

THE MISSING LINK: LEGAL HISTORICAL INSTITUTIONALISM AND THE ISRAELI HIGH COURT OF JUSTICE

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TABLE OF CONTENTS

I. INTRODUCING LEGAL HISTORICAL INSTITUTIONALISM	703
II. ONE BRIEF VERSION OF HISTORICAL INSTITUTIONALISM.....	710
III. ENTER ISRAELI LEGAL HISTORIOGRAPHY AND THE HCJ.....	714
IV. HISTORICAL INSTITUTIONALISM AND THE HCJ'S HISTORY.....	719
A. Critical Juncture No. 1: The Big Bang.....	719
B. Critical Juncture No. 2: A Court Re-Founded.....	721
C. Critical Juncture No. 3: An Overture	722
V. ON THE PERMANENCE-TRANSFORMATION CONTINUUM AT CRITICAL JUNCTURES	724
A. <i>Sic Transit Gloria Mundi?</i>	726
B. LHI and Israeli Legal Historiography	729
VI. CONCLUSION: KEY LESSONS OF LHI.....	731

I. INTRODUCING LEGAL HISTORICAL INSTITUTIONALISM

This Article will introduce “legal historical institutionalism” (LHI), which is a novel, integrative methodology to study the history of courts and other legal institutions.¹ LHI brings together historical institutionalism—the historical school that grew out of the immensely influential new institutionalism—and traditional legal history. In order to concretely demonstrate the significant benefits offered by LHI, and in an effort to contribute to the comparative literature, this Article will not be confined to a sterile, theoretical discussion. Rather, it will include an analysis of the history of one specific, undoubtedly central, court through the prism of LHI: the High Court of Justice of Israel (HCJ), which is part of the Supreme Court of Israel. This Article will weave the exciting and vibrant new institutional conversation into the current thinking of legal

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¹ For the definition(s) of “institutions” in the Article’s context, see *infra* notes 29-31 and accompanying text.

historians in general and into the historiography of the HCJ (and of the Supreme Court of Israel) in particular.

LHI draws on key insights of historical institutionalism, which demonstrate that “[i]nstitutions are relatively persistent, and thus carry forward in time past political decisions and mediate the effects of new political decisions.”² This Article will illustrate that this historical-institutionalist insight may indeed—and insightfully—apply to courts³ by focusing on the conditions under which the HCJ had been initially established and later re-established.⁴ Concomitantly, the contribution of legal history to LHI is in its inclusion of standard legal criteria in the study of courts’ history.⁵ LHI is committed to an “internal legal perspective”

² Keith E. Whittington, *Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 *LAW & SOC. INQUIRY* 601, 616 (2000). For a description of historical institutionalism, see *infra* Part II.

³ As will become evident below, as a terminological matter, courts surely fall under new (and historical) institutionalism’s definition of “institutions.” See *infra* note 29.

⁴ See generally *infra* Part IV.A-B (describing the establishment of the HCJ by the British in 1922 and its later re-establishment in 1948, following the founding of the State of Israel).

⁵ Needless to say, there are many ways to practice legal history. See, e.g., William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *STAN. L. REV.* 1065 (1997) (reviewing the many methodologies applied by legal historians). Still, it seems safe to argue that generally legal historians—even critical legal historians—heed well legal doctrines, even if they “only” wish to deconstruct them or to demonstrate their irrelevance in a case in point. See, e.g., Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 *AM. J. LEGAL HIST.* 275 (1973); Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); WILLIAM E. NELSON & JOHN PHILIP REED, *THE LITERATURE ON AMERICAN LEGAL HISTORY* (1985). For helpful analysis, see also Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC’Y REV.* 9, 10-11 (1975), which opens with “a crude model,” where law is like a box surrounded by “society,” and then argues that

Within the structure of this crude model there is, of course, a great range of possible theories of law, from a theory asserting that law derives its shape almost wholly from sources within the box . . . to one claiming that the box is really empty Yet even those who incline to the latter view take the contents of the box, epiphenomenal though they may be, as the main subject-matter of concern to the legal historians

Legal historians’ serious treatment of legal doctrines becomes especially apparent when juxtaposed with political scientists’ “external” perspective on courts. This generalized comparison between lawyers doing legal history of courts and political scientists who study courts has been noticed already, especially in the context of the “attitudinal model” of adjudication, which is discussed *infra* notes 9-11 and accompanying text. See, e.g., sources cited *infra* notes 6, 7 and *infra* text accompanying note 7 (stating that “[I]aw professors believe the Constitution and other laws constrain the Court, while most political scientists

when analyzing courts' (institutional) history:⁶ if "[l]aw professors believe the Constitution and other laws constrain the Court, while most political scientists do not,"⁷ then the "internal legal perspective" that legal history brings to LHI is that of law professors.

In short, LHI is a comprehensive, interdisciplinary methodology for the study of courts and other legal institutions that seeks to meaningfully incorporate the legal ("internal") perspective into historical institutionalism. In putting forward LHI, this Article takes part in the contemporary effort, triggered by the rise of new institutionalism, to construct an integrative framework to study the courts' behavior.⁸

do not."). The generalization seems to apply even to new institutionalism (as we shall see, *infra* text accompanying note 13 and sources cited *infra* note 20), which grew as a reaction to the methodologies of the said attitudinal and related models. See Gila Stopler, *The Israeli Supreme Court—Between Law and Politics*, 48 TULSA L. REV. 257, 260 (2012) (reviewing ASSAF MEYDANI, *THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS* (2011) and pointing to the fact that the book is written from the perspective of institutional theory and criticizing its "lack of attention to law and to legal analysis . . .").

⁶ See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 280-81 (1997) (juxtaposing the legal scholars' "internal" perspective and the "external" perspective of empirically-based political-scientist legal studies). See also Jack Goldsmith & Adrien Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002); Michael Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1740-41, 1748 (2003) (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2000)); Julie Novkov, *Legal Archaeology*, 64 POL. RES. Q. 348 (2011) (The author—a political scientist—acknowledged the need and offered a methodology "that comes more organically from within the study of law.").

⁷ Gerhardt, *supra* note 6, at 1733.

⁸ See generally *id.* at 1757-59 (advocating "a synthetic rather than unidimensional model of the Court"); Whittington, *supra* note 2, at 628-31. See also Novkov, *supra* note 6 (suggesting to political scientists one possible version of an integrative methodology for the study of courts); John K. Skrentny, *Law and the American State*, 32 ANN. REV. SOC. 213 (2006) (advocating the formation of "dialogue between scholars of law and scholars of the state").

I would like also to note the similar impulse driving this Article and several of Professor Reuel Schiller's publications: the conviction that it is high time that a meaningful link be formed between recent developments in both political science institutional history and legal history. At the same time, the subject matter relevant to Schiller's project and my own are obviously different: the interaction between the New Deal-era administrative state and the courts (Schiller) and the entire history of one legal institution, i.e., of one court (mine). See, e.g., Reuel Schiller, "*Saint George and the Dragon*": *Courts and the Development of the Administrative State in Twentieth-Century America*, 17 J. POL'Y HIST. 110 (2005); Reuel Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) ("There is a need to

This Article's introduction of LHI is long overdue. For the past half-century, courts are often studied from an individualistic perspective, in political science as well as in legal literature, focusing on the role played by particular judges in courts' decisions.⁹ Responsibility for the dominance of such a limited perspective in the study of courts lies to a considerable extent in the "attitudinal model" of adjudication—the seminal model that considers judges' "ideological attitudes and values"¹⁰ as determinative of the way they (and eventually courts) decide—as well as in other, closely related "positive" models.¹¹ Such individualistic approaches have resulted in a simplified and inadequate portrayal of the workings of courts and judges, whereby judges have been divided in a binary manner into one of two extremes: activist (or liberal/progressive) vs. conservative.¹² Later on during the late-1990s, a counter approach emerged as a

build a bridge between . . . institution-focused political history (which ignores courts) and the new legal history of the New Deal (which ignores administrative law).").

⁹ This general statement certainly applies to the United States. As demonstrated below, it also generally applies to Israel. See *infra* note 12.

¹⁰ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993) [hereinafter SEGAL & SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL*]. See also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2000) [hereinafter SEGAL & SPAETH, *THE ATTITUDINAL MODEL REVISITED*]. For additional examples of work done from the attitudinal-model perspective, see Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971 (1996); Saul Brenner & Marc Stier, *Retesting the Segal and Spaeth's Stare Decisis Model*, 40 AM. J. POL. SCI. 1036 (1996); David L. Weiden, *Judicial Politicization, Ideology and Activism at the High Courts of the United States, Canada and Australia*, 64 POL. RES. Q. 335 (2011). For reviews and critiques of the attitudinal model, see, for example, Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903 (1996); Cross, *supra* note 6; Gerhardt, *supra* note 6; Whittington, *supra* note 2.

¹¹ Generally, whereas the attitudinal model attributes courts' decision-making patterns to judges' ideological preferences (see sources cited *supra* note 10), other "positive" models (primarily, rational choice models) hold that judges often act strategically in pursuit of their (possibly personal, ideological, and/or other) preferences and agendas. For examples of the latter models, see, for example, McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631 (1995); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998). For a short intellectual history of the field, see Keren Weinshall-Margel, *Attitudinal and Neo-Institutional Models of Supreme Court Decision Making: An Empirical and Comparative Perspective from Israel*, 8 J. EMPIRICAL LEGAL STUD. 556, 557-61 (2011).

¹² Thus, for example, in 1993, the two foremost proponents of the attitudinal model, Professors Jeffrey A. Segal & Harold J. Spaeth, declared, "Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he [was] extremely liberal." SEGAL & SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL*

MODEL, *supra* note 10, at 65. See also, e.g., SEGAL & SPAETH, THE ATTITUDINAL MODEL REVISITED, *supra* note 10, at 310 (arguing that “not one justice of the Rehnquist Court exercised deference to precedent by voting to uphold both conservative and liberal precedents.”).

Examples of scholarship on the “judicial activism” of U.S. courts abound. See, e.g., J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981-82) (arguing for “a philosophy of judicial restraint[] [which is] [t]he opposite of judicial activism”); Martin Shapiro, *Juridicalization of Politics in the United States*, 15 INT’L POL. SCI. REV. 101, 105 (1994) (noting, inter alia, that “Courts [in the United States] . . . have . . . become more and more active in public affairs as law implementers, typically of constitutional law itself created by courts.”). See also the recent historical survey included in Stefanie A. Lindquist & Frank B. Cross, *The Political and Academic Debate over Judicial Activism*, in MEASURING JUDICIAL ACTIVISM 1 (Stefanie A. Lindquist & Frank B. Cross eds., 2009).

While all these sources deal with the United States, there also is a long, established tradition in Israel and in other countries of legal and non-legal literature describing courts and judges in such terms (activist/conservative) and discussing the desirability of each of the two positions. For a notable example, see RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004), which argues that “judicial empowerment through constitutionalization” has taken place in Canada, Israel, New Zealand, and South Africa. See also e.g., Weiden, *supra* note 10 (noting that “[i]n recent decades, judicial activism has been recognized as not an exclusively American phenomenon, but, indeed, present in many democracies worldwide, to a greater or lesser degree.”). See also, e.g., with respect to Israel, Eli Salzberger, *Judicial Activism in Israel*, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS 217 (Brice Dickson ed., 2007) (noting, inter alia, that “[t]he Israeli judiciary is portrayed by both Israeli and non-Israeli scholars as one of the most activist judiciaries in the world[] It is not surprising, therefore, that judicial activism has been on the scholarly agenda in Israel for the past 35 years and on the public agenda for the last 20 years. . . . [I]n the last 25 years Israeli judicial activism has been greatly influenced by the jurisprudence of Aharon Barak”); MEACHEM MAUTNER, LAW AND CULTURE IN ISRAEL 75 (2001) [hereinafter MAUTNER, LAW AND CULTURE IN ISRAEL] (noting, inter alia, “the adoption of a sweeping activist stance by Israel’s Supreme Court in its jurisprudence in the 1980s and 1990s.”); Gad Barzilai, *Courts as Hegemonic Institutions: The Israeli Supreme Court in Comparative Perspective*, 5 ISR. AFF. 15 (1998); Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israel Judiciary*, 31 SETON HALL L. REV. 760 (2001).

I should note, finally, that it would be a mistake to assume that all the great literature dedicated to courts’ “activism/conservatism” is of one mind with respect to the question of how to define “activism/conservatism” or what makes one an “activist/conservatist” judge. This question is obviously beyond the scope of this Article. See generally Lindquist & Cross, *supra* note 12 (observing, inter alia, that “activism, like beauty, is often in the eye of the beholder”). In fact, Professor Kermit Roosevelt argues that “*judicial activism is an empty epithet.*” KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 38 (2006).

group comprised primarily of political scientists, who took to heart the insights of the new institutionalist “movement,”¹³ came to realize that such flat dichotomous typology of judges had overlooked institutional trends that transcend individual decision-making.¹⁴ Thanks to the work of these scholars, at long last, new institutionalism is beginning to be introduced into the study of courts. Still, there is much work to be done, certainly in the field of legal history.¹⁵

The purpose of this Article is to show that the disjuncture between legal history and historical institutionalism is regrettable. This Article will demonstrate the benefits to be gained by forming “the missing link” between historical institutionalism and legal history, drawing on a detailed analysis of the case of the HCJ. This case study underscores the contributions of historical institutionalism to the manner in which legal scholars and practitioners view the past and present practices of courts. Indeed, being a member of the versatile institutionalist school,¹⁶ historical institutionalism (and institutionalism more generally) has a lot to offer to legal scholarship, and only several of the more notable potential contributions of the former to the latter can be meaningfully outlined here.¹⁷ Accordingly, the ensuing discussion will venture into particularly controversial terrain and will illustrate how, by adopting the LHI’s point of view, the focus of analysis shifts from the prevailing all-too-familiar debate on activism vs. conservatism to a richer understanding of the workings of the courts.

¹³ On new institutionalism, see sources cited *infra* note 20.

¹⁴ This development is authoritatively described (and thus furthered) in Howard Gillman & Cornell W. Clayton, *Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACH 1 (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter SUPREME COURT DECISION-MAKING]. See also, e.g., Kevin T. McGuire, *The Institutionalization of the U.S. Supreme Court*, 12 POL. ANALYSIS 128 (2004) (concluding that “the decisions of the [U.S.] Supreme Court are not merely a function of the goals of individual justices. Rather, the institutional setting is itself an important variable that has shaped the course and content of legal outcomes over time.”).

¹⁵ See *supra* notes 5-6, 8 (discussing the disjuncture between legal and new-institutionalism scholars).

¹⁶ On new institutionalism and its versatility, see *infra* notes 17, 20.

¹⁷ To be sure, not only editorial reasons are responsible for this, but rather mainly the fact that the Article canvasses the history of *one* specific court. As argued below, see *infra* notes 29-31 and accompanying text, new institutionalism—and thus historical institutionalism—may be insightfully related to a host of legal “institutions.” Moreover, even when applied to a given institution (e.g., the HCJ), institutionalism may insightfully address it from several angles, drawing attention and raising questions with regard to such important phenomena as “institutionalization,” processes of organizational/institutional isomorphism and change, institutional fields, and institutional logics. See, e.g., the survey provided in ROYSTON GREENWOOD ET AL., *THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM* 1 (2008); the seminal Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); and *infra* note 24.

In the particular case of the HCJ, this new point of view allows us to see beyond the traditional view of the HCJ as having taken a blunt activist turn in the 1980s-1990s.¹⁸ As this Article will demonstrate, LHI analysis uncovers a more intricate and intellectually coherent story, in which *both* the activist and the conservative trends exist and continue to play out in the court's operation. Evidently, what follows is most certainly not a comprehensive rendition of the HCJ's history—far from it—but rather a preliminary outline of, or prolegomena to, that long history. Yet, as I will show, the following discussion is significant exactly because it will present such an outline. In other words, it will lay out *one* coherent, methodologically sound outline for writing that entire history in a manner that highlights LHI's benefits.

Therefore, this Article operates on two levels. On one level, it offers a rich case study of the history of a common law court, adding to a comparative study of modern courts within and outside of the common law world. On a second level, it introduces the inclusive methodology of LHI to the study of courts and other legal institutions while illustrating the rewards to be gained from LHI by *both* legal historians and new (and historical) institutionalists.¹⁹

This Article proceeds as follows. The following Part (Part II) will provide an overview of historical institutionalism. Next, in Part III, the fundamentals of the HCJ, as a court, will be described and briefly examined. After providing a rough description of the HCJ, the Article will turn to the history of the Court and focus on three points in that history which seem particularly critical from the perspective of historical institutionalism in Part IV. Part V will analyze the HCJ's history as seen through these three critical junctures. Finally, Part VI will conclude by highlighting LHI's contributions to *both* legal historians and institutionalists.

¹⁸ See sources cited *supra* note 12 (citing sources describing Israel courts' post-1980s activism). See also, e.g., MENACHEM MAUTNER, *THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW* (1993) (Hebrew) [hereinafter MAUTNER, *THE DECLINE OF FORMALISM*]. See also, e.g., Menachem Mautner, *Judicial Activism—An Appraisal*, 4 *ALEI MISHPAT* 7 (2005) (Hebrew); Daphne Barak-Erez, *Judicial Review of Politics: The Israeli Case*, 29 *J. L. & SOC'Y* 611, 614-15 (2002) [hereinafter Barak-Erez, *Judicial Review of Politics*] (arguing that “there is a trend in [Israeli] Supreme Court rulings toward an embracing growth in its jurisdiction.”); *JUDICIAL ACTIVISM: FOR AND AGAINST* (Ruth Gavison et al. eds., 1999-2000) (Hebrew); ASSAF MEYDANI, *THE ISRAELI SUPREME COURT AND THE HUMAN RIGHTS REVOLUTION: COURTS AS AGENDA SETTERS* 33 (2011) (noting that “in recent decades, the Supreme Court has gradually increased its involvement in public and political issues, taking a much more activist approach during the 1990s.”).

The Court's activist tendencies have been based on, and manifested by, its growingly-expansive perception of justiciability, as demonstrated in Ariel L. Bendor, *Are There Any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of the Israeli and American Experience*, 7 *IND. INT'L & COMP. L. REV.* 311 (1997).

¹⁹ See *infra* Part VI, which is dedicated to highlighting this point.

II. ONE BRIEF VERSION OF HISTORICAL INSTITUTIONALISM

The disconnect between legal history and historical institutionalism, which is this Article's point of departure, is surprising. After all, new institutionalism, which can be traced back to the late 1970s, swept over academia like a tsunami, covering the whole of political science and considerable parts of the humanities.²⁰ Taking a fresh look at the role institutions and organizations play in society, new institutionalism has captivated the minds of countless scholars of different intellectual affiliations. Historians as well have been swept into the intellectual commotion, giving rise to a new historiographical approach: historical institutionalism.²¹ Yet, as noted, legal academia has by and large observed the tsunami from afar.²² Significantly for our purposes, legal history—at least Anglo-American legal history—has generally kept its distance too. To a large extent it still does,²³ in spite of legal historians' keen interest in the history of one, distinct group of institutions: the courts. It could be therefore expected that legal historians would be naturally drawn to this historiography that, as its name alone suggests and due to its association with new institutionalism, takes institutions seriously. Nevertheless, they have thus far principally stayed aloof.

The aim of this Part (indeed, of the entire Article) is to promote an open conversation between legal history and historical institutionalism. What follows, therefore, is a general overview of historical institutionalism.²⁴ With that in mind,

²⁰ There is a vast literature on new institutionalism, which routinely addresses its reception by various disciplines. See, e.g., James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984); Philip Selznick, *Institutionalism "Old" and "New,"* 41 ADMIN. SCI. Q. 270 (1996); Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC'Y 5 (1998); GUY B. PETERS, INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE 'NEW INSTITUTIONALISM' (1999); RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS 26-46 (Al Bruckner et al. eds., 3d ed. 2008).

²¹ This Part will only deal with the historical-institutionalist side of LHI, assuming that legal history is (more) familiar to the legal audience. For various legal historical methodologies, see *supra* note 5. See also *infra* note 24 (advising against a monolithic understanding of historical institutionalism).

²² See Suchman & Edelman, *supra* note 10; Rogers M. Smith, *Political Jurisprudence, The 'New Institutionalism,' and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988) [hereinafter Smith, *Political Jurisprudence*].

²³ For notable exceptions, see ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992); SUPREME COURT DECISION-MAKING, *supra* note 14; and Assaf Meydani, *The Supreme Court as a Political Entrepreneur: The Case of Israel*, 27 ISR. STUD. REV. 65 (2012). Note, however, that all but one of the contributors to the second source as well as the author of the last are political scientists.

²⁴ See *supra* note 21 (noting that this Article, which is published after all in a legal journal, will focus in this Part only on historical institutionalism).

the following paragraphs will be dedicated to highlighting several key themes in historical institutionalism literature. As noted, historical institutionalism shares fundamental aspects of new institutionalism, which has already been relied upon in the study of contemporary court-made law in Israel²⁵ and elsewhere.²⁶ We can therefore take the much-broader new institutionalism as our point of departure, and move directly to outlining historical institutionalism's distinctive theoretical arguments.

A possible "dictionary definition" of historical institutionalism (and a great deal of new institutionalism) may be that it demonstrates how and why institutions endure²⁷ and how indispensable they are in explaining past and present

On historical institutionalism, see generally PETERS, *supra* note 20, especially at 63-77; Peter A. Hall, *The Movement from Keynesianism to Monetarism: Institutional Analysis and British Economic Policy in the 1970s*, in STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS 90 (Sven Steinmo et al. eds., 1992); Smith, *Political Jurisprudence*, *supra* note 22; Paul Pierson, *The Path to European Integration: A Historical Institutional Analysis*, 29 COMP. POL. STUD. 123 (1996); Whittington, *supra* note 2; Kathleen Ann Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369 (1999); Peter A. Hall, *Historical Institutionalism in Rationalist and Sociological Perspective*, in EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 204 (James Mahoney & Kathleen Thelen eds., 2010) [hereinafter EXPLAINING INSTITUTIONAL CHANGE].

As indicated by its title, this Part presents one version of historical institutionalism. Indeed, as the just-cited literature reveals, and as could be expected (if only due to institutionalism's versatility and wide scope—see *supra* note 17), one could trace in the literature more than a single approach to historical institutionalism. At the same time, a solid common denominator does seem to exist in that same literature. See Rogers M. Smith, *Historical Institutionalism and the Study of Law*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 52 (Keith H. Whittington et al. eds., 2008) [hereinafter Smith, *Historical Institutionalism and the Study of Law*] (outlining historical institutionalists' "two agendas of theoretical development[]" and noting, "[t]hese differences in emphasis are no great chasm.").

²⁵ See Weinshall-Margel, *supra* note 11. See also Yifat Holtzman-Gazit, *Law, Personal Preferences and Institutional Theory: The Development of Land Expropriation Law in District Courts*, 29 TEL-AVIV U. L. REV. 311 (2006) (Hebrew); Margit Cohn, *Regulation and Fuzzy Legality: Government Intervention in the Israeli Downstream Oil Market*, in ZAMIR BOOK: ON LAW, GOVERNMENT AND SOCIETY 535 (Yoav Dotan & Ariel Bendor eds., 2005) (Hebrew); Daniel Shperling & Nissim Cohen, *Economic Arrangements Law, the Supreme Court and the Right to Health in Israel: A Test-Case For Neo-Institutional Analysis*, 4 HUKIM 153 (2012) (Hebrew) (Isr.).

²⁶ See, e.g., Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalism*, in SUPREME COURT DECISION-MAKING, *supra* note 14, at 15; Gillman & Clayton, *supra* note 14; Suchman & Edelman, *supra* note 10; Smith, *Political Jurisprudence*, *supra* note 22; Whittington, *supra* note 2; McGuire, *supra* note 14.

²⁷ See *supra* text accompanying note 2 (citing Whittington). For recent attempts to incorporate institutional *change* into the framework of historical institutionalism, see, for

human behavior.²⁸ It should be noted at the outset that institutions in this context include a wide variety of social structures, including, among others, formal organizations and informal social practices.²⁹ Indeed, it is appropriate to emphasize again that it would be wrong to assume that historical institutionalism may have something important to contribute to jurists' study of courts alone.³⁰ It is surely relevant to a great many other juridical institutions and organizations (e.g., the Bar and law schools), as well as a host of other aspects of law, owing to new institutionalism's expansive grasp of "institutions."³¹

example, James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in EXPLAINING INSTITUTIONAL CHANGE, *supra* note 24, at 1.

²⁸ See, e.g., EPSTEIN & KNIGHT, *supra* note 11, chs. 4-5 (applying an institutionalist approach in analyzing the manners in which the U.S. Supreme Court resolves cases); sources cited *supra* note 23.

²⁹ See W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493 (1987); James M. Ferris & Shui-Yan Tang, *The New Institutionalism and Public Administration: An Overview*, 3 J. PUB. ADMIN. RES. & THEORY 4 (1993); Stephen Skowronek, *Order and Change*, 28 POLITY 91 (1995); Rogers M. Smith, *Ideas, Institutions, and Strategic Choice*, 28 POLITY 135 (1995); Philip J. Ethington & Eileen L. McDonagh, *The Common Space of Social Science Inquiry*, 28 POLITY 85 (1995); PETERS, *supra* note 20, at 97-98, 106.

As illustrated in these and other sources, the relevant literature maintains several approaches to the definition of "institutions" (for one typology of these definitions, see Greenwood et al., *supra* note 17). Relatedly, it may be argued that new institutionalism in general is too extreme in not differentiating between institutions and organizations, as argued by Ove K. Pedersen, *Nine Questions to a Neo-institutional Theory in Political Science*, 14 SCANDINAVIAN POL. STUD. 125 (1991). For attempt to offer such differentiations, see, for example, Claude Ménard, *Markets as Institutions Versus Organizations as Markets? Disentangling Some Fundamental Concepts*, 28 J. OF ECON. BEHAV. & ORG. 161 (1995); Elias L. Khalil, *Organizations Versus Institutions*, 151 J. INSTITUTIONAL & THEORETICAL ECON. 445 (1995).

Finally, as already noted and for the removal of all doubt, it seems that no one seriously disputes courts' classification as (legal) "institutions." See, e.g., STONE, *supra* note 23, at 6 (1992) (arguing that "[c]ourt and constitutions . . . [are] perhaps the most 'formal,' 'the most legal' of institutions . . ."); Greenwood et al., *supra*, note 20.

³⁰ Or that it may only offer the contributions presented in the Article. See sources cited *supra* note 17.

³¹ See Smith, *Political Jurisprudence*, *supra* note 22, at 91. It is actually notable that several of the pioneering studies in the new institutionalism and historical institutionalism traditions, which were conducted as a rule by political scientists, were dedicated to seminal pieces of legislation and legislative processes. See, e.g., STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920* (1982); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUDIATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001).

This is surely not the place to explore such (fascinating) questions as why lawyers have generally shown little interest in such institutionalist schools, or why legal

Historical institutionalism brings to the fore structural, lingering, often undergirding forces that are at play even as seemingly hectic, even erratic historical trajectory unfolds, and often as a correction to competing—“nemeses”³²—theories, principally behavioralism and rational choice, that center on individual agents’ (e.g., justices’) reputed motivations.³³ Historical institutionalism regards organizations and institutions as “sticky”³⁴ in the sense that they have a tendency to stick around for extended periods of time, they often transcend their originators’ time period, they may prove to be more resilient and adaptive than originally anticipated, and even survive serious changes in their surrounding institutional environments.³⁵

Flexible as it may be, an institution’s trajectory is rarely directionless. Rather, it is path-dependent: as it unfolds, it often tends to eventually follow one—perhaps tortuous—course out of the several potential courses sketched in the flow-chart laid out at an institution’s point of origin.³⁶ This flow-chart may be convoluted. At the same time, it is neither chaotic nor random, for it inscribes—often unintentionally—what will turn out to be the institution’s levers of change and points of omission, weakness, or strength. Finally, it follows that the flow-chart is not deterministic. While clearly and highly influential, an institution’s originators’ intent may control the institution’s future pathway only to an extent. Neither they nor others are able to foresee its innumerable future eventualities and correspondingly preordain its future reactions thereof.³⁷ This last aspect is best illustrated by the concept of a critical juncture; namely, a point in time which, in

academia is generally so lopsided “against” the Legislature and “for” the judiciary. Nor is this the place to outline notable cases of disjuncture between lawyers and political scientists studying similar issues, and the probable causes—and consequences—thereof. For the exploration of such issues, see, for example, Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005); Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425, 459-62 (2011) (noting lawyers’ persistent disregard of organizational consideration in their study of regulation). See also *supra* note 5 (describing the distinction between the “internal” (legal) and “external” (political science) perspectives in the study of courts).

³² PETERS, *supra* note 20, at 66.

³³ As noted (*see generally supra* notes 9-11 and accompanying text), the search after a coherent explanation for judges’ decision-making motivations has been intense.

³⁴ Smith, *Historical Institutionalism and the Study of Law*, *supra* note 24, at 47.

³⁵ See, e.g., SKOCPOL, *supra* note 31.

³⁶ Pierson, *supra* note 24, at 145-48; James Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY & SOC. 507 (2000); Giovanni Capocchia & Daniel R. Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341 (2007).

³⁷ Smith, *Political Jurisprudence*, *supra* note 22; Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66 (1988).

hindsight, proves to be of outstanding implication in an institution's overall history.³⁸

In short, historical institutionalism may be characterized by such keywords as the following: it is a *longue durée historiography*,³⁹ with a clear sense of a *big-bang theory* (owing to its interest in Genesisic moments), which traces a comprehensive trajectory of an institution while emphasizing the *critical junctures* therein and demonstrating in what ways it has proven to be (not-preordainedly) *path dependent*.

Note, lastly, that a recurrent challenge of historical institutionalism is for it to provide an integrative narrative that convincingly encompasses the enduring aspects in an institution's history, convoluted as it might have been, and accounts for its turning points, persuasive as the enduring aspects' description may be. The challenge is to underline those elements in an institution's history that preserve—indeed, direct—that history, but not to overdo it, lest the emergent narrative preclude the option of change or be unable to explain it.⁴⁰ The challenge is, in the words of a leading scholar in the field, “to reintroduce . . . the dialectic of meaningful actions and structural determinants into macrosociological explanations and research.”⁴¹

III. ENTER ISRAELI LEGAL HISTORIOGRAPHY AND THE HCG

Israeli legal historiographers—like other legal historians in the common law world—have shown a disregard for historical institutionalism even with respect to the study of the history of the Supreme Court of Israel, which has drawn the greatest attention of legal historians, notwithstanding legal realism's reproach of this practice.⁴² Indeed, the Israeli Court, its jurisprudence, and many past justices all have been studied from a variety of historiographical angles.⁴³

³⁸ Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); John Gal & David Bargal, *Critical Junctures, Labor Movements and the Development of Occupational Welfare in Israel*, 49 SOC. PROBS. 432 (2002); John W. Hogan, *Remoulding the Critical Juncture Approach*, 36 CANADIAN J. POL. SCI. 657 (2006).

³⁹ Pierson, *supra* note 24.

⁴⁰ Smith, *Political Jurisprudence*, *supra* note 22; PETERS, *supra* note 20, at 68-71. See also Mahoney & Thelen, *supra* note 27.

⁴¹ Theda Skocpol, *Sociology's Historical Imagination*, in VISION AND METHOD IN HISTORICAL SOCIOLOGY 1, 4 (Theda Skocpol ed., 1984).

⁴² See, e.g., Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 33 COLUM. L. REV. 431, 450 n. 16 (1930) (suggesting that questions such as “how does the paper rule work out (i.e., have a reflection or a counterpart in behavior) in lower court cases, unappealed?” are “vastly more important than the set-up of doctrine, or even than the actual practice of higher courts”).

⁴³ See generally Ron Harris et al., *Israeli Legal History: Past and Present*, in THE HISTORY OF THE LAW IN A MULTI-CULTURAL SOCIETY: ISRAEL 1917-1967 1-34 (Ron Harris

However, historical institutionalism seems still to be a *terra incognita* in the resultant corpus of Israeli-Supreme-Court legal history. Therefore, the ensuing paragraphs will be the first attempt to fill in a substantial ellipsis in this research.

Before delving into the HCJ and its history, I wish to explain why the Article focuses on this particular judicial institution. The explanation is twofold.

First, in many respects it may be quite misleading, and is certainly impossible, to talk of the Supreme Court of Israel, and its history, in unitary terms. This court has always been a motley bundle of judicial functions, as a survey of its mixed jurisdictions and of the justices' inconsistent statutory duties reveals.⁴⁴ Any talk of its history must, accordingly, take the Court's kaleidoscopic nature into account if it aspires to give a credible depiction of its subject matter. It is mainly for the Supreme Court's manifold duties that this Article will focus on one pivotal aspect in the history of the Supreme Court: its role and history as the HCJ. Why on that particular aspect of the Court's business? Because of the fact that

et al. eds., 2002). See also Nir Kedar, *The Centrality of Law in Israeli History: On the Historiography of Israeli Law and Its Contribution to Israel Studies*, 150 CATHEDRA 156 (2013) (Hebrew) (Isr.). What follows is obviously not—not even remotely—an exhaustive list, but only an attempt to illustrate the Israeli-Supreme-Court historiography's richness: see, e.g., Oren Bracha, *Unfortunate or Perilous: The Infiltrators, the Law and the Supreme Court, 1948-1954*, 21 TEL-AVIV U. L. REV. 333 (1998) (Hebrew); Nathan Brun, *The 'Secret Document on Judges' Affaire: Another Look at the Establishment of the Judicial System in 1948*, 115 CATHEDRA 195 (2005) (Hebrew) (Isr.); Ron Harris, *Israeli Law, in THE FIRST DECADE: 1948-1958* 243 (Zvi Zameret & Hanna Yablonka eds., 1998) (Hebrew) (Isr.); Nir Kedar, *Ben-Gurion and the Struggle for Appointment of a Spharadi Justice of the Supreme Court*, 19 BAR-ILAN U. L. REV. 515 (2003) (Hebrew) (Isr.); PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SHIMON AGRANAT AND THE ZIONIST CENTURY (1997); MAUTNER, THE DECLINE OF FORMALISM, *supra* note 18; Orit Rozin, *KolHa'Am in its Historical Context*, in SILENCE WE ARE TALKING! THE LEGAL CULTURE OF FREEDOM OF SPEECH IN ISRAEL 71 (Michael D. Birnhack ed., 2006) (Hebrew) (Isr.); ELYAKIM RUBINSTEIN, JUDGES OF THE LAND: ON THE BEGINNINGS AND CHARACTERISTICS OF THE SUPREME COURT OF ISRAEL (1980) (Hebrew) (Isr.); Eli Salzberger & Fania Oz-Salzberger, *The Hidden German Origins of the Israeli Supreme Court*, in LAW AND HISTORY 357 (Danny Gutwein & Menachem Mautner eds., 1999) (Hebrew) (Isr.); Yoram Shachar, *Reference Practices of the Supreme Court 1948-2004*, 50 HAPRAKLIT 29 (2008) (Hebrew) (Isr.); Ronen Shamir, *Discretion as Judicial Power*, 5 THEORY AND CRITICISM 7 (1994) (Hebrew) (Isr.).

⁴⁴ For a list of the Supreme Court's and the justices' powers since the establishment of the Court, see Yair Sagy, *Supreme Authority: On the Establishment of the Supreme Court of Israel*, 44 MISHPATIM—THE HEBREW U. L. REV. 7, 12-17 (2013) (Hebrew) [hereinafter Sagy, *Supreme Authority*]. See also Basic Law: The Judiciary, 5744, 38 LSI 101 (1984); Courts Law 5717-1957, 11 LSI 157 (1956-1957). See also, e.g., Election Law [Consolidated Version], 5729-1969, 23 LSI 113-14 §§ 63A(b) (1968-1969) (providing that in cases where the Central Election Committee decides to bar a party from participating in forthcoming election to the parliament, it is obliged to "immediately transfer its decision . . . for the approval of the Supreme Court.").

throughout the years, and certainly in the last generation, the HCJ has acquired an undisputed centrality in Israeli public life that is unmatched by any other judicial forum.⁴⁵

The second point relates to historical institutionalism and to this Article's argument about its potential applicability to the legal history of Israel and legal historiography in general. From a historical institutionalist perspective, this Article's focus on the HCJ is particularly warranted. After all, as we shall shortly see, the Article zooms in on one of Israel's most enduring judicial institutions.⁴⁶ Stated differently, by focusing on this particular judicial institution—the HCJ—this Article is effectively taking a Dworkinian “best-light” approach⁴⁷ in introducing LHI.

So, we finally arrive at the HCJ. The HCJ is one of the Israeli judiciary's most venerable fora, owing, *inter alia*, to its exceptionally long and rich heritage. The HCJ is one of the enduring legal legacies of the British rule over Palestine (1917-1948).⁴⁸ It is one of the institutions that originated during the early years of the Mandate and is still with us today.⁴⁹ Moreover, as will be revealed below, its formal jurisdiction has hardly changed throughout the long years of its existence, and—more importantly—it has always been *the* judicial forum to review contested actions of state organs. Indeed, the lion's share of the country's public law jurisprudence has been the handiwork of the HCJ, and most chapters in the Israeli unwritten “constitution” have been composed by HCJ justices.⁵⁰

⁴⁵ See, e.g., MEYDANI, *supra* note 18, at 153 (describing the process that “led to the placement of the HCJ at the center of the Israeli society.”); Barzilai, *supra* note 12; Dotan Yoav, *Pre-Petition and Constitutional Dilemmas Regarding the Role of Government Lawyers*, 7 MISHPATUMIMSHAL—HAIFA U. L. REV. 159, 159-61 (2004) (Hebrew) (Isr.); Barak-Erez, *Judicial Review of Politics*, *supra* note 18, at 611 (making the following comment, which refers to the Israeli Supreme Court in its HCJ capacity: “[the Court] is generally viewed as a highly influential, almost omnipotent body”).

⁴⁶ See *infra* 111-113 (noting that the jurisdiction of the HCJ has essentially not changed since its foundation in 1922).

⁴⁷ See, e.g., Ofer Raban, *Dworkin's 'Best Light' Requirement and the Proper Methodology of Legal Theory*, 23 OXFORD J. LEGAL STUD. 243 (2003).

⁴⁸ The British rule over Palestine initially took the form of a military regime. However, already in the early 1920s it was internationally recognized and put under the novel internationally-endorsed system of the Mandate. See, e.g., NORMAN BENTWICH AND HELEN BENTWICH, *MANDATE MEMORIES, 1918-1948* (1965); ALBERT MONTEFIORE HYAMSON, *PALESTINE UNDER THE MANDATE, 1920-1948* (1976); TOM SEGEV, *PALESTINE UNDER THE BRITISH* (1999) (Hebrew) (Isr.).

⁴⁹ On the establishment of the HCJ by the British, see Yair Sagy, *For the Administration of Justice: On the Establishment of the High Court of Justice*, 28 TEL-AVIV U. L. REV. 225 (2004) (Hebrew) [hereinafter Sagy, *For the Administration of Justice*].

⁵⁰ See generally Itzhak Zamir, *Administrative Law*, in *THE LAW OF ISRAEL: GENERAL SURVEYS* 51, 77-83 (Itzhak Zamir & Sylviane Colombo eds., 1995) [hereinafter Zamir, *Administrative Law*] and MEYDANI, *supra*, note 18, at 67-68 (noting that the

Three essential characteristics of the HCJ as a court of law appear particularly germane to our discussion. They should be considered not only for the sake of attaining a fuller understanding of the institution at hand, but also because, following the above-mentioned historical institutionalism's synopsis, it would be interesting to examine how these characteristics fare over time on a permanence-transformation continuum.

The three characteristics are the HCJ as a court of first and last resort, its ample discretionary jurisdiction, and the HCJ as *the* public-law court of the land. Let me say a few words about each of these, in the order presented.

The analysis's point of departure has to be the fact that the HCJ is a court of first instance, rather than a court of appeal.⁵¹ As such, it normally deals with new controversies that have not been dealt with before by prior courts. Furthermore, the HCJ, as part of the Supreme Court, is also a court of last resort. Consequently, no appeal may be lodged against its decisions, and no court may hear such appeal.⁵² This unique institutional position of the HCJ provides its justices with a clear view over the entire judiciary. The advantages of such a vantage point become apparent when we factor in the fact that the HCJ has at its disposal the necessary corresponding means (notably, prerogative writs) with which it can regulate all courts at the lower echelons of the judicial pyramid as well as other competent judicial tribunals.⁵³

The HCJ was established in 1922 and would subsequently always be a court of *justice*. Although full appreciation of this characterization requires us to consult the English judiciary's traditions, space does not permit a full treatment of this subject. Suffice it to note that it essentially amounts to entrusting the HCJ with an unusual degree of discretion to be played out in several junctures during the course of any particular case.⁵⁴ Thus, for example, the HCJ has the remarkable power to decide whether to review a petition on its merits, normally by issuing an order nisi, or to summarily dismiss the case after a preliminary examination.⁵⁵ It likewise has the power to wield wide discretion in deciding

Supreme Court is "viewed by the general public as the watchdog over the rule of law and the champion in the fight against corruption and the protection of human and civil rights").

⁵¹ Basic Law: The Judiciary, §15.

⁵² The only option available to the losing party post-HCJ litigation is to try her chances and plea to the Court to make use of its discretionary power to order a further hearing on the case. See Basic Law: The Judiciary, §18. Such a party should know, however, that the Court has always been frugal in exercising this power. And so, the vast majority of petitions to the HCJ have not been previously treated by another court, nor would another court of law review them following a HCJ ruling.

⁵³ For a description of the prerogative writs, see sources cited *infra* notes 57 & 61.

⁵⁴ See, e.g., the recent, authoritative discussion in 3 ITZHAK ZAMIR, ADMINISTRATIVE POWER (2014) (Hebrew), at 1602-04, 1640-41.

⁵⁵ There is an endless list of relevant cases. See, e.g., HCJ 910/86 Ressler v. The Defense Minister 42(2) PD 441 [1988] (discussing the doctrines of standing and justiciability); HCJ 669/85 Rabbi Meir Kahane v. The Speaker of the Knesset, 40(4) PD

whether (and what) remedy to grant—indeed, it may even deny a remedy—even when a petition is considered well-founded.⁵⁶ Much of this discretion is derived from the institution of prerogative writs, which are considered in the common law tradition to be extraordinary remedies whose origin lay in the Sovereign's power to do justice as the Monarch saw fit.⁵⁷ With the *Curia Regis*' differentiation and the eventual transfer of this power to courts, guidelines regulating its actual execution emerged in the familiar common law fashion. As part of that process, such doctrines as order nisi, clean-hand, justiciability, and prerogative writs attained their position in the courts of justice mechanics.⁵⁸

The HCJ's discretion in screening the thousands of petitions filed with its Secretariat had been proclaimed, time and again and *per* countless *curiams*, to be a defining feature of the HCJ.⁵⁹ Generations of justices regarded it as elemental long before the Court's caseload had reached the monstrous proportions of the past few decades.⁶⁰ This cursory description of this lasting feature of the HCJ is another testament to the HCJ's remarkable durability, both as a central judicial institution as well as a law-giving organ.

It is worthwhile to emphasize again that the powers of the HCJ had at least conceptually stemmed from certain powers of the British Monarch, and in particular, his or her power to see to it that justice would be properly administered by all courts in the realm, and to hold accountable all officers acting in his or her name.⁶¹ The HCJ was designed with such powers and such defendants in mind, and therein laid the foundation of its future intimate association with the public law of the land. Most of Palestinian and Israeli public law would be accordingly

393 [1986] (clean-hands doctrine); H CJ 2285/93 Nachum v. The Mayor of Patah Tikva, 45(5) PD 630 [1994] (laches).

As is well known, similar doctrines have long been well established also in U.S. public law. See, e.g., Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365-67, 1371-74 (1973).

⁵⁶ See generally Zamir, *Administrative Law*, *supra* note 50, at 77-83.

⁵⁷ For the history of the prerogative writs, see Stanley A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40 (1953); WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 226 (1956); Louis Leventhal Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L. Q. REV. 345 (1956); JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 164-77 (3d ed. 1990).

⁵⁸ See Yitzhak Zamir, *The High Court of Justice Authority*, in *LEGAL STUDIES IN MEMORY OF AVRAHAM ROSENTHAL* 225 (Gad Tadeschi ed., 1964) (Hebrew) [hereinafter Zamir, *The High Court of Justice Authority*].

⁵⁹ *Id.*

⁶⁰ On the Supreme Court's and the HCJ's caseload in recent years, see RAANAN SULIZIAONO-KEYNAN ET AL., *ON OVERLOAD IN THE ISRAELI JUDICIARY SYSTEM: A 17 COUNTRY COMPARATIVE STUDY* (2007) (Hebrew); MEYDANI, *supra* note 18, at 8-11.

⁶¹ de Smith, *supra* note 57, at 46-51; Norma Adams, *The Writ of Prohibition to Court Christian*, 20 MINN. L. REV. 272 (1936); BAKER, *supra* note 57, at 170-72.

written by the HCJ and this subject matter would become synonymous with the HCJ.⁶²

We will now turn to the history of the Supreme Court. Yet, as promised, the next Part will not attempt to provide an all-inclusive narrative of that history, but rather will focus on three critical junctures in the annals of the Court.⁶³

IV. HISTORICAL INSTITUTIONALISM AND THE HCJ'S HISTORY

A. Critical Juncture No. 1: The Big Bang

The establishment of the HCJ was officially and publicly announced almost a century ago. It was in August 1922 that the Palestine Order-in-Council declared, in Section 43, that this new court would be part of the Palestinian judiciary.⁶⁴ The said Section did not give a clear sense of the nature of that court,⁶⁵ but rather opaquely stated (in its second and last paragraphs) that the HCJ “shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice.”⁶⁶

While vague, two elements stand out in this phraseology: the new court would have exclusive jurisdiction and that jurisdiction would concern “the administration of justice”—an expression denoting to anyone familiar with the British legal nomenclature that it essentially concerns the management of courts.⁶⁷ Taken together, they suggested that the Section’s drafters wished for the HCJ to be an instrument of intra-judiciary management. Recently-conducted archival research substantiated this impression when it revealed that the HCJ had been the brainchild of none other than Sir Thomas Haycraft, better known at the time as

⁶² See, e.g., Zamir, *Administrative Law*, *supra* note 50, at 78; David Kretzmer, *40 Years of Law in the State of Israel*, 19 MISHPATIM—THE HEBREW U. L. REV. 551 (1990) (Hebrew); Meni Mazuz, *Reform in Administrative Law: The Administrative Court Law 2000*, 6 MISHPATUMIMSHAL—HAIFA U. L. REV. 233, 234 (2001) (Hebrew); Maydani, *supra* note 23, at 77.

⁶³ As we shall shortly see, it cannot be seriously doubted that the three junctures presented in the next section were “critical” in the history of the HCJ. See Capoccia & Kelemen, *supra* note 36; but see also Bernard Ebbinghaus, *Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform*, (Max Planck Inst. for the Study of Societies, Working Paper No. 05/2, 2005), available at <http://hdl.handle.net/10419/19916>.

⁶⁴ See *The Palestine Order-in-Council*, in 3 ROBERT HARRY DRAYTON, THE LAWS OF PALESTINE 2569-90 (1934).

⁶⁵ Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324, 351 (1975).

⁶⁶ See *The Palestine Order-in-Council*, § 43, *supra* note 64, at 2579.

⁶⁷ Sagy, *For the Administration of Justice*, *supra* note 49, at 288.

Chief Justice Haycraft. It was he who had devised the creation of the HCJ and who had done everything in his power, including reaching out directly to the Colonial Office in London, over the heads of British officials in Palestine, to see to it that his proposal would eventually be approved.⁶⁸

Research has further revealed what had most probably motivated Haycraft: his unyielding belief that the head of the judiciary, the Chief Justice, must head the judiciary in title and authority, rather than any Executive official or especially the Attorney General. For example, he was adamant that he, as Chief Justice, must set the rules of court. The proposal to found the HCJ in Palestine had been part of this approach, and should therefore be viewed also in the context of the judiciary-Executive turf war of those formative days of the British Mandate.⁶⁹

Haycraft's aspiration that the HCJ would buttress the senior justices' hold over the rest of the judiciary was Janus-faced. It was directed both internally, to the whole of the judiciary, and externally, particularly to those other organs of government skirting the judiciary.

Internally, the HCJ was designed so that it could effectively supervise all parts of the judiciary: all of its judges, the bulk of its officers, and generally most aspects of its daily operation. All this could be achieved with, *inter alia*, the help of the said prerogative writs⁷⁰ that might be issued above and beyond the lines of appeal and encompass cases' entire life-cycle—their execution included. It must be emphasized that Haycraft's drafts reveal that he was particularly concerned with this internally-directed authority of the HCJ, and he intended the HCJ's externally-directed powers—to which I now turn—to be ancillary to the former.

Externally, Haycraft's proposition made sure that the HCJ would provide him and his colleagues⁷¹ with the legal means to ward off what they would regard as attempts to infringe upon the judiciary's integrity or otherwise inappropriately meddle in the administration of courts, or more broadly in the business of the courts. The legal means included the HCJ's trademark remedies (i.e., said prerogative writs) and its signature causes of action (e.g., *ultra vires*). Both would become the fountainhead of the public law of the land.⁷²

⁶⁸ *Id.* at 274-78.

⁶⁹ *Id.* at 265-78.

⁷⁰ See sources cited *supra* notes 57, 61.

⁷¹ It should be noted that both British and "native" judges and justices served in the Mandatory Palestinian judiciary. And although we know that Haycraft sponsored a provision that would have barred the latter from trying HCJ cases, we also know that this proposal did not make it to the relevant pieces of British legislation. See Sagy, *For the Administration of Justice*, *supra* note 49, at 277-78, 285-86.

⁷² See *supra* text accompanying note 62.

B. Critical Juncture No. 2: A Court Re-Founded

We have just recently learned that Haycraft was not the only justice to actively (and successfully) interfere in legislation constituting the HCJ. Another fateful intervention made by sitting justices in the drafting of a foundational, comprehensive bill devoted to the courts took place in the beginning of the 1950s, in the fledgling days of Israeli statehood.⁷³ The bill at issue was the first Israeli bill to lay out the several “general” civil courts of the country, setting their respective spheres of jurisdiction, affixing basic constitutional safeguards to the judiciary’s and judges’ independence, and arranging for key aspects in the day-to-day administration of the judiciary.⁷⁴

The bill’s drafters thought it wise to take the opportunity offered by the establishment of the State of Israel to re-arrange the judiciary in a more rational manner. After all, it was clear to all that the judiciary that emerged at the end of the British rule over Palestine was anything but rationally organized owing to its diverse creators.⁷⁵ A number of (Jewish) jurists found the HCJ’s institutional position as a division of the Supreme Court to be a particularly striking feature, as they thought that the HCJ belonged in the various District Courts. To make a long (and quite interesting) story short, a provision to that effect was eventually incorporated into the said bill of the early 1950s. Upon receiving the bill from the Justice Minister, Pinchas Rosen, the seven sitting justices discussed it at length and collectively expressed their dislike of the proposal to remove the HCJ from “their” court, the Supreme Court, to the District Courts.⁷⁶ They decided to enter the fray. Subsequently, the justices actively and persistently made their case for nipping the proposal in the bud to the Justice Minister and his officials, Israeli parliament (Knesset) members, and other judges and jurists.

⁷³ Sagy, *Supreme Authority*, *supra* note 44. For a discussion on the (re)establishment of the Israeli judiciary, see also the seminal Pnina Lahav, *The Formative Years of Israel’s Supreme Court: 1948-1955*, 14 TEL-AVIV U. L. REV. 479 (1989) (Hebrew), and also, for example, Rosen-Zvi, *supra* note 12, at 771-72.

⁷⁴ Eventually, and (at least to some extent) on the justices’ request, the bill would be divided in two, and enacted as the Judges Law of 1953 and the Courts Law of 1957. Sagy, *Supreme Authority*, *supra* note 44, at 65-66.

⁷⁵ On the historical roots of the Israeli judiciary, see, for example, GAD FRUMKIN, *JUDGE OF JERUSALEM* (1954) (Hebrew); ROBERT H. EISENMANN, *ISLAMIC LAW IN PALESTINE AND ISRAEL: A HISTORY OF THE SURVIVAL OF TANZIMAT AND SHARI’A IN THE BRITISH MANDATE AND THE JEWISH STATE* (1978); Assaf Likhovski, *Between Two Worlds: The Legacy of the Mandatory Legal System and the Early Israeli Legal System, in JERUSALEM AND THE BRITISH MANDATE* 253 (Yehoshua Ben Arie ed., 2003) (Hebrew) [hereinafter Likhovski, *Between Two Worlds*]; NATHAN BRUN, *JUDGES AND LAWYERS IN ERETZ ISRAEL: BETWEEN CONSTANTINOPLE AND JERUSALEM 1900-1930* (2008) (Hebrew).

⁷⁶ See Sagy, *Supreme Authority*, *supra* note 44, at 35-61 (providing a description of the bill and of the justices’ reaction thereto).

This last campaign turned out to be a success, and the HCJ remained in their possession. In this case too, the justices won the day.⁷⁷

C. Critical Juncture No. 3: An Overture

The 1990s opened up with two legal revolutions. The first was the Israeli “constitutional revolution.”⁷⁸ The “constitutional revolution” was declared by the Supreme Court when it announced (in the landmark *United Mizrahi Bank* case of the mid-1990s)⁷⁹ the validity of and laid down the conditions for judicial review of legislation based on the provisions of the 1992 Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. Soon it became clear that the HCJ would be the pivotal court to handle cases of constitutional review.⁸⁰

The second legal revolution of the 1990s was also announced by the Supreme Court, which introduced a fresh configuration of the adjudication of major branches of Israeli administrative law in the first half of the decade. Notably, in the famous 1991 *Pasternak* case, the Court “[s]itting as the HCJ” declared that, as a general matter, public tenders would be henceforth handled by lower courts in their regular civil capacity, rather than exclusively and directly by the HCJ, as had been the general practice.⁸¹ Other decisions in a similar vein ensued.⁸² The Court’s doctrinal novelties were endorsed and elaborated upon by the Legislature during the second half of the 1990s, and the process culminated in 1999 with the enactment of a Law extensively reforming the adjudication of a long list of administrative law matters.⁸³ Consequently, the following year, a sweeping reform in the area of judicial review of administrative agencies took place whereby District Courts were entrusted with passing judgment on entire sections of public law jurisdictions.

Hence, today most legal questions pertaining to public tenders, planning, municipal taxation, as well as innumerable similar matters are routinely dealt with by the District Courts (more accurately, by “District Courts Sitting as Courts for Administrative Matters”) as courts of first instance, rather than directly by the “Supreme Court Sitting as the HCJ.” While the history of this reform is yet to be

⁷⁷ *Id.*

⁷⁸ For the Israeli “constitutional revolution,” see, for example, HIRSCHL, *supra* note 12, at 50-65; MEYDANI, *supra* note 18, at 63-67, 126.

⁷⁹ CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village*, 49(4) PD 221 [1995] (Isr.).

⁸⁰ Maydani, *supra* note 23, at 76-78.

⁸¹ HCJ 991/91 *Pasternak v. Minister of Construction and Housing*, 45(5) PD 50 [1991] (Isr.).

⁸² See HCJ 1921/94 *Soker v. Construction, Housing, and Industry Committee*, District of Jerusalem, 48(4) PD 237 [2004] (Isr.); LCF 1287/92 *Avner Boskilla Chief of the Tiberias Jewish Religious Committee v. Shaul Tzemach*, 46(5) PD 159 [1992] (Isr.).

⁸³ Administrative Matters’ Courts Law, 5760-2000 (2000) (Isr.).

presented, it is already clear that it was done with the HCJ's full support, and had actually been instigated by a series of HCJ opinions in cases such as *Pasternak*.⁸⁴ It is likewise undisputed that one justice in particular, Justice Itzhak Zamir, oversaw this jurisdictional reshuffle through to its completion.

Crucially important, the 2000 reform has not altered the HCJ's vantage point over the vast field of public law, nor has it formally reduced its public law jurisdiction. As a rule, even following the reform, the HCJ retains concurrent or original jurisdiction in essentially all public law matters.⁸⁵ Still, as a practical matter, a large number of petitions that previously had made their way directly to the HCJ⁸⁶ are now funneled to the District Courts as a matter of course. Thus, as a result of the 2000 jurisdictional reconfiguration, such matters are brought to the Supreme Court only on appeal (as a practical matter).

Put in legalistic terms, the 2000 reform—a concurrent-jurisdiction reform—provided the HCJ with a doctrinally-recognized reason for preliminary dismissal of petitions without hearing them based on the existence of an alternative certified forum to review the case: the “District Courts Sitting as Courts for Administrative Matters.” As we have already seen, custom has it that the HCJ's doctrines relating to its discretion in hearing some cases and dismissing others go back to its foundations, indeed to its very *raison d'être* as a (High) Court of *Justice*,⁸⁷ and the HCJ has certainly and repeatedly made use of such customary reasoning.⁸⁸ In this respect, the 2000 restructuring of first-instance public law jurisdiction has merely added another case-in-point to the well-settled doctrine of alternative remedy. It is still noteworthy, however, that the Supreme Court was instrumental in bringing about and designing the 2000 reform.

⁸⁴ Mazuz, *supra* note 62; Sagy, *Supreme Authority*, *supra* note 44.

⁸⁵ See, e.g., CA 9379/03 Czerni v. The State of Israel, 61(3) PD 822 [2006] (Isr.); HCJ 2208/02 Maha Salame v. The Minister of Interior, 56(5) PD 950 [2002] (Isr.); Administrative Matters' Courts Law, 5760-2000, §6.

⁸⁶ This is a generalization that captures the great majority of relevant scenarios. *But see* Zamir, *Administrative Law*, *supra* note 50, at 76 n.46, for the exception of collateral attack.

⁸⁷ See *supra* text accompanying notes 53-58.

⁸⁸ The list of relevant cases is beyond counting. See, e.g., the following two recent cases in both of which the Court dismissed the petitions, *inter alia*, based on the argument that alternative remedy could be found in the District Courts Sitting as Courts for Administrative Matters: HCJ 2311/06 Ovodenko v. The Ministry of Interior—Administration of Population (September 18, 2006); HCJ 3397/08 Assad Ismayil v. The Military Commander for the West Bank (April 30, 2009).

V. ON THE PERMANENCE-TRANSFORMATION CONTINUUM AT CRITICAL JUNCTURES

The focus on critical junctures in the history of the HCJ has the advantage of bringing to the fore the overarching continuities and transformations that run through that history. Indeed, I believe that one of the advantages of LHI—namely, of historical institutionalism as applied to the HCJ but also in general—is that it allows for a nuanced, non-linear, even dialectic grasp of the history of this central court as well as other courts. More specifically to the HCJ, it may steer Israeli legal historians and institutionalists away from both the continuation-transformation dichotomy that dominates especially the historiography of the young, post-Independence Israeli Supreme Court⁸⁹ and the above-mentioned activist-conservative binary-separation.⁹⁰ LHI suggests that these dichotomies should be replaced by a more rounded, *bi-focal vision* of the Court's history—a vision that encompasses *both* transient *and* enduring as well as *both* activist *and* conservative themes in that history.

But this is not the only contribution LHI may offer the extant Israeli literature on the HCJ. For not only does it allow for an insightful, complex outlook on the history of Israel's foremost public law court, it also highlights aspects in the business of the HCJ that have gained little attention thus far. I have two inter-related aspects in mind. In particular, the first brings to light a change in the HCJ's jurisprudence, while the second sheds light on a lasting element in its constitution.

First, as so often emphasized, public law has always been at the forefront of the HCJ. Now I would like to argue that, as viewed through the lens of the above-mentioned three junctures, the history of the HCJ can be told, *inter alia*, as a history of the Court's shifting appetite for the various items on the menu of public law litigation. It may be argued, with the necessary qualifications that come with meta-historical schemes, that whereas initially the Court indicated its special interest in issues concerning the administration of courts (critical juncture 1), later it was anxious to deal with the administration of the state (critical juncture 2), and thence the state constitution appeared particularly enticing (critical juncture 3). Note that this first argument is about a shift in attention rather than of an incremental increase in the scope of cases. Clearly this argument highlights an important *transformation* in the annals of the Court. While it seems to follow Meydani's description of the Court as an "agenda setter,"⁹¹ it provides a refined—truly internal⁹²—account that is more attuned to the legal-doctrinal issues involved. Going back to this Article's broad historiographical argument, this first

⁸⁹ See *infra* Part V.B.

⁹⁰ See *supra* note 12 and accompanying text.

⁹¹ MEYDANI, *supra* note 18, at 121-46. See also EPSTEIN & KNIGHT, *supra* note 11, at 88 for an analysis of the U.S. Supreme Court's practices of "agenda setting" and even "agenda manipulation."

⁹² See *supra* notes 6-7 and accompanying text.

point illustrates LHI's advantage over existing historical institutionalism, which (as noted) examines the Court from an external outlook and thus provides a simplified understanding of its jurisprudence and operation.⁹³

Whereas the first point revolves around the characterization of the Court as the public law court of the land, the second point relates to one of its other distinct features: its institutional position as a court of first and last resort. This has been a noticeable, permanent trademark of the Court. I believe that the three-junctures schema may significantly add to our understanding of this stable feature of the Court by revealing the deeper, less-visible stability that sustains it. This latter stability concerns the role played by the HCJ throughout its history in maintaining, shaping, and administering its original jurisdiction. In other words, the argument is that, from its founding to this day, the HCJ justices have been influential in the creation and persistence of this feature.

Similarly, the HCJ has been instrumental in the gradual trickling-down of a number of public law issues from the HCJ to the lower courts. Going back to the first argument, some of the issues that have lost their luster over the years in the eyes of the HCJ (e.g., public tenders and urban planning) have doctrinally been changed in their classification. While previously the Court had classified these issues to be under the HCJ's exclusive jurisdiction, they have now been categorized as falling under the parallel jurisdiction of the HCJ and the lower courts.⁹⁴ The crux of the argument is, again, that a vital underlying theme runs

⁹³ See *infra* Part VI.

⁹⁴ See CA 9379/03 Czerni v. The State of Israel, 61(3) PD 822 [2006] (Isr.); Itzhak Zamir, *Public Tenders in Civil Courts*, 1 MISHPATUMIMSHAL—HAIFA U. L. REV. 197 (1992) (Hebrew).

This argument relates to host of internal-organizational issues pertaining to the daily life of the judiciary and of the Supreme Court. Thus, for example, it can be expected that the jurisdictional change in the area of public tenders and similar administrative law controversies—that is, the HCJ-initiated shift from the HCJ to the lower courts (see *supra* text accompanying notes 81-82)—has introduced a different dynamic in the relationships of the Supreme Court with the lower courts in the sensitive field of administrative law. For a preliminary related organizational-analysis of the Israeli judiciary, see Yair Sagy, *Orchestrating the Judiciary? Towards an Organizational Analysis of the Israeli Judiciary*, MISHPATUMIMSHAL—HAIFA U. L. REV. (forthcoming, 2014) [hereinafter Sagy, *Orchestrating the Judiciary?*] (Hebrew), and Yair Sagy, *A New Look at Public Law Adjudication: A Critical Organizational Analysis & an Israeli Test Case*, 24 J. TRANSNATIONAL L. & POL'Y (forthcoming). For relevant literature dealing with the U.S. judiciary, see, for example, STEPHEN T. EARLY, *CONSTITUTIONAL COURTS OF THE UNITED STATES: THE FORMAL AND INFORMAL RELATIONSHIP BETWEEN THE DISTRICT COURTS, THE COURTS OF APPEALS, AND THE SUPREME COURT OF THE U.S.* (1977); Donald R. Songer et al., *The Hierarchy of Justice: Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994); Charles M. Cameron et al., *Strategic Auditing in Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000); Ethan Bueno de Mesquita & Matthew

across the three junctures and related doctrinal changes: the HCJ has been influential—one is tempted to say even “activist”—*throughout its history* in the determination of the purview of its own original jurisdiction, and it has been actively pursuing that end. This second point enriches both legal historians’ and institutionalists’ grasp of the Court, especially of the young Israeli Court, which is usually portrayed as clearly conservative due to its undeniable weakness compared to the other two branches of government.⁹⁵

I will now elaborate on and further contextualize the two arguments.

A. *Sic Transit Gloria Mundi?*

The jurisprudence of the Supreme Court during the 1950s and later decades is the subject of an ongoing lively debate, fraught with juxtapositions of conservative versus activist jurisprudences, and I need not rehash it here.⁹⁶ What I do want to stress is that the said debate, seeking to characterize the Court’s shifting styles of jurisprudence across the decades, takes for granted the simple fact that a comparable change in the issues that have concerned the HCJ over the years has also occurred. This would require—and should be especially rewarding when faced with—the kind of *longue durée* analysis that is conducted by LHI.

A comparison of the 1990 critical juncture and that of the 1950s (critical junctures 3 & 2, respectively) insightfully illustrates this point. In the following paragraphs I wish to argue that both junctures saw a similar dynamic in which the HCJ was willing to let go of one set of subject matters (e.g., execution in juncture 2 and planning in juncture 3) in anticipation of an upsurge in cases involving more contentious (and maybe more attractive in its eyes) public law disputes (e.g., the administrative process in juncture 2 and constitutional review post-Israeli “constitutional revolution” of the 1990s in juncture 3). In short, the dynamic is about the HCJ seeking to make room for one item on *its* agenda in lieu of another, since it regarded the latter as suitable to be addressed by the lower courts, even though the latter had been previously whole-heartedly embraced, even cherished, by the HCJ.

Consider the fate of the execution of court orders, including the review of officers of the court who carry out such executory duties. This whole area had always fallen squarely within the purview of HCJ responsibilities. First, it is obviously concerned with the administration of justice.⁹⁷ Second, it is also a particularly sensitive spot in the judiciary-Executive interface in which Executive officers, rather than judges, have to see to it that courts’ judgments are

Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002); Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535 (2011).

⁹⁵ I will return to this point below. *See infra* text accompanying note 120.

⁹⁶ *See* sources cited *supra* note 12.

⁹⁷ *See supra* text accompanying note 67.

effectuated.⁹⁸ In the process, such officers attain a foothold within the justice machinery and assume direct responsibility over a critical phase of the judicial process. No wonder, then, that during the Mandate-period, petitions concerning executory proceedings dominated the HCJ's docket.⁹⁹ In fact, by Israeli Justice Olshen's estimate, they comprised "the vast majority" of petitions to the HCJ during that period.¹⁰⁰ This development would not have surprised Haycraft, who, as noted, intended "his" HCJ to concentrate above all on such issues.¹⁰¹ Yet, we have reasons to believe that Haycraft would have been puzzled by the reputation the HCJ would gain during later generations, and certainly following Israeli statehood, as the bulwark of civil liberties.¹⁰²

An early indication of the currency of the latter perception of the HCJ was given by the first generation of Israeli justices. When faced with the proposal to "deprive them" of the HCJ, which, as we have seen, circulated in official bills in the early 1950s,¹⁰³ the resisting justices raised, among others, the argument that the HCJ played a critical role in the assimilation of rule-of-law principles into the general public and the budding state's bureaucracy. According to the justices, the HCJ would be less effective in carrying out this mission once transferred to the lower courts. The important point is why this argument made sense to many at such an early stage.¹⁰⁴ It seems that the Mandatory HCJ's and its young Israeli successor's few forays into the minefield of inter-branch relations and civil liberties were deemed sufficient to sustain the connection between the HCJ and the preservation of liberal-democratic values. This association was further and considerably solidified in the following years, as the HCJ handed down a series of decisions deemed "liberal" and pro-civil liberties.¹⁰⁵

But what about execution, so dear to Haycraft, its founding father? It turns out that, although the justices of the early 1950s found fault with the said bill that had been sent for their review, most of them conceded that there should be one exception to their complete opposition.¹⁰⁶ The one subject matter traditionally at the disposal of the HCJ that they thought could be easily relegated to lower courts was that of execution. And a few years later, in 1957, Olshen—now the sitting Chief Justice—repeated the same position in a letter to the Justice Minister.¹⁰⁷ Eventually, in 1967 a comprehensive legislative reform in this area

⁹⁸ See Sagy, *For the Administration of Justice*, *supra* note 49.

⁹⁹ Eyal Katvan, *Kosher for Publication: On the Publication of Court Judgments During the Mandate* (unpublished manuscript) (on file with the author) (Hebrew).

¹⁰⁰ Sagy, *Supreme Authority*, *supra* note 44, at 63.

¹⁰¹ See *supra* Part IV.A.

¹⁰² See *supra* note 50.

¹⁰³ See *supra* text accompanying note 74.

¹⁰⁴ Sagy, *Supreme Authority*, *supra* note 44.

¹⁰⁵ See sources cited *supra* notes 50, 62.

¹⁰⁶ Sagy, *Supreme Authority*, *supra* note 44.

¹⁰⁷ *Id.*

took place whereby issues of execution were removed to the “regular” civil courts.¹⁰⁸

Going back to the aforementioned “liberal” jurisprudence, it should be noted that it was typically about disputes between a citizen and an official of the local or national government. This is an indirect way of saying that it was by and large about administrative law, namely the branch of public law that was concerned, first and foremost, with regulating the manner in which Executive organs operate. To be sure, the justices of the 1950s would not let go of this part of the HCJ’s business.¹⁰⁹

Interestingly, petitions concerning the execution of courts’ orders figured much less prominently on the HCJ’s post-Independence docket. While explanations for this dramatic decrease were offered (according to Justice Olshen, for example, it was due to the eradication of corruption among executory officers post-Independence),¹¹⁰ this obviously would not explain why the HCJ decided to “compensate” for the decrease by increasing the proportion of other administrative law cases on its docket. Its reasons for doing so as they might have been,¹¹¹ Haycraft’s formulation of the HCJ’s jurisdiction nevertheless remained intact. The reshuffle in the items of the HCJ’s agenda did not require an update in its constitutive legislation. Although in 1957 Haycraft’s formulation was officially abolished with the adoption of the 1957 Israeli Courts Law, that latter Law as well as later legislation (including the legislation currently in force) have all been considered, for all purposes and intents, to be congruent with Haycraft’s original phraseology.¹¹² To repeat, the Court’s mandate remains the same to this day. It has not changed even throughout (and after) the eventful decade of the 1990s, during which the business of the Supreme Court underwent quite a radical change, as we have seen.¹¹³

Indeed, the concurrence of the two above-mentioned revolutions of the 1990s (the constitutional revolution and the revolution in the adjudication of administrative law matters), especially when viewed in parallel to the other two critical junctures in the HCJ’s history, appears to be noteworthy. It seems to

¹⁰⁸ Ron Harris, *The Fall and Rise of Imprisonment for Debt*, 20 TEL-AVIV U. L. REV. 439 (1997) (Hebrew).

¹⁰⁹ Cf. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (1928).

¹¹⁰ Sagy, *Supreme Authority*, *supra* note 44.

¹¹¹ For relevant explanations, see, for example, MAUTNER, *THE DECLINE OF FORMALISM*, *supra* note 18, ch. 4; MEYDANI, *supra* note 18, at 116-20; Ronen Shamir, *The Extent of English Law Absorption Into the Israeli Law*, in *JERUSALEM IN MANDATORY ERA* 290 (Yehoshua Ben Arie ed., 2003) (Hebrew) [hereinafter *JERUSALEM IN MANDATORY ERA*].

¹¹² See, e.g., H CJ 54/51 Attorney Gen. of Israel v. Cohen, 5 PD 1125, 1140 [1951] (Isr.); H CJ 10/59 Levy v. Reg’l Rabbinic Tribunal, 13(2) PD 1193, 1199 [1959] (Isr.); Zamir, *The High Court of Justice Authority*, *supra* note 58, at 227.

¹¹³ See *supra* Part IV.C.

suggest a similar dynamic whereby the Court takes the initiative in trying to prioritize one kind of case over another by revealing its preference that the least-favored be relegated to lower courts. As noted, while the HCJ's 1950's attempt to revamp the Court's daily routines (apropos the controversy surrounding the Rosen bill)¹¹⁴ by removing execution from its docket had failed,¹¹⁵ its comparable campaign of the 1990s centering on run-of-the-mill administrative law cases was a success.¹¹⁶ Next, I will dwell further on that success and examine it within the wider context offered in the Article.

B. LHI and Israeli Legal Historiography

It appears that the past generation of Israeli legal history witnessed a shift in emphasis in the historiography of early statehood. Whereas previously the foundation of the State of Israel had been regarded as a jurisprudential watershed, later legal historians came to challenge the universal centrality of 1948 in the legal history of the land. Accordingly, while the former approach laid the emphasis on fledgling Israel's departures from its Mandatory legal heritage, the latter underscored many instances of continuity between the law of pre- and post-statehood. Put differently, the latter argued that although the establishment of the State of Israel was undoubtedly and for countless purposes momentous, it might have been less eventful in the legal history of the State, at least in some contexts.¹¹⁷

¹¹⁴ See *supra* Part IV.B.

¹¹⁵ However, as we have seen and I shall now emphasize, in other respects the justices of the 1950s were successful in securing other outcomes, which they regarded as vital. Above all, they got to keep the HCJ in their possession. See Sagy, *Supreme Authority*, *supra* note 44. Moreover, as noted (see *supra* text accompanying note 108), already in 1967 execution controversies would be relegated to the lower courts.

¹¹⁶ See *supra* Part IV.C.

¹¹⁷ See Assaf Likhovski, *Between "Mandate" and "State": Rethinking the Periodization of Israeli Legal History*, 29 MISHPATIM—THE HEBREW U. L. REV. 689 (1998) (Hebrew) [hereinafter Likhovski, *Between 'Mandate' and 'State'*]; Likhovski, *Between Two Worlds*, *supra* note 75. See also Yoram Shachar, *History and Sources of Israeli Law*, in INTRODUCTION TO THE LAW OF ISRAEL 1 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995); Ron Harris, *Preservation of Legal Traditions in Post-Colonial Societies*, in JERUSALEM IN MANDATORY ERA, *supra* note 111, at 287; Shamir, *supra* note 111.

This historiographical debate concerning the periodization of Israeli legal history may naturally bear not only on the manner in which we tell the history of distinct branches of law, but also on the manner in which we divide into periods Israeli legal history as a whole. As is always the case with debates surrounding periodization, deep ideological and jurisprudential questions, which often present themselves in the guise of specific legal historiographical issues, are at stake here. See, e.g., Likhovski, *Between 'Mandate' and 'State'*, *supra*; Hanna Hertzog, *Any Year Can Be Taken as the Beginning—Periodization*

A host of questions have followed the latter approach. Once the centrality of 1948 in Israel's legal history is challenged, a whole series of averted revolutions—legal revolutions that could or maybe even should have taken place but that ultimately did not, be that for lack of will, lack of sufficient support, or for other reasons—may easily be conjured up: notably, proposals circulating at the time to change the State's orientation from the common to continental law, or to considerably amplify the role Jewish law would play post-Independence.¹¹⁸

Thus viewed, this Article seems to add another item to this menu of would-be legal revolutions of the 1950s in recalling the (abortive) attempts made at the time to deprive the Supreme Court of the HCJ. Indeed, the fact that these attempts came to naught may give rise to the argument herein that Israeli jurists followed in the footsteps of the British. Stated more forcefully, on this reading, in adopting the British HCJ configuration, the Israelis merely stayed, even got stuck, in the Mandatory rut. Yet, as noted, this approach hardly captures the complexities of the story at hand. It clearly fails to note the cardinal fact that, to the extent that the post- and pre-Independence HCJ look alike, that resemblance is the result of a political battle. Despite obvious similarities between the Israeli Court and its Mandatory predecessor, the institutional position of the Court—here clearly denoting both the HCJ and the Supreme Court as a whole—had to be won out by the first Israeli Justices who launched a campaign against attempts to reallocate their jurisdiction. Focusing on the institutional continuity between the Mandatory and the Israeli HCJ, one might lose sight of the processes wherein this continuity was actively assured and entrenched. The fact that the HCJ remained part of the Supreme Court in the early 1950s was not a foregone conclusion. Rather, a considerable effort had to be invested in order for the HCJ *not* to be moved, namely, for it to *stay* where it had always been.

At the same time, this episode has demonstrated the strength of the historical-institutionalist argument that “[t]he creation of institutions closes off options by making it more costly to reverse course, by differentially distributing resources, and by tying interests and identities to the status quo.”¹¹⁹ So viewed, the justices of the 1950s benefitted from the fact that Haycraft made sure that there would be an HCJ in Palestine, thus (willy-nilly) making it more difficult to change course in the future. Still, as noted, the first Israeli justices had to launch a

and Identity in the Debate of the 1950s, 17 *THEORY AND CRITICISM* 209 (2000) (Hebrew); Hizky Shoham, *From ‘Great History’ to ‘Small History’: The Genesis of the Zionist Periodization*, 18 *ISRAEL STUD.* 31 (2013).

¹¹⁸ This point was made by Assaf Likhovky in an important relevant piece, Likhovky, *Between ‘Mandate’ and State*, *supra* note 117. See also Sagy, *Supreme Authority*, *supra* note 44, at 32-33; Ron Harris, *Absent-Minded Misses and Historical Opportunities: Jewish Law, Israeli Law and the Establishment of the State of Israel*, in *STATE AND RELIGION IN ISRAEL, 1948-1967* 21 (Meir Bar-On & Zvi Zameret eds., 2002) (Hebrew); Paltiel Dikshtein, *Declaration of the Hebrew Law*, 5 *HAPRAKIT* 3 (1948) (Hebrew).

¹¹⁹ Whittington, *supra* note 2, at 616.

battle (after all, Haycraft made it *more* difficult to change course, but not impossible), a mission they carried out with great enthusiasm and success.

The achievement of the justices of the 1950s may be less visible than that of the justices of the 1990s. Nevertheless, it becomes apparent when examined against the backdrop of the three critical junctures taken together. Indeed, a common denominator of the three critical junctures is that there is an element of success to the three of them. For, in these three instances, the justices were instrumental—indeed, essentially *activist*—in designing the jurisdiction of the HCJ, or at least in keeping it intact. It may be thus said that this Article's analysis unfolds a chronology of on-going judicial activism embedded in the institution of the HCJ and that the unveiling of the overarching activist nature of the HCJ must be made part of the evolving history of this most central of courts.

One final remark, which points to another possible continuity running between the junctures: we must recall that the newly-appointed Israeli justices of the 1950s stood in the midst of the political and legal skirmish surrounding the HCJ, and still were able to secure a favorable result. This narrative, too, does not necessarily sit well with the dominant tenor in the accepted legal historiography of the Court, which tends to depict the justices and the Court of early statehood as holding a precarious position vis-à-vis the other branches of government, if not downright being demeaned by them.¹²⁰ At the very least, the fact that the same Court and the same justices emerged triumphant from the HCJ debate should caution us against adopting sweeping characterizations of the institutional context surrounding the Court and how the justices fared, in the 1950s and in other decades. The poignancy of the last point, too, is made apparent by lining up the critical juncture of the 1950s alongside the other two critical junctures.

VI. CONCLUSION: KEY LESSONS OF LHI

This Article has introduced LHI—that is, an intellectual prism combining legal history and historical institutionalism—to the study of the history of legal institutions in general and of courts in particular. It has sought to demonstrate

¹²⁰ Lahav, *supra* note 73; LAHAV, *supra* note 43; Rosen-Zvi, *supra* note 12, at 775; Avraham Shapira, *Self-Restraint of the Supreme Court and the Preservation of Civil Liberties*, 3 TEL-AVIV U. L. REV. 640 (1973) (Hebrew); Daphne Barak-Erez, *And Thou Shalt Tell Thy Son: History and Memory in the Court*, 26 TEL-AVIV U. L. REV. 773, 800-02 (2002) (Hebrew); DAPHNE BARAK-EREZ, MILESTONE JUDGMENTS OF THE ISRAELI SUPREME COURT 122-29 (2003) (Hebrew); MAUTNER, THE DECLINE OF FORMALISM, *supra* note 18, at 123; MAUTNER, LAW AND CULTURE IN ISRAEL, *supra* note 12, at 158; MICHAL SHAKED, MOSHE LANDAU—A JUDGE 132 (2012) (Hebrew). *But see* Rozin, *supra* note 43; Nir Kedar, *A New Perspective on the Establishment of Israeli Judiciary*, 11 ISRAEL 1 (2007) (Hebrew); Nir Kedar, *Democracy and Judicial Autonomy in Israel's Early Years*, 15 ISRAEL STUD. 25 (2010).

that, owing to its ability to provide a dialectic, synthetic, and rounded theoretical prism, LHI is able to produce new and significant insights into the history of the HCJ, Israeli legal history, and the history of courts in general.

As indicated above, LHI may provide legal historians with a nuanced, non-binary perception typifying, for example, the pervasive discussion of courts' activist/conservative jurisprudence. LHI offers an alternative to such a constrictive and limited perception by highlighting the structural parameters within which courts operate, thus providing a fuller, more credible understanding of the options available to courts and potentially exposing attempts made by courts to enlarge their menu of options. Legal historians can benefit from incorporating such dialectic perceptions into their studies, for example, in considering competing schemes of the periodization of institutions' and countries' legal history.¹²¹

Generally, LHI presents an attractive addition to extant legal historiography by outlining a new way of telling legal institutions' history and hence uncovering narratives formerly untold. Thus, as this Article has demonstrated, LHI, when brought to bear on the legal history of the HCJ, supplements the familiar historiography with both transparent continuities (notably, the HCJ's consistent, "activist" control over its own jurisdiction) and subtle transformations (e.g., in the list of subject matters on the HCJ's docket) that run throughout that history.

Further, as I have demonstrated, because of its focus on the institutional setting within which courts operate and because it takes law seriously, LHI may have something to offer not only to legal historians *but also to new (and historical) institutionalists*, who tend to look at courts "from the outside," as it were, not placing enough emphasis on internal, doctrinal facets of the courts' behavior. The latter group should take to heart the understanding that when it comes to courts, legal doctrines may very well be an important institutional constraint that has to be consulted if a credible account of courts' workings is to be given. For that reason, LHI contributes to new (and historical) institutionalists by demonstrating how an institutionalist analysis of legal institutions may be conducted without neglecting pertinent ("internal") legal doctrines.¹²²

Lastly, this Article has also highlighted—apropos the discussion of the HCJ's remarkable delegation of some of its docket to the lower courts in order to make way for other issues to be addressed—an additional avenue of research that LHI calls for: an LHI analysis of courts is likely to direct our attention to organizational considerations relating to the interface between supreme and lower courts. In doing so, LHI sheds light on a crucial internal aspect of the daily

¹²¹ See *supra* note 117 and accompanying text.

¹²² See *supra* text accompanying notes 91-93 (comparing, apropos the discussion of the changes in the HCJ's "appetite" for the various items of the public-law menu, this Article's analysis to the one offered by MEYDANI, *supra* note 18). See also *supra* note 5 (noting Professor Gila Stopler's critique of the "lack of attention to law and to legal analysis" in institutional analysis).

routine of courts that has been overlooked by *both legal historiography and new institutionalism*.¹²³

For all these reasons, LHI will surely enrich our understanding of legal institutions. My hope, therefore, is that this Article will be soon followed by like-minded research.



¹²³ See *supra* note 94 (suggesting the jurisdictional shift whereby lower courts attained jurisdiction over administrative law matters may have deep organizational consequences).

