ARTICLE

Israel's External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction

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When do we decide to extraterritorially apply constitutional law and when to extraterritorially apply administrative law? Using Israel as a case study, this Article examines the applicability of its constitutional law dealing with human rights to the Occupied Palestinian Territories (OPT). In Israel, the Supreme Court readily applies administrative law to all acts of the military government in the OPT, yet is deeply ambivalent about, often eliding the issue of, constitutional application.

The different treatment, I argue, does not stem from legal doctrine or constitutional text, but rather from deep-seated, mostly unarticulated sentiments about the nature of constitutional law. Constitutional law demarcates the political community. Those within its scope are nominally a part of the polity. Those outside it are frequently viewed as potential threats to the state and its people. Since Palestinians in the OPT are readily viewed as enemies and as a presumptive threat to the Jewish nature of the state, the Court is ambivalent about their inclusion in the Israeli social contract, often resulting in their exclusion from the protections of Israeli constitutional law.

These sentiments also explain the divergent applications of constitutional law and administrative law. Constitutional law sends a message of inclusivity to bearers of constitutional rights. Administrative law, on the other hand, is the hallmark of the administrative state and lacks the constitutive nature of constitutional law. Wherever there is bureaucracy there is administrative law, which takes care that "things administer themselves." As such, administrative law is concerned more with the machinery of the state than with individual rights and political membership.

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I. INTRODUCTION

Constitutions primarily regulate governmental actions and bestow rights within the borders of the state. However, courts and scholars have developed doctrines that justify, in particular instances, the application of the constitution to state actions *beyond* territorial borders.[1] Approaches vary. Some prefer "territorial application," which applies the constitution to a territory the state controls, even if it is not part of the state.[2] Others prefer "personal application," which applies the constitution to citizens outside of the territory.[3] Still others maintain that whenever the state acts, whether at home or abroad, the constitution applies to its actions, known as the "state as a duty holder" approach.[4]

The decision whether and how to apply a constitution outside a country's border is, however, far from technical. Constitutions usually do not contain provisions as to their extraterritorial application, and the decision on extraterritoriality involves a complex mix of legal and policy considerations. Using Israel as a case study, I will examine the applicability of its constitutional rights (enshrined in two of its Basic Laws, which are part of Israel's constitution) to the occupied Palestinian Territories (OPT).[5] But I will also ask a different question, which sheds light on the nature of constitutions: when do we decide to extraterritorially apply constitutional law as opposed to other bodies of public law, specifically administrative law? And what does this decision tell us about constitutional and political identity?

In Israel, the Supreme Court readily applies administrative law to all acts of the military government in the OPT, yet is deeply ambivalent about, often eliding the issue of, constitutional application, even though the state agency exercising authority, the military commander, is the same. What accounts for the different treatment? Why is extraterritorial application of administrative law viewed as non-problematic, whereas extraterritorial application of constitutional law has either been avoided or treated in a cursory manner? The answer, I will argue, does not lie with legal doctrine or constitutional provisions, but with deep-seated, often unstated assumptions, about the nature of constitutional law and its relationship with the polity it regulates.

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1 *See, e.g.*, PAUL ARNELL, LAW ACROSS BORDERS: THE EXTRATERRITORIAL APPLICATION OF UNITED KINGDOM LAW (2012); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996).

2 *See infra* Part II. C. 1.

3 *See infra* Part II. C. 2.

4 *See infra* Part II. C. 3.

5 As discussed below, most of the Basic Laws regulate institutions inside Israel and do not bestow any rights, so their relevance to the OPT is already limited and will not be discussed here.

Part II will provide a brief overview of the Israeli constitutional system. Part III will delve deeper into the law governing the OPT, focusing on the straightforward application of administrative law on the one hand, and the ambivalence toward the application of constitutional law on the other hand. Part IV will seek to account for this ambivalence by relying on the friend/enemy distinction first proposed by Carl Schmitt. The constitution and constitutional law demarcate the political community.[6] Those within its scope are part of the polity. Those outside it are suspect. They may merely be strangers, but others can be presumed as threats to the State and its people. The presumption of threat, in turn, triggers constitutional exclusion. Whereas Schmitt did not discuss the issue of extraterritorial application, I will extend his framework to explain the doctrinal reality of Israeli constitutional law outside the borders of Israel. This also explains the willingness to apply administrative law to the OPT and the reluctance to apply constitutional law. The reason has to do with the message transmitted by constitutional law concerning who is inside the group and who is excluded. Constitutional law sends a message about who is part of "We the People." Administrative law, on the other hand, is the hallmark of administrative power and is viewed as "non-political" law, lacking the constitutive features of constitutional law.

To be clear, my argument will be descriptive. I will not call for applying Israeli constitutional law to the OPT, nor will I discuss the desirability and consequences of such a move. Instead, this Article will seek to explain the Court's approach, to expose its ambivalence, and to ground that ambivalence in a broader theoretical framework.

II. ISRAELI CONSTITUTIONAL LAW—A VERY BRIEF OVERVIEW

Unlike countries that had a clear constitutional trajectory in terms of inception, formation, drafting, and ratification, Israel's constitution-making process has been gradual, incremental, and, as I described elsewhere, "accidental."[7] The Israeli "constitutional moment" could have been the moment of its establishment in 1948. For various reasons, however, this did not happen.[8] A constituent assembly was elected, but soon enough it converted itself to a regular legislature (the Knesset).[9] Instead of drafting a written constitution, a political compromise was struck, providing that:

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6 *See* Eyal Benvenisti & Mila Versteeg, *The External Dimensions of Constitutions*, 57 VA. J. INT'L. L. 515 (2018).

7 I have elaborated on the Israeli constitution-making process in Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Israeli Constitution-Making*, *in* THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 207 (Dennis Galligan & Mila Versteeg eds., 2013).

8 *See, e.g.*, Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327, 1337 (2000).

9 Transition Law, 5709-1949, SH No. 1 p. 1 (Isr.).

> The First Knesset charges the Constitution, Law, and Justice Committee to prepare a draft constitution. The constitution will be comprised of chapters, in a way that each will be a basic law unto itself. The chapters will be brought before the Knesset, if the committee finishes its work, and all the chapters together will become the constitution of the state.[10]

Providing no timeline and little structure, subsequent legislatures began enacting Basic Laws, at first confining themselves to structural issues such as the operation of the Knesset, the government, and the military.[11] None of these basic laws were deemed to be especially controversial, and, according to the Supreme Court, their status was not normatively superior to ordinary legislation.[12] They were Basic Laws in name only, even if they addressed "constitutional issues."

In 1992, the Knesset turned its sights to individual rights. The results were Basic Law: Freedom of Occupation, which secured the right to pursue an occupation of one's choice, and the more significant Basic Law: Human Dignity and Liberty (hereinafter the "Basic Law"), protecting the rights to dignity, life, liberty, privacy, movement, and property.[13] Limitations of the rights were permitted, but any limitation would now be subject to proper purpose analysis and proportionality requirements and would have to conform to the values of Israel as a "Jewish and democratic state."[14]

In a judicial move later heralded as part of Israel's "Constitutional Revolution,"[15] the Supreme Court announced in the *Bank Hamizrachi* case that the 1992 Basic Laws ushered a momentous change in the constitutional framework.[16] The Court held that the two Basic Laws, and later the whole gamut of Basic Laws, were normatively superior to ordinary legislation.[17] Crucially, the Court held that the two new Basic Laws gave it the power of judicial review of legislation. In subsequent cases, the Court expanded the scope of the Basic Laws themselves, specifically Basic Law: Human Dignity

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10 5 Knesset Records 1743 (1950) (Isr.).

11 Shinar, *supra* note 7.

12 CrimA 107/73 Negev Auto. Serv. Station v. State of Israel 28(1) IsrSC 640 (1974) (Isr.).

13 Basic Law: Freedom of Occupation, SH No. 1454 p. 90 (Isr.); Basic Law: Human Dignity and Liberty, SH No. 1391 p. 150 (Isr.).

14 Basic Law: Human Dignity and Liberty § 8; Basic Law: Freedom of Occupation § 4.

15 Aharon Barak, *Twelve Years to the Constitutional Revolution at Twelve*, 1 L. & BUS. 3 (2004) (Hebrew).

16 CA 6821/93 United Mizrachi Bank v. Migdal Coop. Village 49(4) IsrSC 221 (1995), *translated at* http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village.

17 EA 92/03 Mofaz v. Election Comm'r 57(3) IsrSC 793 (2003) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/mofaz-v-chairman-central-elections-committee-sixteenth-knesset; HCJ 212/03 Herut Nat'l Movement v. Election Comm'r 57(1) IsrSC 750 (2003) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/herut-national-jewish-movement-v-cheshin; LCA 3007/02 Yitzhak v. Mozes 56(6) IsrSC 592 (2002) (Isr.); HCJ 1384/98 Avni v. Prime Minister 52(5) IsrSC 206 (1998) (Isr.).

and Liberty, to include rights not explicit in the Basic Law. Seizing on the right to dignity, the Court constitutionalized the right to free speech, equal protection, free exercise, association, and a minimal set of socio-economic rights.[18]

Thus, from a country with no written constitution and constitutional judicial review, the Court—together with several forces in the legislature and with a background push from civil society organizations—was able to bring about a constitutional revolution that is now all but accepted.

All of the above applies within Israel's borders. The Basic Laws are silent on the question of their application outside Israel's borders. Some of the Basic Laws refer to "persons," whereas others refer to "citizens" or "residents." But this does not settle the question of extraterritorial application. Similarly, the 1992 Basic Laws provide that each governmental authority must respect the rights included in the Basic Laws,[19] but that too has not settled the question of extraterritorial application.[20] While these questions arise relatively infrequently, they are pressing when it comes to the territories Israel occupies in the West Bank.[21] The next Part discusses the law applicable to the OPT. Specifically, I begin to describe the distinction between the extraterritorial application of administrative law and constitutional law to the OPT.

III. THE LAW OUTSIDE THE BORDERS

A. Four Normative Sources

In the 1967 War, Israel occupied several areas: the Sinai Peninsula, the Golan Heights, the Gaza Strip, the West Bank, and East Jerusalem.[22] The Sinai Peninsula was under military occupation until it was returned to Egypt as part of the 1979 peace agreement.[23] Israel administered the Golan Heights under military occupation for fourteen years before formally annexing it in 1981.[24] While domestically the Golan is now part of Israel, the annexation

18 *See generally* Hillel Sommer, *The Non-Enumerated Rights: on the Scope of the Constitutional Revolution*, 28 HEBREW U. L. REV. 257 (1997) (Isr.).

19 Basic Law: Human Dignity and Liberty § 11; Basic Law: Freedom of Occupation § 5.

20 *See infra* Part III.C.3.

21 The status of the Gaza Strip after the 2005 "disengagement" remains controversial. *See* HCJ 9132/07 Bassiouni v. The Prime Minister of Israel IsrSC (2008) (Isr.) (unpublished), *translated at* http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ahmed%20v.%20Prime%20Minister.pdf); Yuval Shany, *The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. The Prime Minister of Israel*, 42 ISR. L. REV. 101 (2009).

22 For the relevant legal background regarding each area, see HCJ 1661/05 Gaza Coast Reg'l Council v. The Knesset 59(2) IsrSC 481 (2005) (Isr.).

23 *Id.* ¶ 2.

24 Golan Heights Law, 5742-1981, SH No. 1034 p. 6 (Isr.).

has never been recognized internationally.[25] A similar situation exists in East Jerusalem: immediately after the 1967 War, Israel amended its Law and Administration Ordinance of 1948 to add section 11B, which provided that, "the law, jurisdiction, and administration of the state will apply to any area of the land of Israel (Eretz-Israel) that the government will decide." The government quickly acted upon its newly given authority and applied the law, jurisdiction, and administration to East Jerusalem.[26] In 1980 the Knesset went a step further and constitutionalized the "united city" of Jerusalem in Basic Law: Jerusalem the Capital of Israel,[27] in effect annexing East Jerusalem.[28] Although the U.N. Security Council condemned this move as a violation of international law,[29] Israel—like in the Golan—decided to apply its law (including its Basic Laws) in East Jerusalem, which it does to this day.

Israel occupied the Gaza Strip until its 2005 implementation of the "disengagement plan," which removed the military and the settlements from the area, thus ending its ground presence in the Gaza Strip.[30] Although Israel insists that it no longer controls the Gaza Strip, a prevalent view in the international community is that Israel still maintains effective control over the region, thus placing it under the obligations of the law of occupation.[31] Although the status of the Gaza Strip remains unresolved, this uncertainty is beyond the scope of this Article. Israel, however, still occupies the West Bank. What, then, is the law that applies there?

Under the longstanding jurisprudence of the Israel Supreme Court, two sources of law govern the OPT.[32] First is the international law of occupation, *i.e.*, international humanitarian law (IHL), from which the military draws its formal authority—specifically The Hague Regulations of 1907 and the "humanitarian provisions" of the Fourth Geneva Convention of 1949.[33] A lingering question, one which will not be examined in full here,

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25 S.C. Res. 497 (December 17, 1981).

26 EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 204 (2004).

27 Basic Law: Jerusalem the Capital of Israel, SH No. 980 p. 186 (Isr.).

28 BENVENISTI, *supra* note 26, at 205.

29 S.C. Res. 478 (August 20, 1980).

30 The Implementation of the Disengagement Plan Law, 2005, SH No. 1982 p. 142 (Isr.).

31 *See, e.g.*, INT'L CRIMINAL COURT, OFF. OF THE PROSECUTOR, SITUATION ON REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA: ARTICLE 53(1) REPORT 6 (2014). For a discussion of the effective control test necessary for establishing jurisdiction, and specifically in the context of Gaza, *see* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 142–47 (2011).

32 *See* ASS'N OF CIVIL RIGHTS IN ISRAEL, ONE RULE, TWO LEGAL SYSTEMS: ISRAEL'S REGIME OF LAWS IN THE WEST BANK (2014), http://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf.

33 The term "humanitarian provisions" is a creation of the Israeli government. The government claims that the Geneva Convention is treaty law not applicable in Israeli courts, but that "humanitarian provisions" are applicable as a consequence of the government's ad-hoc concession that they be binding in particular litigation. *See, e.g.*, HCJ 7015/02 Ajuri v. IDF Commander in the West Bank 56(6) IsrSC 352, 364 (2002) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/ajuri-v-idf-commander-

is the application of international human rights law (IHRL) alongside IHL.[34] Although the Israeli government views the two regimes as distinct, the Supreme Court has indicated its willingness to consider IHRL alongside IHL by occasionally citing relevant IHRL human rights provisions, though without acknowledging their full incorporation.[35] On other occasions, the Court has said that IHRL can serve as a supplement where there is a gap in the IHL.[36] More often, however, the Supreme Court avoids the question of IHRL applicability, arguing that the application of Israeli administrative law makes much of IHRL redundant, as the same answer can be reached without deciding questions of international law.[37]

International humanitarian law, specifically Article 43 of the Hague Regulations, provides that the occupant shall "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." As a result, IHL preserves the law of the regime that was in place prior to the occupation in 1967—in this case Jordanian law—as long as the law of the military commander who administers the area does not displace it.[38] Thus, in addition to Jordanian law, the military commander issues military decrees, which today vastly outnumber the older Jordanian law.

The second source of law governing the military is Israeli administrative law.[39] This is the clearest case of applying domestic public law to areas outside the border occupied by Israel.

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west-bank). Israel also claims that the Fourth Geneva Convention does not apply in the OPT, because the Convention is only binding on "high contracting parties," the Palestinians not being one of them. This position has been widely rejected. *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 90 (July 9).

34 Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2003).

35 HCJ 10356/02 Hass v. IDF Commander in the West Bank 58(3) IsrSC 443 (2004) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/hass-v-idf-commander-west-bank; HCJ 3239/02 Marab v. IDF Commander in the West Bank 57(2) IsrSC 349 (2003) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/marab-v-idf-commander-west-bank; HCJ 3969/06 Dir Samet v. IDF Commander in the West Bank IsrSC (2009) (Isr.) (unpublished) (on file with author).

36 HCJ 2150/07 Abu Safiyeh v. Minister of Def. 63(3) IsrSC 331, 349 (2009) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/abu-safiyeh-v-minister-defense; HCJ 7862/04 Abu Daher v. IDF Commander in Judea and Samaria 59(5) IsrSC 368 (2005) (Isr.); HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel 58(5) IsrSC 807, 827 (2004) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/beit-sourik-village-council-v-government-israel.

37 *See, e.g.*, HCJ 3278/02 Ctr. for the Def. of the Individual v. IDF Commander in the West Bank 57(1) IsrSC 385, 396 (2002) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/hamoked-v-commander-idf-forces-west-bank.

38 HCJ 1661/05 Gaza Coast Reg'l Council v. The Knesset 59(2) IsrSC 481, ¶ 5 (2005) (Isr.).

39 *See, e.g.*, HCJ 7015/02 Ajuri v. IDF Commander in the West Bank 56(6) IsrSC 352, 365 (2002) (Isr.).

B. The Straightforward Application of Israeli Administrative Law

The Supreme Court applies Israeli administrative law in the OPT. Initially, the Court accepted jurisdiction as a result of state consent,[40] but a more robust case was developed in a 1973 article by Yoram Dinstein.[41] Dinstein argued that from an Israeli constitutional perspective, the military commander is part of the executive branch, and should therefore be subject to administrative law.[42] From the perspective of Israeli law, he argued, there is no difference between acts of the military commander and rules issued by other executive officials.[43]

A decade later, in an important case called *Jam'iat Iskan*, the Court acknowledged the applicability of Israeli administrative law to the OPT. The military commander, the Court held, exercises governmental power as a public employee. While the commander's authority derives from international law, the way in which he exercises that authority is also governed by the rules of Israeli administrative law.[44] The Court held this without much internal deliberation and without state resistance. Subsequently, applying administrative law to acts of the military commander became routine. Thus, the Court often states that, "every Israeli soldier carries with him, in his backpack, . . . the basic rules of Israeli administrative law."[45] Indeed, the prevailing conception is that the military government "speaks on behalf of the state" and the "voice…is the voice of the state."[46] Through administrative law, the Court has imposed proportionality and reasonableness requirements and due process doctrines, such as the right to a hearing and the issuance of proper notice.[47]

Despite the potentially intrusive nature of judicial review of the military commander, there was never any serious attempt by the state to reject the Court's imposition of administrative law norms. Several reasons account for this. First, the legal grounds for judicial review are well-established under

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40 HCJ 337/71 Almuqdse v. Minister of Def. 26(1) IsrSC 574 (1972) (Isr.); HCJ 256/72 Elec. Co. Jerusalem Dist. v. Minister of Def. 27(1) IsrSC 124 (1972) (Isr.).

41 Yoram Dinstein, *Judicial Review of Military Government Actions in the Occupied Territories*, 3 TEL AVIV U. L. REV. 330 (1973) (Isr.).

42 *Id.* at 331.

43 *Id.*

44 HCJ 393/82 Iskan v. IDF Commander in Judea and Samaria [1983] 37(4) IsrSC 785, 792–93 (1983) (Isr.), *unofficially translated at* http://www.hamoked.org/items/160_eng.pdf.

45 The sentence first appeared in *Iskan*, *id.* at 810, and was picked up in subsequent decisions. *See, e.g.*, HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) IsrSC 477 (2005) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/mara%E2%80%99abe-v-prime-minister-israel; HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Israel 58(5) IsrSC 807, 827 (2004) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/beit-sourik-village-council-v-government-israel; HCJ 8091/14 Ctr. for the Def. of the Individual v. Minister of Def. IsrSC (2014) (Isr.) (unpublished), *translated at* http://versa.cardozo.yu.edu/opinions/hamoked-center-defense-individual-v-minister-defense.

46 HCJ 2717/96 Wafa v. Minister of Def. 50(2) IsrSC 848, 855 (2006) (Isr.).

47 *See, e.g.*, HCJ 1661/05 Gaza Coast Reg'l Council v. The Knesset 59(2) IsrSC 481 (2005) (Isr.); HCJ 320/80 Kawasme v. Minister of Def. 35(3) IsrSC 113 (1980) (Isr.).

Israeli jurisprudence, in particular the principle of the rule of law, which constrains all governmental authorities.[48] Once the military was subjected to judicial review generally, it became difficult to exempt it when it operated as a governing authority outside the border, especially as the occupation became prolonged. Second, although the potential for intervention is expansive, it is now quite clear that the scope of intervention is narrow in fact. Indeed, the Court concedes as much when it argues that in security matters judicial review will be more limited due to the Court's lack of institutional competence.[49] Third, the application of administrative law, and judicial oversight more generally, serves a legitimating function. As Ronen Shamir, David Kretzmer, and Marti Koskenniemi have argued, by subjecting the military government in the OPT to the Court's jurisdiction, both the government and the Court can score public relation points with their target audiences, at home and abroad, while for the most part the Court provides legal cover for the policies advanced by the executive and the military.[50]

C. The Ambivalent Extraterritorial Application of Israeli Constitutional Law

Given the preceding account, it might seem that the application of constitutional law, in particular the Basic Laws dealing with individual rights, would also be relatively straightforward. If the Court applies administrative law, which in theory constrains the military administration in the OPT and grants Palestinians some (mostly due process) rights alongside the international sources which it must apply (and which also constrain the military administration by granting an additional set of rights), and considering the extent of Israel's control over the OPT, the addition of constitutional law might not matter that much to the overall cost-benefit analysis. Yet, the decision whether to apply Israeli constitutional law in the OPT has been generally avoided by the Court or treated in a cursory manner. This section discusses this treatment.

The literature on extraterritorial constitutional application generally distinguishes between three bases for application: territorial, personal, and the state as duty holder.[51] My aim here is not to comprehensively describe

48 *Iskan*, HCJ 393/82 at 810.

49 *Id.*

50 DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES (2002); Marti Koskenniemi, *Occupied Zone—"A Zone of Reasonableness"?*, 41 ISR. L. REV. 13 (2008); Ronen Shamir, *"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 L. & SOC'Y. REV. 781, 784 (1990).

51 Yaël Ronen, *Applicability of Basic Law: Human Dignity and Freedom in the West Bank*, 46 ISR. L. REV. 135, 141 n.31 (2013); Liav Orgad, *Whose Constitution and for Whom? On the Scope of Application of the Basic Laws*, 12 HAIFA L. REV. 145 (2010) (Isr.); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology after Rasul v. Bush*, 153 U. PA. L. REV. 2073 (2005).

or justify each possible basis for extraterritorial application, but rather to show that the Court had a choice. Although each basis was legally possible and plausible, the Court resisted these paths. Accounting for this resistance is taken up in Part III.

i. The Territorial Approach

The interpretive rule in Israel is that unless the legislature provides otherwise, laws apply only to people and assets inside the sovereign territory.[52] A similar rule applies to the OPT.[53] The Court does not distinguish among the Basic Laws, holding that there is a rebuttable presumption that they only apply inside Israel.[54] A possible explanation for the Court's reluctance to apply the Basic Laws outside of Israel is the message implicit in territorially based application. Applying state A laws in state B might run afoul of the principle of non-intervention.[55] Applying Israeli legislation, not through the military commander, under the theory that the OPT constitutes part of Israeli territory sends the message of unilateral annexation, which is prohibited under international law.[56] While this might explain the Court's approach, this has never been made explicit.

Indeed, the Court could have decided differently, and at one point one judge did. In the *Al Amarin* case Judge Cheshin, in dissent, would have held that the Basic Laws should apply to the Gaza Strip.[57] In *Al Amarin*, the Court had to rule on the legality of a house demolition in the Gaza Strip under Regulation 119 of the Defence Regulations of 1945. Judge Cheshin suggested that section 3 of the Basic Law: Human Dignity and Liberty, which protects the right to property, applies in the Gaza Strip. His rationale was not grounded in the importance of human rights, but in the similarity between Israel proper and the territories it occupies. According to Judge Cheshin:

> We are discussing the application of the Defence Regulations (Emergency) not inside Israel but in the Gaza Strip, and it is not in Israel. But I think that the difference is not significant. The

52 HCJ 279/51 Amsterdam v. Minister of Fin. 6 IsrSC 945 (1952) (Isr.); AHARON BARAK, INTERPRETATION IN LAW – STATUTORY INTERPRETATION 578 (1993) (Isr.).

53 HCJ 8276/05 Adalah v. Minister of Def. 62(1) IsrSC 1, 19 (2006) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-defense.

54 *Id.* at 20.

55 Philip Kunig, *Prohibition of Intervention*, *in* 6 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 289 (Rüdiger Wolfrum ed., 2013).

56 Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT'L L. 551, 571 (2005) (describing the development of the rule against annexation as a result of conquest).

57 HCJ 2722/92 Al Amarin v. IDF Commander in the Gaza Strip 46(3) IsrSC 693 (1992) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/alamarin-v-idf-commander-gaza-strip.

> connection between Israel and the Gaza Strip—same for Judea and Samaria [the West Bank]—is so tight…that it would be artificial were we to talk about exercising authority in Gaza as if it were beyond the sea.[58]

Judge Cheshin's approach, though never picked up in subsequent cases, questioned the meaning of "territory." According to Judge Cheshin, the state's territory is not just the area inside its borders but also the area where it exercises significant control. Since Israel and Gaza were intertwined for so long, there was no need to distinguish between them for the purpose of constitutional application. A similar approach to territorial application can be found in the relationship between the United States and Guantanamo Bay. Initially, the United States federal courts held that foreigners held outside the United States cannot enjoy the legal protections afforded to persons inside the United States.[59] This changed in *Rasul v. Bush*.[60] In *Rasul*, the Supreme Court of the United States held that for the purpose of statutory habeas corpus, the federal courts have jurisdiction because the detainees are imprisoned in a territory over which the United States exercises exclusive jurisdiction and control. Congress responded with the Military Commissions Act of 2006, stripping federal habeas corpus rights from those held in Guantanamo Bay.[61] But in *Boumediene v. Bush*, the Court held that the constitutional right to habeas corpus extends to Guantanamo Bay due to the same "complete and exclusive jurisdiction" that was determinative in *Rasul*.[62]

A different link, sufficient for the application of territorial based jurisdiction, can be found in the European Court of Human Rights (ECtHR) decision in *Al-Skeini*.[63] The question in *Al-Skeini* was the extent of the United Kingdom's responsibility under the European Convention on Human Rights (ECHR) for the death of six Iraqi citizens. In the view of the ECtHR, jurisdiction under Article 1 of the ECHR[64] is primarily territorial.[65] Acts performed outside the territory could constitute an exercise of

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58 *Id.* at 706.

59 Kal Raustialia, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2502 n.9 (2005) (citing cases).

60 Rasul v. Bush, 542 U.S. 466 (2004).

61 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

62 553 U.S. 723 (2008). It is important to qualify that the Court confined itself to the constitutional right to habeas corpus. The application of other constitutional rights would be contingent on "objective factors and practical concerns." *Id.* at 764.

63 Al-Skeini v. United Kingdom, 2011-IV Eur. Ct. H.R. 99 (2011)

64 Article 1 provides that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222. Thus, the question turns on what counts as "within their jurisdiction."

65 Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333.

jurisdiction only in exceptional cases.[66] *Al-Skeini* clarified the meaning of territorial jurisdiction to include an area where a contracting party, through "effective control," as a result of military occupation, invitation, or acquiescence, exercised "some of the public powers normally to be exercised by a sovereign government."[67] The ECtHR pointed out that the U.K. "assumed authority and responsibility for the maintenance of security in South East Iraq." Thus, the exercise of "authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom" was sufficient.[68]

Rasul, *Boumediene*, and *Al-Skeini* are important because they demonstrate the contingent nature of the Israeli Supreme Court's approach. In each of these cases, with *Al-Skeini* also being a case of military occupation, the nexus between the state and the territory it controlled was sufficient for the imposition of constitutional or treaty obligations. The Israel Supreme Court could have gone the same way, but it declined to do so. Indeed, the relationship between Israel and the OPT, as Judge Cheshin rightly pointed out, is intensive and prolonged, much more, for example, than the nature of control exercised by the U.K. in Iraq.

ii. The Personal Approach

According to the personal basis approach, the constitution protects people, not territory, and thus it can also apply to people outside the state.[69] Of course, the question is: which people does the constitution protect? Everyone? Citizens? Residents? The United States Constitution famously opens with "We the People,"[70] but obviously does not mean "all people."[71] Similarly, Basic Law: Human Dignity and Liberty refers to "all persons" or "person," but does this mean all persons everywhere?

Much like territorial application, the decision of whom to exclude from the constitution's protection depends on an interpretive choice. Absent any textual anchor, the choice relies on ideological, historical, and policy considerations. Put differently, the decision on personal application is a decision on membership. If one is held to be outside the

66 *Al-Skeini*, 2011-IV Eur. Ct. H.R. at 136–37; *see also* Hirsi Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, 131–33.

67 *Al-Skeini*, 2011-IV Eur. Ct. H.R. at 143. For a critique of the indeterminacy generated by *Al-Skeini*, see Noam Lubell, *Human Rights Obligations in Military Occupations*, 94 IRRC 317, 321 (2012).

68 Al-Skeini v. United Kingdom, 2011-IV Eur. Ct. H.R. 99, ¶ 149 (2011).

69 Orgad, *supra* note 51, at 157. The operative question, according to Keitner, is "who the government harmed." Chimène I. Keitner, *Rights Beyond Borders*, 35 YALE J. INT'L L. 55, 61 (2011).

70 U.S. CONST. pmbl.

71 Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 22 (1984) (noting that the "people" is a reflection of a given society).

polity, then one does not get to enjoy the protections of the constitution.[72] At the same time, a decision on personal application involves pragmatic choices. For example, the European Court of Human Rights has generally not looked favorably on personal application as the exclusive basis for jurisdiction.[73] Underlying this is a concern that personal application might be too remote and expansive without some territorial link. With this in mind, what choice did Israel make?

The most explicit treatment of this question was in the Court's *Gaza Coast* decision.[74] In the *Gaza Coast* case, petitioners were Israeli settlers living in the Gaza Strip who were to be transferred back to Israel as it planned to withdraw from the Strip. The withdrawal was part of a law passed by the Knesset,[75] and the petitioners wanted the Court to invalidate the law on constitutional grounds, specifically based on the claim that their rights to dignity, property, and occupation were violated. The State was willing to assume the Basic Laws applied, but it preferred that the Court not rule explicitly on the matter.

In line with the State's position, the Court did not decide the general question of the Basic Laws' extraterritorial application. But because it ended up finding several of the Act's provisions unconstitutional, it had to decide the question of extraterritorial application. The Court held that the Basic Laws apply to every Israeli in the area to be evacuated, as Israelis located outside the state but in an area subject to its control under belligerent occupation are protected by the Basic Laws insofar as their human rights are concerned.[76] At the same time, the Court declined to extend its holding to areas outside Israel's control and to non-Israelis located in areas subject to belligerent occupation, *i.e.*, Palestinians.

Gaza Coast was an easy case for the Court because its holding was limited to Israeli citizens—in that case, Israeli settlers. Yet, the Court reached a similar result in other cases. For example, in the *Marabe* case, which dealt with the legality of the Separation Wall constructed around the settlement of Alfei-Menashe, the Court addressed the military commander's obligation to protect Israeli settlers, in addition to the protected Palestinian population.[77] Although petitioners were

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72 According to Chief Justice Rehnquist, the Fourth Amendment protects "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

73 MILANOVIC, *supra* note 31, at 174.

74 HCJ 1661/05 Gaza Coast Reg'l Council v. The Knesset 59(2) IsrSC 481 (2005) (Isr.).

75 The Implementation of the Disengagement Plan Law, 2005, SH No. 1982 p. 142 (Isr.).

76 *Gaza Coast Reg'l Council*, HCJ 1661/05 at 71–72. For a discussion regarding the application of Israeli legislation generally to settlers and the settlements, see BENVENISTI, *supra* note 26, at 234–38.

77 HCJ 7957/04 Mara'abe v. Prime Minister of Israel 60(2) IsrSC 477 (2005) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/mara%E2%80%99abe-v-prime-minister-israel; *see also* HCJ 3680/05 Tene Vill. Council v. Prime Minister IsrSC (2006) (Isr.) (unpublished) (on file with author).

Palestinians, the Court emphasized that the military commander had an obligation to safeguard the constitutional rights of *Israelis* living in the West Bank. The Court noted that the military commander must also safeguard the dignity of Palestinians, but without referring to the Basic Law. Likewise, in the *Haas* case, the Court mentioned the "constitutional rights of the residents,"[78] *i.e.*, Palestinians, but without referencing the Basic Laws or explaining what it meant by the term.[79]

Similarly, in the *Alram* case, which challenged segments of the separation wall in East Jerusalem, the Court had to address the rights of Palestinians who lived in the West Bank, alongside Palestinian residents of East Jerusalem.[80] The latter ostensibly enjoy the protections of the Basic Laws as a result of the annexation and the granting of resident status. Yet the Court explicitly declined to address the differences in legal regimes, including the question of extraterritorial application. Indeed, it may be the case that because the legal regimes that applied to the two groups were potentially different, the Court was concerned that differential application would lead to charges of discrimination and apartheid. Instead, the Court simply noted that the applicable principles under international law and Israeli law are similar. However, because of the possible differences in terms of human rights protection, the Court applied what it viewed as the stricter standard—Israeli constitutional law—which would have applied to residents of East Jerusalem only.[81]

We can see a somewhat similar move in the numerous Court decisions addressing the legality of house demolitions of Palestinian terrorists' homes, carried out by Israeli authorities.[82] House demolitions take place in both East Jerusalem and the West Bank; both are governed by Regulation 119 of the Defence (Emergency) Regulations enacted by the British Mandate in 1945. The practice has generated many petitions by families whose home was set to be demolished. In reviewing these petitions, the Court has applied the same legal framework to houses in East Jerusalem and in the West Bank. Specifically, the Court emphasizes that it applies the principles of Basic Law: Human Dignity and Liberty,

78 HCJ 10356/02 Hass v. IDF Commander in the West Bank [2004] 58(3) IsrSC 443 (2004) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/hass-v-idf-commander-west-bank.

79 This was repeated in HCJ 7862/04 Abu Daher v. IDF Commander in Judea and Samaria 59(5) IsrSC 368 (2005) (Isr.). Moreover, it's worth noting that both *Haas* and *Abu Daher* were decided by the same judge. Subsequent cases did not repeat these assertions.

80 HCJ 5488/04 Alram Local Council v. Gov't of Israel IsrSC (2006) (Isr.) (unpublished) (on file with author).

81 *Id.* ¶ 46.

82 On the dubious legality of house demolitions, see Eliav Lieblich, *House Demolitions 2.0*, JUST SECURITY (Dec. 18, 2015, 9:10 AM), https://www.justsecurity.org/28415/house-demolitions-2-0/.

and those principles are applied whether the house is located in areas annexed by Israel or in the OPT.[83]

The equal application would seem to undercut my thesis about the Court's extraterritorial ambivalence. A closer look reveals, however, that the dynamics that apply in the Wall cases are also at work in the house demolitions context. Precisely because the Court is applying the same law, it is understandably reluctant to announce that it should be interpreted one way for a resident of East Jerusalem and another way for a resident of the OPT. Indeed, house demolitions are a rare case in that the same legal norm applies to both annexed and non-annexed occupied areas. Just like the Court cannot be perceived as discriminating based on nationality among persons challenging the *same* segment of the wall, it cannot be perceived as creating two different interpretations of the *same* text based on nationality.

A final example is *Adalah v. Minister of Interior*.[84] In that case, there was a petition challenging the constitutionality of the Citizenship and Entry into Israel Law (Temporary Provision), 2003. The law bars, among other things, citizenship and resident status to Palestinians living in the OPT who marry Israelis and wish to move to Israel. The explicit rationale for the law was the ostensible involvement of Palestinians who married Israelis in facilitating terrorist attacks in Israel.[85] Although the couple challenged the law as violating their right to dignity, equality, marriage, and family, the Court applied the Basic Laws only to the Israeli half of the partnership. Only the Israeli partner, the Court stated, is entitled to claim the protection of the Basic Law.[86]

These cases are important, for they show that when the Court had a choice, it declined to extend constitutional rights to Palestinians on a personal basis. True, when Palestinians petitioned alongside Israelis, or when the Court had to interpret a law that applied in occupied and annexed areas, the Court did apply Israeli constitutional law, but only because separating the two groups would have led to charges of discrimination and would have made the legal framework much more

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83 *See, e.g.*, HCJ 6288/03 Saada v. Commander of the Home Front 58(2) IsrSC 289 (2003) (Isr.) (East Jerusalem); HCJ 6745/15 Abu Hashia v. Military Commander in the West Bank IsrSC (2015) (Isr.) (unpublished) (on file with author); HCJ 8091/14 Ctr. for the Def. of the Individual v. Minister of Def. IsrSC (2014) (Isr.) (unpublished), *translated at* http://versa.cardozo.yu.edu/opinions/hamoked-center-defense-individual-v-minister-defense; HCJ 8024/14 Hijazi v. Commander of the Home Front IsrSC (2014) (Isr.) (unpublished) (on file with author) (affirming the principles in HCJ 8091/14).

84 HCJ 7052/03 Adalah v. Minister of Interior 61(2) IsrSC 2 (2006) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior.

85 Petitioners, however, suggested that alongside the security rationale, the law also had a demographic rationale — limiting the number of Palestinians in Israel. The Court rejected this claim. *Id.* ¶ 10. I discuss this aspect in Part III.B.

86 *Id.* ¶ 18.

difficult to disentangle. The Palestinians thus "benefitted" from having the Israelis on their side, as they enjoyed a constitutional rights spillover, which, on their own, they would not have received. But at no point did the Court hold that Palestinians in the OPT were protected under the Basic Law, despite ample opportunities to do so. In fact, had Palestinians living in the OPT petitioned alone, no constitutional rights would have been extended to them.

iii. The State as a Duty Holder Approach

The third basis for extraterritorial constitutional application imposes constitutional obligations on all of the state's actions, no matter where those actions take place.[87] As Justice Black noted in his plurality opinion in *Reid v. Covert*: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[88] Justice Black's opinion suggests that what matters is whether the agent performing the action is a government entity. If so, then the Constitution applies since it applies to any "state action" irrespective of its geographical location. The rationale underlying this approach is straightforward. What the state cannot do in its own territory, it should not be able to accomplish outside its territory.[89]

The "state as duty holder" approach holds out the twin promise of equality and accountability. Equality, for the state must treat everyone it deals with equally, irrespective of their location. Accountability, since this approach minimizes the creation of legal black holes—areas where the state can act with constitutional impunity. Perhaps it is this promise that explains why the approach has not been embraced by courts, which have rejected it in light of the practical and institutional costs it entails.[90]

Israel has also failed to apply the "state as duty holder" approach as a basis for extraterritorial constitutional application (though accepting it for administrative law). Writing as a scholar, Professor Aharon Barak has leaned toward the view that every Israeli agent "carries with him the Basic Law. Wherever he goes, the Basic Law shall go with him."[91] Yet in his concluding analysis, Barak left the question unresolved, as he pointed to

87 Ronen, *supra* note 51, at 151–55.

88 354 U.S. 1, 5–6 (1954). However, Justice Black applies this insight only to citizens located outside the United States.

89 *Cf.* Issa v. Turkey App. No. 31821/96, 41 Eur. Ct. H.R. Rep. 567, ¶ 71 (2004); *see also* Keitner, *supra* note 69, at 66.

90 Keitner, *supra* note 69, at 68.

91 AHARON BARAK, INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATION 461 (1995) (Hebrew).

considerations that favor application only within Israel.[92] The Court has gone the same way. In *Adalah v. Minister of Defense*, a petition challenging the constitutionality of a law limiting civil compensation to Palestinians harmed by Israeli security forces in the OPT, the Court addressed the issue of whether the law violated the constitutional right of access to justice, derived from the right to dignity in the Basic Law. Repeating the position of Professor Barak, the Court, in a decision authored by President Barak, left the question unresolved.[93] In the end, part of the law was struck down because the Court found an alternate way to apply the Basic Law to Palestinians through the rules of private international law regarding extraterritorial torts. This, however, was a rather circuitous way to apply the Basic Law; crucially, the Court emphasized that it applied the Basic Law because the Palestinians filed suit in an Israeli court, not because of any extraterritorial application.[94]

Avoiding the determination whether the Basic Law applies is even more puzzling given section 11 of the Basic Law: Human Dignity and Liberty. Section 11 provides that all branches of government must respect the rights according to the Basic Law, and, as mentioned above, most of the rights in the Basic Law are granted to "persons," not citizens or residents. Since the Court has held that the military government in the OPT is part of the executive branch, the application of the Basic Law to the OPT was at least plausible, if not simple.

The Court did not pursue this path. Although President Barak opined in *Adalah* that one possibility is that where the government goes, so does the Basic Law, he did not anchor it in Section 11.[95] Other decisions, although referencing the right of human dignity while claiming that it imposes universal obligations, also did not ground it in Section 11.[96] Similarly, military courts in the OPT have explicitly held that the Basic Law does not apply, though its "spirit" does.[97] Given the textual clarity of Section 11, the Court's reluctance to rely on it remains striking.

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92 *Id.*

93 HCJ 8276/05 Adalah v. Minister of Def. 62(1) IsrSC 1, 19–21 (2006) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-defense.

94 For a critique of this reasoning, see *id.* at 39–42 (opinion of Grunis, J.). Accepting the Court's reasoning, Grunis maintained, would be a de facto extraterritorial application of the Basic Laws as long as the suit is filed in an Israeli court. The Court, perhaps aware of this implication, has not repeated this rationale in subsequent cases.

95 *Id.* at 20.

96 HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel 62(1) IsrSC 507 (2006) (Isr.) (Rivlin, J., concurring), *translated at* http://versa.cardozo.yu.edu/opinions/public-committee-against-torture-v-government.

97 See, Mil. Appeal 3335/07 Military Court of Appeals (Judea & Samaria), Dar-Khalil v. Military Prosecutor (2008) (Isr.) (unpublished) (on file with author), and cases cited therein.

iv. Summary

Basic Law: Human Dignity and Liberty, which is most pertinent to the Palestinian population, lends itself to extraterritorial application. The Court, however, was conscious in not extending its application. In every case, the Court managed to duck the question, either by applying international law or administrative law; by holding that the principles of administrative law or international law are sufficiently similar to those of constitutional law so that that the question of application need not be reached; by creating legal fictions that since the suit takes place in Israel, the rights are accrued in Israel; or when Palestinian residents of Israel petitioned alongside Palestinians from the OPT, the latter enjoyed constitutional spillover. In the very few instances where the Court did seem to apply the Basic Law, it did so in a cursory fashion, without providing any analysis or justification as to why it did so.[98] These instances remain anomalous.

Thus, the pressing question is why the Court has been ambivalent about the extraterritorial application of the Basic Law. Yaël Ronen, for example, suggests that because administrative law is similar to constitutional law, the benefit of the Basic Law's application becomes questionable.[99] Smadar Ben-Natan argues that while the Court is not explicit about the application of constitutional law, it does apply a "constitutional mindset" in order to eliminate "black holes." Moreover, the absence of constitutional law can be explained by the fact that the Israeli constitutional revolution came late, at a time when administrative law was sufficiently developed.[100] Both accounts are plausible, yet I believe that deeper sentiments underlie the Court's enduring reluctance. First, constitutional law does provide additional rights—for example, free speech and privacy rights that are not guaranteed either by administrative law or IHL—to Palestinians. Second, if, like Ronen claims, constitutional law doesn't add much, then the question actually becomes more urgent: why not apply it if it doesn't place additional burdens? Ben-Natan is correct that the Court does not want to create legal "black holes," but a constitutional "mindset" is not synonymous

98 *See, e.g.*, HCJ 3368/10 Ministry of Palestinian Prisoners v. Minister of Def. IsrSC ¶ 52 (2014) (Isr.) (unpublished), *translated at* http://versa.cardozo.yu.edu/opinions/ministry-palestinian-prisoners-v-minister-defense (mentioning the Basic Law only once, without explaining whether it applied to the OPT).

99 Ronen, *supra* note 51, at 155. Further reasons for the Basic Law's non-application are the perception of prohibited unilateral annexation and its problematic interaction with the law of occupation. *Id.* at 165; Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 B.U. INT'L L. J. 135 (2012). While I do not dispute these claims, I think deeper sentiments are at stake.

100 Smadar Ben-Natan, *Constitutional Mindset: The Interrelations Between Constitutional Law and International Law in the Extraterritorial Application of Human Rights*, 50 ISR. L. REV. 139 (2017).

with the application of constitutional "law," which the Court has been careful to exclude. Thus, the answer to the puzzle must lie with the message constitutional application sends, even if it makes little difference in practice.

IV. FRIENDS/ENEMIES, THREAT/NON-THREAT, INCLUSION/EXCLUSION, CONSTITUTIONAL LAW/ADMINISTRATIVE LAW

A. Three Distinctions

I begin with the ambivalence surrounding the extraterritorial application of constitutional law. My argument draws on three pairs of distinctions. First, a group of people assert their constitutive commitments that define them as a group. In the Israeli case, the stated foundational political commitment is to a Jewish state. This is the essence of "the political" in Israel, what constitutes the identity of the majority group, and the reason for the creation of the state: to provide a national home for the Jewish people.[101] According to Carl Schmitt, the essence of the political, and the concept of the state itself, is the distinction between friend and enemy, the latter distinction arising when groups face a possibility of war and killing.[102] "Friends" are included in the polity, whereas "enemies" are excluded.[103] In this way, labeling someone an enemy constitutes their otherness and, as I argue below, establishes their threat and consequent exclusion.[104]

The viability of the nation rests on the accurate deployment of the friend/enemy distinction.[105] Schmitt's critique of liberalism, discussed below, blamed liberal states for failing to distinguish friends from enemies. Such failure would lead to their decline or to their being overtaken by more cohesive political groups.[106] Schmitt's solution was that a clear line must be drawn by the sovereign between those who are friends (*i.e.*, those who are part of the group) and enemies in order to guard the community from being potentially overtaken.[107] The

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101 The Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, (1947– 48) (Isr.) ("We…by virtue of our natural and historic right…hereby declare the establishment of a Jewish state in Eretz-Israel, to be known as the state of Israel.").

102 CARL SCHMITT, THE CONCEPT OF THE POLITICAL 19, 25–28 (2007). The discussion of Schmitt draws on Eliav Lieblich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. (forthcoming 2018).

103 SCHMITT, *supra* note 102, at 27.

104 *Id.*

105 *Id.* at 68.

106 Lars Vinx, *Carl Schmitt*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), http://plato.stanford.edu/entries/schmitt/; SCHMITT, *supra* note 102, at Ch. 8.

107 Vinx, *supra* note 106.

friend/enemy distinction is thus not about personal enemies but rather enemies on a collective level who pose a threat to the community as such.[108] An enemy is identified based on the willingness of the group to use force in order to maintain the political distinction that constitutes its identity. There is no need to actually use force, but rather the *potential* for its use must be present.[109]

The basic political commitment in Israel, one that is also reflected in the core constitutional documents, is to a Jewish state.[110] Although the new Basic Laws refer to a "Jewish and Democratic state," those were added only in the 1990s. The word democracy does not appear anywhere in the Declaration of Independence, which is devoted to establishing a national home for the Jewish people, although it does guarantee a set of individual rights.[111] Similarly, the Law of Return guarantees citizenship only to Jews (and their families), as part of the conception of Israel as a national home for the Jewish Diaspora.[112] Those who wish to undermine this identity inside Israel are politically constrained. They cannot form a political party or participate in the elections to the Knesset.[113] But what about those located outside Israel perceived as seeking to undermine the core political identity? Those, I argue, are viewed as enemies, in the sense of the willingness to use force against them and are therefore presumed to be a threat. Again, it is not that a particular person poses a threat, but rather the group itself, and hence its members. Of course, in the Israeli-Palestinian context, Palestinians are also an "enemy" in the individual sense, and many of the policies Israel exercises are designed to target the security threat emanating from individuals. But this, I argue, cannot completely account for the friend/enemy distinction as it applies in the Israeli-Palestinian context.

The friend/enemy, threat/non-threat distinctions are political distinctions. Extending Schmitt's analysis, these distinctions can be

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108 SCHMITT, *supra* note 102, at 28–29.

109 *Id.* at 32, 34–35.

110 *See*, *e.g.*, The Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, (1947– 48) (Isr.); Basic Law: Human Dignity and Liberty § 1A; Basic Law: Freedom of Occupation § 2; The Law of Return, 5710-1950, SH No. 51 p. 159 (Isr.).

111 The word "democracy" initially appeared in the draft Declaration of Independence but was intentionally removed. *See* Yoram Shachar, *The Early Drafts of the Declaration of Independence*, 26 TEL AVIV U. L. REV. 523 (2002).

112 It is thus no coincidence that the Israeli government has repeatedly demanded that the Palestinian leadership recognize Israel as a "Jewish state" as a precondition to peace negotiations. *See, e.g.*, *Israeli PM Demands Recognition of Jewish State*, AL JAZEERA (Mar. 5, 2014), http://www.aljazeera.com/news/americas/2014/03/israel-pm-demands-recognition-jewish-state-2014341824955968.html.

113 Basic Law: The Knesset, SH No. 244 p. 69, § 7A (Isr.). More generally, one could argue that Palestinian citizens in Israel are also viewed as an enemy or a potential threat. To an extent this is true, but their level of threat is considerably smaller than those in the OPT, for reasons of size and political power.

translated into legal doctrine. Friends are worthy of constitutional protections, protections accorded by the state, as opposed, for example, to protections accorded by international law. Those who pose a threat to the state are deemed enemies and therefore do not enjoy constitutional protections. And constitutional law, more than any other body of law, demarcates who is inside the polity and who is outside. Whereas persons inside the state (citizens and residents) are not inherently viewed as a threat,[114] those outside it, especially if they have been involved in a longstanding armed conflict against the state and are perceived as threatening its founding conceptualization as a Jewish state, are presumed to be a threat. While it is possible to treat outsiders in various ways, in the Israeli/Palestinian context Palestinians are presumed threatening, both because of the security risk they pose, but also because of what many Israeli Jews fear will happen to Israel, demographically, if Palestinians in the OPT become part of the Israel.[115]

Thus, the legal consequence of identifying a potential external threat is not only exclusion of that threat from constitutional protections but also exclusion of the threatening individuals from the vehicle that defines the body politic. If you cannot claim rights under the constitution, then you cannot consider yourself a full member of the society governed by that constitution.

Putting the pieces together, the inclusion/exclusion dichotomy is the essence of the discussion on extraterritoriality. As long as constitutional rights are geographically limited, the most important questions are where the constitution applies and to whom. Constitutions provide a blueprint for the basic rights persons hold. They are the basic legal compact between the people and their state. The decision as to whom shall be included under this compact, and where, is an attempt at understanding who is part of the polity.[116]

Despite the multiple ways in which the Court could have extended the Basic Laws to Palestinians, it has refrained from doing so because Palestinians are presumed to be a threat, resulting from the longstanding Israeli-Palestinian conflict, the occupation of the Palestinian Territories, violent attacks on Israelis, and the demographic implication that the

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114 Schmitt can be read as arguing that, in a democracy (as opposed to authoritarian rule), citizens are presumed to be non-threatening. CARL SCHMITT, LEGALITY AND LEGITIMACY 20, 24 (2004). In Israel this is not always the case, and people inside the state can be enemies, for example Palestinian citizens of Israel. Indeed, Schmitt also speaks of internal enemies.

115 For the argument that Israeli policy regarding the OPT is partly motivated by demographic concerns, *see* Davidov et al., *State or Family: Citizenship and Entry into Israel Law (Temporary Provision), 2003*, 8 HAIFA L. REV. 643 (2005) (Hebrew). Israeli policy is also concerned with maintaining a Jewish majority in Israel. *See, e.g.*, The Law of Return, 5710-1950, SH No. 51 p. 159 (Isr.). Case law has also acknowledged that in order to be a Jewish state, Israel needs to maintain a Jewish majority. *See* EA 11280/02 Cent. Election Comm. v. Tibi 57(4) IsrSC 1, 21 (2003) (Isr.).

116 CARL SCHMITT, CONSTITUTIONAL THEORY 141 (2008).

acquisition of constitutional rights could perhaps be a first step toward more meaningful inclusion and possible annexation. This presumption triggers their constitutional exclusion. Put differently, the political distinction and identification of someone as a threat *translates* into the *legal* doctrinal decision to exclude them from constitutional protections.

The preceding analysis can be described systematically:

1. Group formation on the basis of constitutive commitments (Jewish state)

↓

2. Identifying groups who threaten the formed group's shared identity markers

↓

3. Deciding a particular group poses a sufficient level of threat that justifies using force, thus warranting its treatment as "enemy"

↓

4. The presumption of threat and the decision on enmity trigger legal exclusion through the doctrine of extraterritorial constitutional application

Schmitt's account also explains the Court's ambivalence toward the extraterritorial application of constitutional law. The Court can be decisive, yet in the end an explicit decision is never made, as the Court waffles and manages to duck the issue. This process is compatible with Schmitt's critique of liberalism. According to Schmitt, liberals avoid making clear decisions because they resist the necessity of the friend/enemy distinction. Liberals believe that political conflicts between groups can be resolved through reasoned deliberation and compromise to the advantage of all, thus never having to definitively decide political issues.[117]

Indeed, liberals are often discomfited by the presence of power. They seek to tame it, to constrain it in the name of individual freedom.[118] This is compatible with the Court's self-conception as a liberal institution entrusted with the protection of liberal values.[119] Schmitt's critique of liberal discourse, though he focused on parliamentary debates, attacks its endless deliberations without reaching concrete decisions. Applied to the Court's jurisprudence, we can see the ambivalence regarding the application of the Basic Laws to the OPT. The Court finds other ways to grant or deny the

117 Vinx, *supra* note 106; SCHMITT, *supra* note 102, at 33–50, 69–79.

118 *See, e.g.* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

119 Adam Shinar, *Idealism and Realism in Israeli Constitutional Law*, *in* CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 257 (Ernst Hirsch Ballin, Maurice Adams & Anne Meuwese eds., 2017).

petition, without ever ruling decisively on the question of extraterritorial application. It simultaneously denies it in the instant case and leaves the issue open for future cases that will most likely exhibit the same logic.

An illuminating comparison is the military courts in the OPT. Military courts have no qualms stating explicitly that the Basic Law does not apply.[120] The military's essence, of which the military courts are a part, is the exercise of violence, which, according to Schmitt, also enables fast and authoritative decision. Indeed, the military is called when there is external threat from an enemy. The military, therefore, protects the polity from the "outside." It has no difficulty determining who is the enemy and is less sensitive to liberal discourse, which is more present in civilian courts generally, and the Supreme Court as a constitutional court in particular.

The Israeli Supreme Court is therefore in the uncomfortable position of trying to maintain a veneer of liberal values even as it deals with the exercise of military power over an occupied people. It "agonizes" over the decision whether the Basic Laws apply to the OPT, and "apologizes" for not having come to the conclusion by saying that in the end it doesn't matter much, since other bodies of law apply and the result is the same. No such pretense exists in the military courts. Although they insist that the spirit of the Basic Laws apply, they unequivocally state that the Basic Laws themselves do not.[121]

B. Extraterritorial Application as Exclusion: An Example

The *Adalah* decision,[122] mentioned above, is a good example of how the friend/enemy distinction generates exclusion through the doctrine of extraterritorial application. The Knesset enacted the Citizenship and Entry into Israel Law (Temporary Provision), thereby denying citizenship or residency permit to a resident of the OPT. The law prevented, *inter alia*, the possibility of family unification in Israel in cases where one of the spouses married a resident of the OPT.[123] Instead, the couple would have to live separately or leave Israel. Notwithstanding exceptions having to do with medical conditions, work permits, and certain ages (women over twenty-five

120 *See supra* text accompanying note 94.

121 Interestingly, the United States held the same position when it considered constitutional application to areas it occupied. *See* REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 87 (1902). The United States Supreme Court reached a similar conclusion when opining both on the status of the Utah Territory and the status of Puerto Rico. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 44 (1890); Downes v. Bidwell, 182 U.S. 244, 268 (1901).

122 HCJ 7052/03 Adalah v. Minister of Interior 61(2) IsrSC 2 (2006) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior.

123 The Citizenship and Entry into Israel Law (Temporary Provision), 5763-2003, SH No. 1901 p. 544 (Isr.).

and men over thirty-five), the prohibition is sweeping, encompassing all spouses within a certain age group, regardless of the level of threat they pose individually. At the same time, the State denied that the law was motivated by any demographic concerns to maintain a Jewish majority in Israel, which was one of the claims made by the petitioners.

Petitioners were both Israelis and Palestinians. The Court, however, applied the Basic Law only to the Israeli spouse.[124] Here, the Court was not ambivalent about extraterritorial constitutional application when it held that the foreign spouse cannot rely on the Basic Law. But, there is more. The family unification case is also the clearest example of the doctrinal reflection of the friend/enemy distinction. Recall that according to Schmitt, an enemy is not a personal one, but is a group distinction. Similarly, Israel refused to individually evaluate each applicant for entry based on his or her level of risk. While the dissent would have opted for this option of individual assessment, arguing that such evaluations are possible, the majority believed the restrictions—despite their sweeping nature—were proportional.[125]

The opinion of the Court repeatedly stressed the fraught relationship between Israel and Palestine, stating that the two are engaged in armed conflict, a "quasi-war,"[126] which justifies such exclusionary measures while simultaneously ignoring the fact of occupation and Israeli control over the area. Here, the exclusionary measures were not merely the denial of constitutional protections, but, crucially, closing the door on Palestinians becoming part of the Israeli polity. Indeed, if Palestinians are presumed to be a threat to the identity of Israel as a Jewish state, it makes perfect sense to deny them entry so that they do not alter Israel's demographic makeup and, by extension, its constitutional identity.

The Court, however, did not go that far. Realizing that the demographic rationale presented problems for constitutional analysis, nine judges, echoing the State, insisted the law was motivated by security concerns and not demographics. Two dissenting judges, however, remained suspicious. Although they could not determine that the demographic rationale was the purpose of the law, they could not rule it out either.[127] While the demographic rationale was never made explicit by the Court, it nevertheless appeared obliquely in the majority opinion of Judge Cheshin:

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124 *Id.* ¶ 17 (Barak, P., dissenting).

125 To be exact, five judges thought the law was proportional. One judge believed the law was disproportional but nevertheless upheld it since the provision was temporary and set to expire. The Law has been consistently extended ever since.

126 *Adalah*, HCJ 7052/03 ¶ 2 (opinion of Cheshin, J.).

127 In a subsequent case, challenging the same law after it was amended to include more enemy states whose citizens could not obtain status in Israel, the Court dismissed the demographic rationale, again upholding the amended law. *See* HCJ 466/07 Galon v. Attorney Gen. 65(2) IsrSC 44 (2002) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/gal-v-attorney-general-summary.

> A state is made up of its residents. The residents of the state are the persons who shape the image of the society, and *the 'state' serves as a framework for the society and its residents. The entry of a foreign national into the state as a permanent resident thereof means a change of the status quo ante in the relationship of the citizens and residents inter se*. Accepting a resident or a new citizen into Israeli society *makes his status equal to that of the residents and citizens of the state*, and in this way *the image of the society and the state changes*. Where we are speaking of an individual resident or citizen, the change is infinitesimal. But this is not the case with a massive incursion of foreign residents and citizens whose *joint influence on the state may significantly change its image*. Giving an individual a right to bring with him to Israel a foreign spouse is therefore capable of *changing the image of society*, and the question that arises is whether it is right and proper that we should entrust to each and every citizen and resident of the state a constitutional key that makes the doors of the state wide open to foreigners.[128]

Whatever one makes of this statement, Judge Cheshin has never used such language when the immigration was by Jews into Israel. Those immigrants, presumably, do not change the *status quo ante*; they do not change the image of the society. Indeed, when Jews immigrate to Israel they are exercising their right according to the Law of Return and contributing to a Jewish state, the *raison d'être* of Israel.[129] As such, Jewish immigration, even in large numbers, would not raise the friend/enemy distinction, the presumption of threat, nor the inclusion/exclusion distinction. Palestinian immigration raises such fears, among them the fear of granting equal rights to Palestinians, and therefore generates a different discourse that is then reflected in constitutional doctrine.

C. A Possible Objection: The Application of Constitutional Rights to Palestinians and Asylum Seekers Inside Israel

Before continuing, a final objection must be addressed. If non-Jews are viewed as a potential threat to the project of a Jewish state, why does the Court extend them constitutional rights when they are inside Israel? After all, they too might undermine the principle of a state with a Jewish majority.

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128 *Adalah*, HCJ 7052/03 ¶ 54 (opinion of Cheshin, J.) (emphasis added).

129 HCJ 3648/97 Stamka v. Minister of Interior 53(2) IsrSC 728, 751 (1999) (Isr.), *translated at* http://versa.cardozo.yu.edu/opinions/stamka-v-minister-interior ("There are few laws around the world like the Law of Return, and it is the justification—albeit not the only justification—for the existence of the Jewish State…The right of return is granted to every Jew—as such—and the primary characteristic of the right is its decisiveness—it is a right that is almost absolute. Every Jew, whomever, can and is entitled to—at his volition alone—realize the right to return…The decisiveness of the Law derives from its uniqueness — from its being a concrete expression of the relationship between every Jew and the Land of Israel.").

Specifically, there are two significant groups that might be thought to generate demographic anxiety: Palestinian citizens of Israel, which comprise about 20% of the Israeli population, and asylum seekers, mostly from Sudan and Eritrea, who have entered Israel in the thousands since 2006.[130]

Basic Law: Human Dignity and Liberty unequivocally applies to both groups; Palestinian citizens by virtue of their citizenship (Palestinians inside Israel, for example in Israeli prisons, by virtue of their presence) and asylum seekers by virtue of their presence in Israel.[131] Still, there are undercurrents. For example, when petitions by asylum seekers who challenged their detention first reached the courts, the State argued that the constitutional right to liberty does not apply to those who are in Israel unlawfully, and thus asylum seekers, to whom the Anti-Infiltration Law refers to as "infiltrators,"[132] do not enjoy the protection of the Basic Law. This claim received some sympathy in a lower court decision and was repeated in a government brief to the Supreme Court, but was implicitly rejected by the Court, which applied the Basic Law without noting any difficulty.[133]

The treatment of Palestinian citizens is more complicated and goes beyond what I can address here. Suffice it to say, the history of Palestinian citizens is fraught with tension. Israel imposed a military government on its Palestinian population until 1966, mainly because they were viewed as an "enemy" in the security sense; Palestinians are viewed as second class citizens or "conditional citizens" by many in the Jewish majority; and although there is *de jure* equality in many aspects, *de facto* inequality is the norm. In the end, however, the Basic Laws apply to all citizens. Indeed, there has never been any claim to the contrary.[134]

If the friend/enemy distinction was truly the operative principle determining constitutional applicability, why is the application of constitutional rights to Palestinian citizens and asylum seekers straightforward? The answer is not because the Schmittian distinction is inapplicable, but because inside the territory there might be countervailing constraints even if Palestinian citizens are suspect. Specifically, it is almost

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130 The number of asylum seekers, referred to by law as "infiltrators," is estimated at 41,477 as of June 2016. *See* POPULATION AND IMMIGRATION AUTH., DATA ON FOREIGNERS IN ISRAEL (July 2016), https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/q2_2016_0.pdf.

131 *See, e.g.*, HCJ 8665/14 Deseta v. The Knesset IsrSC (2015) (Isr.) (unpublished), *summary available at* http://versa.cardozo.yu.edu/opinions/desete-v-minister-interior-summary; HCJ 7385/13 Eitan – Israeli Immigration Policy v. Gov't of Israel IsrSC (2014) (Isr.) (unpublished) (on file with author); HCJ 7146/12 Adam v. The Knesset IsrSC (2013) (Isr.) (unpublished), *summary available at* http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adam%20v.%20Knesset.pdf.

132 *See* Anti-Infiltration Law (Offenses and Adjudication), 5714-1954, SH No. 161 p. 160 (Isr.).

133 Yonatan Berman, *Arrests of Refugees and Asylum Seekers in Israel*, *in* LEVINSKY CORNER OF ASMARA: SOCIAL AND LEGAL PERSPECTIVES OF ISRAEL'S ASYLUM POLICY 179 (Tally Kritzman-Amir ed., 2015) (Hebrew).

134 Sawsan Zaher, *"Enemy Subject" Doctrine and Palestinians in Israel*, *in* CONDITIONAL CITIZENSHIP: ON CITIZENSHIP, EQUALITY, AND OFFENSIVE LEGISLATION (Sarah Osatzky-Lazar & Yousef Jabareen eds., 2016).

axiomatic that the state must guarantee constitutional rights to those within its territory, especially its citizens. Were the Court to hold otherwise, this would be tantamount to a declaration of discrimination and apartheid. Moreover, once the state ceases to guarantee constitutional rights within its territory, it essentially declares it is not sovereign over that area. This it cannot do, even if it perceives Palestinians inside Israel (or asylum seekers), as threatening the political identity of a Jewish state. In the OPT, however, since the nature of Israel's sovereignty remains contested, relinquishing sovereignty through the non-application of constitutional law is less problematic.

D. The Constitutional Law/Administrative Law Distinction

While the Court remains ambivalent about the extraterritorial application of constitutional law, it has no qualms about the extraterritorial application of administrative law. What explains this divergence? No doubt a simplification, constitutional law sets up the basic government structures and, crucially, determines the framework of rights people have *vis-à-vis* their state by creating substantive rights and obligations. At bottom, constitutional law regulates relations between the state and individuals.

Indeed, unlike constitutional law, which is often a proxy for "we the people," popular identity, and group affiliation, administrative law is more narrowly concerned with the rationality of policymaking, scientific expertise, democratic participation, political accountability, and the promotion of overall welfare.[135] In contrast, constitutional law and constitutional rights in particular are not (just) about welfare, as rights are often thought to trump welfarist considerations.[136] Constitutional law is preoccupied with the concentration of power, and whereas such concern is also prominent in administrative law, it more specifically focuses on channeling and constraining (though not eliminating) executive discretion and bureaucratic power.[137]

Another way of looking at the constitutional/administrative dichotomy is to consider the meaning of "rights" in each system. Again, what follows is an oversimplification, but nevertheless I believe this is the image each holds in the legal consciousness. Whereas constitutional law essentially creates substantive rights and obligations, administrative law is more narrowly focused on enforcing existing law. The rights administrative law

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135 Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41 (2015).

136 Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153–67 (Jeremy Waldron ed., 1984); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 29–30 (1974).

137 DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 10–11 (2014); Sunstein & Vermeule, *supra* note 135, at 44–45.

creates—sometimes referred to as procedural rights—are not the traditional set of rights we associate with constitutional law, but rather they serve as an instrument to ensure that agencies are properly realizing the delegation of power they received from the legislature. In a sense, certain rights are pre-administrative. The administrative state plays a role in their implementation by establishing procedures. To be sure, administrative law also creates rights, but those are often tasked with the detailed implementation of rights that are considered more foundational, and usually that foundationalism refers to constitutional rights. In short, administrative law norms are often secondary norms.[138] For example, procurement rules are meant to protect equality; due process rules guarantee fairness; licensing requirements protect the constitutional right to an occupation, and so forth.

All this contributes to the *image* of regulation and administrative law as non-political law, a discourse of expert-based specialized knowledge, as opposed to constitutional law, which is a special kind of law, sometimes referred to as "political law."[139] Indeed, when the administrative process and the application of administrative law seem to become politicized, we see calls for "depoliticization" and for returning them to their rightful place, freed from political influence.[140]

A further aspect of administrative law's depoliticization is its focus on the rule of law as a foundational principle.[141] Although the rule of law has a substantive element, administrative law is first and foremost preoccupied with its formal version of acting under the authority of law. Administrative law thus seeks to enable the smooth operation of government, to make it a machine that runs by itself. Consequently, the values undergirding bureaucracies governed by administrative law are rationality, predictability, and efficiency.[142] Put differently, we the people have an interest in the rationality and efficiency of our government's operation even when it operates outside state borders. But we do not have such an interest in the substantive rights of those who live beyond our borders.

Constitutional law, on the other hand, advances a conception of a polity, inclusion and community, whether real or imagined. Once constitutional law applies, this suggests something about the subjects of the constitutional

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138 Eliav Lieblich & Eyal Benvenisti, *The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapons Systems are Unlawful*, *in* AUTONOMOUS WEAPONS SYSTEMS: LAW, ETHICS, POLICY 245, 275–76 (Nehal Bhuta et al. eds., 2016).

139 For the idea of constitutional law as political law, see Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

140 *See, e.g.*, Cass R. Sunstein & Thomas J. Miles, *Depoliticizing Administrative Law*, 58 DUKE L. J. 2193 (2009) (calling to depoliticize administrative law through mixed judicial panels).

141 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1669–70 (1975).

142 *See, e.g.*, Johan P. Olsen, *The Ups and Downs of Bureaucratic Organization*, 11 ANN. REV. POL. SCI. 13 (2008).

order.[143] As Gary Jacobsohn argued, a constitution reflects the nation's past and the possibility of transcending that past. It is a site of contestation, one that is unique to the people it regulates.[144] This does not mean that a particular identity is discernible, but nevertheless it is understood that a constitution seeks to embody the polity's constitutive commitments, which are defined and refined in subsequent acts of interpretation.[145]

Interestingly, Schmitt also alluded to the constitutional/administrative distinction described above.[146] According to Schmitt, a "legislative state" is a type of political system "that is distinctive in that norms intended to be just are the highest and decisive expression of the *community will*. These norms, therefore, must exhibit certain qualities, and all other public functions…must be subordinated to them."[147] In contrast, an administrative state "does not seek the mere application of higher norms, but rather only objective directives. In the administrative state, men do not rule, nor are norms valid as something higher. Instead, the famous formula 'things administer themselves' holds true."[148] Central to the administrative state is not the constitutional norm; it is the "administrative decree that is determined only in accordance with circumstances, in reference to the concrete situation, and motivated entirely by considerations of factual-practical purposefulness."[149]

What, then, does all of this have to do with extraterritoriality, and why does this make the application of administrative law to the OPT uncomplicated? The answer, I argue, stems from the nature of administrative law described above. Although administrative law grants procedural rights to Palestinians, it is firstly concerned with the rule of law and the smooth operation of the machinery of government. To be sure, that machinery enforces rights, but those rights are, again, chiefly concerned with the administrative process. True, some of the rights the military government enforces have little to do with administration (for example those found in international human rights law), but here the important point is that we are talking about rights that have little or nothing to do with political affiliation—those rights are not location specific, identity specific, or culture specific; they thus do not trigger the inclusive nature of constitutional law.

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143 Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 CARDOZO L. REV. 767, 772 (1993) ("The purpose of the constitutional text is to provide a solid foundation for national existence. It is to embody the basic aspirations of the people. It is to guide future generations by its basic choices.").

144 *See generally* GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (2010); *see also* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001).

145 George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 737 (1993).

146 SCHMITT, *supra* note 102.

147 *Id.* at 3 (emphasis added).

148 *Id.* at 5.

149 *Id.*

Especially telling is that some Basic Laws, which deal with administrative matters, such as Basic Law: The Military and Basic Law: Adjudication, are thought to apply in the OPT. They bind the administrative powers there and do not grant rights to Palestinians. Thus, Basic Laws—which by their nature are structural and "administrative"—evidently do not raise any problem and have not given rise to litigation precisely *because* they are devoid of any "membership" content.

Applying these distinctions to the question of constitutional extraterritoriality, we can now understand the straightforward nature of the extraterritorial application of administrative law and not constitutional law to the OPT. Administrative law regulates government, the bureaucratic apparatus enforcing the law, and makes sure it is operating within its delegated scope. Much, if not most, of administrative actions are based on what Schmitt called "decrees."[150] Indeed, the main legislative instruments in the OPT are military orders promulgated by the military commander. These decrees are easy to enact, amend, and repeal. They do not require cumbersome legislative procedures like ordinary legislation, and, of course, they lack any democratic pedigree since they are issued by an occupying power. Moreover, if we think of administrative law as a body of law that ensures government runs smoothly, we imbue it with a non-ideological character that can be easily transposed to the OPT. After all, there is nothing in administrative law that suggests membership in a political community; its main object of concern is the government. True, values of fairness and equality undergird much of administrative law principles, but, again, those are focused on agency action. In this way, administrative law can be used to elide fundamental questions that would have to be addressed if one were to consider constitutional law. It is thus depoliticized. As Justice Scalia once quipped: "administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture."[151] There is a sense in which Scalia was right. Administrative law does *seem* dull, because it focuses its attention on issues that *seem* politically neutral and devoid of the high-minded talk of constitutional law. This allows judges to engage in dispassionate discourses without having to attend to the substantive moral, political, and distributional implications of their decisions. Through this, the extraterritorial application of administrative law becomes depoliticized, making it much less controversial than the extraterritorial application of constitutional law.

150 SCHMITT, *supra* note 102, at 6.

151 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 511 (1989).

A recent case is illustrative. In *The Hebrew University in Jerusalem v. Council for Higher Education Judea and Samaria*,[152] petitioners, universities inside Israel, challenged the military commander's decision to establish an Israeli university in the OPT. Fundamental questions were potentially at stake: the implications of establishing the first Israeli university by an occupying power; the permanency of the settlements; and the democratic and academic consequences of establishing a university through a military decree. Instead, petitioners and the Court confined themselves exclusively to an examination of the administrative law issues: did the Council in Judea and Samaria properly consult with the Planning and Budgeting Committee in the Council of Higher Education? Did it properly consider its advisory opinion? Was the decision to establish a new university tainted by a conflict of interest by one of the committee members? These questions were no doubt important, but they were of a procedural, value-neutral nature, in line with administrative law's non-political pretense. Invoking only administrative law and refusing to consider other, substantive arguments raised by an NGO which sought to join the litigation, the Court glossed over the fundamental questions, deferring instead to the "dry" discourse of expertise invoked by the government agencies.[153]

To conclude, the extraterritorial application of administrative law is straightforward because it is not perceived as politically controversial. Administrative law is concerned more with the apparatus of governance than with the substantive rights persons hold as a marker of their affiliation with a political community. The application of constitutional law, on the other hand, raises the specter of political inclusion, or at least the first step in such a process. This would, on a common view shared by many Israelis, compromise the very markers that make Jews in Israel a political community. While it is true that the application of constitutional law would change little (though not nothing) in terms of substantive rights on the ground, it serves as an expressive signal about who counts as part of the community—who is on the inside and who is on the outside.

V. CONCLUSION

This Article suggested that the explanation for the Israeli Supreme Court's ambivalence regarding the extraterritorial application of constitutional law to the OPT cannot be found in legal texts or doctrine. Legally, there is nothing in the Basic Laws preventing their application to persons outside the borders of the State. The reluctance, I argued, stems

152 HCJ 6168/12 The Hebrew Univ. in Jerusalem v. Council of Higher Educ. Judea and Samaria IsrSC (2013) (Isr.) (unpublished) (on file with author).

153 Eliav Lieblich, *A Military Regime with a University*, HAARETZ (Dec. 28, 2013), http://www.haaretz.co.il/opinions/.premium-1.2200860.

from unarticulated sentiments about the Palestinian people, the nature of the occupation, the long running national conflict, and the essence of Israel. Palestinians, as a group, are viewed as an enemy, and are thus presumed as threats. This, in turn, triggers their constitutional exclusion. Moreover, I argued that the threat Palestinians pose is not confined to the security sphere. As the family unification case demonstrated, threat is a feature of the Palestinian collective rather than individual members. Thus, the risk is to both the Israeli polity at large and the conceptualization of the state as a Jewish state, a conceptualization that would be undermined were Palestinians in the OPT included in the Israeli social contract.

The study of Israel's external constitution has yielded important insights not just about who enjoys the protections of the Israeli constitution but also about the perception of Israel by Israelis generally and by the Israeli Supreme Court in particular. Sometimes, you have to look outside to better understand what is inside. Sometimes, the identity of the constitution can be revealed from the absence of its application.

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