

RELIGIOUS FREEDOM AND ISRAELI LAW

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I. INTRODUCTION

Religious freedom under Israeli law is a complex issue. The questions raised, and sometimes the answers, may seem counterintuitive from an American perspective. The cultural dynamics of religious freedom in Israel are somewhat opposite of those in the United States. In the United States, religious freedom issues are often raised by religious minorities and dissenters who seek redress for either government infringement of their free exercise of religion or government support for, or endorsement of, religion¹—most often endorsement of the dominant form of religion in the

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1. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (discussing religious endorsement in the context of displaying the Ten Commandments in county courthouses); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding, on the basis of formal neutrality, a state-sponsored program providing tuition assistance for children to attend alternative schools, religious or secular, when the school district in which a family lives is under federal court-ordered state supervision); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (finding that student-led, student-initiated prayer at public school football games violated the Establishment Clause); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (rejecting free exercise claim by members of a Native American church who were denied unemployment benefits after being fired for ritual use of peyote); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (finding government support of parochial elementary and secondary schools unconstitutional); *Sherbert v. Verner*, 374 U.S. 398 (1963) (upholding the free exercise claim of a

relevant locale.² In Israel, however, the dynamic is the opposite. Religious minorities have extensive religious freedom.³ In fact, the battle lines of many religious freedom issues are drawn between secular and non-Orthodox Jews and the Orthodox minority,⁴ which has been given significant control over a number of status issues such as marriage,⁵ divorce,⁶ conversion,⁷ and food laws.⁸

Israeli law relating to religious freedom takes a variety of forms. There is no formal Israeli constitution.⁹ Unlike the United Kingdom, however, constitutional law in Israel finds expression in a system of Basic

Seventh-Day Adventist when her unemployment benefits were denied because of her inability to work Saturdays in accordance with her faith).

2. See, e.g., *McCreary County*, 545 U.S. 844 (upholding a preliminary injunction ordering the removal of a Ten Commandments display from state courthouses); *Santa Fe*, 530 U.S. 290 (holding that a public school policy allowing prayer before football games violated the Establishment Clause).

3. See, e.g., HCJ 1113/99 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Religious Affairs [2000] IsrSC 54(2) 164 (holding that the Ministry of Religious Affairs violated the principle of equality in failing to grant to the Arab minority an appropriate funding level for cemetery maintenance); Ruth Lapidot, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 446–47, 449–50, 455–59 (1998) (discussing Israel's commitment to religious freedom).

4. See Barak Medina, *Enhancing Freedom of Religion Through Public Provision of Religious Services: The Israeli Experience*, 39 ISR. L. REV. 127, 139–40, 144–52 (2006) (highlighting the appointment of Orthodox Jews to positions of power over public areas and government programs).

5. *Id.* at 147; Arthur Gross-Schaefer & Wayne Jacobsen, *If Not Now, When? The Case for Religious Liberty in the State of Israel*, 44 J. CHURCH & ST. 539, 544–45 (2002) (indicating that only Orthodox rabbis may perform marriages in Israel).

6. See Gross-Schaeffer & Jacobson, *supra* note 5, at 545; Medina, *supra* note 4, at 147 (illustrating that Rabbinical Courts hold exclusive jurisdiction over divorce matters).

7. See Gross-Schaeffer & Jacobson, *supra* note 5, at 545.

8. See Medina, *supra* note 4, at 152 (explaining that the Chief Rabbinate has significant control over business owners through the Prohibition of Fraud in Kosher Food Act).

9. See generally Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312–17 (1995) (discussing the development and growth of Israel's constitution); Dalia Dorner, *Does Israel Have A Constitution?*, 43 ST. LOUIS U. L.J. 1325, 1325 (1999) (explaining that Israel never realized its plan to draft a written constitution); Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements*, 53 AM. J. COMP. L. 77, 78 (2005) (discussing significant constitutional developments in Israel).

Laws,¹⁰ as well as judicially expressed constitutional norms.¹¹ In Israel, concepts of equality and human dignity as set forth in Basic Laws,¹² the founding documents and principles of the Nation of Israel,¹³ treaties,¹⁴ and judicial opinions are relevant to religious freedom¹⁵ even though no Basic Law explicitly defines its boundaries.¹⁶

The lack of explicit constitutional boundaries regarding religious freedom,¹⁷ combined with the preference given to Orthodox religious authorities,¹⁸ has led to a culture war in Israel as the nation has become more secularized and as the Reform and Conservative Jewish movements have gained strength.¹⁹ The dynamics of this culture war and the piecemeal system of constitutional principles in Israel are the focus of this Article. I suggest that the ebb and flow of narrow principles of religious freedom that I have advocated in the context of United States constitutional law²⁰ may be a particularly useful concept in Israel, albeit for reasons quite different than in the United States.²¹

Part II of this Article provides a primer on Israeli law relevant to religious freedom and the nature of Israeli constitutional principles. Part III addresses the dynamics of the culture war that has evolved in Israel between Orthodox Jewish authorities and non-Orthodox Jews. Part III also explains why this dynamic has little impact on non-Jews in Israel, who

10. See Barak-Erez, *supra* note 9, at 313, 323–45; Edrey, *supra* note 9, at 102–03.

11. See Elazar Nachalon, *Structural Models of Religion and State in Jewish and Democratic Political Thought: Inevitable Contradiction? The Challenge for Israel*, 22 *TOURO L. REV.* 613, 624–25 (2006) (providing examples of judicially-expressed constitutional norms).

12. Barak-Erez, *supra* note 9, at 313, 323–45.

13. *Id.* at 315–17.

14. Lapidoth, *supra* note 3, at 448, 458–59.

15. See Barak-Erez, *supra* note 9, at 313, 323–45; see also Edrey, *supra* note 9, at 102–03.

16. See *supra* notes 9–15 and accompanying text.

17. See *supra* notes 9–15 and accompanying text.

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

19. See *infra* Part III.

20. See FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* 153–67 (2007) [hereinafter RAVITCH, *MASTERS OF ILLUSION*]; see also Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 *GA. L. REV.* 489, 544–47 (2004) (discussing a proposed test for Establishment Clause cases in which the importance of different principles ebbs and flows based on the context).

21. See *infra* Part IV.

surprisingly often enjoy greater religious freedom than non-Orthodox Jews.²² Part IV will suggest interpretive principles that may be highly relevant in regard to religious freedom issues in Israel. Part IV will also explore why the use of ebbing and flowing narrow principles of religious freedom may be better suited to religious freedom issues in Israel than reliance on broad overarching principles. Part V will provide a brief conclusion.

II. ISRAELI LAW AND RELIGIOUS FREEDOM

From the date of its founding, the Nation of Israel has recognized principles of religious freedom and nondiscrimination.²³ These principles are reflected in the Declaration of the Establishment of the State of Israel—often referred to as the Israeli Declaration of Independence²⁴—and have been recognized repeatedly by the Israeli Supreme Court.²⁵ The Israeli Declaration of Independence states, in relevant part:

THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; *it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles*

22. See Medina, *supra* note 4, at 138–39, 147–52.

23. See, e.g., Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. REV. 239, 241, 243 (2007) (citing Declaration of the Establishment of the State of Israel, 5708–1948 1 LSI 3 (1948) (Isr.)) (addressing the founding principles of religious freedom and equality but noting practical problems raised by the character of the “Jewish State” notion).

24. Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3 (1948) (Isr.), available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>.

25. See, e.g., HCJ 1113/99 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Religious Affairs [2000] IsrSC 54(4–5) 164 (“Therefore, from the State of Israel’s first day, the declaration established the principle of equality as one of the basic values of the State. Over the years, the principle of equality was established and developed, via legislation and case law, and has also earned for itself, beyond the status of a basic value, the status of a basic right. . . . Discrimination on the basis of religion or nationality in allocation of state funds, which is even prohibited if it is done indirectly, certainly is a fortiori prohibited when it is done directly.”) (citation omitted).

of the Charter of the United Nations.²⁶

Recognition of principles, however, is not the same as consistently following them. Like many nations, Israel has struggled with the tension between the broad principles it espouses and the practical reality of applying those principles to a complex and diverse society.²⁷ In fact, the governmental structure in Israel poses one of the greatest obstacles to realizing the broad religious freedom envisaged in the Declaration.²⁸ This is because the party system in Israel often requires larger political parties to ally themselves with smaller parties in order to form a coalition government, and many of the smaller parties are religious parties.²⁹ In order to gain the cooperation of these smaller parties on key issues, coalition governments often have made concessions on issues involving religion.³⁰ Therefore, the larger political parties like Labor and Likud—which may not oppose removing authority over status issues such as marriage from Orthodox authorities—maintain Orthodox authority in order to keep the government together.³¹ This has led to a great deal of public dissatisfaction among the non-Orthodox majority.³²

There is no separation of synagogue, mosque, or church and state in Israel.³³ The government provides funding directly to religious authorities for matters such as maintenance of places of worship, holy sites, cemeteries, and other matters of relevance to the various religious communities.³⁴ Moreover, until recently there was a formal ministry of religious affairs, which was dominated by Orthodox interests and which oversaw many of the issues mentioned above.³⁵ The ministry no longer exists, but its responsibilities were split among other governmental

26. Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3 (1948) (Isr.), available at <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm> (emphasis added).

27. See Gross-Schaefer & Jacobsen, *supra* note 5.

28. See *id.* at 545–47.

29. See *id.* at 545.

30. See *id.*

31. See *id.*

32. See *id.* at 545–47.

33. See Lerner, *supra* note 23 (noting practical problems in the religious freedom context raised by the idea of the “Jewish State”).

34. See, e.g., Gross-Schaefer & Jacobsen, *supra* note 5, at 545–47; Medina, *supra* note 4, at 133–34, 148–55.

35. Nachalon, *supra* note 11, at 624.

entities.³⁶ As noted above, Orthodox authorities are given the power to determine the validity of marriages, conversions to Judaism, and other issues (but only as it relates to Jews—other religious communities are governed by their own rules).³⁷

There is, however, free exercise of religion in Israel.³⁸ No one is required to be part of any faith or engage in any religious exercises, and most Israelis do not identify as Orthodox.³⁹ Of course, these free exercise rights are seriously compromised in those areas in which Orthodox authorities are given control over status issues.⁴⁰ This conflict has helped fuel the culture war in Israel between Orthodox authorities and the majority of the Israeli public.⁴¹ A natural question one unfamiliar with Israeli law and history might raise is: How did Orthodox authorities gain power over status issues in the first place? The answer comes from a concept called “the status quo.”

Prior to the founding of the Nation of Israel, British and Ottoman authorities gave various recognized religious communities power over a variety of issues that had religious significance, including marriage, divorce, and education.⁴² During that era—most of which occurred before the rise of the Reform, Conservative, and Reconstructionist Jewish movements—Jewish religious concerns were addressed by Orthodox practices.⁴³ Under the British Mandate, even secular Jews could be governed by religious rule on issues such as marriage, and the recognized religions controlled the

36. *Id.*

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

38. Lapidot, *supra* note 3, at 445 (quoting the Declaration of the Establishment of the State of Israel, 5708–1948, 1 LSI 3 (1948) (Isr.), *available at* <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm>).

39. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 545–47 (suggesting that a majority of Israeli Jews may not be Orthodox).

40. *See id.*; *see also supra* notes 4–8 and accompanying text; *infra* Part III.

41. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 545–47. An interesting example of this culture war is the issue of abortion. Jewish Law leaves room for several possible approaches, but Orthodox political actors are the primary supporters of antiabortion laws and regulations. *See* Noga Morag-Levine, *Imported Problem Definitions, Legal Culture and the Local Dynamics of Israeli Abortion Politics*, in *ISRAEL: THE DYNAMICS OF CHANGE AND CONTINUITY* 226, 230–32 (David Levi-Faur et al. eds., 1999).

42. *See* Lerner, *supra* note 23, at 251–53.

43. *See id.* (indicating that deference was granted to religious minorities in matters of land and family and, as such, Israel became “the only modern State in the world lacking a territorial law of marriage and divorce”).

rules governing a number of status issues.⁴⁴

When the Nation of Israel was founded, it seemed clear that there would likely be tension between secular Jewish movements and religious movements.⁴⁵ The new government—for reasons disputed by some historians and political scientists—decided to maintain the status quo on religious issues, leaving status issues under religious control.⁴⁶ Therefore, the system of religious authority that existed under the British Mandate, and before that under Ottoman rule, was merged into the new Israeli government and legal structure.⁴⁷ As Israeli culture has grown more diverse, more secular, and more focused on civil liberties, this initial compromise has fostered significant backlash.⁴⁸

Many raise questions regarding what it means to be a “Jewish State,” and whether Orthodox authority or broad personal freedom better reflect the nature of a “Jewish State.”⁴⁹ That debate is beyond the scope of this Article. I will assume that broad religious freedom *can* be consistent with a “Jewish State,” but even if this assumption is incorrect, religious freedom *is* consistent with Israeli legal principles. The hard question is the definition of religious freedom in a context in which Orthodox authorities have been given significant power, but are seeing that power diminish as government and society change.

Two Basic Laws passed in the 1990s are highly relevant to any discussion of religious freedom under Israeli Law: Basic Law: Human Dignity and Liberty⁵⁰ and Basic Law: Freedom of Occupation.⁵¹ These Basic Laws have been important additions to the law governing religious freedom, despite the fact that their text does not mention religious

44. *See id.*

45. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 542–43.

46. *Id.* at 543 (explaining that leaders of the new government, because of its delicate nature, sought to preserve fragile pre-state unity through various concessions).

47. *See* Lerner, *supra* note 23, at 251–53.

48. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 545–47.

49. *See, e.g.,* Gross-Schaefer & Jacobsen, *supra* note 5; Lerner, *supra* note 23; Nachalon, *supra* note 11.

50. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, *available at* http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1992/3/Basic%20Law-%20Human%20Dignity%20and%20Liberty-.

51. Basic Law: Freedom of Occupation, 1994, S.H. 90, *available at* http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1994/3/Basic%20Law-%20Freedom%20of%20Occupation-.

freedom.⁵² The Israeli Supreme Court has read religious protections into these new Basic Laws.⁵³ Moreover, judicial review of new legislation that conflicts with the Basic Law of Human Dignity and Liberty has been acknowledged by the Supreme Court of Israel.⁵⁴ This is important because the power of judicial review—which would allow the judicial branch to strike down legislation that conflicts with a Basic Law or judicially created right—is not a given in the Israeli system.⁵⁵

Israeli courts regularly strike down administrative action—even action pursuant to valid legislation—when it conflicts with individual and civil rights protected under Israeli law, but legislation is generally superior to the power of the courts.⁵⁶ Only Basic Laws that include what are known as “entrenched” provisions may be applied by the courts to strike down conflicting legislation.⁵⁷ If a provision is not entrenched, courts have no authority to strike down legislation that a court believes conflicts with the Basic Law.⁵⁸ If a provision is not entrenched, a court in a given case may invalidate the *execution* of a law that the court finds to be in conflict with civil rights or liberties found in the Basic Laws, decisions of the Supreme Court of Israel, treaties, or the Declaration of the Establishment of the State of Israel—usually after applying a balancing test.⁵⁹ Yet, as noted above, in most situations courts may not strike down the legislation itself.

Based on its structure and text, Basic Law: Human Dignity and Liberty has been found to include entrenched provisions, at least as to future legislation.⁶⁰ Unlike most entrenched provisions, the entrenchment is not explicit, but rather is based on the text of the Basic Law; as the law is written it is hard to escape the conclusion that conflicting legislation passed

52. See *supra* notes 50–51 and accompanying text.

53. See, e.g., H CJ 3872/93 Mitral Ltd. v. Prime Minister [1993] IsrSC 47(5) 485 (finding freedom of occupation infringed when import permits were denied to businesses dealing with non-Kosher meat).

54. See Barak-Erez, *supra* note 9, at 326–31 (discussing the contours of judicial review of the Basic Laws).

55. See *id.*

56. See *id.* at 326.

57. *Id.* at 326–28 (“The entrenched provisions are those which, according to the Basic Law, can be amended only by the vote of a special majority of Knesset members.”).

58. See *id.*

59. See H CJ 292/83 Temple Mount Faithful v. Commander of the Jerusalem Region Police [1984] IsrSC 38(2) 449, 455.

60. See Barak-Erez, *supra* note 9, at 327–29.

after its enactment can be struck down by the courts.⁶¹ Thus, not only has this Basic Law been held to recognize religious freedom as a fundamental right, but the power of judicial review is available to strike down *new* laws that conflict with that right.⁶² This newly expanded right may prove to be a powerful tool when applied to the principles of equality, nondiscrimination, and the general prohibition of religious coercion.⁶³ Thus, principles of equality, individual liberty and dignity, and noncoercion have all been recognized in the Israeli religious freedom context.

III. THE CULTURE WARS

The sociologist James Davison Hunter utilized the term “culture wars” to describe the battle lines drawn in American society between religious and social conservatives, who seek cultural and governmental recognition of their values and beliefs, and religiously liberal or secularized members of society, who seek to protect individual rights and freedoms against majoritarian and governmental encroachment, and to keep government out of the business of supporting or endorsing religious beliefs or values.⁶⁴ Interestingly, Israel is in the midst of its own culture war. The Israeli culture war is between an entrenched and politically powerful Orthodox minority and the secularized, or non-Orthodox, majority, whose members are legally bound to follow Orthodox rules on issues such as marriage and conversion,⁶⁵ and are also subject to Orthodox-influenced rules governing food,⁶⁶ working on the Sabbath,⁶⁷ and other activities on the Sabbath.⁶⁸ The players on both sides of this cultural divide are

61. *See id.*

62. *See id.* Original versions of both the Basic Law of Liberty and Human Dignity and the Basic Law of Freedom of Occupation left open the potential that any legislation that conflicts with those Basic Laws could be struck down, but when the religious parties realized this, they moved to amend the Basic Laws so that only *future* legislation could be invalidated by the courts in the event that it conflicts with the Basic Laws. *See id.* at 328–31. These amendments also added language intended to require certain considerations in determining whether a new law is invalid because it conflicts with the Basic Laws. *See id.*

63. HCJ 1113/99 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Religious Affairs [2000] IsrSC 54(5) 164; Lapidoth, *supra* note 3, at 455–46.

64. *See* JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

65. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 545.

66. *See* Medina, *supra* note 4, at 148–52.

67. *See* Lerner, *supra* note 23, at 262–65.

68. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 545–46 (indicating Sabbath restrictions have been extended to public transportation, shops and other

Jewish.⁶⁹ The battle is heavily facilitated by the party system in Israel and the strange political bedfellows it creates.⁷⁰

Unlike the culture war in the United States, however, where the divide is partially fueled by conservative backlash against social and legal victories by progressive players,⁷¹ in Israel the culture war is fueled by progressive backlash against the entrenched and legally-empowered conservative minority.⁷² The progressives are, however, beginning to win more victories, such as the disbanding of the Ministry of Religious Affairs,⁷³ the new Basic Laws,⁷⁴ and numerous judicial opinions recognizing broader civil rights and liberties.⁷⁵ The Supreme Court of Israel has played an increasingly important role in balancing the status quo against individual rights, often in favor of individual rights.⁷⁶

For non-Jews in Israel, religious freedom issues often center on the principle of equality, specifically in the funding area.⁷⁷ As noted above, Israel's government provides funding for maintenance of religious needs and places.⁷⁸ In this regard, only certain communities—such as Muslims, various Christian denominations, Bahai, and Druze—are recognized by the government, and thus receive government funding.⁷⁹ The government does not interfere with other denominations, but those communities do not receive funding.⁸⁰ The funding may be tied to the percentage of the Israeli population made up by a recognized group, but however it is allocated, it need not be formally equal; rather, the allocation must be substantively equal.⁸¹ Sometimes the funding is not dispersed as it is supposed to be, and

entertainment facilities, and even to professional soccer).

69. *See id.* at 545–47.

70. *See id.*

71. *See generally* HUNTER, *supra* note 64.

72. *See* Gross-Schaefer & Jacobsen, *supra* note 5, at 545–47.

73. *See supra* note 36 and accompanying text.

74. *See supra* notes 50–63 and accompanying text.

75. *See* Medina, *supra* note 4, at 133–34, 141–42, 146, 149–50, 152–54.

76. *See id.*; *see also* Lerner, *supra* note 23, at 248, 262–63, 265–68, 272–73.

77. *See, e.g.*, HCJ 1113/99 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Religious Affairs [2000] IsrSC 54(5) 164 (addressing Arab claims of funding inequality against the Ministry for Religious Affairs for maintenance of Arab cemeteries).

78. *See* Lerner, *supra* note 23, at 254–55.

79. *See id.* at 254.

80. *Id.* at 254–55 (indicating nonrecognized denominations have full religious freedom and receive tax benefits, but do not receive government funding).

81. *See* HCJ 1113/99 Adalah Legal Ctr. for Arab Minority Rights in Isr. v.

representatives of the relevant non-Jewish community sue.⁸² These suits have been repeatedly successful in the Supreme Court of Israel based on the principle of equality.⁸³ Additionally, the government protects the holy sites of all the major religions against desecration and allows freedom of access.⁸⁴

As for other religious freedom issues, non-Jewish communities in Israel are given control over their own affairs, and the government does not generally interfere with the decisions of these religious communities.⁸⁵ Thus, while Friday night and Saturday are essentially imposed days of rest for Jews in much of Israel because businesses are generally closed and there is limited public transit,⁸⁶ non-Jewish communities may determine their own days of rest—an ability that might be viewed as fostering variable blue laws.⁸⁷ Non-Jewish communities are not bound by the decisions of the Orthodox Jewish authorities on issues of marriage, divorce, and status.⁸⁸ Of course, like Jewish Israelis, non-Jewish Israelis may not be forced by the government to worship in any manner or to profess any faith or creed. These communities are relevant to the broader geopolitical dynamics in the region, but ironically they have greater religious freedom and autonomy in Israel than do secular Jews.⁸⁹ While non-Jewish communities are important players in many of the civil and human rights issues facing Israel, they are not major players in Israel's internal culture wars.

Amidst this cultural divide, several principles have come to the fore in addressing religious freedom issues. Long-established principles of equality and nondiscrimination apply—but are less helpful—to non-Orthodox Jews, because they must be applied in a system that supports a preferred establishment on a number of relevant issues.⁹⁰ Thus, non-

Minister of Religious Affairs [2000] IsrSC 54(6) 164.

82. See *id.* pt. 4.

83. See, e.g., *id.* pt. 5 (“Discrimination on the basis of religion or nationality in allocation of state funds, which is even prohibited if it is done indirectly, certainly is *a fortiori* prohibited when it is done directly.”).

84. See Lapidot, *supra* note 3, at 451.

85. See Lerner, *supra* note 23, at 254–55.

86. See *supra* notes 67–68 and accompanying text.

87. Hours of Work and Rest Law, 5711–1951, 5 LSI 125 (1950–51) (Isr.).

88. See Lerner, *supra* note 23, at 253 (“Religious law is the rule in matters related to personal status, and the recognized religious communities have retained their jurisdiction.”).

89. See Gross-Schaefer & Jacobsen, *supra* note 5, at 544–47.

90. See *id.*

Orthodox Jews cannot be discriminated against or denied equal rights in most areas, but when it comes to issues covered by the status quo, these principles do not seem to apply.⁹¹ For example, no Jew can be married in a legally binding ceremony by a rabbi of his or her choice unless that rabbi is Orthodox.⁹²

Yet, other principles have come into play that may yet alter this dynamic, even as to the status quo. Principles of religious liberty and human dignity have become more relevant.⁹³ Even notions of separation of religion and state and the suggestion that the Orthodox should be accommodated but not preferred have arisen. Yet, while many pragmatic legal and political compromises have occurred, much of the rhetoric on both sides suggests that one or more of the concepts of equality, preferentialism, liberty, human dignity, separation, or accommodation should govern as a broad principle.

IV. BROAD AND OVERARCHING OR NARROW YET FLEXIBLE PRINCIPLES?

There may be a way to facilitate the movement toward greater religious freedom while allowing for recognition of, and support for, aspects of the traditional Orthodox role in Israel. In my book, *Masters of Illusion: The Supreme Court and the Religion Clauses*, I argued that ebbing and flowing narrow principles are more useful in interpreting the religion clauses of the First Amendment to the United States Constitution than broad principles such as “neutrality” and “original intent.”⁹⁴ I argued that the latter were merely illusions in the religion clause context, and that rather than providing objective interpretive norms, they covered up the actual modes of analysis that the Justices were using.⁹⁵ The principles that I proposed could ebb and flow in the context of interpreting the United States Constitution are equality, liberty, separation, accommodation, soft originalism, and pragmatism.⁹⁶ A similar approach may be useful in Israel.

One cannot ignore the fact that Israel has a legally preferred religion

91. See *id.*; see also Lerner, *supra* note 23, at 253–54.

92. Lerner, *supra* note 23, at 253.

93. See Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, available at http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1992/3/Basic%20Law-%20Human%20Dignity%20and%20Liberty-

94. See RAVITCH, *MASTERS OF ILLUSION*, *supra* note 20, at ix–x.

95. See *id.* at 1–36, 153–67.

96. *Id.* at 47–105, 164–65.

in some contexts, so unlike in the United States, preferentialism is an appropriate principle to include in the ebb and flow of principles. Yet equality and liberty are also key principles.⁹⁷ Moreover, accommodation and pragmatism are useful and have been used in the Israeli context.⁹⁸ Finally, while there is no formal separation of religion and state in Israel, the concept of separation has been recognized as a useful one, even if it plays a relatively insignificant role.⁹⁹ The question of original intent is a complex one in Israel; of course most of the framers of the Basic Law of Liberty and Human Dignity and other laws are still alive,¹⁰⁰ but for reasons I suggest in *Masters of Illusion*, any sort of strong originalism is problematic even under these circumstances.¹⁰¹ To the extent that soft originalism might be useful, it is already reflected in the other principles, from preferentialism on one side to religious liberty on the other.¹⁰²

The tension between the “status quo” and an increasingly secular and non-Orthodox religious public has led to both sides of the debate calling on broad principles. The most ardent among the Orthodox often rely on notions of what it means to be a “Jewish State,” and suggest that preferentialism and religious law should govern. Those on the other side of the debate have argued for neutrality and natural rights principles. As I have argued elsewhere, principles of neutrality, religious law (in a civil context), and natural rights often are used to cover up other modes of interpretation that drive legal analysis.¹⁰³

For Orthodox authorities, these other modes may include authoritarianism, accommodationism, dogmatism—which is not necessarily a negative in religious contexts, depending on one’s views—and a set definition for what is considered “Jewish.” For progressives, these modes

97. See *supra* Part II.

98. See RAVITCH, *MASTERS OF ILLUSION*, *supra* note 20, at 87–105, 165.

99. See Gross-Schaefer & Jacobsen, *supra* note 5, at 543–45.

100. See Barak-Erez, *supra* note 9, at 337–40 (stating an argument for original intent might be tenable because “[a]fter all, the relevant events are recent, and all the politicians involved are still available to testify as to the original intent”).

101. See RAVITCH, *MASTERS OF ILLUSION*, *supra* note 20, at 1–6, 81–82 (arguing originalism is “a debate that no one can really win” because the plethora of alternative views of what “the” original intent was creates a situation where it is difficult to decipher the “true” intent, if such a thing even exists).

102. Cf. Barak-Erez, *supra* note 9, at 338–39 (rejecting the value of originalism generally in the Israeli context and arguing that if original intent is to play a role, it should be a form of soft originalism based on the prevailing public opinion that drove the recent Basic Laws).

103. See RAVITCH, *MASTERS OF ILLUSION*, *supra* note 20, at ix–x.

may include concepts of personal autonomy and liberty—which might suggest a separation of self and religion that is artificial for the devout—progressive notions of equality, and support for separation of religion and state. Of course, on each side of the cultural divide there may be many who share some of the underlying values and views expressed on both sides. This has actually led to some fruitful dialogue on what principles might motivate and underlie constitutionalized religious freedom in Israel.¹⁰⁴

In fact, a number of constitutional provisions have been proposed by progressive and Orthodox interests working together.¹⁰⁵ None have passed or gained wide acceptance, but the simple fact of their existence suggests that common ground is possible. Abandoning reliance on broad principles will better enable the sides to understand each other and perhaps find common ground. Moreover, regardless of whether such common ground is found by the parties, open reliance on the narrower principles proposed in this Article will allow lawmakers and judges to better balance interests in making and interpreting law.

Let us now explore how these ebbing and flowing principles might work. The following discussion is simply illustrative, and one may reject my specific proposals and even the narrow principles I suggest in favor of others. The key is that the focus be on ebbing and flowing principles that reflect the modes of interpretation that underlie much of the rhetoric in this area, rather than on the broad, unreachable principles that fuel much of the rhetoric.¹⁰⁶ Israeli scholars, legislators, and judges are far more qualified than I to engage in a detailed discussion of the ebb and flow of religious freedom principles, but the following demonstrates what such an approach may suggest.

As noted above, preferentialism has long been a governing principle in Israel in matters governed by the status quo. In other areas, equality and liberty have become major principles used by courts and invoked by legislators.¹⁰⁷ Yet most of the major issues regarding religious freedom

104. See Nachalon, *supra* note 11, at 627–31.

105. See *id.* (discussing the projects “Foundation for a New Covenant among Jews in Matters of Religion and State in Israel” and “A Constitution by Consensus” and a proposal for a comprehensive constitution developed by the Constitution, Law, and Justice Committee of the Knesset).

106. See RAVITCH, MASTERS OF ILLUSION, *supra* note 20, at 192.

107. See *supra* Part II.

relate to the status quo: marriage,¹⁰⁸ regulation of foods,¹⁰⁹ shopping and entertainment on the Sabbath,¹¹⁰ public transportation on the Sabbath,¹¹¹ recognition of non-Orthodox conversion,¹¹² and determinations as to who is a Jew more generally.¹¹³

The Orthodox authorities are losing on these issues in a piecemeal fashion. Yet they still dominate on some of the most important issues like marriage and conversion. Principles of religious equality, liberty, pragmatism, and accommodationism all point to an approach of accommodation in Israel. This approach would recognize Orthodox authority in predominately Orthodox communities. In other communities, and nationally, non-Orthodox Jews would be accommodated. Thus, in and around predominately Orthodox communities, concerns about noise and light pollution would require the current strict rules regarding the Sabbath to be enforced, such as the closing of all business and amusement establishments and the exclusion of public transit. At holy sites such as the Western Wall, the *current* status quo could be maintained.¹¹⁴ Oversight of restaurants that hold themselves out to be Kosher should remain with Orthodox authorities. Similarly, the recent Israeli Supreme Court decision requiring the Chief Rabbinate to grant Kosher food certificates to Kosher restaurants that are open on the Sabbath or engage in other activities not favored by the Chief Rabbinate, but which are unrelated to the Kosher nature of the food sold at the restaurant, would not apply to “glatt” Kosher establishments.¹¹⁵

Significantly, accommodation of those who do *not* share these beliefs and practices would also be required. Therefore, in areas that are not predominately Orthodox, businesses should have the option to be open on the Sabbath and holidays, public transit could run, and museums could open. The needs of secular and non-Orthodox Jews could also be accommodated in the recognition of civil, reform, and conservative

108. Medina, *supra* note 4, at 147; *see also* Gross-Schaefer & Jacobsen, *supra* note 5, at 545.

109. *See* Medina, *supra* note 4, at 152.

110. Gross-Schaeffer & Jacobsen, *supra* note 5, at 545–46.

111. *Id.* at 545.

112. *Id.*

113. Lerner, *supra* note 23, at 247–49.

114. The current status quo would include existing Israeli Supreme Court decisions recognizing certain religious freedom and egalitarian rights at the wall, while maintaining strong Orthodox influence. *See* Medina, *supra* note 4, at 133–34.

115. *See id.* at 149.

marriages. The basis for this accommodation would lie in the principles of religious liberty and equality.¹¹⁶

Moreover, while the validity of Orthodox conversions would be presumed both for domestic and law-of-return purposes, as they are today under the principle of preferentialism, Reform and Conservative conversions could be recognized under the law of return and, where relevant, for civil law purposes. Orthodox communities, businesses, and institutions would not be made to recognize such conversions. All of this has been proposed by others under broader principles. Yet those who oppose these positions have used broad principles to reject these accommodations as too strict or too lenient. By balancing liberty and equality with preferentialism, however, with none of these principles being utilized in a universal sense, a legal structure can be legislatively and judicially implemented.

When judicial review is available, this balance could be judicially imposed, not because universal notions of religious liberty, equality, or neutrality demand it, but because narrower principles of liberty and equality balanced with historical preferentialism and pragmatism suggest it as the best alternative.¹¹⁷ A secular person's liberty to engage in all sorts of business activities might infringe on an Orthodox person's liberty to observe the Sabbath. When liberty and equality are used as broad principles, these "liberties" are in inherent conflict. One view must prevail for such "liberty" to be recognized, and one must be more "equal" in the government's bailiwick. As narrow principles, both of these individuals' liberty and equality may be recognized.

Because preferentialism is also a governing principle, a form of communal segregation would be allowed. In other words, if one chooses to live in B'nai Brock, certain neighborhoods in Jerusalem, or other Orthodox communities, one can be expected to be forced by community standards backed by law to adhere to Orthodox norms, at least publicly. On the other hand, if one chooses to live in more secularized communities, one can expect to be able to shop on the Sabbath, and so on. Nobody may be forced by law to believe anything in any community, but one may be forced by law not to infringe upon the preferred Orthodoxy in some communities, or to live one's religious norms within more secularized society in other communities—as Jews have successfully done in many countries, including

116. See *supra* Part II; see also RAVITCH, MASTERS OF ILLUSION, *supra* note 20, at 47–71.

117. See *supra* Part II.

the United States. The government may favor the erection of eruvim¹¹⁸ to support religious enclaves in secularized areas, but it could not force nonreligious individuals or businesses to follow the Sabbath within those boundaries.

This is the benefit of narrow principles in a nation that has long recognized government preferentialism. Religious liberty can mean different things in different communities and for different individuals.¹¹⁹ When other principles ebb and flow with liberty to allow a more fluid balance between individual rights and community norms, the tension between individual rights and communal traditions can be minimized. Minimizing these tensions is essential for religious freedom in Israeli law and society.

V. CONCLUSION

The suggestion in this Article to utilize ebbing and flowing narrow principles in effectuating and interpreting religious freedom in Israel makes a great deal more sense than reliance on broad overarching principles or purely pragmatic short term compromises. In this regard, Israeli jurisprudence is a step ahead of the United States because the Israeli courts have already used this ebbing and flowing modal approach. There is a risk, however, that as the Supreme Court of Israel expands religious freedom, its reliance on broad principles will prove illusory except to those who already accept those principles, and this may cause the culture war to continue and expand. It is better to lay the balance on the table openly and address it through the ebb and flow of principles than to play an all-or-nothing hand that is likely to lead to little substantive change.

118. An eruv, Hebrew for “mixing” or “blending,” allows various places, both public and private, to be blended together on the Sabbath. Within this space, observant Jews may carry objects and engage in certain activities otherwise prohibited on the Sabbath. See Barry Smith, *On Place and Space: The Ontology of the Eruv*, in CULTURES: CONFLICT—ANALYSIS—DIALOG 403, 403 (Christian Kanzian & Edmund Runggaldier eds., 2007).

119. Cf. RAVITCH, MASTERS OF ILLUSION, *supra* note 20, at 47–55 (explaining religious liberty in the United States).