ADVANCING JEWISH THOUGHT

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EDITOR'S LETTER

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Dear friends,

The other kind of conservatism

The idea of conservatism has always meant different things. One meaning has to do with the location of power in society: modern conservatives, in this sense, are skeptical that any one person or institution is virtuous enough to wield power wisely, and so they want to see power dispersed widely. In America, this means that conservatives have defended limited government and federalism, so that power is not concentrated in Washington; they have opposed the regulations and bureaucratic growth of the administrative state, so that power can be given and taken away by the electorate; they champion the market economy, believing that no single governmental office or corporate power will know more about the people's desires than the accumulated purchasing decisions of the people themselves.

Yet conservatism has always held another meaning, too. This more temperamental conservatism describes an attitude about public affairs that is rooted in a view of the human condition. Humans are creatures of habit, this attitude goes. They do not like radical change, even if that change promises appreciable benefits. And so, when cultures or laws must change, gradual reform will always be more prudent than radical revolution.

As we bring to a close *Mosaic*'s month-long focus on the most significant event on the Jewish world, the structures of Jewish self-government in Israel, we see a clash of conservative visions manifest before us.

Yariv Levin and Simcha Rothman's proposed judicial reforms are conservative in that first sense: they respond to the unwarranted concentration of power in the judiciary and offer a solution to that problem by dispersing power back to the people's elected representatives. In her response to our featured essay this month, the Israeli legal analyst Netta Barak-Corren offers a criticism of Levin and Rothman's reforms on the grounds of that other, more attitudinal kind of conservatism. Barak-Corren, too, thinks that the judiciary should change. But she holds up previous examples of conservative judicial reform as a model for public policy that minimizes unintended consequences and allows for the kind of civic acculturation that is necessary for big changes to take root.

You can read her response here, along with Evelyn Gordon's last word in our discussion this month, addressing not only Barak-Corren but also Neil Rogachevsky's trenchant political response.

The political theory of Israel's declaration

On our podcast this week, I spoke to the co-authors of a new book on the political theory that informs Israel's declaration of independence. Neil Rogachevsky one of our regulars, makes a re-appearance as one of those authors. The other is Dov Zigler, an independent scholar in New York. Together, they've written one of the most fascinating books on Israeli political ideas in years.

Several years ago at *Mosaic*, the historian Martin Kramer wrote an extensive series on the history behind the drafting of the declaration, and how it came to serve as a legal and political cornerstone in Israel. Rogachevsky and Zigler's book complements that historical analysis by probing the declaration's understanding of rights, sovereignty, freedom, religion, citizenship and the ultimate purposes of Israel.

From the archives

Next week is Passover, which, of course, is a holiday that focuses on the events of the book of Exodus. Several years ago, *Mosaic* published excerpts from Leon Kass's magisterial commentary on Exodus, *Founding God's Nation: Reading Exodus*. You can read those essays—about the nature of Egypt, the ten plagues, and more—here.

If you enjoy any of those pieces and you'd like to learn more, then watch your email. On Sunday, we're going to share with *Mosaic* readers information about Tikvah's new online course with Kass, focused on Exodus. Over eight conversations, I join him to explore the big themes of the book, talk about the impact it's had on him, and much else. Free of charge, it's the perfect learning opportunity right before Passover.

With every good wish,

Jonathan Silver
Editor
Mosaic

Right-wing pro-reform protestors outside the Knesset in Jerusalem on March 27, 2023. Saeed Qaq/ Anadolu Agency via Getty Images.

NETTA BARAK-CORREN

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Netta Barak-Corren is a cognitive scientist and professor of law at the Hebrew University of Jerusalem and a member of the Federmann Center for the Study of Rationality. She is currently a visiting professor at the University of Pennsylvania law school and a visiting fellow at the Edmund & Lily Safra Center for Ethics in Harvard.

The Dangers Lurking in Israel's Judicial Counterrevolution

Israel's judiciary needs balance. But a rash change is likely only to upset further Israel's fragile equilibrium, and possibly bring down the regime itself.

This article is in response to Evelyn Gordon's essay "Israel's Judicial Reckoning

As I write these words, hundreds of thousands of Israelis have spontaneously taken to the streets after news broke that Prime Minister Netanyahu ousted the minister of defense, Yoav Gallant, who had called to halt the government's judicial reforms. This is a moment of great uncertainty and concern for Israel.

At a moment like this, the details are often neglected for the big picture. But every big picture includes a few details that hold special importance. In my response to Evelyn Gordon's eloquent and carefully argued essay, I will focus on the most important details of the Levin-Rothman plan—and Gordon's analysis thereof—and then take a step back to view the big picture.

In her essay, Evelyn Gordon lays out the case against Israel's Supreme Court as it is currently constituted, and in favor (with some caveats) of the reforms proposed by Simcha Rothman and Yariv Levin. I am in agreement with several of her key arguments, but I'd like to focus here on three of the key points I believe she gets wrong. The first concerns appointments

to the Supreme Court; the second concerns the relationship between the appointments and the proposed new rules for judicial review; the third concerns her argument that the Rothman-Levin reforms will set the clock back to the status quo ante 1995. This desire to un-ring the bell—and its disconnect from current reality—is, I believe, why we are facing an unprecedented crisis in Israel.

Before turning to any of these points, it's necessary to understand that Israel at present suffers from not one but three serious constitutional problems—something that becomes clear from reading Gordon's essay alongside Neil Rogachevsky's incisive response. These are: the outsized power of the Supreme Court, the weakness of a unicameral legislature which is controlled by a coalition government, and the instability of the coalition government through the distorting effects of the coalition system. In other words, all three branches of government suffer from structural defects. Gordon is mostly correct in her diagnosis of the judiciary, but, like Rothman and Levin, her focus on this branch to the exclusion of the others points to measures that are apt to aggravate the defects of the executive and legislative branches rather than remedying Israeli separation of powers. I've discussed these issues at length elsewhere, and I will return to them presently.

Let's begin with the aspect of the plan that has caused some of the most intense controversy: the restructuring of the judicial appointments committee. To reformers, this is the part that is most important. To defenders of the current system, and to those like myself who acknowledge the need for reform but object to many of the Levin and Rothman proposals, it is the most troubling. At present, Israel's judges are chosen by a nine-member committee consisting of: the president of the Supreme Court; two other justices, selected by the Court; two members of the Knesset, chosen by the Knesset as a whole; the justice minister along with another minister, selected by the cabinet; and two members of Israel Bar Association, elected by the organization's entire membership. This arrangement thus gives four seats to the elected branches, and five to judges and lawyers.

To Gordon, this situation means that "the justices command an absolute majority, because the Bar representatives almost always side with them." For a long period, this was correct: the committee cemented the hold of a homogenous legal elite on judicial appointments; even if the four elected members of the committee opposed a candidate, they were rendered powerless in the face of the legal professionals. Yet Gordon neglects to note that this situation changed fundamentally thanks to a modest reform instituted in 2008 by then-Justice Minister Gideon Sa'ar, who at the time was a member of the Likud, and who joined the opposition in 2019. The Sa'ar reform required a seven-out-of-nine majority for appointing Supreme Court justices. Thus, instead of one based on an absolute majority, today's appointment system is based on broad agreement created by two veto powers—that of the Court and that of the coalition government.

Since the 2008 reform, the composition of the Court has gradually changed. The efforts of the former justice minister Ayelet Shaked and civic organizations like Simcha Rothman's Meshalim led to the appointment of Israeli jurists who reject the ideas of unbridled judicial power introduced by Supreme Court President Aharon Barak in the 1990s. Of the fifteen justices currently on the court, all but one were appointed since 2008. Six of these fourteen are considered conservatives, six liberals, and two swing voters. Of the last two, one is simply too recent an appointee to have a judicial record, while the other has proved himself to be a bona-fide moderate.

The change in composition has had concrete effects. Take for instance the removal of the doctrine of standing—the principle that to bring a lawsuit one must be demonstrably affected by the law in question—which was nullified by Barak and his predecessors, and rightly seen by critics of the Court as one of the major sources of its overreach. Since his appointment, Justice Noam Sohlberg has reintroduced the requirement of standing, and in more than one case has convinced some of the liberal justices to go along with him.

Alex Stein, a former law professor, is another pertinent example. Since joining the Court in 2018, Stein has developed new interpretational theories that are strikingly different from the purposive interpretation advocated by Barak and his acolytes, which resembles in outcomes what Americans call "living constitutionalism." Instead, Stein has pioneered a method of interpretation that adheres closely to the text of the law under consideration, akin to the originalist school of American jurisprudence. Justice David Mintz (appointed in 2017), meanwhile, has repeatedly emphasized that the Supreme Court does not have the authority to review Basic Laws or amendments to them. He has even cast doubts on the doctrine of judicial review altogether. And these are just a few examples of how, in the wake of the Sa'ar reforms, the Court has been gradually moving away from the excesses that its critics have long complained of.

In fact, the reformers and their allies tend to draw their most compelling evidence of Supreme Court overreach from the 1990s and the first decade of the 2000s. But now the Supreme Court is no longer ideologically homogenous, and it no longer has the ability to replicate itself in perpetuity. Moreover, the broadening camp of conservative justices may now start favoring more conservative appointees. In light of this dynamic reality, there is no justifiable reason to subordinate the appointments entirely to the governing coalition, as Levin and Rothman seek to do.

The prospect of the coalition government having absolute control over judicial appointments is particularly concerning in tandem with another key part of the plan, which involves changing the rules by which the

Supreme Court itself operates. Unlike its American counterpart, Israel's high court generally does not decide cases as a unit. Usually, cases are decided by a bench comprising anywhere from three to thirteen justices. The reform plan would require that only the court in its entirety could review legislation, and that invalidating a law would require a supermajority of twelve out of fifteen. Thus four justices alone could uphold any action taken by the government. Lo and behold—four is exactly the number of seats that the current government will be able to appoint during its tenure.

Together these two aspects of the reforms work like the two blades of a pair of scissors. In the Israeli system, justices once appointed remain in office until they reach the age of seventy, at which point they must retire. We can therefore anticipate the number of vacancies that will arise during the current coalition's tenure. If the reforms are passed and the coalition fills three vacancies immediately, the new justices, plus only one of the conservative justices already on the court, will be able to prevent *any* legislation from ever being overturned. Once the fourth is appointed, the minority rule of the coalition appointees would be solidified. Thus the two blades of the scissors will come together and cut off any checks on the coalition's power. Such a change wouldn't restore the balance of power between the branches of government, but tilt it radically in favor of the executive.

There is also another, broader problem with Gordon's case for judicial reform that goes beyond the details of any particular proposal. She writes that "the reforms are largely meant to restore the legal situation to what it was during Israel's first several decades of existence (a time when no one questioned the country's democratic credentials)."

This is a common argument among reform supporters. But the big picture is that no set of reforms, no matter how constituted, can achieve that particular goal. The Jewish state is approaching its 75th anniversary. If we follow Gordon in taking 1995 as the year that the judicial revolution was completed, more than a third of Israel's history has elapsed since. Israel has changed dramatically—demographically, economically, and politically—since the 1990s. One cannot simply undo Aharon Barak's judicial revolution any more than one can unscramble an egg.

One example of the impossibility of restoring the status quo ante are changes in political culture and norms. Formally the Knesset has always been able to enact any Basic Law it wants with only a simple majority, without any special procedures. But as a matter of political culture, for most of Israeli history no Knesset ever passed a Basic Law without a broad consensus in its favor. From 1958, when the Knesset passed the very first Basic Law, regulating its own procedures, until the passage of the Basic Law: Human Dignity and Liberty in 1992, every Basic Law was passed—usually with a majority of 80 or 90 MKs—after a lengthy, rigorous, and exhaustive process, typically lasting several years and sometimes over multiple Knessets.

Gordon points to the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation—both enacted in 1992 by slim majorities—as exceptions, but she overlooks two very important details. First, the votes for the laws took place when many MKs were on the campaign trail, and therefore not present to vote. Second, neither was passed in the face of vehement opposition, but with only about twenty of 120 MKs objecting. Most of the absent MKs simply calculated that the laws would pass even if they were absent, and felt that they could afford to miss the vote.

More importantly, the Knesset was embarrassed by these slim majorities, and in 1994 voted to amend both Basic Laws simultaneously. During the deliberation over these amendments, MKs stated explicitly that they wanted to create another opportunity to vote on these laws because the slim majority present at their passage detracted from their legitimacy. The 1994 Knesset did something else at the same time: it formally recognized the Supreme Court's power of judicial review, with 80 out of 120 votes in favor of doing so. Only a full year later, in 1995, did the Supreme Court use this power to review a law on the grounds that it conflicted with the Basic Law: Human Dignity and Liberty.

But these norms have since deteriorated. In the past decade, Basic Laws have been amended with less than 72 hours of deliberation, often just to make it possible for an incoming coalition to divvy up cabinet posts in a way that satisfies the various competing interests of its members. And now the coalition is seeking a fundamental change in the relationship among the branches of government in the span of two months, in the face of intense opposition, relying only on its slim majority (64 MKs).

Nothing like this would have happened in earlier decades, before 1995. Restraining the judiciary won't restore the sorts of unwritten norms that were once in place, and the result will be governments that are restrained neither by the court nor by custom.

Something similar has happened with the role of small parties in the governing coalitions. Small parties have always been part of the Israeli system. Never has a single party won a majority of the seats in the Knesset, so the ruling party has always depended on an alliance with smaller parties. But pre-1990s, the small parties didn't ask so much. They focused on fulfilling limited and usually modest objectives that were important to their constituencies. That gradually changed during the 2000s and in the past several governments reached new heights. Small sectoral parties have used their leverage to make ever-larger demands, including asking for major ministries and enormous budgets. In the current government, two-and-a-half of the four most important cabinet positions—the ministry of finance, the ministry of defense, the ministry of public security, and the foreign ministry—have been given to representatives of minor parties (all but the foreign ministry, with Bezalel Smotrich holding both the finance ministry and a secondary ministerial position at the ministry of defense). Meanwhile, the ultra-Orthodox parties secured unprecedented budgets

for a schooling system that teaches almost no secular studies and whose graduates fail to join the military and the workforce, all while demanding legislation that would reserve 20 percent of all government positions for ultra-Orthodox appointees, even if they lack the necessary qualifications.

Such changes in political culture don't lend themselves to straightforward remedies, and are unlikely to be reversed. In aggregate, they render the executive branch more reckless, less representative of the popular will, and less willing to work for the good of the people as a whole. Removing the checks provided by the judiciary, without introducing any alternative checks and balances (which the reform does not), seems even less wise under these circumstances.

A democratic regime is not a mathematical equation where one can change a particular factor or coefficient and expect to get a predictable outcome. Changes to a system often have unforeseen and inadvertent effects, and remedies to existing problems often lead to more severe ones. The modest reform instituted by Gideon Sa'ar in 2008 did not leave most opponents of the judicial revolution satisfied. But over the course of fifteen years, it has yielded results. In the fullness of time, it is apt to bring even greater balance to the judicial system. This does not mean that further adjustments are not necessary, and I proposed several such amendments in my writing. These should, however, be prudent, carefully considered, and surgical. A rash, sweeping constitutional change—a judicial counter-revolution—is likely only to upset further Israel's fragile constitutional balance. An even worse outcome is what we see today in Israel's streets and everywhere else: a social rupture that threatens to bring down the regime itself.

Police and protesters outside the Knesset in Jerusalem on March 27, 2023. Mostafa Alkharouf/ Anadolu Agency via Getty Images.

EVELYN GORDON

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About the author

Evelyn Gordon is a commentator and former legal-affairs reporter who immigrated to Israel in 1987. In addition to *Mosaic*, she has published in the *Jerusalem Post, Azure, Commentary,* and elsewhere. She blogs at Evelyn Gordon.

The Need for Judicial Reform Isn't Going Away

At some point, Israelis must negotiate a genuine compromise on legal reform. Otherwise, the issue will continue tearing the country apart for decades to come.

This article is Evelyn Gordon's reply to the respondents to her essay "Israel's Judicial Reckoning"

Many thanks to Neil Rogachevsky and Netta Barak-Corren for their thoughtful responses to my essay. Barak-Corren addressed the issue of judicial reform more directly, but let me begin with a brief comment on Rogachevsky's response, which was devoted to a different problem with Israel's system of government—the fact that small parties have excessive power. Many Israelis agree, myself included, and various attempts have been made to solve the problem. But that's easier said than done.

In 1992, for instance, the Knesset instituted direct elections for the premiership in hopes of giving the prime minister more power over small coalition partners. But once voters could support their prime ministerial candidate without voting for his party, the big parties shrunk, enhancing small parties' power. In 2014, the Knesset raised the electoral threshold in hopes of forcing out the smallest parties and making resultant coalitions more manageable. Instead, faced with the risk of not crossing the threshold, smaller parties united with even smaller and more radical groups to avoid wasting votes, and the radicals then vetoed compromises that the

mainstream factions probably would have accepted, making coalitions even more unmanageable. So even though the problem of small parties having disproportionate power is widely acknowledged, it still awaits a feasible solution.

Now, back to judicial reform. Contrary to what Barak-Corren seems to think, she and I actually start from an identical premise—that you can't turn back the clock. But from that premise we reach very different conclusions. She believes there is no way to restore the more restrained and responsible political culture of earlier decades, so the Supreme Court must remain a powerful counterweight; consequently, she argues, judicial appointments must remain beyond the politicians' control. I believe there is no way to restore the more restrained and responsible judicial culture of earlier decades; consequently, I consider more ideological diversity among the justices essential, and that requires political control of judicial appointments.

Before discussing the judicial side of the equation, let me briefly address the political one. Barak-Corren and I agree that Israel's current political culture is deeply irresponsible. However, as I argue in my original essay, I believe the only way to rebuild a culture of political responsibility is to start making Knesset members bear the consequences of their decisions, which means not allowing the Supreme Court to overrule policies and appointments that may be stupid or offensive—in the court's terminology, unreasonable—but aren't illegal. I also believe political culture is easier to change than judicial culture, because politicians face periodic elections and will lose their jobs if they antagonize the public through bad policies; indeed, as my essay noted, experience elsewhere has shown that politicians do respond to that threat. Judges, in contrast, are by design insulated from outside pressure, so there is virtually no way to change judicial culture except by appointing new justices with different views.

Barak-Corren and I further agree that judicial reform alone isn't enough to fix the problems with Israel's elected branches; that is why my essay also argued, for instance, that Israel needs to introduce direct elections for MKs in order to make them more of a counterweight to the executive. I also agree with her that the elected branches shouldn't have unchecked power; that's why I argued in my original essay, as she also argues in her response and elsewhere, that if the Knesset were to change the way judges are appointed, it would be excessive also to let the governing coalition appoint the Supreme Court president and require a supermajority of twelve out of fifteen justices to overturn laws (though I supported a smaller supermajority in principle, I don't think it's essential).

But it's a mistake to view the political culture as irreparable and conclude that the best we can do is let the court curb its worst excesses. Rebuilding a responsible political culture is essential for Israel, because no matter how many policies the court overrules or dictates (and it does both lavishly), irresponsible elected officials still have the power to cause significant harm,

just as responsible ones can help to realize significant good. And the work of reconstruction starts with giving politicians the power to implement their policies, then punishing them at the polls if they do a bad job running the country.

Now, what about the judiciary itself? Over the last 35 years, a culture of judicial activism has become deeply entrenched. This goes well beyond the fact that judicial review of legislation, which didn't exist three decades ago, is clearly here to stay. Large swathes of the country's legal establishment genuinely believe that judges, attorneys general, and government legal advisers have both the right and the duty to overrule policies they deem unreasonable and enforce "rights" never conferred or described by the Knesset, that there are and should be no restrictions on standing, that virtually no issue is beyond the court's purview, and that the attorney general's opinion is binding on the government. Indeed, that is the dominant view they are taught in law school.

Under these circumstances, merely eliminating the reasonableness doctrine—a step Barak-Corren has supported in her other writing—isn't likely to make much difference; activist justices will have no problem inventing new grounds for overruling decisions they dislike. Ditto for requiring a supermajority of the court to overturn laws, another policy she has said she supports in principle, though not as part of the current government's reform. On a court with little ideological diversity, a supermajority isn't that hard to attain.

That's why, far from seeking to turn back the clock, I support introducing certain practices that didn't exist before the judicial revolution, like political control over judicial appointments and letting ministers choose their own legal advisers. As the saying goes, personnel is policy. And given the entrenched culture of activism, I think the only way to introduce more judicial restraint is by appointing justices and legal advisers who share that goal. That is why, as Barak-Corren rightly said, the Judicial Appointments Committee's composition has proved the biggest bone of contention between reform supporters and opponents. Both sides recognize that the appointment of justices will determine more than any other factor the kind of court we have.

Barak-Corren also argued that changing the committee's composition isn't necessary, because now that both the governing coalition and the justices have veto power over appointments—a change introduced in 2008, when the majority needed for Supreme Court appointments was raised from five to seven of the committee's nine members—more conservative justices are being appointed. Consequently, the change reformists are seeking will happen in any case, albeit at a more gradual pace, just as the composition of the U.S. Supreme Court slowly changed over the course of decades from ultraliberal in the 1950s and 1960s to conservative now.

Like Barak-Corren, I think gradual change is generally better than radical change. But she overstates the impact of the 2008 reform. It was indeed an improvement over the previous situation, and I agree with her that the court has more conservative justices today than it did fifteen years ago. But she ignores the fact, noted in my original essay, that the mutual veto means right-wing governments can usually at most appoint moderative conservatives—people who want to make changes at the margins, but who largely fall in line with the activist view of the court's expansive powers. Leftist governments, in contrast, can still appoint ultraliberal justices, because they can command eight of the committee's nine seats—the governing coalition's three, the justices' three, and the Bar Association's two (traditionally, as my essay noted, the Bar representatives almost always side with the justices). And that inevitably tilts the balance toward the liberal side.

It's true that if more conservative justices joined the committee, that balance of power could shift. But since the committee's justices are chosen by the court president, that is possible only if a conservative justice becomes president. Based on the current seniority method of choosing court presidents, only one conservative, Justice Noam Sohlberg, is slated to be president in the foreseeable future, and even if his term coincides with a conservative government, almost all the justices who will reach the mandatory retirement age of seventy during those years are themselves conservatives, so he will have little ability to affect the court's balance.

Consequently, the court will remain tilted toward the liberal activist side for the foreseeable future. The change in the U.S. Supreme Court's composition was possible because, when Republicans controlled both the presidency and the Senate, they could appoint staunch conservatives like Antonin Scalia or Samuel Alito. But under the current system, Israeli conservatives almost never control appointments; thus at best, they can usually only appoint a judge in the mold of Anthony Kennedy—someone slightly more conservative than the dominant liberal wing, but who will side with that wing on many crucial votes. That is indeed the case for many, though not all, of today's conservative justices.

And while some of today's conservative justices have advocated certain changes, these changes have been extremely modest. For instance, Barak-Corren mentioned Sohlberg's position on standing, and he has indeed denied standing to NGOs and other "public petitioners" in cases where people with direct, personal interests declined to appear before the court. Yet he would grant standing to public petitioners "in the absence of a petitioner with a personal interest and the ability to submit his own petition," which is the case for most policy issues.

It's also worth noting that even if politicians were to gain control of judicial appointments, the actual change in the court would still be gradual. First, no government has the ability to appoint more than a handful of justices to the fifteen-member court, because the justices' retirements are staggered.

Second, power changes hands periodically in Israel, just as it does in other democracies. Third, as America's experience shows, justices frequently disappoint those who appointed them, and that is because once appointed, they are completely independent.

Beyond the issue of who controls policy decisions, however, there's another important issue at stake in the Judicial Appointments Committee's composition, which was rightly raised by Gadi Taub in an episode of the Tikvah Podcast with Peter Berkowitz in early March. This issue relates to the public's respect for judges and public confidence that the Supreme Court offers impartial justice to everyone. Taub described how many conservatives and religious Jews believe the Supreme Court and the legal establishment do not protect them, but instead protect only the segment of society from which they themselves come. As one example, Taub cited the intolerable ease with which people from the "wrong" groups are held without bail until the end of their trials. But let me mention some others that resonate with many members of the current governing coalition (minorities such as Ethiopian Israelis, the ultra-Orthodox, and Israeli Arabs all have their own examples).

Item: during protests against the 1993 Oslo Accords and the 2005 disengagement from Gaza, thousands of demonstrators who blocked roads were beaten by police and jailed; the jailing of protesters was approved by the entire legal establishment—the prosecution, lower courts, and the Supreme Court. Moshe Feiglin, later a Likud MK, was charged with sedition for advocating civil disobedience and sentenced to jail (though the sentence was commuted to community service); his conviction and sentence were upheld by the Supreme Court. Today, too, there are widespread calls for civil disobedience; protesters have blocked roads on a weekly basis and also staged more severe disruptions, including collective refusals to do reserve duty and blockading Israel's ports and airport. Yet almost nobody has been kept in jail for more than a few hours, and certainly nobody has been charged with sedition.

Item: police brutality against the current protesters is quite properly being investigated. But in 2005, when a senior police officer was caught on tape ordering his subordinates to beat up peaceful anti-disengagement demonstrators in Kfar Maimon, he was rewarded with promotion, and that promotion was approved by the same Supreme Court that has repeatedly quashed appointments over non-issues like friendship with a cabinet minister. (Years later, the officer was forced out for sexually harassing female subordinates; unsurprisingly, an abusive cop remains an abusive cop.)

Item: the attorney general has barred the prime minister from any involvement in the legal reform—the number-one issue rocking the country, and hence the issue the public would most expect its prime minister to address—on the grounds that he has a conflict of interests due to his criminal trials. But the attorney general and the Supreme Court president have publicly lobbied against the reform, despite having an obvious conflict of

interests because it would curtail their own power. In what other democracy do attorneys general and chief justices publicly lobby against government legislation, even when they don't have conflicts of interests?

Item: left-wing and right-wing governments have both passed legislation that sought to encourage but didn't require ḥaredi yeshiva students to do army service, both because forcing them would probably be impossible and because the army doesn't want them very much anyway. The court has overturned all these laws on the grounds that they violate the principle of equality. But it has never suggested that this principle would be grounds for overturning the sweeping draft exemption granted a much larger group, Israeli Arabs.

Item: Yaakov Neeman, the first justice minister to seek to implement legal reform, was forced out within a few months by a perjury charge so trumped up that the trial court threw it out without even asking him to submit a defense. The charge stemmed from minor factual errors in his police statements and a court affidavit—errors that he himself discovered, reported to the police and the court and corrected. As the trial judge said, indicting people for seeking to correct their mistakes merely discourages them from being truthful. And the top prosecutor who filed that travesty of an indictment? She was rewarded with a Supreme Court appointment at the urging of the justices on the appointments committee, despite the fact that, as the left-wing daily *Haaretz* reported at the time, "legal circles express doubts as to [her] suitability."

Item: then-Supreme Court President Aharon Barak and his colleagues repeatedly pushed to promote a lower-court judge who called the Ḥaredim "parasites . . . who have never contributed a jot to the country" and told a disabled attorney she had no business being a lawyer if she couldn't climb the courthouse steps. The judge's blatant prejudice against two different minorities was, in the legal establishment's view, no obstacle to a higher judicial post. The justice minister ultimately blocked his promotion, but he remained a judge.

Item: the legal establishment frequently protects its own when they engage in behavior it would deem disqualifying in anyone else. As one of many examples, consider the lower-court judge Hila Cohen. A disciplinary panel comprising two Supreme Court justices and a district court judge concluded that she twice falsified protocols of a hearing by listing a defendant as present when he wasn't and then describing fictional proceedings in which the absent defendants submitted documents and orally requested postponements. She also destroyed the written postponement requests that the defendants submitted instead of appearing personally. And her punishment? The disciplinary panel "solved" her bad behavior by transferring her to another court.

I don't think the legal establishment was motivated by actual malice in most of these cases, but I do think unconscious bias plays a large role.

When prosecutors and judges see people like themselves disrupting traffic to oppose policies they also oppose, for instance, this strikes them as justified and undeserving of punishment. But when they see people *unlike* themselves disrupting traffic to oppose policies they themselves support, it strikes them as unjustified and deserving of punishment. Similarly, they understand Israeli Arabs' opposition to the draft, so they accept their sweeping exemption; but they find the ḥaredi belief that yeshiva study is more important than army service incomprehensible, so they deem that sweeping exemption unconstitutional.

This helps to explain why judicial appointments are so crucial to the governing coalition. Quite aside from the judicial-activism issue, religious Jews and those on the political right want justices who will grant them equal protection—who will think that blocking roads is either acceptable for all or acceptable for none, and who will not tolerate bad behavior by police officers, prosecutors, and judges just because the victim isn't "one of us" or because the perpetrator is.

I'd also like to address one other argument Barak-Corren made: that the court justifiably interpreted two Basic Laws on human rights as authorizing judicial review—even though only a quarter of the Knesset originally voted for them in 1992 and most MKs did not think that is what they were doing—because of 1994 amendments passed by a sweeping majority. First, nothing in these amendments explicitly authorizes judicial review. Certainly, there were MKs who thought they were introducing judicial review, and said so; there were also MKs who thought and said so in 1992. But most MKs had no reason to believe it in either 1992 or 1994. As I noted in my original essay, the court had never before interpreted any Basic Law as granting that power, nor had it given any hint that it planned to use these laws in that way as of 1994. Indeed, her argument that most MKs skipped the 1992 votes in favor of campaigning merely proves my contention that they didn't think they were doing anything as momentous as approving judicial review of legislation for the first time ever. For truly important votes, MKs show up even in the middle of a campaign.

More importantly, though, I think Barak-Corren ignores the difference between declining to grant rights that never previously existed and revoking rights once they have been granted. The Knesset could have rejected both Basic Laws in 1992, and might well have done so had MKs realized it would lead to judicial review of legislation. But once passed, even conservatives appalled by the court's abuse of the Basic Law: Human Dignity and Liberty assumed that repealing them would be impossible without generating precisely the kind of domestic and international storm today's legal reforms have generated. And if you assume a law is unrepealable, it makes sense to support an amendment that might improve it slightly no matter how much you dislike the original law. That's also why the current government

proposed letting the Knesset override judicial rulings of unconstitutionality rather than seeking to invalidate Human Dignity and Liberty, and why I backed that decision despite disliking the idea of an override.

The assumption that Human Dignity was unrepealable may have been wrong; I was quite surprised when a liberal, anti-reform colleague told me he would be more comfortable with that than with many of the proposals the reform does include. I don't know how widely his view is shared, but if it's possible, I would much rather scrap the override and repeal Human Dignity, because it's a terrible law. It ought to be replaced with more focused legislation that enshrines specific rights rather than vague, overly broad concepts like "dignity," "freedom," and "Jewish and democratic values" that the court can interpret, and indeed has interpreted, to mean almost anything.

I do agree with Barak-Corren that the way recent Knessets have repeatedly amended Basic Laws for narrow political needs is intolerable. But as I said in my original essay, I think the solution for that is to enact stringent procedures for passing Basic Laws, not to allow the Supreme Court to overturn parts of what the court itself has dubbed Israel's constitution. Unfortunately, and contrary to my naïve assumption in that essay, I don't think this is possible now despite all sides agreeing that it is necessary, and it won't be possible until agreement is reached on what the rest of Israel's constitution should contain. The coalition couldn't agree to stringent procedures before genuine legal reform takes place, because that would make it much harder to pass such reforms in the future. And the opposition couldn't agree to such procedures if the current reform did pass, because repealing it would then be too difficult.

Based on conversations with reform opponents, I don't consider compromise impossible. Unfortunately, I do think it's impossible right now; the only realistic chance for it was squandered when President Isaac Herzog—following the opposition's instant rejection of a leaked proposal that many on the right considered a tenable basis for talks—decided publicly to back a "compromise" tilted heavily in the opposition's favor. Once that happened, the opposition could not accept less, yet the plan was unacceptable to the coalition. As Prime Minister Benjamin Netanyahu rightly said, "key clauses . . . only perpetuate the current situation and do not bring the necessary balance between the branches," and the concessions it did make to reform advocates would have had little impact. Indeed, as several commentators noted, the plan seemed primarily intended not to bridge the gaps between the opposing sides, but to peel the ḥaredi parties away from the pro-reform bloc by granting their two chief concerns—ministerial appointments and legislation governing draft deferrals for yeshiva students—explicit immunity from judicial review.

So where does Israel go from here? It's hard to be optimistic right now. As of this writing, the reform seems dead in the water, and that's partly because the government's own behavior has badly undercut the case for it. Coalition members have said, done, and proposed so many appalling things (Haviv Rettig Gur provides a nice summary) that even many who supported the government in the last election are afraid of giving it more power. The obvious conclusion is that reform will be impossible under any government unwilling to act responsibly. But in the (likely) event that the coalition loses the next election, I fear it will be interpreted not as mandating more restrained, responsible behavior in general, but as a specific verdict on judicial reform, thereby deterring reform efforts for many years to come.

More importantly, however, the anti-reform protests have broken something fundamental in Israeli society. Until now, for instance, there was general agreement that the army was above political disputes; refusing to serve for political reasons was a fringe movement on both right and left. That's why only a few dozen out of roughly 20,000 soldiers disobeyed orders during the 2005 disengagement, though millions of Israelis vehemently opposed the pullout. But today, refusal is no longer a fringe movement; hundreds of air-force and intelligence-corps reservists have already refused to report for duty and thousands more have threatened to do so. And once the army has become a political battlefield, it will be fair game for both sides. Do today's protesters really think that next time a government wants, for instance, to evacuate settlements, there won't be massive disobedience among right-wing and religious soldiers, who are overrepresented in many combat units and the junior officer corps?

The same goes for civilian protests. Even before the nationwide strike that began when Netanyahu fired his defense minister for publicly advocating that the reform be paused, anti-reform protesters had been staging weekly "days of disruption" where they blocked roads, blockaded the ports and airport, and generally disrupted normal life around the country. And it's far from clear the protests will halt even now that Netanyahu has paused the reform; organizers say they plan to continue until the reform is scrapped entirely. But the right certainly has the manpower to copy these disruptive tactics; do the current protesters really think rightists won't do so next time they viscerally oppose a particular policy? Or that Israeli Arabs, who constitute a fifth of the country's population, won't do so to protest policies they oppose?

There's also likely to be a significant erosion of faith in democracy on the political right and within the religious public. For years, these Israelis believed the legal system could be changed through the standard democratic processes of winning elections and passing legislation; now, they have discovered that winning and legislating through normal democratic procedures isn't enough.

Rogachevsky and Berkowitz both urged the right to undertake a campaign of public education in an effort to persuade people beyond its own base that reform is warranted. But that is easier said than done when the media and the legal establishment routinely treat any criticism of the existing situation as "antidemocratic," a tendency that only seems likely to intensify now. *Haaretz* recently fired Taub as a columnist because it decided that even one pro-reform article, amid the hundreds of anti-reform pieces it has run, was too much. In this situation, I fear that democracy's inability to respond to their interests when they play by its rules will lead many right-wing Israelis to give up on democracy altogether; some will see violence as the alternative.

Yet even if the current crisis eventually subsides, the underlying issue won't go away. At some point, conservatives and liberals are going to have to sit down and negotiate a genuine compromise on legal reform. Without that kind of leadership, I fear this issue will continue tearing Israel apart for decades to come.

NEIL ROGACHEVSKY

MARCH 31 2023

About the author

Neil Rogachevsky teaches at the Straus Center for Torah and Western Thought at Yeshiva University and is the author of *Israel's Declaration of Independence: The History and Political Theory of the Nation's Founding Moment*, published in 2023 by Cambridge University Press.

Podcast: Neil Rogachevsky and Dov Zigler on the Political Philosophy of Israel's Declaration of Independence

The authors of a new book explore the principles animating Israel's founding moment.

Podcast: Neil Rogachevsky and Dov Zigler

Nearly 75 years ago, on May 14, 1948, David Ben-Gurion proclaimed Israel's sovereignty: a renewed Jewish state, the political expression of the national home of the Jewish people, located in their ancestral homeland.

Many essays and books have been published about the words Ben-Gurion spoke that day—Israel's Declaration of Independence. But Professor Neil Rogachevsky and his co-author Dov Zigler take a new angle on the declaration and what it means.

In a new book from Cambridge University Press, I*srael's Declaration of Independence: The History and Political Theory of the Nation's Founding Moment*, they look at the drafting process and distill from the elements that endured from draft to draft—as well the elements that were changed or removed—a political theory of Israel's founding, in which the political purposes of the Israeli project are made most clearly manifest.

How, in other words, did Israel's founders think about rights, about citizenship, about the justifications of Israel's sovereignty, an Israeli view of freedom, of civil order, and of religion? That's the subject of their new book—and the subject of the conversation they have here with *Mosaic*'s editor Jonathan Silver.

The Ark Encounter and Two Competing Approaches to Miracles

MARCH 1, 2023
From Natan Slifkin
at *Rationalist Judaism*

Located in Williamstown, Kentucky and opened in 2016, the Ark Encounter t heme park features a 500-foot-long replica of Noah's biblical vessel, complete with live animals and detailed exhibits. The organization behind it is an evangelical Christian group committed to the belief that the earth is about 6,000 years old, in keeping with a literal reading of Genesis. After a recent visit, **Natan Slifkin** compares the theme park's approach to the supernatural elements of the Flood story with those of both medieval rabbis and contemporary Ḥaredim:

> The Ark Encounter has some theological messages (largely Christian), but its primary focus is about the logistics of the ark. How did it work? How did all the animals fit on it? How did they survive without the conditions that they require in the wild? What did they eat? How did Noah and his family look after them all? How was there light [in their stalls]? How was there ventilation? How did all the animals get back home afterwards? How did they survive on their way back home through various habitats? With tremendous ingenuity and effort (and a willingness utterly to disregard science and plausibility), the Ark Encounter does not shy away from these questions, and instead tackles them in great detail and with fabulously creative exhibits.
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> Contrast that with the modern ḥaredi approach. [For instance], Rabbi Moshe Meiselman goes to the opposite extreme: he explains at length that the logistics don't work at all, and therefore the whole thing must have been miraculous. . . . Ironically, it is the fundamentalist Christian approach which is more similar to traditional Judaism.
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> Let's start with the Pentateuch. While the unleashing of the Flood is presented as a supernatural act, and there is a description of the animals arriving on their own (which is probably intended to be supernatural), there is no mention of anything miraculous regarding the ark. On the contrary, it is described as being huge, which is logistically necessary to contain many creatures, and covered with pitch, for the logistics of waterproofing.
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> Rabbi Nissim ben Reuben of Gerona (1320–1376) says that there were far fewer types of animals back then; the current multitude rapidly evolved from those that survived on the ark. The same approach is adopted by Rabbi David Luria (1798–1855). . . . This is the exact approach presented in the Ark Encounter.

Demography Is on Israel's Side

MARCH 24, 2023
From Yoram Ettinger at *Ettinger Report*

Yasir Arafat was often quoted as saying that his "strongest weapon is the womb of an Arab woman." That is, he believed the high birth-rates of both Palestinians and Arab Israelis ensured that Jews would eventually be a minority in the Land of Israel, at which point Arabs could call for a binational state and get an Arab one. Using similar logic, both Israelis and their self-styled sympathizers have made the case for territorial concessions to prevent such an eventuality. Yet, **Yoram Ettinger** argues, the statistics have year after year told a different story:

> Contrary to the projections of the demographic establishment at the end of the 19th century and during the 1940s, Israel's Jewish fertility rate is higher than those of all Muslim countries other than Iraq and the sub-Saharan Muslim countries. Based on the latest data, the Jewish fertility rate of 3.13 births per woman is higher than the 2.85 Arab rate (since 2016) and the 3.01 Arab-Muslim fertility rate (since 2020).
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> The Westernization of Arab demography is a product of ongoing urbanization and modernization, with an increase in the number of women enrolling in higher education and increased use of contraceptives. Far from facing a "demographic time bomb" in Judea and Samaria, the Jewish state enjoys a robust demographic tailwind, aided by immigration.
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> However, the demographic and policy-making establishment persists in echoing official Palestinian figures without auditing them, ignoring a 100-percent artificial inflation of those population numbers. This inflation is accomplished via the inclusion of overseas residents, double-counting Jerusalem Arabs and Israeli Arabs married to Arabs living in Judea and Samaria, an inflated birth rate, and deflated death rate.
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> The U.S. should derive much satisfaction from Israel's demographic viability and therefore, Israel's enhanced posture of deterrence, which is America's top force- and dollar-multiplier in the Middle East and beyond.

Amid Growing Social Tensions in Israel, a Moment of Unexpected Solidarity

MARCH 27, 2023
From Michael Selutin at *Israel Today*

In the intense controversy currently raging in Israel over judicial reform, those opposed to reform are often motivated by fear of the growing political power of Ḥaredim, whose parties are part of the governing coalition. Thus the decision last week of anti-reform protestors to march from cosmopolitan Tel Aviv into the adjacent ḥaredi enclave of Bnei Brak seemed like it might fan the flames of conflict. It did not, as **Michael Selutin** reports:

> It was expected that the demonstrators' rainbow flags, as well as their aggressive demeanor with left-wing slogans, would provoke the residents of Bnei Brak. Police had prepared for violent clashes, while urging the demonstrators not to enter the Orthodox city.
>
> What happened next, however, nobody expected. Instead of allowing themselves to be provoked and reacting to aggression with aggression, the . . . city's Orthodox Jews greeted the demonstrators with drinks and warm *cholent*, a Jewish dish prepared for Shabbat. Jewish music was played, people danced, and the demonstrators' aggression subsided immediately. . . . It was probably the first time for many of those present that they had met people who were so opposed to their own lifestyle. Orthodox and progressives finally spoke to one another.

In the event, neither anti-ḥaredi sentiment among the protestors, nor anti-secular sentiment among the Ḥaredim, won the day.

Fourteen Years after Reneging on an Agreement, the U.S. Condemns Israel for Violating It

MARCH 28, 2023
From Elliott Abrams
at National Review

Last week, the State Department upbraided the Knesset for repealing a 2005 law forbidding Jews from entering or living in a small area of the West Bank, on the grounds that doing so "represents a clear contradiction of undertakings" that "Prime Minister Ariel Sharon on behalf of Israel affirmed in writing to George W. Bush." **Elliott Abrams** comments:

> In an exchange of letters on April 14, 2004, Bush gave Sharon the support he needed to complete the Gaza withdrawal. Bush's letter made several important statements: that the United States would impose no new peace plan on Israel beyond what was already agreed; that the United States would "preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats"; and that the Palestinian refugee problem would be solved in [the West Bank and Gaza] rather than by moving Palestinians to Israel. More relevant, Bush also said that "in light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949." In other words, Israeli settlements were realities, and the United States understood that in any final status agreement, Israeli borders would reflect their location.
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> This formal exchange of letters, upon which Sharon relied, was then endorsed by Congress. The United States Senate voted 95–3 in favor on June 23, 2004, and the House of Representatives supported the Bush–Sharon commitments by a vote of 407–9 on the following day.
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> Why is this an act of hypocrisy? Because it was the United States, under the Obama–Biden administration in 2009, that claimed that the 2004 exchange of letters and commitments was absolutely of no consequence and not binding on the United States. . . . The Obama administration had already torn up any such commitment and turned the Bush–Sharon exchange of April 2004 into a pair of dead letters.

How Jewish Democracy Endures

MARCH 30, 2023
From Eric Cohen at *Tikvah*

After several weeks of passionate political conflict in Israel over judical reform, the tensions seem to be defused, or at least dialed down, for the time being. In light of this, and in anticipation of the Passover holiday soon upon us, **Eric Cohen** considers the way forward for both the Jewish state and the Jewish people.