Author Yonoson Rosenblum argues that the greatest threat to Israel’s democracy and Jewish identity is its own Supreme Court.

This past August, Israeli Prime Minister Ehud Barak announced an initiative quickly dubbed by the media a “secular revolution.” At the top of the Prime Minister’s agenda was the swift enactment of a written constitution. Though the specific provisions of that constitution were never discussed, it too came to be referred to as the “secular constitution.” All commentators assumed that the theoretical constitution would further increase the power of the Israeli Supreme Court, already the most powerful in the world, as part of a presumed separation of state and religion.

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Even as he announced a revolution to de-Judaize the public square in Israel, Barak accelerated a second, less trumpeted, secular revolution—one aimed at dramatically reducing the funding of yeshivot and other religious institutions in Israel. In this area too, the Israeli Supreme Court has of late played a key role, and seems destined to play a yet larger role in the future.

The Supreme Court of Israel, then, is the point of intersection between two secular revolutions: one directed at Israel’s public character as a Jewish state and the second designed to “dry-out” the religious community.

What are the sources of the Court’s power? What is its underlying ideology? And where is it headed?

The World’s Most Activist Supreme Court

One of the chief problems confronted by all theorists of democracy is the inherent tension between judicial review and the majoritarian bias of representative democracy—i.e., the presumption in favor of rule-making by democratically elected representatives. They must address the question: How can we prevent a handful of unelected judges engaged in judicial review of the actions of the elected branches of government from becoming the Platonic Guardians of society?

Unfortunately, the problem is not one that has much troubled the members of the present Israeli Supreme Court. With unabashed confidence, a Court that is both sociologically and ideologically unrepresentative of Israeli society has set forth to determine the basic norms of Israeli society according to “enlightened” and “progressive” values.

No Supreme Court in the world has undertaken responsibility for solving all the normative issues confronting society to the same extent as the Israeli Supreme Court, asserts Hebrew University law professor Ruth Gavison, the founder of the Association of Civil Rights in Israel. Virtually every dispute in Israeli society eventually reaches the Israeli Supreme Court—usually sooner rather than later.

Due to a holdover statute from British Mandatory Law, the Court has original jurisdiction over any citizen complaint against any governmental body or official. The Israeli Supreme Court issues 2,000 written opinions annually.1 By contrast, the United States Supreme Court, serving a population almost 50 times as large, dispenses fewer than 150 opinions a year.2

No government action is “too political, too controversial, or too trivial to escape the [Court’s] vigilant eye,” writes legal commentator Evelyn Gordon. Court President Aharon Barak has gone so far as to declare that even decisions concerning troop deployment in wartime are within the Court’s jurisdiction. Nor was that pronouncement entirely theoretical. The Court has actively intervened in military matters. For example, last year, in the context of a damages action brought by a Palestinian stone-thrower injured by IDF gunfire, the Supreme Court promulgated rules of engagement for soldiers pursuing those engaged in potentially lethal attacks on Israeli citizens and soldiers. The Court required pursuing soldiers to coordinate their firing and to fire serially and not simultaneously. The rules seemed to be designed to provide the fleeing stone-throwers with a fair chance of escaping.3 Foreign policy decisions include issuing an injunction against the closure of Orient House in the week prior to the last elections on the grounds that it was “politically” motivated.4

Increasingly, the Court’s decisions are nothing more than expressions of the value preferences of the justices. In a November 11, 1999 interview in the Israeli newspaper Ha’aretz5 that sent shock waves through the Israeli
legal community, Professor Gavison criticized the Court for giving "priority to the values of one group in society at the expense of the values held by other groups." "I do not think it is right for the Court to decide in favor of Westernism and against traditionalism; or in favor of modernity and individualism and against communitarianism," she said.

Professor Gavison noted that by purporting to be Israel’s supreme moral authority, the Court undermined its own legitimacy by entering into a realm beyond its competence. “As a supreme moral authority, it is far from clear that the Court is better than Rabbi Ovadia Yosef. ...The Court should not compete with Rabbi Yosef ...[rather] it should make it clear that it functions in a different space…”

Many of the Court’s opinions read like op-eds, and eschew any reference to traditional legal materials such as statutes or case precedent. In 1997, for instance, the Court ordered the education minister to broadcast a documentary of four teenage homosexuals discussing their lifestyles on educational TV. Justice Kedmi’s opinion was devoid of any legal citation. He offered no rationale for his decision other than that screening the documentary struck him as a good idea, since, in any event, teenage homosexuality exists and there is no sense in hiding from the fact. The Court thus created, without any legal reasoning, an affirmative right, recognized nowhere in the world, to have one’s lifestyle celebrated on national TV. (One wonders what the Court’s reaction would have been to a similar suit by religious youngsters who had made a documentary about their lives.)

Israel this year became the first country in the world to judicially outlaw any form of physical punishment by parents. With that decision, the overwhelming majority of Israel’s adult population was turned overnight into criminals and child abusers. Justice Dorit Beinish’s opinion consisted mainly of a string of citations to a handful of hotly disputed psychology articles and the trenchant observation that children are little and parents are big. She thus revealed herself to be what economist Thomas Sowell’s has termed a “cosmic liberal,” determined to somehow uproot even those inequalities inherent in creation.

Even the fundamental (albeit occasionally hazy) distinction between the society-wide rule-making function of the executive and legislative branches and judicial decision-making in a particular case, is lost on the current Court. Thus in the context of controversy over the Shabbat closing of Bar Ilan Street in Jerusalem, Justice Barak appointed a commission to consider the issue of Shabbat street closings in the entire country, clearly a legislative function. During a hearing on a petition to require the interior minister to register adopted children converted by Conservative clergy as Jewish, Justice Barak ordered the government attorney to brief the issue of whether the Court should institute the Neeman Commission proposals by judicial fiat. The Neeman Commission proposals dealt with the entire issue of conversion in Israel and, until then, had been assumed to require legislation.

THE PHILOSOPHICAL UNDERPINNINGS OF THE BARAK COURT’S ACTIVISM

The World is Filled with Law

The activism of the Israeli Supreme Court is a direct outgrowth of the judicial philosophy of Court President Barak, the dominant figure on the Court. Justice Barak’s legal philosophy begins with his famous declaration: “Every human behavior is subject to a legal norm. There is no act to which the law does not apply.”

A “gay parade” in Tel Aviv. “The Court created, without any legal reasoning, an affirmative right...to have one’s [homosexual] lifestyle celebrated on national TV.”

Israel Sun Ltd.
my law school professor’s descriptions of “Kadi justice” – the type meted out by Middle Eastern potentates sitting under their palm trees. Insist as he might that a legal norm always exists, Justice Barak often shows a reluctance to engage in the normal task of high courts around the world of identifying the applicable legal rule. Rather, he tries to force the parties to accept court-engineered compromises that will obviate the need for specifying the legal rule.11

DEMO CRACY AS RIGHTS, NOT PROCESS

Justice Barak’s definition of democracy further encourages judges to see themselves as the appropriate address for the resolution of all society’s normative conflicts. For Barak, democracy is not so much a process of enacting laws by the elected representatives as it is a set of “ends” or “rights.”12

Because he stresses democracy as a set of rights and not a process of majority rule through representative legislatures, he is not overly concerned with the issue of which branch of government should be making particular decisions. The Israeli Supreme Court shows little or no deference to the judgment of other governmental branches. In reviewing administrative decisions, for instance, it employs a “reasonability” test that effectively allows the Court to reexamine every decision ab initio. The Court’s finding of reasonability or the lack thereof is little more than a conclusory statement of its policy preferences.13

The Israeli Supreme Court is oblivious to what the great American constitutional scholar Alexander Bickel termed the “passive virtues” — forms of judicial self-restraint designed to preserve the legitimacy of the Court by preventing it from intruding into the proper realm of the elected branches. Chief among those virtues is the recognition that certain issues are too inherently political for the judiciary and that the courts should stay their hand when they lack sufficient statutory guidance from the legislature to enunciate a legal norm.

Justice Barak, on the other hand, shows no preference for legislatures over courts as the central lawmaking authority. His writings are laced with frequent expressions of contempt for the Knesset. Far from viewing the Knesset as the proper body for the resolution of the major value conflicts of society, Barak is more inclined to picture it as a threat to his conception of democracy. “One has a strong suspicion – based on reality – that in its haste to attain short-term political goals, the legislature will harm fundamental democratic values,” he writes.14

From Barak’s definition of democracy, it follows that laws may be undemocratic even though passed by a democratically elected Knesset. Thus in the Mealreal case he characterized a 40-year-old administrative ban on the import of non-kosher meat as “theocratic.” He seemed to be saying that any legal rule inspired by traditional Jewish religious beliefs is “theocratic” and therefore “undemocratic.” Only in this way can we make sense of Barak’s description of the Knesset’s subsequent reenactment of the ban on the import of pork as a “democracy by-pass law.”

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In Barak’s philosophy, it follows that the more cases the better, since each case provides another opportunity for a judge to declare a legal norm — a task for which Barak views judges as uniquely suited. Consonant with that view, the Israeli Supreme Court under Justice Barak has eroded traditional doctrines of standing (who may bring a suit) and justiciability (what types of issues are properly for the court) to a greater extent than any other court in the world.9

The problem, however, with viewing all human behavior as subject to a legal norm is that such norms are not found imbedded in either legislation or judicial precedent. When judges depart from such traditional legal materials in attempting to enunciate legal norms9, they are doing nothing other than stating their personal value preferences. In Barak’s own words, the judge’s decision will be a function of his “worldview,” which is itself a product of “his education, personality, and emotional makeup.” (Barak, Judicial Discretion pp.120-21.)

The result of urging judges to become the arbiters of every societal norm, while simultaneously freeing them from the traditional constraints of legal analysis, is what Justice Menachem Elon, the retired vice president of the Israeli Supreme Court, describes as “the rule of the judge, not the rule of law.”

Decisions of the Israeli Supreme Court increasingly call to mind one of the president’s descriptions of “Kadi justice” — the type meted out by Middle Eastern potentates sitting under their palm trees. Insist as he might that a legal norm always exists, Justice Barak often shows a reluctance to engage in the normal task of high courts around the world of identifying the applicable legal rule. Rather, he tries to force the parties to accept court-engineered compromises that will obviate the need for specifying the legal rule.11

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According to Barak’s logic, a ban on pork is anti-democratic because its ultimate inspiration is religious,
whereas a ban on the import of whale meat on ecological grounds suffers no such infirmity. Similarly, laws restricting employment on Shabbat are theocratic, while a day of rest on Sunday based on Socialist principles would suffer from no such problem.¹⁵

Nor does the imposition of the values of a narrow segment of society on the general public conflict with Barak’s conception of democracy. In difficult cases, posing issues of basic societal norms, he writes, the judge should be guided by the views of the “enlightened population in whose midst he dwells.” By the enlightened public, he does not mean a broad societal consensus, but rather an elite – that “part of the general public . . . whose values are universal [and] . . . which is enlightened and progressive.”¹⁶

Imposing the values of a narrow elite on the entire society is apparently justified by virtue of the fact that the elite better understands the ends of democracy. Judges, lawyers and law professors stand at the pinnacle of the “enlightened population” and, according to Barak, judges are entitled to channel into the legal system “fundamental values not yet found in it.” For example, he has described the 1992 Basic Laws as including not only the rights specified, but also “other unenumerated rights that have no name.”¹⁷

Unchecked and Unrepresentative

The Israeli Supreme Court, of course, is far from the only high court in the world to play a major role in determining society’s basic values. It is, however, subject to fewer democratic checks and balances than other activist courts. European constitutional courts, for instance, enjoy far-reaching powers, but, as Professor Gavison points out, they are subject to a clear constitution – not one discovered by the justices themselves¹⁸ — and the justices are specifically appointed for the purpose of making what are essentially political value judgments. Justices on those constitutional courts are chosen by the political branches and serve for a limited period of time. Similarly, the justices of the United States Supreme Court are chosen by the elected branches: they are nominated by the president and confirmed by the Senate.

No such checks exist in Israel. The Supreme Court has a degree of power possessed by no other high court in the world. Chief among those powers is that of appointing new justices to the Court.¹⁹ Formally, justices are selected by a nine-person committee that includes the justice minister and one other cabinet member, two members of the Knesset Law Committee, two representatives of the bar, the court president and two other justices appointed by him.¹⁹ In actual practice, however, no justice has ever been selected without the unanimous support of the three sitting Supreme Court justices. One academic wag describes the Israeli Supreme Court as “the Court that packed itself.”¹⁹ Court President Barak exercises an immense influence over the process. Indeed, it is commonplace for Israeli newspapers to speak of Barak having offered an appointment on the Court to various figures.

This selection process, as one might expect, has resulted in a Court entirely unrepresentative of the Israeli population. Only one justice, for instance, wears a yarmulke, as opposed to one-quarter of the Knesset members. In a country whose Jewish citizenry is of 50% Middle Eastern descent, not one justice is identifiably so.²⁰

Even within the bar itself, the Court members are highly unrepresentative. Most of them came to the Court directly from the state attorney’s office or the groves of academe, with little prior experience in private practice or as judges on lower courts. Every one of the justices graduated from the Hebrew University law faculty, and few, if any, have had any academic training outside the law. Nine of the justices were born within

The Orr Commission

The Orr Commission was headed by Supreme Court Justice Theodore Orr to consider ways of limiting the Court’s workload. According to many critics, the recommendations were designed precisely to allow the Supreme Court to focus exclusively on cases presenting large “value” issues, and to avoid the humdrum work of reviewing appeals from criminal and civil verdicts.
three years of one another, and all but one in the same decade.

A selection process in which the justices select their own successors has resulted in a Court singularly lacking in intellectual clash. The Court has become, in Professor Gavison’s words, “a sect, which is too uniform and effectively perpetuates itself.” While many of the most important recent decisions of the United States Supreme Court have been decided by narrow 5-4 majorities, it is rare for a decision of major impact in Israel to be decided by a narrowly divided Court.

American Supreme Court history could be described in terms of antinomies of competing judicial philosophies on the Court – e.g., Hugo Black vs. Felix Frankfurter or Stephen Breyer vs. Antonin Scalia. By contrast, there is not one justice on the Israeli Supreme Court who serves as an intellectual counterweight to Aharon Barak or who has had the slightest mediating impact on his jurisprudence. The Court might be described as a court of one with thirteen clones.

The dominance of the Court president over the selection process chills dissent throughout the legal system. Any lower court judge or academic with aspirations to the Supreme Court cannot help but be aware that his or her advancement is primarily in the hands of Court President Barak. At a conference on the Orr Commission recommendations, which have been actively promoted by Justice Barak, Justice Minister Yossi Beilin noted that practicing attorneys, judges and academics voiced warnings about the Orr Commission recommendations to him in private that they had been unwilling to express in public.

The ability of the Court to perpetuate itself in this fashion undermines the democratic legitimacy of the Court. Democracy depends on the recognition of various societal groups that even if they do not prevail today, they may do so tomorrow. Rules that tend to enshrine one viewpoint forever contradict this perception.

Justice Barak, of course, has an answer to attacks on the current method of judicial selection: the sitting justices are those most qualified to judge the expertise of various candidates. He bristles at criticism of the unrepresentative nature of the Court. Should the nation’s doctors be chosen by ethnicity rather than by expertise?

The problem with this analogy, however, is that there is no reason to believe that the justices of the Supreme Court have any special expertise to determine the basic values of Israeli society. As former Court President Moshe Landau pointed out recently, “The justices of the Supreme Court see themselves more or less as governing elders... [They] have taken upon themselves a role that they are incapable of fulfilling, and for which they have not been trained; they were trained to judge, not to govern.”

True, we want our doctors to have intensive training and to pass objective exams. But we would look askance if the results of the national medical board exams were suddenly used to select the national soccer squad.

To the extent that the Court is forced into what Justice Landau calls “the morass of political opinions and beliefs,” far better that the role be exercised by justices whose values more closely reflect the variety of values of the society at large, as in the European constitutional courts.

The failure to leave political and ideological decisions to the elected branches (or, as in the European constitutional courts, to justices selected by the elected branches) has resulted, writes Ben-Dror Yemini, director of the Center for Law, Society and Democracy, in “the circumvention of democracy in favor of the ideological coterie that controls the Court.”

The Israeli Supreme Court is marked by a singular lack of humility. Yet if the justices have no doubts about their qualifications to determine all the values and norms of Israeli society, Israel’s citizens have the right to ask: Why should that task be assigned to 14 justices who are unrepresentative of Israeli society and were not chosen by the citizenry?

The Court and the Jewish State

Since 1977, the forces of democratization have opened up most of the centers of power in Israel — the Knesset, the economy and the army — to a broad cross-section of Israeli
society. The Supreme Court and the media, however, remain bastions of the old elites. Those elites, says Professor Gavison, view the Court as the last institution over which they have control and which reflects their values. She accuses those veteran elites of working, through the Court and the constitutional process, to create a homogeneous framework for an extremely heterogeneous population.

That framework, notes Gavison, “does not take into account the values and beliefs of more than half the country’s citizens: the Arabs, the religious population, the Sephardim, and the traditionalists.” Former president of the Supreme Court Moshe Landau told Ha’Aretz interviewer Ari Shavit on Erev Yom Kippur that the values of the Court “are basically those of a certain sector of our public. When the Court speaks in their name… it oversteps its neutrality and arouses opposition.” The “certain sector” to which Justice Landau refers is the least Jewishly identified segment of the population.

Given the backgrounds of the justices picked through the present system of judicial selection, it is clear that even with the best of intentions, the justices would be incapable of weighing the “Jewish interests” in cases before them. So far removed are most of the justices from any ties to Jewish tradition that the Court did not even summarily dismiss a suit by anti-circumcision activists to ban circumcision, or alternatively, to require the procedure to be performed only in hospitals. The Health Ministry was required to respond to the petition.

Yet the justices have no trouble apprehending the liberty interest of any party asserting a desire to do something that is thwarted by the “religious establishment.” It is the countervailing Jewish interest that escapes them. They easily grasp, for instance, the desire of women to pray as men do at the Kotel, with tallit, tefillin, and reading from sifrei Torah. Yet without any personal connection of their own to the Kotel, they fail to recognize that by turning the Kotel into a showcase for whatever is avant-garde in Jewish prayer, they vitiate its power as a symbol of continuity and connection to 4,000 years of history.

Justices who have never experienced a Shabbat can readily understand the desire of motorists to drive on Bar Ilan Street on Shabbat. But can they evaluate the need for a peaceful Shabbat atmosphere by the residents of the adjacent neighborhood? Similarly, when the Supreme Court orders the burial of a non-Jewish immigrant in a Jewish cemetery, the justices fail to recognize that they have wronged the many Jews buried in that cemetery, and their families, who never would have agreed to burial in a cemetery with non-Jews.

The philosophy of the Court, as articulated by Justice Barak, recapitulates its sociology. Not for naught is he labeled by critics and supporters alike “the Admor of secularism.” Both the Israeli Declaration of Independence and the Basic Laws describe Israel as a “Jewish and democratic state.” Though the term “Jewish” precedes “democratic,” and is clearly independent and not subordinate, Barak famously insisted in a debate with Justice Menachem Elon, the retired vice president of the Court, that whenever the two concepts conflict, the term “Jewish” must be interpreted at a level of abstraction – e.g., as a synonym for justice or morality – designed to remove any conflict with the term “democratic.”

Thus Israel’s Jewishness consists, for Barak, of nothing more than its adherence to “those universal values common to members of democratic society.” The “enlightened community” whose standards are to guide the Israeli judge, according to him, is one that is “neither Jewish nor non-Jewish.” In his copious writings, Justice Barak has spelled out at length his conception of “democracy.” His conception of Israel as a “Jewish state,” has received no similar attention – perhaps because in the post-Zionist “state of all its citizens” religion is no longer important.

**The Court’s Impact on Israel’s Jewish Identity**

Not surprisingly, the Supreme Court under Barak’s stewardship has, in decision after decision, undermined Israel’s identity as a Jewish state. In March, the Supreme Court ruled that the Jewish Agency cannot create settlements designated only for Jewish residents. (Earlier, the Court had ruled that the government could exclude Jewish citizens from settlements specially created for Bedouins.) The Court was careful to limit its holding to the specific case at hand. But the logic of its decision — i.e., the assumption that distinctions between citizens on the basis of religion or nationality are an affront to democracy — would also require striking down the Law of Return, which grants automatic Israeli citizenship to all Jewish immigrants, and has long been considered the most fundamental expression of Israel’s Zionist mission.

Indeed, by suggesting that generations of Jews around the world who grew up putting coins in blue and white tin boxes out of enthusiasm for the idea of Jewish settlement were engaged in undemocratic actions, the Court gave unwitting credence to the U.N.’s infamous “Zionism is racism” resolution. For if every distinction between people on the basis of religion or nationality is inherently suspect, what basis is there for a “Jewish” state?

The Court’s rulings in a series of decisions on conversion have had, and will continue to have, a major impact on Israel’s Jewish identity. More than a decade ago, the Court ruled Israel must recognize heterodox conversions performed abroad for purposes of the Law of Return. The immediate practical consequences of
Judaism can be defined in more than one way, it is no longer relevant. Hundreds of thousands of Russian-speaking converts living in Israel today provide a huge pool of potential converts for the heterodox movements. If such converts proliferate, Jewishness will altogether cease to provide any unifying social glue in Israel, as different groups will not be able to agree on who is a Jew or intermarry with one another.

The Barak Court has consistently given short-shrift to Jewish religious interests. In the course of the controversy surrounding the transport of giant turbines (by a private company hired by the government) on Shabbat, the Court short-cut efforts to find alternative solutions that would have allowed the turbines to be moved on other nights of the week. In response to a petition by the company contracted to transport the turbine, the Court ruled that it would be “unreasonable” as a matter of law for the government not to carry out its original plan for Shabbat transport. In reaching that conclusion, the Court effectively declared that it is irrational for the State of Israel to give any value to the preservation of Shabbat if such consideration might result in higher costs or greater inconvenience to motorists.24

More recently, the Court ruled in favor of the right of the Women of the Wall to read from the Torah at the Kotel, wearing tallitot and tefillin. To do so, the Court had to engage in an extremely strained reading of the statute governing prayer at holy sites, which specifies that prayer should be according to the custom of the place. According to the Court, the “custom of the place” refers not to the specific holy site in question, but to the society in general. By that reasoning, the Court will inevitably be forced to sanction egalitarian minyanim at the Kotel, and even theoretically Jews for Jesus, as long as the groups in question can point to some place in Israel where they already observe similar rites.

Drying out the Religious Community

Not only has the Court done much to undermine Israel’s public identity as a Jewish state, a number of its decisions threaten the viability of large segments of the religious community in Israel. No power has traditionally been more associated with the legislative branch than budgetary power, yet even in this area the Court has taken an increasingly interventionist stance.

In October, 1999, the Court ordered hundreds of thousands of shekels transferred to the Masorti (Conservative) Movement, despite the fact that the movement did not have sufficient branches to be recognized as a “national organization” under the governing statute. It was sufficient, in the Court’s eyes, that the movement met the criteria of an earlier, and superseded, statute. The Court’s opinion referred explicitly to the importance of “religious pluralism” – a value that apparently trumped the operative statute.

When the issue concerned the funding of Chareidi youth groups, however, the Court went out of its way to interpret Education Ministry regulations to exclude the groups in question. In a 1996 survey, the Education Ministry found that two groups affiliated with Agudath Israel were receiving about one-quarter of the allocation they should have. Rather than rectify the wrong, the Meretz-controlled Education Ministry immediately drafted regulations

Court will eventually recognize heterodox conversions in Israel, and thereby place its imprimatur of legitimacy on the Conservative and Reform movements. Ironically, Meretz and other anti-religious public groups have long placed the legitimization of the heterodox movements at the top of their agenda. They recognize that it makes no difference whether there are three or 37 “Judaisms.” As long as
limiting funding to groups “educating their members in the world view of Judaism and Zionism… and to view army service as an obligatory value.” The attorney general approved the regulations with the stipulation that nothing contained therein should be interpreted as excluding Arab youth groups, as long as they recognized Knesset sovereignty.

The Court could have found that the Chareidi groups were eligible within the terms of the regulations, as claimed by the subsequent Education Minister from the National Religious Party. Certainly there was no suggestion that the Chareidi groups were less Jewish or Zionist than Arab youth groups. Or it could have struck down the regulation on traditional civil liberties grounds that the government cannot impose ideological tests for the receipt of government benefits.

It did neither. Even in post-Zionist Israel, Justice Michael Cheshin showed no lack of confidence in his ability to define a Zionist group and to determine from his own general knowledge that Chareidi groups do not qualify. He did not feel it necessary to inquire into how the Scouts and other groups instill the values of Judaism. The same Court that was so solicitous of protecting pluralism of views with respect to the Conservative Movement had no hesitancy in ruling Chareidi groups beyond the ideological pale.

Currently before the Court is a challenge by Am Chofshi (a group committed to stopping the spread of the Chareidi community) to a budgetary statute providing for discounts on municipal property taxes. Am Chofshi claims that the statute discriminates between kollel students and other students because kollel students who received income supplements from the Religions Ministry are automatically entitled to the property tax discount.

In oral argument before the Court, the Justices quickly adopted the position of Am Chofshi. Justices Beinisch and Zamir characterized the statute as discriminatory against other students. In fact, the statute established completely neutral income criteria for the discounts. The Religions Ministry’s criteria for income supplements – at least three children, non-working spouse, no car, and income limited to kollel salaries – placed all recipients well within the class of citizens eligible for property tax discounts.

The most shocking intervention of the Court in budgetary allocations occurred this past August. The city of Rechovot allocated a plot of land to the local branch of the Lev L’Achim organization adjacent to the city’s Ramat Yigal neighborhood. Eighteen secular residents of the neighborhood immediately petitioned the Supreme Court against the allocation. It was uncontested that no regulations or statutes governed municipal allocations to private non-profit organizations, and that Rechovot had followed exactly the same procedures that it, and virtually every other city in the country, has followed since the inception of the state.

The Court singled out the allocation for special scrutiny and ordered the attorney general to develop uniform national standards for land allocations to non-profit organizations. It also instructed the Interior Ministry to submit a brief with its recommendations. The Interior

Government-funded Arab youth groups are exempt from the requirement imposed on all Jewish groups to teach “the world view of Judaism and Zionism…and to view army service as an obligatory value.”
all the objections raised to the allocation in the Supreme Court. In addition, each member of the city council visited the existing Lev L’Achim center in Rechovot.

But even after Rechovot had done everything required by the Interior Ministry (whose guidance the Court had explicitly sought), the Court was still not satisfied. Despite the attorney general’s recommendation that no new regulations be applied retroactively, the Court instituted a whole set of further hurdles for the municipality if it still wanted to allocate the land. The Court ignored the overwhelming vote of the Rechovot city council (its third) in favor of the allocation. Without any evidentiary hearing on the nature of the Rechovot city council’s deliberations, the Court determined that those deliberations were inadequate and that the $300,000 invested by Lev L’Achim in construction at the site had been wasted.

In other words, three justices, with no knowledge of Rechovot and with no accountability to the citizens of the city, simply substituted their judgment for Rechovot’s elected representatives. Justices Beinisch, Dorner, and Strassberg-Cohen acted on the assumption that secular residents must be protected from proximity to any religious institution, repeatedly referring to the city’s lack of consideration of secular residents. (In another case involving a land allocation in Rechovot for a Chabad school, in which all the students live within walking distance of the proposed site, Justice Strassberg-Cohen took judicial notice of the fact that religious and non-religious Jews cannot live together.)

The Court either did not know, or chose to ignore, that there are no exclusively religious or non-religious neighborhoods in Rechovot; that the site was adjacent to, not in, Ramat Yigal; that more Ramat Yigal residents had signed positions in favor of the new center than against; and that many of those who signed petitions against were falsely told that the center would be a hostel for Jewish women married to Arabs and would bring drug dealers and Arabs into the neighborhood.

NEW DANGERS AHEAD

To understand how the threat posed by the Israeli Supreme Court could grow still greater, it is necessary to review recent Israeli constitutional history. In 1992, the Knesset passed two Basic Laws: The Basic Law of Freedom of Occupation and The Basic Law of Human Dignity. Passed in the middle of the night, neither law garnered even a third of the Knesset members in support. Yehudit Karp, in the leading law review article on the legislative process leading to passage of the laws, concedes that no more than a handful of Knesset members expressed any sense that passage of the laws represented a momentous moment: there was scant debate and none of the seriousness associated with constitution making.

Uriel Lynn, one of the leading sponsors of the legislation, explicitly stated that the new Basic Laws did not confer upon the Court the right of judicial review of Knesset legislation. Moreover, the Basic Laws plainly stated that they did not supersede any previously enacted legislation – in other words, they do not enjoy super-legislative status.

None of this prevented Justice Barak from declaring (in a law journal article) soon after the enactment of the laws that they constituted a “legal revolution.” Not long thereafter, he asserted in the Bank Mizrachi case that the 1992 Basic Laws are constitutional in nature and conferred upon the Court the power to strike down Knesset legislation.

Israel thus became, in Professor Gavison’s words, the first country in history whose constitution was judicially created by a Court that is unrepresentative of (Israeli) society and which appoints itself. Many of her friends on the Left insisted that only in such a “hush-hush” fashion would Israel ever be able to achieve a liberal constitution on Western models.

But what neither Barak nor his supporters seems to realize is that such a stealth constitution is an oxymoron: Constitutions are promulgated, not “discovered” by courts. As Justice Cheshin so eloquently put it in his Bank Mizrachi dissent, the promulgation of a constitution is a secular
the Court’s intervention would seem to be largely a function of whether the government in power is left-wing or right-wing. If the former, the Court grants the government unlimited latitude; if the latter, the Court does not hesitate to intervene.

5. Unless otherwise indicated, all subsequent quotations of Professor Gavison are from that interview.

6. A handful of Scandinavian countries had already outlawed all corporal punishment by statute.

7. The Bar Ilan litigation provides a good example of some of the problematic aspects of the Barak Court’s jurisprudence. The case posed the narrow legal issue of whether it was within the police power of the supervisor of traffic to order Bar Ilan Street closed on Shabbat. The supervisor of traffic was confronted with two competing interests: that of secular residents in unimpeded movement and that of religious residents of Bar Ilan in a peaceful Shabbat. There is no philosopher’s stone that allows us to weigh the competing interests, and a decision in favor of either would have been reasonable. Yet at the hearing on the case, Justice Barak repeatedly asked the supervisor of traffic what had changed from his earlier decision not to close the street.

What had changed, as Justice Barak knew
well, was the government and the configuration of parties in the governing coalition. A government dependent on the support of religious parties had chosen to give more weight to the religious interests. That is how it goes in a democracy. Given that either resolution was reasonable, the supervisor of traffic’s decision was entitled to judicial deference.


2. In an October 6, 2000 interview with Ha’Aretz, former president of the Supreme Court Moshe Landau noted the frustration of the bar. The drafting and ratification of the United States Constitution, by contrast, took more than a year and produced thousands of pages of recorded debates and the greatest American work of political philosophy, The Federalist Papers.

3. The Federalist Papers.

4. See fn. 10 supra.

5. See Mordechai Haller, “The Court That Packed Itself,” Azure, Autumn 1999, pp. 64-92, from which much of the discussion of Israel’s judicial selection process is drawn.

6. In the course of an informal meeting with the press in late 1997, Justice Barak opined that judicial standards would be diluted if a particular effort were made to appoint Sephardi justices. Because of his close ties to the press, the remark went almost unreported.

7. Justice Barak consistently portrays the justices of the Supreme Court as neutral experts above any taint of bias or suspicion thereof. He seems to believe that donning judicial robes guarantees impartiality no matter how great the evidence to the contrary. Thus he recently sought to protect Chareidi Magistrate Oded Alyagon to the Tel Aviv District Court despite the fact that Alyagon publicly likened the Chareidi public to “large lice” in a speech attended by Barak. Justice Barak has also repeatedly refused to allow judges to recuse themselves in cases involving potential conflicts. In one recent case, the Supreme Court upheld the right of Justice Theodore Orr not to recuse himself in a case in which one of his closest friends was counsel, despite the fact that the Bar Association Code of Ethics, drafted by former Court President Meir Shamgar, clearly mandates recusal in such cases. The Court ruled that the Code of Ethics is not binding. Thus the same Court that has repeatedly enunciated standards for public officials that appear nowhere in the Israeli statute books – such as the requirement that ministers under indictment resign – refused to apply to itself explicit and clearly applicable rules.

8. As we shall see below, religious and nationalistic parties before the Israeli Supreme Court prevail far less frequently than their secular and heterodox opponents. If we found that members of one ethnic group always died in the hospital, while those of another ethnic group were far more likely to survive, we would begin to wonder about the selection process for doctors as well.

9. Irony, the only party which is often unable to have its legal position tested in the Supreme Court is the government itself. The Supreme Court has effectively made the attorney general its emissary within the executive branch. In 1993, the Court ruled that decisions of the attorney general, even in policy matters where there is no controlling legal precedent, are binding upon the government. Thus if the attorney general refuses to defend the government’s position, his decision is final and unappealable.

10. That problem exists, of course, in all judicial decisions. It is, however, exacerbated to the extent that judges feel themselves free to enunciate norms without reference to such guideposts as legislation or precedent.

11. A classic example of the Court’s reluctance to enunciate a legal rule is a recent case concerning whether interpolations into the recovered texts of a particular Dead Sea Scroll constitute protected intellectual property. Even though the issue was one of first impression in a crucial area of the law, Justice Barak attempted to sidestep it and encouraged the parties to reach a compromise. Only after the parties were unable to do so, did the Court decide the issue. In an October 6, 2000 interview with Ha’aretz, former president of the Supreme Court Moshe Landau noted the frustration of the bar with the Court. The Court, he said, “is no more immune. To raise funds but to advance various public purposes by grants to various worthy institutions and organizations. The drafting and ratification of the United States Constitution, by contrast, took more than a year and produced thousands of pages of recorded debates and the greatest American work of political philosophy, The Federalist Papers.”