples," declaimed Rosen before the Knesset, "that every judge be independent and under no obligation to account for his decisions, except to his own conscience."<sup>33</sup> In 1953, after some minor modifications, the Magistrates Law was passed, and the Knesset's authority to confirm judicial nominees was done away with. From then on, justices would be selected by a committee similar in composition to the one in place today. The importance of this arrangement becomes clear in the memoirs of the second president of the court, Yitzhak Olshan. He had opposed the appointment of Simha Asher, an Orthodox rabbi, to the first Supreme Court but was unable to prevent it because, under the old appointments procedure, the justices were not consulted. When Asher died in 1953, shortly after the new system was instituted, religious circles began lobbying for a replacement from the Orthodox community, based on a provision in the law which permitted the appointment of an "outstanding jurist" (such as a rabbinical scholar or a law professor from abroad) even if he was not a member of the Israeli Bar.<sup>34</sup> "This time," Olshan writes, "with the foreknowledge that we, the justices of the Supreme Court, would take a tough stance, ... the question was removed from the agenda of the various meddlers."<sup>35</sup>

Over the years, the Supreme Court has done everything in its power to protect or even augment its domination of the selection process. In 1978, Justice Meir Shamgar (later president of the court) called for the expansion of

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the committee's judicial component for the sake of the appearance of judicial independence.<sup>36</sup> More recently, Aharon Barak has waged a preemptive campaign to convince the public that nothing could be so disastrous as the introduction of democratic controls on the selection of justices. Speaking before members of the Knesset Constitution, Law and Justice Committee in October 1996, Barak voiced his opinion thus: "May God save you from any attempt to bring about a politicization of the structure and composition of the highest judicial body. God in heaven, you can't have constitutional justice that way. It would be a tragedy for the country if appointments to the constitutional court were political...."<sup>37</sup>

In the effort to reach an ideal of perfect judicial independence—what Rubinstein has called a "hermetic seal" between the judiciary and elected officials—Israel has adopted a system in which the judiciary is accountable to no one, justices are appointed by a committee whose hearings are held in secrecy and dominated by the sitting justices, and the nation is left without any real say in the question of who will interpret its laws. The Israeli legal scholar Ze'ev Segal has pointed out that "the main aim of the system is to minimize possible political influence on the selection of judicial officers"—"political influence" meaning, among other things, "intervention in the process by ... members of the legislative and the executive branches...."<sup>38</sup> The Supreme Court, not surprisingly, is quite pleased with this system—former Supreme Court President Simon Agranat termed it "the best in the world"<sup>39</sup>—for the result is that the justices can, and do, shape the courts in their own image.

## V

**W**hat happens when membership in an elite group of people is determined by the members themselves? Invariably, the result is a team of individuals whose ideas and thoughts bear a strong resemblance to one another. While Israel possesses one of the most diverse populations in the

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world—the vast majority of its citizens are either immigrants or the children of immigrants, representing a broad range of political and cultural traditions—its judicial selection process has produced a bland and intellectually uniform Supreme Court, leaving the opinions and concerns of a substantial majority of the Israeli public underrepresented, or not represented at all.

The problem is not, as is usually claimed, one of ethnic or religious homogeneity. Much has been made of the fact that the religious and ethnic makeup of the Supreme Court is overwhelmingly secular-Ashkenazi.<sup>40</sup> But to dwell on the ethnic or religious makeup of the court is to miss the point: There is a more dangerous type of homogeneity, cultural and intellectual, which has come to characterize the courts in Israel, and increasingly so in recent years.

Consider, for example, the lack of professional diversity which has characterized the court since the current selection process was instituted in 1953. The eleven justices appointed from 1948 to 1953 included five judges, three private lawyers, one diplomat, one professor of Jewish literature and one ministry director-general. By contrast, the thirty-two justices appointed since 1954 include twenty-three lower court judges and five senior Justice Ministry lawyers (three attorney-generals and two state attorneys), two law professors, one professor of Jewish law and one private lawyer. This last, appointed in 1992, was the first privately practicing lawyer to be appointed since 1948.<sup>41</sup>

This professional homogeneity is accompanied by a uniformity in the educational background of the justices, a similarity which again has nothing to do with ethnic or religious background. Of the fifteen permanent and acting justices on the Supreme Court today, not one holds a degree in any field other than law.<sup>42</sup> This is especially troubling in light of the narrowness of the education which Israeli law students receive: While in most Western countries a bachelor's degree in the humanities includes exposure to a broad range of basic cultural and philosophical sources, in Israel this is not the case. Future attorneys and judges begin their academic studies already specializing in law, and often have little or no exposure to the most basic texts in other fields—even those fields that may bear directly upon the judgments which

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they will have to make. Areas such as political philosophy, economic theory, international relations, Jewish law, history, literature and the arts are, for many jurists, a closed book. As Rubinstein phrases it in his characteristic understatement, “the justices who have been appointed were not, generally, individuals known for their exposure to public and social affairs...”<sup>43</sup>

All this adds up to a narrowness of mind which is wholly incompatible with the task of constitutional adjudication. In order to determine the constitutionality of an action or law, judges must take into account the implications of the ruling in a wide variety of contexts. As the constitutional scholar Eugene Rostow has put it, “there is a political element in constitutional interpretation, requiring a judge to be thoroughly steeped in the history and public life of the country.”<sup>44</sup> In Israel, the country’s history and public life include not only the Zionist idea which stood at the foundation of the state (which itself comprised a number of competing streams), but also a host of other historical trends and factors, all of which came together at the moment of the country’s founding and have continued to play a role in the development of Israeli law, and therefore cannot be ignored when considering the country’s founding constitutional principles: English common law, American rights jurisprudence, the difference between the American, English and Continental approaches to political theory, European nationalism, Liberalism, Marxism, and the variegated streams within the Jewish legal heritage—not to mention the Bible, which to many of Israel’s founding fathers was the cornerstone, the ultimate constitutional document, of the Jewish polity. Perhaps it is unreasonable to expect each justice to be well-versed in everything. But for this reason, intellectual diversity is all the more important, so that the court as a collective will have access to these competing traditions, and will make decisions based on healthy argument among them. Without this kind of diversity, the Supreme Court cannot be a marketplace of ideas; and as Mill long ago argued, in the absence of a competition among ideas, thinking becomes inbred, flaccid and shoddy.

The incompetence of the current Supreme Court to conduct constitutional judgment for the Jewish state has become increasingly evident in recent

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years, particularly since the 1992 passage of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty. Both of these laws, which the courts have understood as having constitutional stature, guarantee the protection of basic human freedoms, which can only be abrogated by laws that are consistent with “the values of the State of Israel as a Jewish and democratic state.” These values remain unspecified, yet a simple reading of the text yields a limited range of reasonable interpretations for what those “Jewish and democratic” values could possibly be. Since the establishment of Israel, the idea of a “Jewish” state has found expression in a large number of laws, such as the Law of Return granting automatic citizenship to Jewish immigrants from around the world, provision for Jewish education within the general school system, and the granting of a special public status to particularistic institutions such as the Jewish Sabbath.

Instead of attempting to interpret the Israeli tradition of what a Jewish state is, the inclination of the Barak Court has been to reinterpret the word “Jewish” to mean something completely different—something indistinguishable from its values as a “democratic” state. According to Barak, Jewish values have constitutional force only to the extent that they are also democratic values. “The basic values of Judaism,” writes Barak, “are the basic values of the state. I mean the values of love of man, the sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of law over the legislator and the like, values which Judaism bequeathed to the whole world.... Indeed, the values of the State of Israel as a Jewish state are those universal values common to members of democratic society....”<sup>45</sup> Such a statement is deeply troubling, since it so clearly defies the intentions behind the phrasing of the laws—intentions which are not difficult to ascertain, since the laws were passed only seven years ago. The word “Jewish” was meant to be distinguished from the word “democratic,” as it has always been in Israeli parlance. It was meant to express some form of Jewish particularism—cultural, religious, legal, symbolic or nationalistic, or a combination thereof. That this, and not universal democratic principles, is what is meant by the “Jewish” character of the state, is clearly understood in Israel by lawmaker

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and citizen alike. If we are to avoid the accusation that Barak is deliberately attempting to thwart the intentions of the Knesset and the latent constitutional beliefs of the public, we may draw only one possible conclusion: That Israel's Supreme Court is so isolated in its intellectual climate, so removed from the ideals held by the members of the public, that its members actually understand this to be a legitimate reading of the law.

It is also troubling because these Basic Laws themselves are at the core of Israel's "constitutional revolution": For the first time, the court has been handed the power to determine just what Israel's "values as a Jewish and democratic state" are, and to strike down legislation on the basis of that assessment. Such authority demands, it should go without saying, that judges possess a profound familiarity with the vast corpus of thought on both Judaism and democracy. Yet due to the limitations of their training, Israel's Supreme Court justices are not "thoroughly steeped," as Rostow put it, in either field. The paucity of jurists on the bench who are trained in the study of traditional Jewish texts all but prohibits a serious analysis of the state's "Jewish" values; at the same time few of the sitting justices have broad exposure to the classical works of democratic thought, and are certainly not "experts" in democratic political theory. They are experts in Israeli law—an expertise which becomes less and less relevant as their new authority takes them farther and farther afield.

A further example of the kinds of problems which arise from a homogeneous, insular court can be seen in Aharon Barak's now-infamous "enlightened community" test.<sup>46</sup> When, in 1994, Barak declared that contradictions between the democratic and Jewish values of the state should be resolved "according to the views of the enlightened community in Israel,"<sup>47</sup> he did not seem to be aware of the term's stunning antidemocratic implications—that the values of a particular community, rather than those of the country as a whole, should reign in the determination of law—nor of the impact of the expression on the public's opinion of the court. Predictably, the term sparked a scandal. Columnist Ben-Dror Yemini accused the Barak Court of "circumventing democracy in favor of the ideological coterie that controls the

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court,”<sup>48</sup> and former Supreme Court President Moshe Landau used the phrase “judicial fundamentalism” in describing Barak’s “enlightened community” test.<sup>49</sup>

But perhaps more importantly, the phrase was seized upon by those segments in the public who already felt alienated by the homogeneous court, and held up as proof of what they had long suspected: That the Israeli Supreme Court was an elitist, exclusive body advancing the interests of a particular group, rather than the ardent protector of liberty and justice for all. Since then, attacks on the court routinely make reference to the “enlightened community” test. While it is not clear precisely what Barak meant by the term (he has been difficult to pin down on the subject, and has distanced himself from the term in recent years), it does not really matter: It seems inconceivable that an idea so offensive to the public, so contemptuous of widely held values, so ignorant of the harm it would do to the court itself, could have been propagated and consistently reaffirmed by a court president who was not surrounded by colleagues more or less of the same mind.

Unfortunately, the court’s monolithic character and the growing gap between its values and those of the public are already beginning to take their toll on the court’s prestige. In a democracy, even a relatively young one such as Israel’s, citizens are usually adept at identifying sources of unchecked power over their lives. As ever-larger segments of the public come to sense that the nation’s character is being determined not by their elected representatives, but by what appears to be a clique of self-selecting legalists, it is inevitable that they will begin to lose confidence in the judiciary. All branches of government ultimately depend upon public respect, but this is especially true for the judiciary, which lacks the popular legitimacy that comes from being directly elected. And for the courts to maintain this respect, they must be seen as reflecting and applying the values most deeply cherished within the nation. As Archibald Cox has noted:

While the opinions of the court can help to shape our national understanding of ourselves, the roots of its decisions must already be in the nation. The

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aspirations voiced by the court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the court's perception of this kind of common will and upon the court's ability, by expressing its perception, ultimately to command a consensus.<sup>50</sup>

Perhaps the gravest danger to the Israeli judiciary comes from the inability of many Israeli jurists to understand this simple fact. Instead, they have convinced themselves that the domination of the system by a handful of judges isolated from popular opinion somehow *enhances* the public confidence in the court. In the words of Ze'ev Segal, "The fact that the Selections Committee contains a significant plurality of jurists prevents, to a large extent, political abuse of the appointment process and ensures public confidence in the judiciary."<sup>51</sup> The shocking implications of Segal's statement are that if the judiciary were selected by the democratically elected representatives of the Israeli people, the people would no longer have confidence in it; that the Israeli public is disinterested in exercising its sovereign prerogative of choosing those who govern; and that it prefers a non-accountable judiciary to make the rules by which it lives. This reasoning defies both common sense and accepted jurisprudential wisdom elsewhere. As American constitutional scholar Michael S. Paulsen put it: "So long as the courts wield enormous power, it is implausible, as well as wrong in principle, to insist that the people develop an attitude of respectful indifference to how and by whom that power is exercised."<sup>52</sup>

## VI

**T**he expanding role of Israel's Supreme Court as the interpreter of the country's constitutional principles demands a democratization of the judicial selection process. The systems in place in other vibrant democracies offer a variety of models that ensure the high qualifications, abilities and

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independence of those sitting on the bench while granting the power of selection to elected bodies. A variation on the American model, giving the elected prime minister the power to nominate candidates subject to public Knesset hearings and Knesset approval, would offer two separate democratic hurdles to ensure the accountability of the judiciary, while preventing either of the branches of government from acting alone and unchecked. An independent professional assessment committee could be created to make sure that judicial appointees meet a reasonable standard of professional ability, based on predetermined criteria. Continuing the practice of lifetime tenure would ensure the complete independence of justices who have cleared the foregoing hurdles.<sup>53</sup> But whatever the specific model used to recast the judicial selection process in Israel, the institution of democratic screening in the selection process must be established if the Supreme Court is to serve as the arbiter of the nation's constitutional principles, while retaining the confidence of the public.<sup>54</sup>

The objection will undoubtedly be raised that democratizing the appointment process will undermine the independence of judges, who may feel they somehow “owe” something to those who placed them in power. Indeed, it was on the basis of this argument that the current system was introduced in the first place.<sup>55</sup> Yet this argument demonstrates a misunderstanding of the basic workings of politics. Any judge whose salary and position are guaranteed for life is, almost by definition, impervious to political pressures, regardless of how he attained his position. There is no reason why a judge who has nothing to lose would allow a sense of misguided “gratitude” to interfere with the task of proper judgment. Indeed, this point has been made repeatedly by legal scholars.<sup>56</sup> It is worth noting that in America's two hundred years of experience with a democratically controlled judicial appointments system, United States Supreme Court justices have frequently ruled along lines entirely different from what their backers during the nomination process expected.<sup>57</sup> Moreover, there is a crucial distinction between party partisanship and ideological partisanship: Clearly, judges must not be selected because of their affiliation with a political party. However, ideological partisanship is a

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legitimate criterion of judicial selection, since, as we have seen, the judicial task necessarily involves ideological decisions—and the public has a right to have a voice concerning which ideologies are shaping these decisions.

As for the objection that the Israeli legislature is too mired in petty partisanship to choose justices for the Supreme Court, the answer is simple: If the Knesset is competent to serve as the people's representatives in passing constitutional laws that will bind future majorities, it is unreasonable to argue that it is not competent to approve appointments to the body that will determine what the constitution means.

A reformed selection mechanism is not only necessary in order to preserve the prestige of an increasingly embattled Supreme Court. It would also play an important role in strengthening Israeli democracy generally. One of the most debilitating illnesses of any democracy is for people to feel that their input does not matter, that they have no real control over their government, and therefore no reason to take public issues seriously. The judicial selections system fosters just this weakness, by sending the message that the people's elected representatives cannot be trusted with the most important decisions, and that the question of who will occupy the nation's courtrooms must instead be decided by a closed committee.

A reformed judicial appointments procedure should by all means protect the independence of Israel's judges by making sure that they are free from political or other impermissible influences. But the power of Israel's judiciary must be clearly predicated on the confidence of the people, by means of a public screening of judicial candidates. Only in this way will the most important message of democracy be reaffirmed in the public eye: That the judges are, ultimately, servants of the people. No more and no less.

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## Notes

1. Charles L. Black, "A Note on Senatorial Consideration of Supreme Court Nominees," *Yale Law Journal* 79, 1970, p. 660.

2. See Hillel Neuer, "Aharon Barak's Revolution," *AZURE* 3, Winter 1998, pp. 13-49, and Evelyn Gordon, "Is It Legitimate to Criticize the Supreme Court?" *AZURE* 3, Winter 1998, pp. 50-89.

3. For the purposes of this article, the term "lifetime tenure" is meant to include systems in which judges' positions are guaranteed until the age of retirement (in Israel the age is seventy).

4. Archibald Cox, *The Role of the Supreme Court in American Government* (Oxford: Clarendon, 1976), p. 99. See also Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge, 1993), p. 4: "Judges of necessity make law. Only those who believe in fairy tales deny this statement. Even so ... it [is] unsettling to admit to judicial policy making because we have surrounded judicial decisions with a panoply of myth, the essence of which avers that judges and their decisions are objective, impartial and dispassionate."

5. Yitzhak Englard, "The Contribution of Judicial Decisions to Tort Law Developments," *Iyunei Mishpat* 11, 1985-1986, pp. 76, 90; cited in Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* (Tel Aviv: Ma'aglei Da'at, 1993), pp. 46-47. [Hebrew]

6. Aharon Barak, "The Judge-Made Rule and Social Reality," in *Volume in Memory of Yoel Zuzman, Supreme Court President* (Jerusalem: Daf Hen, 1984), p. 93.

7. Black, "A Note," pp. 657-658. He identifies "the loci classici" of his approach in the writings of Oliver Wendell Holmes, Jr., Felix Frankfurter and Learned Hand. See also Eugene Rostow: "We have all long since agreed that judges are men, not automatons.... Inevitably they bring different views to the court...." Eugene V. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* (New Haven: Yale, 1962), p. 123; and Michael Paulsen: "Ideology matters: Whether a judicial candidate is an originalist, a formalist, a pragmatist, or a judicial activist, her judicial philosophy (and, depending on the candidate's judicial philosophy, her political philosophy and personal views) on important issues is central to how she will behave as a judge." Michael Stokes Paulsen, "Straightening Out the Confirmation Mess," *Yale Law Journal* 105:2, November 1995, pp. 549-580.

8. Segal and Spaeth, *Attitudinal Model*, p. 65.

9. Alexander Hamilton, James Madison, John Jay, *The Federalist Papers* (New York: Bantam Books, 1982), no. 78, pp. 392-399; John Arthur, *Words that Bind*:

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*Judicial Review and the Grounds of Modern Constitutional Theory* (Boulder: Westview Press, 1995), *passim*.

10. Arthur, *Words that Bind*, pp. 1-3, 39, 132-133.

11. *Federalist*, no. 78. Equally important, judicial removal through the impeachment procedure was vested entirely in the legislative branch. Hamilton was quite clear that the most important point here was to avoid empowering the executive, the President, to any degree, because of the temptation to remove judges solely to threaten or punish those who might rule against him. Likewise, because of the likelihood of professional competition or jealousies, members of the judiciary itself were to have no role in disciplining or impeaching—to say nothing of appointing—other members of the judiciary. Attempted revenge or control on the part of the legislature was considered a far less likely possibility, because of the great number of different and conflicting interests that would have to converge in order for enough legislative members to agree on the desired, if venal, course of action.

12. Herman Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* (New York: Scribner, 1988), pp. 48-49.

13. Schwartz, *Packing the Courts*, p. 45. See also Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court of the United States* (New York: Oxford, 1974), pp. 33, 65. The first time the U.S. Senate rejected a nominee—whose name was submitted by President George Washington—was in 1795.

14. After being approved, Japanese judges serve life terms, subject to the review of the electorate every ten years. This is unusual among democracies, in that it places a relatively low premium on independence.

15. Conspicuously absent from the list is the United Kingdom, whose system of selecting justices is—as in so many other areas of British government—*sui generis*. The highest court is a committee of the House of Lords, an unelected and ostensibly legislative body which at the same time is supposed to embody the constitutional values of the nation, the way the supreme court does in other countries. The “Law Lords,” as the justices are called, are appointed by the queen upon recommendation by the prime minister, who in turn is advised by the Lord Chancellor as well as a number of sitting Law Lords and legal experts.

16. In most of these countries, the judicial selection process is spelled out explicitly in each nation’s constitution.

17. The full text of the relevant provisions reads: “*Appointment of Judges*: 4. (a) A judge shall be appointed by the President of the State upon election by a Judicial Selections Committee. (b) The Committee shall consist of nine members, namely, the President of the Supreme Court, two other judges of the Supreme Court elected by

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the body of judges thereof, the Minister of Justice and another Minister designated by the Government, two members of the Knesset elected by the Knesset and two representatives of the Israel Bar elected by the National Council of the Bar. The Minister of Justice shall be the chairman of the Committee.”

18. Under the last government, Justice Minister Tzahi Hanegbi was so pusillanimous toward the justices that he effectively expanded the bloc to four, agreeing with every appointment proposed by the justices. When Barak spoke last June at a farewell party for Hanegbi, Barak praised him for “running the meetings honestly and effectively. In his positions he agreed with the proposals which the Supreme Court justices brought before the committee.” *Ha’aretz*, June 7, 1999.

19. Unless he is busy representing the interests of his own party. Under the Netanyahu government, the ministerial representative on the committee was Education Minister Yitzhak Levy of the National Religious Party. His most pressing concern, it would appear, was increasing the number of Orthodox Supreme Court justices. See, for example, *Ha’aretz*, October 23, 1996. It is fair to assume that whenever the government’s minister is not a member of the dominant coalition party, his sectoral interests will come into play as well.

20. There is another possibility: That the committee will become a battlefield for the personal grudges between the lawyers and the justices. In a tense meeting of the five legal-establishment members of the committee in November 1996 to discuss upcoming judicial appointments, the former chairman of the Israel Bar Association, Dror Hoter-Yishai, accused the judges of “taking revenge” against him for his involvement in a number of cases which had come before them. *Kol Ha’ir*, December 6, 1996. Recently, a campaign has been waged to have Hoter-Yishai removed from his position on the committee. *Ha’aretz*, May 4, 1999.

21. *Ha’aretz*, December 13, 1993.

22. See *Ha’aretz*, November 13, 1995. Regarding the personal relationship between the Barak and Beinisch families, see *Kol Ha’ir*, November 17, 1995.

23. See *Kol Ha’ir*, June 14, 1996.

24. There are a number of distinctions between the role of president of the Supreme Court in Israel and that of the chief justice in the United States. The most important difference, perhaps, has to do with the panels of judges which hear cases. In the United States, cases which come before the Supreme Court are heard by all nine justices. In Israel, however, most cases are heard by a small panel of three or five judges. In normal circumstances, the judges are selected at random; in sensitive cases, however, the court president has the power to determine which judges will participate, and can thereby effectively determine the outcome of ideologically laden decisions. For an important example of how this can play itself out, see Pnina Lahav,

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*Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley: University of California, 1997), pp. 199-200.

25. *Globes*, July 16, 1997. To Transportation Minister Yitzhak Levy of the National Religious Party, Barak promised the nomination of an additional Orthodox justice; to MK Amnon Rubinstein of Meretz, Barak promised the nomination of an Arab justice.

26. Martin Edelman, *Courts, Politics and Culture in Israel* (Charlottesville: University of Virginia, 1994), p. 34.

27. Yitzhak Olshan, *Law and Words* (Jerusalem: Schocken, 1978), p. 247. [Hebrew]

28. Moshe Ben-Ze'ev, "Politics in the Appointment of Judges," *Orech Hadin*, May 27, 1981, p. 13.

29. Article 1(c), Courts Ordinance (Transitional Provisions) no. 11, 5708.

30. Elyakim Rubinstein, *Judges of the Land: The Origin and Character of the Israel Supreme Court* (Jerusalem: Schocken, 1980), p. 59. [Hebrew]

31. Smoira and Rosen were aware of the real or apparent conflict of interest; Smoira asked Rosen to obscure his role in the appointment. Rubinstein, *Judges of the Land*, p. 60.

32. Rubinstein, *Judges of the Land*, pp. 60-66.

33. Knesset Proceedings, vol. 8 (1951), p. 1176, cited in Rubinstein, *Judges of the Land*, pp. 105-106.

34. Rubinstein, *Judges of the Land*, p. 106.

35. Olshan, *Law and Words*, p. 328. Justice Olshan's memoirs depict a deep antagonism to religious Jews, and refer repeatedly to Orthodox "conspiracies" to impose religious law on the Israeli public. See, for example, p. 327, and chapter 31, *passim*. In Rubinstein's words, "His book is permeated, to a great degree, with harsh criticism (out of respect I do not use a sharper term) of Israeli religious circles..." Rubinstein, *Judges of the Land*, pp. 154-155.

36. *Ha'aretz*, August 24, 1978, cited in Rubinstein, *Judges of the Land*, p. 120.

37. *Ha'aretz*, October 23, 1996.

38. Ze'ev Segal, "A Constitution without a Constitution: The Israeli Experience and the American Impact," *Capital University Law Review* 21:1, Winter 1992, p. 16. Segal clearly means by this both the narrow partisan concerns of party politics, and examination of a candidate's political ideology, since he calls for "minimum intervention in the process by politicians (members of the legislative and the executive branches)"—not only as party politicians but even as elected policymakers.

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39. Rubinstein, *Judges of the Land*, p. 119.
40. For a general discussion on the ethnic and religious makeup of the courts, see Rubinstein, *Judges of the Land*, pp. 137-157. See also Shimon Shetreet, *Justice in Israel: A Study of the Israeli Judiciary* (Dordrecht: Martinus Nijhoff, 1994), pp. 270-272; *Ma'ariv*, July 19, 1996.
41. Rubinstein, *Judges of the Land*, pp. 36-37; Supreme Court Public Relations Office; Yo'av Yitzhak, *First Class: 1998* (Tel Aviv: Egel Hazahav, 1998), pp. 55-73. [Hebrew]
42. Based on information conveyed by the Supreme Court Public Relations Office; see also Yitzhak, *First Class*, pp. 55-73.
43. Rubinstein, *Judges of the Land*, p. 218. Further, "in light of the advanced age of most of the justices, their compulsory lack of contact with the community and their immersion in a judicial tradition whose aim is to distance judges from external pressures, their outlook is liable to be different than that of the general public." Shimon Shetreet, "Reflections on the Protection of the Right of the Individual: Form and Substance," *Israel Law Review* 12, 1977, p. 32, cited in Rubinstein, *Judges of the Land*, p. 218.
44. Rostow was referring more generally to the task of constitutional adjudication. Rostow, *Sovereign*, p. 93. See also Rubinstein, *Judges of the Land*, p. 202. A pre-eminent American jurist took this idea even further: "It is as important to a judge called upon to pass judgment on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare, and Milton, with Machiavelli, Montaigne, and Rabelais, with Plato, Bacon, Hume and Kant as with books that have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly everything he will." Learned Hand, in *The New York Times Magazine*, November 28, 1954, quoted in Abraham, *A Political History*, p. 53.
45. Aharon Barak, "The Constitutional Revolution: Protected Human Rights," *Mishpat Umimshal* 1, 1992-1993, p. 30, cited in Neuer, "Aharon Barak's Revolution," pp. 47-48.
46. Aharon Barak, *Judicial Discretion*, trans. Yadin Kaufmann (New Haven: Yale, 1989), pp. 36-41; Barak, *Interpretation in Law* (Jerusalem: Nevo, 1992), pp. 231, 345; Aharon Barak, "Basic Law: Freedom of Occupation," *Mishpat Umimshal* 2, 1994, p. 208, cited in Neuer, "Aharon Barak's Revolution," p. 46, note 62.
47. Barak, "Freedom of Occupation," p. 208, cited in Neuer, "Aharon Barak's Revolution," p. 32.
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48. Moshe Landau, quoted in Ben-Dror Yemini, "Enlightened Fundamentalism," *Ha'aretz*, October 1, 1997, p. 28.

49. Yemini, "Fundamentalism," p. 28.

50. Cox, *Role of the Supreme Court*, pp. 117-118. Furthermore: "The power of the Supreme Court to command acceptance and support for its role in government seems to depend upon a sufficiently widespread conviction that it is acting legitimately, that is, performing the functions assigned to it, and only those functions, in the manner assigned." Cox, *Role of the Supreme Court*, pp. 104-105. Rostow concurs, "For the people, and not the courts, are the final interpreters of the Constitution. The Supreme Court and the Constitution it expounds cannot survive unless the people are willing, by and large, to live under it." Rostow, *Sovereign*, p. 142.

51. Segal, "A Constitution," p. 16. Rubinstein agrees with Segal's characterization that the present judicial selections system "is an attempt to neutralize appointments from politicization." Rubinstein, *Judges of the Land*, p. 115.

52. Paulsen, "Straightening Out," p. 579.

53. See Paulsen: "The prospect of open, substantive ideological review of judicial candidates always raises [the] objection ... that it would require a judge to commit herself to voting certain ways in cases that may come before her, compromising both judicial independence and judicial ethics ... [but] serious pre-appointment discussion of judicial philosophy simply does not compromise the constitutional independence of life-tenured judges, once they have been confirmed and appointed." Paulsen continues: "The political branches may demand information necessary to enable them to make informed predictions, but they may not extract promises or pledges. A nominee may answer any and all substantive questions, but always with the reservation of the right to change her mind and always with the caveat that, though she has preliminary views, any particular case must be decided on the basis of its facts and in light of the legal arguments presented." Paulsen, "Straightening Out," pp. 570-573. See also Alexander Hamilton: "As nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution...." *Federalist*, no. 78; and Shetreet: "The rules regarding the tenure of judges generally lie at the foundation of an independent judicial system." Shetreet, *Justice in Israel*, p. 54.

54. "Judges who never have to seek or preserve electoral support have no incentive to please supporters, or to consider how their decisions, particularly in high-profile cases, will be received by the citizenry." Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," *The University of Chicago Law Review* 62:1, 1995, p. 747.

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55. Knesset Proceedings, vol. 8 (1951), pp. 1176-1179, 1191-1192; Knesset Proceedings, vol. 13 (1953), pp. 440-442. See also Olshan, *Law and Words*, p. 224; Rubinstein, *Judges of the Land*, pp. 103-120; Asher Arian, *Politics in Israel: The Second Generation* (Chatham: Chatham House, 1985), p. 182.

56. Croley, "The Majoritarian Difficulty," pp. 746-747.

57. Far from viewing the courts as a threat, the framers of the U.S. Constitution "were more concerned lest the judges become subservient to either of the other branches. To insure the judiciary's independence, the framers provided them with lifetime tenure, no reduction in salary, and created a selection process that neither the President nor the Congress could control." Segal and Spaeth, *Attitudinal Model*, p. 13.