

2016

Borrowing Legitimacy: The Israeli Supreme Court and American Law

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*Borrowing Legitimacy: The Israeli Supreme Court and
American Law*

by

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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Noga Morag-Levine
Spring, 2016

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Introduction*

The Israeli Supreme Court (“Court”) cites American law to borrow its legitimacy.¹ The Court’s search for legitimacy is—as is every such search by institutions—a combination of selectivity and reliance. It is the Court’s pursuit of a recognized authority that speaks to a question in need of answering. When the Court must speak with sure authority, it often looks to American law to provide such authority.²

Jabotinsky v. Weizman, the oldest case discussed below, is a perfect example of such a search. In *Jabotinsky*, decided just three years after Israel became a state, the Court was faced with a question of how to interpret Israel’s Basic Law. Its response? It turned to American law in its early hour of need, citing to it almost exclusively.

This paper will first provide a background for comparative law citations and their use by the Court. Then, it will examine the Court’s reliance on American law in two different subject areas: judicial restraint and the separation of powers. This examination will show two trends in the Court’s use of comparative law: first, different justices will use comparative law to simultaneously elucidate legal philosophy and establish elements of legal tests (sometimes using the same comparative law source, but sometimes not); second, comparative law was used as a contemporaneous and subsequent response to Israel’s Constitutional Revolution. Finally, this paper will examine leading jurists’ use of comparative law and their motivations for doing so.

I. BACKGROUND

a. Comparative Law Generally

A comparative law citation is a legal citation by a government entity (usually a court) in one country to a decision or opinion by a government entity of another country. This paper considers only comparative case law citations. Comparative law citations in case law can generally be grouped into one of three uses: positive, neutral, or negative. In other words, foreign law is used—as is all jurisprudence—as the foundation for a new or evolving legal doctrine; additional authority for an already-decided or established legal principle; or, as examples of how other nations’ jurisprudence leads to undesired results.

For many nations, including Israel, “[c]omparison is a fundamental tool of scholarly analysis . . . [and] plays a central role in concept formation” because comparative law citations

* My thanks: First and foremost, to Professor Morag-Levine for putting up with my erratic schedule, consistently helping me shape my vision for this paper, and her invaluable and incisive comments—I am so grateful. Second, to Professor Bean for her help in deciphering the database and being such a dear friend. Finally, a special thanks to my busy father for his help in editing this text during its final stages.

¹ This includes both Federal and State law. “Borrow” should not be read negatively.

² One note: As an American law student, it is at first hard to conceptualize there ever being a lack of legitimacy in the law. For us, each practice area is a veritable jurisprudential castle: legal principles as cornerstones sunk deep, sometimes hidden or obscured by time; solid, immovable walls of case law built on these cornerstones, established since time immemorial; newer statutory battlements glittering atop these common law walls; and the whole structure manned by a veritable army of practitioners, professors, and judges.

highlight distinctions and similarities between cases.³ And citing to foreign law is not a one-way street travelled only by young democracies. What used to be a “top-down dictation” from well-established judicial systems to fledgling judicial systems is now an “exchange among peers.”⁴

Comparative law citations have their dangers. The great hazard of citing to a foreign court is that the citing court may not understand the jurisprudential context of the cited material.⁵ For example, the American Constitution prohibits religious establishments, whereas Britain and Israel do not; indeed, neither Britain nor Israel even have a written constitution. And unlike France whose constitution is “resolutely secular,” the American Constitution protects the free exercise of religion. Thus, it might be out of place for American courts to use these nations’ jurisprudence when deciding religious freedom cases.⁶

Moreover, even if judges attempt to correct for these unsurprising differences by only citing comparative law on specific subject areas, jurisprudence is never so clearly categorical. A country’ jurisprudence is not a row of neatly arranged boxes from which citations are neatly and primly taken. Instead, every citation is plucked from a massive, complex web of ideas and philosophies, influenced by innumerable factors, including religious, cultural, historical, and economic values.

A final note on comparative law citations: Many justices use citations to foreign cases, as they do domestic cases, that were decided in entirely societally or jurisprudentially dissimilar conditions, and they do this to advance their personal judicial theories, especially when these theories fly in the face of the prevailing political winds.⁷

b. Israel Generally

The Court’s comparative law citations can only be properly understood by laying out the foundations and unique challenges of the Court.⁸ In its early years, the Court’s philosophy,

³ Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 129 (2005).

⁴ Aaron B. Aft, *Respect My Authority: Analyzing Claims of Diminished U.S. Supreme Court Influence Abroad*, 18 IND. J. GLOBAL LEGAL STUD. 421, 424 (2011). For example, “[a]s an initial matter, U.S. Supreme Court references to foreign sources of law have been far more frequent than might be commonly known.” *Id.* at 425.

⁵ Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 528-29 (2005) (“One of the difficulties using foreign law is that you don’t understand what the surrounding jurisprudence is.”). *See also* Carlos Bernal, *Foreword-Informal Constitutional Change: A Critical Introduction and Appraisal*, 62 AM. J. COMP. L. 493, 504 (2014) (“Instead, the ‘want-to-be’ foreign citation strategy seems to give upmost [sic] weight to the views of foreign courts operating in different political, social, cultural and legal context.”).

⁶ Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 Cal. L. Rev. 1335, 1365 (2007).

⁷ *See* VLAD PERJU, CONSTITUTIONAL TRANSPLANTS, BORROWING, AND MIGRATIONS, IN THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1321 (Michel Rosenfeld & András Sajó eds., 2012). *See also* Bernal, *supra* note 5. (noting that comparative law allows the Court’s individual justices “to make their ideology prevail over antagonistic political views that enjoy popular support”).

⁸ A full discussion of the unique geopolitical and regional challenges that have shaped the Court and its jurisprudence are beyond the scope of this paper, but its societal attitudes should be briefly examined.

reflecting the values of the newly minted State of Israel, was quite strongly collective in nature.⁹ However, Israeli society's focus eventually grew less totally collective and became focused slightly more on the individual.¹⁰ Consequently, the Court's early jurisprudential framework was, to some extent, "based on the values of self-fulfillment and individualism."¹¹ Since the 1960s, the Court has strengthened this individual-centered philosophy by emulating America's jurisprudence.¹²

It is also important to note a few special characteristics of the Israeli political system because they do influence the Court's citations to foreign law. Most importantly, the "Israeli political and legal system is a[] . . . combination of a Westminster and a Continental-European type of parliamentary democracy."¹³ The Israeli Declaration of Independence of 1948 was largely taken from the American Declaration of Independence.¹⁴ Its judicial system mirrors this political heritage.¹⁵ In sum, from its inception, many parts of the Israeli government have drawn from more established systems in crafting its political and judicial identity.¹⁶

c. The Court and Comparative Law

The Court is at least a, if not *the*, world's leading comparative law court.¹⁷ One scholar opined that "one cannot but acknowledge that [the Court] is the most important comparative constitutional law institute of the world."¹⁸ For the Court, comparative law is not just a theoretical exercise, but "comparative law plays an important role in Israeli case law."¹⁹

⁹ Eran B. Taussig, *Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings*, 83 ST. JOHN'S L. REV. 1275, 1341 (2009).

¹⁰ *Id.* ("The reformation of Israeli culture influenced tremendously the Israeli legal system and had a significant impact on the reasoning of the justices on the Israeli Supreme Court."). This initial reliance on collective values is unsurprising even if just considering how the State of Israel came to be.

¹¹ *Id.*

¹² Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 357 (1993); Taussig, *supra* note 9.

¹³ *Id.*

¹⁴ The Associate and Assistant Editors, *Introduction to Histories of Legal Transplantations*, 10 THEORETICAL INQUIRIES L. 299, 301 (2009) [hereinafter *Histories of Legal Transplantations*] ("Yoram Shachar traces the roots of the Israeli Declaration of Independence of 1948 to the American Declaration of Independence, composed by Thomas Jefferson in eighteenth-century America. Shachar shows that the American Declaration served as a starting point for the original draft of the Israeli version, composed by a low-ranking civil servant, Mordechai Beham.").

¹⁵ Though, of course, Israel operates without an explicit written constitution, which does starkly deviate from the American model.

¹⁶ *See, infra*, Section II(a)-(b).

¹⁷ David S. Law, *Constitutional Convergence and Comparative Competency: A Reply to Professors Jackson and Krotoszynski*, 66 ALA. L. REV. 145, 151 (2014) (discussing how the Court is praised for its "comparative prowess"); Andrea Lollini, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 Utrecht L. Rev., May 2012, at 55 (naming the Court as being among the constitutional courts "most active in using foreign law"); Alexander Somek, *Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. PA. J. CONST. L. 284, n.1 (1998) ("The Supreme Court of the State of Israel is the most impressive example of such constitutional borrowing.").

¹⁸ Somek, *supra* note 17.

¹⁹ Eliezer Rivlin, *Israel As A Mixed Jurisdiction*, 57 MCGILL L. J. 781 (2012).

Part of the success of the Court is that it is “very careful when using comparative law.”²⁰ It recognizes that a decision maker must be “quite rooted in the system that one refers to in order to be sure that its rules and ideas are interpreted properly.”²¹ To ensure that court decisions from America, Britain, and other countries are understood in the proper context, the Court routinely hires clerks from these countries.²² (Not everyone agrees that this method is wholly successful.²³)

Finally, as a rule, the Court’s comparative law citations are to western jurisdictions.²⁴ The cultural and linguistic differences between Israel and many of these western jurisdictions would normally discourage comparative law citations.²⁵ However, this is more than counterbalanced by Israel’s common law foundation, imported by the British during their early 20th Century governance in Palestine.²⁶

d. The Court and the Supreme Court of the United States

The Supreme Court of the United States (“SCOTUS”) is often cited by the Court. Most significantly, the Court uses SCOTUS’s corpus juris to buttress the legitimacy development of its (relatively) young judiciary.²⁷ One scholar stated that the Court, “operating without a written constitution and in the face of significant uncertainty concerning the scope of its ultimate authority, could gain in stature and legitimacy by embracing well-respected and established American doctrine”; and, by embracing American law, the “Court may at once have created for itself a greater space to fashion limits to guaranteed protections.”²⁸

²⁰ *Id.*

²¹ *Id.* (“In order to leverage and use foreign law in a meaningful way, one must hold considerable knowledge and expertise in both foreign and local law. For one to have access to foreign law, one must possess both the technical tools to approach the law and an understanding of its normative substance.”).

²² Somek, *supra* note 17, at 324. (crediting part of the Court’s comparative law success to its “practice of employing clerks from all over the world, who do the research work on their country of origin”).

²³ Binyamin Blum, *Doctrines Without Borders: The “New” Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131, 2170 (2008) (“The Israeli Supreme Court’s use of comparative law to justify Issacharov may seem to illustrate one of the primary dangers against which Scalia, Richard Posner, and others who oppose the use of foreign law in the United States have cautioned: that comparative law can be used as a rhetorical tool to mask personal or political preferences.”).

²⁴ Bernal, *supra* note 5, at 502 (noting that comparative law citations “come mostly from case law produced in western jurisdictions”).

²⁵ *Id.* (noting that it “is surprising” that the Court cites so many western jurisdictions “given the legal, socio-economic, religious, political, and geostrategic differences between the countries that provide and incorporate these voluntary citations. It also defies some current literature on the choice of voluntary references, which links those references to factors such as ‘linguistic permissibility’”).

²⁶ Rivlin, *supra* note 19, at 782 (arguing that Israel was “was strongly influenced by the British legal system. The rules of English common law and the principles of equity were imported into the region”); Blum, *supra* note 23, at 2152 (noting that the Court has referred to the American and English legal systems as “similar to our own”).

²⁷ Rivlin, *supra* note 19, at 785. Blum, *supra* note 23, at 2152 (stating that the Court relies heavily on “precedents from . . . the United States . . . to explain why reform was crucial and why courts had both the authority and responsibility to initiate it”); Claire L’Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. J. 15, 24 (1998) (“Foreign decisions are often used as a ‘springboard’ to begin development of human rights jurisprudence, and to fill in gaps when no precedent exists.”).

²⁸ Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis*, 58 N.Y.U. ANN. SURV. AM. L. 67, 73 (2001).

SCOTUS has had a powerful influence on the Court.²⁹ For example, SCOTUS's jurisprudence was the foundation of the Court's aforementioned Revolution.³⁰ Starting in 1995, the Court adopted SCOTUS's approach to interpreting the American Constitution, especially judicial review.³¹ Further, in the area of free speech jurisprudence, the Court has traditionally relied on SCOTUS most heavily;³² though in the past 15 years the Court has moved away from this reliance.³³

Various other spheres of influence include tax structures,³⁴ judicial activism,³⁵ and the use of *amicus curiae*.³⁶ Finally, the Court has shown a reticence, similar to SCOTUS to deal with national security issues. In the wake of 9/11, SCOTUS treated many of the Bush administration's sensitive national security decisions as unreviewable.³⁷ Similarly, despite the Court theoretically being as rigorous with national security decisions as it is with all decisions,³⁸ it has declined to deal with sensitive national security issues much like SCOTUS³⁹.

²⁹ Blum, *supra* note 23, at 2157 ("In legal education as in citation practices, the United States [is] . . . a metropole of legal influence upon the Israeli 'periphery.'").

³⁰ Rivlin, *supra* note 19. ("In 1995, the Israeli Supreme Court decided, referring to American constitutional law, that it had the authority to invalidate 'unconstitutional laws'. . . . Since then, the Israeli Supreme Court has developed a number of constitutional rights from these basic laws, influenced by both the American concept of liberty and the European concept of human dignity.")

³¹ *Id.* at 784 ("[T]he Israeli Supreme Court--when using its limited powers--was very much inspired by American constitutional case law. The 'American' liberal approach to interpreting the US Constitution was adopted by the Court when interpreting our 'regular' legislation.")

³² Guy E. Carmi, "Dignitizing" *Free Speech in Israel: The Impact of the Constitutional Revolution on Free Speech Protection*, 57 McGill L. J. 791, 856 (2012) ("Supreme Court rulings have created common law protection of fundamental rights, placing freedom of expression at the top of the protected freedoms."); HCJ 606/93 *Kidum Entrepreneurship and Publishing Ltd v. The Broadcasting Authority*, 48(2) PD 1, 9 (1994) ("Needless to say that 'freedom of expression stands at the top of the liberties upon which our democratic regime is founded.'")

³³ Carmi, *supra* note 32 ("[T]he Israeli Supreme Court extended constitutional protection to the unenumerated right of free speech via the human dignity clause beginning in late 2006. The nexus between human dignity and free speech is tenuous Israel stands at a crossroads. It is slowly abandoning American influence in the field of free speech, and trading it for a human dignity emphasis.")

³⁴ See generally Yitzhak Hadari, *Tax Avoidance in Linear Transactions: The Dilemma of Tax Systems*, 15 U. PA. J. INT'L BUS. L. 59, 97 (1994) (explaining a few American influences on Israel's tax structures).

³⁵ Salzberger, *supra* note 12, at 358 (discussing the "increasing judicial activism and a Supreme Court that is becoming 'American' style, with extensive and ever-increasing involvement in the affairs of the government and of the Knesset").

³⁶ Israel Doron & Manal Totry-Jubran, *Too Little, Too Late? An American Amicus in an Israeli Court*, 19 TEMP. INT'L & COMP. L.J. 105, 106 (2005) (stating that the recent addition of the *amicus curiae* "was a significant step in the process of 'importing' an American legal instrument into the Israeli legal system").

³⁷ Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases Involving Real or Perceived Threats to National Security*, 12 WASH. U. GLOBAL STUD. L. REV. 95, 158-59 (2013).

³⁸ The Court explicitly rejects the maxim "when the cannons roar, the muses are silent"; rather, as Justice Barak said: "It is when the cannons roar that we especially need the laws." HCJ 769/02 *Pub. Comm. Against Torture in Israel v. Gov't of Israel* slip op. ¶ 61 (1995).

³⁹ For example, in HCJ 4481/91 *Bargil v. Government of Israel* 47(4) PD 210 (1993) the Court declined to rule on the filed petition. *Bargil*, 47(4) PD at ¶ 5 (opinion of Shamgar, J.) In *Bargil*, the petitioner requested that the court find the Israeli government's policy of allowing Israeli citizens to settle in the occupied territories of Judea, Samaria and the Gaza Strip to be illegal. *Id.* at ¶ 2. Relying on American law, the Court held that the petition was too general to be justiciable. *Id.* at ¶ 5. It first stated that the political-question doctrine precluded it from reviewing another branch's branch-unique decision made purely within that branch's constitutionally-designated power. *Id.* at ¶ 4. Then, pointing to *Powell v. McCormack*, 395 U.S. 486, 519-21 (1969), it held that the separation of powers requires

But, even with all of this reliance, it goes without saying that, in some areas, Israel has differences in its jurisprudence. For example, the Court does differ in its description of judicial review, relying on a written test instead of different levels of constitutional scrutiny.⁴⁰ Further, though for many years the Court's freedom of expression jurisprudence was based on American ideas of individualism and liberty, in the past few decades the Court has relied more on European ideas of dignity as its core freedom of expression basis "rather than the American verbiage of 'liberty.'"⁴¹ The list does not stop here. Issues like Miranda rights,⁴² standing,⁴³ and the political question doctrine,⁴⁴ are all areas of disagreement. Finally, in an unsurprising plot development,⁴⁵ the Court will occasionally quote American cases and get either the doctrine or the application of the doctrine wrong, or both.⁴⁶

e. The Constitutional Revolution

No introduction of Israeli constitutional law would be complete without an overview of Aharon Barak's Constitutional Revolution ("Revolution").⁴⁷ Israel, like many countries, has legislatively enshrined many of its most fundamental values in a Basic Law. In 1992, the Knesset passed two additions to the Basic Law: the Freedom of Occupation, and Human Dignity and Freedom. At this time, Israel's Basic Laws enjoyed no higher status than any other legislation.

Then, in 1995, newly instated President Barak changed this with his decision in CA 6821/93 *United Mizrahi Bank v. Migdal Cooperative Bank* 49(4) PD 221 (1995). As the first case in which the Court struck down a law as unconstitutional because it violated fundamental rights in the Basic Law, the importance of this case cannot be overemphasized. In *Mizrahi*, President Barak created judicial review and, some argue, a constitution.⁴⁸ *Mizrahi* represents the

the Court to consider whether it "is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision-making power." *Id.* In other words the Court uses *Powell* to develop this "antecedent" doctrine. *Id.* *Bargil* also clarified that the initial question of whether the other branch even has that power it purports to have is a different, justiciable question. *Id.*

⁴⁰ Rivlin, *supra* note 19, at 785 ("In fact, the court replaced the American case law's concept of constitutional scrutiny with a written test for judicial review.").

⁴¹ *Id.* at 785-86. *See also* Carmi, *supra* note 32, at 793 (noting a "shift from the American liberty-based influence . . . to a . . . non-US dignity-based influence").

⁴² Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel - the Ambivalence of Israeli Law Against the Background of American Law*, 19 *BYU J. PUB. L.* 205, 219 (2004) (noting several fundamental differences in the Court's jurisprudence and SCOTUS's jurisprudence under *Miranda*).

⁴³ Kaufman, *supra* note 37 ("Standing and the Political Question doctrine are issues on which Israeli comparative law has differed sharply with the US.").

⁴⁴ *Id.*

⁴⁵ *See, supra*, Section I(a).

⁴⁶ Rosenfeld, *supra*, note 28, at 70-71, n.16 (noting that "the Israeli Supreme Court's adoption of American First Amendment doctrine has led to rulings on certain issues that are inconsistent with American decisions on the same issue"). For example, Justice Barak noted that Israel's use of American doctrine could reach diametrically opposed results in hate speech cases as exemplified in a hypothetical he posed in C.A. 399/85 *Kahane v. Broad. Auth.* 41(3) PD 255 (opinion of Barak, J.). This is discussed further in Section III.

⁴⁷ Aharon Barak was the author of several opinions discussed below and was both a Justice on and the President of the Court. He will be referred to using the title he had when he wrote the opinion, so pre-1995 as "Justice Barak" and post-1995 as "President Barak."

⁴⁸ *Mizrahi*, 49(4) PD at ¶ 109 (opinion of Shamgar, Former Pres.). *See also* Emily Bazelon, *Let There Be Law*, 2002-*JUN LEGAL AFFAIRS* 25, 27 ("The thing is, the United States does have a constitution," former Justice Landau

culmination of President Barak’s drive to expand Israel’s judiciary—this is where the Court “came into its own.” Indeed, *Mizrahi* is arguably the most important in the Revolution because it took the Israeli constitutional law system and added a distinctive aspect of the American system by establishing constitutional judicial review.⁴⁹ And, unsurprisingly, American law played a central role in this revolution.

The Revolution seemed to, at some level, disturb the balance of power between the branches of Israeli government. As a result, many members of the Court use comparative law to argue for restraint and a clearer definition the Court’s new role.⁵⁰ As T-1 and T-2 show,⁵¹ many of the Court’s judicial restraint comparative law citations were made concurrently with the Revolution, and the separation of powers comparative law citations were made a few years later and were presumably intended to clarify the Court’s role in government given the sudden expansion of judicial power. This increase is strongly indicative of separate, yet complimentary, reactions to the Revolution. Thus, the Revolution is quite pertinent for this discussion.

II. SCOTUS’S SPECIFIC INFLUENCE ON THE COURT: JUDICIAL RESTRAINT AND SEPARATION OF POWERS.⁵²

“For every action, there is an equal and opposite reaction.”

Isaac Newton’s Third Law of Motion

a. Judicial Restraint

It should come as no surprise that changes so disruptive and relatively radical as the Revolution and its flagship case, *Mizrahi*, were resisted. Now, while a thorough treatment of the internal affairs, dynamics, and politics of the Court in the 1980s, 1990s, and early 2000s is beyond the scope of this paper, some opinions published during the middle of the Revolution that cited comparative law in response to the Revolution are telling.

For example, most of the judicial restraint comparative law citations were a concurrent reaction to the ongoing Revolution. Several justices urged caution, often in their concurrences, and especially in *Mizrahi* itself. The distribution of judicial restraint comparative law citations is displayed by the chart T-1 below.⁵³

explained in his *Ha'aretz* interview. ‘In contrast, in Israel, the very decision [*Mizrahi*] that states that we have a constitution that includes court oversight of Knesset legislation was made by the court itself. That’s a completely different matter.’”).

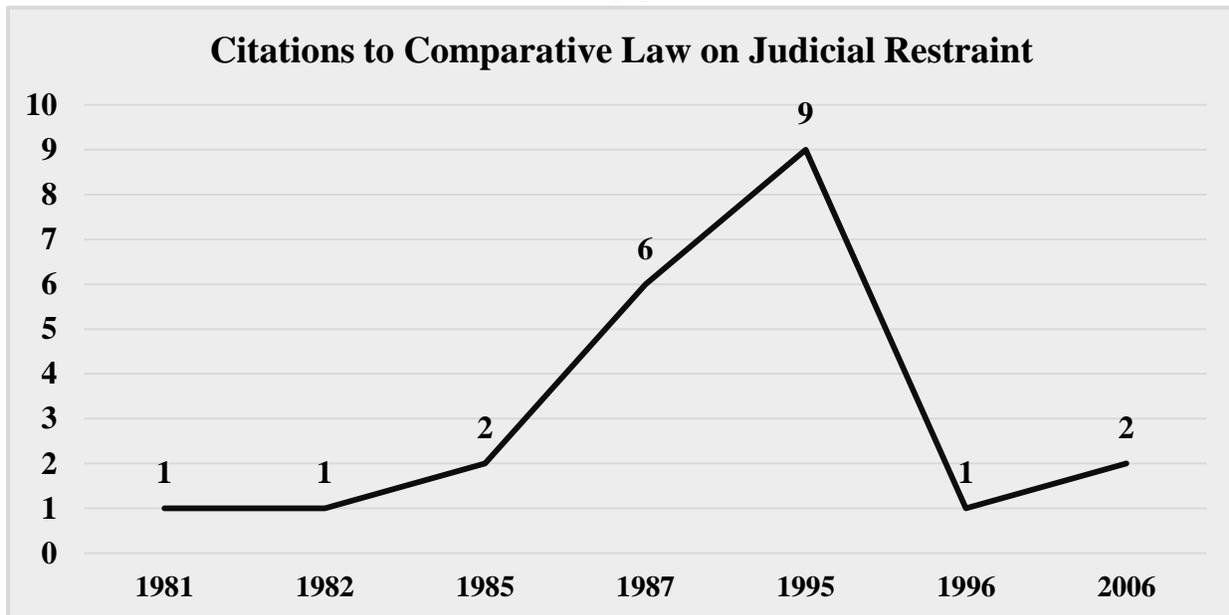
⁴⁹ It is called a “Revolution” for a reason, after all.

⁵⁰ See, *infra*, Section II(a)-(b).

⁵¹ See, *infra*, Section II(a)-(b).

⁵² The following cases were chosen from a database compiled by Professors Morag-Levine and Barbara Bean, and a host of students who graduated long before my time. I must give a special thank you to Professor Morag-Levine for giving me access to this database—it was comprehensive, enormous, easy to navigate, and reliable. I wish I had time to discuss more of the empirical numbers, but the focus of this paper is not the empirical, so mention of the empirical will be constrained to this.

⁵³ “Judicial restraint” is the database coding phrase used to designate which cases specifically discuss judicial restraint. In our database, eleven cases discussed judicial restraint. These cases yielded twenty-six total citations to American law, twenty-two of which were pulled from ten separate majority or concurring opinions, and four of



Four Court cases demonstrate the Court’s reliance on American judicial restraint doctrine during the middle of the Revolution. The last three cases show how concurrences often urge for judicial restraint using comparative law generally, and specifically the constitutional avoidance doctrine.

i. HCJ 652/81 *Sarid v. Chairman of the Knesset* 36(2) PD 197 (1982)

In *Sarid*, the petitioner brought suit because the Knesset Chairman had scheduled an important Knesset vote at an unusual time.⁵⁴ The petitioner argued that the Court could hear the petition because it challenged a decision made by a public official in his official capacity.⁵⁵ The Court held that even if the Chairman did violate Knesset regulations, this violation was minor and did not require the Court to intervene.⁵⁶

Sarid included only one citation to American law on judicial restraint, and it was used to craft a definition of restraint that would preserve the will of the Knesset and the rule of law.⁵⁷ The Court turned to *Joint Anti-Fascist Committee v. McGrath*, where American Justice Frankfurter stated that determining whether a court ought to rule on a question is always “a difficult task that requires use of that ‘expert feel of lawyers.’”⁵⁸ This is an amorphous standard, and it provides the foundation for Israel’s system of judicial restraint and a foil for its rule against advisory opinions. The Court called this expert feel standard “an excellent definition of the limits of judicial power.”⁵⁹

which were in two dissenting opinions. (Neither of the dissent cases in which those citations appeared are discussed.)

⁵⁴ *Sarid*, 36(2) PD 197 at ¶ 1 (opinion of Barak, J.)

⁵⁵ *Id.*

⁵⁶ *Id.* at ¶ 10.

⁵⁷ *Id.* at ¶ 9. The broad idea is judicial balance based in restraint.

⁵⁸ *Id.*

⁵⁹ *Id.*

Two notes about *Sarid*: First, Justice Barak used comparative law that was favorable to his judicial activism, making the Court’s judicial restraint rule as flexible as possible, perhaps to give his future activism legitimacy.⁶⁰ This seems like almost a feaux judicial restraint rule. Second, Justice Barak mainly used comparative law in *Sarid* to enlarge the Court’s authority and extend its reach.⁶¹ Thus, it is ironic that he would also use comparative law in the same decision to flesh out judicial restraint—the other side of that coin.

ii. *Mizrahi* 49(4) PD 221

Mizrahi provides the perfect example of expansion and restraint in the same case. Given the bare judicial activism on display in *Mizrahi*, it is ironic that it includes judicial restraint comparative law citations. Just as President Barak uses comparative law in the majority opinion to expand the judiciary, Former President Shamgar and Justice Goldberg use it in their concurrences as a restraining force. Former President Shamgar and Justice Goldberg cited four American cases in their concurrences.

Ferguson v. Skrupa, 372 U.S. 726 (1963). This case was used by Former President Shamgar to show that President Barak’s creation of judicial review was overreach. Former President Shamgar quoted *Ferguson*, saying that SCOTUS has “returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies.”⁶² Again, irony—Former President Shamgar is using American cases to urging judicial restraint in response to President Barak who used American cases to give birth to judicial review and an Israeli Constitution. President Barak distinguished *Ferguson* by framing it as solely a rejection of *Lochner v. New York*, 198 U.S. 45 (1905), which the Court does not have to deal with; and, *Ferguson* properly treated basic rights and economic rights under different levels of constitutional scrutiny, whereas “[t]his history is foreign to” the Court.⁶³

Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Former President Shamgar used *Williamson* to show that a law does not have to be perfectly comprehensive and airtight to hold it constitutional—a legislature, after identifying problems, can choose to fix some and not others, fix some or all problems only partially, or fix none.⁶⁴ Legislatures, he says, ought not to be held to a level of the perfection.⁶⁵ Indeed, “a reasonable, non-arbitrary solution expressed in a law can benefit the values of the state, even if the court would have chosen a solution that would have been

⁶⁰ *Id.* (“This self-restraint must be based on a standard which will define those areas in which the court will not interfere out of respect for the uniqueness of the Knesset as the people’s elected body, and those in which the court will intervene to preserve the rule of law in the legislature.”).

⁶¹ *See, infra* Section II(b)(ii).

⁶² *Mizrahi*, 49(4) PD at ¶ 80 (opinion of Shamgar, former Pres.).

⁶³ *Id.* at ¶ 102 (opinion of Barak, Pres.).

⁶⁴ *Id.* at ¶ 80 (opinion of Shamgar, former Pres.) (“Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others.”).

⁶⁵ *Id.* (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

more just or sensible, *in its opinion*, had it been given the choice.”⁶⁶ The error the Court made in *Mizrahi* is that it searched for a “single solution” rather than allowing the Knesset to choose from a range of reasonable choices.⁶⁷

Ashwander v. Tenn. Valley Authority, 297 U.S. 288 (1936). Former President Shamgar used *Ashwander* in an attempt to restrain that which he could not totally stop. In *Ashwander*, Justice Brandeis extensively discussed the “[u]nique rules [that] have been shaped to serve the courts that . . . decide upon the invalidity of legislation on constitutional grounds.”⁶⁸ Former President Shamgar explicitly states that, on this issue, the Court should look to America because it “possess[es] a constitutional tradition longer than” Israel’s.⁶⁹ Looking to America, he noted first that SCOTUS “examine[s] claims of unconstitutionality with caution and restraint”; and, second, he co-opted Justice Brandeis’s seven principles of judicial review used when the Constitution is implicated.⁷⁰ In other words, Former President Shamgar’s concurrence strongly urges—based solely on American law—that restraint be exercised when reviewing constitutional provisions.⁷¹ This seems to be his way of trying to make what he saw as an unavoidable harm less evil.

Illinois Election Board v. Socialist Workers Party, 440 U.S. 173 (1979). Justice Goldberg used *Socialist Workers* to support the idea that economic legislation should not be reviewed by degree because any judge could come up with a law a little better or a little worse.⁷² Rather, the “Court should declare a law unconstitutional for deviation from the test of degree, only if the means that the legislature chose reflects an *exceptionally severe deviation* from the range of reasonable infringement for the fulfillment of the proper purpose.”⁷³ Here, Justice Goldberg used American law to set the outer boundaries of degree-based constitutional review.

iii. CA 2401/95 *Nachmani v. Nachmani* 50(4) PD 661 (1995)

Nachmani, published the same year as *Mizrahi*, is, at its core, a contemporaneous and concurrent reaction to the judicial activism of *Mizrahi*. In *Nachmani*, Ruth Nachmani and Daniel Nachmani decided to use in-vitro fertilization to get Ruth pregnant, so they had Ruth’s ova fertilized using Daniel’s sperm.⁷⁴ Shortly thereafter, and before the embryo was implanted in the surrogate, Daniel sought a divorce.⁷⁵ Ruth requested that the hospital release the embryo for

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at ¶ 88.

⁶⁹ *Id.*

⁷⁰ *Id.* at ¶ 88-89.

⁷¹ *Id.*

⁷² *Id.* at ¶ 6 (opinion of Goldberg, J.) (“If a test of legality of degree is carried out in this regard, by means of a careful examination of the possible alternatives, it will be difficult to find economic legislation that will stand up to the test of proportionality. In the words of Justice Blackmun: A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.”).

⁷³ *Id.* (emphasis added).

⁷⁴ *Nachmani*, 50(4) PD at ¶ 1 (opinion of Strasberg-Cohen, J.).

⁷⁵ *Id.*

implantation, but Daniel disagreed.⁷⁶ Ruth asked the district court for an order, which Daniel fought all the way up to the Court.⁷⁷

The topic of judicial restraint plays a minimal role in this case, but the role it plays—as in the following case—is cast by a concurrence urging restraint, this time with regards to the Court’s unnecessarily specific rules of law. Justice Dorner’s concurrence nicely lays out the three rationales used by the opinions to decide which party wins: The majority said that the ultimate decision rests with the party *not* seeking parenthood (Daniel); part of the minority says that the decision rests with the party seeking parenthood (Ruth); and, Justices Dorner and Tal argue that the Court should not adopt either brightline rule, but should “balance the rights of the specific parties.”⁷⁸

Justice Dorner’s approach is based on *Lochner*. Quoting *Lochner*, Justice Dorner suggests that the Court should not decide the specific, narrow question of which party controls implantation of an embryo just on the basis of general principles.⁷⁹ Rather—using syllogism verbiage for a moment—the Court should establish major premises (rules of law), run a balancing test to find the minor premise (the rights of the parties), and come to a different (but hopefully the best) conclusion in each case.⁸⁰ Anything else, like considering rights only in the abstract, he says, could work injustice.⁸¹

In sum, Justice Dorner uses *Lochner* to show that a major premise alone is not sufficient to decide factually intense cases, and that each case should be decided freshly, thus giving judges the most opportunity to work good.⁸² He finally noted that “even a balancing of this kind is not an ad hoc balancing without any guiding principles, but it is made on the basis of rules that are applied to the special circumstances of each case.”⁸³

iv. H CJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel and others v. Minister of the Interior* 51(2) PD 202 (2006)

In *Adalah*, the Court considered the legitimacy of a regulation prohibiting Palestinians who married Israelis from coming across the border.⁸⁴ President Barak, writing for the majority, held that the law—The Citizenship and Entry into Israel Law (Temporary Provision)—was unconstitutional.⁸⁵ The part of *Adalah* that contains comparative law is Justice Rivlin’s

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at ¶ 9 (opinion of Dorner, J.).

⁷⁹ *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting) (“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition subtler than any articulate major premise.”).

⁸⁰ *Nachmani*, 50(4) PD at ¶ 9.

⁸¹ *Id.*

⁸² At least Dorner is consistent—in ¶ 15 he joins another justice’s opinion, but refuses to join all of the other opinion because it partially answers an unnecessary question. This is judicial restraint on full, integrity-infused display.

⁸³ *Id.*

⁸⁴ *Adalah*, 51(2) PD at ¶¶ 1-3.

⁸⁵ *Id.* at ¶¶ 113-14 (opinion of Barak, Pres.).

concurring opinion, which argued that the majority unnecessarily reached the constitutional question.⁸⁶

In his concurrence, Justice Rivlin explained that because intervening “highlights the issue of judicial authority,” a judge must “limit[] himself with rules, . . . only address[] what the parties brought before him,” and “restrict [] himself to concrete questions of real substance.”⁸⁷ Additionally, he quoted *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947), which held that advisory opinions are never acceptable. Rivlin argued that the Court must especially follow these rules because declaring something unconstitutional is the “most drastic measure that it possesses, which is reserved for cases where it has no alternative.”⁸⁸

Further, Rivlin quoted *Ashwander*, pointing out that America has crafted several rules to help justices decide whether a constitutional question even ought to be answered.⁸⁹ In other words, Rivlin argued hard that the constitutional avoidance doctrine be applied, but the majority steadfastly ignored him.

Finally, it is worth noting that the comparative law citations in *Adalah*, like those in *Nachmani* and *Mizrahi*, are contained in a concurrence attempting to restrain what it considers the excess of the majority. In each of these cases, the majority opinion was a decision enlarging the power of the Court. And in each of these decisions the concurrence relied on American law in an attempt to minimize what it considered judicial activism.

b. Separation of Powers⁹⁰

Two strong themes emerged from the following separation of powers cases: First, almost all cases citing to comparative law on the separation of powers include this two-step progression: (1) elucidation of legal philosophy using comparative law and (2) adoption of a test contained in comparative law for use in deciding an aspect of the separation of powers doctrine. And while this may at first appear intuitive, quite often courts do not adopt both the philosophy and the rules of authorities relied on. Thus, this consistency and frequency is notable here.

Second, separation of powers cases largely percolated through the judicial system soon after the Revolution reached its climax in 1995 with *Mizrahi*. The chart below shows that the number of citations to comparative law on the separation of powers exploded in the three years following *Mizrahi*. Therefore, it is likely that this increase was a reaction to the disruptive (and at least philosophical) changes *Mizrahi* wrought.

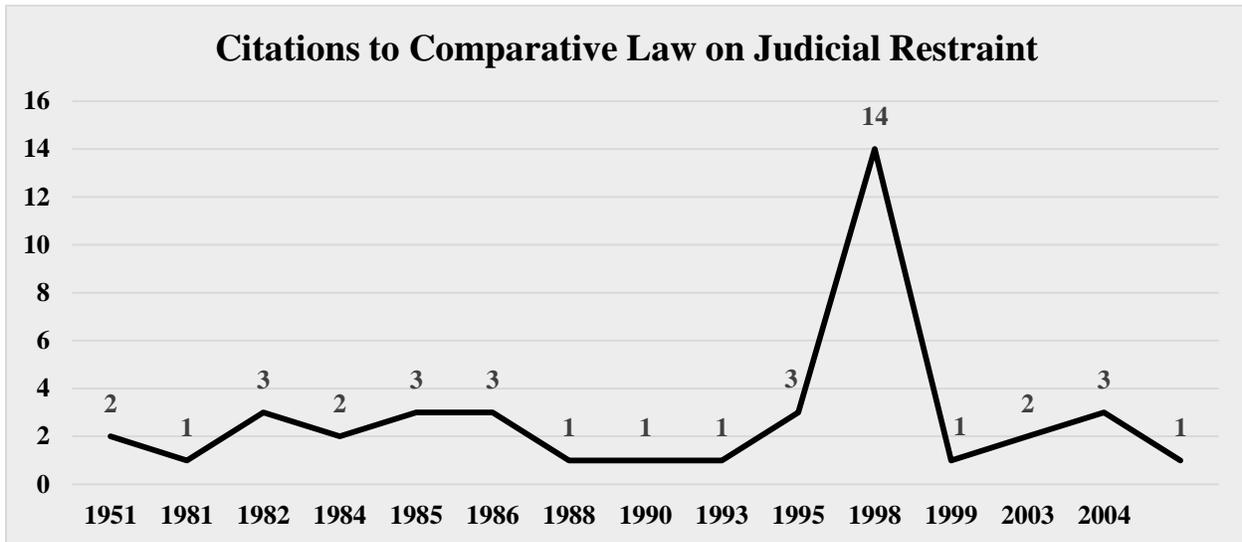
⁸⁶ *Id.* at ¶ 1 (opinion by Rivlin, J.) (“My colleague, President A. Barak, wishes to conclude his opinion with a determination that the Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003 (hereafter — the Citizenship and Entry into Israel Law) is void. There is no need today for this declaration.”).

⁸⁷ *Id.* at ¶ 3.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Israel, like most western countries, views the doctrine of the separation of powers as a philosophical and political cornerstone of its democracy. SUZIE NAVOT, *THE CONSTITUTIONAL LAW OF ISRAEL* 68 (2007) (“One of the most prominent characteristics of a democratic regime is its separation of the sovereign powers between . . . three main branches – Legislative, Executive, and Judicial, and this . . . characterizes the system in the state of Israel.”).



The following five cases demonstrate the Court’s intense reliance on American separation of powers doctrine.

- i. HCJ 65/51 *Jabotinsky v. Weizman* 5 P.D. 801 (1951).

One of the Court’s earliest cases—and, certainly, the first on separation of powers—was *Jabotinsky v. Weizman*. *Jabotinsky*, while obviously not a reaction to the Revolution, is an example of the Court’s reliance on American law to build its separation of powers philosophy.

The Court started its separation of powers journey with a bang. It extensively quoted landmark American decisions as it molded its basic philosophy of government power apportionment—this was pure, unadulterated reliance on American law. Looking to *Mississippi v. Johnson*, the Court adopted the distinction drawn in *Mississippi* between the President’s “political” actions and his “ministerial” powers.⁹² The Court held that the separation of powers did not allow it to disturb an exercise of the President’s political or executive actions.⁹³ The Court then discussed Chief Justice Marshall’s language in *M’Culloch v. Maryland*, stating:

[W]e may say, following him [Marshall], that were we to accede to the request of the petitioners in this case, we would exceed the limits of judicial authority and trespass upon the preserves of the political and executive authorities. In the language of Chief Justice Marshall, “this court disclaims all pretensions to such a power.”

⁹¹ Note the spike to fourteen cases in 1998, just three years after the Court’s decision in *Mizrahi*.

⁹² *Jabotinsky*, 5 P.D. at pgs. 11-12.

⁹³ *Id.* at 12.

Jabotinsky, 5 P.D. at pg. 12. In sum, the Court’s separation of powers test and its separation of powers philosophy were drawn from watershed American decisions that each played a major role in America’s separation of powers doctrine.⁹⁴

Why did the Court rely on American law? First, because SCOTUS has had “considerable experience in examining the boundaries between the respective functions of the three authorities of the State.”⁹⁵ Second, not only did the Court consider SCOTUS an authority on the topic, but the petitioners did as well, explicitly requesting in their briefs that the Court adopt American law to decide the separation of powers question.⁹⁶

Here, unlike in later cases, while the Court relied heavily on American law, it relied to establish limits on the Court.⁹⁷ Not surprisingly, the rationale was presented, in part, as purely the Court’s, and not as co-opted, long-established American doctrines. The Court came to its decision (allegedly) on its own and used comparative law only as evidence that its independent decision was correct.⁹⁸ Admittedly, before quoting SCOTUS, the Court held that its decision was compelled by the necessity of limiting its docket—i.e., it could not hear everything or it would be completely swamped.⁹⁹ It noted “with satisfaction” that SCOTUS agreed with this.¹⁰⁰

ii. *Sarid* 36(2) PD 197

More than thirty years after *Jabotinsky*, the Court again discussed the separation of powers; this time, Justice Barak was on the Court to take a crack at it. As in *Jabotinsky*, in *Sarid*, the Court used American law to shape its philosophy and rule crafting. Additionally, *Sarid* is a major step in the Revolution because it imbued the Court with significant authority and, as a large but not unreasonable step, did much to make later decisions like *Mizrahi* less shocking.

In *Sarid*, the petitioner brought suit because the Knesset Chairman had scheduled an important Knesset vote at an unusual time.¹⁰¹ The petitioner argued that the Court could hear the petition because it challenged a decision made by a public official in his official capacity.¹⁰² The Court held that even if the Chairman did violate Knesset regulations, this violation was minor and did not require the Court to intervene.¹⁰³ The Court initially noted that the very act of deciding this case implicated the separation of powers doctrine.¹⁰⁴ The Court held that ruling on this petition would violate the separation of powers because this “violation is minor and does not affect the basic structure of our parliamentary system, [so] the independence of the Knesset

⁹⁴ It is worth emphasize that these are fundamental Israeli cases quoting fundamental American decisions. Put a different way, American cornerstones became Israeli cornerstones.

⁹⁵ *Id.* at 11.

⁹⁶ *Id.*

⁹⁷ *Cf.* The Court’s *Mizrahi* decision.

⁹⁸ *Jabotinsky*, 5 P.D. at 11-12.

⁹⁹ *Id.* at 11.

¹⁰⁰ *Id.*

¹⁰¹ *Sarid*, 36(2) PD at ¶ 1 (opinion of Barak, J.)

¹⁰² *Id.*

¹⁰³ *Id.* at ¶ 10.

¹⁰⁴ *Id.* at ¶ 5.

should prevail and the court will stay its hand.”¹⁰⁵ But, if the violation were “substantial and infringe[d] upon basic values of our legal order,” the rule of law must be protected.¹⁰⁶

In other words, the deviation from the norm must be strikingly egregious for the Court to interfere with the legislative process. Philosophically, this case implicates the power of the legislature to do as it pleases (within the Basic Law) pitted against the need for laws to be made in an orderly, proper way, and Justice Barak highlighted these concerns.¹⁰⁷

To decide whether a violation is minor or substantial, Justice Barak crafted a test that relied on American law. However, first he differentiated sharply between quasi-judicial and legislative decisions of the Knesset, noting that while the former are open to stricter examination, the latter are afforded a higher level of deference.¹⁰⁸ Further, the internal rules of the Knesset and the management of the Knesset’s proceedings are solely the province of the Knesset.¹⁰⁹

Justice Barak outlined his new separation of powers rule using two American cases: *Powell v. McCormack* 395 U.S. 486 (1969) and *Poe v. Ullman*, 367 U.S. 497 (1961). He used *Powell* as support for his argument that the Court should judicially review internal Knesset actions only when the actions are quasi-judicial (e.g., punishing a Knesset member).¹¹⁰ He then quoted *Poe*, which supports the idea that determining *justiciability* is not a scientific process, but is influenced by several factors.

It is necessary to comment on the influence of Justice Barak here.¹¹¹ *Sarid* was published in 1982, long before Justice Barak became President of the Court. But, even here it appears he is setting the stage for his Revolution, which would not culminate for another decade. He developed a completely malleable standard, allowing the Court to interfere “when the violation complained of is manifest, and impairs substantive values of our constitutional regime.”¹¹² He made a switch that he could turn on or off nearly as he pleased—and this switch can be thrown as often as the situation demands.¹¹³ This test is a pretty fundamental shift from earlier decisions, and it seems that Justice Barak crafts it specifically so that he can later actively rule from the bench with more authority and flexibility.

iii. *Mizrahi*, 49(4) PD 221¹¹⁴

¹⁰⁵ *Id.* at ¶ 9.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at ¶ 7.

¹⁰⁸ *Id.* at ¶ 5.

¹⁰⁹ *Id.* at ¶ 7 (“Paramount considerations relating to the separation of powers, the independence of parliament and the mutual respect which should prevail between state authorities, require that the Knesset enjoy freedom of action in managing its proceedings as it deems fit, without having its acts scrutinized by outside authorities. Were the court to sit in judgment over the propriety of Knesset proceedings, this body would be unable to function properly, and the court too will be flooded with litigation that turns it into a perpetual arena of political and procedural conflicts.”).

¹¹⁰ *Id.* at ¶ 9.

¹¹¹ His influence is further discussed below. *See infra*, Section IV.

¹¹² *Sarid*, 36(2) PD at ¶ 9.

¹¹³ *Id.* “we commend a flexible criterion which, by its very nature defies exact definition, and the content and scope of which will be determined by the court according to the needs of the time, and the matter involved”

¹¹⁴ The importance of *Mizrahi* is discussed above. *See supra*, Section I(e).

In *Mizrahi* the petitioners challenged a property law passed by the Knesset.¹¹⁵ President Barak, writing for the majority, chose to answer the question of whether the Court could strike down the law because it violated the 1992 additions to the Basic Law—i.e., whether the Court, treating the Basic law as a constitution, had the power of constitutional judicial review.¹¹⁶ President Barak turned to *United States v. Nixon*, 418 U.S. 683 (1974), to show that the ideas of separation of powers and judicial review are inextricably intertwined.¹¹⁷ He noted that “judicial review of constitutionality both derives from and gives expression to the principle of separation of powers.”¹¹⁸ President Barak, quoting *Nixon*, stated:

As Chief Justice Burger noted: “In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison* That [it] is emphatically the province and duty of the judicial department to say what the law is Any other conclusion would be contrary to the basic concept of powers and the checks and balances that flow from the scheme of a tripartite government”

Mizrahi, 49(4) PD at ¶ 79 (opinion of Barak, Pres.). Even to a casual reader, it becomes quickly apparent that President Barak is not just quoting *Nixon* for *Nixon*’s sake, however. He is, in fact, using *Nixon* as a vehicle to reach back to the legitimacy of *Marbury v. Madison*, 5 U.S. 137 (1803), the cornerstone of American jurisprudence. If there is any SCOTUS case so basic, so fundamental to a democracy that its principles transcend time, culture, and language, *Marbury* is it.

And what does this reliance on *Marbury* reveal? Well, in America and Israel, the judiciary “say[s] what the law is” because someone must say what the law is, and this role is particularly suited to the temperament and training of judges.¹¹⁹ Moreover, judicial review maintains the separation of powers because it acts as a check on the executive and legislative branches.¹²⁰

In sum, in *Mizrahi* the Court takes the most distinctively American aspect of the American Constitution—judicial review of legislation to determine compatibility with a constitution—as laid out by America’s most fundamental case—*Marbury*—and uses it to reshape the core of its own constitutional jurisprudence and the Court’s role in Israeli politics. President Barak’s decision was a legitimacy-infused way to bring the Court to the forefront of decision-making in Israel. It is hard to get more philosophically reliant than that.

iv. H CJ 3267/97 *Rubinstein v. Minister of Defense* 52(5) PD 481 (1998)

¹¹⁵ *Mizrahi*, 49(4) PD at ¶ 1 (opinion of Shamgar, Former Pres.).

¹¹⁶ *Mizrahi*, 49(4) PD at Introduction (opinion of Barak, Pres.).

¹¹⁷ *Id.* at ¶ 79.

¹¹⁸ *Id.*

¹¹⁹ *Marbury*, 5 U.S. at 177.

¹²⁰ *Mizrahi*, 49(4) PD at ¶ 79 (opinion of Barak, Pres.).

In the late 1990s, the Minister of Defense routinely granted military service exemptions to Ultra-Orthodox Jews studying religious law.¹²¹ The number of exemptions granted eventually reached almost 10% of those legally required to serve in the military.¹²² Several petitioners sued the Minister of Defense, arguing, *inter alia*, that the Minister of Defense lacked the authority to make this number of exemptions and that this authority instead rested with the Knesset.¹²³ The Court agreed, holding that the Knesset, not the executive branch, is vested with the authority to make fundamental policy decisions that divide society, and that the routine granting of exemptions and deferrals to such a large group of people is such a decision.¹²⁴

Rubinstein is, if nothing else, a massive exercise in comparative law. Each of its prongs was based on American Constitutional law.¹²⁵ The Court differentiated between “primary” and “secondary” arrangements, holding that primary arrangements should be adopted by the Knesset while secondary arrangements by agencies.¹²⁶ In support of this precise wording, the Court quoted Chief Justice Rehnquist’s concurrence in *Indus. Union Dept. v. American Petro. Inst.*, 448 U.S. 607 (1980).¹²⁷ And, the Court quoted Chief Justice Marshall in *Wayman v. Southard*, 23 U.S. 10 (1825), in support of the proposition that this dichotomy is not usually clear.¹²⁸ The Court also pointed to America’s digression from strict non-delegation as authority for its malleable standard.¹²⁹

After using American law to simultaneously build and fence in its philosophical conclusion, the Court moved on to discuss three specific justifications for separation of powers. These three legs are: (1) primacy of the legislature under the respective system of government, (2) rule of law, and (3) primacy of the legislature as a basis for democracy.¹³⁰ Each leg of this three-legged stool was supported either in part or wholly by American constitutional law.

For example, the Court pointed to *Mistretta v. United States*, 488 U.S. 361 (1989), as supporting authority for (1) and *Rapp v. Carey*, 375 N.E.2d 745 (N.Y. 1978) as support for (2).¹³¹ For (3), the Court used American cases to show that in democracies, the legislature—the elected representative of the people—is the body upon whom it chiefly falls to enact policy; policy decisions are so closely tied to the people, so the body most closely tied to the people ought to make those decisions.¹³² Agencies are neither responsible nor endowed in a similar way,

¹²¹ *Rubinstein*, 52(5) PD at Introduction (opinion of Barak, Pres.).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at ¶ 43.

¹²⁵ Every one of the prongs for this decision was partially based on American constitutional law, though these principles are principles every cited country supports.

¹²⁶ *Id.* at ¶ 19.

¹²⁷ *Id.* at ¶ 20.

¹²⁸ *Id.* at ¶ 25.

¹²⁹ *Id.* at ¶ 20. Notably, this is one of the only SCOTUS cases since 1935 in which a justice relied on any non-delegation arguments in their opinion.

¹³⁰ *Id.*

¹³¹ Barak also used *Indus. Union* in support of (1). *Id.*

¹³² *Id.* at ¶ 22 (“Hence, one of the tenets of democracy is that decisions fundamental to citizens’ lives must be adopted by the legislative body which the people elected to make these decisions. Society’s policies must be adopted by the legislative body.”).

and the Court supported this by pointing to *United States v. Robel*, 389 U.S. 258 (1967). Thus, standards must accompany the delegation of policy-making power to agencies.¹³³

Finally, President Barak examined the fundamental purpose of this discussion and quoted *Myers v. United States*, 272 U.S. 52 (1926), to support the proposition that this discussion is not just all done for semantics or formalism, but that the separation of powers produces real and necessary benefits by pitting the different the branches against each other.¹³⁴ *Rubinstein* fits perfectly with President Barak’s theme of taking American thoughts and ideals and recasting them into an Israeli-sized system. And this case is also an effort to clarify basic philosophical values perhaps obscured or blurred by *Mizrahi*; so, even though President Barak authored both *Rubinstein* and *Mizrahi*, *Rubinstein*, in its own way, represents a subsequent reaction to *Mizrahi*.

v. HCJ 4885/03 *Israel Poultry Farmers Ass’n v. Gov’t of Israel* 59(2) PD 14 (2004)

The Court does not always agree with American law on separation of powers issues.¹³⁵ In *Poultry Farmers*, it considered a certain aspect of the evolution of American’s separation of powers jurisprudence troubling and explicitly declined to follow it.¹³⁶ That is, it declined to follow SCOTUS’s scrutiny of Congress’s legislative history to ensure legislative due process.¹³⁷ Thus, even though the issue of legislative due process is not core to the separation of powers framework in either country, it is an issue that the Court felt strongly enough about to comment on using comparative law and then reject.

In *Poultry Farmers*, the petitioners challenged the legislative process of the Knesset, arguing that it had passed a law too quickly and, thus, without “legislative due process.”¹³⁸ Right away the Court looked to American law. The Court noted that in American courts there is a growing trend to, “within the framework of examining the constitutionality of statutes, . . . examine[] also the minutes of the deliberations of Congress during the legislative process in order to check whether Congress relied on a sufficient factual basis.”¹³⁹ It stated that this:

[‘L]egislative due process’ approach has not yet been adopted by the United States Supreme Court, even though judicial review of the legislative process is recognized in the United States. . . . But as we shall make clear below, even if the ‘legislative due process’

¹³³ *Id.*

¹³⁴ *Id.* at ¶ 23.

¹³⁵ Here, the Court seems to agree with at least SCOTUS if not other American courts.

¹³⁶ *Poultry Farmers*, 59(2) at ¶ 29 (opinion of Beinisch, J.) (stating that “the legislative process of the Knesset should not be subject to a demand to comply with due process in making decisions, in the same way that administrative authorities are The purpose of judicial review of the legislative process is not to ensure that the Knesset carries out the optimal legislative process. The purpose of judicial review of the legislative process is also not to ensure that the Knesset carries out a responsible and balanced process for each draft law”).

¹³⁷ *Id.*

¹³⁸ Again, as an American law student, I am bemused by the notion that a government passes a law “too quickly” when mine cannot seem to pass one at all.

¹³⁹ *Id.* at ¶ 27. The court further noted *United States v. Lopez*, 514 U.S. 549 (1995), and *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), as examples of this trend. It is worth noting the irony of considering *Lopez*, usually thought of by American scholars as a conservative decision because of its focus on federalism, as being too liberal.

approach had been embraced in its entirety by the United States Supreme Court, this far-reaching approach is unacceptable in our legal system.

Poultry Farmers, 59(2) PD at ¶ 27. In sum, the Court held that the legislative process is not an administrative decision; nor is it the job of the Court to ensure the optimal legislative process; nor does the process for each law need to be balanced and fair.¹⁴⁰ All of these are questions for the Knesset and fall outside the Court's reach.¹⁴¹ Indeed, the Court emphasized caution in ever critiquing how the Knesset does its job.¹⁴²

III. CITATIONS THE COURT GOT WRONG: HCJ 6427/02 *MOVEMENT FOR QUALITY GOVERNMENT IN ISRAEL V. THE KNESSET*, 61(1) PD 619 (2006)

Invariably, exercises in comparative law sometimes result in mistakes or misquoting.¹⁴³ Consequently, it is not surprising that in *Movement*, Justice Rivlin's reliance on American cases was slightly off-kilter.¹⁴⁴ However, to understand why this reliance was rather out of place, it is first necessary to know the facts and the rationale of Justice Rivlin's decision. In *Movement*, the petitioner filed a petition to stop Mr. Hanegbi—who had previously been in some legal trouble—from becoming Minister of Public Security.¹⁴⁵ The Court denied the petition, holding that it would not intervene in the Prime Minister's decision because to intervene would violate the bounds of judicial review.¹⁴⁶

Now, the Court can review any governmental organ;¹⁴⁷ and every branch's actions can be reviewed using a standard of reasonableness.¹⁴⁸ The strictness of the review will vary depending on different factors such as “the type of body under review and the power that has been exercised.”¹⁴⁹ For example, both the Knesset and the Government are afforded special deference because the Knesset is the elected body of the state, and the Government executes the will of the state.¹⁵⁰ However, this respect for the “separation of powers does not imply that each branch may

¹⁴⁰ *Id.* at ¶¶ 27-28.

¹⁴¹ *Id.*

¹⁴² *Id.* at ¶ 28. Though, obviously, the results of Knesset deliberations may create reviewable product.

¹⁴³ *See, supra* Section I(a). *See, e.g.*, Rosenfeld, *supra* note 28, at 72-73 (“For example, the Israeli Supreme Court had recourse to American First Amendment doctrine in cases leading to outcomes strikingly at odds with the outcomes of similar cases in the United States.”).

¹⁴⁴ It should be noted that, in the opinion of the author, Justice Rivlin did not need these cases to develop any law—but, his decision fell in line with the cases' quoted language.

¹⁴⁵ *Movement*, 61(1) PD at ¶ 5. The petition did not argue that the Basic law prohibited Mr. Hanegbi from being appointed, both parties admitted it did not, but it did argue that the Prime Minister's judgment in appointing Hanegbi was within a “range of reasonableness.”

¹⁴⁶ *Id.* at ¶ 35.

¹⁴⁷ *Id.* at ¶ 9 (“All organs of government are subject to judicial review. The power of judicial review over decisions of the Knesset, the Government, and the other governing institutions is the cornerstone of a democracy which upholds the rule of law. It reflects the formal rule of law, meaning that all of the organs of government are subordinate to the law. It also means that everything is subject to judicial review, which is intended to guarantee that the law is kept.”) (citations omitted).

¹⁴⁸ *Id.* (“In light of the above, it has been stated on more than one occasion that this Court is charged with overseeing the legality and reasonableness of the activities of the State.”).

¹⁴⁹ *Id.* at ¶ 10.

¹⁵⁰ *Id.* at ¶ 11. The court went on to explain that the Knesset and the Government were elected by the public, that certain areas of authority are relegated solely to them, and that “[t]he underlying principles of democracy, among

act as it wishes,” but rather that “each branch is independent in dealing with its own affairs, so long as it operates within the bounds of its authority.”¹⁵¹ Also, the nature of the power exercised is an equally important consideration when defining judicial review.¹⁵²

In Justice Rivlin’s opinion, the first and primary opinion in this case, he thoroughly discusses the idea of the separation of powers. Focusing on this case, Justice Rivlin stated that “[w]hen reviewing an act of the executive branch, the Court determines whether a reasonable authority would have been permitted to act in a similar manner.”¹⁵³ Of course, there is a range of reasonableness within which the Government can act, and this range is influenced by the deference afforded the branch in question.¹⁵⁴ In other words, the Court stated that using unique, branch-specific powers entitled a branch to a higher level of deference in that action.¹⁵⁵

Then Justice Rivlin stated: “The Court does not regard itself as a supra-governing body. See 1843/93 [10], at 499; see also *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) [92]; *INS v. Chadha*, 462 U.S. 919, 944 (1983) [93].” Both *Goldberg* and *Chadha* do include language to the effect that the Court is not a super-legislature that will replace legitimate executive or legislative branch decisions with its own reasoning.¹⁵⁶ However, more pertinently for our wrongful citation discussion, *Chadha* also states that “[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.”¹⁵⁷ That is, under the American separation of powers doctrine, the Court ceases reviewing once it discovers specifically what has been done and decides that this action comports with the Constitution.

Conversely, here, Justice Rivlin quickly found that the law in question complied with the Basic Law (Israel’s Constitution),¹⁵⁸ but then he continued to discuss the legitimacy of the decision. This is a strange action, given that the *Chadha* held that the court’s ultimate inquiry is *constitutionality*, which Justice Rivlin had already dispensed with by deciding that the action comported with the Basic Law.

Moreover, it is worth noting that by invalidating the legislative veto act in *Chadha*, SCOTUS ended up also invalidating several other provisions due to the legislative veto’s prolific use. Justice White noted in his dissent in *Chadha* that SCOTUS, through *Chadha*, had struck “down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history[, and that] it will now be more difficult to ‘insur[e] that

them the separation of powers, require that the Court not trespass the boundaries of the Knesset and the Government.” *Id.* at ¶ 12.

¹⁵¹ *Id.* at ¶ 9

¹⁵² *Id.* at ¶ 12.

¹⁵³ *Id.*

¹⁵⁴ *Id.* This deference is analogous to *Chevron* deference.

¹⁵⁵ *Id.* (“Deference, by contrast, is an institutional concept. Deference means that, in examining decisions of other authorities acting within the boundaries of their authority, the Court will not evaluate the wisdom of these decisions or overrule their discretion.”).

¹⁵⁶ *Goldberg*, 453 U.S. at 68 (“In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.”); *Chadha*, 462 U.S. at 944, (“We do not sit as a committee of review, nor are we vested with the power of veto.”).

¹⁵⁷ *Chadha*, 462 U.S. at 944.

¹⁵⁸ *Movement*, 61(1) PD at ¶¶ 1-8.

the fundamental policy decisions in our society will be made” by the legislature.¹⁵⁹ Yet, the Court here uses *Chadha* in support of its judicial conservatism—the notion that the Court should avoid disturbing legislative decisions. In sum, though he relies on it for one point, Justice Rivlin’s actions are inconsistent with *Chadha* as a whole.

IV. INFLUENCE OF LEADING JURISTS

The individual views of the Court justices are no less influential a factor in the prevalence of comparative law than the general expertise and illustriousness of SCOTUS. Obviously, SCOTUS is only influential if its jurisprudence is applied; without justices willing and eager to use SCOTUS jurisprudence, it has no more impact on the Court than a Nepali mountain tribunal.

So why do justices choose to apply American law? There are three main reasons: First, as was noted above, some similarities of America’s and Israel’s legal and political systems make comparative law exercises with America easier because SCOTUS cases are, thus, on average, more applicable than many other countries’ cases.¹⁶⁰ Many basic American ideals—rooted, like many of Israel’s foundational jurisprudential concepts, in English common law—are attractive to the justices.¹⁶¹

Second, individual justices all promote their own ideologies. These ideologies are perhaps the single most efficient method of applying comparative law. Indeed, the Court is a good case study of how individual justices’ views are the “paramount factor” in determining which countries’ citations will be quoted and on what topics.¹⁶² Using justices’ individual philosophies helps explain and clarify what might otherwise be a jumbled mishmash of comparative law citations. Undeniably, American comparative law is fertile ground for idea-shopping. If a justice wants to promote a specific ideology, America’s corpus juris provides a rich, buffet-style array of ideas from which justices may pick whatever concepts are convenient whenever it suits them.¹⁶³

Third, even if, as some scholars argue, certain justices do not actively “country-shop” for legitimacy, the country and system in which justices are educated is a major contributor to their later decision-making because justices are apt to adopt the judicial culture of the country in which they learned the law.¹⁶⁴ “[T]he fact that many Israeli justices were born or educated in foreign countries” explains much of the Court’s comparative law jurisprudence.¹⁶⁵ The influence

¹⁵⁹ *Chadha*, 462 U.S. at 1002 (White, J., dissent).

¹⁶⁰ *See, supra* Section I(b).

¹⁶¹ L’Heureux-Dube, *supra* note 27, at 20.

¹⁶² Bernal, *supra* note 5, at 502.

¹⁶³ *Id.* (“This explains why judges voluntarily select citations from courts belonging to discordant constitutional settings, while, at the same time, reject or ignore the case law from courts located in similar contexts.”).

¹⁶⁴ *See* Laura Kalman, *Does Character Affect Judicial Performance?*, 71 U. COLO. L. REV. 1385, 1389 (2000) (“Yet Israel’s legal culture—rooted, by virtue of the origins of its first judges, in the United States, Russia, Lithuania, Poland, and Germany—has been traditionally more formalistic and positivistic.”); L’Heureux-Dube, *supra* note 27, at 20 (noting that, with foreign-trained justices, “[w]hen time comes to look for solutions to similar problems, they naturally turn for inspiration and comparison to those jurisdictions whose ideas are familiar to them”); Pnina Lahav, *American Influence on Israel’s Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981); GARY JEFFREY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* (1993).

¹⁶⁵ Rivlin, *supra* note 19, at 788-89.

of educational systems on a country's jurisprudence is on full display in the Israeli system. Many justices were trained overseas in the common law systems of England and America, especially in the early days of the Court.¹⁶⁶ And, many other justices were steeped in Eastern European traditions.¹⁶⁷ Finally, instead of just letting Israeli law students go to America, starting in the 1960s "U.S.-style legal education" was moderately transplanted into Israeli law schools.¹⁶⁸

There are two justices in particular whose educations have tethered the Court's jurisprudence closely to American law: Justices Agranat and Barak. Justice Agranat was American and completed his education in the United States,¹⁶⁹ and Justice Barak trained for a year at Harvard Law. Consequently, the reliance of these justices on American law should be no surprise.¹⁷⁰ As all justices do, Justices Agranat and Barak consciously chose the countries they wanted Israel to at least partially legitimize from. And, quite often, on foundational issues like separation of powers or judicial review, American law was the bedrock upon which these justices' decisions rested.¹⁷¹

Additionally, For Justice Agranat, it was well known that American Justice Frankfurter was his hero.¹⁷² For Justice Barak, his reliance on American law may not only have come from his year spent at Harvard. Some scholars have hypothesized that he has also "been influenced by the time he has spent in American law schools" as a professor.¹⁷³ Either way, Justice Barak persuasively and effectively used American law is because he spent time with the law—as a student or teacher—in America's educational system.¹⁷⁴

V. CONCLUSION

Clearly, the Court uses comparative law to borrow legitimacy from American law; for example, explicitly in *Jabotinsky*, and brazenly in *Mizrahi*. Two strong themes define the use of

¹⁶⁶ Blum, *supra* note 23, at 2156-57 ("A related factor that has contributed to Israel's strong reliance upon the common law is the legal education of Israeli judges and scholars over the years. Beginning in the Mandate period, many of Palestine's leading judges and scholars traveled to England to pursue a higher legal education. Lawyers who were trained locally did so in the 'Law Classes,' a legal training program established by the British in Palestine in 1920. The tradition of legal scholars seeking higher education in England continued after the establishment of the state . . .").

¹⁶⁷ Kalman, *supra* note 164.

¹⁶⁸ *History of Legal Transplantations*, *supra* note 14, at 302 (noting the marked "American influence on Israeli legal education").

¹⁶⁹ Blum, *supra* note 23, at 2157 ("Furthermore, some of Israel's leading jurists over the years have been immigrants from the United States, perhaps most notably Chief Justice Simon Agranat (who delivered the opinion of the Court in *Yassin*), who was a graduate of the University of Chicago."); L'Heureux-Dube, *supra* note 27, at 20 ("For example, Israeli Supreme Court Justice Shimon Agranat, who was educated in the United States, made extensive use of American principles in several of his judgments.").

¹⁷⁰ L'Heureux-Dube, *supra* note 27, at 20 ("Another especially influential factor is the importance of education.").

¹⁷¹ See generally Bernal, *supra* note 5 (arguing that judges often make comparative law citations claims based on what countries they want their countries to be associated with).

¹⁷² Pnina Lahav, *The Pains and Gains of Writing Biography: Reflections on Writing the Biography of Chief Justice Simon Agranat*, in *THE HISTORY OF LAW IN A MULTI-CULTURAL SOCIETY* 150 (Ron Harris et al. eds., 2002).

¹⁷³ Bazelon, *supra* note 48, at 30-31. This is taking "Continuing Legal Education" to a whole new level.

¹⁷⁴ Doron & Totry-Jubran, *supra* note 36, at 106 (stating that Barak "was also well versed in U.S. law. He was a former professor of law and an expert in various aspects of American jurisprudence," and that he was "a judge with a liberal legal orientation and a history of judicial activism").

American law to support the Court's judicial restraint and separation of powers jurisprudence: First, American law was used in justices' contemporaneous and subsequent reactions to the Revolution in an attempt to manage the Revolution's aftershocks. Second, when American law is used, it is most often used to provide the philosophical basis for a doctrine of the Court; or, it is used to elucidate and number the elements of a rule. Of course, sometimes the Court gets American cases wrong—this is the danger of comparative law exercises. Finally, the Court uses American law not just because it *needs* to borrow legitimacy, but can also because of the similarities between America and Israel and the justices' personal ideologies and education.