Appendix

Israeli Administrative Law from an American Perspective

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A. Introduction

To the casual American observer, Israeli administrative law appears comfortably familiar. Reading the administrative law opinions of the Israeli Supreme Court, an American will feel in the company of old friends – familiar legal issues, doctrinal categories, policy and jurisprudential arguments, even terms of art and legal authorities. This should hardly be surprising. In both nations administrative law has the common function of delimiting the powers of a modern, industrial democratic regime, and, in particular, allocating power and spheres of discretion between the private and public sectors,[1] and, within the public sector, among legislative,

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1. This paper focuses on American administrative law at the **federal** level. Although there are significant variations among the American states, the dispersion tends to cluster around the more salient federal norms.

executive, and judicial actors. In addition, Israel's administrative law jurisprudence derives heavily from British law and borrows selectively from American sources.

Yet, as one probes deeper, one is struck by rather striking differences between the two regimes. One senses these differences most acutely at the doctrinal level – that is, the choice of verbal formulations used to articulate particular rules or principles. In addition, one encounters differences at the rhetorical level as well – that is, in the form of argument used and relative weights given to various factors in justifying the choice of doctrine and the resolution of particular disputes.

At the risk of inevitable oversimplification, I would characterize the differences in the following ways. First, the Israeli doctrines of standing and justiciability are more tolerant of "public" actions against the government than their American counterparts. Second, judicial review in Israel is more substantively generous than in the United States, while American administrative law relies more heavily on procedural regularity as a device for disciplining administrative discretion. Third, at the rhetorical level, Israeli courts give somewhat greater emphasis to the "public law" objective of preserving the rule of law by policing the legality of official behavior. The administrative law opinions of American courts rely more heavily on the "private law" goal of protecting individuals against injury to legally recognized interests. The object of this paper is both to document these differences and to offer explanations for them.

B. Doctrine

1. Threshold Doctrines

Differences between Israeli and American law are most apparent in the threshold doctrines of standing and justiciability that regulate access to the courts.

(a) **Standing**

The American law of standing was nominally liberalized in the early 1970s by cases such as **Data Processing**[2] and **SCRAP**,[3] which replaced the traditional "legal interest" test with a more flexible "injury in fact" requirement. During the past two decades, however, the Supreme Court has progressively raised the effective height of the standing barrier through more aggressive use of its "nexus," "redressability," and

2. **Association of Data Processing Service Organizations, Inc. v. Camp.** 397 U.S. 150 (1970). See also **Barlow v. Collins** 397 U.S. 159 (1970).

3. **United States v. Students Challenging Regulatory Agency Procedures (SCARP)** 412 U.S. 669 (1973).

"generalized grievance" doctrines.[4] Thus, for example, in the **Simon** case, the Court denied standing to a group of low-income persons seeking to challenge an Internal Revenue Service ruling that permitted tax-exempt hospitals to refuse to give uncompensated health care to indigent patients. In **Allen**, the Court denied standing to a group of parents of black children seeking to challenge allegedly inadequate procedures used by the IRS to implement a declared policy of denying tax-exempt status to racially discriminatory private schools. Most recently, in **Lujan** the Court denied standing to members of a wildlife organization seeking to challenge a regulation issued by the Secretary of the Interior effectively denying extraterritorial application of the Endangered Species Act.

The Supreme Court of Israel appears to be considerably more hospitable to entertaining such "citizen" challenges to the legality of official action. At the doctrinal level, the Court has steadily expanded access to judicial relief by lowering standing barriers. The Israeli Court, like its American counterpart, nominally requires that a petitioner allege a "reasonable likelihood" that the challenged action will "prejudice" an "interest" of his. But, over time, the Court developed exceptions to this general prohibition on the *actio popularis,* for cases involving: (1) allegations of official corruption, or (2) problems of "salient constitutional character." In the **Aloni** case of 1987,[5] the Court further expanded even these rather elastic exceptions. The case involved a challenge to a decision of the Minister of Justice not to order the extradition of a French citizen wanted in France for murder. The Court granted standing to petitioners, despite their lack of any direct or personal interest, because the petition raised "serious legal questions which concern the rule of law in Israel."

The evolution toward a general *actio popularis* took a major step in the landmark **Ressler** case of 1988.[6] Reversing an earlier ruling on the precise point, the Court held that an ordinary citizen had standing to challenge the legality of an order of the Minister of Defense granting deferment of military service to yeshiva students. Justice Barak's opinion for the Court broadened the earlier "corruption" and "salient constitutional character" exceptions to embrace: (1) any allegation of a "grave defect in administrative action," or (2) matters "of a public character that directly concerns the promotion of the rule of law." After **Ressler,** one may fairly wonder whether anything of substance is left of the nominal requirement that a petitioner assert a

4. E.g., **Simon v. Eastern Kentucky Welfare Rights Org.** 426 U.S. 26 (1976); **Allen v. Wright,** 468 U.S. 737 (1984); **Lujan v. Defenders of Wildlife** 504 U.S. 555 (1992).

5. H.C. (application to the Supreme Court sitting in its capacity as the High Court of Justice) 852, 869/86 **Aloni v. Minister of Justice**, 41 (2) Piskey Din (P.D.) 1 (hereinafter: **Aloni**).

6. H.C. 910/86 **Ressler v. Minister of Defense,** 42 (2) P.D. 441 (hereinafter: **Resker**).

personal "interest" in order to establish standing to challenge administrative acts in Israeli courts.

b. Justiciability

As commonly used, the term "justiciability" connotes a cluster of doctrines and principles used by courts to demark a class of disputes thought inappropriate for judicial resolution. The United States Supreme Court has recognized a broad range of such doctrines. For example, under the general rubric of the "political question" doctrine, the Court has ruled nonjusticiable matters arising under the Constitution's Guarantee Clause (guaranteeing to every state a "republican form of government"), involving the conduct of the nation's foreign relations and war powers, the organization and training of militias, and the validity of the legislative process leading up to the enactment of legislation.[7]

A second doctrinal rubric under which American courts categorically refuse to hear claims alleging the illegality of governmental action is the so-called "committed to discretion" exception to the judicial review provisions of the Federal Administrative Procedure Act (APA).[8] Under this rather ambiguous mandate, the Supreme Court has held unreviewable such agency actions as a decision not to prosecute an alleged violation of a regulatory statute,[9] the allocation of funds among competing public programs under a general appropriation,[10] and the termination of an intelligence officer by the Director of the Central Intelligence Agency.[11] These cases distinguish between claims of illegality based upon an alleged violation of a statute from those based upon an alleged violation of the Constitution. Only the former are nonjusticiable. The Court has suggested – although never squarely decided – that Congress may not by statute bar the courts from deciding **constitutional** claims, even though Congress may bar the courts from reviewing **statutory** claims. For this reason, the Court has consistently interpreted "preclusion of review" statutes to apply only to statutory claims.[12]

7. The cases are discussed in **Baker v. Carr** 369 U.S. 186 (1962). See also **Powell v. McCormack** 395 U.S. 486 (1969); **Gilligan v. Morgan** 413 U.S. 1 (1973).
8. 5 U.S.C. §701(a) (2), which provides for judicial review of administrative action "except to the extent that... agency action is committed to agency discretion by law."
9. **Heckler v. Chaney** 470 U.S. 821 (1985). But cf. **Dunlop v. Bachowski** 421 U.S. 560 (1975).
10. **Lincoln v. Vigil** 113 S. Ct. 2024 (1993).
11. **Webster v. Doe** 486 U.S. 592 (1988) (hereinafter: **Webster**).
12. **Johnson v. Robison** 415 U.S. 361 (1974); **Webster** (supra, note 11); **McNary v. Haitian Refugee Center** 498 U.S. 479 (1991).

This willingness of the American Supreme Court to exclude entire categories of legal claims from judicial cognizance contrasts rather sharply with the posture of the Israeli Court. Thus, for example, in recent years the Supreme Court has given increasingly vigilant scrutiny to decisions involving such military and security issues as the granting of military deferments,[13] the establishment of a West Bank settlement for "military" reasons,[14] or a decision of a military commander to prevent the establishment of a lawyer's association on the West Bank.[15] Similarly, the Court has rather freely taken cognizance of claims involving decisions of prosecutors not to institute criminal or enforcement proceedings,[16] and "internal" parliamentary decisions, such as the power of the Knesset Speaker to exclude from consideration of the Knesset a non-confidence resolution submitted by a one-person party[17] or to exclude a bill containing allegedly "racist" language.[18] The Israeli Supreme Court has also readily reviewed the legality of the interparty "political agreements" among members of a ruling coalition.[19]

2. Scope of Judicial Review.

Not only are the threshold barriers to obtaining review on the merits somewhat lower in Israel, but the scope of the review afforded once a petitioner has crossed the threshold appears to be somewhat broader, as well. Consider, for example, the standard for judicial review of an official's interpretation of a statute. In its celebrated 1984 **Chevron** decision,[20] the United States Supreme Court articulated a highly deferential standard of review of agency interpretations of their governing statutes. Although a reviewing court must give effect to an "unambiguously expressed intent of Congress," said the Court, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

13. **Resler** (supra, note 6).
14. H.C. 390/79 **Dweikat v. Government of Israel,** 34 (1) P.D. 1.
15. H.C. 507/85 **Tamimi v. Minister of Defense**, 41(4) P.D. 57.
16. **Aloni** (supra, note 5); H.C. 935/89 **Ganor v. Attorney General**, 44(2) P.D. 485; H.C. 223/88 **Sheftel v. Attorney General**, 43(4) P.D. 356; H.C. 425/89 **Tzopan v. Military Advocate General**, 43(4) P.D. 718.
17. HC 73/85 **"Kach" Party Faction v. The Knesset Chairman,** 39(3) P.D. 141.
18. HC 742/84 **Kahane v. The Knesset Chairman,** 39(4) P.D. 85.
19. H.C. 1635/90 **Zerzevsky v. The Prime Minister**, 45(1) P.D. 749; H.C. 1523/90 **Levi v. The Prime Minister**, 44(2) P.D. 213; H.C. 1601/90 **Shalit v. Peres**, 44(3) P.D. 353.
20. **Chevron U.S.A., Inc. v. Natural Resources Defense Council,** 467 U.S. 837 (1984) (hereinafter: **Chevron**).

permissible construction of the statute." To be sure, the Court's subsequent adherence to this doctrine has been less than perfectly faithful.[21] But the weight of its recent decisions, and those of lower federal courts, has been quite sympathetic to upholding the statutory readings rendered by administrators.

By contrast, the **Chevron** principle of judicial deference does not apply in Israel. The position of its Supreme Court continues to be, as it was once supposed to be in America, that the rendering of authoritative interpretations of statutes is paradigmatically a judicial responsibility. Therefore, the issue decided by a reviewing court in Israel is not whether an administrator's interpretation is "reasonable," but rather whether it is correct.[22]

There appear to be material differences, also, in the standards employed by courts to review the exercise of administrative discretion. Both systems require that administrative actions must be predicated on an adequate basis of evidentiary support.[23] Beyond this, however, the criteria for evaluating discretionary or "policy" determinations appear to deviate moderately. The primary verbal formulation in American administrative law is the "arbitrary-capricious" standard.[24] The Supreme Court has characterized this standard of review as a "narrow one"[25] in the sense that the court may not substitute its judgment for that of the agency unless there has been either a "clear error of judgment," consideration of irrelevant factors, or failure to consider relevant factors. The most common reason advanced by reviewing courts for overturning an administrator's exercise of discretion is failure to provide an adequately reasoned explanation for the decision.[26]

21. See, e.g., **Young v. Community Nutrition Institute** 476 U.S. 974 (1986); **Immigration and Naturalization Service v. Cardoza-Fonseca** 480 U.S. 421 (1987).

22. In its search for the legally "correct" interpretation, the Court will, of course, take into consideration the position of the administrator charged with implementing the statute. But the administrator's interpretation is one among several considerations, and is never dispositive.

23. The American standard is expressed in terms of "substantial evidence," 5 U.S.C.§ 706(2)(E), a term most exhaustively and authoritatively defined in **Universal Camera Corp. v. National Labor Relations Board** 340 U.S. 474 (1951). The Israeli Court rejected the American formulation in favor of the British "probative value" standard, H.C. 442/71 **Lanski v. Minister of the Interior,** 26(2) P.D. 337, but the verbal difference is insignificant.

24. APA § 706(2)(A).

25. **Citizens to Preserve Overton Park, Inc. v. Volpe** 401 U.S. 402 (1971) (hereinafter: **Overton**).

26. E.g. **Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Insurance Corp.,** 463 U.S. 29 (1983).

The standard for reviewing discretionary action in Israel, "reasonableness," embraces all of the grounds for reversal under American law, but adds several others. One is "balance of interests." That is, not only must the agency consider all of the legally relevant factors, but it must accord appropriate weights to those factors. To be sure, this test has been used most aggressively in cases involving direct governmental regulation of expressive activities.[27] But it has been applied generally in other contexts as well, such as a decision by a public corporation not to terminate a contract.[28] A second distinctive ground for the review of discretionary acts is the concept of "proportionality" – similar to the principle well-developed in Continental administrative law that the burden imposed by an administrative restriction or regulation must be proportional to the harm or risk prevented. Again, the Israeli courts have wielded this principle most vigorously in cases involving governmental infringement of what in most societies are regarded as fundamental liberties, such as speech[29] and personal liberty,[30] but not exclusively so.[31]

There is one additional, and important, difference in the posture taken by American and Israeli courts towards administrative discretion. The Israeli Court has stated emphatically that there is no such thing as "absolute discretion." That is, even when a statute appears to confer an open-ended, unrestricted discretion on an administrator, the courts will review an action taken under such an authorization to assure that the action was taken for a legally permissible purpose.[32] By contrast, the

27. E.g., H.C. 14/86 **Laor v. Board of Censorship for Films and Plays**, 41(1) P.D. 421; H.C. 153/83 **Levi v. Commander of the Southern District of Police**, 38(2) P.D. 393; H.C. 87/53 **"Kol Ha'am", Inc. v. Minister of the Interior**, 7 P.D. 871.

28. H.C. 389/80 **Golden Pages Ltd. v. Broadcasting Authority**, 35 (1) P.D. 871. The contract at issue was for the sale of advertising time on the Authority's broadcast network, but there was no indication that the Court's decision or methodology of analysis was affected by the fact that the case involved a contract for commercial speech (as opposed to nonexpressive goods or services).

29. E.g., H.C. 680/88 **Schnitzer v. Chief Military Censor,** 42(4) P.D. 617.

30. E.g., H.C. 672/87 **Atmallah v. Commander of the Northern Front,** 42(4) P.D. 708; A.D.A. (Administrative Detenrion Appeal) 1,2/88 **Agabria v. State of Israel**, 42(1) P.D. 840; H.C. 361/82 **Khamri v. Commander of the Judea & Samaria Region,** 36(3) P.D. 439.

31. See, e.g., **Tamimi** (supra, note 15) (involving a restriction by military authorities on the right of West Bank lawyers to form an independent professional association).

32. H.C. 241/60 **Kardosh v. Registrar of Companies,** 15 (2) P.D. 1151 (reviewing, and reversing, a decision of the Registrar to deny a company registration for reasons of national security, notwithstanding a statutory provision permitting the Registrar "in his absolute discretion either [to] authorize or refuse the incorporation of the company").

American courts have interpreted the Federal Administrative Procedure Act[33] to insulate from judicial review any claim brought under a statute that "precludes" judicial review[34] or any administrative action "committed to agency discretion by law."[35] In this sense, the American courts do recognize a zone – albeit quite limited – of "absolute" administrative discretion.

3. Administrative Procedure

It is often pointed out that Israel lacks a comprehensive code of administrative procedure comparable to the American Administrative Procedure Act. It is easy, however, to overstate the significance of this difference. The law of administrative procedure in both nations is a complex amalgam of constitutional or quasi-constitutional common-law principles of procedural justice,[36] general "framework" statutory provisions,[37] and specific procedural provisions of substantive regulatory and benefits statutes. Looking at the two systems of procedural law in their entirety, one sees many more similarities than differences. Nonetheless, there are several variations worthy of note.

a. Adjudication

In the adjudicative context, both regimes generally require that the governmental agency or official afford the citizen notice and an opportunity to be heard before visiting a significant loss on him. The defining issues for a system of adjudicative process are the "when" and the "what." That is, under what circumstances is the hearing requirement triggered? And what procedures are embraced within the requirement? There are two principal sources of American law on the subject: the Administrative Procedure Act and the Due Process Clauses of the Constitution. The APA provides a highly articulated blueprint for adjudicative hearings of considerable

33. 5 U.S.C. § 701(a).

34. E.g., **Lindahl v. Office of Personnel Management** 470 U.S. 768 (1985); **Gott v. Walters,** 756 F.2d 902 (D.C. Cir. 1985), vacated, 791 F.2d 172 (D.C. Cir. 1985) (en banc).

35. See notes 9-12 supra.

36. Particularly, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and the common-law principal of "natural justice" in Israeli jurisprudence. See e.g., H.C. 3/58 **Berman v. Minister of Interior**, 12 P.D. 1493 (hereinafter: **Berman**).

37. Examples in Israel would include the Interpretation Law of 5741-1981, and the Administrative Procedure Amendment (Decisions and Statement of Reasons) Law of 5719-1958. The APA is the principal, but not exclusive, example in the United States. See notes 64-68, infra.

formality,[38] rather similar to a civil trial in the courts. This formal adjudicative model is required, however, only when the agency's authorizing statute requires adjudication "on the record after opportunity for an agency hearing." Most federal statutes usually do require an "on the record" hearing in the context of enforcement proceedings directed against a particular alleged offender or a proceeding involving the denial or termination of a valuable benefit or privilege, and courts have been willing to interpret ambiguous statutory hearing provisions to trigger the formal adjudicative requirement even in such contexts as licensing.[39]

Curiously, however, the APA does not provide an alternative, less formal adjudicative model for situations that do not meet the "trigger" requirement of a statutory "on the record hearing." In this context, federal administrative agencies are usually free to improvise, subject only to the constraints imposed by the Due Process Clause of the Fifth Amendment to the United States Constitution.[40] In a long line of decisions, the Supreme Court has adopted a highly positivistic-utilitarian approach to adjudicative due process. In the landmark 1972 **Roth** case,[41] the Court articulated its current two-step test for the application of the Due Process Clause. First, a court must determine whether the administrative action "deprived" the claimant of an interest that falls within the constitutional terms "life, liberty, or property." Second, the court must determine what process is "due" – that is, whether any particular procedural element demanded by the claimant is constitutionally necessary. In **Roth** the Court defined "property" as a "legitimate claim of entitlement" grounded in a specific provision of law, such as a statute, regulation, or government contract. Applying that definition, it ruled that Due Process was not applicable to the nonrenewal of a college teacher's one-year teaching contract, because nothing in the applicable law of the state gave him any basis for legitimately expecting renewal. The Roth case defined "liberty" more expansively, as embracing a variety of "privileges long recognized... as essential to the orderly pursuit of happiness by free men.[42] The Court has explicitly held that liberty embraces freedom from bodily restraint and invasion of bodily integrity.[43] But in cases

38. 5 U.S.C. §§ 554, 556-557.

39. E.g., **Wong Yang Sung v. McGrath** 339 U.S. 33 (1950); **Seacoast Anti-Pollution League v. Costle** 572 F.2d. 872 (1st Cir. 1978).

40. Or, in the case of administrative bodies at the state or municipal level, the almost identically worded Due Process Clause of the Fourteenth Amendment.

41. **Board of Regents of State Colleges v. Roth** 408 U.S. 564 (1972) (hereinafter: **Roth**).

42. Id. at 574, quoting from **Meyer v. Nebraska** 262 U.S. 390 (1923).

43. **Ingraham v. Wright** 430 U.S. 651 (1977) (hereinafter: **Ingraham**); **Parham v. J.R.** 442 U.S. 584 (1979); **Youngberg v. Romeo,** 457 U.S. 307 (1982).

involving interests that go beyond this core sense of "liberty," the Court has taken a noticeably positivistic posture, looking for evidence that the interest is specifically protected by the enacted law of the state.[44] As a practical matter, then, the Supreme Court's reliance on positive law to specify the content of "property" and (non-bodily-integrity) "liberty" means that the government could deny citizens **procedural** protections simply by withholding **substantive** entitlements.

The second question addressed by American Due Process jurisprudence is the form of the hearing required when the triggering condition (deprivation of "life, liberty, or property") is satisfied. In its landmark **Eldridge** decision,[45] the Supreme Court articulated a flexible, but highly instrumental balancing test. The process "due" in any given context is, it said, a function of the peculiar demands of the context. In order to determine whether any particular procedural device (such as the right to an oral hearing, or the right to confront and cross-examine witnesses) is required, the court must balance three factors: (1) the weight of the private interest at stake (2) the risk of error (actually, the differential risk of error from not using the particular contested procedural feature), and (3) the governmental interest in dispensing with the proposed procedural feature, including the fiscal and administrative burden of its adoption.

The Court has applied this calculus to a wide variety of contexts, sometimes granting petitioners additional procedural protections and sometimes not. For example, the Court granted the right to a precommitment hearing to a person confined in a state mental hospital,[46] and the right to an informal pretermination hearing to a discharged governmental employee[47] and to a customer of a municipal utility company whose service was disconnected as a result of a disputed debt.[48] On the other hand, the Court denied a student in a state university medical school the right to any hearing on an academic decision to drop her from school.[49] And, in the context of corporal punishment in public schools[50] and the loss or destruction of the property of prison inmates,[51] the Court has denied petitioners an **administrative** hearing, relegating them to their common-law tort remedies.

44. See, e.g., **Paul v. Davis** 424 U.S. 693 (1976); **Meachum v. Fano** 427 U.S. 215 (1976); **Kentucky Department of Corrections v. Thompson** 490 U.S. 454 (1989).
45. **Mathews v. Eldridge** 424 U.S. 319 (1976) (hereinafter: **Eldridge**).
46. **Zinermon v. Burch** 494 U.S. 113 (1990).
47. E.g., **Cleveland Board of Education v. Loudermill** 470 U.S. 532 (1985).
48. **Memphis Light, Gas & Water Division v. Craft** 436 U.S. 1 (1978).
49. **Board of Curators of the University of Missouri v. Horowitz** 435 U.S. 78 (1978).
50. **Ingraham** (supra, note 43).
51. E.g.. **Hudson v. Palmer** 468 U.S. 517 (1984). Cf. **Daniels v. Williams** 474 U.S. 327 (1986).

Adjudicative due process in Israel is less formalistic and less positivistic. The font for most administrative procedural requirements is the common-law principle of "natural justice" inherited from British law. As in England, the contours of the right to be heard have expanded from "quasi-judicial" proceedings to a wide range of "administrative" proceedings that have the potential to affect adversely valuable interests of particular individuals. In the pathbreaking **Berman** case,[52] the Supreme Court applied the principles of natural justice to a decision to de-annex a district from one city and annex it to another. Although the decision was an "administrative" act (as to which there was traditionally no right to a hearing), the Court held that it nonetheless fell within the maxim "no punishment without forewarning." Citing numerous British authorities, the Court interpreted the maxim to require the government to afford a hearing whenever its action "attack[s] a citizen in his person, property, occupation, status and the like." Transferring municipal jurisdiction of a neighborhood affected a "very important change" in the residents' "status" according to the "subjective point of view of the residents themselves." Both the breadth of the interests protected and the use of a subjective measure of value contrast with the somewhat more objective categorical approach used by the American Supreme Court to delineate the circumstances in which Due Process applies.

What sort of hearing does natural justice require in Israel? The Israeli Supreme Court has described the general contours of the *audi alteram partem* rule in these terms:

> [N]atural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position:
>
> (a) to make representations on their behalf; or
>
> (b) to appear at a hearing or inquiry (if one is to be held); and
>
> (c) effectively to prepare their own case and to answer the case (if any) they have to meet.[53]

Beyond stating that generic formula, however, the Israeli Court has not been particularly explicit about the methodology for resolving close procedural claims. In the recent expulsion cases (**Association for Civil Rights in Israel v. Minister of**

52. Supra, note 36.

53. H.C. 361/76 **"Hamegader-Iron" Ltd. v. Customs Collector,** 31(3) P.D. 281, 292.

Defense),[54] the Supreme Court declined to invalidate deportations of suspected terrorists for lack of a prior hearing, but required the military authorities to offer an opportunity for a prompt post-deportation hearing. In so ruling, the Court explicitly balanced several factors including the "serious and irrevocable" personal consequences to the deportee, the danger of inaccuracies and "mistaken identity" in the absence of a personal appearance, and the "vital interests of State security" requiring prompt action. Thus, in methodology, the Court's reasoning was strongly reminiscent of the instrumental balancing test adopted the United States Supreme Court in the **Eldridge** case.[55]

(b) Rulemaking

The high courts of Israel and the United States have not, as a matter of common law or constitutional law, required administrators to provide a hearing in the context of policymaking through the issuance of rules – or "subordinate legislation," as it is conventionally described in Israel. The authority for the proposition that the Due Process Clause does not require a hearing in this context dates back to the celebrated **Londoner** and **Bi-Metallic** decisions rendered by the United States Supreme Court early in this century.[56] These decisions come from an era very different from the modern era, in which so many important public policy decisions are made via rulemaking. For that reason, one might suppose that these decisions have lost some of their precedential value. But the Court has suggested in more recent decisions that their holdings retain full force.[57]

The situation in Israel is similar. The Supreme Court has stated in at least three cases that the dictates of natural justice do not give private parties a right to participate in essentially "legislative" actions of administrators.[58] Although one can fairly argue that all three pronouncements were unnecessary to the holdings of the cases,[59] they

54. H.C. 5973/92 **Association for Civil Rights in Israel v. Minister of Defense** 47(1) P.D. 267.

55. See note 45, supra.

56. **Londoner v. Denver** 210 U.S. 373 (1908); **Bi-Metallic Investment Corp. v. State Board of Equalization** 239 U.S. 441 (1915).

57. **Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council** 435 U.S. 519 (1978) (hereinafter: **Vermont**); **United States v. Florida East Coast Railway** 410 U.S. 224 (1973) (hereinafter: **Florida**); **United States v. Allegheny-Ludlum Steel Corp.** 406 U.S. 742 (1972) (hereinafter: **Allegheny-Ludlum**).

58. H.C. 542/76 **Consortium International Ltd. v. Director-General of the Ministry of Communication,** 31(3) P.D. 477; H.C. 335/68 **Israeli Consumer Council v. Chairman of the Commission of Inquiry for the Supply of Gas,** 23(1) P.D. 324; **Berman** (supra, note 52).

59. Baruch Bracha, "The Right to Be Heard in Rule Making Proceedings in England and in Israel:

appear to state the law in Israel still today. In particular, it seems to be well accepted that the "audi alteram partem" rule of natural justice does not apply to rulemaking in Israel, any more than the counterpart principle of due process applies to rulemaking in America.

At the statutory level, however, the picture is quite different. The APA established a comprehensive statutory framework for federal rulemaking that has remained largely intact since 1946.[60] Under the APA's so-called "notice and comment" procedure,[61] an agency must give prior notice of a proposed rulemaking, through either general publication or specific notification of persons "subject" to the proposed rule. The notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The agency must give interested persons an opportunity to submit written comments. The agency may, but is not required to, hold an oral hearing for the presentation of views. The agency must give "consideration of the relevant matter presented." When it issues final rules, it must provide "a concise general statement of their basis and purpose".

For a time, during the 1970s, the District of Columbia Circuit Court of Appeals interpreted these provisions rather creatively, imposing on agencies requirements to utilize trial-like devices, such as written interrogatories, written rebuttals, and even oral hearings. The Supreme Court brought this expansionist tendency to an abrupt halt with its pronouncement in **Vermont** [62] that reviewing courts have no power to enlarge upon the minimal procedures afforded by the APA. Nonetheless, the lower courts have continued to insist on conscientious application of those requirements,[63] in order to assure affected interests a fair opportunity to register and support their views.

Judicial Policy Reconsidered," 10 **Fordham International Law Journal** 613, 618-23 (1987).

60. 5 U.S.C. § 553.

61. The APA also provides for a more formal, quasi-adjudicative rulemaking procedure. But it is applicable only in situations in which "rules are required by statute to be made on the record after opportunity for an agency hearing." Very few federal statutes contain such an explicit requirement, and the courts have been quite unwilling to interpret ambiguous "rulemaking hearing" provisions to trigger the formal rulemaking model. See **Allegheny-Ludlum** and **Florida**, supra note 57.

62. See note 57, supra.

63. E.g., **Chocolate Manufacturers Association of the U.S. v. Block** 755 F.2d 1098 (4th Cir. 1985).

In addition to the "notice and comment" provisions of the APA, Congress has enacted several additional procedural statutes that effectively strengthen the opportunity of interested parties to participate in rulemaking and other forms of administrative policymaking. For example, the Negotiated Rulemaking Act[64] provides a framework to encourage agencies to establish broadly representative "negotiated rulemaking committees" to generate proposed rules (which must otherwise be enacted through the use of APA procedures). The Government in the Sunshine Act[65] and the Federal Advisory Committee Act[66] (FACA) requires that most meetings of federal agencies and federal advisory committees be open to the public. The Federal Freedom of Information Act[67] (FOIA) obliges federal agencies to disclose records in their possession to anyone who requests access to them, subject to several narrowly-construed exceptions. Finally, the "impact statement" strategy employed by Congress in statutes such as the National Environmental Policy Act[68] (NEPA) indirectly[69] strengthens the participatory opportunities of private parties, by obligating agencies to examine more rigorously the impact of their intended policies on interests previous undervalued in the policymaking process.

Israel has no equivalent to the rulemaking provisions of the American APA. The Knesset has filled this void in some instances, by providing in particular contexts that authorities must, prior to issuing a substantive rule, "consult" with certain interested parties, or publish a draft regulation, or otherwise enable interested parties to present their views to the agency. And the Attorney General issued a directive in 1985 calling for antecedent publication of draft regulations."[70] But there is no generic requirement of notice, opportunity for comment, and statement of basis and purpose comparable to the American model. Nor is there the equivalent of the panoply of additional participatory opportunities conferred or implied by statutes such as the FOIA, Sunshine Act, FACA, and NEPA.

64. 5 U.S.C. § § 561-570.

65. 5 U.S.C. §552b.

66. 5 U.S.C. App. 2.

67. 5 U.S.C §552.

68. 42 U.S.C. § §4331 et seq.

69. The Supreme Court has declared that NEPA does not directly enlarge upon the rights of citizens to participate in agency decisionmaking conferred by the APA or other statutory sources. **Vermont** (supra, note 57); **Kleppe v. Sierra Club** 427 U.S. 390 (1976).

70. Directives of the Attorney General, No. 60.012, November 1985.

C. Rhetoric

Reading the administrative law opinions of the highest courts of Israel and the United States, one observes differences at the rhetorical level as well as the doctrinal level, although the picture here is a good deal less clear. In particular, one observes a difference in the relative emphasis given to the twin functions of administrative law: protecting individual rights and interests, and assuring the rule of law by correcting unlawful official action. American opinions – especially recent opinions of the Supreme Court -- rarely invoke "rule of law" arguments of the sort that appear with greater frequency and saliency in at least some of the Israeli Court's leading opinions. A conspicuous example of the latter is Justice Barak's famous opinion in **Ressler,** where he says:

> The courts in a democratic society are bound by a duty to preserve the rule of law. The meaning of this is, among other things, that they must impose the law upon the governmental authorities and make sure that the government acts lawfully.[71]

And later:

> [I]t is judicial review that safeguards the proper action of the democratic formula. On the one hand, it ensures that the majority opinion will find its proper expression within the legal frames provided by the regime (the constitution, statutes, secondary legislation, orders) and will not exceed those frames, and that governmental action will be taken within the legal frame determined by the majority vote in the legislative body; on the other hand, it ensures that the majority will not violate rights of the individual, unless it is lawfully empowered to do so."[72]

This concern to preserve the rule of law animates opinions of other judges as well.[73]

One looks in vain for comparable language in recent decisions of the American Supreme Court. The standing cases focus on the concrete, physical injuries alleged by

71. **Resler** (supra, note 6), at 462.

72. I.D. at 492.

73. E.g., **Aloni** (supra, note 5) (per Shamgar, C.J.).

the claimant to have been occasioned by the unlawful official act, as well as the nature and strength of the connection between those injuries and the interests or concerns of the particular claimants before the court. The Court's opinions do not evince any strong concern for the prevention of official illegality. Indeed, in Lujan, Justice Scalia specifically rejected the idea that the citizen-suit provision of the Endangered Species Act conferred on all persons "an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[74] Justice Scalia's very invocation of "rights" conjures up the "private law" model of public actions emphatically rejected by Justice Barak. Even to the extent that Justice Scalia and his colleagues recognize an attenuation of the right-duty connection in public law cases, they apparently see no necessary connection between "democracy" and judicial correction of official lawlessness.

One can see a related rhetorical difference in the justiciability cases. In **Ressler,** Justice Barak rejected the idea of "normative nonjusticiability" – that is, the idea that some claims are not justiciable because there exist no legal norms applicable to their resolution. All official acts, he said, are either permitted or prohibited by law. There is no third category, no lawless wasteland governed solely by politics or personal preference, into which courts may not venture (even for the purpose of deciding, on the merits, that the action is lawful). By contrast, the United States Supreme Court has quite explicitly recognized a domain of "normative nonjusticiability." In the seminal **Overton Park** decision, the Court stated that the touchstone for applying the APA's "committed to discretion" exception to judicial review was whether "statutes are drawn in such broad terms that in a given case there is no law to apply.[75]

The different attitudes of the two courts on this point relates to the "rights"-"rule of law" distinction. To the extent that one views the role of judicial review as heavily weighted toward prevention of official illegality, one is less likely to be willing to carve out even a small domain of official action untouched by legal norms. To the extent, by contrast, that one views judicial review as primarily protective of individual "rights" or at least concrete "interests," one is more likely to tolerate such lacunae in the legal fabric.

A related point concerns the two courts' view of the relationship between "law" and "politics" (or "policy"). In **Ressler,** Barak draws a sharp distinction between the two. The courts have plenary authority over the domain of law, he says, and the political branch has plenary authority over the domain of policy. The fact that the actions of the judiciary, in its domain, affect the actions (or consequences of actions)

74. **Lujan** (supra, note 4).

75. See not e 25, supra, quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

by the government, in its domain, is not ever a **categorical** reason for the courts to stay their hand, although in particular instances it might be such a reason. Although the United States Supreme Court has often articulated a distinction between law and policy, one senses that the Court sees the relationship as a continuum, rather than a dichotomy. The continuum, moreover, contains a central region of intense overlap within which it is appropriate, as a general or categorical matter, for courts to exercise restraint. The reluctance to countenance "public" standing and the willingness to recognize a domain of absolute unreviewable discretion are plausibly manifestations of this view.

Further evidence for this thesis is supplied by the divergent views of the American and Israeli courts on the scope of review of administrators' statutory interpretations. The **Chevron**[76] deference doctrine recognizes a significant domain of "lawmaking" (statutory interpretation) that the Supreme Court views as more appropriately committed to administrators than to courts (perhaps because it is so thoroughly commingled with politics). The Israeli high court, by contrast, customarily accords less deference to an official's interpretation of his governing statute, a position that one would expect in a regime committed to a dichotomous view of law and policy.

D. Hypothesis

If I am correct in thus characterizing the differences, at a doctrinal and rhetorical level, between the regimes of administrative law in the two countries, what is the explanation for these differences? The determinants of legal doctrine, justificatory rhetoric, and jurisprudential theory are too numerous and subtle to warrant any simple or parsimonious explanation. But certain features of the legal and political environment seem to cry out for recognition as explanatory variables.

1. Governmental Structure

The most obvious explanatory variable is the difference in the two States' governmental structures. With its bicameral national legislature, directly elected chief executive, three-tiered judiciary, and federal system, the United States has a much more decentralized governmental structure than Israel, with its single-house legislature, parliamentary system of executive government,[77] and much more

76. See note 20, supra.

77. Israel has now moved part way toward the American presidential system through provision for direct popular election of the Prime Minister. Basic Law: The Government, S.H. no. 1396, p. 214. But this change did not take effect until 1996, and the Knesset retains the power to

concentrated judiciary. These structural differences have rather obvious implications for the role of the judiciary, especially its highest court, in supervising official action.

A system as fragmented as the American federal structure contains numerous political checks on unwise, ill-advised, and even unlawful administrative behavior. Administrative agencies in the American federal government are subject to supervision by and dependent, to varying degrees, on the support or three independent political entities: the House, the Senate, and the President, each elected by different constituencies, serving terms of different lengths, and often representing different political parties. These multiple overseers constrain the probability that agencies will depart significantly from the currently prevailing political consensus.

There is, of course, no assurance that the political consensus prevailing at the time when an agency takes a particular action will coincide with the consensus that prevailed at the time when the agency's authorizing statute was enacted. It is, presumably, this latter consensus that is the touchstone for resolving questions about the **legality** of an administrator's action. The prospect of a shift in the political consensus over time is one of the central reasons for requiring **judicial** oversight of agencies, rather than relying solely on political oversight.

The need for judicial supervision, then, is a function of the probability that administrators will act *ultra vires*. This, in turn, is a function of the scope of legal discretion customarily delegated to administrators. The larger the scope of delegated discretion, the less likely that an administrator will stray beyond its limits.

The relative scope of delegated discretion is plausibly greater in a decentralized presidential system than a parliamentary regime. To see why this is so, imagine the policy preferences of each independent political actor in a particular regime as a point in a two-dimensional policy space.[78] In the American system, there would be three points, representing the policy preferences of the House, the Senate, and the President. The triangle formed by these three points then defines the range of political discretion within which the administrative agency may operate. At the moment of statutory enactment, moreover, the triangle defines the agency's **legal** discretion. Because of their distinctive electoral bases and internal structures, the three American political power centers are likely to have rather distinct policy preferences. Because

dissolve the government (and thus also to dissolve itself) by a vote of no-confidence in the Prime Minister.

78. For an illustration of the application of this methodology to a comparison of presidential and parliamentary regimes, see Pablo T. Spiller, A Positive Political Theory of Regulatory Instruments: Contracts, Administrative Law or Regulatory Specificity?" 69 S. **California Law Review** 477 (1996) at 486-501.

the points are likely to be widely spaced, therefore, the area of the agency's legal discretion is likely to be relatively large.

In a centralized unicameral parliamentary system like Israel's, by contrast, there are in theory only two political authorities: the parliament and the government. Because the government derives its authority from its majority in the legislature, its policy preferences are likely to be close to those of the legislature. Thus, the range of policy discretion available to an administrator could be visualized as a rather short line between two proximate points. In actual operation, the model is more complex because the cooperation of minority parties is so often necessary to fashion a ruling coalition. These parties then have political power disproportionate to their sheer numbers, at least in those policy arenas in which they have strong interests. In the Israeli case, an example would be the "religious" parties, which exercise a powerful influence over matters of intense concern to the Orthodox Jewish community, such as domestic relations, Sabbath observance, and Jewish immigration. Recognizing the influence of such minority parties transforms the geometry of administrative discretion from a short line to a narrow triangle. Nonetheless, as a general matter, one would expect the range of both politically and legally permissible discretion accorded to administrators to be larger in the American than the Israeli system.

The implication of this analysis is that administrators will stray from the original range of consensus – and therefore, act *ultra vires* – more frequently in a regime such as Israel's. Therefore, the occasions for judicial supervision of **substantive** legality will be more numerous – and the resulting need for such supervision greater. By contrast, in the American system, where political oversight is likely to be a more effective form of administrative supervision, **procedural** regularity may assume greater relative importance. The more open and participatory the process that administrators must use in making and implementing policy, the more likely that each of the political branches will be able to exercise effective oversight over them. Thus one would expect that in a system such as America's, the courts would give relatively greater emphasis to procedural regularity than substantive legality in reviewing administrative action.

In a system like Israel's, by contrast, political supervision of officials is likely to be more concentrated and less public. The government and the ruling party or coalition in the legislature have virtually identical interests. The "government" does not need public procedures to help it supervise its own functionaries. In such a system, one must look to the opposition parties in the legislature to provide independent political oversight. By virtue of being the minority (losing) parties, however, they are usually denied the kind of staffing and investigatory powers necessary to exercising a meaningful oversight role.

Thus, in the Israeli system the independent judiciary is one of the few and quite possibly the sole, governmental bulwarks against ill-advised, oppressive, and unlawful official action. One would therefore expect its high court to fashion doctrines that make it easier for claims of official illegality to be presented for decision, and standards of review that provide relatively expansive substantive criteria by which to judge official acts. In such a system, competing institutional concerns about excessive judicial "intrusion" into "politics" will receive correspondingly less weight.

2. Security Concerns

The fact that Israel has been surrounded, infiltrated, and periodically attacked by mortal enemies for most of its history heightens the need for judicial oversight of the government. Even democratic regimes with much more dispersed political power have shown themselves to be thoroughly capable of trampling on civil rights and liberties during times of war and perceived threats to national security, as is amply demonstrated in recent American[79] and English[80] history. With its highly centralized political structure, chronic exposure to acts of invasion and terrorism, and prolonged history as an occupying force of neighboring, hostile territory, Israel is highly susceptible to abuses and misuses of government power in the name of national security.

An enhanced **need** for judicial oversight does not, of course, necessarily imply that the judiciary will supply that need. Indeed, in the early years of the State, the Israeli Supreme Court was very reluctant to intervene in governmental actions that implicated national security.[81] The very persistence of Israel's "state of emergency," however, has given the High Court both the opportunity and the confidence to develop a more active role in the review of security matters, while preserving the discretion to give the government the leeway that it might feel necessary in times of particular peril.[82] The doctrines of judicial review developed in Israel during the past 30 years are well suited to that role. The Court has drastically relaxed the standing and

79. See, e.g., **Korematsu v. United States** 323 U.S. 214 (1944); **Hirabayashi v. United States** 320 U.S. 81 (1943). Cf. **Dames & Moore v. Regan** 453 U.S. 654 (1981).

80. See, e.g., **McEldowney v. Forde** [1971] A.C. 632; **Liversidge v. Anderson** [1941] 3 All E.R. 338.

81. See Baruch Bracha, Judicial Review of Security Powers in Israel: A New Policy of the Courts, 28 **Stanford Journal of International Law** 39 (1991).

82. E.g., *Association for Civil Rights in Israel* (supra, note 54).

justiciability barriers that would block review of many governmental security policy decisions at the threshold, while preserving a limited role for "institutional justiciability" in those disputes in which judicial intervention might prove especially embarrassing for the Court. Likewise, its standard of review is sufficiently encompassing to prevent the most egregious abuses of individual liberty in the name of national security.

3. Constitutional Law

This latter point brings us to the final explanatory factor for the differences between American and Israeli administrative law – the nature of the two States' constitutions. It is often pointed out that the United States has a written constitution and Israel does not. In fact, the difference is much more complicated and subtle. The American Constitution is written, to be sure, but in most crucial places almost indeterminately ambiguous or vague, requiring highly discretionary judicial "interpretation." Israel has a series of "Basic Laws" enacted piecemeal over time by the Knesset as a kind of written "constitution," but it was not until the recent "Gal Amendment Law" case[83] that the Supreme Court even began to elucidate the authoritative status of Basic Laws. In the meantime, like its British cousins, the Israeli courts have used "common law" principles of statutory interpretation to elaborate a regime of judicially privileged interests such as freedom of expression.[84]

The real difference is in the degree of popular and political acceptance of judicial review of legislative acts, and this, in turn, is largely a function of history. We Americans sometimes forget that Justice Marshall was almost impeached for declaring in **Marbury v. Madison**[85] that the Supreme Court had the power to declare an act of Congress unconstitutional. We also forget that Marshall chose a politically tactful setting in which to declare such a controversial proposition. The Court declared unconstitutional an act of Congress conferring original jurisdiction on the Supreme Court. Thus, the Court denied itself the power to decide the case on its merits (as a matter of original jurisdiction) while ascribing to itself the power to invalidate Congressional enactments.

We also sometimes forget that **Marbury** was an administrative law case: that is, it was an action by a would-be public official (a justice of the peace) against an

83. C.A. (Civil Appeal) 6821/93 **Hamizrahi Union Bank, Ltd. v. "Migdal" Cooperative Village** 49(4) P.D. 221.

84. **Kol-Ha'am** (supra, note 27).

85. 1 Cranch 137 (1803).

administrator (the President) who had allegedly acted *ultra vires* (by withholding his commission in violation of a statute). In the United States of 1803, administrative law – though unknown by that name served as the procedural vehicle for the development of substantive "constitutional law." As such, administrative law was inextricably linked with constitutional law, and it is only the passage of time that has enabled American legal scholars to separate the two fields. Because constitutional law is now so well established as an independent body of judicial doctrine that we Americans think of administrative law as distinct. In late 20th Century America, administrative law is viewed as a means of securing essentially procedural protections and subconstitutional statutory rights to citizens aggrieved by actions of administrative agencies.

In the development of its administrative law, then, Israel is much closer to **Marbury** than **Chevron.**[86] The High Court is still struggling, nearly 50 years after the founding, to establish popular and political legitimacy for judicial oversight of the actions of a popularly elected government. And it has done so for most of that period under a state of emergency and without the mandate of an enacted constitution that expressly protects the liberties of ordinary citizens and religious and ethnic minorities. In that context, it should come as no surprise to Americans that the Israeli courts have elaborated a highly flexible and expansive administrative law jurisprudence.

86. See note 20, supra.