Israel Law Review **52**(3) 2019, pp 427–454. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2019.
doi:10.1017/S0021223719000141

BOOK REVIEW ESSAY

THE PARADIGM OF ORIGINALISM: ISRAELI CONSTITUTIONAL LAW AND LEGAL THOUGHT

Review Essay of Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart Publishing 2013)

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This review essay challenges three main claims about originalism in American legal thought. While it affirms that originalism could be the Law of a legal system, it first challenges the mainstream idea that American originalism is the paradigmatic case in theory and in practice. Second, the essay confronts the normative justification that originalism ensures democracy based on the rule of law. Third, it interrogates the dichotomy between living constitutionalism and originalism regarding the use of history by arguing that originalism is a form of hegemony. The case study analysed in this article is Israeli legal thought and practice after the enactment of the 1992 Basic Laws, with the focus on the right of equality.

Keywords: originalism, hegemony, Israel, Israeli law, Palestinians, decisionism

1. INTRODUCTION

American originalism is perceived as a unique legal culture in theory and practice based on the claim that judges apply (or should apply) the original political will of the foundation era of the state as authoritative in present constitutional cases.[1] This political will may refer to the intentions of the founders, the ratifiers or drafters of the Constitution, or the public meaning or understanding of the Constitution during the foundation era.[2] The influential Storrs Lectures delivered by Bruce Ackerman in 1983 at Yale Law School strongly contributed to this idea.[3] For Ackerman, the establishment of the United States created a dualist model of democracy, which is 'a genuinely distinctive pattern of constitutional thought and practice'.[4] European thinkers did not imagine such a model, Ackerman contended, as 'neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the

[*] PhD in Law from the Hebrew University of Jerusalem; General Director of Adalah – The Legal Center of Arab Minority Rights in Israel; hassan.jabareen@gmail.com. I wish to thank Barak Medina and Paul Kahn for their thoughtful and challenging comments which helped me to further articulate and clarify the ideas in this article. I also wish to thank my wife Rina for our ongoing valuable discussions throughout the writing of this article, and David Fontana and the anonymous reviewer of the *Israel Law Review* for their helpful remarks. For transparency, I was the lawyer, together with my colleagues from Adalah, in several of the cases discussed in this article.

[1] Jack M Balkin, 'Constitutional Interpretation and Change in the USA: The Official and the Unofficial' (2015) 14 *Jus Politicum* 21.

[2] ibid 20. Sunstein labelled this version 'hard originalism', which asks judges to 'go back in a time machine and ask the Framers very specific questions about how we ought to resolve very particular problems': Cass R Sunstein, 'Five Theses on Originalism' (1996) 19 *Harvard Journal of Law & Public Policy* 311, 312–13.

[3] Bruce A Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013–72.

[4] Bruce A Ackerman, *We the People, Volume 1: Foundations* (Belknap Press 1991) 3.

key'.[5] This dualist model is based on two tracks: the 'political moment', which expressed the idea of 'We the People' through extra-legality leading to new social and political conditions that control the other 'normal politics' track, which expresses the day-to-day politics of the legislators and constitutional law. Ackerman's colleague at Yale, Akhil Amar, developed this dualist model and contended that 'We the People' is even able to create constitutional changes, including against Article V at any time, as the original meaning of the Constitution limits only governmental agents and not the will of the people.[6] Even the Bill of Rights itself, Amar argued, was shaped by the majoritarian original will to protect the states and not individual rights.[7] Cass Sunstein noted that Amar's creative work makes him 'the most influential originalist'.[8]

Based on this dualist model, leading normative originalists claim that originalism ensures democracy based on the rule of law.[9] Keith Whittington asserts that originalism secures 'democratic structure by enforcing the popular will against the agents of the people',[10] and thus judges must 'uphold the original Constitution – nothing more, but nothing less'.[11] This belief in the 'American uniqueness' model even provides the explanation for American exceptionalism, as Jed Rubenfeld argues that, unlike European democracies, the American foundation created a democracy that accepts laws made only by Americans.[12]

I argue that Carl Schmitt's theory of constitutional law is the first comprehensive and most influential European thesis to articulate the dualistic democratic model, and that it is the paradigmatic theory on originalism.[13] Already in 1928, Schmitt wrote that '[t]oday, the contrary awareness is propagated: that the text of every constitution is dependent on the political and social situation of its time of origin'.[14] Like American originalism that equates originalism with democracy, where equality is the paradigmatic right as it derives directly from the original scope of 'We the People', Schmitt asserted that originalism leads not to the rule of law but to its negation. For

[5] ibid.
[6] Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment Outside Article V' (1994) 94 *Columbia Law Review* 457.
[7] Akhil Reed Amar, 'The Bill of Rights as a Constitution' (1991) 100 *Yale Law Journal* 1131.
[8] Cass R Sunstein, 'Originalism for Liberals', *The New Republic*, 30 September 1998, https://newrepublic.com/article/64084/originalism-liberals.
[9] Prakash, an originalist, noted that '[p]rominent originalists claim that only originalism can safeguard the rule of law, protect political democracy from overreaching judges, and defend individual rights': Saikrishna B Prakash, 'Book Review: Overcoming the Constitution' (2003) 91 *Georgetown Law Journal* 407, 432. Scalia argued that originalism is more compatible 'with the nature of and purpose of a constitution in a democratic society' and it establishes 'a historical criterion quite separate from the preferences of the judge himself': Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849, 862, 864. Solum and Bennett argue that originalism is more compatible with the rule of law based on the fixed meaning of the constitution as put by popular sovereignty: Lawrence B Solum and Robert W Bennett, *Constitutional Originalism: A Debate* (Cornell University Press 2011) 36–44.
[10] Keith E Whittington, *Constitutional Interpretation*: *Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999) 159.
[11] Keith E Whittington, 'The New Originalism' (2004) 2 *Georgetown Journal of Law & Public Policy* 599, 609.
[12] Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971.
[13] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer ed and tr, Duke University Press 2008). See the translator's introduction about the influence of this theory on European political and legal thought.
[14] ibid 65.

him, originalism creates 'decisionism': decisions that apply the political will that knows no normativity or reason.[15] *Dred Scott v Sanford* is the best example of such decisionism as it applied the founding will in deciding that slaves do not belong to the original meaning of 'We the People', despite the constitutionalism that was developed after *Marbury v Madison*.[16]

The case study examined in this article – Israeli legal thought and practice – affirms Schmitt's theory. It also challenges the contention that originalism is a unique form of American adjudication, as noted by Jack Balkin: 'In almost no other country do judges of constitutional courts employ this sort of originalism'.[17] The first influential comparative study, which was authored by Jamal Greene, confirms this perception and concludes, inter alia, that the courts of 'India, South Africa, and Israel' are hostile to 'static historicism', and most of the leading jurists in these countries subscribe to the idea that 'the past is authoritative in the present cases is pooh-poohed'.[18] For Kim Scheppele, while American originalism looks backward, most modern systems follow the living constitutionalism approach, which evaluates the whole history without fragmentations from the 'now'.[19]

Contrary to this literature, I argue that Israeli legal thought and practice is the paradigmatic case of originalism. Its originalism leads to Schmittian democracy based on decisionism, where the identity of the founding people precedes the popular sovereignty based on common citizenship (those who participated in the parliamentary politics). Further, the evaluation of the whole history of this originalism is also from the 'now', as originalism is a form of hegemony. Based on Antonio Gramsci's concept of hegemony, a new regime is successful when the public accepts its founding values to the degree that it becomes their beliefs, their common sense and their philosophy.[20] To use the originalists' terminology, the original public meaning of the Constitution is hegemonic.

The case study examines Israeli Supreme Court decisions and academic writings since the enactment of the 1992 Basic Laws, with the focus on the right of equality. While Israeli jurists do not identify their interpretive approach as originalism, I suggest that a scrutiny of the academics' argumentation, as well as the Court's decisions, reveal the distinctive role of originalism. This inquiry shows that when founding values are hegemonic, Israeli justices apply originalism, as hegemony is their common sense. When founding values contradict the hegemony, the justices may then apply living constitutionalism. As equality is the paradigmatic right for originalism, the case study shows that originalism appears in the cases of Palestinian citizens of Israel. Similarly, the justifications of Israeli academics of the core principle of the 1992 Basic Laws – namely that Israel is a 'Jewish and democratic state' – apply the same original meaning of equality, as hegemony is their philosophy.

[15] Paul Hirst, 'Carl Schmitt's Decisionism' in Chantal Mouffe (ed), *The Challenge of Carl Schmitt* (Verso 1999) 7.
[16] Paul W Kahn, 'Reason and Will in the Origins of American Constitutionalism' (1989) 98 *Yale Law Journal* 449.
[17] Balkin (n 1) 22.
[18] Jamal Greene, 'On the Origins of Originalism' (2009) 88 *Texas Law Review* 1, 3.
[19] Kim Lane Scheppele, 'Jack Balkin Is an American' (2013) 25 *Yale Journal of Law & the Humanities* 23, 25.
[20] Antonio Gramsci, *Selections from the Prison Notebooks* (Quintin Hoare and Geoffrey Nowell Smith eds and trs, International Publishers Co 1971).

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

The article analyses Israeli legal thought through a discussion of the book *Israeli Constitutional Law in the Making*. This seminal book – edited by Gideon Sapir, Daphne Barak-Erez and Aharon Barak – celebrated the twentieth anniversary of the 1992 Basic Laws. It consists of 25 articles written by Israeli academics, and nine commentaries on the articles authored by leading American and European constitutional scholars.

The first part of this discussion (Section 2) lays out the theoretical basis for the argument. It introduces Schmitt's constitutional theory and its link to American originalism, and Gramsci's hegemony. Section 3 discusses the characteristics of the foundation of Israel in 1948–49. This is followed (in Section 4) by an analysis of the application of the living constitutionalism approach by the Israeli Supreme Court, which challenges founding values. Section 5 illustrates originalism through an examination of the Court's decisions regarding Palestinian equal rights in Israel and writing by Israeli academics. Section 6 discusses why the Israeli case is the paradigmatic case of originalism and what lessons we can learn regarding the normative claim that originalism secures democracy based on the rule of law, followed by a conclusion.

2. SCHMITT, AMERICAN ORIGINALISM AND GRAMSCI

The American dualistic model makes different distinctions. First, it distinguishes between the founding values and constitutional law. 'A dualist Constitution', Ackerman states, distinguishes between two kinds of decision: 'the first is a decision by the American people', and 'the second by their government'.[21] As Richard Kay, a very prominent originalist, put it, 'every legal system sits upon a political bottom', which provides its validity and legitimacy as 'every legal system is governed, at the end, by principles whose authority can't be found in law'.[22] Similarly, Paul Kahn claims that American nationalism started before the written Constitution with the sacrifice through the Revolution, and it precedes the constitutional text.[23]

Second, the principles of this bottom or the First Decision are not abstract, as Dworkin claims, but express the concrete will of the sovereign, which precedes liberalism based on the rule of rights and democracy.[24] Third, for most of the originalists, the rule of the law, as Kay explains, rests on dualist values: 'the first is the value of certainty', which refers to clear and abstract rules, and 'the second is the value of legitimacy', which 'is a political value' that requires rules to follow the founding sovereign's will.[25] Fourth, the First Decision is democratic and it precedes decisions of the 'electoral representatives' of the current popular sovereignty. As Whittington puts it, 'dualism maintains the distinction between "the sovereign's people" and "regular legislation"' and thus no organ is authorised to represent the people.[26]

[21] Ackerman (n 4) 6.
[22] Richard Kay, 'The Illegality of the Constitution' (1987) 4 *Constitutional Comment* 57, 58.
[23] Paul Kahn, 'The Question of Sovereignty' (2004) 40 *Stanford Journal of International Law* 259, 270.
[24] Ackerman (n 4) 10–16.
[25] Richard Kay, 'Originalist Values and Constitutional Interpretation' (1996) 19 *Harvard Journal of Law and Public Policy* 335, 335–38.
[26] Whittington (n 10) 75.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

Schmitt's theory is also based on this dualist model and its distinctions. It starts: 'A concept of the constitution is only possible when one distinguishes Constitution and constitutional law'.[27] The Constitution is a self-conscious act of a people's free will 'that determines the form and type of the political unity, the existence of which is presupposed'.[28] Like Kahn's sacrifice, a religious community or any group becomes a people only when it determines to be a political community based on the political, which means the willingness to struggle and to sacrifice based on the friend-enemy relationship.[29] The Constitution is the people's founding identity and the state itself. Schmitt's Constitution is like Ackerman's First Decision, and the constitutional law (through a written or unwritten constitution, statutes and court judgments) is 'valid first on the basis of the Constitution' as 'every legal order is based on a decision'.[30] Like American originalism, legitimacy is equated to validity and not to rights. If there is no constitution, there is no political community, no state, no democracy and no constitutional law.

Schmitt distinguishes between identity and representation, rights and group belonging. Like American originalism, democracy must refer to its original conception, as for Schmitt 'democracy is the identity of ruler and ruled, government and governed', where 'identity' denotes the homogeneous people 'whose members are similar to one another'.[31] Similar to Amar's claim that the Bill of Rights was linked to group unity to protect the states and not individual rights, for Schmitt the basic rights presuppose 'the political unity of the people'.[32]As a people's democracy, equality is 'the essence of democracy' and thus it is a political concept, which relies on a distinction based 'on belonging to a particular people'.[33] Democratic equality is the paradigmatic right in order to ensure all other equalities, such as equality in political participation, equality in freedom of expression, and others.[34] Thus, the right of citizenship must correspond with dualism, as the original meaning of equality is first about who belongs to the homogeneous people and not 'who is a citizen' in its legal sense.[35] The case study of this article affirms the Schmittian meaning of democracy, as well as the original meaning of equality.

Regarding 'the rule of law', Schmitt's starting point is similar to that of the American originalists; however, he reached a very different conclusion. Like the American originalists, he argued that 'the dualist concept of law' rests on two values: the first requires 'a norm with certain qualities'; and 'the second is the political element', which corresponds with 'concrete will and command and an act of sovereignty'.[36] For Schmitt, like Amar, the people's will is able to decide on any constitutional change at any moment, including against articles that

[27] Schmitt (n 13) 73.
[28] ibid.
[29] ibid 263–64.
[30] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, University of Chicago Press 1985) 10.
[31] Schmitt (n 13) 264.
[32] ibid 200.
[33] ibid 58.
[34] ibid 259.
[35] ibid 207.
[36] ibid 187.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

determine the procedure of constitutional amendment, and such a decision is valid as the original meaning aimed to limit only governmental agents.[37] So dualism must lead to decisionism, as the quality of the first decision never leaves the law when will knows no normativity and 'no other constitutional institution can withstand the sole criterion of the people's will, however it is expressed'.[38] American originalists claim that originalism requires judges to apply the sovereign will or the political will of the foundation. The case study of this essay shows that judges apply this will, which leads to decisionism and not to the rule of law.[39]

Schmitt did not clarify how the collective will reaches the court. He only explained briefly that the public sphere is the place for the people's will to be expressed.[40] Gramsci's hegemony completes Schmitt's theory as it brings the power of political culture to the argument.[41] For Gramsci, although most of the revolutions occurred through violence and dictatorship, in order to succeed the new regimes must build a hegemony. This hegemony is based on general acceptance of the new conditions of the social and political structure, which should be accepted as Rousseau's 'general will' serving the national interest and led by an 'intellectual and moral leadership'.[42] The hegemonic regime shapes the collective historical memory and creates the link between the past and the present through all the educational institutions, the army, churches, laws, official symbols, holidays, museums and other official bodies.[43] Hegemony succeeds when philosophy and practice are united.[44]

While this regime is open to some scope for disagreement and rival political parties, the fundamental beliefs in the founding values are outside the public debate, as the public perceives them as universal, moral and as their common sense.[45] The separation of powers is an important principle for unity, as the 'unity of the State [is] in the differentiation of powers' and still 'all

[37] ibid 153–55.

[38] Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy tr, The MIT Press 1985) 15.

[39] To justify originalism, Whittington describes the quality of the sovereign's decision: 'The gap between chaos and order can be bridged only through a singular act of will'. By this, Whittington highlights Schmitt's exception that to prohibit chaos 'a normal situation must exist' and 'the sovereign is he who decides on the exception' to protect the order: Whittington (n 10) 144; Schmitt (n 13) 13. Following Schmitt's dualist concept of law, Kahn argues that between the written legal norm and the judicial decision, there is a gap and free will fulfils it. We know the concrete content of the norm only when it is decided by the court. For Kahn, '[d]ecision determines norm' and '[t]he rule of law is the will of the sovereign … because the decision is the locus of sovereign presence': Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press 2011) 90.

[40] Schmitt (n 13) 242–43.

[41] Andreas Kalyvas, 'Hegemonic Sovereignty: Carl Schmitt, Antonio Gramsci and the Constituent Prince' (2000) 5 *Journal of Political Ideologies* 343, 365.

[42] Gramsci (n 20) 57–58.

[43] Martin Carnoy, *The State and Political Theory* (Princeton University Press 2014) 65–88.

[44] Williams explained that Gramsci's hegemony is 'a 'moment' in which the philosophy and practice of a society fuse or are in equilibrium; an order in which a certain way of life and thought is dominant, in which one concept of reality is diffused throughout society in all its institutional and private manifestations, informing with its spirit all taste, morality, customs, religious and political principles and all social relations, particularly in their intellectual connotation': Gwyn A Williams, 'The Concept of "Egemonia" in the Thought of Antonio Gramsci: Some Notes on Interpretation' (1960) 21 *Journal of the History of Ideas* 586, 587.

[45] Douglas Litowitz, 'Gramsci, Hegemony, and the Law' (2000) 2 *Brigham Young University Law Review* 515, 519.

three powers are also organs of political hegemony, but in different degrees'.[46] Accordingly, judges express their differences and disagreements but with loyalty to the founding values. For this article, the acceptance of these values by judges and intellectuals, regardless of their personal beliefs, is crucial for examining the existence of hegemony.

This case study shows that originalism is a form of hegemony and it does need to use historicist methodology, such as seeking the founders' intentions or the original public understanding of the values at the time of foundation.

Critics argue that the normative claim of American originalists ignores the fact that the founding decision was of a people of white men that excluded many groups (natives, blacks and women).[47] Thus, originalists try to maintain the principle of people's homogeneity, as the founding generation is 'us', which precedes the current popular sovereignty, which includes many different groups.[48] This case study confirms this critique.

Before proceeding to the case study and for the sake of comparison, let us outline the main characteristics of American originalism, which arguably make it unique. First, the United States was created by a revolutionary act. Originalism is a unique American phenomenon, Balkin contends, because, unlike most states, 'the American nation was created by Americans themselves through a self-conscious act of political revolution', which shapes their identity, national narrative and national memory.[49] It is so unique, it differs from the case of the French Revolution where, unlike America, 'there was a French State', 'there were French people' and 'there was a French nation' long before the French Revolution.[50] Second, the meaning of the Constitution was fixed during the foundation.[51] For comparison, as David Fontana explains, this fixed meaning must be linked to a revolutionary act that created a new political identity.[52] It could refer to a written constitution that creates the nation, and in the absence of such a written constitution (like Israel) it could refer to key founding national and cultural features.[53] For example, Ackerman's 'political moment', which shaped 'We the People' outside the written constitution, and Kahn's sacrifice predated the written constitution. Third, the original meaning of the Constitution constrains judges.

[46] Gramsci (n 20) ch 2, subsection on Hegemony (Civil Society) and Separation of Powers 507.
[47] Amy Kapczynski, 'Historicism, Progress, and the Redemptive Constitution' (2005) 26 *Cardozo Law Review* 1041.
[48] Post explains the sameness and the homogeneity principle of originalists: 'Historical interpretation can be understood implicitly to assert an identification, a community of interest, with the framers or ratifiers of those provisions. "Their" consent, so the implicit assertion would go, is "our" consent; they spoke "for" us': Robert C Post, 'Theories of Constitutional Interpretation' (1990) 209 *Faculty Scholarship Series* 13, 29.
[49] Jack M Balkin, 'Why are Americans Originalist?' in Richard Nobles and David Schiff (eds), *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Routledge 2016) 309, 315.
[50] Balkin (n 1) 24.
[51] Solum argues that almost all originalists agree with what he calls the 'fixation thesis', namely that the original meaning of constitutional rights was fixed during the time of the constitution-making process: Lawrence B Solum, 'What is Originalism? The Evolution of Contemporary Originalist Theory' (2011) *Georgetown Law Faculty Publications and Other Works* 1353.
[52] David Fontana, 'Comparative Originalism' (2010) 88 *Texas Law Review* 189.
[53] ibid 196–97. On the rise of originalism without a written constitution, see Yvonne Tew, 'Originalism at Home and Abroad' (2014) 52 *Columbia Journal of Transnational Law* 780; Andrew Coan, 'The Irrelevance of Writtenness in Constitutional Interpretation' (2010) 158 *University of Pennsylvania Law Review* 1025.

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What makes American originalism unique is not that judges use history, but rather the claim that they should apply the original meaning of the Constitution.[54]

This case study shows that the Israeli case meets these unique features of originalism. The State of Israel was created by a revolutionary act in 1948–49, which is very similar to the characteristics of the American act. The original meaning of 'We the People' fixed the meaning of equal rights in the cases decided after the 1992 Basic Laws; and all of the justices apply this original meaning of equality regardless of their personal values.

3. THE FOUNDING ACT: 1948–49

Like the United States, the State of Israel was founded through an act of self-creation in 1948–49. Before the founding of the state, there was nothing known as 'the State of Israel', and there were no groups called 'Israeli citizens', 'Israeli Jews' or 'Israeli Palestinians'.[55] As Americans are Americans because they created America, Israeli-Jews are Israelis because they created Israel. As America came from nowhere, the State of Israel came into being from no other authority.[56]

As in the American case, Israel came into being with blood and violence and a militaristic victory, and no international norm or agreement determined the territory and its population. According to the United Nations Resolution on the Partition Plan of Palestine (1947), Palestine should be divided into two states: a Jewish state with 55 per cent of the territory and an Arab state with 45 per cent of the territory.[57] However, the territory that is known as Israel within the Green Line was established after a war which ended with a ceasefire in 1949, with the new state covering 73 per cent of Palestine. The founder of the state, David Ben-Gurion, emphasised that '[t]he State of Israel was not established as a consequence of the UN Resolution'.[58] For him, the boundaries set out in the UN Partition Plan depended on an agreement, but the Arabs rejected this.

The political was already a main factor in shaping the group relationship. While Israel opened itself to Jewish immigration, it rejected the international request for the return of Palestinian refugees. For Ben-Gurion, '[t]here are no refugees – there are fighters, who sought to destroy us'.[59] By this, the founding act led to a Jewish majority. The political also justified the imposition of a

[54] Balkin (n 1) 22.

[55] The name of the state was introduced for the first time in the Declaration of Establishment of the State of Israel in May 1948: 'We … declare the establishment of a Jewish state … to be known as the State of Israel': Provisional Government of Israel, 'Declaration of Independence', *Official Gazette No 1* (Tel Aviv), 14 May 1948.

[56] The Israeli Supreme Court supports the idea that the authority of the first temporary legislator came from nowhere: 'For the authority to give itself this power, there is no previous reference. This is the beginning of a self-creation process that was created from nowhere, which characterizes the start of a new political regime. Its existence was not derived from any other previous political regime': CA 6821/93 *United Mizrahi Bank Ltd v Migdal Cooperative Village* 1995 PD 49(4) 221, 359–60.

[57] UNGA Res 181 (II) (29 November 1947) (UN Partition Plan for Palestine).

[58] This text was written by David Ben-Gurion to US President Truman, who had requested the return of the Palestinian refugees: see Tom Segev, *1949: The First Israelis* (Owl Books 1998) 35.

[59] Ibid.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

military regime from 1948 to 1966 on only the Palestinians who remained and became citizens of the state,[60] and sanctioned the confiscation of Palestinian property, as enemy property.[61]

In sum, the militaristic achievements of the founding act led to the following new conditions: (i) a Jewish majority within the Green Line; (ii) free Jewish immigration to the new state; (iii) the refusal to return Palestinian refugees; (iv) making Palestinians who remained into second-class citizens (military rule was imposed only on them and not on Jewish Israelis); (v) the confiscation of Palestinian property; (vi) making the Hebrew-Jewish culture dominant in the new state; and (vii) the partitioning of Palestine. This founding act today illustrates the connection between the Israeli celebratory moment of the state's 'Independence Day' and the commemoration of *Nakba* day – the Palestinian catastrophe.[62]

These 'new conditions' went far beyond the Zionist movement's original, pre-1948, public understanding of an 'independent state'. Professor Benjamin Akzin – one of the founders of the Faculty of Law of Hebrew University, who served as assistant to Zeev Jabotinsky, the founder of the Israeli right-wing – wrote in 1966:[63]

> It is important to note that even the most radical and extremist of political Zionism did not dream about an independent state as it is perceived today … Weitzman and Jabotinsky … were united with the hope to see the Jewish state as a dominion belonging to Britain. Ben-Gurion, in his testimony before the Peel Committee in 1936, expressed the same wish. Others dreamt to see the future Jewish state as a sector belonging to a federation or confederation within the peoples of the Middle East … I knew Jabotinsky personally and intimately and I can testify to that for him, the Jewish state in its absolute independent state was second-order to be considered as Britain's leaders were not interested in a Jewish dominion. I will go so far and say that even until his last day (4 August 1940), Jabotinsky wished that … Britain will agree to constitute a Jewish State as a form of dominion.

A new history began with the foundation. As a new state, its leaders and intellectuals started intense discussions about its new identity and direction. Tom Segev, a leading historian of the 1948–49 period, noted that 'the intense confrontation between different values and ideologies gave rise to a tremendous flood of literature' and 'everybody talked about "new horizons"'.[64] Although the majority followed Ben-Gurion's founding political party, some philosophers, authors, poets and journalists started to ask: What is Judaism, what does it stand for, and what is a Jewish state?[65] They expressed deep concern about the loss of human values as a result

[60] On the military regime, see Sabri Jiryis, *The Arabs in Israel* (Inea Bushnaq tr, Monthly Review Press 1976).
[61] Michael Kagan, 'Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East' (2007) 38 *Columbia Human Rights Law Review* 263.
[62] The law that is known as the 'Nakba Law', which was passed in 2011, illustrates this connection. The law imposes sanctions on any state-funded institution that commemorates Israeli Independence Day as a day of mourning as a result of the *Nakba* or challenges the Jewishness of the state. The Court has refused to intervene, thereby upholding the constitutionality of the law: HCJ 3429/11 *Alumni Association of the Arab Orthodox High School in Haifa v Minister of Finance* (5 January 2012) (*Nakba Law* case).
[63] Benjamin Akzin, *Topics on Law and Politics* (Magnes 1967) 65–66 (in Hebrew).
[64] Segev (n 58) 290.
[65] ibid 287.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

of the new conditions; some even worried about 'self-segregation' by making Hebrew the language of education.[66] Baruch Kimmerling, a prominent Israeli sociologist, revealed that many Hebrew University professors were very critical of the new conditions.[67] For Segev, the real debate was between the 'establishment literature' and the 'Canaanite Movement', which advocated against building a 'Jewish nationality' and for creating an 'Israeli nation or Hebrew nation' in a state for all of its citizens, Jews and Palestinians.[68]

The role of Ben-Gurion's founding party was to build a new hegemony. It called on the press and intellectuals to be involved 'in the shaping of society' and to 'guide the people'.[69] Kimmerling explained that 'the state bureaucratic apparatus, the education system and the military' put intensive efforts into building a new hegemony.[70] As the society perceived itself under threat, the creation and construction of a new hegemony was achieved within a very short time.[71] The purpose was to shape a political identity that would be accepted 'as the only legitimate model within the collectivity and as a source of cultural capital'.[72] Kimmerling explained that '[a] new state civic religion, with its own cults, ceremonies, calendar, holidays and commemorations was constructed, first around the military, and later around the Holocaust'.[73] This model saw the new conditions as justified, final and not as a matter for negotiation; as expressing the true meaning of Zionism; and as embodying the political will of the founding people for sovereignty and freedom in their historical homeland.

Another main feature of the politics of the foundation is the relationship between the state and religion. In 1948 Ben-Gurion reached agreement with religious Jewish groups known as the 'status quo arrangement'. All of the Israeli Jewish groups (secular, religious, Mizrahi and Ashkenazi, right and left) accepted that the new state should have religious characteristics.[74] Although the political was already a constitutive factor of the new hegemony, this arrangement included exempting Yeshiva students from army service. The number of exempted Yeshiva students in 1948 was minor, and the main reason for the exemption was the request of the religious leadership to allow these students to spend their time and efforts in renewing the Yeshiva project, which was destroyed in Europe during the Holocaust.

The creation of a democracy also belonged to the founding era. The first Knesset elections were conducted in January 1949, even before the ceasefire. All residents participated in this election and three Arabs out of 120 representatives were elected. The election created for the

[66] ibid 287–89.
[67] Baruch Kimmerling, *Immigrants, Settlers, Nations: The State and Society in Israel – Between Multiculturalism and Culture Wars* (Am Oved 2004) 152 (in Hebrew).
[68] Segev (n 58) 291.
[69] ibid 288.
[70] Baruch Kimmerling, *The Invention and the Decline of Israeliness: State, Society and the Military* (University of California Press 2001) 6.
[71] ibid 148.
[72] ibid 97.
[73] ibid.
[74] Kimmerling (n 67) 149.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

first time a popular sovereignty based on a common citizenship of 'Israeli-Jews' and 'Israeli-Palestinians'.[75]

Another significant founding decision, which the book under review highlights, is that the political parties in the first Knesset refused to enact a bill of rights and agreed that instead of a written constitution, the Knesset would enact 'basic laws'. The nine Basic Laws enacted up to 1992 concerned institutional matters and lack constitutional supremacy. The book celebrates the twentieth anniversary of the two Basic Laws enacted in 1992: Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation.[76]

4. LIVING CONSTITUTIONALISM

This section analyses the judicial approach to living constitutionalism after the enactment of the 1992 Basic Laws, as discussed in the book under review. The enactment of these Basic Laws in 1992 came about following crucial political compromises. First, although the original draft proposed by 'liberal lawmakers' defined Israel as a 'democratic state', as a result of 'substantial concessions' the final draft added the term 'Jewish'.[77] The first time that the phrase 'Jewish and Democratic' appears in any piece of legislation is in the Basic Laws. Second, the Basic Laws enumerated very few rights and, as Tamar Hostovsky Brandes explains, the omission of leading rights was intentional, with 'the right to equality being the paradigmatic example'.[78] Finally, it was stipulated that the 'status quo arrangement' regarding religion-state and all laws that were enacted before the Basic Laws would remain valid.[79] Although no public discussion accompanied the passage of these laws, the legal community labelled the enactment a 'constitutional revolution'.[80]

The 1995 *Bank Mizrahi* case, in which the Supreme Court decided for the first time that the Basic Laws had constitutional status, is the most cited case in the book under review.[81] Some scholars consider it to be one of the few revolutionary decisionist cases in the world, as it does not follow the existing rule of recognition.[82] Indeed, Chief Justice Barak ruled that 'the

[75] On the influence of the first election on the hegemony, see Hassan Jabareen, 'Hobbesian Citizenship: How the Palestinians Became a Minority in Israel' in Will Kymlicka and Eva Pföstl (eds), *Multiculturalism and Minority Rights in the Arab World* (Oxford University Press 2014) 189–218, and in *Theory and Criticism* (Van Leer Institute 2014) 13–46 (in Hebrew).

[76] See the Knesset's website for the English translation of the two Basic Laws: The Knesset, 'Basic Laws', https://m.knesset.gov.il/EN/activity/Pages/BasicLaws.aspx.

[77] See Moshe Cohen-Eliya, 'The Israeli Case of a Transformative Constitutionalism' in Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart 2013) 173, 177.

[78] Tamar Hostovsky Brandes, 'Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters' in Sapir, Barak-Erez and Barak (n 77) 267, 273.

[79] Yehudit Karp, 'The Basic Law: Human Dignity and Freedom: Biography of Power's Struggle' (1992) 1 *Mishpat Umimshal* [*Law and Government*] 323, 343 (in Hebrew).

[80] As Justice Barak wrote, 'the public is not aware that lately a revolution occurred in Israel. This is a constitutional revolution': Aharon Barak, 'The Constitutional Revolution: Protected Fundamental Rights' (1992) 1 *Mishpat Umimshal* [*Law and Government*] (in Hebrew).

[81] *United Mizrahi Bank* (n 56) 359–60.

[82] Barber and Vermeule survey the 'exceptional cases' in which courts decide on the Constitution itself. They argue that this Israeli judicial decision is one of the rare cases in the world where what they call 'constitutional decisionism' appears. The decision 'runs contrary to the rules of the existing legal order': NW Barber and

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rule of recognition is decided by the Court',[83] and today the Court 'identifies and declares that the Knesset is the constituent assembly and the legislature'.[84] Thus, all Basic Laws limit the Knesset's power as a legislator. Justice Cheshin was the only justice who challenged this approach; as he stated in his opinion, '[w]e did not hear yet about a legal question … whether a constitution was given or not'.[85]

Like Scheppele's description, the Court's use of history in the *Bank Mizrahi* case is from 'now' and looking forward. The Court was keenly aware of the founders' intent, as referred to by Chief Justice Barak: 'It is well known that the Prime Minister, Ben-Gurion, was against having a constitution'.[86] However, he added, 'the judge must ask himself what is the perception of the Israeli public today?'[87] He reasoned, 'the best interpretation of our national history' is to see that the Knesset has the power to give a constitution.[88] For him, history must be viewed as a whole without fragmentation.[89] The public understanding of its laws must look forward towards a constitutional democracy as 'the lessons of World War II – where the Holocaust is central and human rights were oppressed by totalitarian regimes – put human rights on the agenda of the world'.[90]

The drafting of the Yeshiva students' case, which challenged the 1948 'status quo arrangement', is the second most-cited case in the book (*Yeshiva* case).[91] It marks the first Supreme Court decision to declare equality as a constitutional right. During the 1970s and 1980s, the Court rejected challenges to the arrangement of exempting Yeshiva students from army service, ruling that it was 'a political question'. However, after *Bank Mizrahi*, the Court decided that this exemption is against the rule of law, as there is no legislation to support it.[92] Eight years later, in 2006, an 8:1 majority of the Court further decided that a new statute, which postponed the drafting of these students, is unconstitutional as it violates the right of equality. The state argued that the legislator intentionally excluded the right of equality from the 1992 Basic Laws and thus the case did not raise a constitutional question. However, Justice Barak ruled that 'human dignity' should consider 'fundamental values', and therefore it includes equality.[93] Justice Gronis wrote a minority opinion upholding the new law, following John Ely's theory,[94] which justifies judicial review when the democratic process fails because of a negative perspective against the minority.

Adrian Vermeule, 'The Exceptional Role of Courts in the Constitutional Order' (2016) 92 *Notre Dame Law Review* 817, 818.

[83] *United Mizrahi Bank* (n 56) 357.

[84] ibid 391.

[85] ibid 475.

[86] ibid 364.

[87] ibid 397.

[88] ibid 396.

[89] ibid 395.

[90] ibid 352.

[91] HCJ 6427/02 *Movement for Quality Government v Knesset* 2005 PD 61(1) 619 (*Yeshiva* case).

[92] HCJ 3267/97 *Rubinstein v Minister of Defence* 1998 PD 52(5) 481.

[93] ibid para 32.

[94] John Ely, *Democracy and Distrust* (Harvard University Press 1980).

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

The *Yeshiva* case indicates that the political determines the boundaries of belonging. The question of who must share the burden is relevant to the Israeli Jewish community as the political grouping and not to all citizens. Justice Cheshin's opinion articulated Schmitt's Constitution: the state's political character rests on its ability to defend itself. If there is no sacrifice by all Israeli Jews, there is no Jewish state; there is no existence and no constitutional law; and therefore there is no need even to discuss whether equality is enumerated or not as the question is a matter of existence.[95]

As in the *Bank Mizrahi* case, the 'now' was the dominant factor in the *Yeshiva* case. The judgment indicates that the dramatic increase in the numbers of young persons who were potentially exempt from army service was crucial: in 1948 there were very few exempted Yeshiva students but by 2005 it had reached 11 per cent of the total number of persons who could be drafted. As Justice Barak stated, '[t]here is a limit … the quantity makes the quality'.[96]

Like the claims of the American originalists, several authors in the book under review criticise the Court's use of history to promote 'fundamental values'.[97] Hostovsky Brandes argues that the short period of time since the enactment of the 1992 Basic Laws 'could not on its own justify interpreting the right to human dignity contrary to legislative intent', especially on the right of equality which intentionally was not enumerated.[98] Gideon Sapir argues that 'fundamental values' become judicial values and by this 'the Court writes the Constitution, interprets it and thereby decides in disputes concerning values that were gagged in the past by the political system', especially on the 'status quo arrangement'.[99] Joshua Segev sees the Court's approach as pursuing a 'very radical methodology', as it avoids 'tradition and long standing practices'.[100] Ariel Bendor worries about 'political judging' based on 'values'.[101] For Moshe Cohen-Eliya, the Court 'has always been the flag-bearer of liberal, democratic humanistic values', but its judicial activism led to a backlash, so he suggests following Ely's approach.[102]

So far, we have seen the Court's use of the living constitutionalism approach, which challenged founding values mainly in two seminal cases – *Bank Mizrahi* and the *Yeshiva* case –

[95] For Justice Cheshin, the law that postpones the Yeshiva students' army service contradicts 'the basic values that constitute our organic life, our truth, our wishes, all the hopes that the new state of Israel is built on … these values that give life to Knesset's laws': *Yeshiva* case (n 91) opinion of Justice Cheshin, para 6. He continued: 'Thus the Israeli Defense Forces (IDF) is the body that secures the continuation of the Jewish state … If there is no IDF, there will not be a Jewish state … the duty to serve in the IDF aims to secure the right of individuals and the state – the right to survive and self-defence. This duty applies to every person who can carry arms with his hands': ibid para 17.
[96] *Yeshiva* case (n 91) opinion of Justice Barak, para 28.
[97] Scalia, for example, criticises the use of 'fundamental values' as it is the 'judicial personalization of the law'. For him, in a democratic society the elections take care of 'current values' very well: Antonin Scalia, 'Originalism: The Lesser Evil' (1988) 57 *University of Cincinnati Law Review* 849, 862.
[98] Hostovsky Brandes (n 78) 273.
[99] Gideon Sapir, 'Why a Constitution – in General and in Particular in the Israeli Context?' in Sapir, Barak-Erez and Barak (n 77) 9, 23.
[100] Joshua Segev, 'Justifying Judicial Review: The Changing Methodology of the Israeli Supreme Court' in Sapir, Barak-Erez and Barak (n 77) 105, 114.
[101] Ariel L Bendor, 'The Purpose of the Israeli Constitution' in Sapir, Barak-Erez and Barak (n 77) 41.
[102] Cohen-Eliya (n 77) 178.

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which have a direct connection with the founding act of 1948–49. In the following section, I discuss the case of the Palestinian citizens of Israel.

5. ORIGINALISM

Although the three editors of the book under review state that 'Israel's particular *raison d'être* as a State [is] defined in its Basic Laws as "Jewish and democratic"',[103] the book does not discuss cases concerning the equal rights of Palestinian citizens. As I will explain and argue, these cases constitute the leading decisions in which the Court articulated the constitutional interpretation of this *raison d'être.* This section is presented in two parts: (i) originalism in legal practice by examining Supreme Court decisions, and (ii) originalism in Israeli legal academic writing.

5.1. SUPREME COURT DECISIONS

The landmark *Ka'adan* case, decided in 2000, is the first case in which the Supreme Court provided its interpretation of the values of a 'Jewish and democratic state' in order to set out the scope of equal rights for Palestinian citizens of Israel.[104] In this case, the authorities denied an Arab family's request to purchase a house in a new small town, arguing that the 'history of settlement' since 1948 is to build the 'Jewish state', and that accepting the petition would negate the history of the foundation. The Court used both approaches in this judgment: living constitutionalism and originalism. Chief Justice Barak rejected the state policy of racial segregation in housing and ruled that 'Jewish and democratic' does not mean that 'the state will discriminate among its citizens'.[105] For Justice Barak, the 'Jewish state' is a state with a Jewish majority, which is open for immigration for Jews only and which possesses dominant Jewish-Hebrew cultural characteristics.[106] He emphasised that accepting the petition does not negate the founding identity, including the 'history of settlement': 'The petitioners do not discount the Jewish foundations of the state of Israel's identity, nor the history of settlement in Israel. Their petition is future-oriented'.[107]

While conservatives initially perceived *Ka'adan* as anti-Zionist, they later started to use its interpretation of 'Jewish state' in arguments against equal rights for Palestinian citizens. In 2002, in the run-up to the Knesset elections, the Attorney General requested the disqualification of an Arab political party list and its leader, contending that their platform of 'a state for all of its citizens' negates the Jewishness of the state based on *Ka'adan* (the *Disqualification* case). Justice

[103] Gideon Sapir, Daphne Barak-Erez and Aharon Barak, 'Introduction: Israeli Constitutional Law at the Crossroads' in Sapir, Barak-Erez and Barak (n 77) 1, 5.
[104] HCJ 6698/95 *Ka'adan v Israel Land Administration* 2000 PD 54(1) 258.
[105] ibid para 31.
[106] As Justice Barak put it, 'Hebrew, for instance, is necessarily the state's main language, and its primary holidays will reflect the national renewal of the Jewish nation. Jewish heritage constitutes a central component of Israel's religious and cultural heritage and it includes also other characteristics which we do not need to state': ibid.
[107] ibid para 7.

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Barak, in this case, decided that while the concept of 'a state for all of its citizens' or advocacy for the return of Palestinian refugees negates the Jewishness of the state, these positions should be balanced with the characteristic of Israel as a 'democratic state' which ensures wide political participation.[108] Although all 11 justices in this case agreed with Barak's interpretation of 'Jewish state', they disagreed with its applicability. In a split 7:4 decision, the Court dismissed the disqualification request, reasoning that the Attorney General did not provide evidence to show that the political party's main activity directly targeted the features that define the 'Jewish state'.

Let us see the link between *Ka'adan*, the *Disqualification* case and the foundation. All the justices in these cases agreed that the interpretation of 'Jewish state' means that the state must retain the following elements: (i) a Jewish majority; (ii) denial of the return of Palestinian refugees; (iii) furtherance of the Law of Return; (iv) rejection of 'a state for all of its citizens'; (v) domination of Jewish group rights (e.g., language, culture, religion); and (vi) ensuring the history of settlement. I will explain that this particularity is linked to the revolutionary founding acts of 1948–49. Before I do so, I will first discuss cases that clarify the scope of the 'history of settlement', as referred to in *Ka'adan.*

After *Ka'adan*, the political will started to appear clearly in Palestinian rights cases. In one well-known case, Palestinian Christian villagers from Iqrit – who had been evacuated from their village by the Israeli army in 1948 – were promised permission to return after the end of the war. In 1997, almost fifty years later, they were still displaced and again they brought their case before the Supreme Court. As citizens, they argued that the 1992 'constitutional revolution' concerning the rights of property and human dignity must allow them to return to their village.[109] The Prime Minister at the time, Ariel Sharon, in responding to the petitioners' case, made a link between their case and the Palestinian refugees' claim for return, arguing that the petition raises 'diplomatic matters'. The Court accepted his position in 2003:[110]

> [T]he Palestinian people are again raising their claim for the right of return, and returning the uprooted villagers may create a precedent which will damage the high interests of the State. This subject refers to diplomatic matters, where the government enjoys very wide discretion.

This case marked the first occasion on which the Court clearly articulated that political will trumped constitutionalism. The petitioners asked for a second hearing and Justice Matza agreed that '[i]t seems that this is the first time that the [state] authority raised before the Court and asked to be released from its promises based on pure political and diplomatic reason'.[111] Despite this, Justice Matza denied the request and explained that this case raises 'unique political-diplomatic reasons', which probably will not come before the Court again.

[108] EA 11280/02 *Central Elections Committee to the Sixteenth Knesset v Tibi* 2003 PD 57(4) 1 (*Disqualification* case).
[109] HCJ 840/97 *Sbeit v Government of Israel* 2003 PD 57(4) 803 (*Iqrit* case).
[110] ibid para 6.
[111] HCJ 6354/03 *Sbeit v Government of Israel* (18 June 2004), para 5 (*Iqrit* case, request for further hearing).

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Contrary to Justice Matza's prediction, a similar case did come before the Court involving other villagers, who also asked to return to their land which had been confiscated in 1948. Here, the Court decided that cases related to the 1948 War are exceptional and thus 'the influence of the Basic Law: Human Dignity and Freedom … if it does exist, is minimal'.[112] This decision is the first after *Bank Mizrahi* in which the Court ruled that the 1992 Basic Laws have no influence on a legal question simply because it belongs to the foundation era.

These two cases concerning uprooted villages exemplify decisionism, where political will trumps constitutionalism in order to ensure the achievements of the state's foundation, even if the claimants are citizens of the state.

This political will also appears in cases concerning the use of Muslim holy sites. In 2002, Arab Muslim citizens requested the reopening of a unique historical mosque for prayer which the state had declared as absentee property in 1948. The petitioners argued that God cannot be an absentee and the authorities' plan to convert the Big Mosque to a museum infringed their equal rights to religion. The authorities made a link between this request and the foundation era, and contended that 'the relevant considerations for the authorities should be political and diplomatic considerations'.[113] While Justice Salim Jubran, the only Palestinian justice, found that prohibiting Muslims from praying in the Big Mosque carries racist messages and that the mosque should be a place of prayer, his final decision rejected the petitioners' request and ordered that the future museum should also give respect to Islamic heritage, a remedy that was against the petitioners' demands.

The 'diplomatic reasons' appear in another case concerning holy sites. In *Darweesh*, the petitioners challenged the state's implementation of the Protection of Holy Sites Law (1967), which provides that the Minister of Religious Affairs will declare the holy sites of all religious communities.[114] The Minister declared only Jewish holy sites as holy places. In 2004, Palestinian Muslim citizens requested the equal implementation of the law by also declaring the list of Muslim holy sites. The state raised the history of the foundation and claimed that this request 'might lead to diplomatic consequences'.[115] The Court dismissed the petition by explaining in a short paragraph that there is no need to enact bylaws to protect Muslim holy sites. According to this ruling, there is no official recognition for the existing Muslim holy sites, as the only holy sites named by the state are Jewish sites.

The cases concerning the uprooted villages, the Big Mosque and holy sites clarify the scope of the 'history of settlement' noted in *Ka'adan*, which applied the original will. As decisionist cases, the Court perceives the militaristic achievements of the foundation as final and not as a matter of constitutionalism, and it continues to treat the land and holy sites of Palestinian citizens as enemy-alien property. The book under review does not discuss these cases; this presents a

[112] CA 4067/07 *Jabareen v State of Israel* (3 January 2010), para 35.
[113] HCJ 7311/02 *Association for Support and Defense of Bedouin Rights in Israel v Municipality of Beer Sheva* (22 June 2011), opinion of Justice Naor, para 21 (*Big Mosque* case).
[114] HCJ 10532/04 *Sheikh Abdullah Nimr Darweesh v Minister of Religious Affairs* (9 March 2009) (*Holy Sites* case).
[115] See the state's response submitted before the Court, para 16, available in the case file at Adalah.

challenge to the main theme of the book that following the enactment of the 1992 Basic Laws, the only approach of the Israeli Supreme Court is living constitutionalism.

Let us now examine originalism. First, with the exception of the Law of Return, the other elements delineated by the Court, mentioned above, in interpreting the meaning of 'Jewish state' do not rely on legislation or any legal norm. Second, these conditions go far beyond the public meaning of the 'Jewish state', as articulated by the Zionist movement before 1948, as Professor Akzin explained.[116] Third, the Court's interpretation differs sharply from the first two official constitutive documents that use the term 'Jewish state', namely the UN Partition Plan (1947) and the Declaration of the Establishment of the State of Israel (1948). The UN Partition Plan provided that two states – one Arab and one Jewish – should be created; they must be democracies without any sort of discrimination,[117] and with special protection for land rights[118] and holy places.[119] The Declaration of the Establishment of the State of Israel, while pronouncing that the 'Jewish state' will be open to Jewish immigration, does not include the other above-mentioned elements.[120]

These judicial decisions indicate that the original public meaning espoused by Ben-Gurion's party regarding the new conditions in 1948–49 became authoritative as the hegemonic understanding of 'We the People'. To recap, the factors of the founding act led in 1948–49 to a denial of the return of Palestinian refugees; free Jewish immigration to the new state; a Jewish majority within the Green Line; second-class citizenship for Palestinians who remained; and confiscation of Palestinian property based on the 'enemy-alien' doctrine.

We can see the elements that indicate the existence of hegemony. First, all the justices accept these specific factors as constituting the meaning of a 'Jewish state'. The Court's understanding of 'territory-citizens' belongs to the territory achieved by the state in 1949. The *Disqualification* case also indicates that Israel is a 'Jewish state' as it refers to the founding people of 1948, and it is a 'democratic state' as there was no Knesset, since the first elected legislature in 1949, without the political participation of all citizens.[121] Second, this original meaning constrains the Court's

[116] Akzin (n 63).

[117] UNGA Res 181 (II) (n 57) Part 1, B, art 10(d): 'Guaranteeing to all persons equal and non-discriminatory rights in civil, political, economic and religious matters and the enjoyment of human rights and fundamental freedoms, including freedom of religion, language, speech and publication, education, assembly and association'.

[118] ibid, Part 1, C, Ch 2, art 8: 'No expropriation of land owned by an Arab in the Jewish State (by a Jew in the Arab State) shall be allowed except for public purposes. In all cases of expropriation, full compensation as fixed by the Supreme Court shall be paid previous to dispossession'.

[119] ibid, Part 1, C, Ch 1, arts 1 and 2: '1. Existing rights in respect of Holy Places and religious buildings or sites shall not be denied or impaired. 2. In so far as Holy Places are concerned, the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens … without distinction as to nationality, subject to requirements of national security, public order and decorum'.

[120] Declaration of the Establishment of the State of Israel (n 55). The Declaration provides that the new state 'will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice … it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations'.

[121] Although the political discourse heavily emphasises that Jerusalem, which was occupied in 1967, is the capital of the state, the Court never identified it as a factor of the 'Jewish state'. Note that the Palestinians in Jerusalem are not citizens and do not participate in elections.

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judgments, regardless of legal changes or the justices' political opinions, gender or ethnic origin (as liberal, conservative, secular or religious, man or woman, Ashkenazi, Mizrahi or Palestinian Arab). Third, the hegemony allows for disagreement regarding the application of the elements but not their legitimacy, as seen in the *Disqualification* case.

In its reasoning in these cases, the Court did not use a historicist methodology (such as the founders' intent, the Declaration, or the original public understanding). *Ka'adan* evaluates the whole past without fragmentation, from the present and looking forward, as Justice Barak praised the history of settlement and then stated: 'It is always important to know not only from where we came, but also where we are heading'.[122] At the same time, Justice Barak set out the elements of a 'Jewish and democratic state' without citing any legal references. Similarly, in the 'history of settlement' cases – namely those involving the uprooted villages, the Big Mosque and the holy sites judgments – the Court did not engage with any historical references. In these cases, the hegemony does the work; it became the justices' 'common sense'.

Following Schmitt's theory that originalism is about the founding identity that determines the scope of equality, for the Israeli Supreme Court, the whole meaning of the founding act is about equality based on 'We the Jewish People'. None of the justices expressed the need to uphold the 1948 'status quo agreement'. None of them voiced concern about Ben-Gurion's position against drafting a written constitution. After more than 25 years, *Bank Mizrahi* still enjoys legitimacy and, as Bendor explains, '[i]t is accepted in practice, not only by the Supreme Court but also by the Knesset'.[123] However, following the *Ka'adan* ruling against racial segregation in housing, the Knesset enacted the 2011 Admissions' Committee Law, which allows each small town to reject applicants based on 'social suitability', and mostly Arab families are excluded.[124] This legislation, which legalised the existing practice, in many ways undermines the Court's decision in *Ka'adan.*

Contrary to the positions of the Israeli authors as articulated in the book under review, the Court was originalist in its application of the 1992 Basic Laws in the cases concerning Palestinian rights. While the legislator was worried primarily that protecting the right of equality would reach the ethnic privileges and domination by the Jewish majority created since 1948, the Court shows that it (the Court) is the guardian of this intention. The book focuses on the *Yeshiva* case but we can see easily that as a result of the increase in the number of exempted Yeshiva

[122] *Ka'adan* (n 104) para 37.
[123] Bendor (n 101) 41.
[124] While there are many other possibilities regarding the scope of the 'Jewish state', the Court chose only its originalist meaning. For example, one may accept the characteristics of the State of Israel as a Jewish state without agreeing to any aspect of discrimination. The State is the only Jewish state in the world, as it is the only state that carries a Jewish-Hebrew name and declares Hebrew as its official language, and the only state that recognises Jewish holidays as official holidays. In addition, the State of Israel could also be a bi-national state and at the same time be the only Jewish state in the world, as it would be the only state where Israeli Jews – as Jews – have the right of self-determination, which includes the right to govern. Although these possibilities have nothing to do with discriminating against Palestinian citizens in land allocation and citizenship, the Court chose very specific factors that fit only within the meaning of Ben-Gurion's party in 1948–49. The originalist version explains why the Court dismissed all the petitions and also explains why these decisions enjoy legitimacy from the public as it falls within the hegemony.

students, the Court rejected the 1948 'status quo agreement' to protect today the original meaning of the political. Here, both living constitutionalism and originalism appear as a form of hegemony.[125]

The question is not whether equality is enumerated in the 1992 Basic Laws, but how it is decided. For the duality of the law, the content of the norm, written or not, is determined only after the decision, on which the will is its locus.[126] A good example is the case concerning the ban on family unification, in which the Court upheld the constitutionality of a law that prohibits Palestinian family unification in Israel. In this case, both approaches, living constitutionalism and originalism, coexist. While the Court, in this 2006 case, decided for the first time that the right to equality based on nationality and the right to family life are constitutional rights, it justified the prohibition, using its originalist approach based on the political, finding the Palestinians to have the status of 'enemy aliens'.[127] In fact, after *Bank Mizrahi* and as of the time of publication of the book under review, the Court had dismissed all cases brought by Palestinian citizens against discriminatory laws.[128]

Both claims – Gramsci's thesis on hegemony and Schmitt's theory that equality is the paradigmatic right for originalism – find support indirectly among some American scholars, with Yale Law School professors taking the lead. Through Ackerman's 'political moment', the American elites built a political culture, which determines equality based on the values of 'We the People'. The foundation era supported slavery, the Reconstruction era resulted in racial segregation, and the New Deal era, by emphasising civil rights, led to *Brown v Board of Education*. Like Gramsci's hegemony, during 'normal politics' justices express differences between themselves as well as with the legislator; however, they maintain loyalty to

[125] Schmitt's theory could also answer the question of why the Court overturned founding politics regarding the drafting of Yeshiva students. For Schmitt the Constitution is the 'principle of dynamic emergence of political unity, of the process of constantly renewed formation and emergence of this unity from a fundamental or ultimately effective power and energy'. The state is something 'always arising anew' and the political unity 'must form itself daily': Schmitt (n 13) 61.

[126] As Kahn's thesis, which follows Schmitt, posits that the norm is abstract and we do not know its substance until it is decided. The decision determines the norm and not the opposite. Kahn provided the example where most Americans agreed with slavery, while at the same time believing in the moral norm of equality: Kahn (n 39) 90.

[127] HCJ 7052/03 *Adalah v Minister of Interior* 2006 PD 61(2) 202 (*Family Unification* case).

[128] Beside the *Nakba Law* case (n 62) and the *Family Unification* case (n 127) mentioned above, on 5 June 2013, the Court dismissed a petition against Amendment 113 of the National Insurance Law, enacted in 2010, which reduces child allowances by 60% for families that have not had their children vaccinated. The petitioners argued that the law has adverse effects mainly for Arab Bedouin residents of the unrecognised villages in the Negev: see HCJ 7245/10 *Adalah v Minister of Welfare and Social Affairs* (5 June 2013) (*Vaccinations* case). On 17 September 2014, the Court dismissed petitions against a statute that allows small Israeli Jewish communities to reject applicants for housing based on the criteria of 'social suitability' and the 'social and cultural fabric' of the town: HCJ 2311/11 *Sabah v Knesset* (9 September 2014) and HCJ 2504/11 *Sabah v Knesset* (17 September 2014) (*Admissions Committees* case). These criteria work in fact to exclude Arab families. On 14 January 2015, the Court rejected a petition to cancel an amendment to the Electoral Threshold Law enacted in 2014, which raises the threshold percentage of votes needed to gain seats in the Knesset from 2% to 3.25%: HCJ 3166/14 *Gutman v Attorney General* (14 January 2015) (*Electoral Threshold* case). Raising the threshold forces radically different Arab political parties to run together, such as secular and religious groups, thereby harming political pluralism.

originalism.[129] Amar emphasised that the Founders and the first US Presidents understood the significance of building public opinion about the power of the people's will: 'The idea of popular education resurfaces over and over in the Bill of Rights' and 'church, militia and jury' were understood 'as devices for educating ordinary Citizens about their rights and duties'.[130] For Kahn, nationalism started with the call for sacrifice and, as he contended, '[w]e know who we are when we know the concerns for which we are willing to sacrifice'.[131] Here, the core of hegemony is the original meaning of the political that shapes who are the equals. Reva Siegel explains that the historicist methodology does not explain the practice of originalism, but rather it is the link between history, public opinion and national memory.[132] For her, this practice of originalism is a form of living popular constitutionalism,[133] meaning that originalism is a form of hegemony. According to these scholars, discovering the link between originalism and equality is not about the use of a particular historicist methodology. It is about understanding the political identity through political imagination, national memory and education, which captures the whole meaning of 'We the People' in the present.

To summarise, the Israeli case answers the core of originalism. First, like the American case, Israel has a unique revolutionary founding act. Second, the meaning of equality based on the understanding of the scope of 'We the People' was fixed during the foundation in 1948–49. It became hegemonic within a very short time as a result of the efforts of the political elite and state institutions. Third, this original meaning of equality is authoritative, as even after the 1992 Basic Laws it has led to absolute judicial constraint.

If originalism is a form of hegemony in legal practice, this hegemony must also become the 'philosophy' of the intellectuals. This subject is the focus of the next section.

5.2. The Role of the Intellectuals

Although many Israeli Jewish intellectuals in 1948–49 were against 'the new conditions', they nonetheless represented the hegemonic belief of that generation. Two articles contained in the book in Part 9 'Israel – "Jewish and democratic"' illustrate that understanding. The first article is that of Chaim Gans, a prominent legal philosopher who is affiliated with the

[129] With regard to creating hegemony, Ackerman argued that 'the basic unit is The Generation'. We, the living, accept the meaning of the 'historical events' of the creative generation who struggled for 'the war for independence, war between states, struggle between capital and labor', which led to 'big constitutional changes in public values', and we 'convert our lived experience into the next generation's monuments in our history books and statute books, songs and public holidays': Bruce Ackerman, 'A Generation of Betrayal?' (1997) 65 *Fordham Law Review* 1519, 1524.
[130] Amar (n 7) 1210.
[131] Paul Kahn, *Putting Liberalism in its Place* (Princeton University Press 2005) 261.
[132] Reva Siegel, 'Heller and Originalism's Dead Hand – In Theory and Practice' (2009) 56 *UCLA Law Review* 1399.
[133] Reva Siegel, 'Dead or Alive: Originalism as Popular Constitutionalism in Heller' (2008) 122 *Harvard Law Review* 191.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

Zionist left;[134] the other is authored by Aviad Bakshi and Gideon Sapir, who are known to be affiliated with the Zionist right wing.[135] We will see that their ideas follow the hegemony created by Ben-Gurion's party and they attempt to frame these notions as philosophy.

Gans claims that there are three Zionist versions that justify the 'Jewish and democratic state': proprietary, hierarchical and egalitarian. The proprietary view holds that the Jewish people have a right of ownership over the 'Land of Israel', which was given by God. The 'hierarchical' represents the view of the mainstream Israeli academics, which is based on cultural superiority; the contribution by Bakshi and Sapir belongs to this version. Bakshi and Sapir open with a universal claim: every nation-state is entitled to preserve its culture. They then define the 'nation' as referring to an 'ethno-cultural' group, and thus the State of Israel has a legitimate interest in protecting Jewish cultural rights. From this perspective, they justify the prohibition of Palestinian family unification in Israel 'for preserving the Jewish majority'.[136] For Gans, this version advocates Jewish domination in almost every field.[137]

Gans replaces the God of the proprietary version and the cultural reasoning of the hierarchical view with reasoning based on security. He sees Jews as a minority in the Middle East who are surrounded by the Arab enemy, and thereby directly applies the 'enemy alien' doctrine to Palestinian citizens of the state.[138] 'In the case of the Jews in Palestine', Gans argues, Jewish domination should apply 'only to spheres of security and demography'.[139] For him, as American natives have the right to control the demography in their area, 'Jewish hegemony' is justified for the exercise of Jewish self-determination.[140]

For both versions – the hierarchical and Gans' view – the partitioning of Palestine is key.[141] It helps to support the claim that group rights of Palestinians should be exercised in the Palestinian state when it is established and to reject the idea of a bi-national state in Israel, including the claim of the Palestinian refugees for return. Bakshi and Sapir believe that their ideas follow 'liberal premises';[142] Gans thinks that his version is egalitarian.

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[134] Chaim Gans, 'Jewish and Democratic: Three Zionisms and Post-Zionism' in Sapir, Barak-Erez and Barak (n 77) 473.

[135] Aviad Bakshi and Gideon Sapir, 'A Jewish Nation-State: A Discussion in Light of the Family Reunification Case' in Sapir, Barak-Erez and Barak (n 77) 487. Gila Stopler wrote a critical analysis in the book under review about the Jewishness of the state as it refers to religion-state relations and not Arab-Jewish relations: Gila Stopler, 'National Identity and Religion-State Relations: Israel in Comparative Perspective' in Sapir, Barak-Erez and Barak (n 77) 503.

[136] Bakshi and Sapir (n 135) 500.

[137] Gans (n 134) 478.

[138] Gans explains that Palestinians who are citizens of Israel 'often side with their ethno-cultural group and not with the state in which they are citizens. As long as the conflict remains … the Jews must rely on their strength. In other words, they must continue to live within the framework of a state within which they enjoy hegemony and in which they have military power. Even when an agreement, which would end the current state of war between the parties, is reached, many years will have to pass before relations predicated on mutual trust can be established': Chaim Gans, *A Just Zionism: On the Morality of the Jewish State* (Oxford University Press 2008) 78–79.

[139] Gans (n 134) 480.

[140] ibid.

[141] Bakshi and Sapir (n 135) 501.

[142] ibid 488.

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Despite the differences in political affiliations among these authors, they agree that the Jewish state must retain very particular elements: (i) 'Jewish hegemony' on demography; (ii) denial of the right of Palestinian refugees to return; (iii) the Law of Return; (iv) Jewish domination in security matters; (v) rejection of a bi-national state/a state for all of its citizens; and (vi) domination of Jewish group rights. They also see that Palestine must be divided into two states. These elements also appear in the Palestinian literature as constituting the Palestinian catastrophe – the *Nakba*.[143]

The views of 'outsiders' are often helpful in inquiring into claims of the universality of a 'hegemonic group', as they are closer to a situation of being behind a 'veil of ignorance'. Susanna Marcini and Michael Rosenfeld, American legal scholars, responded to the two articles referred to above. They argue that these ideas are 'radically incompatible with human rights standards and with the understanding of democracy as a system which treats each individual with equal respect and concern'.[144] For them, Gans 'represents a serious deprivation of equality in the context of collective constitutional approach',[145] and thus his version 'is not egalitarian as he presents it to be'.[146] Further, these interpretations of a 'Jewish state' are not universal as the Israeli authors claim, as '[o]ne can fully support Israeli statehood and its Jewish "character" without accepting the idea that any nation-state can disregard the legitimate cultural and identity-related rights of sub-national groups, or worse, establish a system of differentiated citizenship'.[147] Also, for Frank Michelman, such a particular interpretation of the 'Jewish state' is neither universal nor belongs to liberal philosophy.[148]

I argue that these Israeli authors express the original public meaning of Ben-Gurion's party in 1948–49, which is linked to the founding acts of 1948–49. With the exception of the Law of Return, these ideas do not rely on any legal norm or the Zionist perspectives held before 1948; nor do they belong to a universal philosophy based on reason. The imagined territory of a 'Jewish and democratic state' is not that designed by the UN Partition Plan, and not that which was under Israeli control at the time of the 1948 Declaration of the Establishment of the State of Israel or that which is under Israeli control today. It is that territory that was determined by the 1949 ceasefire.[149]

[143] See the articles in Ahmad Sa'di and Lila Abu-Lughod (eds), *Nakba: Palestine, 1948 and the Claims of Memory* (Columbia University Press 2007).
[144] Susanna Mancini and Michel Rosenfeld, 'The Dilemmas of Identity in a Jewish and Democratic State: A Comparative Constitutionalist Perspective on Bakshi and Sapir, Gans, and Stopler' in Sapir, Barak-Erez and Barak (n 77) 517, 524.
[145] ibid 528.
[146] ibid 519.
[147] ibid 522.
[148] Frank Michelman participated in this conference for the twentieth anniversary of the 1992 Basic Laws. He claimed that if the idea of a Jewish state means 'a state where people of Jewish cultural identity and religious faith are assured of being able to live as authentically Jewish, safely and with full social respect', then there is no clash with liberal theory 'but this does not hold true if it includes a component of domination': Frank I Michelman, 'Constitutional Essentials' (2011) *Harvard Public Law Working Paper* 8.
[149] Gans (n 134) 479.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

Like the Supreme Court, these Israeli academics do not use a historicist methodology. Simply, the hegemony now appears as philosophy. The disagreement between them is about what is the 'best justification' for the above elements and not about the legitimacy and the acceptance of such elements. Still, their mission is impossible as it attempts to provide a philosophy of reason to the founding act, which is a result of concrete decisionism and, by definition, knows no reason but only political will. Even the Court could rely only on political will and not reason in the 'history of settlement' cases.

Indeed, their 'philosophy' appears like faith in a civil religion. If there is no Jewish majority, there is no state; if there is no Law of Return, there is no Jewish self-determination; the return of the Palestinian refugees is the end of the state's existence; a bi-national state is the end of Zionism; and returning property to Palestinians is the end of Jewish settlement.

The tragedy of intellectuals like Gans is the enactment of the infamous 2018 Basic Law: Israel – The Nation State of the Jewish People (the Nation-State Law), which clearly sets out the polity of the state as solely 'We, the Jewish People'.[150] Although the values of 'Jewish and democratic' were regulated in the 1992 Basic Laws, based on a compromise with the right-wing camp, the 'liberal Zionists' started to use it as a sword against the right wing in advocating that to keep the Jewishness of the state, Israel must end the 1967 occupation. Now the right wing has legislated for its main beliefs in the Jewish Nation-State Law, which has been condemned locally and internationally as anti-democratic and racist.[151]

The debate around the Nation-State Law also indicates that originalism is a hegemonic belief. The Zionist liberal camp does not advocate against the law's substance but against what it does not include – the right of equality.[152] The response of the right wing is that this law simply states the legal tradition since the state's foundation, and equality is already ensured as a constitutional right (as the book's authors emphasise).[153]

As we have seen in this section, the founding values regarding the 'new conditions' of 1948–49 were accepted by the Israeli Supreme Court and by the intellectuals, which again explains that originalism is a form of hegemony. These insights will help us to see in the next section why the Israeli case and not the American case is the paradigmatic case of originalism.

[150] The Nation-State Law provides that self-determination in the State of Israel, including immigration and group rights, is exclusively for the Jewish people, and '[t]he state views Jewish settlement as a national value, and will act to encourage, promote and consolidate its establishment': see the Knesset website (n 76).

[151] Short articles about this new Basic Law are published on Verfassungsblog, 'An Israel of, for and by the Jewish People?', *Verfassungsblog: On Matters Constitutional*, https://verfassungsblog.de/category/debates/an-israel-of-for-and-by-the-jewish-people.

[152] For example, the former Chief Justice Aaron Barak stated in a public lecture on 19 December 2018 that the Nation-State Law is very important and 'indeed there is no real dispute in Israeli society among left or right, regarding most of its articles'. He added that contrary to what the legislator advocates, he and 'the Court never gave priority to democratic values over the Jewish values of the state'. For him, the law lacks reference to the right of equality on the individual level: see Bat El Binyamin, 'Aharon Barak: The Nation-State Law is an Important Statute Poorly Enacted', *Arutz 20*, 18 December 2018, https://www.20il.co.il/-אהרון-ברק-חוק-הלאום-הוא-חוק-חשוב-שנחקק/ (in Hebrew).

[153] Aviad Bakshi, 'Does the Nation Law Violate Equality?', *ICON-S-IL Blog*, 21 October 2018, https://bit.ly/2P9mHDH.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

6. THE PARADIGM OF ORIGINALISM AND ITS LESSONS

I contend that the Israeli, rather than the American case is the paradigmatic case of originalism, and that originalism leads to Schmittian democracy based on decisionism and not to the rule of law. For this discussion, we need criteria for examining the legal system of originalism. As has been mentioned, for originalists, rules must correspond with dualist values: certainty and legitimacy. We can imagine the latter value as something that follows the conditions of the rule of recognition as put forward by HLA Hart. Indeed Hart's rule of recognition is similar to the quality of the founding decision as it is valid because it exists as a social fact and because of its acceptance by the public and officials. For Hart, the rule of recognition is the ultimate and supreme criterion which was accepted as a common public standard by the officials to identify the validity of other rules.[154] This rule must be examined from 'the internal point of view' of the officials by accepting it without necessarily being identified with it morally.[155]

Following the dualist model, a legal system that is based on originalism must rest on two kinds of rule of recognition: one is the 'regular rule of recognition', which takes care of the value of certainty; the other can be called 'the sovereign rule of recognition', which takes care of political values. The sovereign rule of recognition provides that every decision that interprets or applies constitutional rights is valid only if it complies with the political will that is linked to the revolutionary founding act (such as Ackerman's First Decision, Schmitt's Constitution, the founders' intent or the original public understanding). Our test is the right of equality as it is the paradigmatic right for originalism, for it is the only right which derives directly from the scope of 'We the People' and identifies the nationalistic character of the regime by determining who is 'in' and who is 'out'.

I argue that originalism is the Law of the Israeli legal system as this system is identified by these two kinds of rule of recognition. The regular rule of recognition was identified and declared by the Court in *Bank Mizrahi*, while the other, the sovereign rule of recognition, is linked to the hegemony. This sovereign rule of recognition answers Hart's conditions. First, all the Israeli justices accept the original meaning of equality. Second, as a social fact, the Court declared it in *Ka'adan.* Third, the internal point of view approves the acceptance by all the Israeli justices of the original meaning of equality regardless of their personal views as to the result of its applicability, whether or not it makes justice.[156] Needless to add, Israeli Zionist academics also accept it regardless of their political affiliation, as we saw in the previous section. As hegemony itself is a matter of acceptance, this sovereign rule of recognition is the Israeli hegemonic value.[157]

[154] HLA Hart, *The Concept of Law* (Oxford University Press 2012) Ch VI.
[155] ibid 89.
[156] Justice Jubran's decision in the *Big Mosque* case (n 113) is a good example. He provided very strong justifications for why the petition must be accepted, as not opening the mosque for prayer infringes the human dignity of Muslim citizens and discriminates against them. However, his final decision complies fully with the politics of the foundation.
[157] We saw that in a case such as *Ka'adan* (n 104), in which both originalism and living constitutionalism appear, the Court decided that the result does not contradict the sovereign rule of recognition. Indeed, the space of freedom

Stephen Sachs and William Baude argued that the debate on originalism should be moved from the conceptual and the normative claims to the question of whether originalism is the American law.[158] For this purpose, they were the first to rely on Hart's rule of recognition. They concluded that originalism is the American law as it follows the founding law of the Constitution regarding the rules of change, such as Article V, precedents and the common law. In other words, they reduce the politics of revolution and nationalism to universal procedural rules of change. However, what makes American originalism a unique phenomenon, as Balkin noted, is the claim that the national values of the foundation control constitutional law.[159] While the characterisation of Hart's rule of recognition is helpful in examining originalism as the Law, its content should be about the substance of the founding political identity, which determines the scope of constitutional rights, and not about procedures which carry universal characteristics. *Bank Mizrahi* changed the founding regular rule of recognition with regard to procedures by providing the Court with the power of judicial review, but the sovereign rule of recognition that refers to the substance, which is first of all about the concrete meaning of equality, remains. A similar relationship can be seen between *Marbury v Madison* and *Dred Scott v Sanford*, which both coexisted during the same period.

This is why the Israeli legal system, rather than the American legal system, is the paradigmatic case, as originalism is the Israeli Law. This fact explains many different aspects of the law. First, unlike American academic writing on constitutional law, where there is debate about the legitimacy of originalism, Israeli constitutional thought mainly illustrates the Zionist hegemonic consensus, which covers a very wide range of ideas of conservative to liberal Zionist scholars. Second, unlike the US Supreme Court, where it is rare to find a final originalist judicial decision, originalism is the hegemony of Israeli Supreme Court justices and it appears in a very wide range of decisions.[160] Third, and most importantly, while American legal thought discusses Ackermanian constitutional moments, Israeli legal thought is devoid of serious debate as to whether the 1992 'constitutional revolution' led to a constitutional moment. In order to ask this question, one must have different perspectives about the past, but when the present is itself embedded in the past and the past is transferred to the law, it is impossible to even raise the

for the will of the justices runs between fully applying the sovereign rule of recognition to the point at which they follow it without contradiction. This range is the space of disagreement in which the justices can dispute issues of applicability, but with loyalty to the hegemony in ad hoc cases such as the *Disqualification* case (n 108). Again Gramsci's hegemony helps us to understand the relationship between the two rules.

[158] Stephen Sachs, 'Originalism as a Theory of Legal Change' (2015) 38 *Harvard Journal of Law & Public Policy* 817; William Baude, 'Is Originalism Our Law?' (2015) 115 *Columbia Law Review* 2349.

[159] For Sachs, the focus should be on whether the changes in American law follow the founders' law for changes as 'originalism is all about procedures not substance' (Sachs (n 158) 879). Similarly, Baude decided that the rule of recognition of the founding also refers 'to the validity of other methods of interpretation or decision', which includes precedents and the common law (Baude (n 158) 2352).

[160] For example, American originalists celebrate *Heller* with regard to the Second Amendment (the use of firearms by citizens), in which a deeply divided US Supreme Court issued a 5:4 decision upholding an individual's right to possess a firearm. Many scholars refer to the approach of Justice Scalia in this case as a form of living constitutionalism or popular constitutionalism: see references in Siegel (n 133) and *District of Columbia v Heller* 554 US 570 (2008).

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

question. David Fontana, who provided a short commentary in the book under review, noticed that Israeli constitutionalism is unique in the world as one that lives in 'perpetual revolution' for a long period without moving to a new constitutional moment.[161]

Schmitt's theory is also the paradigm for originalism because its meaning for equality fits the Israeli practice as the paradigmatic case. Like Schmitt, Gans' version, including the *Family Unification* and the *Yeshiva* decisions, all see the Israeli Jewish community as the relevant political community for equal rights and apply the political against the Palestinian citizens. Like Schmitt, Bakshi and Sapir do not accept citizenship as a factor for belonging as they define the 'nation-state' as it belongs to a people 'that share common ethnic origin, or another component of identity that is not dependent upon common citizenship'.[162] Similarly, for the Court, the 'fixed identity' of the founding people precedes the popular sovereignty based on citizenship, as seen in the *Disqualification* case. Like Schmitt, the Court rejected the idea of a 'nation-state' based on common citizenship and followed the position of Ben-Gurion's party against the 'Canaanite Movement' in 1948–49 by refusing to recognise 'Israeli nationality' as a legitimate category for Israeli citizens on their identity cards.[163]

The paradigmatic case (Israel) and the paradigmatic theory (of Schmitt) shows clearly that originalism is about maintaining a people's homogeneity. The articulation of views by the Israeli academics in this regard appears in the book's debate about judicial review, as such a discussion is always one about 'We the People'. When Ariel Bendor advocates 'professional judging' and his only exceptional case is judging that defends 'Jewish and democratic' values, he defends originalism as a rule of a people's democracy.[164] When Sharon Weintal advocates a three-track democracy in which the Court acts as 'the nation's trustee loyal to its founding narrative',[165] she sees originalism as a democratic track. While Sapir argues against judicial review, as there is no consensus on 'fundamental values,' he then switches and advocates judicial review to defend the values of a 'Jewish and democratic state' as democracy is about ruling by 'the founding people'.[166]

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[161] David Fontana, 'Perpetual Constitutional Moments: A Reply to Hostovsky Brandes and Weintal' in Sapir, Barak-Erez and Barak (n 77) 303, 304. Although only 70 years have passed since the founding of Israel and not over 200 years like the US, this difference in time has nothing to do with the relevance of originalism. The passage of time is not a matter for examining whether originalism is the sovereign rule of recognition. In addition, originalism itself does not accept the passage of time as a matter for change, as the fixed meaning of the Constitution should be valid after 70, 100 or 200 years. Kahn's work, which examined US Supreme Court decisions during the first 65–70 years of the foundation era, shows this clearly. The Israeli case is similar to his thesis in that both indicate how 'political will' and 'reason', originalism and living constitutionalism, coexist. As *Marbury v Madison* and *Dred Scott v Sanford* coexisted, *Bank Mizrahi* lives together with the cases concerning the uprooted villages and the holy sites: Paul W Kahn, 'Reason and Will in the Origins of American Constitutionalism' (1989) 98 *Yale Law Journal* 449.

[162] Bakshi and Sapir (n 135) 489.

[163] The Court dismissed a petition by citizens to register 'Israeli' instead of 'Jew' as their nationality on their identity cards, explaining that there is no such category: HCJ 8573/08 *Ornan v Minister of Interior* (2 October 2013).

[164] Bendor (n 101).

[165] Sharon Weintal, 'The Inherent Authority of Judges in a Three-Track Democracy to Recognise Unenumerated Constitutional Rights: The Israeli Story of a Judicial Mission with No Ammunition' in Sapir, Barak-Erez and Barak (n 77) 285, 293.

[166] Sapir (n 99).

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These ideas of originalism that see the founding people as preceding popular sovereignty invite the question of whether Israel is a democracy, as a democracy is about the sovereignty of the 'popular sovereignty'. The Israeli Constitution is Schmitt's Constitution, as the founding people's identity is itself the state's identity, and thus its democracy is a people's democracy and not its citizens' democracy. Thus, for Israeli Zionists, the 'Jewish state' is a 'democratic state', as both identities live legitimately together without contradiction.

As a result of the dualist distinction of originalism between identity and representation, parliamentary laws are not always allowed to decide, as political participation based on common citizenship is not the ultimate expression of the political will of the 'fixed identity'. Thus, there is a need in many cases for a decision. The sovereign rule of recognition could appear at any moment, as it depends on the concrete circumstances of each case. Its power collapses the distinction between normal politics and a political moment, certainty and will, and regularity and exception. Taking originalism seriously creates a legal culture of decisionism. All the cases discussed here – including *Bank Mizrahi*, and those concerning the uprooted villages, the Big Mosque and holy sites – are clearly decisionist cases derived from a legal culture that was created during the foundation. In his article in the book under review, Barak Medina explains that, historically, the Israeli parliament has played a marginal role in decision-making, even in the absence of an immediate threat.[167] Daphne Barak-Erez, a current Supreme Court justice, expresses satisfaction with this situation in her article, as she perceives that the Court always reaches the relevant balances.[168] The fact that a liberal justice like Barak-Erez sees such a phenomenon as normal is because decisionism is part of the normality. When the rule of law rests on dualist values, decisionism becomes normal and the rule of law becomes very situational.

7. CONCLUSION

Both Schmitt's theory and Israeli legal practice are the paradigmatic models of originalism in theory and practice. These models show that the conception of democracy based on originalism is about the case in which the founding political identity precedes the popular sovereignty. For maintaining the principle of sameness, decisionism and not the rule of law becomes part of the normality, as the content of the decisions that follow the founding identity is the matter for such a people's democracy and not the legality based on parliamentary laws or constitutionalism based on the rule of rights. For this reason, the foundation is the sacred moment, as it is the only significant time in which the particular ethnic homogenous people appear in full, concrete clarity. The analysis of non-normative originalism, as developed by Yale Law School professors – in particular, Amar, Ackerman and Kahn – are the closest to Schmitt's theory.

[167] Barak Medina, 'The Role of the Legislature in Determining Legitimate Responses to Security Threats: The Case of Israel' in Sapir, Barak-Erez and Barak (n 77) 445, 446.
[168] Daphne Barak-Erez, 'The National Security Constitution and the Israeli Condition' in Sapir, Barak-Erez and Barak (n 77) 429.

https://doi.org/10.1017/S0021223719000141 Published online by Cambridge University Press

The link between political identity and hegemony is very significant for studying originalism. The founding values are not sacred in themselves, as only those values that become hegemonic and linked to the understanding of the political identity are matters for originalism, while others could be challenged through living constitutionalism. Hegemony links the past with the present and through it the relevant founding values continue to live. Originalism is a form of hegemony and not a matter of the use of a particular historicist methodology that attempts to discover the political identity through dictionaries.

Still, it is not easy to discover the power of hegemony. In general, hegemonic groups are not aware of its effects, as it is their 'common sense', philosophy, faith and culture. This difficulty explains the problem of Greene's comparative study, in which he concluded that Israeli jurists are hostile to historicist methodology. Indeed, while Zionist Israeli jurists are originalists, not one of the Israeli authors in the book or the justices who delivered the judgments mentioned here defines himself or herself as an originalist.

Hegemony also explains the problem of the book. With its 33 contributors, not one of whom is Palestinian, the book discusses Israel as a constitutional democracy with an activist Supreme Court committed to living constitutionalism and human rights, and not a 'Jewish democracy' based on originalism and decisionism. As the values of the 'Jewish and democratic state' are the *raison d'être* of the state, studying constitutional law must start with the cases concerning Palestinian rights. However, as the book itself embodies the hegemonic discourse, its discussion of equality will obviously focus on the political community, and the *Yeshiva* case will serve as the example. By this, the book does not succeed in reaching the substance of Israeli constitutionalism.