
CHOOSING THE CHOSEN: THE VALIDITY OF RACIAL RESTRICTIONS ON THE ALIENATION OF PROPERTY IN ISRAEL AND THE UNITED STATES

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I. INTRODUCTION

Israel is a nation that resists definition. Not by accident, it is both a Jewish state, existing of, by and for the Jewish people, and a liberal-democracy, guaranteeing to all citizens freedom and equality under the law, regardless of race or religion.¹ These two conceptions of the state are not opposites, nor are they synonyms. Instead, they relate to one another as a tension upon which the state of Israel is founded.

It is easier to understand this dual nature of Israel as a Jewish and liberal-democratic state by putting the issue into context. That context is the “Jewish Question.”² While, the Jewish Question presents itself as a myriad of paradoxes and dilemmas; the present study focuses only on the

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1. See Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3, (1948). See generally, DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* (1990) (outlining this issue in the context of the rights of Israel-Arabs).

2. By the Jewish Question it is meant: what of the situation of the Jews as a landless, stateless people in Christian Europe? This is no doubt a crude and over-simplified expression of the Jewish Question, but it nonetheless conveys the basic issue at hand. Cf., e.g., BRUNO BAUER, *DIE JUDENFRAGE [THE JEWISH QUESTION]* (London, Braunschweig 1843); THEODOR HERZL, *THE JEWISH STATE* (1946); Karl Marx, *On the Jewish Question*, reprinted in *THE MARX-ENGELS READER* 26-52 (Robert C. Tucker ed., Norton 1978) (1843); Leo Strauss, *Progress or Return*, reprinted in *THE REBIRTH OF CLASSICAL POLITICAL RATIONALISM* 227 (Thomas L. Pangle ed., 1989).

dimension of Israel as a secular or religious state.³ That is, does the diaspora, i.e., an existence of profound homelessness, compel the Jews to seek civic, political emancipation,⁴ or rather, can the condition of homelessness never truly be solved until the Jews return (*t'shuvah*) home, i.e., to the Jewish land?⁵

Neither of these “solutions” adequately addresses the condition of homelessness. On the one hand, for very practical reasons, many Jews sought to resolve the Question through a secular path.⁶ This approach grew from the failure of assimilation in nineteenth century Europe and culminates in political Zionism: The problem of the Jews can be readily solved through the establishment of their own state. In other words, the solution resides in seizing the reins of *political* power. But, as Leo Strauss pointed out, this solution was not a solution at all: “The basic idea underlying purely political Zionism was not Zionism at all. It could have been satisfied by a Jewish state anywhere on earth.”⁷ Pure political Zionism is another expression of assimilation, only at the macro level.

On the other hand, others believed that the Jewish Question could only be solved by returning to Israel, to the Jewish homeland.⁸ If so, the Jewish state would have to adopt Hebrew, the language of Judaism. Yet, this view also presented difficulties. To begin with, there was as kind of slippery-slope dilemma: Once a Jewish state becomes the goal, exactly how Jewish does it need to be? Founding the nation in the Biblical homeland and adopting Hebrew may not be enough. Perhaps the state would have to also adopt Jewish law, or Torah, as well. Taken to its very extreme, messianism, the notion of a Jewish state is inseparable from the rebuilding of the Temple and the coming of the Messiah.⁹

The modern state of Israel attempts to strike a balance between these two positions, and thus expresses the tension between them. The Declaration of Independence, dated May 14, 1948, illustrates this tension

3 The present study attempts to better understand the secular-religious tension in Israel through and examination of non-Jewish ownership of property.

4 See Marx, *supra* note 2, at 26.

5 Messianism, a theory holding that there can be no return to Israel before the coming of the messiah, is *t'shuvah* in its most radical form.

6 Strauss identifies Benedict Spinoza as the first proponent of such a path: “If the foundations of [the Jews’] religion did not effeminate their minds, I would absolutely believe that they might again restore their state, under auspicious circumstances, considering the fact that human things are mutable.” Strauss, *supra* note 2, at 230 (quoting BENEDICT SPINOZA, THEOLOGICO-POLITICAL TREATISE, ch. 3 (n.p.) (n.d.)).

7 Strauss, *supra* note 2, at 232-33.

8 See *id.* at 228-30.

9 See *id.*

more vividly than anything else: “We . . . hereby declare the establishment of a Jewish state in Eretz-Israel. . . . [I]t will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.”¹⁰ This leaves open the question of whether Israel is a Jewish state, offering equal freedoms and rights *to Jews*, or a *liberal-democratic* nation that holds paramount the rights of every individual.

Of course, by its very terms, the Declaration states that Israel will embody both conceptions.¹¹ Nevertheless, these two definitions co-exist in tension, and sometimes even conflict. The present study explores the legal dimensions of an instance when they do come into conflict; namely, in the area of property law. Traditional common law rules and the principles of liberalism understand the right to freely buy and sell property as a central proposition.¹² However, in order to institute and preserve Jewish ownership of land in Israel, the government has effectively barred non-Jews from purchasing large tracts of land.¹³ To date, the Israeli Supreme Court has not ruled on the legality of these restrictions.

This Note attempts to consider various approaches that the Israeli Supreme Court might take in light of persuasive authority from a jurisdiction that has a long history of dealing with such restrictions: the United States. In particular, this study uses the American experience, and the legal precedent to which that experience has given rise, as a lens through which the Israeli dilemma might be understood: Can Israel exist as both a Jewish and liberal-democratic state? The legal restraints on alienation of land serve as a test case with respect to that dilemma.

After highlighting some of the basic features of the Israeli legal system, Part II of this study considers Israeli land law in detail. Part III then examines the American experience with respect to racial restraints on alienation through three stages of development: First, the selective enforcement era that held to the traditional rule against restraints on alienation but failed to apply that rule in the case of minorities; second, the modern era, which extended the traditional rule to areas of race in the name of integration; and third, the post-modern era, applying a reasonableness standard to the problem of restraints on alienation. Part IV attempts to view again the Israeli racial restriction in light of the three stages of the

10. Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3, (1948).

11. *See id.*

12. *See infra* Part III.A.

13. *See infra* Part II.B.2.

American experience. Part V concludes that the recent reasonableness standard offers the most promising approach for the Israeli Supreme Court, given both the situation in Israel and the principles of liberalism.

II. THE ISRAELI LEGAL LANDSCAPE

A. ISRAELI LAW IN GENERAL

Israel is a common law country modeled on the English parliamentary system.¹⁴ Like the English system, there is no written constitution.¹⁵ Furthermore, Israel's sole legislative body, the Knesset, which is roughly analogous to England's House of Commons, enjoys technical sovereignty.¹⁶ Acts passed by the Knesset are theoretically immune to judicial override. However, it would be inaccurate to portray the Israeli legal system as completely lacking any hint of judicial review.

1. *The Problem of Judicial Review*

Is there judicial review in Israel? This is not an easy question to answer. In fact, the question of whether there is judicial review in Israel has been the subject of much debate, among both Israeli and American commentators.¹⁷ Without devoting an entire study to the issue, it is fair to say that judicial review in Israel is barred in theory yet prevalent in practice.

On the one hand, some Supreme Court decisions appear to clearly prohibit what we would call judicial review, that is, the practice of striking down a legislative act on the grounds that it conflicts with a law or

14. See ARIEL BIN-NUN, *THE LAW OF THE STATE OF ISRAEL, AN INTRODUCTION* 4-13 (Dr. Menachem Eichelberg trans., Rubin Mass Ltd. 1990) (1983) (describing the development of the law in the state of Israel and its initial dependence on English common law). See also HENRY E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 20-37 (1968) (outlining the basic features of the Israeli government); GUIDO TEDESCHI, *STUDIES IN ISRAEL LAW* 166-237 (A. Harari trans., Hebrew University Students' Press 1960) (exploring the Israeli legal system's method of dealing with gaps in the law).

15. See KRETZMER, *supra* note 1, at 7-9 (noting Israel's lack of a formal constitution). See also Amos Shapira, *Why Israel Has No Constitution*, 37 ST. LOUIS U. L.J. 283 (1993) (briefly outlining some of the reasons behind Israel's hesitation in establishing a written constitution).

16. See KRETZMER, *supra* note 1, at 8 (citing Rogozinski v. State of Israel, 26(1) P.D. 129, 136 (Berinson, J.) (stating that the "Knesset as the legislative branch of the state is sovereign and has the power to pass any law it likes")). See also Shapira, *supra* note 15, at 287-88.

17. See, e.g., Amos Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405 (1983); Shapira, *supra* note 15, at 287-88 (discussing the interpretative devices used by the Supreme Court to circumvent laws passed by the Knesset); Daphne Barak-Erez, Note, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COL. HUM. RTS. L. REV. 309 (1995).

principle endowed with superior normative power. For instance, in the case of *Rogozinski v. State of Israel*,¹⁸ Justice Berinson stated that the “Knesset as the legislative branch of the state is sovereign and has the power to pass any law it likes.”¹⁹ This has led some commentators, such as David Kretzmer, to state that “the Supreme Court of Israel will not undertake judicial review of the validity of primary legislation, i.e., statutes passed by the Knesset or British Mandatory legislation that has the status of Knesset legislation.”²⁰

On the other hand, there is evidence that something akin to judicial review is practiced in Israel. This begins with the landmark 1948 decision, *Kol Ha'am Co. Ltd. v. Minister of Interior*,²¹ where the Court held that although certain principles of civil liberties are not contained in Knesset legislation, those principles nonetheless inform and guide judicial decisions:

The system of laws under which the political institutions . . . have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence, especially as regards basing the State “on the foundations of freedom” and securing freedom of conscience mean that Israel is a freedom-loving State. It is true that the Declaration “does not consist of any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws” . . . but in so far as it “expresses the vision of the people and its faith,” we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State. . . .²²

This decision makes clear that, from the founding of the State of Israel, the Supreme Court has been willing to “interpret” laws and ordinances in light of higher principles.²³ Although ostensibly an “all-mighty” legislature, the Knesset is hardly afforded that treatment by the Supreme Court. In short, the debate seems to have focused on the nature

18. 26(1) P.D. 129, 136, cited in KRETZMER, *supra* note 1, at 8.

19. *Id.*

20. KRETZMER, *supra* note 1, at 8.

21. H.C. 73/53, 7 P.D. 871, translated in 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 90 (E. David Goitien ed. 1962) (nullifying an order by the minister of the interior to close down a newspaper for a few days) [hereinafter SELECTED JUDGMENTS].

22. *Id.* at 884 (citations omitted).

23. In fact, even Kretzmer acknowledges this. He notes, for instance, that “the principle of equality is not merely a pious statement of intent adopted in the Declaration of Independence. The principle has been granted legal status . . . in decisions of the Supreme Court.” KRETZMER, *supra* note 1, at 11.

and extent of judicial review, rather than on its existence. As the Israeli Constitutional scholar Amos Shapira has noted:

To be sure, in a parliamentary system without a written constitution endowed with a “super law” quality, the legislature is vested with theoretically unlimited legislative powers and may legislate in derogation of basic individual freedoms and rights. It can do this because no constitutional super-norm exists to limit its power. Yet, in practice, the court attributes to the legislature the intention not to deny or restrict any of these fundamental freedoms, except in instances where the court is faced with a clear-cut, explicit legislative decree to the contrary which it cannot explain or interpret away. Every discrepancy or ambiguity which offers an interpretation option is bound to trigger this presumption in favor of human rights and individual freedoms. This, in turn, brings about a restrictive, narrow construction of legislative measures purporting to curtail fundamental freedoms. This libertarian judicial endeavor has been carried out, particularly in recent years, in an unabashed activist drive.²⁴

Thus, it seems clear that although Israel is without a constitution, courts do in practice call upon extra-statutory principles in coming to a decision. Those principles, or norms, might derive from the Declaration of Independence,²⁵ from prior decisions,²⁶ or from the very history of the Jewish people.²⁷ At the same time, it is important to keep in mind that these “extra-statutory” principles, that is, unwritten laws, upon which courts might rely, are at present “soft legal principles.”²⁸ That is, in the face of clear legislative language, an Israeli court is bound to uphold the statute even if it conflicts with principles enunciated in prior decisions or the Declaration of Independence.

24. Shapira, *supra* note 15, at 287-88.

25. *See, e.g.*, H.C. 73/53, *Kol Ha'am*, 7 P.D. 871, translated in 1 SELECTED JUDGMENTS at 90 (explicitly relying on the language of the Declaration of Independence to support the holding); High Court of Justice 262/62, *Decisions of District Courts* vol. 16, at 2113 (“Although the Declaration of Independence does not by itself confer upon the citizen a legally enforceable claim, it nevertheless expresses society’s concept of life, and every authority must be guided in its actions by the principles of the Declaration of Independence.”). *See also* BIN-NUN, *supra* note 14, at 36 (going so far as to say that the Declaration could be argued to be a written constitution).

26. *See* BIN-NUN, *supra* note 14, at 27 (noting the importance attached to stare decisis).

27. *See* KRETZMER, *supra* note 1, at 9 (citing *Emma Berger v. Dist. Planning Comm.*, 27(2) P.D. 764, 771); Foundations of Law Act, 1980, 34 L.S.I. 181, (1979-80).

28. *See* KRETZMER, *supra* note 1, at 11.

2. Sources of Law

The Israeli legal landscape is marked by many sources of law—more in fact, than the typical common law jurisdiction. While a United States court might look to Constitutional, statutory and judicial authority to justify a decision, Israeli courts will consider those as well as other sources of law.

Although it technically has no legal status, the legal landscape in Israel cannot be understood without considering the Declaration of Independence.²⁹ As touched on earlier, the Declaration, if nothing else, evidences the deep fissure underlying the State of Israel: between a Jewish state and a secular liberal-democratic nation.³⁰ More specifically, the Declaration of Independence describes Israel as a “Jewish state in Eretz Israel [the land of Israel]” that “would open its doors to every Jew and grant Jewish people the status of a nation with equal rights among the family of nations.”³¹ However, it also promised that the new state “would develop the country for the benefit of all its inhabitants, and that it would maintain complete equality of political and social rights of all its citizens, irrespective of race, religion or sex.”³²

The ambiguous legal status of the Declaration of Independence reflects its tension. On the one hand, the Declaration expresses what are seemingly inviolable principles of freedom and equality.³³ Subsequent statutes, court decisions, and executive opinions have made clear that those principles are “not merely a pious statement of intent adopted in the Declaration of Independence.”³⁴ On the other hand, as noted earlier, the

29. See H.C. 10/48, Zeev v. Gubernik, 1 P.D. 85, *translated in* 1 SELECTED JUDGMENTS at 68 (holding that the Declaration of Independence is not a constitutional law which determines the validity or invalidity of ordinances and statutes).

30. See *supra* Part I.

31. Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3, (1948).

32. KRETZMER, *supra* note 1, at 1 (paraphrasing the statement made in the Declaration). Kretzmer also notes that:

the Declaration included an appeal, in the midst of the onslaught which has been continuing against us for months, to the Arabs resident in the State of Israel “to preserve the peace and to take part in the building of the state on the footing of full and equal nationality and appropriate representation in all its organs.”

Id.

33. See KRETZMER, *supra* note 1, at 11 (citing the opinion of the Attorney General in the case of Kiryat Arba, *Racial Discrimination in a Coalition Agreement*, in DIRECTIVES OF THE ATTORNEY GENERAL, CONSTITUTIONAL AND ADMINISTRATIVE LAW, No. 21.480 of Aug. 1, 1995, 2 (invalidating an overtly anti-Arab clause in a local council coalition agreement)). There the Attorney General stated that “[e]quality before the law is a basic principle of Israel’s legal system. . . . [This principle] has grown to become a well-rooted, binding legal principle.” *Id.* at 11. See also H.C. 73/53, *Kol Ha’am Co. Ltd. v. Minister of Interior*, 7 P.D. 871, *translated in* 1 SELECTED JUDGMENTS at 90.

34. KRETZMER, *supra* note 1, at 11.

Declaration is not afforded formal legal weight, and the principles enshrined in it are frequently subject to limitations when deemed necessary.³⁵ The circumscribing of these principles no doubt stems in large part from the realities facing a Jewish nation in the midst of hostile neighbors.³⁶

The second source of law that should be noted is the statutes and ordinances passed by the Knesset. As mentioned earlier, the Knesset is technically sovereign and cannot be overruled by the courts.³⁷ The Knesset's first act after Israel's independence was to leave intact a four-layer body of law subject to the supremacy of Israeli law.³⁸ At the foundation was Ottoman law, which had developed over the centuries when the Turks ruled Palestine; second were the laws of the British Mandatory period (1917-1948); third were the rules of English common law and equity; and fourth was the *millet* system,³⁹ which relegated jurisdiction over personal matters to the various religious communities. Today, with the exception of the *millet* system and a handful of regulations dating from the British Mandatory period, the body of law has been replaced by Israeli legislation.⁴⁰

The third source of law, really a subset of the statutes and ordinances passed by the Knesset, is a series of statutes known as the Basic Laws.⁴¹ There are eleven Basic Laws dealing with various issues, among them civil rights (right to dignity and freedom),⁴² form of government⁴³ and land law.⁴⁴ The Basic Laws were originally conceived as a gradual process that would culminate in a complete, written constitution.⁴⁵ However, the Basic

35. See *id.* (calling the principle of equality a "soft" legal principle).

36. See Shapira, *supra* note 15, at 286 (arguing that the continuous external threat to Israel has contributed to the delay in implementing a formal constitution that would guarantee civil rights). See also KRETZMER, *supra* note 1, at 135-55 (describing the security issue *viz* Israeli-Arab civil rights).

37. See *supra* Part II.A.

38. This categorization follows Kretzmer's analysis. See KRETZMER, *supra* note 1, at 12.

39. *Millet* meaning nation, thus nation system. For a brief description of the *millet* system, see *infra* text accompanying notes 50-54.

40. See KRETZMER, *supra* note 1, at 12. See also Foundation of Law Act, 1980, 34 L.S.I. 181, (1979-80) (proscribing that courts, faced with no immediate answer in statute or case law, look to the Jewish tradition).

41. See ARYEH GREENFIELD, ISRAEL'S WRITTEN CONSTITUTION (2d ed. 1995) (providing a verbatim English Translation of the Declaration of Independence and of the Basic Laws).

42. See Basic Law: Human Dignity and Freedom, 1992, reprinted in GREENFIELD, *supra* note 41, at 9.

43. See Basic Law: The Government, 1992, reprinted in GREENFIELD, *supra* note 41, at 39.

44. See Basic Law: Israel Lands, 1960, 14 L.S.I. 48, (1960).

45. See BIN-NUN, *supra* note 14, at 38 ("The controversy over a written Constitution has resulted in a compromise similar to that reached for the codification of private law: the different elements are set

Laws do not, as a whole, possess normative superiority over regular statutes; only “entrenched” provisions of the Basic Laws have the power to invalidate subsequent legislation.⁴⁶ “Entrenched” laws differ from regular laws in that regular laws can be overridden by subsequent legislation, while entrenched provisions require a special majority of the Knesset to enact such alterations. The Supreme Court has only been willing to invalidate legislation that is inconsistent with entrenched provisions.⁴⁷ Nevertheless, the fact that the Basic Laws are pieces of the future constitution inevitably separates them from typical legislation coming out of the Knesset.⁴⁸

The fourth source of law consists of prior decisions of the court. Indeed, as a common law jurisdiction, Israeli courts are bound to follow precedent unless compelled to decide otherwise by higher authority (a higher level court or the Knesset).⁴⁹ Furthermore, it should be noted that the Israeli Supreme Court serves a central function in developing case law insofar as it is the final court of appeal and it possesses (siting as a High Court of Justice) the authority to order public bodies to take or refrain from taking certain actions.⁵⁰ In both of these capacities, Supreme Court decisions bind subsequent decisions.

The *millet* system serves as the fifth and most unique source of law in Israel. First established by the Ottoman Empire in the Fifteenth Century,

down one at a time in so-called ‘Basic Laws,’ to be merged some day into a written Constitution.”); Shapira, *supra* note 15, at 288-89.

46. See KRETZMER, *supra* note 1, at 7-8. See also Barak-Eretz, *supra* note 17, (discussing the ambiguity of the so-called entrenched provisions). For an example of Supreme Court decisions refusing to invalidate legislation in the absence of entrenched provisions, see KRETZMER, *supra* note 1, at 8 (citing *Negev v. State of Israel*, 28(1) P.D. 640 (holding that the Basic Laws have no superior status); *Kaniel v. Minister of Justice*, 27(1) P.D. 794).

47. See, e.g., H.C. 98/69 Bergman v. Minister of Finance, 23(1) P.D. 693, *translated in* 8 SELECTED JUDGEMENTS 13 (invalidating a law held inconsistent with § 4 of Basic Law: The Knesset); H.C. 246, 260/81, *Agudat Derekh Eretz v. Broadcasting Authority*, 35(4) P.D.1, *translated in* 8 SELECTED JUDGEMENTS 21 (same); H.C. 141/82, *Rubinstein v. Chairman of the Knesset*, 37(3) P.D. 141, *translated in* 8 SELECTED JUDGEMENTS 60 (same).

48. In fact, there is currently a debate regarding the status of even the “regular,” i.e., non-entrenched, provisions of the Basic Laws. This debate centers on the meaning of what is known as the “limitation provision” contained in Section 8 of the Basic Law: Human Dignity and Freedom which states: “Rights under this Basic Law must not be infringed, except by a Law appropriate to the ethical values of the State of Israel, which has a valid purpose, and then to an extent that does not exceed necessity, or under an aforesaid Law by virtue of an explicit authorization in it.” Basic Law: Human Dignity and Freedom, *reprinted in* GREENFIELD, *supra* note 41, at 10. For a discussion of this provision, see Barak-Eretz, *supra* note 17, at 327-30.

49. Israel has taken the unusual step, for a common law jurisdiction, of providing a statutory rule for judicial commitment to precedent. See Basic Law: Judicature § 20, 1984, 38 L.S.I. 101, 105, (1983-84) (“A rule laid down by a court shall guide any lower court. A rule laid down by the Supreme Court shall bind any court other than the Supreme Court.”).

50. See *id.* at 104.

the *millet* system originally granted autonomy to every non-Moslem religious community.⁵¹ The system was left largely intact by the British authorities during the Mandatory period and still endures to this day.⁵² In its present form, matters of personal status, that is, marriage and divorce, are within the sole jurisdiction of the respective religious communities.⁵³ That is, Jews, Moslems, Druse, and Christian denominations have their own courts;⁵⁴ all, except the Christian denominations, are regulated by statute with the presiding judges being appointed by the President of Israel. Furthermore, these judges are paid by the state.⁵⁵

The final source of law is the precedents and legal principles of other common law jurisdictions. Like any common law system, Israeli courts are permitted to look to other jurisdictions for persuasive authority when the existing case law and statutory scheme fall silent regarding a particular issue. This practice does not simply follow from the fact that Israel is a common law jurisdiction; in fact, it can be traced to the first piece of legislation passed after independence. The first act passed by the Provisional Council of State (the precursor to the Knesset)—the Law and Government Ordinance, Section 11—provided that:

The law which existed in Palistine on the 5th Iyar, 5708 (14 May, 1948) shall remain in force insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provincial Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.⁵⁶

Preserving the existing law until later modified was consistent with the British approach during the Mandate. In particular, Article 46 of the Palestine Order-in-Council, 1922, prescribed the same approach, namely that “prevailing Ottoman law would remain in force unless modified by later legislation.”⁵⁷ Equally important, however, Article 46 permitted courts to rely on English common law and equity when confronting gaps,

51. See KRETZMER, *supra* note 1, at 12, 166-68.

52. See *id.* at 166-68.

53. See BIN-NUN, *supra* note 14, at 24 (citing Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953).

54. See, e.g., Druze Religious Courts Law, 1962, 17 L.S.I. 27, (1962-63).

55. Jewish law, *Halakhai*, plays a minor role in Israeli law outside of the *millet* system. See, e.g., BIN-NUN, *supra* note 14, at 25 (BIN-NUN quotes C.A. 191/51, DSC Vol. 8, at 179 (Supreme Court decision): “When Jewish law is claimed to apply universally the answer is that all religious law owes its effect in this country to the decision of the secular legislator.”). For a brief consideration of the position of Jewish law on the issue of restraints on alienation, see *infra* text accompanying note 84.

56. Law and Administration Ordinance, 1948, 1 L.S.I. 7, 9, (1948).

57. KRETZMER, *supra* note 1, at 12.

or lacunae, in the law. Thus, the practice of citing persuasive authority from other common law jurisdictions has a statutory basis.

Today, of course, Israeli courts (especially the Supreme Court) do not look exclusively to English precedent. Indeed, Article 46 was repealed by the Foundations of Law Act (1980),⁵⁸ which provides that, “where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage.”⁵⁹ Nevertheless, it is common practice for courts, especially the Supreme Court, to look abroad for persuasive authority when confronting a gap in the law. And in fact, one of the more common sources of persuasive authority is the United States, especially its Supreme Court precedent.⁶⁰

B. ISRAELI LAND LAW

1. *In General*

There can be little doubt as to the paramount importance of land in Israel. The first word of the Declaration of Independence is land, “*eretz*.”⁶¹ Avraham Granott, a prominent leader of the Jewish National Fund, an

58. 34 L.S.I. 181, (1979-80).

59. *Id.*

60. BIN-NUN notes that, “[g]enerally speaking, both the judicial systems and the legal writing of the English speaking world are still preferred [for comparative analysis and persuasive authority], and those of the United States are paid increasing attention.” BIN-NUN, *supra* note 14, at 20. Shapira states that, “[i]n fact, American Supreme Court cases are often cited and relied upon in Israeli constitutional adjudication.” Shapira, *supra* note 15, at 288. For examples of such reliance see H.C. 358/88, *The Association for Civil Rights in Israel v. The Central District Commander*, 43(2) P.D. 529, *translated in* 9 SELECTED JUDGEMENTS, 1 (citing three United States Supreme Court cases); H.C. 680/88, *Meir Schnitzer & Others v. The Chief Military Censor, Mr. Yitschak Shani & Others*, 42(4) P.D. 617, *translated in* 9 SELECTED JUDGEMENTS 77 (relying on three United States Supreme Court decisions); H.C. 246, 260/81, *Agudat Derekh Eretz v. Broadcasting Authority*, 35(4) P.D. 1, *translated in* 8 SELECTED JUDGEMENTS 21 (relying on one Supreme Court case); H.C. 652/81, *M.K. Yossi Sarid v. Chairman of the Knesset*, 36(2) P.D. 197, *translated in* 8 SELECTED JUDGEMENTS 52 (relying on four Supreme Court cases); E.A. 2, 3/84, *M. Neiman v. Chairman of the Central Elections Committee for the Eleventh Knesset*, 39(2) P.D. 225, *translated in* 8 SELECTED JUDGEMENTS 83 (relying on nineteen Supreme Court and Circuit decisions); H.C. 153/83, *Alan Levi v. Southern District Police Commander*, 38(2) P.D. 398, *translated in* 7 SELECTED JUDGEMENTS 109 (relying on nine Supreme Court decisions); *Barzilai v. Government of Israel*, 40 P.D. (3) 40, *translated in* 6 SELECTED JUDGEMENTS 1 (relying on thirteen state and federal decisions); Cr.A. 126/62, *Dissenchick v. Attorney General*, 17(1) P.D. 164, *translated in* 5 SELECTED JUDGEMENTS 152 (relying on seven Supreme Court decisions); H.C. 73/53, *Kol Ha’am Co. Ltd. v. Minister of Interior*, 7(1) P.D. 871, *translated in* 1 SELECTED JUDGEMENTS 90 (relying on nine Supreme Court decisions); H.C. 65/61, *Jabotinsky v. Weizmann*, 5 P.D. 801, *translated in* 1 SELECTED JUDGEMENTS 75 (relying on nine Supreme Court decisions).

61. Declaration of the Establishment of the State of Israel, 1948, 1 L.S.I. 3, (1948).

organization that today controls nearly one-fifth of the land in Israel, noted in 1936 that Jewish control of land was “quite literally [a question] of life and death for Zionism and the Jewish National Home.”⁶² Indeed, even the most causal observer of current events in Israel could recognize that the issue of land is central to the Israeli psyche.

The first thing to note about land, or real property, in Israel is the fact that it is largely owned and controlled by the state.⁶³ Unlike the United States, there does not exist in Israel a large market of freely-alienable private property. At the same time, this does not mean that no one owns property in Israel. In fact, while 90% of the real property in Israel is controlled by the state,⁶⁴ much of that land is leased out to individuals and private entities (such as kibbutzim, or collectives) by the state through long-term leases (usually ninety-nine years).⁶⁵ Nevertheless, the ultimate interest in that land resides with the state and cannot be permanently transferred.

The vast majority of land controlled, in one form or another,⁶⁶ by the Israeli government can be divided into two categories: state lands and JNF⁶⁷ lands. Under the Basic Law: Israel Lands (1960),⁶⁸ none of this land can be permanently transferred: “Lands in Israel of the state, the Development Authority, or the JNF, shall not be transferred by sale or any other manner.”⁶⁹ Although the present study focuses on the nature and consequences of restrictive covenants placed on the JNF controlled property, a brief word should be devoted to the public lands. Israel consists of roughly 20,255,000 dunams (one dunam = 1/4 acre, 1000 dunams = one sq. km.), and 15,205,000 dunams are state owned.⁷⁰ Of that, the Negev desert constitutes approximately 10,100,000 dunams.⁷¹ Thus, the government directly owns 75% of the real property in Israel. This property, in turn, is leased out through the Israel Lands Administration

62. KRETZMER, *supra* note 1, at 49 (quoting AVRAHAM GRANOTT, *THE LAND ISSUE IN PALESTINE* 12 (Jerusalem, 1936)).

63. See KRETZMER, *supra* note 1, at 49-76 (discussing the control of land in Israel).

64. See *infra* text accompanying note 79.

65. See KRETZMER, *supra* note 1, at 60-69. See also Nomi Stoltzenberg & David Myers (unpublished manuscript on file with author).

66. Whether JNF lands are truly controlled by the “state” is debatable and constitutes part of the present inquiry. See *infra* Part IV.A.1, B.1-2.

67. See discussion of JNF lands *infra* Part II.B.2.

68. 14 L.S.I. 48, (1960).

69. *Id.*

70. See KRETZMER, *supra* note 1, at 74-75 n.72 (relying on ISRAEL LANDS ADMINISTRATION, *REPORT FOR 1961/62* (Jerusalem, 1962)).

71. *Id.*

(ILA), the governmental body charged with administering all Israel land.⁷² As an organ of the state the ILA is legally prohibited from overtly discriminating on the basis of race, religion or sex, and thus leases Israel lands to both Jews and Arabs.⁷³

2. JNF Lands

More important for the present study are JNF-controlled lands, which are governed by a restrictive covenant barring Arabs from leasing the land.

The JNF was originally established in 1901 at the Fifth Zionist Congress for the purpose of purchasing land in Palestine and Syria for the settlement of Jews.⁷⁴ It was set up as an official part of the Zionist Organization (later the World Zionist Organization, WZO), and was separately registered in London as a limited company.⁷⁵ After 1952, the JNF was overseen by the WZO and the Jewish National Agency Status Law, which applied to all institutions of the WZO.⁷⁶ Yet, the lands owned by the JNF remained registered in the name of the English company. In 1953 the Jewish National Fund Law was passed, which provided that, upon agreement between the English company (i.e., the JNF) and the Minister of Justice, all JNF-held lands would be transferred to a newly-formed Israeli company.⁷⁷ Shortly thereafter in 1953, the JNF and the Minister of Justice did come to an agreement, and the lands were transferred to the new company, called Keren Kayemet le-Yisrael (still known in English as the JNF).⁷⁸

The substance of that agreement—the memorandum and articles of incorporation of the new company—constitutes the restrictive covenant governing JNF lands. In particular, the memorandum of the new company approved by the Minister of Justice states that the primary objective of the JNF is:

72. See Israel Lands Administration Law § 2(a), 14 L.S.I. 50, (1960).

73. This should in no way be taken to deny the institutional, or de facto, discrimination that occurs on a daily basis against Arabs in the leasing of property. While it is true that the ILA does lease land on a regular basis to Israeli Arabs, the manner in which those leases are conducted is very different from the way it is conducted *viz* Jews. In other words, while JNF and state lands are legally different, in the final analysis, institutional discrimination blurs any practical difference between these two for Israeli-Arabs. See KRETZMER, *supra* note 1, at 89-115 (describing overt and covert discrimination in Israel).

74. See *id.* at 49-50.

75. See *id.*

76. World-Zionist Organization—Jewish Agency (Status) Law, 1952, 7 L.S.I. 3, (1952-53).

77. See Keren Kayemet Le-Israel Law, 1953, 8 L.S.I. 35, (1952-53).

78. See KRETZMER, *supra* note 1, at 61.

purchasing, acquiring by lease or exchange, receiving by lease or in any other way, lands, forests, rights of possession or easements and all other such rights, as well as immovable property of any sort, in the designated area (which includes the State of Israel and any area controlled by the Government of Israel) *for the purpose of settling Jews on the said lands and property.*⁷⁹

The memorandum then goes on to state the following:

provided that the object stated in sub-section a. [quoted above] of this section shall be regarded as the main object of the company, while the powers listed in the following sub-sections shall be carried out so as to assist, in the opinion of the company, in achieving the said object.⁸⁰

These two provisions in the JNF-government agreement have been understood to bar any long-term leasing of JNF lands to non-Jews.⁸¹ This fact remains despite the fact that since 1960, all JNF lands have been administered by the ILA (Israel Land Administration). As noted above, under Basic Law: Israel Lands, as well as its counter-part legislation, the Israel Lands Administration Law of 1960, all JNF lands were to be administered by the ILA (with the JNF's main function becoming land reclamation). Nevertheless, this legislation was accompanied by a covenant between the government and the JNF which mandated that the ILA must administer JNF lands in accordance with the memorandum and articles of association of the JNF (quoted above). Thus, even though JNF lands are administered under the governmental organ of the ILA, the full force of the restrictive covenant barring the alienation (through long-term lease) of JNF property to non-Jews remains in effect.

It might be tempting to downplay the significance of these restrictions on the practical ability to buy (through long-term lease) real property in Israel. The government directly owns, as mentioned above, nearly 75% of all land in Israel. The JNF owns *only* about 19-20% of the total land in Israel (approximately 3,570,000 dunams).⁸² While almost 20% is not negligible, one might assert that there is plenty of room for everyone. However, a closer look at the numbers reveals just how significant the issue is from a practical point of view.

Although the government owns 75% of the land, nearly two-thirds of it is located in the Negev desert, which for all intents and purposes is non-

79. Memorandum of Keren Kayemet le Yisrael § 3(a), *reprinted in* KRETZMER, *supra* note 1, at 61-62.

80. *Id.* at 62.

81. *See id.* *See also* Stoltzenberg & Myers, *supra* note 65, at 10.

82. *See* KRETZMER, *supra* note 1, at 75 n. 75.

cultivable.⁸³ Thus, upon excluding the Negev, which constitutes half of Israel's territory, or roughly 10,100,000 dunams, it turns out that the state owns roughly 5,100,000 dunams while the JNF owns 3,570,000 dunams. In other words, the JNF owns nearly 45% of the cultivatable and urban property in Israel; property that is off-limits to all non-Jews.

C. QUESTION FRAMED

It is clear that the JNF restraint on the alienation of property under its control sets forth a crucial issue for Israel. The immediate and palpable effect is the *legal* closing off of almost half of the agricultural and urban property in the state of Israel to all non-Jews. But, even more important is the significance that this restriction holds for the state of Israel, as a Jewish and liberal-democratic state. Thus, can Israel rightfully claim a place within the *liberal* tradition—with the full panoply of *individual* rights and freedoms—while at the same time sanctioning this type of arrangement? Or does the JNF restriction simply reveal Israel to be more a *democracy* than a liberal-democratic society: a nation of pure majority, that is, Jewish, rule without regard in the final analysis to individual rights? In short, can Israel live up to the dual ideals set forth in the Declaration of Independence?

The Israeli Supreme Court has not yet ruled on the legality of the JNF restraint on alienation.⁸⁴ The present study will consider how the Court might decide with the larger issues mentioned above in mind; in particular, it will examine the status of the restraints in light of the American experience. Of course, any comparison between the United States and Israel must be mindful first and foremost with the vast differences between the two countries.⁸⁵ However, the goal of this piece is not to simply transplant wholesale American “precedent” into the Israeli context. Rather, it is to first evaluate the status of the JNF restrictions in light of the long American history of dealing with similar arrangements, and second to consider the very consequences of an Israeli court taking up the issue in the first place.

83. See *supra* text accompanying note 71.

84. The issue almost arose in 1987 when an Arab real estate agent from Haifa challenged the JNF restrictive covenant. After a legal device was used to transfer the property at issue to the state (thus releasing it from JNF restrictions) the Supreme Court petition was withdrawn. See KRETZMER, *supra* note 1, at 75 n. 76.

85. See generally Shapira, *supra* note 15 (noting the many differences between the American and Israeli situations).

It is important to note that considering the JNF restraints on alienation in light of the American experience is not simply academically intriguing. In fact, the Israeli Supreme Court might very well find it necessary to look abroad were it to take up the JNF matter because all of the other sources of law listed above are ambiguous. Clearly, the Declaration of Independence, notwithstanding its questionable legal status, leaves open the question of whether Israel is a liberal-democratic state or Jewish state. The former would compel a court to invalidate the arrangement while the later might allow it to be upheld. The body of statutes coming out of the Knesset is similarly ambiguous. While the legislation accompanying the JNF-government agreement clearly sanctions the restrictions, other statutes appear to recognize an over-arching principle of equality. More to the point, the Kiryat Arba opinion of the Attorney General clearly states that overt discrimination on the part of a governmental body is strictly prohibited.⁸⁶ Similar ambiguities run through the case law, with some decisions holding in favor of complete parliamentary sovereignty, while other decisions appear to interpret statutes as narrowly as necessary in order to trigger the strictures of the equality principle.⁸⁷

Thus, it is quite likely that the Israeli Supreme Court might find that the issue falls within a lacuna, or gap, in the law. As noted earlier, in the case of a lacuna, the Court is permitted to consider the persuasive authority from other jurisdictions. And given its proclivity in the past to consider American precedent,⁸⁸ the following analysis is more than an academic exercise.

III. THE AMERICAN EXPERIENCE

Discrimination in the United States with respect to the purchase and sale of real property has undergone a series of phases over the last century. For the present purpose, the history can be broken down into three phases: First, the pre-*Shelley* period marked by overt discrimination and selective enforcement of rules against restraints on alienation; second, the modern

86. See KRETZMER, *supra* note 1, at 11.

87. Note that even Jewish Law, *Halakha*, is ambiguous on this point: "The land shall not be sold in perpetuity." *Leviticus* 25: 23. The interpretation of this verse depends on the frame of reference. If the frame of reference is simply the Jewish state, or the Jewish people, then the land could remain exclusively Jewish so long as it does not remain in the hands of an particular individual or family. On the other hand, if the frame of reference is the entire world then the JNF restriction would violate the Law, insofar as it holds in perpetuity the land for a particular people. It seems that the latter frame of reference is the more plausible, especially given the biblical status of Jews as the "Chosen People." Without the wider frame of reference, this status has no meaning.

88. See *supra* text accompanying note 60.

period after *Shelley*, which viewed any form of discrimination (that is, restraint on alienation) with suspicion; and third, the more contemporary period which still bars overt discrimination but is more willing to make exceptions in cases of reasonableness (that is, reasonable restraints on alienation).

A. STAGE 1: SELECTIVE ENFORCEMENT OF CLASSICAL LIBERAL THEORY
REGARDING RESTRAINTS ON ALIENATION

1. *Traditional Liberalism*

The principle of a free and open market in real property is central to the classical liberal tradition. In turn, the ability to alienate one's property without restraint has traditionally been seen as central to maintaining a free and open market in land.⁸⁹ Despite this complimentary relation, liberalism and the rule against restraints on alienation are not simply synonymous.

First, from an historical point of view, the common law rule barring restraints on alienation emerged, ironically, as part of an effort to maintain the feudal system beginning with the statute of Quai Emptores in 1290.⁹⁰ Ironically, the rule became one of the primary legal weapons against the last vestiges of feudal society. On the other hand, classical liberalism came into its own in the Eighteenth Century with such figures as John Locke and Adam Smith.⁹¹ It was not until then that liberalism and the common law rule converged to express what many today take for granted: that the right to alienate one's property understood as a correlate to the general ideals of freedom and equality.⁹²

However, from a more normative point of view, there exists a tension between liberalism and the rule against restraints on alienation. This

89. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS Part II, Introductory Note (1981) ("[m]uch of modern property law operates on the assumption that freedom to alienate property interests which one may own is essential to the welfare of society").

90. See *id.* (commenting that the rule against direct restraints on alienation is older than the rule against perpetuities, and traces its history to the beginnings of the 13th century). See also JOHN GRAY, RESTRAINTS ON ALIENATION § 18 (2d ed. 1895) (citing back to the 13th and 14th centuries in support of the rule against restraints on alienation).

91. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publishing Co. 1980); ADAM SMITH, WEALTH OF NATIONS (Laurence Dickey abr., Hackett Publishing Co. 1993) (1776).

92. See Stoltzenberg & Myers, *supra* note 65. Cf. HANNAH ARENDT, THE HUMAN CONDITION 110 n.56 (1958) ("No doubt, 'before 1690 no one understood that a man had a natural right to property created by his labour; after 1690 the idea came to be an axiom of social science.'") (quoting RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 156 (1951)).

tension, really a counter-force internal to liberalism itself, expresses itself most clearly in the fact that equally valid rights—from the point of view of liberalism—exist on the side of the individual attempting to impose the very restraints on alienation which the common law rule rejects.⁹³ In other words, in contradistinction to the present property owner's right to alienate stands the competing right of the seller (and buyer who enters into contract with the seller) who wishes to lay down such restrictions. As Stoltzenberg and Myers succinctly put the issue:

The rationale for the rule against restraints on alienation is that restraints on the owner's right to alienate her property infringe upon her freedom, her individual autonomy, and thereby undermine the conditions of equal opportunity and open competition upon which the free market depends. And yet there is a tenuous balancing act here: restraints on alienation are as much an *expression* of the autonomy of the individual property-owner who consented to their creation as they are an infringement.⁹⁴

This tension within liberalism will be discussed at more length below, especially with respect to the relatively new reasonableness (*viz.* restraints on alienation) standard.⁹⁵ For now, it is sufficient to note the fact that in the United States, courts ostensibly sided with the strict rule against restraints on alienation and the vein of liberalism that coincided with it.⁹⁶ Nevertheless, beginning with restrictive zoning practices until 1917 when the Supreme Court ruled them unconstitutional in *Buchanan v. Warley*,⁹⁷ and with private racially-restrictive covenants thereafter, much of the early American experience in the realm of property law witnessed overt racism towards African-Americans, Jews, Asians, Native Americans and other minorities. In short, Nineteenth and early Twentieth Century America claimed the strictest adherence to the principles of private property and classical liberalism embodied in the common law rule against restraints on

93. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS Part II, Introductory Note (1981) ("The policy in favor of freedom of alienation has always conflicted somewhat with the contrasting policy that one who owns property should be able to transfer it, subject to such qualifications as he may desire to impose.").

94. Stoltzenberg & Myers, *supra* note 65, at 18.

95. See *supra* Part III.C.2.

96. See, e.g., *Blackstone Bank v. Davis*, 38 Mass. (21 Pick.) 42 (1883) (holding invalid a disabling restraint on alienation of a fee simple absolute); *Smith v. Dunwoody*, 19 Ga. 237 (1856) (same); *Ogle v. Burmister*, 124 N.W. 758 (Iowa 1910) (same); 6 AMERICAN LAW OF PROPERTY § 26.15 (A.J. Casner ed. 1952). Cf. *Murray v. Green*, 28 P. 118 (applying CAL. CIV. CODE § 711 (West 1954) to hold invalid a disabling restraint on alienation); *Alderman v. Crenshaw*, 66 S.E.2d 265 (GA. 1951) (applying GA. CODE ANN. § 44-6-43 (1981) to hold similarly). See also RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS, Part II Introductory Note (1981) (commenting that the rule against restraints on alienation were traditionally stricter than the rule against perpetuities).

97. 245 U.S. 60 (1917).

alienation while in practice selectively enforcing that rule against minorities by suspending its application to racially restrictive covenants.

B. STAGE 2: THE MODERN POSITION

The practice of selective enforcement of the common law rule against restraints on alienation in the service of racism began to see an end, at least at a national level, with the landmark case of *Shelley v. Kraemer*.⁹⁸ The case grew out of a dispute among homeowners over a private covenant entered into in 1911 restricting the sale of homes in a neighborhood to whites only. When an African-American family (the Shelleys) moved into one of the homes, a white party to the original agreement brought suit to restrain the Shelley family from taking possession of the property. The trial court refused to enforce the covenant on the grounds that it was defective, but the Supreme Court of Missouri, sitting en banc, reversed in favor of the white petitioners. The United States Supreme Court reversed, refusing to allow enforcement of such a covenant on the grounds that the Fourteenth Amendment bars a court from granting relief for the violation of a racially-restrictive covenant. More precisely, the Court held that, first: enforcement by state courts of racially restrictive covenants constitutes state action under the Fourteenth Amendment because “but for the active intervention of the state courts . . . petitioners would have been free to occupy the properties in question without restraint;”⁹⁹ and, second: such enforcement violates the equal protection clause of the Fourteenth Amendment.

Most scholarship surrounding *Shelley* has focused on the issue of state action.¹⁰⁰ In particular, many critics have noted that the wide view of what constitutes state action articulated by the Court in *Shelley* runs the risk of conflating the private and public spheres insofar as every private agreement (that is, contract) is ultimately backed by the powers of the state.¹⁰¹ However, it is just as significant, especially in the present context, to note what *Shelley* represents with respect to the classical liberal position regarding restraints on alienation. If nothing else, *Shelley* marks the end of

98. 334 U.S. 1 (1948).

99. *Id.* at 23.

100. See, e.g., GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 938-42 (1997); Stoltzenberg & Myers, *supra* note 65; Louis Henkin, *Forward: On Drawing Lines*, 82 HARV. L. REV. 63 (1968).

101. See Stoltzenberg & Myers, *supra* note 65. For examples of judicial reluctance to follow the logic of *Shelley*, see *Barrows v. Jackson*, 346 U.S. 249 (1953) (Vinson, J., dissenting); *Rice v. Sioux City Mem'l Park Cemetery*, 60 N.W.2d 110 (Iowa 1953).

a glaring exception to the traditional common law rule against restraints on alienation and the traditional liberal position supporting the common law rule.¹⁰² Moreover, in view of the counter-force within liberalism favoring freedom of association and contract outlined above, *Shelley* can be seen as a hardening of the traditional common law rule and that line of liberal thought that celebrates *individual* autonomy.

The emphasis on individual rights, in contrast to group rights, is a natural consequence of the fact that *Shelley* emerges in an era that emphasized, at least officially, the idea of integration.¹⁰³ For very legitimate reasons, those leading the struggle for civil rights in America had come to view with suspicion, if not outright hostility, the notion of group rights or “rights of association.” With the Supreme Court decisions such as *Brown v. Board of Education*¹⁰⁴ and the Civil Rights Act of 1965,¹⁰⁵ the official policy of the United States took a decisive turn in favor of integration, even if came at the cost of impinging on the freedom of individuals. In the case of *Shelley*, of course, the values of integration overrode the private wishes of neighboring homeowners (and the past owner of the Shelley home).¹⁰⁶

102. There is little case law following *Shelley* that deals with racially restrictive covenants. Most cases summarily decide the matter by simply citing *Shelley*. Furthermore, today there exist statutory bars against such covenants at the federal and state levels. *See, e.g.*, Fair Housing Act (FHA) 42 U.S.C. § 3601 (1994) (“[I]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”); 42 U.S.C. § 3604 (1994) (prohibiting discrimination in sale or rental of housing on the basis of race, color, religion, sex, familial status, or national origin); CAL. CIV. CODE § 53(b) (1982) (“Every restriction . . . whether by way of covenant . . . or upon transfer of title to real property, which restriction . . . directly or indirectly limits the acquisition, use or occupancy of such property because of the acquirer’s, user’s or occupier’s sex, race, color, religion, ancestry, or national origin is *void*.”); N.J. STAT. ANN. § 46:3–23 (West 1989) (“[A]ny promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property . . . which limits, restrains, prohibits, or otherwise provides against the sale, grant, gift, transfer, assignment, conveyance, ownership, lease, rental, use or occupancy of real property to or by any person because of race, creed, color, national origin, ancestry, marital status, or sex is hereby declared to be void as against public policy, wholly unenforceable”) (emphasis added).

103. It should be noted that although *Shelley* remains a key feature in the legal framework ensuring civil rights in America, the Civil Rights Movement itself did not truly emerge for another ten years. One interpretation of this focuses on the fact that *Shelley* concerned itself with private action; when it became clear that the minimal regulation of private action permitted under the Constitution would not achieve the equality between the races first hoped for it became necessary to mandate equality through statute (i.e., the Civil Rights Act of 1965).

104. 347 U.S. 483 (1954).

105. Civil Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.)

106. It is important to note that in the wake of *Shelley*, the American experience witnessed a rash of so-called “white flight,” the practice of moving to predominantly white suburbs when faced with the influx of a minority, and racial steering, in which African-American and other racial (and religious)

What is important to keep in mind, for the present study, is the fact that post-*Shelley* America, one might say modern America, has taken a specific position within the liberal tradition—namely, in favor of individual rights over group rights, and of almost total integration over any notion of separateness. Post-*Shelley* America extends the traditional common law rule against restraints on alienation.

C. STAGE 3: THE REASONABLENESS STANDARD

The position outlined above was referred to as the “modern position.” Yet, many might find the notion of total integration, even at the cost of associational rights, outdated. One common illustration of this possible, post-modern, reaction is the recent emphasis on cultural identity.¹⁰⁷ Blind integration is characterized as conformity; one does not necessarily strive to simply enter mainstream society, rather the individual seeks to achieve equal footing as an African-American, as a Native-American, etc.¹⁰⁸ In short, the “melting-pot” has been replaced by the “salad-bowl.”

Property law in the United States has not remained immune to such social forces. In fact, American property law to a large extent reflects and facilitates this movement. From cooperative apartment and condominium complexes, to large scale development projects, Americans in recent years have attempted to use the rules governing property to develop and maintain a group or community identity.¹⁰⁹ Some of these trends might be attributable to either a reaction against the integrationist policies coming out of the civil rights era,¹¹⁰ or the natural tendency of Americans to form and utilize groups.¹¹¹ But whatever its cause, the use of property law to

minorities were “steered” into segregated housing. See Stoltzenberg & Myers, *supra* note 65, at 13-19. This no doubt, contributed to the passage of the Civil Rights Act and the FHA.

107. See, e.g., JOHN H. BUNZEL, RACE RELATIONS ON CAMPUS 107-41 (1992) (discussing the dilemmas of power and assimilation); CRISIS IN AMERICAN INSTITUTIONS (Jerome H. Skolnick & Elliott Currie eds., 9th ed. 1994); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA, REFLECTIONS ON A MULTICULTURAL SOCIETY (1991) (commenting on the rising ethno-centric trends in American society, especially in institutions of higher education).

108. See SCHLESINGER, *supra* note 107, at 101-18; Jacob Weisberg, *Thin Skins*, THE NEW REPUBLIC, Feb. 18, 1991 at 22 (“Increasingly, Oberlin students think, act, study, and live apart. . . . The result is separate worlds.”).

109. See *infra* Part III.C.1.

110. See Stoltzenberg & Myers, *supra* note 65, at 16 (discussing “white-flight” and other reactions to the court decisions and legislation implementing an integrationist policy).

111. See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 1 (1989) (“[W]e are a society of groups. De Tocqueville’s observation that the principle of association shapes American society remains as valid today as it was in the mid-nineteenth century.”).

further the homogeneity of various groups has begun to gain acceptance by courts and the attention of scholars.

1. *Doctrinal Evidence*

Perhaps the most salient example of the law's movement towards a more accommodating view with respect to group rights, or group autonomy, is the most current Restatement's position on restraints on alienation: "A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."¹¹² Under this standard, the per se rule against direct restraints on the alienation of a fee simple absolute is abandoned in favor of a test that takes into account a number of social factors.¹¹³ These reasons could range from maintaining control over the character of the property to furthering a charitable purpose or preserving land in the name of conservation.¹¹⁴

However, although the reasonableness standard might represent a departure from the traditional common law rule,¹¹⁵ as was intimated above, it is not entirely at odds with liberalism. Indeed, liberalism expresses the rights of property owners not so much as a per se rule but more as a tension: between the right to contract and set down restrictions on one's property and the right of property owners to freely alienate their ownership. The new reasonableness standard simply acknowledges and makes explicit this tension within the liberal tradition.

112. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 (Tentative Draft No. 2, 1991).

113. *See id.* § 3.4 cmt. c (discussing the various factors relevant to determining reasonableness).

114. *See id.*

115. It should be noted that, in this instance, the Restatement is not simply wishful thinking as in the realm of torts or especially criminal law (i.e., the Model Penal Code). The Restatement position on restraints on alienation *does* reflect modern American common law. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4 reporters note (Tentative Draft No. 2, 1991) ("Application of a reasonableness test to restraints on alienation of all estates, including fees simple, is generally accepted."). For examples of such application of the reasonableness test, see *Gale v. York Ctr. Community Coop., Inc.*, 171 N.E.2d 30, 33 (Ill. 1960) (adopting a balancing test for restraints on alienation, where the utility of the restraint is compared with the injurious consequences that will flow from its enforcement); *Iglehart v. Phillips*, 383 So.2d 610, 614 (Fla. 1980) (using similar test); *Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136 (Ct. App. 1981) (using rational relation form of reasonableness test); *City of Oceanside v. McKenna*, 264 Cal. Rptr. 275 (Ct. App. 1989) (competing policy considerations lead to an exception to the traditional rule against restraints on alienation).

2. Emergence of Group Rights

As noted at the outset of this section, the reasonableness standard has emerged most often in the context of group or communal property. In turn, this phenomenon has generated some provocative scholarship on group rights in America. Moreover, the study of group rights is not limited to legal circles.¹¹⁶ An equal number of philosophical¹¹⁷ and social science¹¹⁸ works have given thorough treatment to the issue.

What emerges from these studies is a complex picture of the social group and its place in society. As Gregory Alexander has pointed out, the notion of group rights is not a unitary concept.¹¹⁹ In fact, Alexander identifies two main approaches to group rights, each with its own set of precepts and consequences: the public choice/pluralist theory and communitarianism. Both attempt to define the proper role of the social group *viz* the individual and society as a whole.

On the one hand, public choice/pluralist theory essentially understands intentional groups (as opposed to ascriptive or non-intentional groups),¹²⁰ as little more than the “mere aggregation of individual choices.”¹²¹ The cohesion of the group derives from its contractarian nature: “Voluntary associations . . . come into being when individuals calculate that the costs

116. See, e.g., Alexander, *supra* note 111 (discussing pluralist/public choice and communitarian theories of group rights); Ronald R. Garet, *Communitarianism and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983) (distinguishing group rights from individual and social rights by placing all three within a common framework); Ronald R. Garet, *The Rights of Groups: Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893 (1991-92) (exploring the intrinsic value of social groups and its possible legal recognition); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994) (discussing how nonconstitutional doctrines reflect social ambivalence about decentralized communities). Cf. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (setting forth a normative framework in which groups are conceived as legal “worlds” by virtue of their respective law).

117. See, e.g., ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWINDLER & STEVEN TIPTON, *THE GOOD SOCIETY* (1991); ARENDT, *supra* note 92.

118. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); EARL LATHAM, *THE GROUP BASIS OF POLITICS* (1952); ROBERT H. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* (1975); J. David Greenstone, *Group Theories*, in *MICROPOLITICAL THEORY* 243 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

119. See Alexander, *supra* note 111.

120. See *id.* at 26. Although somewhat debatable, pluralists and public choice theorists distinguish groups into two categories: voluntary and non-voluntary groups. “Clear examples of voluntary associations are clubs, fraternal organizations, religious societies, and the like.” *Id.* at 21. Non-voluntary groups are families and religious denominations. However, some (including Alexander with regard to family) deeply disagree with characterizing even family and religion as non-voluntary. See *id.* at 27.

121. *Id.*

of acting in concert with others to pursue some convergent good are lower than the costs of pursuing that goal individually.”¹²²

The public choice/pluralist arguments for group autonomy flow directly from this understanding of the group. The intentional group—essentially a collection of “preference-maximizing individuals”¹²³—deserves immunity from state control because the individual members, as autonomous selves, possess either the freedom to contract or the freedom to associate with their fellow citizens.¹²⁴ In other words, the legitimacy of group autonomy from the pluralist/public choice view, essentially derives from an extension of “the familiar liberal arguments for individual autonomy to the group context.”¹²⁵

On the other hand, communitarian theory takes a more substantive view of the group as such.¹²⁶ While agreeing with pluralist/public choice theory that groups are an enriching and valuable aspect of our society, communitarians understand groups as much more than the sum of its individual members.¹²⁷ Rather than coming together simply to maximize one’s personal, albeit shared preference, communitarians see individual group members “drawn together by shared visions that constitute for each of them their personal identity.”¹²⁸ Thus, in the final analysis, communitarians must “deny that the self is autonomous,”¹²⁹ and instead conceive the individual only within the context of community. Put in a slightly different way, while the pluralist/public choice theorist understands individuals to bring their own notion of the good to the group (and only for the purpose of enhancing it), the communitarian sees the individual coming to (an initially) separate notion of the good, one that exists inseparable from the group.

What is important to keep in mind at this point is that each of these strands of group rights theory finds their place within the reasonableness

122. *Id.* at 21.

123. *Id.* at 30.

124. This glosses over a distinction that Alexander observes within the pluralist/public choice school between those who ground group autonomy on the principle that individuals, as free and autonomous agents, have the right to associate as they see fit, and those who stress the welfare maximizing benefits that derive from the existence of groups. *See id.* at 28-30. For purposes of the present study, it is sufficient to recognize strict individual autonomy as the normative foundation of pluralist/public choice theory as a whole.

125. *Id.* at 30.

126. *See id.* at 22-24.

127. *See id.* at 23.

128. *Id.* at 26.

129. *Id.* at 23.

standard. A per se rule against restraints on alienation is ultimately hostile to either communitarianism or public choice theory.

IV. THE AMERICAN EXPERIENCE FOR ISRAEL

The American experience thus appears to offer three possible alternatives for an Israeli court attempting to determine the validity of JNF-imposed restraints on the alienation of its property. However, another issue, common to both the American and Israeli systems, remains central to the consideration of the JNF restraints: the problem of state action.¹³⁰ The difficult issue of whether the JNF is a state actor has so far not been discussed. A full treatment of the issue lies beyond the scope of this paper.

Nevertheless, whether the JNF is construed as a public or private entity directly affects the analysis of the restraints on alienation currently at issue. Indeed, the three approaches outlined above manifest themselves quite differently when seen through either the lenses of state action or private actor. Thus, given the centrality of this issue and the limited scope of the study, the most prudent course is to avoid solving the state action problem directly and instead consider, in turn, the relevance and persuasion of the American experience assuming first that the JNF is a state actor, and then second that it is a private entity.

A. JNF AS STATE ACTOR: RESTRICTIONS PUBLICLY-IMPOSED

The JNF could simply be construed as a state actor. The fact that JNF lands are administered by a governmental agency (the ILA) that the Minister of Justice signed off on the restrictions on behalf of the state, and finally that the Knesset passed two pieces of legislation authorizing the current scheme, all combine to make the JNF an organ of the state.¹³¹ If the High Court were to interpret the issue in this manner, the first two American approaches outlined above, segregationist and integrationist, could apply. The reasonableness standard does not come into play because that approach only bears upon clearly private action.

130. Like in the United States, wholly private actors are by and large immune from many of the laws that bind government entities. See KRETZMER, *supra* note 1, at 14, 115-29. There is however some support for the view that corporations and other institutions that fulfill public functions are subject to the same principles that bind government entities, in particular the equality principle. See KRETZMER, *supra* note 1, at 14 (citing *Micro-Daf v. Elec. Corp.*, 41(2) P.D. 449).

131. See *supra* Part II.B.2.

1. “*Separate and Unequal*”

Enforcing a statutory scheme that explicitly favors Israeli Jews at the cost of Israeli Arabs is clearly at odds with the central principles for which Israel has come to stand. Overt judicially-sanctioned discrimination against a racial minority runs counter both to the traditional common law, which was designed to promote the equality and freedom of the individual, and to either of the strands of liberalism outlined above.

Of course, this is not to deny the fact that the reality on the ground in Israel might very well resemble the selective enforcement phase of the American Experience.¹³² Even in areas covered by specific legislation outlawing discrimination in any form, Israeli Arabs nonetheless suffer from various levels of racism.¹³³ Moreover, it must be acknowledged that the particularist strands of Zionism might also endorse state-sponsored discrimination insofar as it preserves the “Jewishness” of the state.¹³⁴ Indeed, this brand of Zionism contributes to the institutional discrimination prevalent in Israeli society.

Nevertheless, legitimizing the unfortunate reality of racism in the context of property ownership by simply refusing to apply the principles of freedom and equality to a class of citizens betrays many aspects of Israeli law touched on above. Most importantly, it would violate the principles of equality before the law found in the Declaration of Independence, various court decisions, statutes and executive opinions. Even with the limited judicial review outlined above, the principle of equality is sufficiently clear in almost all the sources of Israeli law for the Supreme Court to resist this approach.

2. *Total Integration or “Separate Is Inherently Unequal”*

Were the Israeli Supreme Court to adopt (and implement) the integrationist approach, it would no doubt require the total abolition of the JNF memorandum and articles of association. Both de jure and de facto discrimination would have to be completely exterminated. American authority, with no exception, universally holds racial classifications on the

132. See KRETZMER, *supra* note 1, at 115-29. Kretzmer refers to what we would call de facto discrimination as institutional discrimination. See *id.*

133. A notable example of this occurs in the educational system. See KRETZMER, *supra* note 1, at 169-70. Kretzmer states that “[o]ne of the areas in which institutional discrimination is almost endemic is education.” *Id.* at 170.

134. See *supra* Part I.

part of the state null and void.¹³⁵ As noted earlier, this practice is in line with a belief that separate is inherently unequal and leads to the proposition that integration should be favored even at the cost, at least in some cases, of the right of individuals to freely contract and associate.

However, the practical situation in Israel suggests that the High Court might resist such a decisive move. First, it could require answering the question of whether Israel is a Jewish or secular state; a question that has been deferred for a later date.¹³⁶ Adopting a *per se* rule against any restraint on alienation, in the American sense, which would effectively mandate an integrationist policy covering fifty percent of Israel's habitable lands might be too radical and explicit of a secular move. It might mean "taking a decisive position . . . on the religion and state dilemma. . . . [Which], in turn, is likely to deepen the cultural rifts within the society at a time when a struggle for physical survival is still raging."¹³⁷

Second, it would run counter to other aspects of Israeli law, in particular the *millet* system, which sanctions a certain separateness among groups in Israel. This is also reflected, as noted above, in the everyday practice of Israelis of maintaining a certain amount of group insularity through separate living, courts (regarding personal status) and education. The notion of a "color-blind" law is not an accurate portrayal of the Israeli legal system, at least when it is viewed in its totality. Thus, given the limited scope of judicial review, it would be difficult for the Court to invalidate a law that conflicts with liberal principles pronounced in certain areas of the law but contradicted in others (namely, the *millet* system).

Third, even if the integrationist approach were adopted, it is doubtful whether Israel would witness a massive change in ownership of JNF lands. Many, if not most, Jewish owners of such property might not be willing to sell to Arabs.¹³⁸ The ILA, controlled exclusively by Jews, might not be receptive to the idea of leasing to Arabs. And, just as significantly, Arab

135. See *supra* text accompanying note 100. See also *Taormina Theosophical Community, Inc. v. Silver*, 190 Cal. Rptr. 38 (Ct. App. 1983) (relying on statute and common law in part to invalidate a restraint on alienation); *Riste v. Eastern Washington Bible Camp, Inc.*, 605 P.2d 1294, 1295-96 (Wash. Ct. App. 1980) (relying on traditional common law rule against restraints on alienation and *Shelley v. Kraemer* to invalidate a religious restriction on alienation).

136. See *Shapira*, *supra* note 15, at 285-88 (noting that the whole rationale behind the Basic Laws was to adopt the constitution slowly). He goes on to note that there is a general consensus that it would be inappropriate to answer fundamental, constitutional questions while Israel is still struggling for its survival. See *id.* at 286-87.

137. *Id.* at 286.

138. See *Stoltzenberg & Myers*, *supra* note 65 at 26 (noting that a majority of Israeli's may favor group segregation).

individuals might very well not be interested in leasing JNF lands, especially urban property, insofar as it is populated by Jews. If the current demographic patterns are any evidence, it would appear that both Arabs and Jews prefer to a large degree to live amongst themselves, in sharply defined communities.¹³⁹ In sum, most Israelis, Arab and Jew alike, do not wish to live out the integrationist ideal enshrined in American law.

3. *Constraints of the State-Actor Approach*

As might be clear by now, viewing the JNF as a state actor leads to a legal dead-end for the Israeli Court. State-imposed discrimination or integration¹⁴⁰ are essentially untenable given the principles embraced by Israel and the realities present in Israeli society. A middle ground between these positions is needed. While the Israeli High Court Justices might very well be creative in crafting a remedy that captures that middle path, the American experience only offers total acceptance or rejection of state sponsored action. However, such a path does exist in the realm of private action.

B. JNF AS PRIVATE ENTITY: RESTRICTIONS PRIVATELY-IMPOSED

Despite evidence pointing toward state action, the JNF could plausibly be understood as a private entity.¹⁴¹ In fact, the JNF to this day remains a voluntary, Zionist organization. Moreover, the lands at issue here are still officially owned by the JNF. One could even argue that the memorandum and articles of association which impose the restraints on alienation can only be understood if the JNF is construed as a private organization.¹⁴²

At first blush this might appear as a more permissive approach, allowing the court to simply characterize the restraints on alienation as a purely private matter, outside of the reach of judicial control. Yet, ironically, calling the JNF a private actor opens the way for the greatest possible judicial intervention. As outlined above, the common law in general and United States precedent in particular provide ample authority for judicial scrutiny of private agreements. However, the three phases of

139. See, e.g., Meron Benvenisti, *Two Generations: Growing Up in Jerusalem*, N.Y. TIMES, Oct. 16, 1988 (magazine), at 34 (reporting that even the physical unification of Jerusalem failed to end segregation and isolation of the Arab and Jewish communities).

140. Note again that the effectiveness of state "imposed" integration would be limited at best.

141. For an elaboration of this argument, see KRETZMER, *supra* note 1, at 64-65.

142. In other words, the entire agreement between the government and the JNF is read literally so that the ILA only administers lands on behalf of the JNF, a private organization that continues to exist even after the agreement.

the American experience each offer a different understanding of the validity of private restraints on alienation. These three alternative approaches should be considered in turn.

1. *“Separate and Unequal”*

While it would be inappropriate for the Israeli Supreme Court to sanction public discrimination on the part of the JNF, approving private discrimination of the type found here, would constitute an even more egregious violation of the principles of liberalism. Thus, because once the Court construes the JNF a strictly private entity it is free to fashion whatever remedy it thinks appropriate without the direct impediment of statute. In other words, the Court sitting as a common law court is free to invalidate race-based restraints on alienation without worrying about the constraints of judicial review.¹⁴³

Given the traditional common law position regarding *any* direct restraints on the alienation of a fee simple,¹⁴⁴ it would be wholly inconsistent with the principles of liberalism enshrined in the Declaration of Independence, various statutes and numerous Court opinions if the JNF restrictions were allowed to stand. Selectively enforcing (or not enforcing) the common law rule against restraints on alienation coincides with an unfortunate chapter in American history that has for many years been closed. Thus, this approach is not only wrong with respect to the liberal tradition, in either forms outlined above, but also outdated.

2. *Integration*

The integrationist stage of the American experience would require a per se rule against any racial restraints on alienation, similar to that existing in the United States today. This approach would largely resemble the position outlined above with respect to barring any state sponsored racial discrimination. Likewise, however, the Israel-specific concerns raised by that path also bear relevance here. Namely, the peculiar dilemma of the church-and-state issue in Israel (i.e., a Jewish vs. a secular state), counsels caution in taking on a legal problem that may pronounce a decisive judgment one way or the other. Furthermore, other aspects of the Israeli legal system, in particular the *millet* system, suggest that a total integrationist position is not universally held by Israeli authority.

143. Cf. Foundation of Law Act, 1980, 34 L.S.I. 181, (1979-80) (allowing the Supreme Court to ignore even its own precedent).

144. Again equating, for practical purposes, long-term leases (99 years) with fee simple absolute.

Also important for the Israeli court in this context, sitting as a common law court, is the fact that the American experience itself lends reasons to reject integrationism, insofar as it does not reflect the most current position among courts, scholars, and perhaps even individual citizens. As intimated earlier, the notion of color-blindness is viewed as ignorance of cultural identity. Whether valuing community or the right of individuals to associate and contract among themselves, scholars and courts appear to have moved beyond a strict per se rule against restraints on alienation.¹⁴⁵ This in turn compels a consideration of the Reasonableness standard.

3. Reasonableness Standard

This is the most difficult, yet most promising, approach the American experience offers the Israeli Supreme Court. It is the most difficult because a reasonableness standard, by its very nature, resists a straight-forward, formulaic answer to legal questions.¹⁴⁶ Instead, it compels a court to weigh the specific factors that favor either side of the issue. It is the most promising for much the same reason: a reasonableness standard allows the court—within the bounds of liberalism—to approach the JNF restraints on alienation mindful of the practical constraints existing on ground.

Thus, the central question must be proposed: Is the restraint on the alienation of JNF property reasonable? Although this study limits itself to considering this question in light of the persuasive common law authority coming out of the United States, it might be fair to venture that the Israeli Supreme Court would likely find the restraints reasonable strictly given the situation on the ground in Israel. As touched on above, an invalidation of the JNF restraints could very well be interpreted as a blanket endorsement of the secular vision of the state. It is true that the Court might take a view on a particular issue more in line with the secular-state view as opposed to the Jewish state view. Yet, given the paramount importance of land in Israel and the scope of the issue in question here (covering roughly fifty percent of the habitable land), prohibiting restrictions that favor Jews in favor of a rule promoting “color-blind” integration might, even on the

145. With the exception of racial restrictions.

146. This is simply one example of the difference between rules and standards; between bright-lines and fuzzy balancing tests. See generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (developing a metaphor of “crystal” rules and “muddy” standards). Although it is important to resist over-simplifying this dichotomy (rules and standards in many instances resemble one another), there is a real difference between the two. See Alexander, *supra* note 111, at 56.

grounds of reasonableness, be too much for the Israeli polity to bear at this point. Moreover, the fact that other aspects of Israeli law sanction segregation weighs in favor of the reasonableness of the JNF restraints on alienation.

In view of the discussion on liberalism in Part III, one could assert that allowing JNF restrictions on alienation of its property to stand is totally inappropriate, even hypocritical. While freedom of association and contract are admittedly legitimate aspects of the liberal tradition, even those principles do not permit labeling a set of restrictions reasonable that essentially lock up fifty percent of the habitable land for the state's racial majority. In short, the JNF restrictions might not be reasonable in the liberal sense of the term.

This criticism deserves careful attention. Its premise is that the sheer weight of the JNF land restrictions outweigh any possible countervailing factors. Whether the Israeli Supreme Court can uphold the JNF restrictions without retreating from liberalism reintroduces the dilemma raised at the outset of this study and present throughout: does Israel exist as a liberal-democratic state or as a Jewish nation in which non-Jews are guests? It is impossible to answer this question fully here, or perhaps even in a wider discussion, but it is important to point out an aspect of the reasonableness approach that could represent a significant response to this criticism.

Considering again the notion of group rights occasioned by the reasonableness standard, it may be possible for the Israeli Supreme Court to uphold the validity of JNF restrictions while maintaining allegiance to the core principles of liberalism. As noted earlier, the notion of group rights can be understood through a pluralist/public choice theory or communitarianism. Both theories occupy a place within liberalism.¹⁴⁷ How then might the idea of group rights come into play in the Israeli context?

First, Israeli society suggests that the communitarian strand of group rights might be the more appropriate framework for the Court to adopt when considering the JNF restrictions. Although more individualistic today than in the 1950s or 1960s, Israel is still a society dominated by groups—groups that resist the pluralist/public choice characterization as a collection of preference maximizing individuals. Groups in Israel—in particular, Jews, Moslems, Christians and other religious denominations—all resemble much more closely the communitarian understanding, namely

147. See *supra* Part III.C.2.

associations where individuals come together to actualize a good inseparable from the group itself. In fact, even the pluralist/public choice theorist might agree that Judaism and Islam represent more of a community than a collection of preference-maximizing individuals.

Second, were the Court to explicitly frame the reasonableness test within a group rights/communitarianism theory it would, at least at a *normative level*, be committed to equality, but as between the various groups (communities) at issue. This commitment to equality grows out of the role courts play under the communitarian theory; a role which precludes stacking the deck in favor of one group. That is, communitarianism recognizes the need for legal arbitration between communities; the courts occupy a special place in preventing the domination of one group over the other.¹⁴⁸ Put more crudely, but nonetheless accurately, communitarianism permits separateness but requires courts to maintain equality between the various communities. Separate but equal.

Of course, it must be reiterated that the commitment to equality is strictly normative. If nothing else, the American Civil Rights Movement has proven the fallacy of separate but equal, at least in the United States. It is one thing to say that equality between discrete groups will be respected, it is another thing entirely to carry it out. Thus, given the present state of institutional discrimination in Israel, even the communitarian approach might not satisfy the criticism outlined above, at least for now. But it may go as the Court can at this point by subjecting the JNF restraints on alienation to unhindered judicial scrutiny and committing the Court to a normative role dedicated to equality.

V. CONCLUSION

The JNF restraints on alienation of its property represents a crucial issue for the state of Israel, both practically and normatively. The American experience highlights the various avenues the Israeli Supreme Court might consider in determining the validity of such restraints. Although at first appearing to be the strictest approach, analyzing the issue under a public-actor understanding of the JNF leads to a legal dead-end

148. See Cover, *supra* note 116, at 53. Cover states that [j]udges are people of violence. . . . But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence. The range of the violence they could command (but generally do not) measures the range of the peace and law they constitute.

Id. See also Alexander, *supra* note 111, at 33 (arguing that communitarianism recognizes and appreciates the regulative role of the state, i.e., judicial power).

given the Israeli situation. Instead, the American experience suggests that the JNF should be considered a private entity, thus permitting the Court full discretion insofar as it sits as a common law court.

While it is unlikely that the Israel Supreme Court would invalidate the JNF restriction at this point, viewing it as a private entity and applying the reasonableness standard would commit the Court to a normative position prescribing equality and judicial independence. In this sense, the reasonableness standard represents the best approach for the Israeli Supreme Court: The principles of liberalism and democracy are realized to the fullest extent possible given the situation on the ground in Israel. Moreover, the significance of this normative commitment should not be underestimated simply because the reasonableness approach probably fails to abolish the racial restrictions immediately. Rather, the reasonableness approach occasions a reconsideration of the relations between groups in Israel; a reconsideration that is committed to equality, the benchmark of a liberal democracy. And although the political situation might prevent an immediate change to the situation now, the reasonableness standard offers Israel the tools to continue and extend that reconsideration in the future.¹⁴⁹

149. For an example of such a reconsideration, or rather an opening to a reinterpretation of the social and political relations in Israel, see Emmanuel Levinas, *the State of Israel and the Religion of Israel*, in *DIFFICULT FREEDOM* 218 (1985). Levinas states:

The subordination of the State to its social promises articulates the significance of the resurrection of Israel as, in ancient times, the execution of justice justified one's presence on the land.

It is in this way that the political event is already outstripped. And ultimately, it is in this way that we can distinguish those Jews who are religious from those who are not. The contrast is between those who seek to have a State in order to have justice, and those who seek justice in order to insure the survival of the State.

Id.