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# Liberalizing the Law in the Land of the Lord: Limits to the Americanization of Israeli Religious Jurisprudence

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# NOTES

# Liberalizing the Law in the Land of the Lord: Limits to the Americanization of Israeli Religious Jurisprudence

ABSTRACT

*This Note presents an analysis of American and Israeli constitutional jurisprudence concerning matters of religion. Recently, there has been a shift in Israel's High Court of Justice toward implementing values of individual rights and religious pluralism. Some have analogized this shift in focus to the role played by the U.S. Supreme Court. However, fundamental differences remain between the American and Israeli approaches, stemming from divergent conceptions of national identity encapsulated in the states' respective foundational legal documents.*

*This Note examines the interplay of national identity and religious jurisprudence and its effect on individuals' legal rights. In doing so, it demonstrates how the legal entwinement of religion and state will prevent Israel from fully implementing American norms regarding matters of religion.*

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## I. INTRODUCTION

In July 2012, Israel's largest coalition government in recent history fell apart over the failure of Israel's Parliament, the Knesset, to enact an alternative to the Tal Law, which granted military draft deferments to Orthodox Jews[1] enrolled full time as *yeshiva* (religious school) students.[2] The controversy over military service stemmed from a decision by the High Court of Justice[3] (the High Court) that found the deferment arrangement illegal and gave the Knesset twelve months to fix the situation.[4] The decision sparked a divisive national

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1. Members of the Orthodox Jewish religion conform their behavior to *Halakha* (Jewish religious law). Martin Edelman, *A Portion of Animosity: The Politics of the Disestablishment of Religion in Israel*, 5 ISR. STUD. 204, 210 (2000). The most conservative Orthodox Jews are also referred to as ultra-Orthodox or *haredim*. *See, e.g.*, GERSHON SHAFIR & YOAV PELED, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 41 (2002) (referencing Orthodox Jews as *charedim*). Although Orthodox Judaism can be divided into many subsects, this Note will use the general term Orthodox because Israeli laws generally treat Orthodox Jews as a singular group.

2. *See* Jodi Rudoren, *Israel's Unity Government Is Disbanding over Dispute on Draft*, N.Y. TIMES, July 12, 2005, http://www.nytimes.com/2012/07/18/world/middleeast/unity-government-in-israel-disbanding-over-dispute-on-draft.html?_r=1&ref=jodirudoren (examining the unity coalition split between Israeli Prime Minister Benjamin Netanyahu and Shaul Mofaz, Kadima Party leader). *See generally Policies and Implementation Challenges in Israel Towards Conscription of Ultra-Orthodox Men*, HORNSTEIN BLOG PROGRAM (Dec. 20, 2010), http://hornstein2011.blogspot.com/2010/12/policies-and-implementation-challenges.html [hereinafter *Conscription of Ultra-Orthodox Men*] (providing history of deferments for *yeshiva* students).

3. The High Court of Justice is Israel's Supreme Court.

4. *See* SHAFIR & PELED, *supra* note 1, at 275 (identifying instances of activism demonstrated by the High Court); Edelman, *supra* note 1, at 215–16 (describing the High Court's holding that granting deferments to full-time *yeshiva* students is illegal);

debate about the place of religion in Israeli society, as well as the proper role of the High Court over religious issues.[5] Orthodox leaders voiced vehement opposition to the Israeli legal system. Rabbi Ovadia Yosef, spiritual leader of the Orthodox political party Shas, claimed that Israeli judges "hate the Torah."[6]

Clashes between Orthodox Jews and the High Court did not begin with the Tal Law. Orthodox animosity stems from the judicial system's role as a mechanism for changing the relationship between religion and state within Israel.[7] Beginning in the 1980s, the High Court became increasingly willing to intervene in matters not previously considered appropriate for judicial review and began deciding issues on the basis of individual rights, including freedom of religion.[8] Numerous High Court cases helped to erode the privileged position occupied by the Orthodox establishment by virtue of its status as the sole official religion of Israel's Jewish population.[9]

In its promotion of liberal individualistic values, the High Court increasingly utilized American precedent.[10] This led a number of commentators to refer to the "Americanization" of Israeli law.[11] However, the High Court faces severe limitations in its ability to adopt an American approach to matters of religion. This Note compares American and Israeli judicial approaches to the matter of religion and state in order to illustrate the means through which the High Court can change the religious status quo and the many impediments to it doing so.

Examining American and Israeli religious jurisprudence demonstrates how the two nations differ with respect to the relationship between religion and state and how that relationship affects and is affected by divergent conceptions of national identity.

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*Conscription of Ultra-Orthodox Men*, *supra* note 2, (providing subsequent history about implementation).

5. *See* Aluf Benn, *Influence of Israeli Arabs, Haredim on Israeli Society Spells End of Mandatory IDF Service*, HAARETZ, July 3, 2012, http://www.haaretz.com/news/national/influence-of-israeli-arabs-haredim-on-israeli-society-spells-end-of-mandatory-idf-service-1.448570 (discussing the Tal Law's implications for Israeli national identity); Jodi Rudoren, *Israeli Identity Is at the Heart of a Debate on Service*, N.Y. TIMES, July 12, 2005, http://www.nytimes.com/2012/07/06/world/middleeast/national-identity-at-heart-of-debate-on-israeli-military-service.html?ref=jodirudoren (discussing social tensions behind the Tal Law debate).

6. Yair Ettinger, *Rabbi Ovadia Yosef Bashes Israeli Legal System, Calling It 'Court of Gentiles,'* HAARETZ, Aug. 19, 2012, http://www.haaretz.com/news/national/rabbi-ovadia-yosef-bashes-israeli-legal-system-calling-it-court-of-gentiles.premium-1.459202.

7. *See* Edelman, *supra* note 1, at 209 ("As a result of their value orientation and their willingness to take an activist role, the courts, especially the Supreme Court, were being asked to rule on an ever-wider range of matters.").

8. SHAFIR & PELED, *supra* note 1, at 267–68; Edelman, *supra* note 1, at 209.

9. *See* Edelman, *supra* note 1, at 204, 217 (examining the transformation from collectivism to individualism within Judaism).

10. *Id.* at 209.

11. *Id.*

The U.S. Supreme Court often faces cases involving religious matters, including the Free Exercise Clause's guarantee of an individual's freedom of religion[12] and the Establishment Clause's prohibition on government preference for one religion over another or religion over nonreligion.[13] However, in the United States an individual's religious identification remains fully relegated to the private realm, free from government interference. This reflects a liberal discourse of citizenship whereby the nation theoretically and legally belongs equally to citizens of all religions.[14] In Israel, on the other hand, the High Court has decided numerous cases in which it was required to define a Jewish person.[15] The court has not followed the traditional Orthodox interpretation, expressing support for individual autonomy over matters such as religious identification.[16] Yet the very fact that the court needed to decide the issue demonstrates the public nature of religious identification. This reflects an ethnocultural discourse of citizenship whereby individuals are defined by group membership.[17] The determination of "who is a Jew" has important legal ramifications for both an individual's rights and the state's identity as the nation of the Jewish people. While the High Court may be able to reign in the power of the Orthodox, the legal entwinement of religion and state will preclude it from being able to become fully "Americanized" in regards to matters of religion.

This Note begins by summarizing the history of Orthodox Judaism's privileged position in society and the ways in which the High Court has begun to erode that privileged position. Part III then compares the divergent national identities reflected in American and Israeli foundational legal documents and examines how differing social conditions helped to create these national identities. Part IV compares cases from the Supreme Court and the High Court in order

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12. U.S. CONST. amend. I.

13. *Id.*

14. *See* SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 24 (1981) (discussing how the U.S. Constitution turned liberal ideals into fundamental legal entitlements that became the basis of community).

15. *See, e.g.*, HCJ 58/68 Shalit v. Minister of the Interior, 23(2) PD 477 [1969] (Isr.), *in* SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 35, 47–48 (Asher Felix Landau ed., 1971) [hereinafter SELECTED JUDGMENTS] (declining to rule on the definition of "Jewish" in the majority opinion, but discussing the problems presented in creating such a definition in dicta); HCJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.) *in* SELECTED JUDGMENTS, *supra*, at 1, 3 ("The question of law before us is very simply the meaning of the expression 'Jew' as used in the Law of Return, 1950.").

16. *See Shalit*, 23(2) PD 477, *in* SELECTED JUDGMENTS, *supra* note 15, at 35, 47–48 (stating in dicta that secular law, not religious law, must be used to consider the definition of "Jewish" in certain contexts).

17. *See* Rogers M. Smith, *The "American Creed" and American Identity: The Limits of Liberal Citizenship in the United States*, 41 W. POL. Q. 225, 234 (1998) (defining ethnocultural discourse in the context of American citizenship laws).

to examine how religious jurisprudence both affects and is affected by national identity. Part V examines the High Court's ability to alter the relationship between religion and state in Israel and the limitations to its adoption of an Americanized approach to matters of religion.

## II. ORTHODOX JUDAISM IN ISRAELI SOCIETY

At Israel's independence, Orthodox Judaism was established as the sole official religion of the Jewish people.[18] Israel maintains links with fourteen established religions,[19] but the Jewish nature of the state allowed the Orthodox to obtain a privileged position in the state's social, political, and legal spheres.[20] However, beginning in the 1980s, the High Court began to challenge the religious status quo through the rhetoric of individual rights and religious freedom.[21] The High Court's decisions on religious matters that ran contrary to Orthodox doctrine eroded the Orthodox establishment's monopoly on questions of Judaism.[22] The cases involving the question of "who is a Jew" provoked the greatest controversy because of their implications for national identity.

### A. *Orthodox Judaism's Privileged Position in Israel*

While only approximately 20 to 25 percent of Israel's Jewish population is Orthodox, Orthodox Judaism has obtained disproportionate prominence in Israeli public life.[23] This prominence is due to the role played by Orthodox Judaism as a source of legitimacy for the Zionist national project.[24] Before the establishment of the State of Israel in 1948, early Zionists faced a dilemma in their quest to establish a homeland for the Jewish people.[25] Zionism represented a secular nationalist movement, but the only cultural attribute common to the Jewish nation was the Jewish religion, to

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18. Edelman, *supra* note 1, at 204.

19. *See id.* at 206 ("Legally, then, Israel does not have *an* established religion; it has a multiple establishment.").

20. *See id.* ("There is no denying . . . that Orthodox Judaism has functioned in the Israeli polity as if it were the official state religion.").

21. *Id.* at 208–09.

22. *See id.* (examining the High Court's role as an objective vehicle for policy transformation).

23. *Id.* at 210.

24. *See* SHAFIR & PELED, *supra* note 1, at 148–49 ("For Zionism, however, the need to rely on primordial factors for legitimation and mobilization was particularly acute, since there was no modern culture common to all Jews.").

25. *See id.* ("[Dr. Jacob Israël de Haan] drafted a joint Arab-*charedi* statement calling on Zionists to give up their efforts to establish a Jewish national home in Palestine or face endless war with the Arabs.").

which a vast majority of the Jewish population adhered.[26] The Zionist leadership needed the cooperation of the Orthodox rabbis, as those universally recognized as the spokesmen for the Jewish people, in order to plausibly claim to speak on behalf of the worldwide Jewish nation.[27] The theological justifications for the nationalist project, offered by Orthodox rabbis, such as Rav Abraham Issac Kook, proved invaluable to the Zionists in earning credibility among the masses of Eastern European Jews.[28]

In 1947, in return for enhancing the legitimacy of Zionism, David Ben-Gurion, Israel's first Prime Minister, who at the time served as the chairman of the Jewish Agency, sent a letter to the Orthodoxy's executive agency outlining the "status quo agreement."[29] It pledged that the State of Israel would implement the prevailing religious arrangements by designating Saturday (the Jewish Sabbath) as the national day of rest, observing *kashrut* (Jewish dietary laws) in all government kitchens, reserving exclusive jurisdiction over marriage and divorce to religious courts, and preserving the autonomy of religious education.[30] Ben-Gurion further augmented those privileges by granting military deferments for full-time Orthodox *yeshiva* students.[31] But Orthodox Judaism's role in the state extended beyond those privileges articulated in the letter. For instance, Orthodox Jewish institutions receive the vast majority of state appropriations because all recognized religions receive state funding on a proportional basis.[32]

Israel's electoral system of proportional representation has allowed the Orthodox minority to wield a substantial amount of political influence. None of the large secular parties has been able to acquire a majority of seats in the Knesset since 1984.[33] Thus, the parties have relied on smaller religious parties to form coalition governments.[34] In return for their support, the secular parties allow

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26. *See id.* (discussing the acute need for Zionists to utilize religious symbols because there was no modern culture common to all Jews).

27. *See id.* at 137–38 (describing the interrelation between the Zionist movement and Orthodox Jews).

28. IAN S. LUSTICK, FOR THE LORD AND THE LAND: JEWISH FUNDAMENTALISM IN ISRAEL 31 (1988).

29. SHAFIR & PELED, *supra* note 1, at 140–41.

30. *Id.*

31. *See id.* at 143–45 (discussing the impact of the military-service exemption of *yeshiva* students). *See generally Conscription of Ultra-Orthodox Men*, *supra* note 2 (detailing a history of deferments for *yeshiva* students).

32. Edelman, *supra* note 1, at 206–07.

33. *Id.* at 207–08.

34. For instance, Shas has formed part of every coalition government since its first election to the Knesset in 1984. Ezra Kopelowitz, *Religious Politics and Israel's Ethnic Democracy*, 6 ISR. STUD. 166, 169 (2001); *see also* SHAFIR & PELED, *supra* note 1, at 146 ("The usual explanation for the privileges enjoyed by Orthodox Jews has been

the religious parties to control the Ministry of Religion, as well as various other ministries, such as Education, Interior, and Housing.[35] The secular parties' reliance on the religious parties for coalitions means a majority will rarely pass legislation that faces significant Orthodox opposition.[36]

### B. *The Erosion of Orthodox Judaism's Privileged Position*

Until 1995, Israel lacked a written constitution.[37] Although the Declaration of Independence explicitly called for a written constitution, it faced stark opposition from early Zionist leaders.[38] Ben-Gurion, in particular, was loath to accept any limitation on the power of the Knesset that risked impeding its ability to act quickly and decisively in the face of national security threats.[39] Instead, the Knesset passed the Harari Resolution, prescribing a process of incremental accumulation of individual basic laws that would eventually comprise the constitution.[40] However, these basic laws did not possess the power to override other, nonbasic laws.[41] The absence of fundamental, superior constitutional principles curtailed the possibility of judicial review of legislation.[42]

The situation changed in 1995 when the justices of the High Court declared that Israel no longer lacked a written constitution—Eleven Basic Laws that had been enacted by the Knesset would function as one.[43] Moreover, Chief Justice Ahron Barak went so far as to assert the power of American-style judicial review based on the normative, superior nature of the constitution.[44] At the core of the

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that Israel's system of proportional representation has enabled Orthodox political parties to hold the balance needed for forming coalition governments.").

35. Kopelowitz, *supra* note 34, at 170.

36. *See* Edelman, *supra* note 1, at 208–09 ("With the near equality in the Knesset of the left and right blocs, the Orthodox parties were so essential to any cabinet coalition . . . that the theoretically "junior" partners had almost as much power as the larger secular bloc with whom they chose to coalesce.").

37. *See id.* at 209.

38. Gary J. Jacobsohn, *Alternate Pluralisms: Israeli and American Constitutionalism in Comparative Perspective*, 51 REV. POL. 159, 161 (1989) ("The frustration of Israelis who have advocated a written constitution is traceable to the Declaration of Independence, which explicitly refers to 'a Constitution to be drawn up by the Constituent Assembly.'").

39. SHAFIR & PELED, *supra* note 1, at 261.

40. *See* Jacobsohn, *supra* note 38, at 161 ("[T]his vaguely worded legislation left unclear the status of the basic laws, just as it was silent as to a timetable for completion of the Constitution.").

41. *Id.* at 262.

42. *Id.*

43. Edelman, *supra* note 1, at 209.

44. *Id.*; *see also* Ahron Barak, *The Role of the Supreme Court in a Democracy*, 3 ISR. STUD. 6, 7 (1998) ("Before a judicial determination, the statute or basic law spoke

new constitution stood two basic laws dealing with individual rights, Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom.[45] Under these laws, the court began to take an activist approach to protecting individual rights, consonant with the liberal values that had come to dominate Israeli society.[46] While a majority of the decisions dealt with socioeconomic freedoms, the court became increasingly willing to tackle religious issues.[47]

The adoption of a constitution coincided with a larger shift in Israeli society from a collectivist ethos that emphasized communal interest and social justice during the state's formative years to an individualistic ethos that emphasized self-reliance and personal rights.[48] The individualistic ethos pervading society led to growing dissatisfaction among non-Orthodox Jews with Orthodox restrictions on their individual autonomy.[49] Non-Orthodox Jews comprised approximately 75 percent of Israel's Jewish population, but the status quo arrangements and electoral process served to subordinate the majority's religious views to those of the Orthodox minority.[50] The failure of the electoral process led many dissatisfied Israelis to turn to the courts, asserting a freedom of religion akin to that in the United States.[51]

A number of High Court decisions threatened the Orthodoxy's privileged status in Israel. For example, the High Court restricted the power of the Rabbinical Courts by ruling that they did not have the power to impose sanctions on Jews who refused to accept their jurisdiction in civil suits.[52] The High Court also required the Ministry of Religious Affairs to set aside funds for non-Orthodox religious institutions.[53] When the government, under pressure from the Orthodox Jews, denied a permit to a company seeking to import nonkosher meat, the court found the denial unconstitutional under Basic Law: Freedom of Occupation.[54] Confronting the very divisive issue of Orthodox military service, a unanimous panel of eleven

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with a number of voices. After a judicial determination, the statute or basic law speaks with a single voice.").

45. *See* SHAFIR & PELED, *supra* note 1, at 263 (describing the laws as enhancing liberal citizenship rights in the civil, political, and economic spheres).

46. *See id.* at 267–68 (explaining the court's gradual shift to a more activist role in promoting liberal values).

47. *See generally id.* at 274–75 (highlighting the legal developments of High Court decisions on religious issues).

48. *See* Edelman, *supra* note 1, at 205 (characterizing the "first Israeli republic" from 1948 to 1973 as collectivist and the "second Israeli republic" from 1992 to the present as individualistic).

49. *Id.* at 210.

50. *Id.*

51. *Id.*

52. *Id.* at 214.

53. *Id.*

54. Edelman, *supra* note 1, at 222.

justices found the arrangement granting deferments to full-time *yeshiva* students to be illegal.[55] The Orthodox perceived these decisions as threatening its position as the official religion of Israel and its goal to establish a state based upon *Halakha* (Jewish religious law).

However, Orthodox Jews found the controversy over "who is a Jew" most threatening because its resolution carries both practical and symbolic effects for the Jewish nature of Israel.[56] The first line of "who is a Jew" cases dealt with the degree to which the ethnic definition of Jewish corresponded to the religious definition for purposes of citizenship. The Law of Return (1950)[57] and the Nationality Law (1952)[58] gave Jews the right to immigrate to Israel and automatically obtain citizenship, respectively. These laws have largely sustained the Jewish majority within the state.[59] In the 1962 *Brother Daniel* case, the High Court faced the question of whether a person who converted from Judaism to Christianity could be considered Jewish for purposes of the Law of Return.[60] The court did not accept a completely subjective definition of Jewishness, whereby an individual could be defined as Jewish merely by self-identifying with the Jewish community.[61] Rather, the court found that the term "Jew" should be interpreted in conformance with the understanding of the Jewish community.[62] However, the relevant Jewish community was not confined to Orthodox Jews.[63] The court ruled that a convert to another religion did not qualify as a Jew.[64] The ruling departed from the Orthodox definition, which does not exclude people who join other religions.[65]

In 1967, the court confronted the issue of Jewish identity in regard to the Population Registry Law.[66] In Israel's population

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55. *Id.* at 215–16; *see also* SHAFIR & PELED, *supra* note 1, at 152–53 (discussing the strategy in the late 1990s to "reshape the nature of state-religion relations."); *Conscription of Ultra-Orthodox Men*, *supra* note 2 (providing subsequent history about implementation).

56. *See* SHAFIR & PELED, *supra* note 1, at 145 (describing the political importance of the question in view of the role played by ethnonational discourse in Israel); Edelman, *supra* note 1, at 217 ("At issue is which individuals are entitled to participate fully in the shaping the nature of the Jewish State.").

57. Law of Return (1950), 5710–1950, 4 LSI 114 (1949–1950) (Isr.), *amended by* Law of Return (Amendment 5730–1970).

58. Nationality Law (1952), 5712–1952, 6 LSI 50 (1952) (Isr.).

59. Edelman, *supra* note 1, at 217.

60. HCJ 72/62 Rufeisen v. Minister of the Interior (*Brother Daniel*), 16 PD 2428 [1962] (Isr.) *in* SELECTED JUDGMENTS, *supra* note 15, at 1, 10.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 23.

65. *See* Edelman, *supra* note 1, at 218 (describing opposing notions of Jewishness).

66. *Id.*

register, citizens are classified according to "nationality," defined by ethnicity.[67] The *Shalit* case involved a petition by the father of minor children demanding that the registrar enter his children as belonging to the Jewish nationality, even though they were not affiliated with the Jewish religion according to *Halakha*.[68] The court held that the term *Jew* should carry the same meaning as in the Law of Return.[69] According to Justice Berinson, the definition of the Jewish nation depended not on *Halakha*, but rather on the "views of the enlightened section of the population."[70] However, the court did not completely abandon religious criteria. The children did have ties to the Jewish faith, as their father was Jewish and their mother did not profess to follow any other religion.[71] Heated public debate over the *Shalit* case caused the Knesset to pass a law in 1970 that defined a Jew for purposes of the Law of Return and the Population Registry Law as a person born of a Jewish mother or converted to Judaism who is not a member of another religion.[72] This departed from the Orthodox definition by failing to require conversion according to the Orthodox interpretation of *Halakha* and automatically excluded members of other religions.[73]

The other line of "who is a Jew" cases involved conversion. In *Miller v. Minister of the Interior*, the High Court ruled that an individual that converted to Judaism under non-Orthodox auspices in the Diaspora was a Jew according to the Law of Return and had to be registered as such under the Population Registry.[74] In 1995, *Goldstein v. Minister of the Interior* extended the *Miller* holding by finding that the Minister of the Interior did not have the power to refuse to register as Jewish individuals who had been converted to Judaism by non-Orthodox rabbis in Israel.[75] The court's official

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67. *See id.* (stating the Population Registry Law does not limit Jewishness to the *halakhic* definition of a person born to a Jewish mother or converted to Judaism).

68. HCJ 58/68 Shalit v. Minister of the Interior, 23(2) PD 477 [1969] (Isr.), *in* SELECTED JUDGMENTS, *supra* note 15, at 35, 35. According to *Halakha*, a person is Jewish if born to a Jewish mother. The children had a Jewish father and a non-Jewish mother.

69. *See id.* at 187–88 (stating that the Law of Return could not be interpreted using religious law).

70. *Id.*

71. *Id.* at 35; *see also* Benjamin Akzin, *Who Is a Jew? A Hard Case*, 5 ISR. L. REV. 259, 263 (1970) (arguing that full dissociation from religion as criterion for Jewish nationality would have been premature and amounted to judicial arbitrariness counter to public opinion).

72. Edelman, *supra* note 1, at 218.

73. *Id.*

74. *Id.* at 219 (citing HCJ Miller v. Minister of the Interior, 40(4) PD 436 [1988] (Isr.)).

75. *Id.* at 219 (citing HCJ 1031/93 Chava-Goldstein v. Minister of the Interior [1995] (Isr.)).

recognition of non-Orthodox Judaism threatened the status of Orthodox Judaism as the definition of Judaism in Israel.

However, the resolution of "who is a Jew" has implications that reach far beyond the Orthodox establishment. Because Israel defines itself as a "Jewish democracy," the decision of who belongs to the Jewish community affects the state's national identity. It also affects the individual rights of citizens within the state. Israel's identity as the nation of the Jewish people led to a plethora of legal entitlements reserved specifically to members of the Jewish community. The determination of whether or not an individual is a Jew thus carries significant consequences. These implications illustrate the limits to the influence of American jurisprudence over its Israeli counterpart. Religious identification may carry significant social consequences for a citizen of the United States, but it will not affect the individual's legal entitlements. This difference arises from the divergent national identities encapsulated within the states' respective foundational legal documents.

## III. THE TANGLED WEB OF LAW, RELIGION, AND IDENTITY

The law, religion, and national identity interact in mutually reinforcing ways in the United States and Israel. American jurisprudence encapsulates the liberal, individualistic values enshrined in the U.S. Constitution. The Constitution adopted those values because they reflected the United States' relatively pluralistic, open society.[76] Judicial decisions that rely on those values further reinforce the United States' identity as a nation of all its citizens. Israeli jurisprudence, on the other hand, demonstrates the ethnocultural discourse that pervades Israel's Declaration of Independence and Basic Laws. Those foundational legal documents stemmed from the fractured, group-oriented nature of Israeli society.[77] Judicial decisions in Israel, in turn, reinforce the state's identity as the nation of the Jewish people.

### A. *Conceptions of National Identity*

Differences between American and Israeli approaches to religion and state arise from divergent conceptions of national identity embodied in each state's foundational legal texts. The U.S. Constitution defines the state through the enunciation of liberal democratic values, including the separation of religion and

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76. *See* Jacobsohn, *supra* note 38, at 174–75 (describing divergent forms of pluralism in the United States and Israel).

77. *Id.*

government in the Establishment Clause.[78] The Israeli Declaration of Independence, on the other hand, defines the state as the nation of the Jewish people.[79] Although the term *Jewish* includes ethnic and cultural dimensions, the Jewish religion plays a prominent role in defining those dimensions.[80] As the sole official religion of the Jewish people, Orthodox Judaism holds a superior position socially, politically, and legally within the state.[81] In contrast, despite numerous divisions within the American public, the nation legally belongs to all its citizens, regardless of ethnicity or religion. In Israel, while all ethnicities and religions enjoy full civil and political rights, the state remains the nation of the Jewish people.

1. American National Identity

In his book *American Creed*, Samuel Huntington argued that national identity and political principle are inseparable in the United States.[82] He posited that Americans have nothing important in common aside from the liberal values embodied in the Declaration of Independence and the Constitution.[83] These liberal values, rooted in the thinking of the Enlightenment, include concern for universal human rights, religious toleration, and the promotion of commerce and the sciences.[84] The Declaration of Independence articulated the ideals of a liberal democracy in its statement, "All men are created equal," and its enumeration of natural rights belonging to all citizens.[85] The Constitution then transformed those ideals into fundamental legal entitlements. Huntington thus concluded that this fundamental constitutional law became the basis of community.[86] He contrasted the American experience to that of most other nations, where national identity evolved from commonality of ancestors,

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78. U.S. CONST. amend. I.

79. THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL para. 10 (Isr. 1948) ("This right is the right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign state.").

80. *See* SHAFIR & PELED, *supra* note 1, at 149 (detailing how the Jewish religion was incorporated into the state); Sammy Smooha, *Ethnic Democracy: Israel as the Archetype*, ISR. STUD. 198, 202 (1997) ("[T]here is no separation in Israel between religion and nationality, religion and ethnicity (that is, a person belonging to the Jewish people or born a Jew cannot simultaneously be a member of any religion other than Judaism), and religion and state.").

81. *See* Edelman, *supra* note 1, at 206 ("There is no denying . . . that Orthodox Judaism has functioned in the Israeli polity as if it were the official state religion.").

82. HUNTINGTON, *supra* note 14.

83. *Id.*

84. Smith, *supra* note 17, at 229.

85. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

86. HUNTINGTON, *supra* note 14, at 30 ("In other countries, one can abrogate the constitution without abrogating the nation. The United States does not have that choice.").

experiences, ethnic background, language, culture, and often religion.[87]

Critics have pointed out limitations in Huntington's analysis. For example, Rogers M. Smith found that a conception of American nationality based solely on liberalism failed to take account of the shortcomings of liberal ideals in responding to the problems of community identity in American society.[88] He emphasized the presence of conflicting discourses of citizenship that gained prominence in American public life throughout the nation's history.[89] Republicanism, in its emphasis on shared virtuous endeavor and the common good, was capable of supporting nonliberal conceptions of citizenship characterized by social homogeneity.[90] Ethnoculturalism conflicted even more starkly with liberal ideals in its articulation of an American community characterized by an array of particular cultural orientations and customs, including Northern European ancestry, Protestantism, and the white race.[91] In support of his theory, Smith documented the ways the nation's laws of citizenship often contained requirements (e.g., place of birth, ethnicity, and gender) that demonstrated a more exacting standard for membership in the community than adherence to constitutional values.[92]

While Smith correctly points out the multifaceted nature of the American community, the extent to which the liberal values articulated in the Constitution shaped American national identity should not be underestimated. The Constitution defines the United States as a nation of all its citizens. The rights it articulates belong to every American citizen regardless of ethnicity or religion. Of course, this has not always been the case. For a long portion of the nation's history, individuals were denied social, political, and legal rights on bases such as race and gender. But the addition of the Civil Rights Amendments[93] and the Nineteenth Amendment[94] went a long way toward ensuring that the rights guaranteed by the Constitution belong to the entire American people. Individuals identify with many different subgroups, such as races or religions, but there remains an overarching American identity.[95] The government does not classify a citizen's nationality based on ethnicity or religion. Rather, every citizen is simply an American citizen. And while the nature of certain

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87. *Id.* at 23.
88. Smith, *supra* note 17, at 225–26.
89. *Id.*
90. *Id.* at 231.
91. *Id.* at 234.
92. *Id.* at 226.
93. U.S. CONST. amends. XIII–XV.
94. *Id.* amend. XIX.
95. *See* Jacobsohn, *supra* note 38, at 175 ("[American] pluralism acknowledges groups as collections of individuals, not as units whose corporate identity carries with it any claim upon the state for specific entitlement.").

laws make them applicable only to a particular subgroup, the Constitution does not prioritize any one group over another. Its principles apply to the entire American people, and as such, it serves to bind them together as a unitary community.

2. Israeli National Identity

An inherent tension exists in Israel's dual character as Jewish and democratic. On the one hand, Israel purports to be the nation of the Jewish people. On the other hand, it purports to be the state of all its citizens. Official Zionist ideology contends that the two principles are perfectly compatible, and the state maintains that it is fully committed to both.[96] Israel's Declaration of Independence guarantees full civil and political rights to all its citizens.[97] However, it defines peoplehood in terms of ancestral bonds, rather than liberal ideals, by tracing the collective history of the Jewish people from biblical times through the Holocaust.[98] The Jewish religion, embodied officially by the Orthodox, permeates almost all facets of the state.[99] Sometimes religion plays a symbolic role, influencing aspects of the state such as the official language (Hebrew), state emblems (star of David and menorah), and national holidays.[100] Other times, religion plays a direct role in determining legal entitlements.[101]

A number of Israeli laws reflect the Jewish nature of the state and give de jure recognition to the de facto dominance of the Jewish population. The Law of Return and the Nationality Law allow any Jew, and certain classes of relatives, to immigrate to Israel and automatically obtain citizenship.[102] On the other hand, these laws permit the immigration and naturalization of non-Jews only under certain limited circumstances and completely exclude Palestinian Arabs.[103] A recent High Court decision upheld an amendment to the citizenship laws that forbids Palestinian Arabs from obtaining

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96. Smooha, *supra* note 80, at 206.

97. THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL para. 13 (Isr. 1948).

98. *Id.* paras. 1–8.

99. *See* Smooha, *supra* note 80, at 205–07 (describing Israel as "a state of and for the Jews," and elaborating ways in which Jewishness is given a superior status in society).

100. *Id.* at 205–06.

101. *See id.* at 206 (describing a preference for Jews in immigration legislation and how Israel confers a special legal status on charitable organizations that cater to Jews only).

102. Law of Nationality, 5712–1952, 6 LSI 50 (1952) (Isr.); Law of Return, 5710–1950, 4 LSI 114 (1949–1950) (Isr.), *amended by* Law of Return (Amendment 5730–1970).

103. Smooha, *supra* note 80, at 206.

citizenship through marriage to an Israeli citizen.[104] The Foundations of Law Act, enacted in 1980, states that if the High Court encounters a legal issue and does not find a solution in the words of legislators, in precedent, or by way of analogy, it should rule according to the principles of liberty, justice, equity, and peace of the Jewish heritage.[105] Amendment 8 to Basic Law: the Knesset prohibits a list of candidates from participating in Knesset elections if the party's goals or acts either explicitly or implicitly include denial of the existence of the State of Israel as the state of the Jewish people.[106] Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Freedom both contain clauses that define their purposes as grounding in a basic law the values of Israel as a Jewish and democratic state. [107] Other laws indirectly benefit the Jewish community to the exclusion of others. For instance, the Jewish Agency and Jewish National Fund receive special legal status and fulfill quasi-governmental functions, such as development and leasing of land and support of cultural activities.[108] Both institutions are obliged by their own constitutions to serve only Jews.[109]

Chief Justice Ahron Barak sought to reconcile Jewish and democratic values by defining Judaism in a way that makes it indistinguishable from liberalism. He said:

> The fundamental values of Judaism are the . . . values of the love of mankind, the sanctity of life, social justice . . . human dignity, the rule of law over the legislator . . . . [T]he values of the State of Israel as a Jewish state must not be identical with Jewish law . . . . Indeed, the values of the State of Israel as a Jewish state are those universal values that are common to all members of democratic society and that grew out of Jewish tradition and Jewish history.[110]

While Barak's interpretation could offer a more inclusive conception of national identity, it is by no means universally shared. [111] Moreover, it fails to reflect the reality that the state was created to serve as the homeland of the Jewish people and its primary national goal remains serving the interests of the Jewish people.[112] The state

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104. Batsheva Sobelman, *Israeli High Court Upholds Controversial Citizenship Law*, L.A. TIMES, Jan. 12, 2012, http://latimesblogs.latimes.com/world_now/2012/01/israel-passes-laws-restricting-arabs-asylum-seekers.html.

105. Smooha, *supra* note 80, at 206.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. SHAFIR & PELED, *supra* note 1, at 273.

111. *See, e.g.*, Nadim Rouhana & As'ad Ghanem, *The Crisis of Minorities in Ethnic States: The Case of the Palestinian Citizens of Israel*, 30 INT'L J. MIDDLE E. STUD. 321 (arguing that Israel is an ethnic nondemocracy).

112. *See* SHAFIR & PELED, *supra* note 1, at 145 (pointing out the importance of determining "who is a Jew?" in defining Jewish collectivity and the privileged status of Jews in society).

defines nationality based on ethnicity, which is intimately connected to religion in the case of Jewish nationality.[113] It does not recognize an overarching Israeli nationality.[114] It further classifies its citizens on the basis of religious community.[115] Each community's religious court has full jurisdiction over matters of personal status, including marriage, divorce, wills, child custody, and burial.[116] Civil marriage and divorce do not even exist in Israel.[117] While individuals may self-identify with the larger Israeli community, the state does not embody the Israeli community. Rather, it is comprised of multiple communities representing distinct ethnicities and religions, and its national identity is defined by one particular community.

### B. *National Identity as a Reflection of Social Conditions*

The divergent conceptions of American and Israeli national identity embodied in each state's foundational legal texts reflect the differing social conditions that prevail in each country. Although U.S. history contains myriad examples of social divisions, American legal history reflects a move towards greater integration and tolerance.[118] While the vision of the United States as a melting pot may not ever be perfectly realized in practice, it is not a vision without any grounding in reality.[119] In Israel, citizens feel a stronger personal identification with religion and ethnicity, and divisions within Israeli society are more visible and entrenched.[120]

#### 1. American Pluralism

The Constitution begins with the phrase "we the people."[121] The "people" referred to theoretically includes the entirety of the American people.[122] However, sharp religious and ethnic divisions once permeated the state's social, political, and legal spheres.[123] For instance, the privileges of citizenship, most notably voting, originally belonged exclusively to white, male landowners.[124] Racial classifications provide an example of the most extreme type of

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113. *Id.*

114. Smooha, *supra* note 80, at 211.

115. *Id.* at 206.

116. *Id.*

117. Edelman, *supra* note 1, at 206.

118. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (finding that a state ban on interracial marriage violates Equal Protection); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (finding segregation in public schools inherently unequal).

119. *See* Jacobsohn, *supra* note 38, at 174–75 (describing American pluralism and intergroup inequality as "relatively unproblematic" in comparison with its Israeli counterpart).

120. *See id.* at 174 (discussing the principally irreconcilable differences between secular and religious Jews, as well as Israel's intense social cleavages).

division; black citizens were once relegated to the status of property rather than people.[125] The laws subjugating black citizens reflected the dominant white society's belief in the inferiority of the black race.[126] Judicial decisions dealing with questions of race regularly reflected societal prejudice. For instance, in *State v. Cantey*, the Court of Appeals of South Carolina faced the question of whether to classify persons with one-sixteenth African blood as white or black.[127] The judge found it proper to consider the men's reputations, stating, "It may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste."[128]

Over time, the de jure and de facto divisions between the races began to erode. Although group divisions retain continued importance through the present day, American legal history reflects a move towards greater integration and tolerance.[129] The Thirteenth,[130] Fourteenth,[131] and Fifteenth[132] Amendments, respectively, eliminated slavery, enfranchised black citizens, and prohibited discrimination based on race. These Amendments did not fully eradicate legal distinctions between the races, but future cases, such as those outlawing segregation[133] and prohibitions on interracial marriage,[134] made significant strides towards making American society more fully inclusive. Changes in the legal status of race often helped to change the social status of race. For instance, the

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121. U.S. CONST. pmbl.

122. *See* HUNTINGTON, *supra* note 14, at 24 (arguing that what Americans have in common is their political principles).

123. *See, e.g.*, Jacobsohn, *supra* note 38, at 170–75 (giving examples of cases exemplifying ethnocentric Americanism). *See generally* CULTURAL DIVERSITY IN THE UNITED STATES (Larry L. Naylor ed., 1997) (examining the diverse cultural groupings that make up American culture).

124. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 7–17 (2009) (describing the beginnings of suffrage in post-Revolutionary America).

125. *See generally* IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES 4 (2003) (describing how slaves were "[d]efined as property and condemned as little more than beasts").

126. *See* Walter Johnson, *The Slave Trader, the White Slave and the Politics of Racial Determination in the 1850s*, 87 J. AM. HIST. 13, 13–38 (2000) (discussing societal reactions provoked by a trial to determine the race of a female slave who appeared white).

127. 20 S.C.L. (614 Hill) (1835).

128. *Id.* at 2.

129. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

130. U.S. CONST. amend. XIII.

131. *Id.* amend. XIV.

132. *Id.* amend. XV.

133. *See, e.g.*, *Brown*, 347 U.S. at 483.

134. *See Loving*, 388 U.S. at 1.

mandatory integration of public education forced citizens of different races to interact with each other and be exposed to alternative viewpoints.[135] On the other hand, changes in the social status of race often precipitated the changes in legal status.[136]

Race has by no means disappeared from American public discourse, and divisions based on race are still reflected in numerous ways. In the legal sphere, the Supreme Court still struggles with issues of race. For instance, classifications that benefit a racial group that suffered from past discrimination produce sharp divisions among the Justices, with Justice Thomas calling for "a color blind Constitution" [137] and Justice Stevens finding racial distinctions permissible for remedial purposes.[138] And race provides only one stark example of the social divisiveness of group identity, with other notable examples being gender and sexuality.[139] Although the Establishment and Free Exercise clauses of the First Amendment prohibit legal distinctions between members of different religions, religion has been the cause of much social hostility.[140] The aftermath of the terrorist attacks on September 11, 2001, witnessed a significant increase in anti-Muslim sentiment within American society, demonstrated recently by the passionate protests over the erection of mosques in a number of different cities.[141] But while

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135. *Brown* has sparked much debate over its triumphs and shortcomings. For some background on the matter, see generally Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693 (examining the litigation campaign preceding the case to show how *Brown* and its legacy illuminate enduring features of the U.S. political system).

136. *See* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 272–98 (2005) (describing how intraracial community and institution building worked in conjunction with antidiscrimination litigation efforts).

137. *See* Grutter v. Bollinger, 539 U.S. 306, 377 (2003) (Thomas, J., concurring in part and dissenting in part) ("[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

138. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 276 (1995) (Stevens, J., concurring) (differentiating between a "No Trespassing" sign and a welcome mat).

139. *See generally, e.g.*, VICTORIA OLWELL, THE GENIUS OF DEMOCRACY: FICTIONS OF GENDER AND CITIZENSHIP IN THE UNITED STATES, 1860–1945 (2011) (discussing the role of women and their "genius" in the social and political context).

140. For a contemporary example, see Robert P. Jones, *What the Contraception Controversy Taught Us About Religion in America*, WASH. POST, Feb. 17, 2012, http://www.washingtonpost.com/blogs/figuring-faith/post/what-the-contraception-controversy-taught-us-about-religion-in-america/2012/02/17/gIQAoWPKKR_blog.html (discussing the implications of Catholic bishops' opposition to the Obama administration's requirement that employers provide no-cost birth control to their employees through insurance plans).

141. *See, e.g.*, *Muslim Community Center in Lower Manhattan (Park 51)*, N.Y. TIMES (Aug. 3, 2011), http://topics.nytimes.com/top/reference/timestopics/organizations/p/park51/index.html?scp=1-spot&sq=ground%20zero%20mosque&st=cse (discussing the controversy surrounding the construction of a Muslim community center in Manhattan).

American society is by no means perfectly harmonious, a wide array of different groups manage to coexist relatively peacefully.[142] The nation has not been torn apart by ethnic civil war like many other countries throughout the world. The same laws govern all citizens, and the same courts enforce those laws for all citizens. American citizens might not have friendly relations with all their fellow citizens, but they nevertheless comprise a singular people.

2. Israeli Pluralism

In Israeli society, citizens tend to feel a stronger sense of affiliation with subgroups rather than the larger national collective.[143] Although the divisions in Israeli society contain many nuances, three major, overarching cleavages stand out: religious and secular Jews, Ashkenazi (European) and Sephardi (Arab) Jews, and Jews and non-Jewish Arabs.[144] The divide between Jews and Arabs has proven the most intractable, in large part because of its implications for national identity.[145]

Sephardi Jews are people of the Jewish faith with historical links to the Arab Muslim world.[146] After 1948, Israel received a large influx of Sephardi Jews.[147] These Jews were relegated to a form of second-class citizenship.[148] In public discourse, Sephardi Jews were referred to as just another "ethnic group," as opposed to Ashkenazi Jews, who constituted normative society.[149] Socioeconomic conditions have reinforced the power disparities, with large gaps persisting between the groups in terms of occupation, income, and education.[150]

However, Sephardi Jews have always retained the distinct advantage of being a part of the Jewish people, to whom the nation

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142. *See* Jacobsohn, *supra* note 38, at 175 ("[In] a limited number of Western states . . . 'pluralism and intergroup inequality are relatively unproblematic.'").

143. *See id.* at 174 (discussing a study that revealed "Israeli cleavages are more intense, more superimposed, less crosscutting, and more political in nature" than those in the United States).

144. *Id.*

145. *See* Smooha, *supra* note 80, at 220 (detailing how the Israeli concept of a "good citizen" necessarily excludes Arab citizens).

146. Sephardi Jews are also referred to as Mizrahim. *See generally* Ella Shohat, *The Invention of the Mizrahim*, 29 J. PALESTINE STUD. 5 (1999) (examining the paradoxical effects on Arab Jews of their rival nationalisms).

147. SHAFIR & PELED, *supra* note 1, at 74.

148. *See id.* at 79–81 (discussing the settlement of immigrants in "development towns" where occupational and income gaps were common).

149. *See id.* at 75–79 (discussing perceived distinction between "those who were members of the virtuous republican community and those whose membership in the Yishuv [pre-statehood Jewish community in Palestine] was based on ethno-national ties only").

150. *See id.* at 81–87 (describing the disparity in occupational and income status between the Mizrahim and the Ashkenazi and the Mizrahim's inadequate educational structure due to discrimination).

belongs.[151] Thus, they have been able to use their Jewish identity to bolster their political and social status.[152] Faced with a dual identity, Jewish and Arab, Sephardi Jews sought to ally themselves with the Jewish community by emphasizing an ethnocultural discourse.[153] For instance, Shas, the only successful Sephardi political party, is also an Orthodox party whose platform emphasizes the need to enhance the role of the Jewish religion in public and private life.[154] Moreover, Sephardi Jews have often proven the most hostile to integration with Palestinians.[155]

Ultimately, however sharp the divide between Ashkenazi and Sephardi Jews or religious and secular Jews, the groups remain part of a larger shared community: the Jewish people. The societal cleavages among Jews are akin to the societal cleavages found in the United States. The different groups do not always have friendly relations, but they comprise a singular people, and the nation belongs to that singular people.

Non-Jewish Arabs present a different story because they are classified as a distinct people, outside of normative Jewish society.[156] Israel institutionalized group separation when it adopted the Ottoman practice of classifying individuals according to religion and allowing each religious community full jurisdiction over matters of personal status, such as marriage, divorce, and child custody.[157] The system of communal autonomy was meant to minimize strife between religious minorities and the state.[158] This institutional arrangement both reflected the de facto separation between groups within society and helped to perpetuate it.[159] In the case of non-Jewish Arabs, the separation goes well beyond religious matters.[160] Israeli Arabs

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151. *See id.* at 92 (discussing the concept of ethnonationalism running through Meir Kahane's election).

152. *See id.* (explaining how an ethnonationalist view dominated the candidates in the elections of 1988 who "more than tripled their strength").

153. *See id.* (discussing the Mizrahim contention that societal inclusion should be based on "mere Jewishness" rather than the internalization of Zionist or Israeli values).

154. *See id.* at 93–94 (discussing the meaning and implementation of Shas's slogan, "restore the crown to its old glory").

155. For a more comprehensive history of Israel's radical right-wing parties, see generally EHUD SPRINZAK, THE ASCENDANCE OF ISRAEL'S RADICAL RIGHT (1991) (examining the radical right from its origins to its impact on Jewish culture).

156. *See* Smooha, *supra* note 80, at 221 (describing how Arab citizens constitute a separate and unequal minority).

157. *See* Edelman, *supra* note 1, at 206–07 (describing the pervasive role of the government over various aspects of private life).

158. *See id.*

159. *Id.* at 207 (explaining the intended convergence of the different societal groups toward the greater good).

160. *See* Smooha, *supra* note 80, at 221 ("The state recognizes the Arabs as a religious, linguistic, and cultural minority.").

comprise a minority of the population, roughly 16 percent.[161] The Arab community is granted rights to maintain a publically funded separate system of Arab education, to cultivate their Arab culture, and to conduct cultural ties with other Palestinians and the Arab world.[162] But this autonomy comes at the price of integration into the larger society. Certain rights of citizenship are categorically denied to Israeli Arabs. For instance, even an Arab citizen who so desired would be forbidden from serving in the army.[163] While most Arab citizens probably do not have such a desire, participation in the military confers certain benefits, some tangible, such as veterans' financial benefits, and some symbolic, such as social status, that Arab citizens cannot enjoy.[164] Moreover, because Israel requires all other citizens to serve in the military, with certain exemptions, military service becomes an important shared experience that serves to foster community ties.[165]

The separation of the Jewish and Arab communities stems from the so-called Arab–Israeli conflict that began with the war in 1948 and continues up to the present-day failure of peace talks.[166] At the heart of the conflict lies a struggle over national identity.[167] People on both sides see the conflict in zero-sum terms—the state formed on the land formerly known as Palestine can either be a Jewish nation or an Arab nation.[168] The frequent references in Israeli discourse to the "demographic threat" posed by the Arab population demonstrate this sentiment.[169] If enough additional people of Arab descent became

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161. *Id.* at 202. Only Arabs within the Green Line, demarcating the boundary between Israel and the Palestinian Territories, receive Israeli citizenship. Arabs in East Jerusalem are excluded.

162. *Id.* at 221.

163. *Id.* at 202. Arab citizens do have the option of participating as volunteers in Israel's national service program. Arab participation in civil service has increased nearly tenfold from 250 in 2007 to 2,400 in 2012. The debate over Orthodox military service also included disagreement over compelling Arab national service. *See* Jodi Rudoren, *Service to Israel Tugs at Identity of Arab Citizens*, N.Y. TIMES, July 12, 2012, http://www.nytimes.com/2012/07/13/world/middleeast/service-to-israel-tugs-at-arab-citizens-identity.html?_r=1&ref=jodirudoren (discussing the struggle for Israeli Arabs to reconcile their identity as citizens of a Jewish state).

164. See Smooha, supra note 80, at 217 ("The extensive use of military service as a criterion for the allocation of benefits is very striking, because most Jews serve in the army, whereas most Arabs do not.").

165. *See id.* at 202 ("Israel is a deeply divided society that needs consociationalism.").

166. A full discussion of the Arab–Israeli conflict goes beyond the scope of this Note. For a detailed history, see generally CHARLES D. SMITH, PALESTINE AND THE ARAB-ISRAELI CONFLICT (7th ed. 2010).

167. *See* Smooha, *supra* note 80, at 212 (discussing the distinction between Jewishness and Zionism).

168. *See id.* (discussing the implications of the Jewish people constituting the majority and therefore exerting dominance over the nation).

169. *See* Gideon Alon & Aluf Benn, *Netanyahu: Israel's Arabs Are the Real Demographic Threat*, HAARETZ (Dec. 18, 2003, 12:00 AM), http://www.haaretz.com/

citizens of Israel such that the state became majority Arab, clearly the state would not retain its Jewish character. That situation goes against the state's avowed purpose of serving as the homeland for the Jewish people.[170] This concern creates the perception that Arab citizens are a threat to the state's core national goal, which leads to legal and societal consequences.[171]

Amendment 8 to Basic Law: the Knesset exemplifies the Knesset's attempt to safeguard the Jewish character of the state.[172] Amendment 8 provides that a list of candidates shall not participate in Knesset elections if the party's list of goals or acts explicitly or implicitly includes the denial of the existence of the State of Israel as the state of the Jewish people.[173] While political parties representing Israeli Arabs do hold seats in the Knesset,[174] the inclusion of the term "implicitly" provides ample leeway for their exclusion. Moreover, Arab parties have not yet been included in coalition governments because of their disagreement over issues such as retaining the Jewish–Zionist character of the state and forming a Palestinian state.[175] The laws that relegate Arabs to an inferior status comport with public opinion.[176] In the social sphere, antagonism between Jews and Arabs remains widespread.[177] In a particularly telling 1995 survey, 74.1 percent of Jews said that the state should prefer Jews to Arabs.[178]

The divide between Jews and Arabs demonstrates how the Israeli conception of pluralism differs from its American counterpart. Jews and Arabs generally do not view themselves as part of the same community.[179] Rather, they constitute two distinct cultures that must share the same space and accommodate each other. And while the state accommodates multiple groups, it only belongs to one.[180]

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print-edition/news/netanyahu-israel-s-arabs-are-the-real-demographic-threat-1.109045 (recounting how, speaking at the Herzliya Conference on security, then-Finance Minister Benjamin Netanyahu remarked that "[i]f there is a demographic problem, and there is, it is with the Israeli Arabs who will remain Israeli citizens").

170. *See* Smooha, *supra* note 80, at 212 (discussing Israel's dominance of the Hebrew language and the Jewish culture and institutions).

171. *See id.* ("From a Jewish viewpoint, rejection of Zionism as an ideology and as a force shaping the state is tantamount to rejecting the state itself.")

172. Basic Law: The Knesset, 5741–1981, S.H. No. 1016 p. 168 (Isr.).

173. Smooha, *supra* note 80, at 206.

174. *Current Knesset Members of the Eighteenth Knesset*, KNESSET, http://www.knesset.gov.il/mk/eng/mkindex_current_eng.asp?view=1 (last visited Dec. 20, 2012).

175. Smooha, *supra* note 80, at 209.

176. *Id.* at 220.

177. *See id.* ("[M]ost Jews think that the Arabs do not deserve equal rights . . . .").

178. *Id.* at 219.

179. *See id.* at 211 ("[T]here is no shared Israeli nation for all the citizens of the state . . . .")

180. *See* THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (Isr. 1948) ("THE STATE OF ISRAEL will be open for Jewish immigration and for the

The increased divisiveness that characterizes Israeli society compared to American society affects the High Court's jurisprudence.[181] Although it took many years to achieve legal equality among citizens of the United States, the U.S. Supreme Court now bases its decisions on the precept that laws should apply equally to all citizens.[182] In Israel, an overarching Israeli identity does not exist, and the High Court operates within the reality of group identity.[183] It decides which individuals belong to which groups and which laws apply to which groups.[184]

## IV. RELIGIOUS JURSPRUDENCE AS A REFLECTION OF NATIONAL IDENTITY

American and Israeli religious jurisprudence reflect the differences in the two states' conceptions of national identity. Consistent with the liberal discourse that informs the U.S. Constitution, religion remains a matter of individual conscience, free from government interference in the United States. All religions, including nonreligion, receive equal legal status.[185] An individual's membership in a religious group does not affect the individual's legal entitlements or responsibilities.[186] Therefore, the Supreme Court generally does not concern itself with religious identification and classification. In Israel, on the other hand, a person's religious affiliation has important legal consequences.[187] The High Court must decide how to divide individuals among religious groups. Religious classification retains special importance for membership in the Jewish community, the group to whom the state is dedicated. Although the court's religious jurisprudence includes liberal rhetoric

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Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants . . . .").

181. *See, e.g.*, HCJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.), *in* SELECTED JUDGMENTS, *supra* note 15, at 1 (grappling with the Jewish religious law as applied to a converted Jew and interpreting statutes in the Law of Return and the Registration of Inhabitants Ordinance to have the secular meaning).

182. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (holding that segregation of children in public schools based on race alone is unconstitutional).

183. *See* Jacobsohn, *supra* note 38, at 174–75 (discussing the acceptance of pluralism in Israel).

184. *See* Edelman, *supra* note 1, at 218 (providing the Supreme Court's judicial definition of a Jew).

185. U.S. CONST. amend. I.

186. *See* Jacobsohn, *supra* note 38, at 174–75 ("[T]he issues of equality over which political conflict occurs tend to center on material concern rather than on the more divisive issues of religion and morality.").

187. *See* Smooha, *supra* note 80, at 205–07 (discussing the implications of the Israeli state as an "ethnic democracy").

about individual rights, it remains grounded in the ethnocultural discourse that pervades Israeli society.

### A. *American Separation of Religion and State*

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." [188] The Establishment Clause prohibits the establishment of an official church. [189] The Free Exercise Clause prohibits the government from regulating, penalizing, or rewarding religious beliefs as such.[190] Sometimes tension exists between the two clauses. The Establishment Clause limits the government's ability to distinguish between adherents and nonadherents, but the Free Exercise Clause offers protection based on adherence to religion, necessitating some distinction between the two groups. However, both clauses protect religious freedom by ensuring that adherence or nonadherence to any religion will not affect an individual's standing in the national community.[191] A citizen need not worry about being more or less of a citizen based on religious choice. The clauses thus work to maintain the private nature of religious identification. The Court is not called upon to classify individuals as adherents of one religion or another when deciding fundamental legal questions.

#### 1. Free Exercise Clause

Free exercise claims arise when generally applicable laws require conduct that is incompatible with religious practice or prohibit conduct required by religion.[192] In those cases, the Court must decide whether or not a religious exemption is required.[193] Sometimes this requires an initial inquiry into the sincerity of a claimant's religious belief. For instance, in *Wisconsin v. Yoder*, a state law penalized a member of the Old Order Amish for refusing to send his daughter to school past the eighth grade.[194] Before considering whether the claimant could receive an exemption from the law based

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188. U.S. CONST. amend. I.
189. *Id.*
190. *Id.*
191. *See* Lemon v. Kurtzman, 403 U.S. 602, 664–66 (1971) (White, J., dissenting) (discussing the relationship between the First Amendment and the Establishment Clause).
192. *See, e.g.* Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878–79 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (considering the Amish religion's impact on the law mandating school attendance for children).
193. *See* sources cited *supra* note 192.
194. *Yoder*, 406 U.S. at 207.

on it impinging on his ability to freely exercise his religion, the Court had to consider whether the claim was based on religious belief.[195]

For a claim to properly fall within the First Amendment, it cannot rest on a purely personal or philosophical basis.[196] In *Yoder*, Chief Justice Burger, writing for the majority, explained, "Although . . . what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[197] He contrasted religious belief to "a subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond . . . ."[198] However, the Court had no difficulty in concluding that the traditional way of life of the Amish went beyond personal preference.[199] Rather, it stemmed from deep religious conviction, shared by an organized group.[200]

Although the Court found it necessary to consider sincerity of belief to determine whether the claim fell within the scope of the First Amendment, it did not inquire into the truth or veracity of those beliefs.[201] Moreover, the Court did not purport to define membership in the Amish community, but rather accepted the claimant's self-identification as Amish.[202] The determination of sincerity affected whether or not an individual could be exempt from a law.[203] The exemption applied equally to adherents of different religions, so long as members of the religion sincerely held similar convictions.[204] Membership in the Amish community did not grant any special legal entitlements or confer a privileged status in the national community.

The Supreme Court subsequently took a more negative view toward religious exemptions, regardless of an individual's sincerity of belief. In *Department of Human Resources v. Smith*, the Court found

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195. *Id.* at 215.

196. *See id.* ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

197. *Id.* at 215–16.

198. *Id.*

199. *Id.* at 216.

200. *Id.*

201. *See also* United States v. Ballard, 322 U.S. 78 (1944) (finding that the First Amendment barred submission to the jury of the truth or verity of respondents' religious doctrine or beliefs, but not submission to the jury of the question whether the defendants sincerely believed their representations).

202. *Yoder*, 406 U.S. at 216 (requiring no objective determination of belief).

203. *See* Smooha, *supra* note 80, at 220 (stating that informal, daily discrimination against Arab citizens is particularly widespread in hiring practices for white-collar jobs in the Jewish economy, in housing rentals, and in treatment by the police).

204. *Id.* at 219.

that Oregon did not have to exempt religiously inspired peyote from its general criminal prohibition on use of the drug.[205] Justice Scalia's majority opinion noted that other states had enacted religious exemptions to their drug laws.[206] However, he distinguished permissible exemptions from constitutionally required exemptions.[207] He found that the rights enshrined in the Bill of Rights, though protected against government interference, were not banned from the political process.[208] Recognizing the risk that the political process would place less popular religious practices at a disadvantage, he stated, "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[209]

Next, the conscientious objector cases required the Supreme Court to tackle the definition of "religious belief" found in the Universal Military Training and Service Act of 1948.[210] The Act allowed exemption from combatant military service for individuals who were conscientiously opposed to participation in war in any form by reason of their religious training and belief.[211] It defined religious belief as "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but . . . not includ[ing] essentially political, sociological, or philosophical views or a merely personal moral code."[212]

In *United States v. Seeger*, the Supreme Court exempted an individual who stated that he preferred to leave his belief in a Supreme Being open.[213] He stated his beliefs as, "goodness and virtue for their own sakes . . . a religious faith in a purely ethical creed . . . without belief in God, except in the remotest sense."[214] The Court interpreted belief in a Supreme Being broadly, articulating the test as "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the

205. *Smith*, 494 U.S. at 890.

206. *Id.*

207. *Id.*

208. *See id.* (discussing how judges may need to weigh the importance of the law against religious beliefs).

209. *Id.* Congress attempted to restore the compelling-interest test previously used in cases such as *Yoder*, which *Smith* repudiated, in the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb (2006). The Court found the statute invalid as applied to states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). It has not addressed the legitimacy of the statute's application to the federal government.

210. 50 U.S.C. app. § 456(j) (1964), *amended by* Military Selective Service Act of 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100, 104 (1967).

211. *Id.*

212. *Id.*

213. United States v. Seeger, 380 U.S. 163, 166 (1965).

214. *Id.*

orthodox belief in God of one who clearly qualifies for the exemption."[215]

In *Welsh v. United States*,[216] the Supreme Court went so far as to allow an exemption despite the fact that the registrant had struck the word "religious" on his application. Justice Black's plurality opinion found that the religious exemption clearly excluded two groups of registrants: those whose beliefs are not deeply held and those whose objection to war rests solely upon considerations of policy, pragmatism, or expediency.[217] It did not exclude, however, "those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection . . . is founded to a substantial extent upon considerations of public policy," so long as the objection had some basis in moral, ethical, or religious principle.[218]

Like the exemption in the Amish case, the religious exemption at issue in these cases offers a benefit to adherents of religion that it does not grant to those who do not adhere to any religion. Even interpreting the term as broadly as possible, the language of the 1948 statute necessitates drawing the line somewhere. Justice Harlan, concurring in *Welsh*, found the distinction between theistic and nontheistic beliefs, on the one hand, and secular beliefs, on the other hand, to violate the Establishment Clause.[219] While the majority did not address the issue, Justice Harlan's point highlights the tension between the Establishment and Free Exercise clauses. However, an essential difference remains between determining whether a person qualifies for protection based on freedom of religion on the one hand, and determining the definition of the religion to which a person belongs, on the other.

In each of the cases involving religious exemptions, the effect of the Court's decision on the individual rights is relatively narrow: the individual is granted an exemption from complying with a particular provision of law. The individual is not granted a different level of citizenship based on a designation of religious or not religious.

2. Establishment Clause

James Madison, in protest of the renewal of Virginia's tax support for the state's established church, argued, "[T]he best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions."[220] Madison's statement captures the purpose

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215. *Id.*
216. Welsh v. United States, 398 U.S. 333 (1970).
217. *Id.* at 342–43.
218. *Id.* at 342.
219. *Id.* at 345 (Harlan, J., concurring).
220. Everson v. Bd. of Educ., 330 U.S. 1, 12 (1947).

behind the Establishment Clause. Beyond simply prohibiting the establishment of an official church, the clause helps to ensure that the government does not act in a way that prioritizes one religion over another, or religion over nonreligion, so that no citizen receives a privileged position in the national community on the basis of religious choice.[221] It protects an individual's religious freedom indirectly, by making sure that benefits and penalties are not linked to religion.[222] The Supreme Court cases addressing the Establishment Clause focus on the actions of the government, not individuals.[223] Before exploring whether the clause applies to an action, the Court must determine whether the action can be fairly attributed to the government.[224] Individuals remain free to express their religious beliefs publically if they so choose.[225]

The Establishment Clause cases demonstrate the difficulty of defining the scope of permissible government action. For example, the cases do not categorically prohibit the government from displaying symbols with religious significance. In *Lynch v. Donnelly,* the Supreme Court upheld as constitutional a city's erection of a crèche in a public park as part of a Christmas display.[226] The Court explained its aversion to a rigid, absolutist view of the Establishment Clause by acknowledging the important role played by religion in American life throughout the state's history.[227] Chief Justice Burger wrote, "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." [228] He listed the proclamation of Christmas and Thanksgiving as national holidays in religious terms, the national motto "In God We Trust," and the reference to "one nation under God" in the Pledge of Allegiance to the American flag as examples.[229] Thus, the Court rejected a per se rule that would indiscriminately invalidate all governmental conduct that conferred benefits or gave special recognition to religion in general or to one faith in particular.[230] Rather, the Court looked at the context of the display as a whole to determine whether it had a secular purpose,

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221. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

222. *See id.*

223. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (finding a permanent monument in a public park to constitute government speech).

224. *See id.* at 467–70 (explaining the importance of determining whether a city was engaging in its own expressive conduct).

225. *Id.* at 469.

226. 465 U.S. 668.

227. *Id.* at 675–79.

228. *Id.* at 675.

229. *Id.* at 675–79.

230. *Id.* at 678.

whether its primary effect was to advance or inhibit religion, and whether it created an excessive entanglement of government with religion.[231]

The Supreme Court has applied a number of different approaches in drawing the line between permissible and impermissible government behavior with respect to religion and has sometimes reached contrary conclusions on cases with fairly similar fact patterns.[232] But wherever courts draw the line on any particular occasion, the Establishment Clause helps to maintain the United States' status as a country of all its citizens. Justice O'Connor, in her concurring opinion in *Lynch*, articulated the purpose of the Establishment Clause as prohibiting the government "from making adherence to a religion relevant in any way to a person's standing in the political community." [233] Courts stand as a guard against endorsement, because endorsement would "send[ ] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[234] Justice O'Connor also noted that, on the other hand, disapproval of religion sends the opposite message.[235] The harm from both messages comes from segregating citizens on the basis of religious belief. Therefore, separating religious life from political life enforces the belief that the American nation belongs to all its citizens and fosters a unified sense of American national identity.

### B. *Israeli Entwinement of Religion and State*

The *Brother Daniel* case provides a vivid example of the important role that the Jewish religion plays in Israel's national identity and jurisprudence.[236] Even as the High Court differentiated the secular civil law that applied to all citizens from the religious law applied by Rabbinical Courts to matters of personal status for Jewish

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231. *Id.* at 678–79. The Court applied the *Lemon* test, first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

232. *Compare* McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844 (2005) (holding the display of the Ten Commandments in Kentucky county courthouses unconstitutional), *with* Van Orden v. Perry, 545 U.S. 677 (2005) (holding a display of the Ten Commandments on Texas State Capitol grounds constitutionally permissible).

233. 465 U.S. at 687 (O'Connor, J., concurring).

234. *Id.* at 688.

235. *Id.*

236. *See* HCJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.) *in* SELECTED JUDGMENTS, *supra* note 15, at 1 (denying a person of Jewish ancestry access to a streamlined naturalization process available to Jewish immigrants because he had converted to Catholicism).

citizens, the court's reasoning demonstrated the inextricable links between the secular law and Jewish religion.[237]

The case stood before the High Court in 1950, before the 1970 Amendment to the Law of Return that defined "Jew" as "a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion."[238] The High Court needed to interpret the Law of Return's simple opening statement: "Every Jew has the right to come to this country as an *oleh.*[239]" Without a legislative definition for guidance, the court faced the challenge of deciding whether Brother Daniel, an individual born to Jewish parents who converted to a different religion, could be considered a Jew under the law.[240]

The court considered and rejected two opposing definitions of *Jew*, both of which would have classified Brother Daniel as a Jew. First, Justice Silberg declined to interpret the term in accordance with Orthodox religious law.[241] Under *Halakha*, a Jew who converts or becomes an apostate remains a Jew.[242] Justice Silberg found that the term acquired different meaning in the Law of Return than it did in the Rabbinical Courts.[243] The difference stemmed from the fact that the Law of Return, unlike laws governing personal status issues, was a secular law of the state.[244] The secular nature of the law necessitated interpreting its terms according to their "ordinary meaning," taking into consideration the legislative purpose behind its enactment.[245] In divining the ordinary meaning of "Jew," Justice Silberg found it appropriate to inquire into the customary understanding of the term by Jews.[246] He reasoned, "they are nearest to the subject matter of the Law, and who better than they know the essential content of the term 'Jew'?"[247] He did not explain who constituted the Jewish community that best knew the essential

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237. *See id.*

238. Law of Return, 5710–1950, 4 LSI 114, § 4B, (1949–1950) (Isr.), *amended by* Law of Return (Amendment 5730–1970).

239. *Id.* § 1. An *oleh* is a Jew who has completed *aliyah*, or immigration to Israel.

240. *See Rufeisen*, 16 PD 2428, *in* SELECTED JUDGMENTS, *supra* note 15, at 1, 1 (reviewing the state of the case).

241. *See id.* at 10 (distinguishing the use of the term *Jew* in secular law from its use in religious law).

242. *See id.* at 3 ("According to the prevailing opinion in Jewish law . . . a Jew who is converted or becomes an apostate continues to be treated as a Jew for all purposes save perhaps as to certain 'marginal' laws which have no real importance with regard to the central problem.").

243. *Id.* at 10.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

content of the term. But since he rejected a definition in conformance with *Halakha*, the group was not restricted to Orthodox Jews.[248]

Justice Silberg also rejected Brother Daniel's proffered definition of *Jew*, a completely subjective conception whereby a person "who still feels and regards himself as a Jew in spite of his conversion" would qualify.[249] Although departing from Orthodox religious law, the court found that the term *Jew*, in its ordinary meaning, would not be completely divorced from the Jewish religion.[250] The court's reasoning centered around the central role played by the Jewish religion in binding the Jewish people as a community and forming the state's national identity.[251] Justice Silberg summarized the ties between the Jewish people, Jewish religion, and the state of Israel:

> Whether he is religious, non-religious or anti-religious, the Jew living in Israel is bound, willingly or unwillingly, by an umbilical cord to historical Judaism from which he draws his language and its idiom, whose festivals are his own to celebrate, and whose great thinkers and spiritual heroes . . . nourish his national pride.[252]

As an adherent of a different religion, Brother Daniel's love for Israel would be "from without—the love of a distant brother."[253]

Though Justice Silberg dismissed the petitioner's argument that refusal to recognize him as a Jew would transform Israel into a theocratic state, Justice Silberg emphasized that law, rather than religion, regulated the lives of the nation's citizens.[254] However, the nature of Israel's laws, which classify citizens based on ethnicity, required the creation of legal distinctions between different ethnic groups. Justice Silberg found religion to be an important component of Jewish ethnicity because it offered a clear external sign to distinguish the Jewish population from the non-Jewish population.[255] He explicitly articulated the connection between individual religious identity and the national Jewish identity.[256] By binding together the Jewish people, the Jewish religion played a central role in creating

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248. *See id.* (rejecting the Rabbinical Court's definition of *Jew* as applied to the Law of Return).

249. *See id.* at 3, 11–13 (acknowledging the subjective test for the definition of *Jew* in his identification of the issue and rejecting such a test by ultimately holding that Rufeisen was not Jewish).

250. *Id.* at 12–13.

251. *Id.*

252. *Id.* at 11.

253. *Id.*

254. *See id.* at 12 (rejecting the claim that Israel was as a theocratic state by emphasizing the court's reliance on secular—in contrast to religious—definitions of Jewishness).

255. *Id.*

256. *Id.* at 11.

and cementing Jewish national identity.[257] Justice Silberg quoted a scholar who said:

> Even the national idea, although it gave birth to the conception of Jewish secular nationalism, could not sever at one stroke the ancient bonds between Israel and its Torah, between the people and its sacred law. On the contrary, national sentiment itself has endeavored to tie *these very bonds* more tightly by nationalism."[258]

Justice Cohn, agreeing with Justice Silberg, echoed the importance of the Jewish religion to Israeli national identity.[259] Justice Cohn found that the Law of Return could not be construed to conflict with the background and conception of the state.[260] Rather, he felt the court had an obligation to interpret the law in a manner that would promote the state's "prophetic vision and . . . aims."[261]

The effect of Brother Daniel's exclusion from the group labeled "Jews" went beyond intangible matters of self-identification. As a Christian, Brother Daniel lacked entitlement to a number of legally prescribed privileges, ranging from the ability to automatically obtain citizenship to having access to the publically funded services provided by the Jewish Agency and Jewish National Fund.[262] More fundamentally, the decision affected the way he belonged to the state. Although he received civil and political rights, such as voting rights and the freedom to practice his religion, the state was not defined as his homeland.[263] He did not fall within the class of citizens to which the state dedicated its prophetic vision and aims. He could reside within Israel, but only as a distant brother. By emphasizing common ancestral heritage and continuity between a shared past and present, the justices relied on an ethnocultural discourse at the expense of liberal discourse.[264]

Reliance on ethnocultural discourse is not unique to the *Brother Daniel* case. Rather, it pervades the High Court's jurisprudence on matters of religion.[265] Israel's law developed in a way that both

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257. *Id.*

258. *Id.* at 12 (quoting YEHEZKEL KAUFMANN, GOLAH VENEKHAR [EXILE AND ALIENATION] 361 (1929–1932)).

259. *See id.* at 14 ("I agree further with Silberg J. when he says that 'we do not cut ourselves off from our historic past nor do we deny our ancestral heritage.'" (quoting *id.* at 11)).

260. *Id.* at 14.

261. *Id.*

262. *See* Smooha, *supra* note 80, at 216–17 (describing the Jewish Agency and the Jewish National Fund as institutions "obliged by their own constitutions to serve Jews only").

263. *See* THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (Isr. 1948) (defining Israel as a Jewish state).

264. *See* Smith, *supra* note 17, at 228–40 (discussing different discourses of national identity).

265. *See, e.g.*, HCJ 58/68 Shalit v. Minister of the Interior, 23(2) PD 477 [1969] (Isr.), *in* SELECTED JUDGMENTS, *supra* note 15, at 35 (deciding whether the Ministry of

reflected the bond between Jewish religion and Jewish nationalism and reinforced it.[266] It responded to social conditions whereby Jewish citizens viewed themselves as part of a cohesive group and concomitantly viewed other groups as outsiders.[267] By codifying these views in statutes that classify Jews as a unified group deserving of unique entitlements, Israel's law also incentivized the perpetuation of that mindset. On the one hand, cases such as *Brother Daniel* reacted to that reality.[268] The justices recognized the necessity of defining who is a Jew in order to determine the scope of a law that confers special privileges on Jews.[269] On the other hand, in making that determination, the justices legitimated that reality by accepting that an individual's religious identification constitutes a valid matter for judicial review.[270] While professing the importance of liberal individualistic values, the court nevertheless recognized the central role played by religion in constructing and perpetuating the state's Jewish national identity.[271] This role enabled religion to become a valid consideration in determining individuals' legal entitlements.

## V. LIMITS TO LIBERALIZING THE LAW IN ISRAEL

In some ways, the High Court plays an important role in changing the religious status quo within Israel. When it challenges the power of the Orthodox over Israeli citizens' lives, it alters the existing balance of power whereby the Orthodox establishment wields influence disproportionate to its size. The power to define the Jewish community acts as an important tool in shaping the relationship between religion and state within Israel. By ruling on the issue of "who is a Jew," the High Court appropriates for itself the authority to determine membership in the Jewish community. Previously, the

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the Interior could legally refuse to register petitioner's children as "Of Jewish nationality and without religion").

266. *See* SHAFIR & PELED, *supra* note 1, at 272–74 (discussing civil rights and Jewish ethnonationalism).

267. *See* Jacobsohn, *supra* note 38, at 174–75 (discussing Israel's greater legal recognition of cultural separateness and nonassimilation compared with the United States).

268. *See* HCJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.), *in* SELECTED JUDGMENTS, *supra* note 15, at 1 (denying a person of Jewish ancestry access to a streamlined naturalization process available to Jewish immigrants because he had converted to Catholicism).

269. *See id.* at 10–11, 14 (struggling to determine the appropriate test for defining *Jew* for the purposes of the Law of Return).

270. *See id.* at 11–13 (recognizing a strong link between religious identification and the secular legal definition of *Jew*, and finding Rufeisen's conversion to Catholicism dispositive in holding him not Jewish for the purposes of the Law of Return).

271. *See id.*

Orthodox rabbis retained sole authority over that determination. The court therefore assumes power at the expense of the Orthodox establishment. The court has used its power over religion to shift toward individual freedom, whereby religious classification is largely a matter of personal choice. In this way, the court has moved Israel toward the American model, in which religion remains largely separate from the state.

However, the High Court remains severely inhibited in its ability to adopt the American model. In order to fully relegate matters of religion to the realm of personal choice, the court would have to remove religion from the authority of both the Orthodox and the judiciary. It would have to declare the issue of individuals' religious classification nonjusticiable. However, the fact that Israel's law distributes entitlements and responsibilities on the basis of religious identification necessitates a clear delineation of the different groups. Moreover, in order for religion to truly be separate from the state, the court would have to cease relying on the ethnocultural discourse of citizenship that divides citizens into hierarchical religious groups. However, Israel's legal structure encourages the continuation of this discourse because Israel's laws do not treat citizens as members of the same group. [272] Beginning with Israel's Declaration of Independence, the state has been legally defined by group membership.[273] This legal structure stems from deep, entrenched divisions within Israeli society that encourage an "us" versus "them" mentality, with "them" posing a threat to "us."[274]

Comparing American and Israeli constitutional jurisprudence on matters of religion illustrates the limits to the Americanization of Israel's law. In America, the constitutional principles of freedom of religion and government neutrality toward religion form a core part of American national identity, even if many citizens personally identify with a particular religion.[275] Free Exercise Clause cases only examine the sincerity of an individual's religious beliefs to determine if the individual comes within the clause's protection.[276] A religious

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272. *See* Smooha, *supra* note 80, at 216–17 (discussing the inadequacy of civil-liberties protections for Arabs in Israel).

273. *See* THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (Isr. 1948) (describing Israel as a Jewish state).

274. *See* Jacobsohn, *supra* note 38, at 174–75 (discussing Israel's greater legal recognition of cultural separateness and non-assimilation compared with the United States).

275. *See* HUNTINGTON, *supra* note 14, at 23–30 (describing American national identity as rooted in political values as opposed to ethnicity or religion).

276. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (analyzing the applicability of the Free Exercise Clause by considering the sincerity, but not the merits, of the respondents' beliefs); Welsh v. United States, 398 U.S. 333, 335–44 (1970) (reversing a Ninth Circuit decision upholding the rejection of a draft registrant's application for conscientious objector status where the registrant's values, though not religious, were strongly held).

exemption to a law would apply equally to members of any religion. The Establishment Clause cases focus on what the government may or may not do.[277] The prohibition on government preference for any religious sect or religion over nonreligion protects all citizens from feeling like outsiders in the political community on the basis of religious belief, or lack thereof. Rather than distinguishing between classes of citizens, the clause aims to ensure that religion does not become the basis for unequal treatment.[278] Defining the boundaries of ethnic and religious groups is not the province of the judiciary.

In Israel, on the other hand, the High Court must distinguish between citizens on the basis of religion because Israeli laws grant or deny entitlements based on group identity.[279] In the *Brother Daniel* case, the court did not follow the traditional Orthodox interpretation.[280] It expressed support for individual autonomy over private matters such as religious identification.[281] However, the very fact that the court needed to decide the issue demonstrates the public nature of the religion. The court felt compelled to consider religion because of the central role played by Orthodox Judaism in binding the Jewish people together and defining the state's national identity.[282] The decision, in turn, helped to reinforce the entwinement between religion and state. A classification as Jewish entailed different legal consequences than a classification as non-Jewish. The determination of "who is a Jew" therefore had important ramifications for the petitioner's individual rights.

So long as Israel remains a Jewish democracy, the High Court will be constrained in its ability to alter the religion–state status quo. It can erode the power of the Orthodox within the state, but it cannot fully disentangle religion from state. Moreover, even if it could do so, it would not likely choose to. The laws reflect an ethnocultural

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277. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (focusing on whether the government unit in question was engaging in its own expressive conduct).

278. *See* Lynch v. Donnelly, 465 U.S. 668, 687 (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

279. *See* HCJ 72/62 Rufeisen v. Minister of the Interior, 16 PD 2428 [1962] (Isr.) *in* SELECTED JUDGMENTS, *supra* note 15, at 1 (denying a person of Jewish ancestry access to a streamlined naturalization process available to Jewish immigrants because he had converted to Catholicism).

280. *See id.* at 10 (declining to apply the religious definition of *Jew* to a secular law in adjudicating whether a person was entitled to a streamlined naturalization process available to Jews).

281. *See id.* at 11 (recognizing a broad spectrum of beliefs within Israeli society, "from the extreme orthodox to the total agnostic").

282. *See id.* (recognizing the importance of religion to the Jewish identity, even as distinguished from the religious definition of *Jew*); *see also* SHAFIR & PELED, *supra* note 1, at 149 ("While different tendencies in Zionism have tried, in varying degrees, to endow the traditional religious themes with secular national meanings . . . they could never be purged of their original religious content.").

discourse that pervades Israeli society and influences the justices' opinions, as evidenced by the rhetoric in the *Brother Daniel* case.[283] Although courts have some ability to catalyze social change through court decisions, group separation and Jewish dominance remain deeply entrenched aspects of Israeli national identity that could not likely be changed by judicial decree.

## VI. CONCLUSION

A comparison of American and Israeli constitutional jurisprudence highlights the limits to the Americanization of Israel's law concerning matters of religion. While the United States adheres to the constitutional principle of separation of religion and state, religion plays a prominent role in Israel's national and legal identity. Israel's Declaration of Independence defines the state as the homeland of the Jewish people. Although all ethnicities and religions enjoy representation and rights of citizenship, Israel's new constitution remains committed to the definition of the state as a Jewish nation. While the Jewish identity contains ethnic and cultural dimensions, the Jewish religion has played an important role as a historic source of legitimization for the Zionist project and a continued source of connection between the Jewish people. The U.S. Declaration of Independence and Constitution, on the other hand, define the state as the nation of all American citizens, regardless of ethnicity or religion. An individual's religious identification remains beyond the reach of government interference.

The public versus private nature of religious identity points to important differences in the national identities of Israel and the United States. A liberal discourse of citizenship prevails in the United States, which tends to conceptualize peoplehood in terms of ideas and values. While religion certainly plays a role in public life, the nation theoretically and legally belongs equally to citizens of all religions. The Constitution does not differentiate between citizens on the basis of religion. Ethnocultural discourse tends to play a more prominent role in Israel, with peoplehood conceptualized in terms of ancestral ties and shared group attributes. The laws reflect this discourse by classifying citizens on the basis of religion and ethnicity.

Israel's High Court possesses some tools for reigning in the power of the Orthodox rabbinate over public life in Israel. It can ensure that the rabbinate cannot force individuals to follow religious laws. It can dismantle certain discrete privileges, such as *yeshiva* student deferments from the military. It can even make the definition of "Jewish" more inclusive, such as by recognizing conversions

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283. *See Rufeisen*, 16 PD 2428, *in* SELECTED JUDGMENTS *supra* note 15, at 1.

performed by non-Orthodox rabbis. However, it cannot fully disentangle religion from the state. Orthodox Judaism has strong roots in the formation of the nation. In a society with an "us" versus "them" mentality, religion offers a relatively simple way to delineate the boundary between the two. As long as religion continues to bind and define the Jewish people, it will also define the nation formed to serve that people. Even if the court continues to promote liberal, individualistic values in other areas of law, religious matters will continue to evoke the collectivist logic inherited from the earliest days of Zionism.

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