

GUEST ESSAY

The Solution to Israel's Crisis Might Be in America's Constitution

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The political crisis engulfing Israel has raised profound and fundamental questions about the roots of democratic legitimacy. Now that the government of Prime Minister Benjamin Netanyahu has blinked, and a vote on its proposed transformation of the judiciary has been delayed, Israelis might just have a chance to consider those broader questions and negotiate toward some long-needed political reforms. As they contemplate such prospects, they should consider the experience of America's Constitution makers.

Israel's regime has always struggled with the basic task of liberal democracy: to balance majority rule with minority rights. Israeli democracy is hyper-concentrated. It consists of a unicameral, or single-house, legislature, and essentially no competing democratically legitimate power centers. A narrow parliamentary majority can use the power of the state to do pretty much anything it wants.

Since the 1990s, in response to the dangers of such unrestrained power, the Israeli judiciary has claimed for itself a variety of powers of review and nullification, and it has often acted to restrain government actions to protect the rights of individuals and minority groups. These assertions of judicial power have sometimes served important ends and sometimes misguided ones. But legitimacy in a democracy is a function of means and not just ends, and the actions of Israel's Supreme Court too often had no basis in law.

Mr. Netanyahu's government has decided to place some restraints on this power, acting to subject the judiciary (which more or less appoints its own members) to more direct control by the elected legislature. And this, together with concern about the prime minister's motives, given a continuing criminal case against him, has spurred enormous protests.

Israeli politics is therefore in the midst of a struggle between an unrestrained democratic power center and an unmoored undemocratic one. And that struggle is not structured by any clear legal or constitutional framework. It's no surprise that this has led to an explosive confrontation with no obvious mode of resolution. The only surprise is that it took this long.

To pull back from the brink, Israelis should recognize the basic terms of the debate they need to have. The crowds in the streets opposing the government's proposal to transform the judiciary in recent weeks said they were defending Israeli democracy. But it would be more accurate to say they were marching for essential restraints on democracy. They demanded that the preconditions for a free society in Israel not be trampled by a narrow majority in its legislature, and they were right.

As Americans have learned the hard way, majority rule can be a principle of despotism if it is not restrained by respect for the basic equal rights of citizens. That restraint must be a function of some counter-majoritarian mechanisms throughout the regime, including courts kept independent of political pressure.

At the same time, the Israeli government seeking to restrain an unanchored judiciary was not arguing for fascism. It was arguing for majority rule, the essential premise of democracy. It was an elected parliamentary majority complaining that the courts routinely act without a legitimate foundation in laws made by the people's representatives, and it was right.

Judicial independence means independence from political pressure, not from the law. Courts cannot act based on what judges think the law should say, but on what statutes enacted by elected legislators actually do say. The Israeli Supreme Court has developed a dangerously arbitrary standard of reasonableness that is not anchored in legal criteria — which it has used, for example, to strike down government appointments and even parliamentary enactments, as with laws regarding migrant workers in recent years.

And judges themselves should ultimately be appointed in ways that are accountable to the public, directly or indirectly, even if at the remove of some formal process of selection and with protections against pressure once they are in office. Judicial whims are less, not more, legitimate than the whims of government ministers. But neither should be how a mature democratic republic governs itself.

The solution to Israel's governing crisis therefore cannot simply involve the triumph of one side or the other in today's disputes. The problem is the absence of a constitutional framework for Israeli political life — a shortage of mechanisms to balance majority rule and minority rights.

That means this crisis needs to be a beginning and not an end. It needs to be the impetus for a process of constitution-making in Israel. The temporary respite the government has now declared creates an opportunity to back down from the confrontation and open negotiations instead. And in that cause, there may be lessons for Israel in the American experience of framing its Constitution.

Israelis get a lot of advice from Americans, surely more than they want. And we Americans might be reluctant to offer help just now, as our own divisions run deep and our politics hardly feels like a model of stability and order.

But exactly because we have always been divided, the American experience is actually highly relevant to Israel's circumstances. Our Constitution arose in response to undeniable evidence of the inadequacy of our original system of government, and it created a formal arrangement of powers that aimed to balance the seemingly contradictory objectives of empowering majorities and protecting minorities. It has done that by establishing a variety of legitimate power centers — in different branches and different levels of government — and compelling them to both compete and cooperate. This slows down American government in ways that narrow majorities often find frustrating. But it also means that significant change happens only if fairly broad and durable majorities want it.

And while this frequently leaves our politics feeling fractious and contentious, it has actually made for extraordinary durability. The United States has had the same system of government for more than 230 years. Through intense divisions and pressures, even a civil war, we have kept the same set of institutions, modifying them only gradually in accordance with the original formal procedures for amending our Constitution. Even Britain, which has retained institutions with the same names as those it had in the 1780s, has changed its actual form of government tremendously in that time. Most of today's other democracies either didn't exist yet back then or have gone through numerous forms of government since.

The secret to our system's durability is its dynamic balance. Its parts are always pushing and pulling at one another, but none simply dominates. Elections or appointments by elected officials are the only ways anyone can gain power, yet our system is filled with counter-majoritarian correctives. We shield some officials from the pressures of direct election, ensure that not all elected officials are chosen by the same electorate, decentralize power, require supermajorities for some important decisions, enshrine some key rights in a written charter and give some judges life tenure once they are appointed. This compels narrow majorities to seek more support before they can have their way. It lets minority voices be heard and considered, even if they ultimately lose.

Another lesson for Israel is that our Constitution was not written by the legislature it replaced but by a convention appointed specifically to reconsider our system, which arrived at a coherent patchwork of compromises and then submitted it to the public in each state for approval. That meant the new system did not inherit all the old one's mistakes and made for buy-in that helped that new system gain legitimacy, and endure. A similar convention in Israel, perhaps with members appointed proportionally by the parliamentary parties but with an eye to individuals up to the task, could stand a chance of making the most of this moment.

Our convention also focused on the future. In the heat of its debates, in August 1787, James Madison rose to speak about how the formulas used for representation in Congress might play out over a century or more. The Massachusetts delegate Nathaniel Gorham interrupted him and said thinking so far ahead was a waste of time: "Can it be supposed that this vast country including the Western territory will 150 years hence remain one nation?" But that is precisely what our Constitution supposed, and more than two centuries later we can be grateful that it did.

Israeli democracy could use the self-confidence of such long-term vision as well, as its ad hoc institutions have always felt like emergency measures.

A crisis may seem like a difficult time for such forward-looking political reform. But on that front the American experience offers one more lesson: Opportunities for significant reform are created by crises of legitimacy. They're not a function of polite conversations about the need for clear lines of authority but of disastrous failures of inadequate regimes — of violent breakdowns of authority and people marching in the streets. And making the framework amendable, albeit with significant supermajority requirements, allows it to respond to major social change and address its own inadequacies over time.

Israel is living through a political crisis today. It faces very different pressures than the United States does and will require its own system built around its own priorities. But it might learn from the American experience that a crisis could open unexpected vistas for the Jewish state.

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