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Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters

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ABSTRACT

Constitutional transition periods present a twilight time between two executives. At such times, the outgoing executive's authority is questionable because of the democratic difficulties and agency concerns that arise at the end of the executive's term. Thus, parliamentary systems developed constitutional conventions that restrict caretaker governments' action. These conventions seem to achieve the desired results in the United Kingdom, Canada, New Zealand, and Australia. In contrast, in the United States, the prevailing norm is that there is only one president at a time, and this is the incumbent president, who is fully authorized to govern the country and his or her discretion is unfettered. Transition periods are thus exploited by U.S. lame-duck presidents to make last-minute appointments,

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regulations, and even international agreements. Israel does not fit either of the two poles in the dichotomy between parliamentary systems that successfully deal with caretaker authority and presidential systems that do not. Though a parliamentary system, its constitutional history is full of examples of abuse of caretaker power. This has led Israel's Supreme Court to treat the sphere of authority of caretaker governments as justiciable in contrast to other courts' treatment of the subject. Exploring its case law in issues of war, peace, and other lesser matters offers a rich case study of the standards that should govern this unexplored legal–political area.

Using Israel as a case study within a comparative constitutional framework, this Article suggests three important lessons. First, it is not the nature of the constitutional system per se, whether parliamentary or presidential, that determines the success of preventing abuses of transitional governments' power. Rather, the potential for abuse exists in both types of systems. Furthermore, the challenges posed by these transitional governments are similar in both types of systems. Second, transitional governments' power is not a topic that courts are inherently unable to regulate. Rather, if constitutional conventions fail to do their job or do not evolve, judicial review is a potent possibility. Last, it is not enough to determine that transitional governments must act with restraint, as the Israeli Supreme Court has determined, but it is important to give concrete meaning to which actions are permitted by transitional governments and the circumstances under which they are allowed. The Article concludes by delineating such general guidelines.

TABLE OF CONTENTS

I. INTRODUCTION

As a cautionary tale of the vulnerability inherent in transition periods and the serious dangers that can follow, one need only recall that the Nazis were able to overtake Prussia—the largest *Länder*

(state), controlling two-thirds of Germany's territory and population—while a caretaker government ran it because, inter alia, the government was too weak to fight change. At the same time, Nazism's rise was also enabled by the gradual weakening of the federal Weimar parliament through repeated dismissals by the federal executive, which resulted in numerous periods of caretaker authority seriatum.[1] A nation needs its caretaker to be strong enough to fight undemocratic revolutionary forces, yet not so strong that it becomes the vehicle of internal gambits to extend or expand control.

Caretaker and lame-duck governments operate in the interim between two executives in parliamentary and presidential systems respectively.[2] They are a recurrent phenomenon around the world, yet their authority is an academically neglected topic, especially in the area of constitutional law.[3] Despite their name, which implies

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1. DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 1–37 (1997) (discussing the rise and fall of the Weimar Republic and calling it a "failed experiment in democracy"); Jeffrey Seitzer & Christopher Thornhill, *An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context, in* CARL SCHMITT, CONSTITUTIONAL THEORY 22–23 (Jeffrey Seitzer ed. & trans., 2008) (discussing Nazi takeover of Prussian caretaker government). *See generally* David Dyzenhaus, *Legal Theory in the Collapse of the Weimar: Contemporary Lessons?*, 91 AM. POL. SCI. REV. 121 (1997) (discussing the collapse of the Weimar Republic). The term "caretaker government" became prevalent after World War II. J.C. JOHARI, THE CONSTITUTION OF INDIA: A POLITICO-LEGAL STUDY 139–40 (2007). The term spread after Winston Churchill formed a caretaker government to govern Britain in the interregnum after he resigned from the wartime national coalition of the Labour and Conservative political parties and until a new government was formed following elections. *Id.* This government was "quite exceptional" in Britain in the sense that Churchill composed a new interim government rather than continuing with the old government until a new government was formed after elections. *See* SIR IVOR JENNINGS, CABINET GOVERNMENT 86 n.1 (3d ed. 1959) ("[I]t is not British practice to appoint a 'Caretaker Government' for the duration of a general election."). Churchill acted in this way because his coalition broke apart. *Id.*

2. A caretaker government is a government functioning in a parliamentary system in the interregnum following elections and before the formation of a new government, or a government whose term has ended prematurely. *See* Rivka Weill, *Constitutional Transitions: The Role of Lameducks and Caretakers*, 2011 UTAH L. REV. 1087, 1089 (2011) (defining a caretaker government). In contrast, lame-duck president status is mostly relevant after elections, when it is clear that the incumbent is not continuing for another term. *Id.* It should be noted that there are no official or consensual definitions for these transitional governments. *See* John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317, 338–39 (2003) (discussing different possible definitions of lame-duck periods). In fact, some studies treat the transition period as stretching over many months prior to elections. *See, e.g.*, DENIS S. RUTKUS & KEVIN M. SCOTT, CONG. RESEARCH SERV., RL34615, NOMINATION AND CONFIRMATION OF LOWER FEDERAL COURT JUDGES IN PRESIDENTIAL ELECTION YEARS 9 n.27, 10, 22–24 (2008), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19070.pdf (exploring the reasons behind the dramatic slowdown in presidential appointments to the judiciary that are confirmed by the Senate during the last few months of a presidential term).

3. *See* Jonathan Boston et al., *Caretaker Government and the Evolution of Caretaker Conventions in New Zealand*, 28 VICTORIA U. WELLINGTON L. REV. 629, 630

that their power is or should be curtailed, these governments enjoy full authority in most democratic legal regimes. The justification is practical: Someone needs to run the state even during transition periods. Yet, these governments suffer from both agency difficulties and democratic deficits.

To deal with the challenges, parliamentary systems have developed conventions, not enforceable in courts, for restraining caretaker actions.[4] In fact, these conventions seem to work well in the United Kingdom, Canada, New Zealand, and Australia. These countries barely discuss caretaker power, and they do not report significant abuse of that power. This is so despite the fact that some of these countries have proportional-representation election methods and thus suffer from long transition periods.[5] No similar conventions

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(1998) ("The international academic literature on caretaker government is exceptionally thin."); Michael Laver & Kenneth A. Shepsle, *Cabinet Government in Theoretical Perspective, in* CABINET MINISTERS AND PARLIAMENTARY GOVERNMENT 292 (Michael Laver & Kenneth A. Shepsle eds., 1994) ("It is important . . . to be aware of the policy implications of having a caretaker cabinet in power. Surprisingly, this is a matter that has been more or less totally ignored by the literature on government formation . . . .").

4. *See* GEOFFREY PALMER & MATTHEW PALMER, BRIDLED POWER: NEW ZEALAND'S CONSTITUTION AND GOVERNMENT 45–47 (4th ed. 2004) (discussing the "Main Principles" of the caretaker convention); Boston et al., *supra* note 3 (examining New Zealand's caretaker conventions); Laver & Shepsle, *supra* note 3, at 292–94 (discussing possible legislative control of the caretaker cabinet). *See generally* Glyn Davis et al., *Rethinking Caretaker Conventions for Australian Governments*, 60 AUST. J. PUB. ADMIN. 11 (2001) (discussing how caretaker conventions in Australia regulate the operation of government starting at the time an election is called); Claude Klein, *The Powers of the Caretaker Government: Are They Really Unlimited?*, 12 ISR. L. REV. 271 (1977) (examining the powers of caretaker governments); John Wilson, *The Status of the Caretaker Convention in Canada*, 18 CAN. PARLIAMENTARY REV. 12 (1995) (discussing the role of constitutional conventions in regulating the behavior of Canadian governments during the transition period).

5. In fact, comparative literature attributes the frequent occurrence of caretaker governments and the extended duration of their terms to the proportional-representation elections method used in some parliamentary systems. *See, e.g.*, Boston et al., *supra* note 3, at 631 ("While periods of caretaker government occur in all parliamentary democracies, they tend to be both more frequent and more protracted in countries with proportional representation."). In New Zealand, since the elections system changed to mixed-member proportional representation in 1996, there have been cases in which a caretaker government served up to two months after elections. *See id.* at 639 (discussing an interregnum in New Zealand at the end of 1996). Belgium, with its proportional-representation election method to the federal Chamber of Representatives, set a world record for a caretaker government that served 541 days during peacetime. *Belgium Swears in New Government Headed by Elio Di Rupo*, BBC NEWS (Dec. 6, 2011), http://www.bbc.co.uk/news/world-europe-16042750. India, too, suffers from frequent and prolonged caretaker administrations as the result of the need to build coalition governments. *See* Meenu Roy, *The Caretaker Government: Need for Fresh Guidelines, in* REVIEWING THE CONSTITUTION 94–102 (B.L. Fadia ed., 2001) (examining the "status and powers of a caretaker government"); H.R. Saviprasad, *Caretaker Government—Extent of Powers*, 12 CENT. INDIA L.Q. 397, 398–99 (1999)

developed in the United States, where the governing norm is that there is only one president at a time, the incumbent president, who is fully authorized to deal with all matters and his or her discretion is unfettered.[6] In fact, U.S. lame-duck presidents are famous for their "midnight actions,"[7] which may include controversial pardons, appointments, regulations, and even the signing of international agreements.[8]

It could be argued that the difference between these various countries' experiences should be attributed to the nature of the constitutional system, whether parliamentary or presidential:

(discussing the prevalence of caretaker governments since the "pressures and pulls of coalition politics" cause many governments to fall before their terms are completed).

6. The phrase "there is only one president at a time" has become "a mantra of the transition" from George W. Bush to Barack Obama. Steven Lee Myers & Helene Cooper, *Obama Defers to Bush, for Now, on Gaza Crisis*, N.Y. TIMES (Dec. 28, 2008), http://www.nytimes.com/2008/12/29/washington/29diplo.html.

7. Midnight actions are last-term actions taken by lame-duck presidents. *See* Jay Cochran III, The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters 2–3 (Mar. 8, 2001) (unpublished manuscript), *available at* http://mercatus.org/sites/default/files/The_Cinderella_Constraint(1).pdf (discussing the significant increase in regulation during the final three months of President Jimmy Carter's administration). Midnight actions are sometimes even described as manifesting the "Cinderella constraint" under which lame-duck presidents must conclude business before midnight of the president-elect's inauguration day. *See id.* at 4 ("[T]hey turn back into ordinary citizens at the stroke of midnight.").

8. In the recent decade, the phenomenon of lame-duck presidents received renewed attention from a small and influential segment of American law professors. *See* BRUCE ACKERMAN, THE CASE AGAINST LAMEDUCK IMPEACHMENT 9 (1999) [hereinafter ACKERMAN, LAMEDUCK IMPEACHMENT] (criticizing the House's impeachment of President Bill Clinton while the House was lame duck); Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 N.C. L. REV. 1253, 1255 (2006) (exploring the arguments concerning whether constitutional principles exist to guide presidential conduct during transition periods and, if so, their scope); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 953 (2003) (using the transition from the Clinton Administration to the Bush Administration to explore possible reforms to assist future incoming administrations in successfully tackling the wake of midnight regulation left by predecessors); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 557 (2003) [hereinafter Mendelson, *Agency Burrowing*] (arguing that "agency burrowing" can in fact positively contribute to the responsibility of regulatory agencies and that we should thus adopt a "more functional means of ensuring agency legitimacy"); Nina A. Mendelson, *Quick off the Mark? In Favor of Empowering the President-Elect*, 103 NW. U. L. REV. COLLOQUY 464, 467 (2009) (investigating whether a president-elect should be given authority to exercise more power prior to inauguration); Nagle, *supra* note 2, at 317–19 (discussing President John Adam's lame-duck actions leading to *Madison v. Marbury*); John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 477 (1997) (discussing the Twentieth Amendment, which was enacted to minimize lame-duck periods). *See generally* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005) (discussing the deadlock that gripped the electoral college at the end of President Adams's term and providing a new understanding of the transformative roles that both the presidency and the Court played since the early days of the republic).

Parliamentary systems by their nature better deal with transitional governments than presidential systems. Thus, they do not exhibit the same abuse of caretaker power. Since a president is directly elected by the people, he or she enjoys full authority even as a lame duck. In contrast, caretaker governments are more subdued because they have no independent mandate from the people and have lost the indirect authority from the people, through a parliament, during transition.[9] In addition, as directly elected chief executives, presidents enjoy unilateral powers that are usually not available to their prime minister counterparts in parliamentary systems.[10]

However, Israel's experience seems to disprove this dichotomy between the happy story of caretaker governments in parliamentary systems and the failed story of U.S. lame-duck presidents. Though a parliamentary system, Israel has a long history of abuse of caretaker power.

Against the backdrop of an enduring emergency and ongoing threat to its security, Israel's vulnerability is only exacerbated by the high rate of executive turnover. Although its Basic Law: The Knesset defines the Knesset's (Israel's Parliament) term of office—and by inference also that of the government—as a stable four-year term,[11] surprisingly, Israel has had thirty-two governments during the past eighteen Knesset terms.[12] Governments have not survived more than an average of twenty-two months since the state was founded because of the combined effects of its parliamentary system, proportional-representation election method, and a low electoral threshold of 2 percent.[13] The period of transition can stretch for many months—

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9. In fact, this was my initial thought on the subject. *See* Rivka Weill, *Twilight Time: On the Authority of Caretaker Government*, 13 LAW & GOV'T 167, 204 (2010).

10. *See* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643–64 (2000) (discussing a possible cycle of impasse between Congress and the executive that may result in the President relying on his authority to engage in unilateral action).

11. *See* Basic Law: The Knesset, 5718–1958, SH No. 244 p. 69, § 8 (Isr.), *available at* http://www.jewishvirtuallibrary.org/jsource/Politics/basictoc.html ("The term of office of the Knesset shall be four years from the day on which it is elected.").

12. *See* History of the Knesset—Overview, THE KNESSET, http://www.knesset.gov.il/history/eng/eng_hist_all.htm (last visited Oct. 27, 2012) (providing factual statistics for the past eighteen Knesset terms).

13. Lacking a personal electoral mandate, prime ministers have had to build their government on a coalition of many parties in order to master a Knesset majority. *See The Work of the Knesset: Responsibilities, Roles and Authority*, THE KNESSET, http://www.knesset.gov.il/birthday/eng/KnessetWork_eng.htm (last visited Oct. 27, 2012) (discussing the vast array of parliamentary groups that comprise the Knesset). Thus, coalition members representing a small segment of the public are able to topple the government and force new elections. *See The Electoral System in Israel*, THE KNESSET, http://www.knesset.gov.il/description/eng/eng_mimshal_beh.htm (last visited Oct. 27, 2012) (discussing the 2-percent-threshold system and the absolute majority needed to force an early election).

from six months before elections to a few months following elections.[14] Israeli caretaker governments serve an average of eighty days (eleven weeks).

During these transition periods, caretaker governments in Israel acted in ways resembling lame-duck presidents in the United States, who have sought to make public-sector appointments, conduct international negotiations, or embark on military operations before relinquishing the reins of power.[15] For example, lame-duck President George W. Bush finalized a bilateral military accord with the Iraqi government against the wishes of President-elect Barack Obama, Congress, and the American people.[16] President Bill Clinton signed the Rome Statute, the treaty establishing the International Criminal Court,[17] which led the newly elected President Bush to take the remarkable and unprecedented act of "unsigning" the treaty.[18] Further back in U.S. history, lame-duck President Jimmy Carter signed the Algiers Declarations on his last day in office in return for the release of American hostages held in Iran. This was done despite (or perhaps because of) the fact that the new President-elect, Ronald Reagan, ran on the opposite platform of taking a harsh non-negotiable stand against Iran.[19]

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14. Basic Law: The Government, 5761–2001, SH No. 1780 p. 158, §§ 8–10, 11, 30 (Isr.); Basic Law: The Knesset, 5718–1958, SH No. 244 p. 69, § 35 (Isr.).

15. *See infra* Parts III, IV (discussing the three areas in which Israeli caretaker governments most readily act and examining the different reactions to each in Israeli jurisprudence).

16. *See* Ryan Patrick Phair, *The Lame Duck Presidency: A Case for Restraint on 'Midnight' Actions During the Transition Period*, ACSLAW.ORG, 8–13 (Dec. 2008), http://www.acslaw.org/files/Phair%20Issue%20Brief.pdf ("A significant source of controversy in the current transition period is the Bush administration's attempt to secure a comprehensive bilateral accord with the government of Iraq that would govern U.S. policy in Iraq going forward.").

17. *See* Press Release, Sen. Jesse Helms, Helms on Clinton ICC Signature: This Decision Will Not Stand (Dec. 31, 2000), *available at* http://www.amicc.org/docs/Helms_Sign.pdf ("President Clinton's decision to sign the Rome treaty establishing an International Criminal Court in his final days in office is as outrageous as it is inexplicable."). Senate Foreign Relations Committee Chairman Jesse Helms criticized Clinton's signature of the International Criminal Court's treaty as a "blatant attempt by a lame-duck President to tie the hands of his successor." *Id.*

18. *See* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2085–86 (2003) (investigating the legal consequences attached to signing treaties). Though a signed treaty is not finalized until ratification, it does impose on the state signing the treaty interim international obligations to keep from acting in a way that would frustrate the draft treaty. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (discussing the "[o]bligation not to defeat the object and purpose of a treaty prior to its entry into force").

19. *See* Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 320–22 (2001) (discussing President-elect Reagan's public demonization of Iran and stating that "it was no coincidence that the governments reached agreement and adhered to the Algiers Declarations on President Carter's last full day in office").

These midnight actions of lame-duck U.S. presidents have their roots in the beginning of the republic. In fact, the famous *Marbury v. Madison* case[20] dealt with massive midnight appointments to the judiciary made by President John Adams in his last days in office in order to entrench Federalist agendas. When the Federalists realized that they had lost control of Congress and the presidency for the first time since the Constitution was adopted, they exploited the lame-duck period to decide contested international issues, enact statutes, and make pivotal appointments, including the appointment of Chief Justice John Marshall.[21]

Similarly, the Israeli caretaker government, headed by Prime Minister Ehud Olmert, embarked on Operation Cast Lead in Gaza, which was the subject of fierce international criticism that culminated in the now-refuted Goldstone report.[22] Further back, Prime Minister Menachem Begin bombed the nuclear reactor in Iraq on June 7, 1981, shortly before the June 30th election date. He did this out of concern that the Labor Party would gain power, and "the government headed by Peres would be incapable of making such a decision and carrying it out."[23] Begin took this action even though he knew that his likely successor, opposition leader Shimon Peres, was against it.[24]

Midnight actions of Israeli caretaker governments do not consist of military operations alone. They also include acceleration of peace negotiations in attempts to reach agreements or finalize understandings before losing power. In fact, the landmark 2001 case of *Weiss v. Prime Minister of Israel*,[25] which set the legal standard for caretaker government conduct, dealt with accelerated peace negotiations with the Palestinian Authority conducted by Prime

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20. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

21. *See* Nagle, *supra* note 2, at 322–37 (discussing the actions taken by the Sixth Congress's lame-duck session beginning in December 1800); Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1072 (2007) (investigating the actions taken by the defeated lame-duck Federalist party after losing not only the presidency but also control of Congress in 1800).

22. *See* Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, WASH. POST, April 1, 2011, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_print.html (discussing how Goldstone would have changed the Goldstone Report had he known then what he has subsequently discovered about the Gaza War); *infra* Part IV.B (discussing Operation Cast Lead, the military campaign in Gaza and focus of the Goldstone Report). For the Goldstone Report, see Rep. of the Human Rights Council, 12th Sess., Sept. 14–Oct. 2, 2009, U.N. Doc. A/12/48 [hereinafter Goldstone Report], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.PDF.

23. SHLOMO NAKDIMON, TAMMUZ IN FLAMES: THE BOMBING OF THE IRAQI REACTOR—THE STORY OF THE OPERATION 209 (1993).

24. *See id.* at 192–229.

25. HCJ 5167/00 Weiss v. Prime Minister of Isr. 55(2) PD 455 [2001] (Isr.).

Minister Ehud Barak's government twelve days before elections, after the government lost a no-confidence parliamentary motion and its coalition fell apart over these very talks.[26] More recently, Prime Minister Olmert attempted to conclude the deal for release of the kidnapped soldier Gilad Shalit in exchange for Palestinian prisoners held by Israel in his last days in office—after it was known that Benyamin Netanyahu would replace him—but failed.[27] Last minute actions of transitional governments are thus of potential common concern to both presidential and parliamentary systems, though Israel is quite exceptional among parliamentary systems in having these widespread abuses of caretaker power.

In both the United States and Israel, constitutional conventions that restrict transitional executive actions did not properly develop.[28] However, the countries depart in how their legal systems have reacted to the challenge. Unlike the U.S. Supreme Court—where no cases have arisen, and even if they were to arise, the issue would most likely be treated as nonjusticiable[29]—the Israeli Supreme Court treats the exercise of caretaker government's authority as a justiciable issue. In the landmark *Weiss* case, the court ruled that caretaker governments enjoy full authority as regular governments, but should nonetheless act with restraint, unless there is a "vital public need" at stake.[30] The Israeli Supreme Court actively supervises the application of this standard. In fact, between December 2008 and January 2009, petitioners filed numerous

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26. *See infra* Part III.A.1 (discussing the *Weiss* decision).

27. *See* Prime Minister's Media Adviser, *Special Cabinet Meeting on the Release of Gild Shalit*, ISR. MINISTRY OF FOREIGN AFF. (Mar. 17, 2009), http://www.mfa.gov.il/MFA/Government/Communiques/2009/Special_Cabinet_meeting_release_Gilad_Shalit_17-Mar-2009.htm (discussing the cabinet meeting held to consider the possibilities for securing the release of Gilad Shalit).

28. It should be noted that Ireland and Germany, too, are quite exceptional among parliamentary systems in having no conventions that restrict caretaker actions. MICHAEL LAVER & KENNETH A. SHEPSLE, MAKING AND BREAKING GOVERNMENTS: CABINETS AND LEGISLATURES IN PARLIAMENTARY DEMOCRACIES 47 (1996) [hereinafter LAVER & SHEPSLE, MAKING AND BREAKING GOVERNMENTS]; Boston et al., *supra* note 3, at 633–34; Laver & Shepsle, *supra* note 3. However, in Germany, this does not raise great concern as only a constructive vote of no confidence can lead to the fall of the government, and then an alternative government is formed by definition. *See* LAVER & SHEPSLE, MAKING AND BREAKING GOVERNMENTS, *supra* ("[A] constructive vote-of-no-confidence procedure means that an alternative cabinet is proposed as part of the original no-confidence motion."); Laver & Shepsle, *supra* note 3 (same). In Ireland, caretaker governments act with full vigor and enjoy full legitimacy. *See* LAVER & SHEPSLE, MAKING AND BREAKING GOVERNMENTS, *supra* ("[In Ireland,] the outgoing cabinet continues with more or less undiminished powers until an alternative is sworn in.").

29. *See* Beermann & Marshall, *supra* note 8, at 1270 ("There are no cases addressing presidential duties and obligations with respect to transition, and even if a legal dispute developed, it is likely that a court would find it nonjusticiable.").

30. *Weiss* 55(2) PD at 469.

petitions against actions pursued by Olmert's caretaker government, and the court decided all on the merits.[31]

Treating caretaker governments' actions as justiciable is exceptional in comparative terms.[32] It is thus interesting to examine whether the Israeli experience sets a record of successful judicial intervention. This Article divides the Israeli Supreme Court's decisions into three categories of caretaker action: (1) conducting peace negotiations, (2) making public-sector appointments and actions, and (3) distributing material goods to the public. This Article discusses both Israeli and comparative experience with regard to each of these categories.

Though the Israeli Supreme Court uses the same rhetoric of *Weiss* in all three categories, this Article argues that de facto it applies the *Weiss* standard differently, depending on the category to which the action belongs.[33] When examining what the court has done (judicial results), rather than what it said (judicial reasoning), the picture that emerges is that the court has prohibited public-sector appointments across the board during caretaker administration, while routinely permitting accelerated peace negotiations.[34] This seeming contradiction is not supported by comparative treatment of these categories. In other parliamentary systems that abide by caretaker conventions, caretaker governments are banned from making both significant public-sector appointments and international agreements.

This Article offers three possible explanations for these seemingly conflicting results: (1) the reversibility of the action taken; (2) the importance of representing electoral opinion; and (3) the justiciability of the issue, including the existence of alternative remedies to the court's intervention. However, upon reflection, this Article suggests that these three distinctions—derived from the

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31. *See, e.g.*, AA 672/08 Israel's Broad. Auth. v. Tavor (Jan. 27, 2009), Nevo Legal Database (by subscription) (Isr.); HCJ 9843/08, Legal Forum for the Land of Isr. v. Judicial Election Comm. (Jan. 8, 2009), Nevo Legal Database (by subscription) (Isr.); HCJ 10357/08, Legal Forum for the Land of Isr. v. Isr. (Dec. 9, 2008), Nevo Legal Database (by subscription) (Isr.); HCJ 9202/08, Livnat v. Prime Minister of Isr. (Dec. 4, 2008), Nevo Legal Database (by subscription) (Isr.).

32. *See supra* note 4 and accompanying text.

33. Other authors confined their analysis to the *Weiss* ruling without considering the court's subsequent decisions. An essay by Professor Shimon Shetreet advocates limiting the powers of a caretaker government. Shimon Shetreet, *The Limits of a Caretaker Government*, *in* ZAMIR BOOK ON LAW, GOVERNMENT AND SOCIETY 737 (Yoav Dotan & Ariel Bendor eds., 2005). In contrast, an essay by Professor Asher Maoz asserts that the entire issue should be treated as nonjusticiable. Asher Maoz, *The High Court of Justice and the Foreign Relations of the State*, 4 MAAZANEI MISHPAT (NETANYA ACAD. C. L. REV.) 85 (2005); *see also* 2 AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 831–34 (6th ed. 2005).

34. *See infra* Part III. The discussion of Israel's treatment of caretaker governments builds on Weill, *supra* note 9.

court's opinions—should lead to results that are the opposite of what the court decided. That is, during transition periods, peace negotiations should have been banned, while some public-sector appointments should have been permitted.[35] The risk of making the wrong decisions is not a mere technicality; in this era of globalization, media manipulation, and the use of religion as social control, a caretaker government acting improperly can mean the difference between a democratic government and a totalitarian one. It can also lead to the corrosion of good faith in international relations at a time when cross-national ties are already strained.

The troubling results of Israeli judicial decisions in the area of caretaker action, coupled with the fact that comparative jurisdictions treat the issue as governed by conventions alone, should not lead to the conclusion that this topic, by its nature, is per se nonjusticiable and cannot be successfully judicially supervised. Rather, this Article argues that the difficulties with Israeli jurisprudence result from the lack of detailed concrete standards for what actions are permitted and under what circumstances they are permitted.

This Article thus proposes to explicitly yoke the need for restraint to any contemplated "extraordinary actions"—those that are not in the regular course of affairs. This Article explains why this is the right standard and delineates criteria for what actions should be treated as extraordinary. Extraordinary actions will be permitted only if they are justified by a vital public need or if they are preapproved by an incoming legislature. This proposed framework may fit other countries dealing with transitional authority. While in some countries this transitional regime may be part of the country's soft law governed by conventions or government codes alone, as in the countries that were formerly part of the Commonwealth, other countries may need a more vigorous regime supervised by judicial review, as in the case of Israel.

Part II sets forth in brief the theoretical framework for dealing with the authority of transitional governments in parliamentary and presidential systems. It further discusses the comparative experience with regulating such governments. Part III analyzes Israel's exceptional jurisprudence on caretaker actions, dividing judicial decisions into three categories as defined above. Each category is analyzed under both Israeli and comparative law. Part IV suggests three explanations for the seemingly conflicting results achieved in Israeli jurisprudence with regard to the three categories. This Article further argues that the three explanations are ultimately unconvincing bases on which to permit peace negotiations yet prohibit across the board public-sector appointments during caretaker periods. Part V suggests that Israel's jurisprudence has

35. *See infra* Part IV.

reached problematic results, not because caretaker authority cannot be regulated by the courts, but because the courts failed to develop concrete criteria for which actions should be allowed and under what circumstances. This Article proposes a legal framework for a transitional government's powers that takes into account both the democratic drawbacks and the concern that its actions will be driven by extraneous considerations relating to elections or the loss of its power. This proposed framework aims to strike the proper balance between the need for continuity of government and the desire to protect democracy. Part VI provides a summary and conclusion.

II. THE CHALLENGES POSED BY TRANSITIONAL GOVERNMENTS

No one disputes the need to have a government in place at all times. Nonetheless, the transition period is characterized by two unique constitutional problems. First, there is the agency problem, which leads to the significant concern that governments' actions will be driven by the wrong motives. Second, transitional governments enjoy only weak democratic legitimacy. This Article discusses each in turn. It then offers counterarguments based on concerns about efficiency and instrumentalism that suggest that governance must have continuity even during transition periods. This Part concludes with a portrayal of the comparative experience of regulating these governments.

A. *The Agency Problem*

The "agency problem" describes the gap between the interests of the representative and the interests of constituents, and the likelihood that the former will make decisions to further his or her own agenda at the expense of the latter.[36] This problem is especially acute during caretaker and lame-duck periods. The concern is that these governments will pass resolutions and adopt measures to serve extraneous considerations that do not reflect the common good.

Before elections, governments that operate with no fixed electoral calendar (a situation more typical in parliamentary than presidential systems) may try to extend their terms of office by postponing elections for as long as possible, as has frequently

36. *See* Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 PUB. CHOICE 67, 67–68 (1996) (discussing the mismatch between the interests of politicians and the interests of their constituents, resulting in legislator shirking).

occurred in Israel.[37] Similarly, governments might take drastic measures to influence the upcoming election's results.[38] The greater the fear that the political party in power will not get reelected, the greater the risk that the caretaker or lame-duck administration will adopt daring measures in the hope that, if the measures succeed, they will prove fruitful in the upcoming elections. On the other hand, the party in power may believe it has nothing to lose if its measures fail, since it is presumed to lose the elections in any case.

The fear of extraneous considerations is especially high when it is clear that the prime minister or key figures in the government cannot be reelected by the people, commonly because of an illness, criminal offense, or constitutional term limits. This fear is magnified when the key governmental figures are not deeply affiliated with their political party, and thus are not particularly interested in an election victory for their party's successors. Insight from game theory provides an analogous example: unlike a player who is contemplating extended or repeated opportunities for gain, a player engaged in a one-time or last-term game will choose the best individual strategy over one that is socially optimal.[39]

While agency difficulties appear even before elections, they are largely manageable because of the impending elections, which typically constrain even last-term executives who identify themselves with their parties. The concern is greater in a post-election period, after the government has lost power. In such situations, caretaker or lame-duck governments may implement policies without concern for the consequences of their actions. After all, the regular mechanism of democratic checks and balances, in the form of the citizens' vote, no longer applies to them.[40] Moreover, these governments know that they will not have to deal with the consequences of their actions, as responsibility is transferred to the administration being sworn in to

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37. I found that in the twelve cases in which elections were moved up in Israel, the term of a caretaker government was especially long and lasted about 160 days, twice as long as the average transition period of all governments in Israel. Moreover, about 118 of the 160 days (74 percent) preceded elections. Weill, *supra* note 9, at 177.

38. *See* Beermann, *supra* note 8, at 975–80 (discussing the political consequences of last-minute measures taken by President Clinton at the end of his time in office).

39. *See* THE FEDERALIST NO. 72, at 488–89 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (discussing the need for reeligibility of chief magistrates in office); GEORGE J. MAILATH & LARRY SAMUELSON, REPEATED GAMES AND REPUTATIONS: LONG RUN RELATIONSHIPS 1–2 (2006) ("Repeated interactions give rise to incentives that differ fundamentally from those of isolated interactions.").

40. *See* William G. Howell & Kenneth R. Mayer, *The Last One Hundred Days*, 35 PRESIDENTIAL STUD. Q. 533, 550 (2005) ("Outgoing presidents need no longer concern themselves about the electoral consequences of what they do during the transition, or about how a controversial decision will affect the rest of their agendas."); Nagle, *supra* note 8, at 479 ("[O]nce defeated, members were unaccountable to the electorate.").

office. These midnight actions may involve waste, imprudence, unilateral controversial actions, entrenchment of policies, division of loot, and even leaving of "scorched earth."[41]

Even when the ruling party apparently remains the same in parliamentary systems, one cannot ascertain the composition of the government or its underlying principles until it takes office and has formed a coalition. Thus, though the agency concern is mitigated if the ruling party remains the same, it does not vanish. The same may be true of a president's successor from the same party, who may have a different agenda than the lame-duck president, though the data does suggest that midnight actions of lame-duck presidents are typical when a change of party occurs.[42]

B. *The Democratic Deficit*

Caretaker and lame-duck administrations pose a democratic challenge no less than an agency one. In a parliamentary system, there are no separate elections for the executive branch of government. Rather, parliamentary elections indirectly determine the composition of the executive. The mandate of the government stems from the elected representatives in parliament and is dependent on their continued confidence.[43]

This Article defines a caretaker government as a government functioning in a parliamentary system in the interregnum following elections and before the formation of a new government, or a government whose term has ended prematurely and is functioning until an alternative government is formed. The term of a government may end prematurely as the result of a loss of parliament's confidence or if parliament is dissolved. Loss of a parliament's confidence can arise from numerous causes: elections that have redistributed governmental power, an explicit vote of no confidence by a parliament, failure to pass a budget law, or dissolution of the governmental coalition. Even if a caretaker government came about for reasons other than no confidence (such as the death of the prime minister), once a caretaker government is formed, there is no longer any practical significance to expressions of no confidence, since the

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41. For elaboration on these midnight actions, see Weill, *supra* note 2, at 1106–11. *See also* literature enumerated *supra* note 8.

42. *See, e.g.*, Beermann, *supra* note 8, at 951–52 (describing late-term actions, which are designed to burden the other political party about to take over the White House); Howell & Mayer, *supra* note 40, at 533–43 ("And if the sitting president (or his party) lost the election, he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor's hands.").

43. *See* COLIN TURPIN & ADAM TOMKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 565–71 (6th ed. 2007) (discussing parliament and the responsibility of government).

aim of such a motion is to compel the resignation of the government. Therefore, the prevailing practice in parliamentary systems is not to express no confidence in a caretaker government. Moreover, countries that treat the death or incapacitation of a prime minister as a cause for caretaker governance have expressed their view that the prime minister's identity is so vital that his or her replacement must actively regain parliamentary confidence. When the government became a caretaker because of the dissolution of parliament, rather than an explicit vote of no confidence, then the government no longer has a legislative body to account to.

Without parliament's confidence, the government's democratic legitimacy is severely weakened. The limited democratic legitimacy the caretaker government does enjoy is due to the imperative to prevent a political void and ensure continuity.[44] Furthermore, if every caretaker government suffers from a democratic deficit, a post-election caretaker government suffers it the most. Once the electorate has spoken, its wishes must not be thwarted.[45]

Lame-duck presidents suffer from democratic deficit too. But it occurs later than in parliamentary systems since presidents do not rule based on parliamentary confidence. Only after elections have been held and their successors have been named does such democratic deficit occur in presidential systems.[46] This is why this Article defines a lame-duck president as a president serving after elections, when it is clear that the incumbent is not continuing for another term. Only at such time, does the president suffer from the *combined* challenges of agency and democratic difficulties.

C. *Efficiency and Instrumental Concerns*

Despite the agency and democratic challenges, stability and efficiency in the executive branch of government is vital, especially during transitions. The Founding Fathers of the U.S. Constitution addressed this issue when writing:

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44. *See, e.g.*, ROBERT A. DAHL, AFTER THE REVOLUTION? 1–79 (rev. ed. 1990) (discussing different criteria for establishing authority and the varieties of democratic authority); Ackerman, *supra* note 10, at 642–88 (discussing various bases of legitimacy and attributing representation as the main source of legitimacy of a government).

45. It is important to distinguish between a government that has lost parliament's confidence and a minority government. A minority government exists through the means of outside support of members of parliament preventing its fall since it otherwise lacks the necessary majority achieved by internal coalitions. It is important for such a government to reach ad hoc agreements on every issue to avoid losing power. *See* KAARE STROM, MINORITY GOVERNMENT AND MAJORITY RULE 3–22 (1990) (discussing the reasons for minority-government formation and the challenges it faces).

46. *See* Weill, *supra* note 2, at 1101–04 (discussing the democratic deficit of lame-duck presidents).

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.[47]

This continuity concern supports treating transitional governments as enjoying the same powers as any regular government.

Other arguments favoring this position are practical. For example, it is very difficult to determine whether an act by a caretaker or lame-duck government is motivated by extraneous considerations or by a desire to continue regular and legitimate governmental activity. Some even adopt a paternalistic approach, suggesting that ignoring the electorate might actually help the government to make the best decisions for the people, even if these decisions are not popular ones. Some also contend that the government should be allowed to tie "loose ends," and that the last-minute pressure serves as a catalyst for it to do so. It is even claimed that, in certain conditions, the appointments and regulations of a caretaker or lame-duck government can stimulate public discussion by putting opposing views on the agenda of the newly elected administration.[48] This position thus maintains that instrumental justifications support leaving these interim governments fully authorized to handle state affairs.

D. *Comparative Experience with Regulating Transitional Governments*

In view of the complex nature of caretaker and lame-duck governments, one would expect the law applicable to such governments to minimize the dangers of agency difficulties and democratic deficits, yet provide for continuity in administration. However, an examination of comparative-law literature reveals that the topic is barely discussed.[49] Where a legal system does decide to treat the subject, as is common in parliamentary systems that formed part of the Commonwealth or were influenced by British law, caretaker authority is usually treated through constitutional conventions alone, which are not enforceable in courts.[50] In the United Kingdom, Australia, New Zealand, and Canada, these conventions are even codified in formal documents, such as cabinet

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47. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

48. *See* Mendelson, *Agency Burrowing*, *supra* note 8, at 602.

49. *See supra* note 3 and accompanying text.

50. *See supra* note 4 and accompanying text.

manuals or guidelines on the conduct of government during election time.[51]

Why is the topic, treated through constitutional conventions, nonenforceable in court? Even countries with caretaker conventions presume that caretaker governments enjoy the same full constitutional authority as any regular government.[52] The conventions thus provide flexible, nonenforceable tools that guide caretaker governments' discretion in the exercise of their authority. The conventions do not dictate any particular course of action, but rather set standards for governments' behavior. Conventions are appropriate for regulating caretaker governments as "conventions are about defining or restricting the exercise of formal powers that exist in law but are circumscribed in practice."[53] Furthermore, conventions by their nature are flexible and adaptable to changing circumstances.[54]

What is the content of these caretaker conventions? These conventions usually embody the principle of restraint. That is, a caretaker government must act with restraint and defer any substantial business to the next regular government, unless the issue is routine or urgent. When the issue cannot be delayed, caretaker governments are instructed to consult with the opposition. If the identity of the next government is known, then the caretaker

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51. *See* THE CABINET MANUAL ¶¶ 2.27–.34 (U.K.) [hereinafter UK CABINET MANUAL], *available at* www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-manual.pdf (providing "[a] guide to laws, conventions, and rules on the operation of government"); GUIDELINES ON THE CONDUCT OF MINISTERS, SECRETARIES OF STATE, EXEMPT STAFF AND PUBLIC SERVANTS DURING AN ELECTION 1–5 (2008) (Can.) [hereinafter CANADA'S GUIDELINES], *available at* http://jameswjbowden.files.wordpress.com/2011/07/guidelines-cartaker-convention1.pdf ("While constitutionally, a government retains full legal authority to govern during an election . . . it is expected to exercise restraint in its actions. The rationale is that . . . . there is no elected chamber to which the government can be held accountable."); NEW ZEALAND CABINET MANUAL ¶¶ 6.16–.35 (2008), *available at* http://cabinetmanual.cabinetoffice.govt.nz/6.16 (outlining the duties of the current government from the time an election is called until a new government is formed); ANNE TIERNAN & JENNIFER MENZIES, CARETAKER CONVENTIONS IN AUSTRALASIA 134 (2007), *available at* http://epress.anu.edu.au/caretaker_citation.html (detailing the current government's obligations toward the incoming government from the time an election is called until a new government is formed).

52. *See, e.g.*, NEW ZEALAND CABINET MANUAL, *supra* note 51, ¶ 6.16 ("[T]he incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office."); Boston et al., *supra* note 3, at 631 ("[C]aretaker governments are generally deemed to have full executive powers.").

53. LORNE SOSSIN & ADAM DODEK, *When Silence Isn't Golden: Constitutional Conventions, Constitutional Culture, and the Governor General*, *in* PARLIAMENTARY DEMOCRACY IN CRISIS 91, 93 (Peter H. Russell & Lorne Sossin eds., 2009) (discussing the role of constitutional conventions with regard to the authority of the Governor-General).

54. *Id.* at 99.

government might be instructed to follow the advice of the incoming administration, even against its better judgment.[55]

Despite the emergence of such caretaker conventions, the literature on the subject in these countries is sparse and does not explain why caretaker governments should be distinguished from regular governments or why the conventions are tailored to achieve those purposes. Nonetheless, the conventions seem to work as, overall, there are no major reports of abuse of caretaker power in these countries.[56]

In contrast, no such conventions developed in the U.S. presidential system to deal with lame-duck presidents' authority. On the contrary, there are numerous articles devoted to documenting the abuse of lame-duck U.S. presidents' power.[57] The question arises: Are these abuses inherent to the nature of presidential systems, or can they be attributed to the lack of development of caretaker conventions? Israel provides an interesting case study in this regard. Though Israel is a parliamentary system, no constitutional conventions restricting caretaker power developed within it, and it provides numerous instances of abuses of caretaker power.[58]

Israel had the opportunity to develop or recognize these caretaker conventions. Instead, it opted to explicitly reject them. In the 1976 major coalition crisis that eventually led to an election and the rise of the Likud Party to power for the first time since the state was founded, the government appointed a public committee to investigate the regulation of caretaker governments.[59] This

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55. *See* CANADA'S GUIDELINES, *supra* note 51, at 1–2 ("[C]onsultation with the Opposition may be appropriate . . . ."); NEW ZEALAND CABINET MANUAL, *supra* note 51, ¶ 6.24 ("[T]he outgoing government should . . . act on the advice of the incoming government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office—even if the outgoing government disagrees with the course of action proposed."); TIERNAN & MENZIES, *supra* note 51, at 134 ("Any reference to post election action should be in terms of the 'incoming government.'"); UK CABINET MANUAL, *supra* note 51, ¶¶ 2.27–.34.

56. For the sparse literature on the subject, see *supra* notes 3–4 and accompanying texts.

57. *See supra* notes 6, 8 and accompanying text.

58. *See supra* notes 23–27 and accompanying text.

59. The committee was appointed to deal first and foremost with the problem that, at the time, the Basic Law: The Government provided for a freeze in the composition of caretaker governments, such that no minister could have resigned or joined. The committee recommended abolishing this state of affairs. BERENSON, COMMITTEE REPORT ON THE SUBJECT OF TRANSITIONAL AND CARETAKER GOVERNMENTS 1–6 [hereinafter BERENSON REPORT] (unpublished) (on file with author). The Knesset amended the Basic Law in accordance with the committee's recommendation, and there is no such provision in the current Basic Law. Basic Law: The Government, 5761–2001, SH No. 1780 p. 158, § 30(b) (Isr.), *available at* http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm ("When a new Knesset has been elected or the Government has resigned . . . the outgoing Government shall continue to carry out its functions until the new Government is constituted.").

committee, known as the Berenson Committee after Justice Tzvi Berenson who served as its head, recommended that a caretaker government in Israel enjoy the same powers as a regular government. It explicitly rejected the convention of restraint developed in other parliamentary systems. In the words of the Committee:

> For practical reasons and given the country's special circumstances, the committee decided that restricting the actions of a caretaker government could cause an excessively drastic shift from a regular government to a caretaker government, impair the administration's proper functioning, and tie its hands from carrying out vital operations of state institutions in the event of a sudden crisis. Vague phrases like the "regular course of affairs" cannot guarantee the necessary degree of certitude for proper constitutional activity.[60]

The frequency of caretaker governments in Israel and their long terms in office seem to support this position. But, this rejection of caretaker conventions led to abuse of Israeli caretaker governments' power. This abuse is atypical of parliamentary systems with caretaker conventions, even when these governments reign for long periods.

Into this vacuum in the regulation of Israeli caretaker governments stepped the Israeli Supreme Court. It decided to treat the issue of caretaker authority as a justiciable matter, in contrast to both other parliamentary systems, which treat the issue through conventions, and the U.S. presidential system, which leaves the field wholly unregulated.[61] In the following Parts, this Article examines the court's jurisprudence in the field and explores its lessons regarding the possibility of treating this topic as justiciable. In particular, the Article examines whether the court's jurisprudence is a success story or is proof that the issue cannot be regulated by the courts.

III. TREATING CARETAKER ACTION AS JUSTICIABLE

While Israel's Basic Law: The Government, which forms part of Israel's formal constitution,[62] merely states that a caretaker government continues "to carry out its functions until the new Government is constituted,"[63] the constitution does not explicitly

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60. BERENSON REPORT, *supra* note 59, at 6.

61. *See supra* notes 4–8 and accompanying text.

62. The court decided that Israel's Basic Laws amount to its formal constitution in the famous decision: CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Collective Vill. 49(4) PD 221 [1995] (Isr.), *translated in* 1995–2 ISR. L. REPORTS 1, *available at* http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf. See Rivka Weill, *The Israeli Case for Judicial Review and Why WE Should Care*, 30 BERKELEY J. INT'L L. 349 (2012), for a discussion of the case.

63. Basic Law: The Government, 5761–2001, SH No. 1780 p. 158, § 30(b).

define caretaker powers. Instead, courts addressed this issue once abuse of caretaker power became noticed and prevalent. This Article suggests that *Weiss*,[64] the landmark Israeli ruling on this subject, was later implemented in three distinct spheres: (1) peace negotiations, (2) public-sector appointments, and (3) the distribution of material goods. This Article further argues that, although the courts use uniform rhetoric when applying *Weiss* and seem to employ the same standards when evaluating each of these spheres, their rulings show differences in their de facto treatment of these divergent spheres of action. Furthermore, this Article examines both Israeli and comparative attitudes toward each of the three spheres and finds no support for Israel's diverse treatment of peace negotiations, on the one hand, and public-sector appointments, on the other. In contrast, the unique judicial treatment of the sphere of distributing material goods to the public during transitional times finds explanation and support in this Article. The next Part will discuss whether this difference in Israel's jurisprudence with regard to peace negotiations and public-sector appointments amounts to a troubling inconsistency or whether it has adequate justification. This in turn may reflect on courts' capacity to regulate caretaker action.

A. *Conducting Peace Negotiations*

1. The *Weiss* Decision

After the Berenson Committee Report, the next important milestone on the subject of caretaker governments' powers was the *Weiss* decision. While the Berenson Committee of the late 1970s recommended leaving caretaker authority aligned with that of regular governments—that is, with no special restrictions—the *Weiss* decision of the early 2000s set standards for legitimate caretaker behavior.

Weiss was handed down during Prime Minister Barak's administration, when the prevailing law provided for direct elections to the office of prime minister.[65] On the eve of Barak's departure for the Camp David conference in early July 2000, right-wing political parties deserted the government, leaving Barak with the support of

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64. HCJ 5167/00 Weiss v. Prime Minister of Isr. 55(2) PD 455 [2001] (Isr.). Following the *Weiss* decision, the Attorney General formulated rules for the conduct of caretaker governments, especially regarding appointments in the public sector. *See* ATTORNEY GENERAL GUIDELINES REGARDING ELECTION ISSUES, *available at* http://www.knesset.gov.il/elections18/heb/law/LegalAdviser.pdf.

65. Israel has a pure parliamentary system with the exception of the elections in 1996–2003, when direct elections for the office of prime minister were held under Basic Law: The Government. *See* RUBINSTEIN & MEDINA, *supra* note 33, at 822–23.

fewer than thirty Knesset members.[66] A majority of fifty-four to fifty-two (with seven abstentions) in the Knesset passed a no-confidence motion against the Prime Minister on July 10, 2000.[67] Yet the government did not fall because the motion fell short of an absolute majority (sixty-one Knesset members). The Second Intifada uprising, also known as the Al-Aqsa Intifada, broke out shortly thereafter in September 2000.[68]

According to the court in *Weiss*, "The negotiation [for peace with the Palestinian authority] and its content are a subject of sharp debate in Israel. Against this background—and against the background of other internal matters—the Prime Minister, Mr. Ehud Barak, resigned from his position as Prime Minister."[69] Direct elections for the office of prime minister were scheduled for February 6, 2001.[70] Despite Barak's resignation, his government continued to conduct peace negotiations with the Palestinians.[71] These negotiations started many months before the resignation and continued as late as twelve days before the elections, with the goal of achieving an agreement before elections.[72]

In a petition to the High Court of Justice, Professor Hillel Weiss argued that it was unreasonable for a government to conduct such fateful negotiations involving painful territorial concessions so close to the elections without the support of the Knesset.[73] A remedy was sought that would order the government to stop the negotiations until a new government formed following elections.

In a judgment delivered by President Aharon Barak, the High Court of Justice dismissed the petition on the merits.[74] It was unanimously ruled that a caretaker government enjoys the same powers as any regular government.[75] Six of the seven justices added that, in exercising its authority, a caretaker government enjoys a

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66. Emanuele Ottolenghi, *Explaining Systemic Failure: The Direct Elections System and Israel's Special Elections of February 2001*, 8 ISR. AFF. 134, 146 (2002).

67. Maoz, *supra* note 33, at 86.

68. *Id.*

69. *Weiss* 55(2) PD at 463.

70. *Id.* (Türkel, J., dissenting).

71. *Id.* (majority opinion).

72. *Id.* at 463 (majority opinion), 475 (Türkel, J., dissenting).

73. *See id.* at 463 (majority opinion) (referencing petitioner's argument that reasonableness limited the government's actions to ongoing operations). It should be noted that Israel's Supreme Court sits also as a High Court of Justice. Basic Law: The Judiciary, 5744–1984, SH No. 110 p. 78, § 15 (Isr.).

74. *See Weiss* 55(2) PD at 455, 473 (denying petition on the grounds that the government's actions did not deviate from the proper range of reasonableness). It should be noted that Israel's Chief Justice is called President.

75. *See id.* at 468 (majority opinion), 474 (Levin, Deputy President, concurring), 475 (Türkel, J., dissenting), 477 (Zamir, J., concurring) (agreeing that there is no formal limitation on the powers of an outgoing government).

narrower range of "reasonableness" discretion than a regular government, at least in certain matters.[76]

The justices, however, were divided in their reasoning, as well as on the outcome of the judgment. Six of the seven justices favored dismissing the petition, but only four of them based their dismissal on the merits.[77] Two others, Deputy President Shlomo Levin and Justice Yitzhak Zamir, cited threshold causes that could be described as lack of justiciability and therefore refrained from legitimizing the government's actions on the merits.[78] Justice Yaakov Türkel, in a minority opinion, opted to accept the petition because the government failed to show any specific urgent need to conduct the negotiations twelve days before the elections.[79]

In the majority opinion, President Barak held that the Basic Law: The Government adopted the principle of continuity by allowing the outgoing government to function until a new government is formed, and the Basic Law does not confine the powers of a caretaker government to the regular course of affairs.[80] The court also noted that the Berenson Committee had rejected the idea of limiting the powers of a caretaker government, both because it was impractical and because it would make it impossible to properly deal with a sudden crisis.[81] The court therefore ruled that limiting the powers of a caretaker government should be done, if at all, by way of legislation and not by judicial decision.[82] The court further noted that no constitutional convention ("custom") has developed in Israel that restricts caretaker action.[83]

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76. *See id.* (agreeing that the application of the reasonableness inquiry changes when applied to outgoing governments). Deputy President Shlomo Levin did not express any views on the matter. *Id.* at 474 (Levin, Deputy President, concurring).

77. *See id.* at 473 (majority opinion) (finding that the actions of the outgoing government did not deviate from the range of reasonableness).

78. *See id.* at 474 (Levin, Deputy President, concurring), 477–80 (Zamir, J., concurring) (refraining from the reasonableness inquiry of other justices).

79. *See id.* at 475–77 (Türkel, J., dissenting) (arguing that the range of reasonableness continuously narrows as the Prime Minister's term approaches its end).

80. *See id.* at 465 (majority opinion) (explaining that the ongoing operations approach was used in other countries but no such formal limitation existed in Israeli law). The case relies on the old and repealed version of Basic Law: The Government, however similar provisions exist in the new Basic Law: The Government, 5761, SH No. 1780 p. 158, § 30(b) (Isr.) ("[T]he outgoing Government shall continue to carry out its functions until the new Government is constituted.").

81. *See Weiss* 55(2) PD at 466 (using the Berenson Committee Report as support for refusing to construct a formal limitation on an outgoing government's power).

82. *See id.* at 466–68 ("[T]he Knesset as an establishing authority may . . . limit the powers of an outgoing government, if it sees fit . . . .").

83. *See id.* at 468 ("[I]t has not been proven to us . . . [that there is] the existence of a constitutional custom according to which the outgoing government has only ongoing powers (or 'maintenance' powers).").

At the same time, the court ruled that the nature of a caretaker government would be reflected in its exercise of governmental discretion.[84] In exercising its authority, a caretaker government has a narrower range of reasonableness than a regular government.[85] The criterion was that a caretaker government must act with restraint, unless there is a "vital public need for action."[86] Even if it is essential to take action, the caretaker government must act with proportionality in fulfilling that need.[87] The court emphasized that the test is not whether an action is regular or extraordinary, but whether the circumstances required action or restraint.[88] Exercising restraint is the default position, especially after elections when a new government is being formed.[89]

Rather than rule it nonjusticiable, the court concluded that there was a "vital public need" to conduct peace talks twelve days prior to elections, a need that prevailed over the government's limited mandate.[90] While Basic Law: The Government does not explicitly address the realm of foreign relations, the court held that this issue was within the government's authority since the state's executive branch holds both residual power and the authority to declare war.[91] The court treated foreign relations and state security as political matters, in which every government is entitled to broad discretion.[92]

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84. *See id.* at 469 (explaining that a caretaker government must act with the restraint appropriate for an outgoing government).

85. *See id.* at 470 ("[T]he range of reasonableness of the prime minister who has resigned . . . is narrower than the range of reasonableness of a prime minister and government who are operating normally.").

86. *See id.* at 469 (explaining that the duty of restraint does not apply when there is a "vital public need to act").

87. *See id.* (explaining that when a vital need exists, the government must act in appropriate measure).

88. *See id.* ("The correct question is, whether in the overall balance . . . restraint or action is required.").

89. *See id.* at 470 (giving various examples of inappropriate post-election actions for an outgoing government, such as appointing senior officials). It is noteworthy that the court sought to focus on one form of caretaker government—the one that is created following the resignation of a prime minister. *Id.* at 468. In doing so, it did not explain why the reason for bringing about a caretaker government might affect the law applicable to it.

90. *See id.* (noting that it is appropriate for an outgoing prime minister and his cabinet to manage foreign policy or defense from war when there is a "vital public need").

91. *See* Basic Law: The Government, 5761–2001, SH No. 1780 p. 158, §§ 1, 32, 40 (Isr.) (granting the executive branch residual authority and the power to declare war). Similar provisions existed in the old version of the law.

92. *See Weiss* 55(2) PD at 472 (stating that the court will not replace the government's foreign and defense discretion with its own).

It would be up to the Knesset and the public, not the court, to oversee the government's actions in these sensitive spheres.[93]

In failing to intervene, the court relied on, inter alia, the declaration of the Attorney General that, if Israel and the Palestinian Authority were to sign an agreement, its international as well as internal validity would be explicitly contingent upon its ratification by the Knesset[94]—a validity clause which raises questions about the role of caretaker governments in international relations, addressed later in the Article.[95]

The *Weiss* decision thus followed the Berenson Committee's position in holding both that caretaker governments enjoy the same authority as regular governments and that the criterion of the regular course of affairs should not be the measurement for the legitimacy of caretaker action. However, it deviated from the Committee's position in its willingness to regulate caretaker action such that caretaker governments must act with restraint unless there is a vital public interest that requires action. What is of further interest is that the court did not wait for the issue to be regulated by amendment of the Basic Law but rather took upon itself the role of judging the legitimacy of caretaker action.

2. The *Livnat* Decision

The same issue that was addressed in *Weiss* resurfaced in December 2008 when the caretaker government headed by Prime Minister Olmert resumed peace negotiations with Syria and the Palestinian Authority, including discussions about the Golan Heights and Jerusalem.[96] Negotiations were conducted even though Olmert had resigned as prime minister, and elections were pending because Foreign Minister Tzipi Livni, his replacement from his party, had failed to form a new government.[97] Knesset member Limor Livnat

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93. *See id.* The court held that nonintervention was consistent with precedent. The court dismissed previous petitions concerning negotiations for the Oslo agreements, the Golan Heights, and even the release of terrorists. *Id.*

94. *See id.* at 473 (referring to the Israeli Attorney General's declaration that any agreement between outgoing Israeli government representatives and Palestinian representatives would be conditional until approved by the Knesset).

95. *See infra* Part IV.A. It is interesting to note that, in the elections for the office of prime minister on February 6, 2001, Ariel Sharon received 62.3 percent of the votes, while Ehud Barak received 37.7 percent. According to commentators, the elections were more indicative of a defeat for Barak and his policy than a victory for Sharon. *See* Ottolenghi, *supra* note 66, at 150.

96. *See* HCJ 9202/08 Livnat v. Prime Minister of Isr., at 3 (Dec. 4, 2008), Nevo Legal Database (by subscription) (Isr.).

97. *See* Aluf Benn & Haaretz Correspondent, *Does Failure To Form a Gov't Make Tzipi Livni a Loser?*, HAARETZ, Oct. 26, 2008, http://www.haaretz.com/print-edition/news/analysis-does-failure-to-form-a-gov-t-make-tzipi-livni-a-loser-1.256064 (reporting that Livni was unable to form a government without calling elections).

petitioned the High Court, challenging the "reasonableness" of conducting peace negotiations under these circumstances.[98] The court dismissed the petition, relying directly on *Weiss*.[99]

This later judicial decision interpreted *Weiss* as allowing a caretaker government to conduct peace negotiations.[100] Furthermore, in *Livnat*, the court did not make its decision contingent on the government's commitment to include an explicit stipulation in the agreement (if reached), stating that its international validity is dependent on the Knesset's approval.[101] Instead, the court focused only on the agreement's internal validity: "By law, the government's decisions regarding a change in the status of the Golan Heights or Jerusalem require Knesset's approval by a majority of its members."[102] Similarly, the court dismissed on the same grounds a petition filed the same month against the release of Palestinian prisoners for the Muslim Eid al-Adha (Festival of Sacrifice) holiday as a good-faith gesture in the context of peace negotiations with the Palestinians.[103]

In summary, while *Weiss* established the principle that a caretaker government must act with restraint unless there is a "vital public need for action," the court de facto treats peace negotiations as always fulfilling the "vital public need" requirement, even when negotiations are conducted just days before elections. The court does not view the issue as nonjusticiable, but rather decides on the merits that peace negotiations are allowed. The court also does not probe the concrete circumstances surrounding each negotiation, nor does it suggest that, in principle, it is unreasonable for a caretaker government to conduct international peace negotiations, which would have made the *Weiss* outcome an exception to the general rule. In failing to firmly establish that principle, the court's rulings have been interpreted for the convenience of caretaker governments, who repeatedly accelerate peace negotiations during their caretaker term, relying on the legitimacy granted to those actions by the Israeli Supreme Court. In this sense, the court's rulings function in the way that James Bradley Thayer has warned: they shift responsibility from

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98. *See Livnat*, HCJ 9202/08, at 3.

99. *See id.*

100. *See id.* at 6.

101. *See infra* Part IV.A (discussing the role of caretaker governments in international relations); *cf.* HCJ 5167/00 Weiss v. Prime Minister of Isr., 55(2) PD 455, 473 [2001] (Isr.) (stating that its decision relies on the Attorney General's specific commitment that were agreements to be made by the outgoing government's representatives, such agreements would include a specific stipulation that they are conditional until approved by the Knesset).

102. *See Livnat*, HCJ 9202/08, ¶ 5.

103. *See* HCJ 10357/08 Legal Forum for the Land of Isr. v. Gov't of Isr., at 31 (Dec. 9, 2008), Nevo Legal Database (by subscription) (Isr.).

the elected branches to the court and inhibit, rather than enhance, democratic accountability.[104]

3. Comparative Experience with International Agreements

Israeli governments did not shy from embarking on military operations or, conversely, accelerating peace negotiations during caretaker periods, as discussed above.[105] Furthermore, the Israeli Supreme Court approved accelerating peace negotiations, believing there was always a vital need to negotiate for peace, even during caretaker periods.[106] Reaching international agreements during a transitional administration is especially problematic since the state is obligated under international law to abide by the international agreement even if a change of administration has occurred, unless the other parties to the agreement consent to changing the agreement.[107] In fact, the behavior of Israeli caretaker administrations in the international arena stands in sharp contrast to the prevailing norm in the parliamentary model of caretaker governments. Under this model, caretaker governments are constrained by constitutional conventions from committing the state in the international arena.[108] Thus, for example, when Winston Churchill headed his caretaker government in 1945, he attended the Potsdam Conference that held international discussions between the Three Powers—the United States, the Soviet Union, and Britain—regarding the future fate of the defeated Germany.[109] As the head of a caretaker government, Churchill felt obliged to bring the leader of the opposition and shadow prime minister, Clement Attlee, as well as the shadow foreign secretary.[110] Attlee later replaced Churchill in the talks as the Prime Minister of Britain.[111]

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104. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893) ("[I]f [legislators] are wrong, they say, the courts will correct it.").

105. *See supra* notes 22–27 and accompanying text (citing examples of Israeli caretaker governments engaging in military operations and peace negotiations).

106. *See supra* Part III.A.1–2.

107. *See* Combs, *supra* note 19, at 334 ("[I]nternational law . . . requires states to honor their commitments until the other party or parties to the agreement consents to a change."); *see also* discussion *infra* Part IV.A (comparing the international law implications of signing versus ratifying agreements by caretaker governments).

108. *See, e.g.*, Boston et al., *supra* note 3, at 637–41 (discussing New Zealand's caretaker government restrictions).

109. *See* JOHARI, *supra* note 1, at 139–40 (referencing Churchill's participation in the Potsdam Conference); *see also* T.D. Burridge, *A Postscript to Potsdam: The Churchill-Laski Electoral Clash, June 1945*, 12 J. CONTEMP. HIST. 725, 733–37 (1977) (detailing Churchill's efforts to arrange and participate in the Potsdam Conference).

110. *See* JOHARI, *supra* note 1, at 140 (referencing Churchill's inclusion of Clement Atlee and Ernest Bevin in the Potsdam Conference).

111. *See id.*

Some authors argue that U.S. presidents postpone concluding international agreements, leaving them for the president-elect to decide, unless the incoming administration consents to the agreement.[112] But, de facto, there are numerous examples of abuse of lame-duck power to conclude international agreements, even against the known wishes of the president-elect. Already during the early republic, lame-duck President Adams ratified the treaty with France, titled the Treaty of Môrtefontaine,[113] by relying on lame-duck senatorial votes. Adams was able to garner the majority by convincing senators that without the ratification, Thomas Jefferson would reach a new treaty less favored by them.[114] In more recent times, President Carter signed in his last day in office the Algiers Declarations in return for the release of American hostages held in Iran. This conclusion of the crisis through negotiations rather than force ran against the declared policy of President-elect Reagan.[115] President Clinton signed the Rome Statute as a lame duck despite the controversial nature of the treaty. This act was so unacceptable to President-elect Bush that he made the unprecedented move of "unsigning" the treaty.[116] Most recently, President Bush signed agreements with the Iraqi government against the wishes of President-elect Obama.[117] These are just a sample of examples of abuse of lame-duck power to set facts in the international arena against the known wishes of the president about to enter office.

Article II, § 2 of the U.S. Constitution requires presidents to ratify international treaties by receiving the consent of two-thirds of the Senate, thus requiring the cooperation of two branches of government in order to undertake international obligations.[118] This

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112. *See, e.g.*, Beermann & Marshall, *supra* note 8, at 1281 (discussing how lame-duck presidents usually avoid controversial international issues or seek their successor's input); Combs, *supra* note 19, at 334 ("[L]ame-duck administrations have typically attempted to defer controversial foreign affairs decisions until the new administration took power, or at the least, have attempted to consult with the President-elect to attain agreement as to the course to pursue.").

113. *See* Nagle, *supra* note 2, at 322–23 (noting the Senate's ratification of the Treaty of Môrtefontaine in early February 1801 during the post-election lame-duck session).

114. *See id.*, *supra* note 2, at 322–23. (quoting JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 252 n.† (1996)) (discussing the negotiations and agreement at Môrtefontaine).

115. *See* Combs, *supra* note 19, at 306–07 & n.19 (discussing the conflicting views of Carter and Reagan with regard to the Algiers Declarations).

116. *See* Swaine, *supra* note 18, at 2061–62 (discussing responses to the Bush Administration's decision to "unsign" the Rome Statute).

117. *See* Phair, *supra* note 16, at 10 (considering the Bush Administration's constitutional duty during its lame-duck phase).

118. *See* U.S. CONST. art. II, § 2(2) ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

bilateral mechanism may reduce the democratic deficit of having a lame-duck president make commitments in the international arena, though it does not eradicate the problem because the president may rely on senatorial consent composed of lame-duck Senate members.[119] U.S. presidents, however, routinely circumvent this constitutional requirement of receiving two-thirds senatorial approval for international treaties by treating many international agreements as "congressional–executive agreements" rather than "international treaties."[120] The presidents do not seek two-thirds of the Senate's approval for congressional–executive agreements, but rather treat such agreements as requiring the consent of both houses in simple majorities.[121] Presidents thus have maneuvering power to decide what route of ratification is preferable to them: is it easier for them to garner simple majorities in both houses or a two-thirds majority in the Senate? The answer may vary according to the factual question of which political party controls which house. Reaching international agreements without two-thirds of the Senate's approval during lame-duck periods only exacerbates the democratic-legitimacy problem of having a repudiated president commit the United States to certain partisan policies in the international arena.

B. *Appointments and Actions in the Public Sector*

The question of caretaker power has also arisen in Israel in the context of public-sector appointments. This Article separates the discussion into three categories: (1) public-sector appointments made when the government does not occupy a majority in the appointing body, (2) appointments made when the government has no influence whatsoever, and (3) appointments made when the government has a decisive influence. The judicial decisions used the same rhetoric of *Weiss* in all three categories and surprisingly arrived at the same conclusion in each: the Israeli Supreme Court prohibited appointments during caretaker periods. That is to say, even though the *Weiss* decision allowed for peace negotiations during caretaker administration, the court prohibited public-sector appointments across the board during caretaker administration. This applies even when the government has no power to intervene in the appointment. After discussing Israel's jurisprudence with regard to public-sector

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119. See Weill, *supra* note 2, at 1122–25, for a discussion with regard to lame-duck legislatures.

120. *See generally* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). The authors argue that "We the American People" expressed dualist consent to the route of congressional–executive agreements and thus this venue represents a nonofficial amendment to the U.S. Constitution. *Id.*

121. *Id.* at 802–03 (identifying the informal process that yielded the congressional–executive agreement).

appointments, this Article discusses comparative treatment of such appointments.

1. Public-Sector Appointments When Government Representatives Do Not Occupy a Majority in the Appointing Body

The Israeli Supreme Court was asked to address the question of whether a caretaker government is empowered to appoint chief rabbis and judges. In both cases, the court decided to postpone the appointments until the formation of a new government, even though the government's representatives fell short of a majority in the appointing bodies, as discussed below.

At around the time of *Weiss*, the National Religious (Mafdal) Party petitioned, challenging the appointment of chief rabbis and members of the Chief Rabbinate Council during the term of a caretaker government.[122] The chief rabbis head both the Great Rabbinical Court and the Chief Rabbinical Council, which enjoy, among other powers, state authority in issues of marriage and divorce of Jewish citizens and inhabitants, *kashrut* (kosher status) of food, and authorization of rabbis.[123]

Relying on *Weiss*, the court (with a different composition of justices) reached a completely different outcome than that reached in *Weiss*. It ruled that, because the appointment of chief rabbis was "final" for a lengthy period of ten years, the decision should wait until the formation of the new government.[124] The court stated that it was more important to prevent a caretaker government from appointing chief rabbis than to uphold the letter of the statute concerning the election date for chief rabbis.[125] The court also made a distinction between this case and *Weiss*, stating: "In the regular course of affairs, the selection of Rabbis is not reversible; there is something final about that. This makes the situation different from the circumstances dealt with in *Weiss* [where the peace agreement may be made contingent on Israeli Parliament's approval]."[126] Thus, despite the fact that the government could not manipulate the timing of the appointment of chief rabbis, which is dictated by law,[127] and despite the fact that government representatives are only a minority on the

122. HCJ 9577/02 Nat'l Religious Party v. Speaker of the Knesset (HAMAFDAL) 57(1) PD 710 [2002] (Isr.).

123. *See* Chief Rabbinate of Israel Law, 5740–1980, SH No. 965 p. 90, § 2 (Isr.) (listing the functions of the Council of the Chief Rabbinate of Israel).

124. *See HAMAFDAL*, HCJ 9577/02 (Dorner, J.) (preventing the appointment of chief rabbis during caretaker administration).

125. *See id.* at 715–16.

126. *See id.* at 716.

127. *See* Chief Rabbinate of Israel Law, 5740–1980, SH No. 965 p. 90, § 16 (stating that chief rabbis serve for ten years and their successors are to begin their terms at the expiration of their predecessors).

appointing committee,[128] the court banned the appointment during caretaker administration.

A similar issue arose during the term of the caretaker government headed by Prime Minister Olmert. Minister of Justice Daniel Friedman sought to appoint judges to courts suffering from a severe shortage of judicial manpower.[129] Ostensibly, this satisfied the *Weiss* criteria of "vital public need" for action during caretaker administration. To this end, the Minister of Justice sought to convene the Judicial Appointments Committee.[130] By statute, of the nine members on the Committee, two are ministers and two are Knesset members.[131] The other members are professionals: three justices (one of which is the president of the court) and two representatives of the Israeli Bar Association.[132] Significantly, in the wake of a 2008 amendment to the Courts Statute, a majority of seven of the nine committee members was needed to appoint justices to the Israeli Supreme Court.[133] The professional members of the Committee therefore have the power to block any appointment that they consider unworthy.

Despite this composition, the president of the Israeli Supreme Court, together with two other justices sitting on the Committee, opposed convening the Committee on the grounds that judges should not be appointed during the term of a caretaker government.[134] Minister of Justice Friedman criticized President Dorit Beinish's decision, as she was appointed during a caretaker government's term. He claimed that her position stemmed from the fact that he and President Beinish had bitterly disputed judicial policy and the court's role in a democracy.[135] In other words, Friedman viewed Beinish's position as politically motivated.

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128. *See id.* §§ 7–8 (defining the nature and number of representatives in the appointing committee).

129. In fact, President Dorit Beinish publicly spoke of the great shortage in judicial manpower and the urgent need to appoint new judges. *See* Ruthie Avraham, *To Postpone Appointing Judges Until After Elections*, NEWS1 (Oct. 28, 2008), http://www.news1.co.il/Archive/001-D-177093-00.html (discussing the president's belief that although it will lead to further shortages, no judges can be appointed during a caretaker government).

130. *See* 9843/08 HCJ, Legal Forum for the Land of Isr. v. Judicial Election Comm., ¶ 4 (Jan. 8, 2009), Nevo Legal Database (by subscription) (Isr.).

131. *See* Basic Law: The Judiciary, 5744–1984, SH No. 110 p. 78, § 4 (Isr.) (listing the composition of the Judicial Appointments Committee).

132. *See id.*

133. *See* Courts Law, 5769–2008, SH No. 2176 p. 813 (Isr.) (Revision No. 55).

134. *See Legal Forum*, HCJ 9843/08, ¶ 1.

135. He favored judicial restraint and interpreted her position as favoring judicial activism. On the great controversy between President Beinish and Minister of Justice Friedman, see Yuval Yoaz, *Friedman's Purpose: To Limit the High Court of Justice's Spheres of Intervention*, HAARETZ (Aug. 23, 2007), http://www.haaretz.co.il/misc/1.1559086.

The court, sitting as a High Court of Justice, dismissed a petition challenging the Committee's decision not to convene during caretaker period.[136] The court explained that the Committee's decision was not "unreasonable."[137] Although the court accepted that there was a "vital public need" for appointment, it refrained from intervening because "the appointment of new judges is a subject at the center of public political controversy."[138]

The decisions regarding the appointment of both chief rabbis and judges show that the court treats caretaker governments as different from regular ones. It strives to inhibit their actions to appoint important public figures that exercise discretionary powers over Israel's public life, so that these appointments will be conducted by a government with a fresh mandate from the people.

2. Appointments in Which the Government Has No Influence

The court's efforts to prevent public-sector appointments during a caretaker period are so far-reaching that this principle was also applied to cases in which the government had no influence on the appointment. For example, the National Labor Court entertained the question of whether a director of Arabic-language television broadcasts could be appointed during the term of the caretaker government headed by Prime Minister Olmert.[139] As with other professional civil-service appointments, a tender is issued for the appointment of a director for Arabic broadcasts; the government does not make the appointment.[140] If the tender fails to produce suitable candidates, a search committee makes the appointment.[141] In this case, the conflict of interest that arose in the search committee proceedings was not the reason why the Labor Court disqualified the appointment. Rather, it was because the appointment was set to occur during the term of a caretaker government, notwithstanding the fact that the government was not empowered to make the appointment or to intervene in the appointment process, and no evidence of influence or an attempt to influence the appointment was produced.[142] This decision of the National Labor Court demonstrates that courts have understood the Israeli Supreme Court's policy to

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136. *See Legal Forum*, HCJ 9843/08, ¶ 15.

137. *See id.* ¶ 11.

138. *See id.* ¶¶ 12–13.

139. *See* AA 672/08 Israel's Broad. Auth. v. Tavor (Jan. 27, 2009), Nevo Legal Database (by subscription) (Isr.).

140. *See id.* at 6.

141. *See id.*

142. *But see* HCJ 10134/02 MK Aushayia v. Prime Minister 57(2) PD 49, 53 [2003] (Isr.) (reaching the opposite result and allowing the appointment, during an election period, of the directors of the First Channel of the Israeli Broadcasting Authority and of the television news division).

require refraining from making appointments in the public sector during caretaker administration.

3. Appointments in Which the Government Has Decisive Influence

The court prohibited the appointment of religious council members during caretaker periods based on the government's decisive control of the appointment process. The court expressed great concern that the government's considerations in making its appointments would be improper, or would at least be viewed that way by the public.[143] It seems that the court attached importance to leaving the appointment to a government representing the public's most up-to-date opinion. Thus, an appointment in which the government exercises a decisive influence is best left to the incoming government whenever possible.[144]

The message emerging from decisions regarding appointments in the public sector is clear: public-sector appointments should not be made during a caretaker government's term of office. Judges,[145] chief rabbis,[146] members of religious councils,[147] a director of Arabic television[148]—and by extension, important officials in the judicial branch of government, civil service, and local authorities—are among the prohibited categories. The reasons may vary: to make sure the choice reflects the public's up-to-date opinion, or to prevent the appearance that the appointment is motivated by improper considerations, especially if the choice would be final or irreversible. The court adheres so strongly to this idea that it applies it even when the government plays no role in an appointment or is only a minority

143. *See* HCJ 8815/05 Adv. Landstein v. Adv. Spiegler (Dec. 26, 2005), Nevo Legal Database (by subscription) (Isr.).

144. *See also* HCJ 4065/09 Adv. Cohen v. Minister of Interior (July 20, 2010), Nevo Legal Database (by subscription) (Isr.); *cf.* HCJ 5240/96 Juamis v. Minister of Interior 51(1) PD 289, 300 [1997] (Isr.). Significant restrictions on the acts of a caretaker government in the public arena were also expressed in a petition concerning the consolidation of local authorities in Judea and Samaria, even though fundamental decisions had been made before the government became a caretaker. *See* HCJ 10466/08 Alchaini v. IDF Commander in Judea and Samaria (Jan. 1, 2009), Nevo Legal Database (by subscription) (Isr.).

145. *See supra* Part III.B.1 (discussing the judicial prohibition of caretaker governments from appointing judges).

146. *See supra* Part III.B.1 (discussing the judicial prohibition of caretaker governments from appointing chief rabbis).

147. *See supra* Part III.B.3 (explaining the prohibition of religious-counsel appointments as a matter of governmental control and public opinion of that control).

148. *See supra* Part III.B.2 (demonstrating the coverage of appointment prohibitions by looking at officials who are not appointed by government officials, but cannot be appointed during the term of a caretaker government).

on the appointing body.[149] In the last two cases, the legislature ostensibly expressed its opinion that the appointment was not political. Nevertheless, the judicial branch took a different approach. This total ban on public-sector appointments may lead to a paralysis of state affairs.

The judicial message regarding public-sector appointments is also the reverse of the message in the peace negotiations context. The court expresses its views that caretaker governments are different creatures than regular governments: one should be wary both of their democratic legitimacy and extraneous motives, and thus curtail their actions.

4. Comparative Experience with Public-Sector Appointments

Israeli administrations are not alone in attempting to complete public sector appointments during caretaker periods. In fact, U.S. political history is full of lame-duck appointments as well. However, while Israeli courts prohibit and rescind such caretaker appointments, there is no one to effectively guard against such appointments in the United States.

Lame-duck appointments were already occurring in the United States in the early days of the republic. The most famous U.S. constitutional decision, *Marbury v. Madison*, established the power of judicial review over statutes.[150] Less known is the fact that the landmark decision dealt with the outrageous sweeping judicial appointments John Adams made while he was a lame-duck president.[151] Adams intended to pack the judiciary with judges who were affiliated with or identified with the Federalists in the face of the already known Republican electoral takeover of both the presidency and Congress.[152] To this effect, Adams also passed the Judiciary Act, which enjoyed the partisan support of Federalist votes, and created many new judicial positions that he hurried to occupy with his appointees.[153] In addition, Adams also appointed many members to the executive branch, filling military, diplomatic, and sundry positions.[154]

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149. *See supra* Part III.B.1–2 (offering examples of instances in which the government had little or no influence in the appointment process, yet caretaker government appointments were still prohibited).

150. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803) (declaring that laws in conflict with the Constitution are void and the judiciary has the authority to judge which laws are in conflict with the Constitution).

151. *See* Nagle, *supra* note 2, at 317–22 (examining the actions John Adams took as a lame-duck president).

152. *See id.* at 318–21 (detailing the actions taken by Adams during his lame-duck period).

153. *Id.* at 324–25.

154. *Id.* at 325–26.

President Thomas Jefferson, who followed Adams, treated these last minute appointments as illegitimate and attempted to undo them through various drastic measures. These methods included refusing to deliver the signed commissions to the prospective appointees, repealing the Judiciary Act, impeaching specific members of the judiciary, and abolishing the 1802 Supreme Court term.[155] Among his last-minute appointments to the judicial branch, President Adams appointed William Marbury as a justice of the peace in the last forty-eight hours of his administration.[156] Alas, his Secretary of State, John Marshall, failed to deliver the signed commission to Marbury before the end of Adams's term.[157] Jefferson refused to deliver the commission, and Marbury petitioned the Court to honor the commission appointing him a justice of the peace.[158] Though John Marshall—former Secretary of State and appointed Chief Justice by the lame-duck Adams—declared that Marbury was entitled to the commission, Marbury lost the case because the Court decided that it was not authorized to grant him the relief sought.[159]

These lame-duck appointments to the public sector did not end in the first decades of the republic. Rather, a lame-duck administration typically promotes its people into key positions in the civil service to entrench its policies after it no longer governs. On average, over one hundred employees are transferred from political to tenured positions in U.S. administrations during lame-duck periods.[160] The lame-duck president may also fill vacancies or, conversely, eliminate positions, depending on his or her substantive attitude toward a specific administrative agency and its programs.[161] As a result, the incoming president may find it even more difficult to control the supposedly "professional" merit-based civil service and to encourage it to promote the new presidential agenda.[162]

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155. Combs, *supra* note 19, at 303–05.

156. Nagle, *supra* note 2, at 326.

157. *Id.*

158. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 143 (1803) (describing the failure of the Jefferson Administration to deliver the commission).

159. *See id.* at 138 ("The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of original jurisdiction not warranted by the constitution."); *see also* Nagle, *supra* note 2, at 326–28 (describing the circumstances of the *Marbury* case).

160. Mendelson, *Agency Burrowing*, *supra* note 8, at 606.

161. *See id.* at 607 (describing how the administration of George H.W. Bush "eliminate[d] a 141-person office of the Army Corps of Engineers in Buffalo three days after the election").

162. *See id.* at 615 (noting that a new administration will have to guard against subversion of its policies by appointees of the previous administration). Mendelson argues that there are also benefits to be considered: such last-minute hiring decisions by the lame-duck administration may contribute to diversity within the bureaucracy, enhance deliberation and dialogue within the bureaucracy and also between it and the public on the one hand, and the Presidency on the other, and even enable self-

It should be noted that last-minute appointments to the public sector are not cut of one cloth. Rather, the President must gain the Senate's confirmation for some of these appointments, including Justices of the Supreme Court.[163] Supposedly, this interbranch cooperation strengthens the legitimacy of lame-duck appointments. This assertion must be qualified, however, since those lame-duck appointments usually fail if the Senate is controlled by a different political party, rather than that associated with the lame-duck president. A Senate controlled by a different political party prefers to leave the vacancies for their president-elect to fill.[164] Thus, lame-duck appointments that do gain the Senate's approval may be of two types. The first presents a partisan move of the lame-duck president that succeeds solely because of partisan support of his or her party in the Senate. This type of lame-duck appointment should hardly be viewed as legitimate, despite the interbranch confirmation process. The other type is an appointment that succeeds because it involves a moderate candidate, perhaps even one identified with the political party that is about to gain the presidency. The lame-duck president promotes this appointment as the "lesser evil," that is to say, better to influence the identity of the candidate to be appointed from the rival camp than have no say at all in the appointment process. The latter will occur if the vacancy is left for the president-elect to fill. Those appointments may be treated as bipartisan and garner support from senators of both political parties.[165] This bipartisan type of lame-duck appointment may be viewed as relatively more legitimate because it represents a consensual move rather than an assertion of power that should no longer belong to the lame-duck president.

In contrast to the United States, parliamentary systems, especially those that originally belonged to the Commonwealth, follow conventions under which caretaker administrations refrain from making significant public-sector appointments.[166] These conventions require leaving those appointments for the new incoming government to decide.[167] If there is a vacancy that must be filled, the caretaker government may only make a temporary appointment—including

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monitoring within the bureaucracy because of the diversity of opinions and personnel. *Id.* at 642, 648.

163. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring advice and consent of the Senate for the appointment of certain officials).

164. Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 416 (2007).

165. *Id.* at 417 (describing Republican Benjamin Harrison's appointment of a Democrat to the Supreme Court during the lame-duck session of 1892); *see also* John Massaro, *"Lame-Duck" Presidents, Great Justices?*, 8 PRESIDENTIAL STUD. Q. 296, 299 (1978) (arguing that lame-duck presidents tend to deemphasize ideology and other political factors in choosing nominees to the Supreme Court).

166. *See supra* Part II.D.

167. *See supra* Part II.D.

extending the stay of a presiding official—for a few months, so as not to bind the hands of its successor.[168] If a temporary appointment is not possible, or if it is not desirable in light of the public interest, then the caretaker government must gain the consent of either the incoming government or the legislature for the appointment.[169] Obtaining such consent makes the appointment legitimate and consensual rather than partisan. Which governmental branch's cooperation is required differs between various countries.[170]

C. *Distribution of Material Goods to the Public*

1. Distribution of Material Goods to the Public

The decision concerning the authority of the Committee for the National List of Reimbursed Drugs (NLRD) to convene on the eve of Knesset elections dealt with the distribution of material goods by a caretaker government.[171] At first glance, the decision is mystifying. The NLRD Committee was banned from convening before the elections but was permitted to convene immediately after the elections, even before a new government was formed.[172] It was further emphasized in the Israeli Supreme Court's decision that, after the elections, the caretaker government was permitted to decide to adopt recommendations of the Committee to expand the NLRD.[173]

How can the court's decision be explained? If the ban on convening the NLRD Committee was based on the government's status as caretaker, this status would not have changed after the elections until a new government was formed. It would have been expected that a caretaker government's actions banned before elections would be even more *verboten* after elections.[174] In the words of President Barak in *Weiss*, the range of reasonableness in which a caretaker government is entitled to act "becomes narrower—and the

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168. *See, e.g.*, Boston et al., *supra* note 3, at 638 (discussing lame-duck policies in New Zealand); Roy, *supra* note 5, at 97–98, 101 (discussing lame-duck policies in India).

169. *See, e.g.*, Boston et al., *supra* note 3, at 637 (explaining that in New Zealand's parliamentary system, emergency interim measures should not be made without consultation with the opposition).

170. For example, New Zealand's *Cabinet Manual* requires the consent of the House. *See* NEW ZEALAND CABINET MANUAL, *supra* note 51, § 6.20(d). But if the identity of the next government is clear, then its consent must be sought. *Id.* § 6.24.

171. HCJ 2453/06 Israel's Med. Ass'n v. Attorney Gen. (IMA) (Mar. 21, 2006), Nevo Legal Database (by subscription) (Isr.).

172. *Id.* ¶¶ 3–4 (Grunis, J.).

173. *Id.* ¶¶ 3–4 (Grunis, J.), ¶ 3 (Naor, J.).

174. This argument applies even if the election's results show that the ruling party has not lost its power. This is so because in a parliamentary system with proportional representation, there is a need to build a coalition, and the resulting government may have a different agenda than the preceding one. *See supra* Part II.A.

need for restraint and reserve made more necessary—after the elections, and before the elected prime minister begins his term in office."[175] But the NLRD judicial decision allows a caretaker government to perform functions after elections that it is not allowed to perform prior to elections.

Although this was not explicitly stated by the court, this Article suggests that the rationale underlying the NLRD decision was the concern that, if the NLRD Committee and, in turn, the government decided to expand the NLRD before elections, this would have constituted a form of "bribery" and an attempt to distribute material goods in the form of drugs in order to gain electorate support for the existing government.[176] Justice Miriam Naor might have been insinuating this when writing that: "The real conflict is that the government decision, which the petitioners are aiming for, will be rendered before the elections and under the pressure of elections, thereby increasing the chances that the government will accept the NLRD committee's expected recommendation."[177] Since this involved a risk of distribution of material goods as a means of influencing the election's results, the court saw fit to bar the expansion of the NLRD before the elections, but permitted it after the elections when there was no cause for concern that the decision could constitute a form of election bribery. Obviously, the distribution of drugs after elections cannot change election's results that have already been decided.

The decision to expand the NLRD—as opposed to the timing of the expansion—did not call for caretaker restraint in the court's view, since there was a "vital public need" for taking action to save lives.[178] Moreover, this Article suggests that the decision to expand the NLRD did not deviate from the country's regular course of business. Consequently, this action was not significant enough to warrant postponing the action for a new government.

Another example of this category of material goods may be found in the court's decision regarding the timing of submission of investigative committees' reports. *Regional Municipality of Modi'in v. Minister of Interior* dealt with the question of when investigative committees should submit their reports to the Ministry of the Interior.[179] Because the reports implied change in the boundaries between local authorities and had potential implications for the

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175. HCJ 5167/00 Weiss v. Prime Minister of Isr. 55(2) PD 455, 470 [2001].

176. The NLRD Committee is appointed by the Ministers of Health and Treasury. It advises the government and the Health Council on which drugs should be included in the government's healthcare package. *IMA*, HCJ 2453/06, ¶ 2 (Grunis, J.).

177. *Id.* ¶ 4 (Naor, J.).

178. *Id.* ¶¶ 3–4 (Grunis, J.). See also Justice Levi's dissenting opinion that because of the urgency of the matter, the NLRD should convene even before elections.

179. HCJ 6413/08 Reg'l Municipality of Modi'in v. Minister of Interior (March 10, 2010), Nevo Legal Database (by subscription) (Isr.).

distribution of income among municipalities, they could have affected the regional elections.[180] Probably for this reason, the court decided that "[t]he committee's recommendations shall not be submitted until after the elections for the local authorities."[181]

Because the court distinguished between pre- and post-election distribution of goods, this Article suggests that if the court believed the government intended to distribute material goods on the eve of elections as a means of indirectly influencing the election's results, the court would prohibit the action before the elections but allow it afterwards, even before the formation of a new government. In principle, this could be within the government's regular sphere of authority; thus, if not for the timing on the eve of elections, it would not have been problematic even for a caretaker government.

2. Comparing Distribution of Material Goods and Public-Sector Appointments

But why is the distribution of material goods different from public-sector appointments? On its face, both constitute distribution of goods on the eve of elections. Yet, the court applies a different law to the two categories.[182] Public appointments must wait until a new government is formed.[183] In contrast, the government may not distribute material goods pre-elections, but can do so post-elections and even before a new government is formed.[184]

This Article suggests that the divergent treatment can be explained by examining the beneficiaries and consequences of each act: a public appointment benefits the appointee; for him or her, it resembles the distribution of goods. Yet the consequences to the public are continuous throughout the appointment period and extend well beyond election time. Thus, the appointment is arguably a way to continue influencing, setting, and even entrenching the government's agenda after the government's caretaker period ends. A public appointment should therefore not be regarded as purely a matter of political hygiene, but should be avoided until a new government is formed.

The distribution of actual material goods, on the other hand, benefits members of the public who receive the good and certainly can influence elections if done near elections. But its effects are usually short-lived; research indicates that people are more affected in their immediate decisions by short- rather than long-term considerations,

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180. *Id.* at 3.
181. *Id.*
182. *See supra* Part III.B, III.C.1.
183. *See supra* Part III.B.
184. *See supra* Part III.C.1.

and thus distribution done years in advance of the next election will probably not influence people's votes.[185] It makes sense, therefore, that the government may distribute material goods to the public as long as it is done after the elections, whether or not a new government has formed.

3. Comparative Experience with Distribution of Material Goods to the Public

Not only do Israeli governments distribute material goods to the public during transition times, but U.S. presidents, too, utilize their power during the end of their presidency to distribute favors and goods to individuals, interest groups, and the public at large. In addition to the exercise of the appointment power already discussed, which often requires the Senate's cooperation, presidents utilize their unilateral pardon power in favor of contested cases.[186] The pardon and appointment powers benefit specific individuals.

Presidents also unilaterally declare vast parcels of land as national monuments and parks.[187] This may already serve as a "bribery" technique to affect the election's results. Indeed, President Clinton turned many acres into nature reserves in order to assist Al Gore in his election campaign.[188] It should be noted, however, that it is more common for presidents to exploit their unilateral power in the ways mentioned after elections rather than before. Two explanations may be offered for this post-election behavior. First, when this behavior is manifested after elections, it is generally intended to affect presidents' "legacy" rather than influence election results already decided.[189] Second, presidents utilize these unilateral powers

185. *See, e.g.*, Michael M. Bechtel & Jens Hainmueller, *How Lasting Is Voter Gratitude? An Analysis of the Short- and Long-Term Electoral Returns to Beneficial Policy*, 55 AM. J. POL. SCI. 851, 864–65 (2011) (considering the duration of the beneficial impact of public goods on voter decision making).

186. The Constitution of the United States grants unilateral pardon power to the President. U.S. CONST. art. II, § 2, cl. 1. On the use of the pardon power in controversial ways during lame-duck presidencies, consider Howell & Mayer, *supra* note 40, at 533–35. *See also* Beermann, *supra* note 8, at 977–80 (reviewing controversial pardons granted by President Clinton in the waning days of his term).

187. Howell & Mayer, *supra* note 40, at 546–47 (discussing President Clinton's establishment of numerous national monuments). *See generally* Margaret Tseng, Lame Duck Presidents and the Use of Unilateral Powers: An Examination of Monument Proclamations (presented at the Annual Meeting of the American Political Science Association, Aug. 27–31, 2003), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/6/4/7/6/pages64764/p64764-1.php.

188. Beermann, *supra* note 8, at 975–76 (considering the potential electoral effects of President Clinton's efforts to convert land into nature reserves prior to elections).

189. For a discussion of legacy concerns as influential on presidential lame-duck policies, see, e.g., David A. Crockett, *"An Excess of Refinement": Lame Duck Presidents in Constitutional and Historical Context*, 38 PRESIDENTIAL STUD. Q. 707, 711–15

more after elections when they fear influencing the ballot in unwanted ways if actions are pursued before elections. If their behavior carries the risk of being unpopular, they will wait until after elections to execute their plans.[190]

These last-minute actions are typical to U.S. lame-duck presidents but not to caretaker governments in parliamentary systems.[191] This divergence can be attributed not only to the existence of effective caretaker conventions in parliamentary systems,[192] but also to the fact that, in parliamentary systems, prime ministers typically do not enjoy unilateral powers equivalent to those enjoyed by U.S. presidents.[193] Furthermore, this lame-duck concern about presidential legacy is more characteristic of the "cult of personality" that accompanies presidential rather than parliamentary systems.[194]

This Article concludes by stating that the Israeli Supreme Court stepped into the vacuum caused by the lack of constitutional conventions regarding Israeli caretaker governments. The court will not hesitate to restrict caretaker actions if it believes that the actions should be postponed until a new government is formed, as is the case with public-sector appointments.[195] In this respect, the court functions as a restraining power on Israeli caretaker governments, much like constitutional conventions in other parliamentary systems.[196] But no similar restraining power inhibits U.S. lame-duck presidents. This perspective only makes the Israeli Supreme Court's position on peace negotiations more puzzling. Why does the court permit caretaker governments to negotiate for peace but ban them from making public-sector appointments? Shouldn't one be worried

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(2008); Tseng, *supra* note 187, at 6 ("The lack of political consequence in the final year gives additional incentive for presidents to extend their policy impact and political legacy.").

190. Jeffery A. Jenkins & Timothy P. Nokken, Contemporary Lame-Duck Sessions of Congress: An Overview and Assessment with Special Emphasis on the 110th Congress 6 (unpublished working paper), *available at* http://faculty.virginia.edu/jajenkins/contemp_LD.pdf (analyzing the timing considerations of presidents in their use of their unilateral powers).

191. *See* Parts I, II.D.

192. *See, e.g.*, UK CABINET MANUAL, *supra* note 51, ¶¶ 2.27–.34 (discussing restrictions on government activity following, for instance, the loss of a vote of confidence). A caretaker government is "expected not to take any important policy decision that goes to influence the popular vote in its favour or adversely affects the prospects of the opposition leaders in the battle of the ballot box." JOHARI, *supra* note 1, at 139. *But see* Roy, *supra* note 5, at 100 (describing Charan Singh's attempts at "vote garnering exercises").

193. Ackerman, *supra* note 10, at 647–56 (comparing the power of prime ministers in parliamentary systems with the power of U.S. presidents).

194. *Id.* at 657–64 (discussing the "cult of personality" prevalent in the U.S. presidential system when compared to a parliamentary system of the British type).

195. *See supra* Part III.B.

196. *See supra* Parts I, II.D.

about democratic legitimacy or extraneous considerations when caretaker governments negotiate for peace? Or does the court's position show that regulating caretaker action has or should have limitations bounded by the political question doctrine? In the next Part, this Article proposes and critiques a number of possible explanations for the court's divergent treatment of peace negotiations, on the one hand, and public-sector appointments, on the other.

IV. WHY DISTINGUISH PEACE NEGOTIATIONS FROM PUBLIC-SECTOR APPOINTMENTS?

From the Israeli judicial decisions described above, several rationales may be derived that justify the divergent judicial treatment of public-sector appointments and peace negotiations during caretaker periods. These rationales include: (1) the act's reversibility; (2) the importance of representing the people's most current opinion when making the act; and (3) the justiciability of the issue, including the existence of alternative control mechanisms to the court's intervention. This Part argues that these rationales do not support the contradictory outcome wherein a caretaker government may conduct peace negotiations but may not appoint public-sector officials. Thus, the divergent Israeli judicial treatment amounts to inconsistency. The next Part argues that Israel's experience with judicial review over transitional governments does not prove that this matter should be treated as nonjusticiable. Rather, this Article discusses how a properly designed law applied to transitional governments may lead to better, more consistent results in judicial decisions.

A. *Reversibility*

The Israeli Supreme Court differentiated between peace negotiations and public-sector appointments, explaining, inter alia, that appointments are not reversible, while peace treaties are, since the latter can be made conditional upon legislative ratification.[197] Does this distinction legitimize peace negotiations by a caretaker government?

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197. *See* HCJ 9577/02 Nat'l Religious Party v. Speaker of the Knesset (HAMAFDAL) 57(1) PD 710, 716 [2002] (Isr.) (justifying the court's decision to reject public-sector appointments while allowing peace negotiations during caretaker period).

1. Distinguishing Signing from Ratification

In allowing caretaker governments to negotiate for peace, the Israeli Supreme Court in effect relied upon the distinction prevailing in contemporary international law between the stages of signing and ratifying international agreements. While in the past it was enough to sign a treaty, the presumption today is that all treaties must be ratified before they become binding by international law.[198] The law changed largely due to the development of democracy and the principle of separation of powers. Historically, the negotiators were the representatives of the Crown, carrying out its orders, and international law did not anticipate a discrepancy between the positions of the ruler and the treaty signatories.[199] In modern times, with the separation of powers, it became apparent that the executive conducting international negotiations might not represent the opinions of the legislature.[200] Therefore, the gap between signing and ratification serves the need for efficient negotiations subject to the veto power of the legislature, as required by the constitutions of many countries.[201]

It should be noted that oftentimes the treaty is both signed and ratified by the executive for purposes of international law, even when the internal law of the country requires its ratification by the legislature.[202] In the latter case, however, before the treaty is ratified by the executive for international law purposes, the executive requests the consent of the legislature as prescribed in the internal law.[203]

2. The Significance of Signing

Does this legal focus on ratification imply that the signing stage is of little consequence? Theoretically, international undertakings

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198. *See, e.g.*, Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007) (noting that under modern practice, signature alone is insufficient to manifest consent to be bound by a treaty).

199. *Id.* at 313–14 (emphasizing that monarchs "had the authority to unilaterally bind their nations to treaties").

200. *See, e.g.*, John Eugene Harley, *The Obligation To Ratify Treaties*, 13 AM. J. INT'L L. 389, 392–93 (1919) (considering the legislature's obligation to ratify a treaty, and the possibility that the legislature will refuse to do so, once the executive has signed it).

201. *See id.*; *see also* Bradley, *supra* note 198, at 308 (discussing the tension in the United States between unilateral executive treaty powers and the Senate's constitutional veto power).

202. *See, e.g.*, Bradley, *supra* note 198, at 308 (discussing how unilateral executive action is in conflict with Article II of the Constitution, which requires "the advice and consent of two-thirds of the Senate").

203. *See, e.g.*, CrimA 131/67 Kamiar v. State of Isr., 22(2) PD 85, 120–23 [1968] (Isr.).

could be shirked by nonratification. Indeed, many countries have not ratified the agreements they signed.[204] Nonetheless, this Article argues that it would be wrong to diminish the importance of signing international agreements for several reasons. First, the distinction between the two stages, signing and ratification, primarily applies to multilateral treaties, in which a country is only one of many players.[205] It thus has less bargaining power, especially if it is not an influential state, and it must go home with the proposed draft of the agreement and obtain the approval of the relevant internal institutions, primarily the legislature.

The distinction between the stages in bilateral treaties is more problematic. If the country is dissatisfied with the treaty, it has the prerogative to refuse to become a party to it from the outset. International law recognizes the duty of good faith as a core duty,[206] which means that a country should not sign a treaty when the executive knows that it does not have legislative support to ratify it.

Second, the signing stage per se creates an interim obligation under international law. In accordance with the Vienna Convention, which enjoys the status of customary international law, at the stage between the signing and ratifying, "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty."[207] This obligation is established only at the interim stage and can be stipulated otherwise in the treaty itself.[208] Moreover, this obligation becomes void if the state indicates that it does not intend to ratify the treaty.[209]

Yet, the very interim obligation gives legal effect to the act of signing an international agreement. In order to avoid these interim obligations, George W. Bush used the unprecedented tactic of "unsigning" the Rome Statute.[210] Interestingly, President Clinton was criticized for signing the Rome Statute as a lame duck.[211]

Third, the final draft of the agreement is usually formulated at the signing stage. After that, ratification is mostly a binary all-or-

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204. *See, e.g.*, Swaine, *supra* note 18, at 2064 (discussing a phenomenon common in the United States and elsewhere whereby the executive signs a treaty or other international agreement that is never subsequently ratified by the legislature).

205. *Id.* at 2088; *see also* Joanna Harrington, *Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament*, 50 MCGILL L.J. 465, 472 (2005) (stating that with bilateral treaties, the tasks of signing and ratification are done in a single procedure, whereas with multilateral treaties, there is a clearer distinction between the two processes).

206. Vienna Convention, *supra* note 18, pmbl. (noting that the principle of good faith is universally recognized).

207. *Id.* art. 18.

208. *Id.* art. 18, 19.

209. *Id.* art. 18(a).

210. Swaine, *supra* note 18, at 2061.

211. *Id.* at 2085–86 (suggesting that President Clinton's "hasty signature" during his lame-duck period indicated "shallow engagement").

nothing decision, particularly in the case of bilateral agreements.[212] Of course, if the government knows that it needs legislative approval to ratify a treaty, the legislature's position will have already influenced the content of the agreement.[213] This assumption, however, is problematic in light of the considerations presented below.

Fourth, a decision by the legislature to not ratify an international treaty, which was signed by the government, may damage the state's international reputation and its ability to conduct negotiations in the future, especially bilateral agreements. Therefore, the legislature sometimes approves an international agreement that it would otherwise not have agreed to.[214]

Fifth, the damage to a state's international reputation stemming from a decision not to ratify may be detrimental to its relations with the other contracting state(s). In extreme cases, failure to ratify might also lead to formal or informal sanctions by the international community. This situation is especially relevant when the signatory is a small country and the agreement has major implications for other states.[215]

It is no coincidence that noted writers on the powers of transitional governments caution that these governments must exercise restraint, especially when conducting foreign affairs.[216] In particular, governments must act in cooperation with the legislature in this sensitive area, which calls for stability and continuity. The

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212. Under the Vienna Convention, a state may only enter a reservation upon signing the treaty. Vienna Convention, *supra* note 18, art. 19. Such reservations are possible if they are not explicitly forbidden in the treaty itself, and if the reservation does not preempt and void the intent and purpose of the treaty. *Id.* The Convention further states that with treaties dealing with a small number of signatories in which it is evident that the purpose and design of the treaty is meant for it to apply fully to all the signatories, the concession of the additional signatories may be required in order for a state to enter a reservation. *Id.* art. 20.2.

213. *See* LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION 53–80 (2000) (providing an empirical analysis of U.S. treaties and executive agreements, finding that the legislature influences international cooperation in numerous ways).

214. For a discussion about the complex dynamics between the legislative and executive branches in the formation of international treaties, see *id.* at 3–80 (analyzing legislative influence).

215. *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1863–64 (2002) (discussing the reputational harm that can come even to large countries when their legal foreign policy actions have adverse implications for other states).

216. *See, e.g.*, Combs, *supra* note 19, at 334–35 (discussing the limitations that lame-duck status should have upon a president's power to conduct foreign affairs); Nagle, *supra* note 2, at 340 (proposing that lame-duck actors should be denied the power to take irrevocable actions); Phair, *supra* note 16, at 2–5 (outlining the constitutional constraints that ought to apply with regard to a lame-duck president).

ability of a country to advance its interests is dictated to a large degree by its reputation for reliability.[217]

This position is also supported by the fact that there is an inherent tension between international law and the basic tenets of democracy. While democracy usually enables the majority to change its statutes (subject to its constitution), under international law a contracting party may not unilaterally retreat from its obligations, even if there has been a change of government in its country.[218] Therefore, great care must be taken to ensure that the caretaker government does not overstep its authority, particularly in the realm of foreign, as opposed to internal, affairs. While a new government has many tools to overturn recent decisions in the realm of internal affairs, they are less available when it comes to the conduct of foreign affairs.[219]

Thus, the Israeli Supreme Court's distinction—between public-sector appointments, which it treats as final, and international agreements, which it treats as provisional because they may be subject to the legislature's approval—is not convincing. All of these arguments support a decision by the Israeli Supreme Court to restrain caretaker governments from engaging in international negotiations. This Article now examine whether the Israeli peace process may suggest a different conclusion.

3. The Israeli Peace Process

In the context of an Israeli peace treaty, how would these considerations be expressed? Had the peace treaty discussed in *Weiss* been signed, it would have been difficult for the Knesset to extricate itself from the bilateral agreement, both for fear of damaging its reputation and because of the possibility of international sanctions. "Unsigning" the treaty would likely have further eroded its relations with the Palestinian Authority. It is therefore questionable that making the ratification of the agreement subject to its approval by the Knesset would have been enough to overcome the legitimacy problem of having a caretaker government that did not enjoy the confidence of the Knesset negotiate and sign the peace agreement.

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217. *See* Beermann & Marshall, *supra* note 8, at 1281–82 (examining the impact that reliability plays in the ability of the United States to conduct foreign policy).

218. *See* Combs, *supra* note 19, at 329–40 (discussing the fact that subsequent administrations must abide by obligations made by prior administrations or the country will be in breach of international law).

219. *See id.* ("[I]ncoming Presidents, at least in theory, do not have the range of responses [available in domestic policy] . . . to limit or eliminate their predecessor's foreign affairs' commitments.").

Moreover, the reality of peace talks in the Middle East is such that negotiations often begin where previous talks ended.[220] Thus, for instance, Attorney General Elyakim Rubinstein warned Prime Minister Barak's government in early 2001 that it was inappropriate to conduct negotiations during a transition period.[221] According to him, Israel's experience in reaching tentative understandings in negotiations is that "'an understanding once reached cannot be taken back', meaning it is very difficult to go back on something perceived as a concession in the negotiations."[222] It should be emphasized that the warning was given regarding the very same peace negotiations that were at issue in *Weiss*. Similarly, more recently, President Obama made it clear to Prime Minister Netanyahu that "[w]e won't start the negotiations from scratch, we will not take the historical record and toss it aside."[223] According to the same source, "There's an historical record of all past negotiations."[224] It is therefore important that Israel's negotiators have a mandate from the electorate to negotiate.

Furthermore, under Israel's law, once the Israeli Government has ratified a treaty, it becomes binding upon the State of Israel under international law, even if the Knesset opposes the treaty.[225] Israel has also stated this policy in a written declaration to the United Nations:

> (A) [T]he legal power to negotiate, sign and ratify international treaties on behalf of Israel is vested exclusively in the government of Israel and is in the charge of the Minister for Foreign Affairs; (B) where the Knesset has given its approval to the ratification of the treaty, the act of ratification is signed by the President of the State.[226]

The language of Basic Law: The President of the State provides that the President "shall sign such treaties with foreign states that have been ratified by the Knesset."[227] However, the government and

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220. *See* ITAMAR RABINOVICH, WAGING PEACE: ISRAEL AND THE ARABS 1948–2003, at 152 (2004) (providing that the Israelis and the Palestinians both knew that, once a concession was made or an idea was placed on the table, it could not be undone, even if they were "formally" withdrawn from the table).

221. Press Announcement: Elyakim Rubinstein Does Not Recognize Right of Government To Conduct Critical Negotiations with Palestinians, NEWS1 (Jan. 1, 2001), www.news1.co.il/Archive/0019-D-60-00.html?tag=12-49-54.

222. *Id.*

223. Natasha Mozgobyea & Barak Rabid, *Obama Strongly Expressed His Impatience to Netanyahu and Abbas*, HAARETZ (Sep. 23, 2009, 1:52 AM), http://www.haaretz.com/print-edition/news/source-obama-strongly-expressed-his-impatience-to-netanyahu-and-abbas-1.7435.

224. *Id.*

225. CA 131/67 Kamiar v. State of Isr. 22(2) PD 85, 97 [1968] (Isr.); *see* RUBINSTEIN & MEDINA, *supra* note 33, at 914–24.

226. *See Kamiar* 22(2) PD at 104.

227. Basic Law: The President of the State, 5724, SH No. 428 p. 118, § 11(5) (Isr.).

ensuing judicial decisions interpreted this provision as requiring the President to sign the treaty only when the government requested the Knesset's approval and such legislative approval was de facto granted.[228] The provision was not interpreted to require the consent of the Knesset as a precondition for ratifying treaties. This is the representation that Israel made to other states with which it was conducting negotiations.[229]

Therefore, changing the law concerning negotiations with the Palestinian Authority to require the Knesset's approval as a precondition for the agreement to be internationally binding would have required Israel to explicitly declare this to the other party, and perhaps also to the UN institutions, during the negotiations stage in order to satisfy its duty of good faith in conducting negotiations. A declaration before the High Court of Justice that the government of Israel will make the validity of the agreement contingent upon Knesset's approval is not enough.[230] Yet, the court in *Weiss* did not require that the government notify the other party or the UN institutions of the need for the Knesset's consent as a precondition for the agreement's international validity.

The court also did not make the validity of a signed agreement conditional upon the approval of the *incoming* newly elected Knesset and government. Therefore, one could imagine an agreement that was signed by a caretaker government, with its narrow mandate, and was further ratified by an outgoing Knesset, which also had a narrow mandate.[231]

Moreover, even when the Attorney General in *Weiss* attempted to stipulate in the agreement, if reached, that "the agreement's validity depended upon approvals prescribed by internal law," it would have been for naught, since internal law does not require the Knesset's approval to give effect to an international agreement in the international realm.[232]

In fact, it is not even clear that an agreement needs to be approved by the Knesset for it to become effective under internal law. The court in *Weiss* declined to opine on whether constitutional custom

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228. *See Kamiar* 22(2) PD at 96, 103–05.

229. *See* Gilad Noam, *Treaty Making in Israel: The Applicable Law, in* THE AUTHORITY TO ENTER INTO TREATIES IN THE STATE OF ISRAEL: A CRITICAL ANALYSIS AND REFORM SUGGESTION 31, 31–47 (Moshe Hirsh ed., 2009), *available at* law.huji.ac.il/upload/Treaties.doc.

230. On the importance of informing the other parties, see, for example, *Kamiar* 22(2) PD at 126–29; Bradley, *supra* note 198, at 334–35 (discussing the impact of the United States' unsigning of the International Criminal Court treaty); Noam, *supra* note 229, at 38.

231. On the legitimacy difference between an incoming and an outgoing legislature, see *infra* Part V.B.2. *See also supra* note 119 and accompanying text.

232. *See supra* text accompanying notes 225–27 (discussing the relationship between the Knesset and the government regarding international treaties).

requires that peace treaties involving territorial changes be ratified by the Knesset.[233] Existing legislation does require the Knesset's approval for territorial changes, but only with regard to territories governed by the law, jurisdiction, and administration of the state (i.e., not including Judea and Samaria, or as commonly termed, the West Bank).[234] In this spirit, the court in the *Livnat* case did not interpret *Weiss* as contemplating the additional step of ratification by the Knesset.[235] At the same time, as far as constitutional rights of citizens may be compromised as a result of the peace treaty, this constitutional infringement would have to be authorized by statute.

In summary, it is doubtful whether making the validity of a peace treaty conditional upon the Knesset's approval can remedy the basic flaw of a caretaker government, without the Knesset's confidence, engaging in peace talks. The very acts of negotiating and signing the agreement have weighty implications. For example, they affect: (1) Israel's reputation and its ability to engage in future negotiations; (2) whether international sanctions will be imposed if

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233. *See* HCJ 5167/00 Weiss v. Prime Minister of Isr. 55(2) PD 455, 468 [2001] (Isr.) (stating that evidence was insufficient to establish the existence of a constitutional custom). For an opinion that such custom does exist, see generally Shimon Shetreet, *The Role of The Knesset in Treaty Making*, 36 HAPRAKLIT 349 (1986).

234. See The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) Act, 5759–1999, SH No. 1703 p. 86, § 2 (Isr.), which states: "Any decision by the government according to which the Law, Jurisdiction and Administration of the State of Israel shall no longer apply to a territory requires the approval of the Knesset attained by a majority of its members." Thus, such a decision must be backed by a sixty-one-vote majority. This law only applies to the areas to which Israel extends its jurisdiction and legal system, and therefore does not apply to the territories of Judea and Samaria that were never formally annexed to Israel. *See* HCJ 1661/05 Reg'l Municipality of Gaza Beach v. Knesset 59(2) PD 481 [2005] (Isr.). Recently, the Knesset enacted The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) (Amendment) Act, 5771–2010, SH No. 2263 p. 58 (Isr.), in which it requires that a referendum be held before the elected bodies decide to relinquish territory that is annexed to Israel. If at least eighty Knesset members support the relinquishment of territory, then the requirement to hold a referendum may be ignored. In December 2010, Dr. Mohammed S. Wattad filed a petition with the Israeli Supreme Court challenging the constitutionality of the referendum process on the grounds that, inter alia, the process undermines the constitutional authority of the elected bodies, as provided for in the Basic Laws. As such, the referendum process should have been introduced in a Basic Law rather than in a regular statute. The content of the petition (No. 9149/10) is available at http://humanrights.org.il/main.asp?search=משאל. For a different opinion, see Weill, *supra* note 62, at 382–84 (stating that "[t]he claimant's arguments are contrary to the concept of popular sovereignty, which would demand that the People be allowed to express their opinion on fundamental constitutional issues"). It should also be noted that, the Basic Law: Jerusalem, Capital of Israel requires a majority of sixty-one votes in the Knesset to approve the transfer of any sovereign power in Jerusalem. Basic Law: Jerusalem, Capital of Israel, 5740–1980, SH No. 980 p. 186, §§ 6–7 (Isr.). It will also require amending the Basic Law. *Id.* § 7.

235. *See supra* Part III.A.2 (discussing the *Livnat* decision).

the agreement is not ratified; (3) whether the Knesset must vote on the agreement en bloc, without being able to address its content; (4) the duty of good faith in conducting bilateral negotiations; and (5) any interim obligations that apply by international law upon signing the agreement.

B. *The Mandate Issue*

It follows from the judicial decisions that the court was, in fact, more stringent in protecting the people's ability to exercise its will over public-sector appointments than it was with regard to peace talks. This Article now examines the importance of the mandate in each of these categories and whether it justifies distinguishing between peace negotiations and public-sector appointments.

1. Peace Negotiations

The Israeli Supreme Court defined Israeli democracy as one requiring, inter alia, that "decisions fundamental to citizens' lives must be adopted by the legislative body which the people elected to make these decisions. Society's policies must be adopted by the legislative body . . . ."[236] The court emphasized that "[t]he desire to preserve the elevated status of the Knesset is of general application"[237] and is not confined to the nondelegation doctrine.[238]

This approach has even greater applicability in decisions involving territorial changes. Relinquishing governmental authority and territorial changes are considered constitutive acts that require special approval from the People.[239] In Israel, in contrast, referenda

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236. HCJ 3267/97 Rubinstein v. Minister of Def. 52(5) PD 481, 508 [1998] (Isr.).

237. *Id.* at 511.

238. The Israeli Supreme Court developed the nondelegation doctrine, under which certain decisions must be made by the Israeli legislature rather than by the executive branch. The court utilized this doctrine to strike down certain regulations and government decisions, explaining that they are too important to be made by the executive branch and must be decided instead by the Knesset. *See, e.g., id.* at 490–531 (applying the doctrine to actions concerning deferrals and exemptions from military service). So far, the court did not use the nondelegation doctrine to strike down a statute as granting too broad a discretion to the executive branch, though this may happen in the future. *See* Rivka Weill, *Did the Lawmaker Use a Canon To Shoot a Flea? On Proportionality in Law,* LAW & BUS. J. (forthcoming).

239. *People* with a capital *P* is used in instances in which the People are involved in a dualist constitutional moment. I follow Ackerman's terminology in this regard. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–33 (1991) (utilizing the term *People* with a capital *P* to describe those involved in a constitutional moment). Regarding the need to involve the People in territorial and sovereignty changes, see A.V. DICEY, ENGLAND'S CASE AGAINST HOME RULE 71–100 (1886) (discussing the need to obtain the People's consent as a precondition for Home Rule for Ireland). For a similar argument, see also A.V. DICEY, A LEAP IN THE DARK OR OUR NEW CONSTITUTION

or direct appeal to the People have until now not been de facto exercised.[240] Furthermore, most of the territory that is the subject of negotiations with the Palestinians has never been annexed to the territory of the State of Israel, nor is it governed by the law, jurisdiction, and administration of the state.[241] It is treated under Israeli law as territory under "belligerent occupation" and not under the sovereignty of the state.[242] Thus, relinquishing control over these territories does not require the People's consent in a referendum under Israeli law.[243]

At the same time, since citizens of Israel have settled in parts of the territory with the government's cooperation (or with its turning a blind eye), it is necessary that the Knesset be a full partner in processes that could prejudice the constitutional rights of citizens and inhabitants.[244] This makes it problematic to empower a caretaker government to conduct such significant negotiations when it does not enjoy the Knesset's confidence. This is all the more applicable when the government adopts measures that the *Weiss* court acknowledged would spark fierce public debate, are a pivotal topic in elections, have led to the fall of the government, and about which the Knesset has already expressed its opinion against them.[245]

113–16 (1893); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., 1988) ("The People alone can appoint the Form of the Commonwealth . . . .").

240. *See* REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 4 (David Butler & Austin Ranney eds., 1994) (noting that referenda have not been utilized in Israel); *see also supra* note 234 (discussing recent legislation requiring that a referendum be held before elected bodies make binding decisions to relinquish territory annexed to Israel).

241. Israel officially applied Israeli law, jurisdiction, and administration to the Golan Heights. Golan Heights Law, 5742–1981, SH No. 1034 p. 6, § 1 (Isr.). East Jerusalem is officially part of Israeli territory, and Israeli law, jurisdiction, and administration applies with regard to it. In fact, this is part of Israel's constitutional law. *See* Basic Law: Jerusalem, Capital of Israel, 5740–1980, SH No. 980 p. 186, § 5 (Isr.) ("The jurisdiction of Jerusalem includes, as pertaining to this basic law, among others, all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem beginning the 20th of Sivan 5727"). Israel enacted no similar laws with regard to Judea and Samaria (the West Bank).

242. *See* HCJ 1661/05 Reg'l Municipality of Gaza Beach v. Knesset 59(2) PD 481, 514–16 [2005] (Isr.).

243. *See* The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) Act, 5759–1999, SH No. 1703 p. 86, § 2 (Isr.) (discussing when a referendum is required).

244. *See, e.g.*, HCJ 1661/05 Reg'l Municipality of Gaza Beach v. Knesset 59(2) PD 481 [2005] (Isr.). The Court in *Gaza Beach* decided that the coerced evacuation of Israeli citizens from Gaza was an infringement of their constitutional rights to property and dignity. Such infringement was however justified if compensation provisions were adequately provided for. The court found that the compensation granted was unconstitutional. It thus intervened and enlarged the compensation granted to those required to evacuate. *Id.*

245. *See, e.g.*, *supra* Part III.A (discussing the *Weiss* decision).

In addition to territorial changes, the conduct of foreign affairs in general is a subject that requires the executive to enjoy a mandate from the people. Thus, for example, Walter Bagehot wrote that in the parliamentary system a vote of no confidence is meant to force the replacement of a prime minister, especially when people are not happy with his or her decisions concerning foreign affairs.[246] Lori Damrosch suggested that the impeachment process could be similarly used against a president who prevents Congress from effectively overseeing the conduct of foreign affairs, thus materially breaching separation of powers principles.[247]

Does this requirement of restraint in foreign affairs during caretaker administrations serve right-wing ideology in Israel? This Article suggests that the answer is no. The duty of caretaker governments to exercise restraint is politically neutral, serving neither right- nor left-biased ideology. It prevents not only peace negotiations by caretaker administrations, but also midnight actions of the right. For example, a petition was filed against a preelection decision of Prime Minister Netanyahu in 1999 to close the Orient House in East Jerusalem.[248] It was argued that the decision was an attempt to indirectly influence the election's results. Moreover, it could have led to bloodshed in the city.[249] In response, the court issued a one-week injunction barring the closure of the Orient House, in effect granting the petitioners the final relief they sought, when elections were held that same week.[250]

One may also wonder whether the mirror image of conducting negotiations toward a peace agreement is waging war. The court in *Weiss* did indeed infer the government's authority to conduct peace negotiations from its authority to go to war.[251] Recently, Prime

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246. *See* WALTER BAGEHOT, THE ENGLISH CONSTITUTION 58–59 (2d ed. 1963) (discussing the great advantage of the parliamentary system over a presidential one as manifested in parliament's authority to oust the government if the government lost parliamentary support).

247. *See* Lori Fisler Damrosch, *Impeachment as a Technique of Parliamentary Control over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525 (1999) (offering that impeachment of the President may be used as the equivalent mechanism to a no-confidence vote in a parliamentary system when the President acts against congressional will in foreign affairs matters).

248. *See* HCJ 3123/99 Hillman v. Minister of Int'l Sec. (Nov. 5, 1999), Nevo Legal Database (by subscription) (Isr.).

249. *See* Maoz, *supra* note 33, at 93.

250. *See Hillman*, HCJ 3121/99. Maoz criticizes the court for reaching opposite results in the case of the Orient House (de facto acceptance of the political left-leaning petition) versus the case of negotiations towards a peace agreement (rejection of a petition from the political right). *See* Maoz, *supra* note 33, at 118.

251. The government is the executive branch of the State (section 1 of the Basic Law: the Government). Based on this power and additional powers given to it (see, for example, sections 40 and 41 of the Basic Law: the

Minister Olmert's caretaker government initiated a military campaign in Gaza known as Operation Cast Lead, which was the subject of the now-refuted Goldstone Report.[252] It could be argued that the timing of this campaign enjoyed indirect legitimacy by the *Weiss* decision.

Furthermore, even if these military operations were unavoidable, it was among the caretaker government's crucial tasks to seriously consider the propriety of carrying out the campaign as a caretaker. The lack of public debate about the authority of Prime Minister Olmert's caretaker government to undertake Operation Cast Lead, along with bold statements of Prime Minister Begin about seizing the caretaker period to bomb the nuclear reactor in Iraq in 1981,[253] suggest that considerations inhibiting actions by caretaker governments are not part of the current political culture. It should be noted, however, that in the end, Operation Cast Lead had the consent of the opposition and was therefore not controversial.[254] This mitigates the difficulty of conducting this action during a caretaker period.

To conclude, the principle of restraint in the actions of caretaker governments in foreign affairs should be applicable to both peace negotiations and the conduct of military operations. The principle is thus politically neutral and does not a priori benefit either side of the political spectrum.

How then can the *Weiss* ruling be explained in the context of the mandate? A distinction can be drawn between the *Weiss* ruling and the *Livnat* ruling, although both deal with conducting international peace negotiations during a caretaker term. The *Weiss* ruling involved a caretaker government headed by a prime minister elected through direct elections.[255] During that era, the Israeli system of government was a fusion of a quasi-parliamentary and a quasi-presidential system.[256] Therefore, the Prime Minister enjoyed a separate mandate from the electorate—one that competed with the mandate that the Knesset received in elections. Hence, even though the government lost its parliamentary majority and arguably even

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> Government) it is empowered to administer the foreign and defense policies of the State.

HCJ 5167/00 Weiss v. Prime Minister of the State of Isr. 55(2) PD 455, 471 [2001].

252. *See generally* Goldstone Report, *supra* note 22 and accompanying text.

253. *See supra* note 23 and accompanying text.

254. *See* Ronen Leivoviwz & Raviv Druker, *The Right Wing Parties Oppose the Cease-Fire: The Rockets Will Reach Tel Aviv*, NANA10 (Jan. 17, 2009), news.nana10.co.il/Article/?ArticleID=610288.

255. *See supra* note 65 and accompanying text (explaining that Israel has a parliamentary system with the exception of the years 1996–2003, in which direct elections of the Prime Minister were held).

256. *See* RUBINSTEIN & MEDINA, *supra* note 33, at 822–23.

the confidence of the Knesset, one may contend that the Prime Minister still enjoyed a separate direct mandate from the electorate during the preelection period that had not yet been repudiated. This direct mandate enabled the administration to continue to conduct negotiations with the Palestinians, notwithstanding its caretaker status. Similarly, in the United States, it is customary for the outgoing president to have full presidential power until elections because U.S. presidents are elected by the people and enjoy an independent direct mandate.[257] From this standpoint, the *Weiss* ruling could have been justified, although the justices in *Weiss* did not offer this justification.

The *Livnat* ruling, on the other hand, was delivered in December 2008, after direct elections of the Prime Minister were repealed and a purely parliamentary system was restored. Under this system, once the government loses the confidence of the Knesset, it does not have a separate direct mandate from the electorate. It would therefore be improper to conduct negotiations, especially those having fateful consequences on the nation's future. Yet, the court in *Livnat* did not note this distinction and did not arrive at an outcome different from *Weiss*, even though this key difference logically leads to divergent holdings.

2. Public-Sector Appointments

The court took a much stricter stand on the issue of public-sector appointments. It entirely banned them, even when the government (regardless of its caretaker status) was prohibited from intervening in the appointment, and thus there should have been no reason to prohibit the appointment during the caretaker period.[258] This Article asserts that the legitimacy of public-sector appointments made during caretaker tenure should depend on the degree of governmental influence on the appointment. When the government does not control a majority of the appointing body, the legislature seems to have expressed the view that the appointment is apolitical. In such cases, it is doubtful whether the appointment should be put on hold during the term of a caretaker administration.

For example, the date on which a chief rabbi can be appointed is dictated by statutory provisions and not subject to the arbitrary wish

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257. However, the democratic legitimacy of the President weakens after election and especially if the President's political party is defeated. *See, e.g.*, Ivo H. Daalder & James M. Lindsay, *Lame-Duck Diplomacy*, 24 WASH. Q. 15, 23 (2001) (discussing the coordination between the Bush and Clinton Administrations during the transition of power).

258. *See supra* Part III.B (discussing prohibitions on public-sector appointments during caretaker periods).

of an outgoing government.[259] Moreover, the Knesset and the government do not hold a majority on the committee that makes the appointments, which is done by secret ballot.[260] In contradiction to the court's stance, it is thus doubtful whether caretaker status should prevent the appointment of chief rabbis. Yet, it is not enough to rely only on the statutory language. If the government and the Knesset have de facto decisive influence on the appointment despite the legal appearance of lacking it, it should be deferred during caretaker periods.[261]

As for the restriction on judicial appointments by caretakers, a similar argument was raised in the United States during the first term of President Bush. Bruce Ackerman argued that, since the presidential race remained undecided and the Supreme Court halted the Florida recount, Bush did not have a mandate to appoint justices to the U.S. Supreme Court.[262]

When the system of appointment is political, as it is in the United States, it is problematic to appoint justices during a caretaker or lame-duck government. As discussed, the renowned *Marbury v. Madison*[263] case was sparked by the infamous decision of incoming Thomas Jefferson to revoke last-minute appointments made by his predecessor, John Adams, during the lame-duck presidency.[264] Adams made those rash last-minute appointments to gain control of positions of power beyond the period of his mandate.[265]

In Israel, whether judges can be appointed during the term of a caretaker government must be inferred, among other things, from one's perspective on the judicial-appointment system.[266] If it is believed that the appointment system is based on professional merit alone, as has been asserted by the Zamir public committee that dealt

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259. *See* Chief Rabbinate of Israel Law, 5740–1980, SH No. 965 p. 90, § 16 (Isr.).

260. *See id.* §§ 4, 7, 8.

261. For an analysis of the gap between the letter of the law and common practice regarding political influence on such appointments, see, for example, HCJ 6673/01 Movement for Quality Gov't in Isr. v. Minister of Transp. 56(1) PD 799, 815 [2001] (Isr.).

262. *See* Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48 ("To allow this president to serve as the Court's agent is a fundamental violation of the separation of powers.").

263. 5 U.S. (1 Cranch) 137 (1803).

264. *See supra* Part III.B.4 ("President Thomas Jefferson, who followed Adams, treated these last minute appointments as illegitimate and attempted to undo them through various drastic measures.").

265. *See supra* Part III.B.4 ("Adams intended to pack the judiciary with judges who were affiliated with or identified with the Federalists in the face of the already-known Republican electoral takeover of both the presidency and Congress.").

266. For the composition of the Judicial Appointment Committee, see *supra* note 132 and accompanying text.

with the subject, then there is no need to delay the appointment.[267] On the other hand, if the appointment committee is de facto significantly driven and swayed by politicians, making its activities politically motivated, then the appointment should be postponed until after elections.

To conclude, from a democratic point of view, it seems that the far-reaching implications of peace treaties on citizens' lives and on national security far outweigh the importance of appointing chief rabbis and even Israeli Supreme Court justices. Where peace treaties are concerned, more so than with public-sector appointments, it is vital that government actions represent the opinion of the people. Moreover, when the Knesset and the government do not have decisive influence on the appointment, the justification of delaying the appointment is questionable, even during the term of a caretaker administration. It may cause unnecessary paralysis in state affairs.

C. *The Justiciability Issue*

It may be argued that justiciability offers another possible explanation for the judicial decisions that distinguish between peace talks and public-sector appointments. According to this explanation, the Israeli Supreme Court declines to intervene in peace negotiations because it views the issue as one in which the executive branch has a very broad scope of discretion.[268] It is therefore hard for the court to find a decision that falls outside this scope and is considered unreasonable. Consistent with the general Israeli judicial policy of treating virtually every subject as justiciable,[269] the court does not refer to peace negotiations as nonjusticiable. Yet, the results of its decisions show maximum self-restraint from intervening in issues related to national security and foreign affairs. Academics in the legal-realism camp will explain that there is greater political sensitivity and inherent danger in the court's intervention in peace negotiations than in public-sector appointments and that this explains the court's divergent treatment of the two.[270]

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267. *See* REPORT OF THE JUDICIAL APPOINTMENT PROCEDURE COMMITTEE 25 (2001).

268. *See* HCJ 10357/08, Legal Forum for the Land of Isr. v. Gov't of Isr., at 3 (Dec. 9, 2008), Nevo Legal Database (by subscription) (Isr.).

269. *See* HCJ 1635/90 Zharzhevski v. Prime Minister, 45 PD 749, 775 [1991] (Isr.); HCJ 910/86 Ressler v. Minister of Def., 42(2) PD 441, 474 [1988] (Isr.) ("Adjudication is characterized by determination between claims, whatever content."). One must, however, be mindful of evasive tactics that the court employs in order to avoid making decisions in particularly difficult cases. *See, e.g.*, Daphne Barak-Erez, *The Justiciability Revolution: An Evaluation*, 50 HAPRAKLIT 3, 3–27 (2008); Yoav Dotan, *Judicial Activism in the HCJ, in* JUDICIAL ACTIVISM: FOR AND AGAINST 65–68 (Gavison et al. eds., 1990).

270. *See* Barak-Erez, *supra* note 269, at 10.

In other parliamentary systems, it is indeed customary to treat the powers of a caretaker government as being nonjusticiable or falling within the realm of constitutional conventions that are not enforced by the courts.[271] But this attitude applies in these systems to *all* realms of caretaker activity. Given Israel's broad approach to justiciability, it is unlikely that peace negotiations by a caretaker would or should be singled out as nonjusticiable. Indeed, the assumption would be that, if the court does not intervene, it means the conduct is proper.[272] Moreover, the majority in *Weiss* did not reject the petition as nonjusticiable, but rather ruled that conducting peace talks twelve days before elections was "reasonable."[273]

Are there meaningful comparisons to peace negotiations in other areas of state activity? In petitions involving security matters that raise human rights infringements, the Israeli Supreme Court does not refrain from intervening only because national security is at stake. Rather, it examines whether the infringement of human rights is constitutional. The court, for example, intervened on issues concerning the mode of conducting war, including the issue of targeted killings and the use of human shields.[274]

This Article argues that the court should perform a similar supervisory function with regard to caretaker governments' discretion to conduct peace negotiations. The court in *Weiss* and *Livnat* was not called upon to express its opinion on the content of the negotiations, but on their timing. Judicial supervision of caretaker activity is needed not only to demarcate the constitutional powers enjoyed by the different branches of government, but also to preserve the heart of the democratic process—the right of the people as a collective to determine its arrangements on peace and security matters and the individual right of each member of the political society to vote and decide on such matters.[275] These rights are infringed when a

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271. *See* Beermann & Marshall, *supra* note 8, at 1270 ("There are no cases addressing presidential duties and obligations with respect to transition, and even if a legal dispute developed, it is likely that a court would find it nonjusticiable."); Davis et al., *supra* note 4, at 11, 12 (indicating that Australian caretaker governments are regulated by conventions, which are not enforceable by the courts).

272. *Cf.* Thayer, *supra* note 104, at 155–56 (warning against expansion of judicial oversight of government as it may shift responsibility to the courts instead of the elected branches).

273. *See supra* Part III.A.

274. *See* HCJ 769/02 Public Comm. Against Torture in Isr. v. Gov't of Isr., 57 (6) PD 285, ¶¶ 51–54 [2006] (Isr.) (targeted killings); *see also* HCJ 3799/02 Adalah v. Cent. Commander of IDF, 60(3) PD 67, ¶¶ 5–7, 25 [2005] (Isr.) (human shields).

275. In other cases, the court stated that it perceives the preservation of the democratic character of the state as its core function and a principle so important that even a "Basic Law" will be powerless to abolish democracy or materially change it. See, for example, HCJ 6427/02 Movement for Quality Gov't v. Knesset, ¶ 74 (Barak, President), ¶ 28 (Cheshin, Deputy President) (May 11, 2006), Nevo Legal Database (by

caretaker, rather than a regular, government decides war and peace issues. Furthermore, judicial review in this sphere of activity strengthens democracy, in John Hart Ely's terms, rather than being counter-majoritarian.[276]

Judicial supervision of caretaker activity in foreign affairs matters will align with recent calls made by experts on international law that courts exercise judicial review over the conduct of foreign affairs in general, and the transfer of sovereign powers in particular.[277] These experts suggest that there is real concern that the executive will increase its power at the expense of the legislature by regulating matters through international agreements, which previously were regulated by domestic legislation.[278] If the executive takes action in these areas without approval from the legislature, this could create a severe "democratic deficit."[279]

It should also be emphasized that, in the Israeli context, the Knesset has no effective means of supervising the exercise of authority by a caretaker government. It cannot "fire" a government that is already a caretaker.[280] Even a reprimand by the Knesset does not obligate the government to follow the Knesset's mandates.[281] Furthermore, particularly when international negotiations are involved, the supervisory power of the Knesset is limited. Without active and volitional reporting by the government to the Knesset, the latter cannot know what precisely is going on in the negotiations room. It is therefore vital that a government conducting negotiations, at minimum, be one that enjoys the confidence of the Knesset, not a caretaker government.

This Article concludes that the various arguments which can be used to explain the judicial policy of not intervening when caretakers conduct peace negotiations as opposed to public-sector

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subscription) (Isr.) (regarding the application of Israeli compulsory military service laws to Yeshiva students).

276. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (advancing a theory that justifies judicial review only when it serves to enhance the democratic process, such as promotion of equality, free speech, the supervision of the election process, and protection of minorities rights).

277. *See, e.g.*, Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004) (discussing the institutional characteristics of the judicial branch and how they should affect the judicial role in supervising issues of foreign affairs).

278. *See, e.g.*, Tomer Broude, *Entering into Treatises in the State of Israel—From Theory to Practice*, *in* TREATY MAKING AUTHORITY IN THE STATE OF ISRAEL: CRITICAL ANALYSIS AND PROPOSALS FOR REFORM 48–77 (2009); Barak Medina & Yuval Shani, *Division of Authority in the Process of Entering into an International Treaty by the State: Basic Principles*, *in* THE AUTHORITY TO ENTER INTO TREATIES IN THE STATE OF ISRAEL, 5–30 (Moshe Hirsh ed., 2009), *available at* law.huji.ac.il/upload/Treaties.doc.

279. *See* sources cited *supra* note 278.

280. *See supra* Part II.B.

281. RUBINSTEIN & MEDINA, *supra* note 33, at 747. For a different opinion, see Yoram Danziger, *Strengthening the Status of the Knesset Decisions—How?*, 34 HAPRAKLIT 212 pt. I, 413 pt. II (1982).

appointments—(1) the reversibility of the decision, (2) the importance of representing the electorate opinion on the subject, and (3) the issue of justiciability, including whether there are alternative mechanisms of review—all demonstrate that the court's intervention is actually warranted, particularly when peace negotiations are concerned. Furthermore, judicial intervention is even more warranted in peace negotiations than in public-sector appointments. The lack of uniformity in the judicial results is tantamount to inconsistency. It may also contribute to the creation of a political culture that gives caretaker governments carte blanche to make long-term historical decisions that are the subject of fierce public controversy.

Those who are not willing to see the court intervene so boldly in international affairs can at least agree that the court must declare the issue explicitly nonjusticiable, a route the court has refused to take. By declaring the issue nonjusticiable, the court at the very minimum would have refrained from casting legitimacy to caretaker action. This in turn would have left the government exposed to public criticism.[282]

In the next Part, this Article suggests that the Israeli jurisprudence on caretaker action should not lead to the conclusion that judicial review of caretaker action is unfeasible or not desired. Rather, properly designing the law that applies to caretaker action may lead to better judicial results, while also achieving the sanguine goals of enhancing democracy and diminishing extraneous decisions by caretaker governments.

V. GENERAL PRINCIPLES OF THE DESIRED LAW

The conflicting results in Israeli Supreme Court jurisprudence should not lead to the conclusion that caretaker activity cannot be regulated. Rather, the experience of other parliamentary systems with caretaker conventions suggests that proper guidelines may contribute to a healthier functioning democracy, if these conventions are obeyed. If they are not or those conventions do not develop, then this Article argues that the judicial system should step in and enforce restraint on caretaker activity.[283]

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282. Interestingly, there are those who argue that the courts should supervise a decision of the government to hold a no-confidence vote and hold early elections. *See* Raymond Youngs & Nicklaus Thomas-Symonds, *The Problem of the 'Lame Duck' Government: A Critique of the Fixed-Term Parliaments Act*, PARLIAMENTARY AFF. (2012).

283. *See* JOHARI, *supra* note 1, at 140. In fact, already in 1975, an unofficial committee on electoral reforms in India proposed that "[a] convention backed by legal sanction should be developed" that restricts the actions of caretaker governments. *Id.*

Interestingly, in India, the President fulfills a special supervisory role during transitional periods and ascertains that caretaker governments do not exceed their limited mandate.[284] In regular times, in contrast, the President must follow the advice of his ministers because they enjoy the legislature's confidence and he holds only a rather symbolic role, much like the Crown in Britain.[285] This special guardian role of the President at times of caretaker politics received the assent of the Calcutta High Court.[286] The Court stated:

> There is no mention of any care-taker Government as such, in our Constitution or in the constitutional law . . . . But an extraordinary situation like the present, in my opinion, calls for a care-taker Government and therefore, the respondent No. 1 [Prime Minister] and his Council of Ministers can only carry on day-to-day administration in office which are necessary for carrying on "for making alternative arrangements". In effect the President, in my opinion is therefore, not obliged to accept the advice that the respondent No. 1 and his Council of Ministers tender to him except for day-to-day administration and the Council of Ministers and the respondent No. 1 should not make any decisions which are not necessary except for the purpose of carrying on the administration until other arrangements are made. This in effect means that any decision or policy decision or any matter which can await disposal by the Council of Ministers responsible to the House of People must not be tendered by the respondent number 1 and his Council of Ministers. With this limitation the respondent No. 1 and the Council of Ministers can only function. And in case whether such advice is necessary to carry on the day-to-day administration till "other arrangements are made" or beyond that, the President, in my opinion, is free to judge.[287]

The discussion should thus focus on the proper design of the law applicable to caretaker activity. This Article rises to this challenge by showing where the Israeli Supreme Court could have adopted a better law and why such law would have reached better results.

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284. *See id.* at 142–45 (suggesting instructions the Indian presidential *communiqué* that dissolves the Lok Sabha, or lower house of Parliament, should provide to the caretaker government, including to avoid important policy decisions, remain no more than three months, and hold free and fair elections); Saviprasad, *supra* note 5, at 398–99, 401 (discussing the Indian Constitution and caretaker governments); *see also* Shriniwas Gupta, *The President and Caretaker Government—A Modus Vivendi*, 7 CENT. INDIA L.Q. 27, 37–38, 404–05 (1994) (arguing that there is a need to amend the Indian Constitution to clarify that the President is free to reject the advice of a caretaker government); Roy, *supra* note 5, at 94–102.

285. *See* JOHARI, *supra* note 1, at 142–45.

286. Madan Murari v. Charan Singh, (1980) A.I.R. 95 (Cal.) 95, 105–06 (1979) (India), *available at* http://judis.nic.in/supremecourt/chejudis.asp.

287. *Id.* The court handed down the decision on December 11, 1979. It should be noted that the Bulgarian Constitutional Court, too, played a role in this field. It issued an interpretive decision in 1993 regarding the powers of caretaker governments. *See* Hristo D. Dimitrov, *The Bulgarian Constitutional Court and Its Interpretive Jurisdiction*, 37 COLUM. J. TRANSNAT'L L. 459, 488–89 (1999) (exploring the value of ex ante guidance from the Constitutional Court at times of political volatility with reference to Decision 20/92, DV 1 (1993)).

Furthermore, this law may fit various jurisdictions dealing with the challenge of transitional governments. This law may be in the form of constitutional conventions that may even be codified in cabinet manuals. If constitutional conventions prove to not be strong enough to restrain governments, then the courts should step in and enforce these guidelines. Enforcing these conventions in courts will turn them into binding law.

A. *Regular-Course-of-Affairs Criteria*

The *Weiss* court rejected the criterion of "regular course of affairs" as a measurement for the legitimacy of caretaker activity.[288] This Article, however, proposes to employ it to explain instances when transitional governments do not need to act with restraint. The widespread approach among parliamentary legal systems is that caretaker governments must only deal with regular affairs, which aligns with their role as a "babysitter" until the newly elected government takes office.[289]

Contrary to the argument in the Berenson Committee Report that this test is inapplicable,[290] it has far-reaching practical implications in other areas of law, including corporate, tax, and property, especially when defining powers.[291] In these varying fields, the criterion of "regular course of affairs" evolved in judicial decisions on a case-by-case basis, while applying an "I know it when I see it" approach.[292]

This test is also consistent with the concept of democracy as expressed in judicial rulings in the nondelegation field that the *material* decisions in the life of the nation must be made by the elected legislature rather than the executive body.[293] Furthermore, it is a criterion used in corporate and property law to deal with situations where there is concern that an agent is abusing his or her

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288. *See supra* note 88 and accompanying text.

289. *See* Klein, *supra* note 4, at 282 (comparing Sweden and Austria, where caretaker governments have a limited mandate, to Israel, where the caretaker government has the same authority as an established government).

290. *See* BERENSON REPORT, *supra* note 59, at 6.

291. *See* Weill, *supra* note 2, at 1112 (asserting the value of the regular affairs limitation on caretaker governments, which is widely accepted in commonwealth countries).

292. This statement was made famous in the definition of pornography in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *See id.* at 197 (Stewart J., concurring).

293. *See* HCJ 3267/97 Rubinstein v. Minister of Def. 52(5) PD 481, 508 [1998] (Isr.); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317–19 (2000) (providing a brief history of the nondelegation doctrine).

powers, contrary to the interests of the principal.[294] These are situations that do go beyond "the regular course of affairs."[295] The test thus addresses both the agency difficulty and the democratic-deficit characteristic of caretaker and lame-duck governments. As such, it fits to regulate caretaker and lame-duck administration's activity.

To understand which actions are not in the regular course of affairs, this Article proposes the use of criteria set forth by courts in the context of the nondelegation doctrine.[296] If the criteria help to define the powers of a regular government in the context of the nondelegation doctrine, *a fortiori* they will help to set criteria for the operation of a transitional government. Of course, issues that a regular government may be authorized to handle under the nondelegation doctrine might nonetheless be outside the regular course of affairs for a transitional government. In other words, the criterion of the regular course of affairs must be more stringently applied to transitional governments.

It follows that any action cannot be deemed to be in the regular course of affairs for a transitional government if it fits any one of the following "risk" categories: it has long-term effects on entire public sectors or even society as a whole, it is the subject of fierce public controversy, it infringes constitutional rights, it is irreversible or hard to undo, or it is opposed by the legislature. Similar criteria for the operation of a caretaker government, though perhaps not as detailed and instructive, were applied in various countries, including in Canada, New Zealand, Australia, and the United Kingdom.[297]

Clearly, peace talks and major international agreements have all the characteristics of actions that are not in the regular course of affairs: (1) they have long-term effects on entire public sectors, or even society as a whole; (2) they are usually the subject of fierce public controversy, especially on the eve of an election; (3) they affect constitutional rights, especially if they entail the evacuation of citizens; and (4) they involve irreversible consequences. They should

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294. *See* Weill, *supra* note 2, at 1112 (applying legal scholars' concerns of the potential agency problems that can occur outside of the regular course of affairs to lame-duck governments).

295. *Id.*

296. *See* HCJ 6061/08 Israel v. Dep't of Agric., at ¶¶ 12–18 (Aug. 19, 2009) (Arbel, J.), Nevo Legal Database (by subscription) (Isr.); HCJ 11163/03 Arab Higher Monitoring Comm. v. Prime Minister of Isr., at ¶¶ 38–40 (Feb. 27, 2006) (Cheshin, Deputy President), Nevo Legal Database (by subscription) (Isr.); Weill, *supra* note 2, at 1113 (applying the animating principle behind the nondelegation doctrine—which requires certain fundamental decisions to be made by the legislature rather than the executive—to avoid the agency problems that could arise with a lame-duck government).

297. *See* Boston et al., *supra* note 3, at 632 (describing caretaker conventions in parliamentary systems where the caretaker government retains its legal authority but is expected to avoid "issues of significance").

not be conducted in caretaker or lame-duck periods. In contrast, the regular course of affairs encompasses some public-sector appointments, including some made on the eve of elections, especially when the appointments are not controversial and when the government has only minor weight in making the appointment. In those cases, there is no reason to paralyze the country's regular affairs. Thus, had the Israeli Supreme Court used the criteria for the regular course of affairs suggested, it may have reached more justified judicial decisions. The problem with the court's jurisprudence is not that the topic should be treated as nonjusticiable, but rather that the court did not apply the proper criteria to regulate caretaker action.

B. *Permitting Extraordinary Measures*

This Article further proposes that a transitional government should be empowered to take extraordinary measures—that is, actions falling outside the regular course of business—when there is a "vital public need for action" or when the incoming legislature has preapproved such extraordinary measures.

1. A Vital Public Need for Action

A vital public need for action occurs during emergencies, and the transitional government should be empowered to respond as any regular government, so long as there is a causal relation between its actions and the state of emergency.

The government should also be empowered to act in cases that fall short of an emergency. If, at the discretion of the government, it is vital to take an extraordinary measure, it must confer with the opposition and, if possible, adopt measures on which there is consensus. For example, during New Zealand and Australia's severe financial crises in the mid-1980s, the caretaker governments deferred to the dictates of the incoming governments on how to manage the crises when they depreciated the local currency.[298] Contrary to New Zealand and Australia's experiences, however, this Article argues that the incumbent government must confer with the opposition, but need not accept its dictates. After all, the final accountability for the action rests with the incumbent government. There is no recognizable constitutional institution as the government-elect or president-elect upon whom accountability may be bestowed.

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298. *See id.* at 634–36 (describing how, after initial disagreement between the outgoing Prime Minister and incoming government, the incumbent implemented the strategy advised by the new government for responding to the exchange-rate crisis).

In such cases of vital public need for action, transitional governments must also try to limit the long-term effects of their actions. For instance, to prevent paralyzing the country, caretaker governments in Australia, Canada, New Zealand, and the United Kingdom are permitted to make temporary appointments for a fixed period of up to several months, temporarily extend appointments that are about to expire, and extend contracts that are about to expire for a limited period.[299]

2. Preapproval of the Legislature for Taking an Extraordinary Measure

This Article further proposes that extraordinary actions should be prohibited if they do not fall under the vital public interest justification unless preapproved by the legislature. In contrast to Claude Klein's proposal, made in the Israeli context, that a caretaker government will be empowered to act unless instructed otherwise by the Knesset,[300] the default rule in this proposed framework prevents transitional governments from undertaking extraordinary acts.

Assuming that the legislature will be asked to preapprove an extraordinary measure of a transitional government, should a distinction be made between pre- versus post-election actions taken by the caretaker or lame duck? Before and just prior to elections, legislative members themselves are usually running for office. Therefore, it may not be appropriate for them to approve extraordinary measures, since their current mandate is also about to expire.[301] Following elections, when a new legislature is established, approval by the incoming legislature of an action of a caretaker or lame-duck government has significance. Where, in a parliamentary

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299. *See* TIERNAN & MENZIES, *supra* note 51, at 54 (describing New Zealand's approach to transitional arrangements, which recommends that caretaker governments facing decisions that will bind the incoming government either defer such decisions, create temporary solutions, or resolve them in consultation with other parties); *see also* Davis et al., *supra* note 4, at 14 (describing the Commonwealth's flexible approach to temporary public appointments during a caretaker period). *See generally* sources cited *supra* note 51 (codifying constitutional conventions).

300. *See* Klein, *supra* note 4, at 285–86 (suggesting that a caretaker government be empowered to act as it wishes in the absence of specific instructions from the Knesset and thereby avoid the problem of government paralysis).

301. The Parliament Act of 1911 endorsed a perception of distinguishing between a fresh and an old mandate from the people. The House of Commons' power to pass statutes was at its peak when its mandate was fresh from the people and at its lowest point toward the end of its life. This is so because only in the last two years of a parliament's life the Lords' suspensory veto meant potentially de facto absolute veto. Rivka Weill, *Centennial to the Parliament Act 1911: The Manner and Form Fallacy*, PUB. L. 105, 117 (2012). *See generally* ACKERMAN, LAMEDUCK IMPEACHMENT, *supra* note 8 (arguing in favor of restricting the authority of lame-duck Congresses to impeach the President based on legitimacy concerns).

system, the power of governments depends on confidence, approval of caretaker action by the incoming legislature serves an analogous purpose. It is also reasonable to assume that the incoming parliament's approval is also a green light from the incoming administration, which depends on parliamentary confidence and controls a parliamentary majority. In conclusion, parliament—especially an incoming one—has the authority to preapprove an extraordinary measure of a caretaker government. Similarly, in a presidential system, the nod from an incoming Congress lends democratic legitimacy to the actions of the lame-duck executive, who otherwise suffers from severe democratic deficit.

This proposed framework strikes a proper balance between the need for governmental continuity and the need to prevent caretaker or lame-duck governments from making fateful and irreversible decisions when their mandate is limited and their actions might be driven by extraneous considerations. This proposed framework may be codified in constitutional conventions in countries that are characterized by executive self-restraint. In other countries, this framework may be developed in case law enforced by the courts. Of course, restrictions on caretaker government may also be part of the constitutional text as has happened in Denmark.[302] But, the absence of an explicit constitutional text should not be a barrier for imposing such restrictions.

In addition, this Article suggests amending the legislation regulating this field in parliamentary systems. In light of the findings that prolonged caretaker periods occur in Israel precisely at times when elections are moved up and during the preelection period,[303] a change in election timetables must set the vote to occur within a fixed and brief period of two months.[304] This will significantly minimize the duration, as well as the occurrence, of caretaker governments and

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302. Section 15(2) of the Constitutional Act of Denmark of June 5, 1953, states:

> When the Folketing [Parliament] passes a vote of no confidence in the Prime Minister, he shall ask for the dismissal of the Ministry unless writs are to be issued for a general election. Where a vote of censure has been passed on a Ministry, or it has asked for its dismissal, it shall continue in office until a new Ministry has been appointed. Ministers who remain in office as aforesaid shall perform only what may be necessary to ensure the uninterrupted conduct of official business.

CONSTITUTIONAL ACT OF DENMARK OF JUNE 5, 1953, § 15(2), *available at* http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Constitution%20of%20Denmark.pdf.

303. *See supra* note 37 and accompanying text.

304. In fact, the Berenson Committee included such a recommendation in its report. *See* BERENSON REPORT, *supra* note 59; *see also* JOHARI, *supra* note 1, at 144 (suggesting that caretaker periods be limited to two or three months at most in India, despite the fact that India is the most populated democratic country in the world and therefore requires a relatively long election period).

their inherent constitutional difficulties. It is high time to protect the most basic democratic values of representation, accountability, and majority rule, which are imperiled by caretaker governments.

VI. CONCLUSION

Caretaker and lame-duck administrations pose unique challenges to democracy because they are characterized by both democratic deficit and agency difficulties. Parliamentary systems that belonged to the Commonwealth or were influenced by British law have dealt with this challenge quite successfully through constitutional conventions that are observed by the political branches. In contrast, the U.S. presidential system suffers from great abuse of presidential lame-duck power. Similar abuse is evident in Israeli caretaker administrations, despite Israel's parliamentary system. Israel has dealt with the challenge differently than the United States. In light of caretaker abuse, the Israeli Supreme Court intervened to regulate caretaker activity, an atypical approach to this matter. Studying the court's unique jurisprudence assists in developing the proper law that should govern transitional governments, as well as in assessing whether judicial review of constitutional transitions is feasible or desirable.

Using Israel as a case study within a comparative constitutional framework, three important lessons may be suggested. First, it is not the nature of the constitutional system per se, whether parliamentary or presidential, that determines the success of preventing abuses of a transitional government's power. Rather, the potential for abuse exists in both types of systems. Furthermore, the challenges posed by these transitional governments are similar in both types of systems. Second, transitional governments' power is not a topic that cannot inherently be regulated by courts. Rather, if constitutional conventions fail to do their job or do not develop, judicial review is a potent possibility. Last, it is not enough to determine that transitional governments must act with restraint, as the Israeli Supreme Court has determined, but it is important to give concrete meaning as to which actions are permitted by transitional governments and under what circumstances they are allowed.