THOU SHALT ACCOMMODATE THE SECULAR: SABBATH LAWS' EVOLUTION FROM "DAY OF REST" TO "DAY OF LEISURE"

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I. INTRODUCTION

The Hours of Work and Rest Law[1] is a body of Israeli legislation that enumerates the restrictions of weekly work hours for employers and employees.[2] It contains separate rules for Jews and non-Jews, requiring Jewish workers to take their weekly rest period on Saturdays[3] and permitting non-Jewish workers to take off Friday, Saturday, or Sunday.[4] This Article traces Israel's Sabbath labor regulations through the Hours of Work and Rest Law, its enforcement by local and national authorities, and challenges to its constitutionality in the Israeli Supreme Court case, *Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig*.[5]

This Article views the Israeli Supreme Court's decision to uphold the law's constitutionality in *Design 22* within the framework of Israel's legislative history and past judicial rulings. The Court's decision is analyzed in the context of Israel's status as an expressly religious state and the resulting tensions between religious and secular segments of Israeli society. This Article also explores the evolution of Sunday restrictions in U.S. law from religious motivations to secular justifications, contrasts Israel's *Design 22* decision with U.S. court decisions regarding the constitutionality of Sunday closing laws in the United States—particularly as featured in the landmark case *McGowan v. Maryland*[6]—and draws comparisons between their respective validations of Sabbath and Sunday laws.

Viewing Israel's Sabbath labor restrictions through the prism of American Sunday laws leads to a richer understanding of the *Design 22* decision, and brings into sharper focus the distinct approaches of the Israeli justices' concurring opinions. In addition, knowledge of Sunday laws' history under American law highlights Israel's unique position as a democratic state with no separation of

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1. Hours of Work and Rest Law, 5711-1951, 5 LSI 125 (1950–1951) (Isr.).
2. *Id.*
3. *Id.* ¶ 7(b)(1).
4. *Id.* ¶ 7(b)(2).
5. HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig 2005(1) Isr. L. Reps. 340 [2005].
6. 366 U.S. 420 (1961).

religion and state,[7] which intertwines civil and religious services, and requires consideration of both Jewish and democratic values in assessing fundamental rights.

Although both the United States and Israel face the demands of increasingly secular societies, Sunday laws and Sabbath laws have evolved on parallel planes due to their courts' diverging legal foundations. U.S. courts must ensure that Sunday laws are framed in compliance with the Establishment Clause, while Israeli courts have no such requirement. On the contrary, to be upheld as constitutional under Israeli law, the Hours of Work and Rest Law must "befit the values" of Israel as a "Jewish and Democratic state"[8] and must contain both a proper "social purpose" as well as a proper "national-religious purpose."[9] Thus, the considerations for Israeli and American courts differ starkly with respect to Sabbath and Sunday work laws, although they draw similar critiques and face related dilemmas.

The following section, Part II, provides a backdrop of the current state of affairs of Israel's religious-secular tensions, delves into the Hours of Work and Rest Law itself and its enforcement on the ground, and outlines the prior Israeli cases that challenged Sabbath restrictions. Part III contains a detailed analysis of *Design 22*; traces the reasoning of Justices Barak, Naor, and Procaccia in their decision to uphold the constitutionality of the Hours of Work and Rest Law; and unpacks and critiques their respective positions. The examination of U.S. Sunday laws comprises Part IV, which follows the Sunday laws' evolution from the nineteenth century to their validation in *McGowan* in 1961, and profiles the modern state of Sunday laws in the United States. Part V synthesizes the distinctions and resemblances between *Design 22* and *McGowan*, and interprets the relationship between Israeli Sabbath laws and U.S. Sunday laws more generally. Part VI presents several solutions or compromises to achieve a sustainable balance between religious and secular Israelis' Sabbath-related demands.

II. ISRAEL'S SECULAR AND RELIGIOUS TENSIONS AND COMPROMISING LEGAL POSITIONS

A. Secular and Religious Tensions in Israeli Society

Israeli society faces a chronic stream of controversies which pit its secular and religious citizens at odds with one another, attributable in no small part to the ultra-Orthodox Jewish population boom over the past few decades.[10] One of the more

7. For an analogous comparative analysis examining South African Sunday laws in contrast with U.S. Sunday laws, see Jerry S. Ismail, *South Africa's Sunday Law: Finding a Compromise*, 11 IND. INT'L & COMP. L. REV. 563 (2001). The plurality of *State v. Lawrence* found that South Africa's constitution contains no establishment clause. *Id.* at 571.

8. *Design 22,* 2005(1) Isr. L. Reps. at 355–56.

9. *Id.* at 362–63.

10. Tobias Buck, *Israel Faces Threat from Ultra-Orthodox*, FINANCIAL TIMES (May 21, 2010), http://www.ft.com/intl/cms/s/0/8d1485b6-64fa-11df-b648-

recent clashes concerns the role of women in public space, and the ultra-Orthodox demands that women not be seen or heard in public arenas. Some of the more well-publicized disputes include: a government awards ceremony honoring a female pediatrics professor;[11] the resignation of the Israeli Air Force's chief rabbi over a mandatory military event featuring female singers;[12] and a confrontation on a gender-segregated public bus.[13]

Israel does not have separation of religion and state, and even its civil services and policies are laid with religious foundations. For example, civil marriage does not exist in Israel; marriage must be a religious ceremony, and if it is a Jewish marriage, then it must adhere to exclusively Orthodox standards.[14] Furthermore, as will be explored extensively in this Article, Israel's self-identification as a Jewish state also manifests in its labor and employment regulations; as a general matter, Jews may not employ other Jews, be employed, or be self-employed on the Jewish Sabbath (from Friday at sundown until Saturday night).[15]

Debates about the role of religion in Israel's public sphere do not take place in a vacuum. They arise in the context of profound cultural and economic conflicts between religious and secular Jewish Israelis. Secular Israelis may bear considerable resentment towards ultra-Orthodox (Haredi) citizens who receive exemptions from the military[16] and are often recipients of tax benefits and

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00144feab49a.html#axzz27YLIcKSp.

11. Ethan Bronner & Isabel Kershner, *Israelis Facing a Seismic Rift Over Role of Women*, N.Y. TIMES (Jan. 14, 2012), http://www.nytimes.com/2012/01/15/world/middleeast/israel-faces-crisis-over-role-of-ultra-orthodox-in-society.html?pagewanted=all.

12. *Id.*

13. Joshua Mitnick, *From Back of the Bus, Israeli Women Fight Segregation*, WALL ST. J. (Jan. 5, 2012), http://online.wsj.com/article/SB10001424052970204368104577136253309226604.html. Public buses that run through ultra-Orthodox neighborhoods tend to be gender-segregated, with women in the back and men in the front, to facilitate the men's practice not to look at a woman other than one's wife. In *Ragen v. Ministry of Transportation*, the Court considered whether public transportation providers could continue to enforce gender segregation in buses passing through ultra-Orthodox neighborhoods. The Israeli Supreme Court found the practice invalid, as it violated the principles of equality and antidiscrimination, but also held that if passengers willingly consented to such an arrangement by voluntarily sitting in different parts of the bus, the bus companies could accommodate their passengers' demands. The Court also required that buses put up signs which make clear that separate entrances and segregated seating are not mandatory. HCJ 746/07 Ragen v. Ministry of Transportation [2011] (Isr.), *available at,* http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.pdf.

14. Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 122 (2000) (citing IZHAK ENGLARD, RELIGIOUS LAW IN THE ISRAELI LEGAL SYSTEM 62, 176 (1975)). It is therefore impossible for Jews and non-Jews to marry legally in Israel or to have a non-religious ceremony. Furthermore, due to the Orthodox monopoly over status issues, even non-Orthodox rabbis are prohibited from officiating valid state-recognized Jewish marriages. *Id.* at 122–23.

15. Hours of Work and Rest Law, 5 LSI 125.

16. The policy to grant military exemptions for Haredi men studying in *yeshivot* (academies for Jewish learning) is a highly contentious issue. In February 2012, Israel's Supreme Court deemed the Tal Law (which gave students in *yeshivot* full-time exemptions from military service)

government subsidies.[17] Moreover, Haredi men frequently do not contribute to the workforce or national economy—as they commonly spend their days engaged in Torah study rather than pursuing secular professions.[18] There is over 60% unemployment among Haredi men, while Haredi women often work to support their families.[19]

Approximately 20% of Israelis describe themselves as "religious," about 40% consider themselves "traditional," and over 40% identify as completely secular.[20] The proportion of the ultra-Orthodox population in Israel has risen dramatically in recent years, with the ultra-Orthodox population now numbering one million.[21] Between 1990 and 2008, the percentage of ultra-Orthodox Jews in Israel rose from 3% to 9% of Israel's Jewish population,[22] an increase partially explained by the fact that religious Jews, and Haredim in particular, tend to have high birth rates.[23] Dan Ben-David, executive director of the Taub Center for Social Policy Studies observes: "[Haredi children] make up more than 20 percent of all kids in primary

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unconstitutional, but left the job of crafting a new policy to the Knesset (Israel's parliament). *See* Yair Ettinger & Gili Cohen, *Israel's High Court Rules Tal Law Unconstitutional, Says Knesset Cannot Extend it in Present Form*, HAARETZ (Isr.), Feb. 21, 2012, http://www.haaretz.com/news/national/israel-s-high-court-rules-tal-law-unconstitutional-says-knesset-cannot-extend-it-in-present-form-1.414009. *See also Judaism in Israel: Talmud and Cheesecake*, ECONOMIST (July 28, 2012), http://www.economist.com/node/21559463 [hereinafter *Judaism in Israel*] (noting that there are approximately 110,000 Haredi men who have not served in the military, and that: "Each year another 6,000-odd *haredi yeshiva* (Talmudic seminary) students reach the age of 18 and join the ranks of draft-dodgers. That figure already represents 13% of the Jewish male age group . . . and is set to grow fast . . . .").

17. Meirav Arlosoroff, *Promoting Haredi IDF Service with Carrots, Sticks*, HAARETZ (Isr.), June 19, 2012, http://www.haaretz.com/business/promoting-haredi-idf-service-with-carrots-sticks-1.437248 (regarding proposals to incentivize Haredi men to complete their military or national service that would alter economic benefits offered to Haredi men and their families).

18. *See* Bronner, *supra* note 11; *Judaism in Israel*, *supra* note 16.

19. *Id.*

20. Shimon Shetreet, *The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel*, *in* RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 87, 134 (Winfried Brugger & Michael Karayanni, eds., 2007). It is unclear whether this statistic only accounts for Israeli Jews or if it also includes the Israeli Muslim or other non-Jewish segments of the population. *See Judaism in Israel*, *supra* note 16 (referencing a survey of Jewish Israelis from 2009 by the Guttman Centre for Surveys, in which 46% identified as secular, approximately 8% identified as ultra-Orthodox, approximately 15% as Orthodox, and approximately 32% as traditional).

21. Bronner, *supra* note 11. In a special report on "Judaism and the Jews" in *The Economist*, the author concludes: "there are now so many *haredim* that the rest can no longer ignore them." *Judaism in Israel*, *supra* note 16.

22. Yishai Blank, Localizing Religion in a Jewish State 18 (Sept. 3, 2011) (unpublished manuscript) (on file with author); UZI REBHUN & GILAD MALACH, DEMOGRAPHIC TRENDS IN ISRAEL 8 (2008). The irony of the Haredi population explosion is that the initial motivation for the military exemptions and government subsidies which were granted upon Israel's founding was that the Haredi community was so small that it was commonly believed that it would soon cease to exist. Government aid and special treatment has in fact facilitated the Haredi population's growth.

23. *See* Bronner, *supra* note 11.

schools . . . In 20 years, there is a risk we will have a third-world population here which can't sustain a first-world economy and army."[24]

In addition, Haredim have come to have significant representation in the Knesset (Israel's parliament) through Shas, an ultra-Orthodox political party, which has succeeded in garnering enough seats to be a strategic ally in building parliamentary coalitions.[25] This bargaining power allows a religious minority to have substantial political power and control over status issues (including marriage, divorce, and conversion), and has resulted in some odd pairings and unintuitive political bedfellows.[26]

B. The "Status Quo" Compromise and Reinforcing Legislation

The "status quo" compromise between religious and secular leaders in Israel can be traced back to negotiations prior to Israel's establishment as a state in 1948.[27] The status quo compromise was a social covenant between religious and secular communities in Israel, by which the secular conceded to restrictions in religious areas—including the Sabbath, marriage and divorce, conversion, and issues regarding kosher food—and the religious assented to living in a secular state.[28] No legislation formalizes the status quo compromise, but the document which memorializes it and most closely resembles any formal legislation is a letter from 1947, known as the "status quo document," that the Jewish Agency (the main Zionist organization which the secular Labor Party controlled) sent to Agudat Yisrael (a movement of the ultra-Orthodox community).[29] The letter agreed to recognize: (1) the Jewish Sabbath as the official day of rest; (2) exclusive

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24. *Id.*; *Judaism in Israel*, *supra* note 16 (noting that 26% of Israeli first-graders are Haredi).

25. Martin Asser, *Shas: Breaking the Israeli Mold*, BBC NEWS (Oct. 30, 2000), http://news.bbc.co.uk/2/hi/middle_east/998558.stm. In the most recent elections in January 2013, however, Prime Minister Benjamin Netanyahu formed a parliamentary coalition excluding the ultra-Orthodox parties. Ben Brumfield & Mike Schwartz, *Israel's New Government Excludes Ultra-Religious*, CNN (Mar. 14, 2013), http://www.cnn.com/2013/03/14/world/meast/israel-new-government.

26. *See* Frank S. Ravitch, *Religious Freedom and Israeli Law*, 57 DRAKE L. REV. 879, 880, 887–88 (2009). Coalitions with Shas or other religious parties are not the only strange bedfellows to which Israel's parliamentary system gives rise. An extreme example: in the 2009 parliamentary elections, the Holocaust Survivors party joined forces with the marijuana legalization group to form a unified party. Lily Galili, *The Pro-Marijuana Holocaust Survivors Party is the Hottest Match-up*, HAARETZ (Isr.), Feb. 8, 2009, http://www.haaretz.com/news/elections/the-pro-marijuana-holocaust-survivors-party-is-the-hottest-match-up-1.269653.

27. Daphne Barak-Erez, *Law and Religion under the Status Quo Model: Between Past Compromises and Constant Change*, 30 CARDOZO L. REV. 2495, 2496 (2009).

28. Natan Lerner, *Religious Liberty in the State of Israel*, 21 EMORY INT'L L. REV. 239, 264 (2007) (citing Shahar Ilan, *Only if the Secular Jews Agree*, HAARETZ (Isr.), Oct. 30, 2006, http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=780998).

29. Barak-Erez, *supra* note 27, at 2496; Ruth Gavison, *Days of Worship and Days of Rest: A View from Israel*, *in* RELIGION IN THE PUBLIC SPHERE: A COMPARATIVE ANALYSIS OF GERMAN, ISRAELI, AMERICAN AND INTERNATIONAL LAW 379, 382 (Winfried Brugger & Michael Karayanni, eds., 2007).

application of Jewish law to the institutions of marriage and divorce; (3) use of kosher food in public institutions; and (4) the continuation of the ultra-Orthodox Yeshiva educational system.[30]

Some scholars contend that the current state of the status quo compromise is highly unstable[31] and has perhaps eroded to the point of utter disintegration.[32] Arguably, the socio-cultural and religious climate that spawned the compromise is irretrievably lost; in 1947, the atmosphere in the region lent itself toward striving for national unity, while today it is rife with mutual resentment and perennial stalemates.[33] In addition, at the time of the establishment of the state, even the most secular Israelis were more familiar with and tied to traditional Jewish practice from their own upbringings.[34] For second, third, and fourth generation secular Israelis, this may no longer be the case, and they may be less willing to restrict themselves in religious areas.[35] Similarly, the Orthodox and ultra-Orthodox living in close-knit communities may also be less willing to compromise on their say in the country's religious character, now that they have set a certain tone and have achieved significant political sway. As Tel Aviv University law professor Daphne Barak-Erez noted, the status quo is "a reification of something that does not exist anymore."[36] Furthermore, Hebrew University law professor Ruth Gavison observed that both religious and secular Israelis feel that the status quo "has been eroded against them," and that there is vast disparity "between the law on the books and the law in action."[37] When a religious-secular dispute arises, Israeli journalist Shahar Ilan remarked that "the secular Jews run to the High Court of Justice and the ultra-Orthodox threaten a coalition crisis."[38]

The legislation that followed the establishment of the state reinforced the main promises of the status quo, including the Days of Rest Ordinance of 1948[39]—one of the very first issues the newly founded Israeli government handled—which designates the Sabbath and Jewish holidays as official days of rest and entitles non-Jews to days of rest according to their respective traditions.[40] A subsequent central piece of legislation which also fulfilled the promises of the status quo was the Hours of Work and Rest Law of 1951, wherein the Jewish days of rest and

30. Barak-Erez, *supra* note 27, at 2496–97.

31. *Id.* at 2499.

32. Lerner, *supra* note 28, at 264 (citing Shahar Ilan, *Only if the Secular Jews Agree*, HAARETZ (Isr.), Oct. 30, 2006, http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=780998).

33. *See* Barak-Erez, *supra* note 27, at 2499.

34. *Id.* at 2498–99.

35. *See id.* at 2502.

36. *Id.* at 2507.

37. Gavison, *supra* note 29, at 398.

38. Lerner, *supra* note 28, at 264 (quoting Shahar Ilan, *Only if the Secular Jews Agree*, HAARETZ (Isr.), Oct. 30, 2006, http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=780998).

39. Days of Rest Ordinance, 5708-1948, 1 LSI 18 (1948) (Isr.).

40. Lerner, *supra* note 28, at 246; Gavison, *supra* note 29, at 382.

worship were established as Israel's official days of rest.[41] Notably, the legislation which acknowledges the Sabbath as Israel's day of rest, in accordance with the status quo, limits itself to the labor market, and does not generally proscribe (or for that matter, prescribe) public or private activities which pertain to Sabbath observance.[42]

C. The Hours of Work and Rest Law and its International Context

Israel's Hours of Work and Rest Law (HWRL) places restrictions on the work week for employers and employees.[43] The HWRL sets a ceiling on the permissible number of hours of work per day and per week[44] and stipulates the conditions of employment during prohibited hours.[45] Each employee's "weekly rest" must include "not less than thirty-six consecutive hours in the week."[46] The HWRL distinguishes between the prescribed weekly rest of Jews and that of non-Jews: "The weekly rest shall include – (1) in the case of a Jew, the Sabbath day; (2) in the case of a person other than a Jew, the Sabbath day or Sunday or Friday, whichever is ordinarily observed by him as his weekly day of rest."[47] According to the scheme set forth by the HWRL, Israeli-Jewish workers must take their weekly rest on Saturdays, while non-Jewish workers may select Friday, Saturday, or Sunday as their weekly day of rest.[48] On each person's day of rest, the owner "of a work-shop or industrial undertaking shall not work in his workshop of undertaking and the owners of a shop shall not do business in his shop."[49]

Employees are forbidden from being employed on their designated days of weekly rest except under a set of specific circumstances.[50] Employees may receive permission from the Minister of Labor and Social Affairs to be employed during their weekly rest, when interrupting the work could seriously endanger national defense, security of persons or property, the economy, or any processes or services which the Minister considers essential to the public or part of the public.[51] Thus,

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41. Hours of Work and Rest Law, 5 LSI 125.

42. *See* Days of Rest Ordinance, *supra* note 39; Hours of Work and Rest Law, 5 LSI 125.

43. Hours of Work and Rest Law, 5 LSI 125.

44. *Id.* ¶¶ 2–3; Guy Davidov, *Unbound: Some Comments on Israel's Judicially-Developed Labor Law*, 30 COMP. LAB. L. & POL'Y J. 283, 288 (2009).

45. Hours of Work and Rest Law, 5 LSI 125, ¶¶ 10–19.

46. *Id.* ¶ 7(a). *But see id.* ¶ 8 (permitting the Minister of Labor and Special Affairs to assign a weekly rest for a period of fewer than thirty-six hours, "but not shorter than twenty five consecutive hours").

47. *Id.* ¶ 7(b).

48. *Id. See also* Barak-Erez, *supra* note 27, at 2497 (noting that "the Hours of Work and Rest Law of 1951 has recognized the Sabbath as the official day of rest in the country"). While the HWRL prescribes the Sabbath day as the day of rest for a significant majority of the population, it does not explicitly demarcate Saturday as the national official day of rest.

49. Hours of Work and Rest Law, 5 LSI 125, ¶ 9A(a).

50. *Id.* ¶ 9.

51. *Id.* ¶ 12(a). *See also* Lerner, *supra* note 28, at 262; Guy Davidov, *Enforcement Problems in "Informal" Labor Markets: A View from Israel*, 27 COMP. LAB. L. & POL'Y J. 3, 5

while non-Jewish workers have the freedom to choose their weekly day of rest, Jews must obtain special permission to employ other Jews or to be employed on Saturdays, regardless of whether they are Sabbath-observant or not.

Israel is not alone in developing periods of rest for workers, nor is the HWRL the only forum in which it endorses a day of rest. Before and after enacting the HWRL in 1951, Israel participated in two international conventions in 1921 and 1957 which supported a weekly day of rest.[52] Both conventions proposed, in accordance with international consensus, that the day should be selected based on regional or state customs and traditions, while accommodating religious minorities. First, the Convention of Weekly Rest in Industry of 1921 of the International Labour Organization (ILO), signed and ratified by 113 states including Israel (then Palestine), established that all workers in private or public industries should receive no fewer than twenty-four consecutive hours as a period of weekly rest.[53] The convention recommended that the period be extended to thirty-six hours whenever possible, and be common to all workers and granted in accordance with the traditional or customary day of rest in that region.[54] Second, Israel signed and ratified the Convention Concerning Weekly Rest in Commerce and Offices of 1957, which stated that workers are entitled to a period of weekly rest of twenty-four hours or more, common to all workers in each workplace, and preferably according to the country's customs or traditions, while respecting minority customs and traditions.[55]

In 1993, the European Council adopted a similar directive on weekly rest. The original version of Article 5 read:

> Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3. The minimum rest period referred to in the first subparagraph shall in principle include Sunday.[56]

The second clause containing "shall in principle include Sunday" was struck down by the European Court of Justice in 1996, stating that "the council has failed to explain why [Sunday] is more closely connected with the health and safety of workers than any other day of the week."[57] Although the council annulled the clause, it acknowledged that "the question whether to include Sunday in the weekly rest period is ultimately left to the assessment of Member States, having regard, in particular, to the diversity of cultural, ethnic and religious factors in

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(2005).

52. Gavison, *supra* note 29, at 394.

53. International Labour Organization [ILO], Weekly Rest (Industry) Convention, 1921 (No. 14), Nov. 17, 1921.

54. Gavison, *supra* note 29, at 394.

55. ILO, Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 6, June 26, 1957.

56. Council Directive 1993 O.J. (L 307), art. 5.

57. Case C-84/94 United Kingdom v. Council, 1996 European Court Reports [ECR] I-05755, ¶ 37.

those States . . . ."[58]

Ironically, at the time, nine of the fifteen E.U. states had Sunday as their official weekly day of rest.[59] The German Act on Working Time of 1994, for example, contains a general prohibition of work on Sundays.[60] Germany will grant work permits for a variety of reasons (including international competition), but all shops and businesses are closed on Sunday due to Germany's powerful labor unions.[61] In Denmark, similarly, the weekly period of rest is thirty-six hours, preferably Sunday, on which shops must be closed unless they receive a special permit.[62] The French Labor Code regulates the weekly day of rest in detail: Sunday is a twenty-four hour day of rest, with exceptions that include shops and cultural and entertainment venues—whose workers receive a free Sunday every other week and an alternative day of rest during the week if they work on Sundays.[63] Sunday laws in the United States also contain some parallels to the HWRL; these connections and distinctions will be explored in depth later on in this Article.

D. Aftermath of Sabbath-Related Legislation

Initially, the Sabbath restrictions associated with the status quo compromise and HWRL operated smoothly and without controversy. Secular Jewish Israelis did not claim, at least not in legal proceedings, that the restrictions were tantamount to religious coercion, but rather viewed them as part of a shared cultural tradition.[64] Over time, however, the mood began to change, particularly after the 1967 war, and the secular became more impatient about the restrictions imposed on them.[65]

A number of cases in the late 1960s evidenced the tensions surrounding religion in the public sphere, which included disputes about work on the Sabbath. In 1968, in *Yiramax Ltd. v. S.I.*, the Israeli Supreme Court ruled that a law mandating the closure of gas stations on Saturdays was unreasonable, particularly considering the lack of access to public transit on Saturdays.[66] In 1969, in *Meron v. Minister of Labor*, the Israeli Supreme Court permitted Israeli television to expand its broadcasting to seven days a week.[67] In addition, in 1969, the HWRL was amended explicitly to prohibit one from working in one's own shop or plant on rest

58. *Id*.

59. Gavison, *supra* note 29, at 395.

60. *Id.* at 395, n.37.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 383–84. As Gavison notes, secular Jewish Israelis initially accepted the Sabbath work limitations "as natural and right," and in even the most secular kibbutzim, the Sabbath had "a special aura." *Id.* at 384.

65. Gavison, *supra* note 29, at 384.

66. CrimA 217/68 Yizramex Ltd. v. S.I. 22(2) PD 343 [1968].

67. HCJ 287/69 Meron v. Minister of Labor 24(1) PD 337 [1969] (rejecting the rights argument that religious workers would be discriminated against for not being able to work on Saturdays); Gavison, *supra* note 29, at 386.

days.[68] Prior to the amendment, the only explicit Sabbath work prohibition was employing others.[69]

In the mid-1980s, a series of cases addressed the permissibility of opening commercial movie theaters on the Sabbath. These cases highlighted the friction between local authorities and the Minister of Interior, as the Minister of Interior has the power under Israeli law to review local bylaws, and to approve or reject them.[70] In the first case, *Municipality of Petah Tiqvah v. Minister of Interior*,[71] the city of Petah Tiqvah authorized a movie theater to open on the Sabbath, but the Minister of Interior at that time refused to approve the law.[72] The Israeli Supreme Court ruled that the Minister of Interior was not acting within his powers.[73] Similarly, in *State of Israel v. Kaplan*,[74] a cinema in Jerusalem had violated a local bylaw that prohibited its operation on the Sabbath.[75] Jerusalem's Magistrate Court found the bylaw "reflected an unreasonable balance between religious sensibilities and other interests and that freedom from religion was beyond the power of local legislation in the absence of explicit authorization."[76]

Following *Kaplan*, the Knesset (the national legislative branch) enacted the Municipalities Ordinance,[77] which authorizes local bylaws to prohibit the operation of businesses and entertainment venues on the Sabbath,[78] and permits local authorities to take into account religious traditions when deciding whether to allow or restrict business operations on the Sabbath.[79] The ordinance expressly authorizes local authorities to ban certain activities on the Sabbath, and at the same time clarifies that such a policy is a local decision to be made by each locality.[80] Although the Knesset empowered local authorities to close commercial operations on the Sabbath, it is up to the executive branch to enforce existing municipal bylaws and national legislation.[81]

In the 1990s, conflicts arose in religious areas of Jerusalem and Tel Aviv, where the local religious population—which deems driving to be a Sabbath

68. Hours of Work and Rest Law, 5 LSI 125, ¶ 9(a).

69. *See id.* ¶ 7.

70. Gavison, *supra* note 29, at 386.

71. HCJ 347/84 The Municipality of Petah Tiqvah v. Minister of Interior 39(1) PD 813 [1985].

72. *Id.*; Gavison , *supra* note 29, at 386.

73. *Petah Tiqvah*, 39(1) PD 813.

74. Cr.F (Jer.) 3471/87 Israel v. Kaplan, PM 1988(2) 1531. Notably, Judge Procaccia wrote an opinion for *Kaplan* and later, as a member of the Supreme Court, wrote one of the opinions for *Design 22*; in both, she contends that closure of places of entertainment interferes with fundamental freedoms and denies parts of the population the right to spend their day of rest as they please.

75. *Id.*

76. Gavison, *supra* note 29, at 386–87.

77. Municipalities Ordinance Amendment Law, 1990, SH 34 (Isr.).

78. Barak-Erez, *supra* note 27, at 2501 n.20; Gavison, *supra* note 29, at 387.

79. Lerner, *supra* note 28, at 263.

80. Barak-Erez, *supra* note 27, at 2501 n.20.

81. Shetreet, *supra* note 20, at 139 (noting that the executive branch has failed to enforce such municipal and national ordinances).

prohibition—closed off roads in their neighborhoods, while the secular Sabbath-driving population demanded that the roads remain open.[82] This issue arose in *Horev v. Minister of Transportation*, wherein the Israeli Supreme Court determined that the Minister of Transportation's decision to close the road, thereby endorsing the religious neighborhood's unilateral actions, could only stand if a proper arrangement for secular residents could be found.[83]

Israel has never had a constitution, but it does have a series of "Basic Laws" upon which the eventual constitution is to be based.[84] In 1992, two fundamental human rights laws were enacted: (1) Basic Law: Human Dignity and Liberty,[85] and (2) Basic Law: Freedom of Occupation.[86] Both laws identify Israel's values as a "Jewish and democratic state," although they stop short of defining "Jewish" or "democratic."[87] Reference to the "Jewishness" of the state is particularly subject to debate.[88]

Neither of the two 1992 Basic Laws expressly provide for protection of religious liberty, but the Supreme Court has read such protection into "dignity," and therefore religious liberty is deemed protected by Basic Law: Human Dignity and Liberty.[89] However, the form of religious liberty remains undefined, although most agree that it includes freedom *of* religion as well as freedom *from* religion.[90] Prior to the enactment of these laws in 1992, there was no law in place to stop the Knesset from enacting laws which explicitly endorsed religious prohibitions or actions, but political rather than legal constraints prevented the Knesset from doing so, as until relatively recently the Knesset was controlled by a secularist majority.[91]

A constitution is yet to be approved by the Knesset, but in a proposed text of Israel's constitution, proposed Article 8 reads: "(A) The established days of rest in the State of Israel are the Sabbath and the Jewish festivals. Non-Jews may rest on their holidays. (B) On days of rest no one shall be employed, and *there shall be no commerce or production*, except under conditions to be specified by law."[92]

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82. HCJ 5016/96 Horev v. Minister of Transportation, 1997 Isr. L. Reps. 153 [1997].

83. *Id.*; Gavison, *supra* at 29, at 2503 n.24 (noting a proper arrangement was found by ascertaining that there were no secular residents in the heavily Orthodox area). *See also* Barak-Erez, *supra* note 27, at 2499 n.15.

84. Barak-Erez, *supra* note 27, at 2504.

85. Basic Law: Human Dignity and Liberty, 5752-1992, SH 1391, 60.

86. Basic Law: Freedom of Occupation, 5754-1994, SH 1454, 90.

87. Gavison, *supra* note 29, at 388; Shetreet, *supra* note 20, at 127; Blank, *supra* note 22, at 9.

88. Blank, *supra* note 22, at 9.

89. *Id.*; Shetreet, *supra* note 20, at 127.

90. Blank, *supra* note 22, at 9.

91. *Id.* at 10–11.

92. *See* The Sixteenth Knesset Constitution, Law, and Justice Committee Sitting as the Committee for the Preparation of a Constitution by Broad Consensus, Proposals for a Constitution 3 (Feb. 13, 2006), translation available at http://experts.cfisrael.org:81/admin/proposals.pdf [hereinafter Proposals for a Constitution] (emphasis added). *See also* Lerner, *supra* note 28, at 265.

Proposed Article 8 essentially reiterates the HWRL in 8(A), but 8(B) takes the restrictions a step further: that, subject to exceptions, "there shall be no commerce or production." This clause, making prohibitions on commercial activity the default position, will likely be met with opposition by secular factions.

E. Hours of Work and Rest Law on the Ground: Social Reality and Enforcement

In most Israeli cities, public buses and railways do not run on the Sabbath, while private taxis, private bus lines, and Ben-Gurion International Airport do maintain operations.[93] Increases in private car ownership have decreased reliance on public transit, which affects street traffic on Friday nights and Saturdays,[94] and has sparked debate concerning road closures in religious neighborhoods.[95] Most cities with a Jewish majority have laws requiring that all businesses and shops be closed on the Sabbath, but most municipalities permit some to remain open.[96] Gas stations and movie theaters are no longer an active issue, nor are restaurants and bars, and shopping malls outside of main towns operate on Saturdays.[97] In addition, athletic events often take place on Saturdays, since that is when athletes and attendees can all be available; one of the effects of this practice is that religious Jewish athletes are excluded from these events, and therefore cannot compete seriously or professionally.[98] Furthermore, army regulations concerning the Sabbath and Jewish holidays provide that entertainment should avoid "profanation" of the day; soldiers are therefore prohibited from listening to the radio in public spaces on military bases.[99]

According to surveys conducted in the early 2000s, 17% of Israelis shop on the Sabbath, 7% of Israelis shop every Sabbath, and the average frequency of Sabbath shopping is 1.6 times a month, meaning that Israelis go shopping on Sabbath every second or third week.[100] In addition, statistics show that some 20% of Israel's work force is employed on the Sabbath, regularly or occasionally.[101]

The enforcement of Sabbath laws largely depends on who the Minister of Interior and Minister of Commerce and Industry are at any given time.[102] Some Ministers have tried to enforce the HWRL by using non-Jewish officers to inspect shops and issue fines to workers who open their shops on Saturdays.[103] Generally,

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93. Lerner, *supra* note 28, at 263. *See also* Gavison, *supra* note 29, at 390 (discussing public transit on Saturdays not being offered in most of the Jewish part of the country).

94. Barak-Erez, *supra* note 27, at 2500.

95. *Horev v. Minister of Transportation*, 1997 Isr. L. Reps. 153.

96. Gavison, *supra* note 29, at 383, 387.

97. *Id.* at 388–89, 390.

98. *Id.* at 390.

99. Shetreet, *supra* note 20, at 136 (arguing that to speak of "profanation," a religious precept, has little resonance for secular soldiers).

100. Gavison, *supra* note 29, at n.26.

101. *Id.* at 391.

102. *See id.* at 389.

103. *Id.*

those businesses that are issued fines simply pay them and continue keeping their shops open on Saturdays.[104] In *Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig*,[105] one business that applied for an exemption under the HWRL and was subsequently rejected contested the constitutionality of the HWRL as a violation of the Freedom of Occupation.[106]

In recent years, the recent Minister of Interior Eli Yishai, a member of Shas, an ultra-Orthodox religious political party, has heightened enforcement of the HWRL. One example is Yishai's threat in 2007 to issue indictments and impose fines on local distributors who held book launches of the final Harry Potter book on a Friday night and Saturday.[107] In addition, in January 2010, Yishai supported a measure to require businesses to pledge allegiance to the HWRL as a condition for obtaining a business license, in an effort to deter businesses from remaining open on the Sabbath.[108] The chairman of the Federation of Israeli Chambers of Commerce criticized the measure as an "impossible burden on opening and managing businesses," while a Shas source stated that "it is terrible that in the Jewish state rapacious economic interests and the pursuit of profits take precedence over ensuring that no Jew works on the day of rest against his will."[109] Also in 2010, Yishai ordered the interior ministry's computer system to shut down its online payment system on Sabbaths and Jewish holidays, and the highly controversial move was criticized as "pure [religious] coercion."[110]

In addition to official governmental action, religious groups are finding ways to enforce Sabbath commerce bans informally. For example, some groups are issuing "Haredi Cards" to identify shops and businesses that close operations on Saturdays.[111] The impetus behind the card is that Haredim will only support businesses which close on the Sabbath, which will give businesses economic incentive to close up shop on Saturdays to draw in Haredi business.[112]

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104. *Id.*

105. HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig, 2005 (1) Isr. L. Reps. 340 [2005] (Isr.).

106. *See id.*

107. Associated Press & Shiri Lev-Ari, *Yishai Warns Stores over Harry Potter Book Launch on Shabbat*, HAARETZ (Isr.), July 17, 2007, http://www.haaretz.com/news/yishai-warns-stores-over-harry-potter-book-launch-on-shabbat-1.225679.

108. Matthew Wagner, *Shas: 'Close Business on Shabbat to Get License,'* JERUSALEM POST (Isr.), Jan. 12, 2010, *available at* http://www.jerusalem-religions.net/shas-close-business-on-shabbat-to-get-license/?lang=en.

109. *Id.*

110. Dana Weiler-Polak, *Shas Minister Shuts Down Online Payments on Shabbat, Holidays*, HAARETZ (Isr.), Sept. 14, 2010, http://www.haaretz.com/print-edition/news/shas-minister-shuts-down-online-payments-on-shabbat-holidays-1.313653.

111. Gavison, *supra* note 29, at 390.

112. *Id.* at 390. Apparently, the Haredi Card has not yet caused any significant reduction in commercial activity. *Id.*

III. THE HOURS OF WORK AND REST LAW'S CONSTITUTIONALITY UNDER *DESIGN 22*

A. Design 22: Constitutional Challenge to the Hours of Work and Rest Law

In 2005, the Israeli Supreme Court tested the HWRL's constitutionality in *Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig* as an alleged violation of the Freedom of Occupation.[113] The petitioner was a furniture company fined for employing Jews to work in its furniture shops on Saturdays.[114] The company then applied to the Minister of Labor and Social Affairs under the HWRL[115] for a permit to employ Jews on Saturdays.[116] This application was subsequently rejected.[117] The petitioner filed a petition in the Israeli Supreme Court, contending that the rejection of the application was extreme, as a prohibition against employing Jews on Saturdays would result in substantial economic loss to its company.[118] Additionally, the petitioner argued that the HWRL was an unconstitutional violation of the Freedom of Occupation.[119] The Supreme Court held that although the HWRL does constitute a violation of the Freedom of Occupation, the law passes constitutional scrutiny by meeting the requirements of the Freedom of Occupation's limitations clause.[120] The Court also held that the respondent's rejection of the petitioner's application was not unreasonable, as the petitioner failed to establish that its activities during the period of weekly rest were "essential" for the public.[121] The Court thus unanimously upheld the constitutionality of the HWRL.

Although the Court in *Design 22* did not address any constitutional claims as to the freedom of religion, this does not suggest that there were none to be made. In his lead opinion, Justice Barak stated:

> [W]ith regard to the existence of a fundamental violation of the freedom of occupation, we do not need to examine whether the Hours of Work and Rest Law violates additional human rights, such as the right to freedom of religion and freedom from religion. . . . Indeed, in the petition before us the constitution[al] debate focused merely on the violation of freedom of occupation by the Hours of Work and Rest Law.[122]

Thus, Justice Barak left open the possibility that the HWRL could be unconstitutional on other grounds, but since the petitioners did not raise those

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113. *Design 22*, 2005 (1) Isr. L. Reps. 340. For further discussion of the *Design 22* case see *infra* Section III.B. The Freedom of Occupation provides the freedom to pursue work or a profession as one chooses. Basic Law: Freedom of Occupation, 5754-1994, SH 1454.

114. *Design 22*, 2005 (1) Isr. L. Reps. at 341.

115. Hours of Work and Rest Law, 5 LSI 125, ¶ 12(a).

116. *Design 22*, 2005 (1) Isr. L. Reps. at 341.

117. *Id.*

118. *Id.* at 335.

119. *Id.* at 342.

120. *Id.* at 340–41.

121. *Id*.

122. *Design 22*, 2005 (1) Isr. L. Reps. at 352.

issues, the Court refrained from ruling on them.

1. Constitutional violation of the Freedom of Occupation

The HWRL's restriction against Jews' employment on Saturdays imposes a direct conflict with one of the two Basic Laws that the Knesset adopted in 1992: the Freedom of Occupation.[123] The HWRL provisions which restrict work week and work hours, and specifically those prohibiting work during the weekly rest, present a clear violation of the Freedom of Occupation, as they prevent employers and employees from exercising their right to pursue a livelihood in accordance with their wishes. If employers or employees choose to work on their day of weekly rest, which is their ostensible right under the Freedom of Occupation, they would be prohibited from doing so under the HWRL.

Even before the Knesset enacted the Basic Laws, the general notion of freedom of occupation—the freedom to engage in one's work or occupation as one chooses for oneself (so long as it does not violate any established prohibitions)—was embedded in Israel's common law.[124] As a result of its evolution from a common law principle to a "constitutional super-legislative right,"[125] for a law to restrict the Freedom of Occupation, it "must satisfy the requirements of the limitations clause."[126] Accordingly, another law may infringe upon the Freedom of Occupation so long as certain limitations are met.

The limitations clause provides that: "[f]reedom of occupation may only be violated by *a law* that *befits the values of the State of Israel*, is intended for a *proper purpose*, and to an extent that is *not excessive* or under a law as stated by virtue of an express authorization therein."[127] The limitations clause is thus composed of four separate requirements:

> (1) the violation is made by *a law* or under a law by virtue of an express authorization in the law; (2) the law violating freedom of occupation *befits the values of the State of Israel*; (3) the law violating freedom of occupation is for a *proper purpose*; and (4) the violation caused by the law to the freedom of occupation is to an extent that is *not excessive*.[128]

As the HWRL was expressly authorized by law, it clearly fulfills the first requirement.[129] The second requirement, that the law "befits the values of the State of Israel," is more amorphous, particularly because the limitations clause itself does not define precisely what these values are. Instead, these values may be derived from an earlier clause in the Freedom of Occupation: "[t]he purpose of this Basic Law is to protect freedom of occupation in order to enshrine in a basic law

123. Basic Law: Freedom of Occupation, 5754-1994, SH 1454.
124. *See Design 22*, 2005 (1) Isr. L. Reps. at 345–46.
125. *Id.* at 349.
126. *Id.* at 350.
127. Freedom of Occupation, *supra* note 123, ¶ 4 (emphasis added).
128. *Design 22*, 2005 (1) Isr. L. Reps. at 355.
129. *Id.*

the values of the State of Israel as a Jewish and Democratic state."[130] Accordingly, a law which "befit[s] the values of the State of Israel"[131] must refer to Israel's values "as a Jewish and Democratic state."[132]

The next step in determining whether the HWRL "befits the values of the State of Israel" is to identify which values constitute Israel's values as a Jewish state, and those corresponding to its values as a democratic state. In his lead opinion in *Design 22*, Justice Barak highlighted two elements of Israel's values as a Jewish state: the "Zionist aspect" and the "traditional-religious aspect."[133] In an effort to define the practical manifestations of these two elements, he cited to an earlier Israeli Supreme Court decision:

> [T]he right of every Jew to immigrate to the State of Israel; that Jews will constitute a majority therein; Hebrew is the official language of the State, and its main religious holidays and symbols reflect the national revival of the Jewish people. Jewish tradition is a central element in its religious and cultural heritage.[134]

Justice Barak concluded that Israel's values as a Jewish state are a "rich and multi-faceted concept."[135]

As for Israel's values as a democratic state, Justice Barak cited to the same prior Israeli Supreme Court decision to flesh out what characterizes Israel's democratic values: "a recognition of the sovereignty of the people as reflected in free and equal elections; a recognition in the essence of human rights, including dignity and equality, the principle of the separation of powers, the rule of law and an independent judiciary."[136] With both sets of values in mind, Justice Barak urged constitutional interpreters to find inherent in each law an "accord and harmony" and "synthesis and compatibility" between Jewish and democratic values,[137] and found that the HWRL achieves this "[n]ormative unity and harmony."[138]

Justice Barak concluded that the HWRL befits Israel's values as a Jewish state and as a democratic state, for both "social reasons" and "national-religious reasons."[139] The "social reasons" for the HWRL are "to provide hours of weekly rest to the worker by determining one uniform day of rest that will allow a whole family to be together on the day of rest."[140] The "national-religious" considerations are that the day of weekly rest is determined "by choosing hours of rest against a background of national-religious considerations—the Sabbath for Jews and Friday

130. Freedom of Occupation, *supra* note 123, ¶ 2 (emphasis added).

131. *Id.* ¶ 4.

132. *Id.* ¶ 2.

133. *Design 22*, 2005 (1) Isr. L. Reps. at 357.

134. EDA 11280/02 Cent. Elections Comm. for the Sixteenth Knesset v. Tibi [2003] (Isr.) at 22.

135. *Design 22*, 2005 (1) Isr. L. Reps. at 357.

136. *Id*. (citing Cent. Elections Comm. for the Sixteenth Knesset v. Tibi [2003] (Isr.) at 23).

137. *Design 22*, 2005 (1) Isr. L. Reps. at 357–58.

138. *Id.* at 358.

139. *Id*.

140. *Id.*

or Sunday for non-Jews . . . ."[141]

Justice Barak found that "the social aspect and the national-religious aspect of a weekly rest is a golden thread" that runs throughout the corpus of Jewish religious law, which even finds expression in the fourth of the biblical Ten Commandments.[142] In his opinion, Justice Barak quoted the fourth commandment in its Deuteronomic version, in pertinent part:

> Observe the day of the Sabbath to sanctify it as the Lord your God commanded you. Six days shall you labor and do all your work. And the seventh day is a Sabbath to the Lord your God, you shall not do any work, either yourself or your son or your daughter or your man-servant or your maid-servant or your ox or your ass or any animal of yours or stranger that is within your gates, so that your man-servant and your maid-servant shall rest as you do. Remember that you were a slave in the land of Egypt and that the Lord your God freed you from there with a mighty hand and an outstretched arm; therefore the Lord your God has commanded you to observe the Sabbath day.[143]

In this passage, Justice Barak found interwoven the religious command to observe the Sabbath, along with a social concern for workers, and a guarantee of a uniform period of weekly rest.[144] Thus, the Court determined that the HWRL is an authentic expression of Israel's values as a Jewish state.[145]

Justice Barak used the same themes—social need and national-religious considerations—to demonstrate the HWRL's values as befitting Israel's democratic values. The law guarantees workers a weekly rest period, and preserves family bonds by implementing a uniform day of rest, and it does so while also taking into account national-religious sentiment and observance.[146] Justice Barak cited to an Israeli National Labor Court decision which expounded on the social impact of the HWRL, and its efforts to protect workers:

> The Hours of Work and Rest Law should be interpreted as a law that gives expression to a proper social policy. This policy provides a normative framework of hours of work in the economy and prevents an employee and his employer from agreeing to a framework of work hours that harms the employee's quality of life. This law restricts the freedom of the individual to determine his work hours, but the purpose in this restriction is to protect the worker against a violation of his humanity.

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141. *Id.* at 360.

142. *Id.* at 359.

143. *Design 22*, 2005 (1) Isr. L. Reps. at 359 (citing Deut. 5:12–15). Notably, the Deuteronomic version contains subtle differences from the version of the fourth commandment as it appears in Exodus 20:8–11, which relates the Sabbath to six days of creation and divine rest on the seventh day, rather than to slavery and exodus from Egypt. The version in Exodus also lacks the appended rationale "so that your man-servant and your maid-servant shall rest as you do." It is therefore logical that Justice Barak would quote the Deuteronomic passage, which reflects more of social justice-oriented character and more explicit concern for workers' rights.

144. *See Design 22*, 2005 (1) Isr. L. Reps. at 360.

145. *Id.*

146. *Id.*

> The initial purpose is to advance the quality of life and to protect the dignity of whoever does work by limiting the work day, and thereby in practice defining also the hours of rest.[147]

For further support of the HWRL's choice of days of weekly rest, Justice Barak referred to the International Labour Organization's Weekly Rest (Commerce and Offices) Convention of 1957,[148] which provided that all those subject to the convention were "entitled to an uninterrupted weekly rest period comprising not less than 24 hours in the course of each period of seven days" and that "[t]he weekly rest period shall, whenever possible, coincide with the day of the week established as a day of rest by the traditions or customs of the country or district."[149] He added that bastions of democracy such as England, Canada, and the United States have established Sunday as their weekly day of rest, in the spirit of selecting a day which is "consistent with the most common religious outlook in the country."[150]

In sum, the *Design 22* Court found that the HWRL befits the values of the State of Israel as a Jewish and democratic state through its social concern for workers' rights and family bonds, coupled with its national-religious concerns for each group to be entitled to observe its own weekly day of rest.[151]

As for the third requirement of the limitations clause, that the law be "intended for a proper purpose," the Court in *Design 22* separated the inquiry into two questions: the content of the purpose and how necessary it is for the state to realize that purpose.[152] The content of the purpose is proper if it seeks to achieve a social purpose (enhancing human rights, protecting the public interest, etc.), and it is necessary if it is "important for the values of society and the state."[153] According to Justice Barak, the HWRL serves a dual purpose, as explored above in assessing its values.[154] It serves a social purpose by protecting workers, promoting family unity, and guaranteeing horizontal equality between those who are religiously observant and those who are not.[155] At the same time, it serves a national-religious purpose by preserving the Jewish character of the state,[156] being "mindful of the feelings of the religious public in Israel," and giving "expression to the national ties that bind us together as a people."[157] The HWRL therefore serves a "proper purpose" and thereby meets the third prong of the limitations clause.[158]

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147. LabA 300271/98 Tepco Energy Control Systems and Environmental Production Ltd v. Tal [1998] (Isr.) at 710; *see also Design 22*, 2005 (1) Isr. L. Reps. at 360.

148. *Design 22*, 2005 (1) Isr. L. Reps. at 360.

149. International Labour Organization, Weekly Rest (Commerce and Offices) Convention, 1957, Art. 6(1).

150. *Design 22*, 2005 (1) Isr. L. Reps. at 361, 364.

151. *Id.*

152. *Id.* at 361.

153. *Id.*

154. *Id.* at 359.

155. *Id.* at 363.

156. *Design 22*, 2005 (1) Isr. L. Reps. at 364.

157. *Id.*

158. *Id.* at 363.

The fourth requirement is that the law not be excessive and must contain measures which are proportionate to reaching its desired purpose.[159] The Court found that this condition was met.[160] Therefore, although the HWRL patently violates the Freedom of Occupation of employers and employees, the law is not unconstitutional, as it meets all four requirements of the Freedom of Occupation's limitations clause. The HWRL is an authoritative law, it befits Israel's values as a Jewish and democratic state, it was enacted for a proper purpose, and it is not excessive.

2. The Hours of Work and Rest Law as conduit for religious coercion

In *Design 22*, the petitioner averred that the HWRL's prescription of Saturday as the mandatory day of rest for Jews is tantamount to religious coercion,[161] and requested that the Court implement a "flexible" system in its place, whereby each employer and employee may choose his or her day of weekly rest.[162] Justice Barak responded that the HWRL is not religiously coercive, and instead concluded that "it is an expression of the values of the State of Israel as a Jewish State."[163] In addition, although the law mandates the weekly period of rest, it does not compel Jews to observe the Jewish Sabbath or to engage in any traditional or religious practices whatsoever.[164] In her concurring opinion, Justice Miriam Naor reasoned that the "flexible" system that the petitioner championed is even more susceptible to religious coercion:

> If the law allowed each worker to choose for himself a day of rest, as the petitioners request, in many cases the real choice will be made by the employer and not by the workers . . . . The constraints of obtaining a livelihood may lead to the result that the worker "chooses" a day of rest that is not really his preferred day of rest, and we cannot verify that the choice of *another* day of rest that is not the Sabbath is really a free choice. . . . In my opinion, this binding law protects workers more than a law that allows them, supposedly, a free choice.[165]

Thus, Justice Naor maintained that rather than violate religious freedom, the HWRL functions to protect workers from exploitation or coercion by their employers.[166]

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159. *Id.* at 366.

160. *Id.* at 368.

161. *Id.* at 365.

162. *Design 22*, 2005 (1) Isr. L. Reps. at 364.

163. *Id.* at 366.

164. *Id.*

165. *Id.* at 370–71.

166. Another argument for the HWRL as protecting religious employees is that without the HWRL, secular employees would have an employment advantage due to their willingness or ability to work on Saturdays and holidays. However, as Guy Mundlak notes, secular *employers* are at a disadvantage, since religious employers are permitted to exclude but secular employers must accommodate religious employees. Guy Mundlak, *The Law of Equal Opportunities in Employment: Between Equality and Polarization*, 30 COMP. LAB. L. & POL'Y J. 213, 228, 229,

3. Balancing the social and religious aspects of the Sabbath

In her concurring opinion, Justice Ayala Procaccia agreed that the petition was properly denied and supported Justice Barak's articulation of dual social and national-religious purposes for the Jewish Sabbath as the weekly day of rest for Jews.[167] Specifically, she emphasized the importance of an internal balance between the social and religious purposes, and noted that such a balance may "justify a departure from the rule that prohibits work on the Sabbath, in order to allow an individual to fashion the way in which he spends his day of rest as he wishes,"[168] in accordance with each person's personal beliefs and lifestyles.[169] To accommodate non-observant Jews on Saturdays, "we also need public frameworks that will assist and allow this, including public transport that will allow the public to move freely, the opening of museums and cultural institutions, the activity of theatres and cinemas, the holding of lectures and congresses, and the like."[170]

Justice Procaccia contended that the provision of the HWRL granting exceptions for employment on days of weekly rest is intended to promote this balance.[171] The HWRL exception authorizes the Minister of Labor to permit employment during weekly rest when the services "in the opinion of the Minister of Labour and Social Affairs, are *essential* to the public or part thereof."[172] Justice Procaccia asserted that:

> This broad power that was given to the minister to permit work on the Sabbath with regard to necessities that are essential for the public or for a part thereof is intended . . . to extend the power to grant permits not only to the supply of essential physical necessities, but also in order to ensure essential necessities of the public or of parts thereof in spiritual matters and the spheres of, culture, art, leisure, and entertainment. It is intended to ensure the individual's quality of life in a free society that has freedom of religion and freedom from religion. It is intended to allow a person to realize in a proportionate manner the social aspect of the Sabbath in accordance with his tastes and his lifestyle, and to give expression thereby to customs, lifestyles and the various cultures in the many strata of Israeli society.[173]

Thus, Justice Procaccia concluded, public need may justify granting permits for employment on Saturdays for certain avenues of expression which allow Israeli Jews of all degrees of observance or non-observance to shape their day of weekly rest in accordance with their own beliefs and values.[174]

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230 (2009).

167. *Design 22*, 2005 (1) Isr. L. Reps. at 371.

168. *Id.* at 372.

169. *Id.* at 373.

170. *Id.*

171. *Id.* at 372.

172. Hours of Work and Rest Law, 5 LSI 125, ¶ 12(a) (emphasis added).

173. *Design 22*, 2005 (1) Isr. L. Reps. at 372–73.

174. *Id.* at 373–74.

B. Design 22: Preliminary Analysis and Critique

Beginning with Justice Procaccia's opinion, the notion of public accommodation and consideration of the Sabbath in terms of lifestyle choice are areas that Justice Barak overlooked in his opinion, perhaps deliberately. These are the same themes raised in a prior decision by Justice Procaccia in *State of Israel v. Kaplan*,[175] when she was a Jerusalem Magistrate Court judge. *Kaplan* concerned cinema closures on the Sabbath, and her opinion in that case also encouraged increased access to various leisure activities.[176]

Although Justice Procaccia's appeal for what this author calls "secular accommodation" is compelling, one weakness of the secular accommodation model is its circularity: the more leisure opportunities are made available, the less opportunity there is for leisure for *all* workers. That is, if cultural and entertainment venues are to remain open, then they must be staffed. Therefore, there will be a larger portion of Israeli workers who cannot partake in leisure activities on Saturdays. Similarly, a policy of secular accommodation is in stark opposition to the principle of a uniform day of rest. By reframing the "day of rest" as a "day of leisure," it makes a uniform day off from work unworkable. Access to public transit, gas stations, museums, cinemas, shopping malls, restaurants, and bars requires a work-force to keep them open, which negates the concept of a uniform day of rest for the national workforce. If anything, it promotes a day of rest solely for higher class or white-collar workers, but pressures the working class—the bus drivers; the gas station attendees; ticket-takers; mall workers; waiters; and bartenders—to work on Saturdays, and to be unable to spend the day with their families. If proponents of secular accommodation appreciate the value of a uniform day of rest on which as much of the national workforce as possible is not working, then they should acknowledge that a consequence of secular accommodation is to negate that value, and potentially to sacrifice that value for the working class. If, however, the value of a day of leisure outweighs the value of having a uniform day off of work, then secular accommodation can be justified.

Another difficulty with Justice Procaccia's call for secular accommodation is that her reading of the HWRL may have been too broad. She justified the extensive employment that would be required to make public transit widely accessible, and to keep open museums, theaters, cinemas, and shopping malls, by contending that the Minister of Labor is granted "broad power" under the HWRL.[177] The HWRL states that the Minister may permit employment which, if interrupted, "is likely to prejudice the defense of the State or the security of persons or property or seriously to prejudice the economy," or work or services which the Minister considers "*essential* to the public or part thereof."[178] Justice Procaccia interpreted the last

175. Cr.F (Jer.) 3471/87 Israel v. Kaplan, PM 1988(2) 1531; Gavison, *supra* note 29, at 408.

176. Gavison, *supra* note 29, at 386–87, 408.

177. *Design 22*, 2005 (1) Isr. L. Reps. at 373–74.

178. Hours of Work and Rest Law, 5 LSI 125, ¶ 12(a). The Hebrew word used for "essential" in the HWRL is *hiyuniyim*.

clause—work or services which are "essential"—to include both "essential physical necessities" as well as "essential necessities . . . in spiritual matters and the spheres of culture, art, leisure, and entertainment."[179]

Although the Minister is granted some latitude to determine what is considered "essential" based on the context in which the term appears in the HWRL, regarding services which are so indispensible that they could endanger the state militarily or economically.[180] "Essential" seems to set a fairly high bar. Justice Procaccia extended the category "essential" to services that are important and even necessary for a culturally sophisticated and modern pluralistic state, but not activities that would compromise its position if closed for a day.[181] In sum, Justice Procaccia may have construed the term "essential" more liberally than is warranted.

Nevertheless, that is not to say that cultural institutions should remain closed on Saturdays. Rather, it simply may not be within the Minister of Labor's discretion to grant such broad exceptions under the HWRL in its current version, and the HWRL should be amended to reflect the needs of Israel's secular population, which has transformed appreciably since 1951. Moreover, if such services are so crucial for Israel's modern secular population, then it may be too risky to give the Minister of Labor the discretionary power to make those sorts of determinations, and the HWRL should be amended to ensure permanent access to these services and institutions on the Sabbath.

While Justice Procaccia emphasized a "day of leisure" and the accommodation of leisure activities,[182] Justice Barak maintained the notion of a "uniform day of rest" as a uniform day off of work.[183] But even Justice Barak's decision did not promote the values and vision that it purported to tout: Design 22 and businesses like it will likely continue to do business on the Sabbath, and will just pay the fines or look for non-Jewish workers.[184] The decision therefore neither enforces the Jewish character of the public sphere, nor does it protect the rights of workers or advance the principle of a shared day of rest for purposes of national unity and family togetherness.

Ruth Gavison contends that the *Design 22* decision misses the mark. The question of work on the Sabbath is not about religious or secular accommodation,

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179. *Design 22,* 2005 (1) Isr. L. Reps. at 372.

180. *Id.*

181. *Id.* at 372–73.

182. *Id.* at 371.

183. *Id.* at 360.

184. Gavison, *supra* note 29, at 408. For a sense of how substantial the fines are, in 2008, the Tel Aviv Labor Court fined Best Buy 90,300 shekels (approximately $24,000 USD), the maximum allowable fine according to law, for employing seven Jewish workers on the Sabbath. In addition, the general manager was personally fined 36,000 shekels (approximately $9,500 USD). *See* Dan Izenberg, *Best Buy Fined NIS 90,800 for Employing Jews on Shabbat*, JERUSALEM POST (Isr.), Jan. 16, 2008, http://www.jpost.com/Israel/Article.aspx?id=89063. Depending on the size and profitability of the company, and the extra costs incurred by adhering to the HWRL, violating the HWRL and paying the fines may be an affordable cost of doing business.

the freedom to practice religion, or the freedom not to practice religion, but rather, is a product of a culture war:

> The present situation is not in fact a struggle between state and religion or between religious and secular militants. It is a decision by default of a cultural quest for identity in Israeli society. . . . It is about whether or not Israel will maintain a distinct cultural public sphere, and whether this distinct public sphere will include a weekly cycle that gives the Sabbath a special place.[185]

The crux of the matter, says Gavison, is whether and in what manner the state will maintain its cultural history, and whether it will continue to demarcate the Sabbath as a day that is distinct, as well as distinctively Jewish. This, Gavison argues, is not a decision for the courts, but a determination for society "about the kind of social norms and public culture it wants."[186]

IV. SUNDAY AS A "UNIFORM DAY OF REST" IN U.S. LAW

Sunday closing laws have a long and complex history in the United States. As British colonists settled, they enacted their own versions of English blue laws:[187] "[a]ll thirteen colonies had Sunday closing laws. By the end of the nineteenth century, nearly every state had at least some law prohibiting certain activities on Sunday. Laws prohibiting general retail activity on Sundays were fairly widespread as of the middle of the twentieth century."[188]

Although a majority of states maintain Sunday restrictions in some form or another,[189] the substance and scope of Sunday laws have evolved significantly, and the notion of Sunday as a "day of rest" has eroded considerably, in both normative and official capacities. Nonetheless, Sunday's status as "a uniform day of rest" has been upheld as valid under the Establishment Clause by the U.S. Supreme Court.[190] This ruling has remained untouched since the Supreme Court's monumental 1961 decision in *McGowan v. Maryland*, which reframed Sunday as a day for relaxation and recreation, and cast its restrictions as secularly rather than religiously motivated.[191]

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185. Gavison, *supra* note 29, at 409.

186. *Id.* at 410.

187. Lesley Lawrence-Hammer, *Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause*, 60 VAND. L. REV. 1273, 1276 (2007). The very first U.S. Sunday law was in 1610, a Virginia law making church attendance compulsory and its violation punishable by death for the third offense. *See* Statute of 1610, *reprinted in* DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, BLUE LAWS 30 (1987).

188. Jonathan Gruber & Daniel M. Hungerman, *The Church vs. The Mall: What Happens When Religion Faces Increased Secular Competition?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 12410, 2006), *available at* http://www.nber.org/papers/w12410.

189. Lawrence-Hammer, *supra* note 187, at 1278.

190. McGowan v. Maryland, 366 U.S. 420, 445, 453 (1961).

191. *See generally McGowan*, 366 U.S. 420.

A. The Evolution of Sunday Laws in Nineteenth Century American Courts

In his comprehensive study of Sunday laws in nineteenth century American courts, Andrew King charts the gradual evolution of the development of Sunday laws, as "American courts reluctantly gave up strict enforcement of Sunday observance."[192] At first, Sunday laws prescribed affirmative duties, including church attendance, but over time they proscribed work, entertainment, or "worldly" activities.[193] Nineteenth century judges pursued both religious and secular means to justify the Sunday laws.[194] Judges with religious leanings insisted that because the United States was a Christian nation, Christianity was thus the source of its common law.[195] Due to separation of church and state concerns, the prospect of religious coercion, as well as a discomfort with sectarianism as a source of normative legal interpretation, some courts have instead touted Sunday laws as a "biological imperative" that used a "one-day-in-seven" formula.[196] "Nature, not God, they asserted, dictated the need for a cessation in labor."[197] Other courts explained that they were simply following the majority custom,[198] without resorting to religious, biblical, or biological notions. Ultimately, courts managed to contend that enforcement of Sunday restrictions was a secular police power, and as a result, did not entangle them in religious matters.[199]

In addition, King notes two other factors that caused American courts in the nineteenth century to limit the reach of Sunday laws.[200] First, courts applied a public-private analysis to Sunday prohibitions.[201] Thus, the courts "took the position that a government's primary concern was with the preservation of the public order on the traditional Sunday," and therefore "[p]rivate activities that did not disturb the public fell outside the range of the Sunday laws."[202] Courts maintained that Sunday statutes only applied to the relationship between the individual and the state, but not to the relationships between individuals.[203] Second, courts treated private litigation more flexibly and liberally[204] than criminal matters. Courts "that were inclined to punish sabbath-breakers detected a dissonance with their common law mission of bringing justice to the wronged."[205]

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192. Andrew J. King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 771 (2000).

193. Elina Tetelbaum, *A Sobering Look at Why Sunday Liquor Laws Violate the Sherman Act*, 2011 UTAH L. REV. 625, 628 (2011).

194. King, *supra* note 192, at 677.

195. *Id.* at 677, 687.

196. *Id.* at 679.

197. *Id.*

198. *Id*.

199. *Id.*

200. King, *supra* note 192, at 678.

201. *Id.*

202. *Id.* at 680.

203. *Id.* at 681. King also notes that this dichotomy between public and private paralleled the doctrine of separation of church and state. *Id.*

204. *See id.* at 709.

205. *Id.* at 772.

Accordingly, courts created loopholes that allowed litigants to enforce contracts entered into on Sundays or to receive compensation for injuries sustained on Sundays.[206] Thus, the courts enabled litigants to have their day in court, whereas otherwise they may have been barred by Sunday restrictions.[207]

By the mid-nineteenth century, courts recognized exemptions for the "exigencies of society of trade."[208] Certain courts also granted exemptions for "gas companies, watermen, and dairymen."[209] Others permitted agricultural activities,[210] as well as railroad maintenance work,[211] and even manufacturing.[212] By the end of the nineteenth century, state Sunday statutes contained exemptions "for many consumer services once barred on Sundays."[213] Thus, by the twentieth century, Sunday laws took on a far more secular shape than they had previously.

B. Upholding Sunday Laws' Constitutionality in Twentieth Century Courts: McGowan and Beyond

In the twentieth century, America's population became increasingly secular.[214] Although the contours of the Sunday laws were modified in response to accommodations for secular activities, states continued to retain their Sunday closing laws and other blue laws.[215] In the landmark case from 1961, *McGowan v. Maryland*, the U.S. Supreme Court affirmed Sunday laws' place in American society.[216] The Court recognized that although Sunday laws have their origins in religious motivations,[217] it concluded that the laws are now "wholly apart from their original purposes or connotations."[218] Instead, they have the more universal and secular goal "to provide a uniform day of rest for all citizens."[219] Sunday was construed as "a day which all members of the family and community have the opportunity to spend and enjoy together . . . a day on which people may visit friends and relatives who are not available during working days."[220] Rather than a day of worship, Sunday was now protected as a day "of relaxation rather than . . . religion."[221]

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206. King, *supra* note 192, at 688.
207. *Id.* at 772.
208. *Id.* at 732.
209. *Id.*
210. *Id.* at 733.
211. *Id.* at 736.
212. King, *supra* note 192, at 737.
213. *Id.* at 772.
214. Lawrence-Hammer, *supra* note 187, at 1277.
215. *See id.* at 1274–75, 1277.
216. McGowan v. Maryland, 366 U.S. 420, 445 (1961).
217. *See id.* at 431 (1961); *see* Glenn S. Gordon, *Lynch v. Donnelly: Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185, 200 (1985).
218. *McGowan*, 366 U.S. at 445.
219. *Id.*
220. *Id.* at 450.
221. *Id.* at 448.

Accordingly, the *McGowan* Court found that Sunday laws did not constitute a violation of the Establishment Clause, and thereby were not a First Amendment violation.[222] The *McGowan* Court also stated that Sunday laws *could* be held unconstitutional on Fourteenth Amendment grounds if the restricted activities depended "on grounds wholly irrelevant to the achievement of the State's objective."[223]

This secular societal justification from *McGowan* was echoed in several Supreme Court cases which soon followed, perhaps most notably in *Braunfeld v. Brown*.[224] *Braunfeld*, like *McGowan*, held that Sunday laws had evolved from "wholly religious sanctions to legislation concerned with the establishment of a day of community tranquility, respite and recreation."[225] In *Braunfeld*, a Jewish business owner challenged a Pennsylvania criminal statute that delineated Sunday as the mandatory day of rest.[226] The store owner argued that the statute placed him at a competitive disadvantage, since he had to keep his business closed for two full days instead of one due to his religious obligation to close on Saturday.[227] The Court found that if the petitioner were permitted to keep his business open on Sunday it would grant him an unfair competitive and financial advantage, rather than level the playing field.[228]

Notably, Justice Douglas dissented vehemently in each of the 1961 Supreme Court decisions.[229] He fervently rejected the majority's acceptance of the Sunday laws' "evolution" from religious motivations to a broader, and wholly secular, societal purpose.[230] He averred that "[n]o matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities."[231] Moreover, the very selection of Sunday as the "uniform day of rest" was not coincidental, but instead a manifestation of the Sunday laws' religious, and specifically Christian, foundations.[232] Justice Douglas posited that because Sunday laws "compel minorities to observe a second Sabbath, not their own," they

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222. *Id.* at 421.

223. *Id.* at 425.

224. 366 U.S. 599 (1961). The other two cases following *McGowan* in 1961 were Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (holding that a Pennsylvania statute enacted in 1951 prohibiting retail sale on Sunday of certain commodities was constitutional); and Gallagher v. Crown Kosher Super Market of Mass, Inc., 366 U.S. 617 (1961) (holding that a Massachusetts state law limiting sales on Sunday was constitutional because Sunday laws provide a period of rest and quiet).

225. *Braunfeld*, 366 U.S. at 602.

226. *Id.* at 601.

227. *See* Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J.L. & SOC. PROBS. 653, 664 (1995).

228. *Braunfeld*, 366 U.S. at 608–09; *see* Gregory H. Fuller, Case Note, *Constitutional Law-Free Exercise of Religion-Strict Scrutiny and the Religious Freedom Restoration Act*, 74 TENN. L. REV. 129, 143 n.147 (2006).

229. *See McGowan*, 366 U.S. at 561 (Douglas, J., dissenting).

230. *Id.* at 573.

231. *Id.* at 572–73; *see also* Lawrence-Hammer, *supra* note 187, at 1287.

232. *McGowan*, 366 U.S. at 573 (Douglas, J., dissenting).

impermissibly engage in preferring one religion over another, in clear violation of the Establishment Clause of the First Amendment.[233]

Justice Douglas' claim that Sunday laws, or uniform days of rest laws more generally, compel or coerce observance of the majoritarian religion is a dubious one. A similar claim was put forth in *City of Charleston v. Benjamin*[234] in the 1840s, in which a Jewish store owner challenged an ordinance that made Sunday sales forbidden.[235] Benjamin contended that the ordinance violated his free exercise of religion by forcing him to observe the Christian Sabbath.[236] In *City of Charleston*, the South Carolina Supreme Court's response to Benjamin's claim was that, "[s]ince the law did not compel Sunday worship, it did not violate the precepts of religious freedom."[237] To be considered a free exercise violation, the enforced regulation would have to be far more egregious, coercive, and ritually specific than a mere cessation of labor.

Some may argue that if Benjamin or Braunfeld had contended that they were biblically commanded not merely to rest on the seventh day, but to work six days a week,[238] then they would have had a stronger claim for a violation of the Free Exercise clause.[239] In response, one could counter that it is possible to pursue "labor" on Sunday in a way which does not involve one's day job or opening one's business, such as mowing the lawn or performing housework. It would therefore be possible to freely exercise one's religion while respectfully observing the statutory Sunday restrictions.

Today, employers face the challenge of how best to accommodate employees who observe a day of rest, whether on Sunday or not.[240] In *Estate of Thornton v. Caldor, Inc.*,[241] the U.S. Supreme Court held that a Connecticut statute that guaranteed a day off to every employee who "states that a particular day of the week is observed as his Sabbath"[242] was unconstitutional as an Establishment Clause violation.[243] Because it imposed "an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates[,] . . . Sabbath

233. *Id.* at 577.

234. 33 S.C.L. 508 (1848).

235. King, *supra* note 192, at 690.

236. Benjamin, 33 S.C.L at 509.

237. King, *supra* note 192, at 692.

238. As Exod. 20:9–10 states: "Six days you may labor and do all your work, but the seventh day . . . [n]o work may be done . . . "; *see also* Exod. 34:21: "For six days you may work, but on the seventh day you shall rest."

239. *See* Burton Caine, *"The Liberal Agenda": Biblical Values and the First Amendment*, 14 TOURO L. REV. 129, n.280 (1997) (contending that there is a separate command to work six days, which would be violated by a mandatory rest period on one of those six days).

240. *See* Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731, 1740 (2011).

241. 472 U.S. 703 (1985).

242. Conn. Gen. Stat. § 53-303e(b) (1985).

243. *Estate of Thornton*, 472 U.S. at 710.

religious concerns automatically control over all secular interests at the workplace."[244] The statute thus went "beyond having an incidental or remote effect of advancing religion," and instead had "a primary effect that impermissibly advances a particular religious practice."[245] At the same time, Title VII already requires that employers "reasonably accommodate" employees' religious observance needs.[246] This model of accommodation arguably recognizes and protects religious pluralism in the workplace.[247]

C. Modern American Forms of Sunday Laws

Since the *McGowan* decision, many blue laws were challenged on constitutional grounds, largely as violations of the Fourteenth Amendment which rested "on grounds wholly irrelevant to the achievement of the State's objective."[248]

A study by Jonathan Gruber and Daniel Hungerman traces the effects of blue law repeals upon church attendance, charitable donations, and drinking and drug consumption.[249] Their study demonstrates that repeal of blue laws led to a "significant drop" in church attendance and charitable giving.[250] Their observation that "raising secular competition lowers religious attendance"[251] varied in effect from group to group. Among those who attended more than weekly, the repeal had little effect, but among those who attended only once a week, it had the most significant effect, with a 15% decline in that category:[252]

> There is, however, a very large negative coefficient on the effect of attending weekly, which represents a 15 percent decline in the prevalence of that category. There are then no effects on attending about weekly, 2-3 times per month, or once per month, positive and significant effects on attending several times a year or 1-2 times per year, and no effect on not attending at all. Thus, the results appear to indicate a shift down the distribution: those attending weekly move to lower attendance, raising the prevalence of nearby categories (such as about weekly), but individuals in those categories reduce attendance as well, leading to an offsetting decrease and no net effect, as well as an increased prevalence of rare attendance. The fact that there is no change in the "no attendance" category implies that individuals are not dropping out of church-going altogether, but rather that they are simply going less frequently.[253]

Although the study purports to isolate blue law repeals as the sole causal

244. *Id.* at 709.

245. *Id.* at 710.

246. *See* Carmella, *supra* note 240, at 1740.

247. *Id.* at 1741.

248. *See* Gruber, *supra* note 188, at 4 (citing McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

249. *See* Gruber, *supra* note 188, abstract.

250. *Id.* at 25.

251. *Id.* at 16.

252. *Id.*

253. *Id.* at 16–17.

link[254] that led to the decline in religious participation in the "giving and going margins,"[255] the study results are "unable to rule out a simultaneous change in church-going attitudes and blue law repeal."[256]

Notwithstanding Gruber and Hungerman's controls, a correlative link appears far more probable than a strict causal interpretation, particularly given that the study's "causal interpretation of this finding rests on the assumption that nothing else changed at the same time as the blue laws that also caused a decline in church-going."[257] The presumption that *nothing else changed* is markedly short-sighted, given the likelihood of popular support of the blue laws' repeal within each state, in order for the state legislatures to accomplish repeal of such well-established laws. Moreover, the fact that so many states, in a relatively short time-span, repealed the blue laws, indicates a cultural shift in America more broadly—namely, that of increased secularization, which both affected Americans' attitudes toward religious practice and encouraged the blue laws to be repealed in the first place.

Despite wide repeal of blue laws, most states maintain "some type of Sunday closing law."[258] These state statutes may take on general or specific forms.[259] General Sunday closing laws broadly prohibit all labor and business.[260] General laws may exempt a long list of activities from their broad bans, or alternatively, they may individually list each prohibited activity, rather than list the exempted activities.[261] Some states contain restrictions only for a portion of the day on Sunday.[262] Specific Sunday restrictions delineate "specific activities as uniquely worthy of Sunday restriction."[263] Some specific restrictions include: horseracing, hunting, sale of motor vehicles, and, most commonly, sale of alcohol.[264] Regardless of the type of law, whether general or specific, "states often provide their political subdivisions the ability to 'opt out' of the state-level restrictions."[265] In sum, despite the trend toward increased secularization, "Sunday restrictions have not only survived, they have thrived," and remain in place in some form in a majority of states.[266]

254. *Id.* at 17.
255. Gruber, *supra* note 188, at 22.
256. *Id.* at 18.
257. *Id.* at 17.
258. Lawrence-Hammer, *supra* note 187, at 1277–78.
259. *Id.* at 1278.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 1279.
264. Lawrence-Hammer, *supra* note 187, at 1279–80.
265. *Id.* at 1280.
266. *Id.* at 1274.

D. Modern Rationales for Validation or Invalidation of Sunday Laws

Some scholars have supported the non-religious justifications for Sunday as a "uniform day of rest" as advanced in *McGowan v. Maryland*,[267] arguing that Sunday restrictions can "create a basic social synchronization within time."[268] With Sunday as a day of rest for all workers, the restrictions "coordinate our work time and our leisure time so that we share common rhythms," and facilitates interpersonal connections during common periods of rest.[269]

By contrast, Lesley Lawrence-Hammer argues that if a Sunday law case were brought before the Supreme Court today as an Establishment Clause violation, it would be held as an unconstitutional establishment of religion.[270] Establishment Clause jurisprudence has evolved significantly since 1961, and the tests the Supreme Court uses to adjudicate Establishment Clause cases boil down to assessing "either (1) the government's purpose in acting, or (2) the effect of its actions."[271] Lawrence-Hammer posits that modern Sunday laws lack a legislative purpose, have the effect of endorsing religion, and coerce religious exercise through observance of the Christian Sabbath.[272] She further contends, echoing Justice Douglas' dissent, that *McGowan*'s secular legislative purpose of creating a "uniform day of rest" has never truly evolved from its initial religious motivations.[273]

V. *DESIGN 22* VERSUS *MCGOWAN*

Sunday laws must toe the line so as not to violate the Establishment Clause, and therefore must remove all vestiges of their initial religious motivations.[274] American courts must eschew religious derivation of U.S. laws, but Israeli courts may embrace religion.[275] While Justice Douglas's critique of *McGowan* and its

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267. *See, e.g.,* Katharine B. Silbaugh, *Sprawl, Family Rhythms, and the Four-Day Work Week*, 42 CONN. L. REV. 1267, 1280–82, 1284 (2010) ("The coordination or synchronization of work time and what is alternatively called leisure, family, or private time, is the product of its value to the people.") (discussing TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 39–43 (2000)).

268. RAKOFF, *supra* note 267, at 38. Analogous rationales are made for observance of the Jewish Sabbath in modernity. *See* Ethan Tucker, *Jack Lew and the Power of Shabbat*, JEWISH DAILY FORWARD (Jan. 19, 2012), http://forward.com/articles/149840/ (arguing for Jewish Sabbath observance as a time for "turning within to rejuvenate, to recharge and to model the promise of a weekly respite from non-stop labor"); *see also* ABRAHAM JOSHUA HESCHEL, THE SABBATH 10 (1951) ("The meaning of the Sabbath is to celebrate time rather than space. Six days a week we live under the tyranny of things of space; on the Sabbath we try to become attuned to *holiness in time.*").

269. Silbaugh, *supra* note 267, at 1281 (citing RAKOFF, *supra* note 267, at 40).

270. Lawrence-Hammer, *supra* note 187, at 1297.

271. *Id.* at 1295.

272. *Id.* at 1297; *see also id.* at 1284, 1287.

273. *Id*. at 1297.

274. See *supra* notes 270–73 and accompanying text for a discussion of how Sunday laws would be treated under the current Establishment Clause framework.

275. See *supra* notes 14–26 and accompanying text for a discussion of the role of religion in Israeli law and social order.

progeny was that "the parentage of these laws is the Fourth Commandment,"[276] Justice Barak transparently and unabashedly quoted the fourth commandment as a proof-text for the HWRL's legitimacy as an embodiment of Israel's values as a Jewish state.[277] For Justice Barak, the HWRL's dual social and national-religious purposes are its justification, and by no means its undoing.

The *McGowan* Court reframed Sunday as a secularly motivated day of recreation and relaxation in order to avoid an Establishment Clause violation. The *Design 22* Court was under no such pressure to depict the HWRL as entirely secularly or socially motivated. According to Justice Barak's opinion, the HWRL must have both a proper social purpose and a proper national-religious purpose.[278] Justice Procaccia, on the other hand, emphasized the day's social aspects more so than its religious or traditional aspects.[279] Justice Barak seemed content with viewing the Sabbath as a "uniform day of rest" which facilitates national unity and family togetherness,[280] but Justice Procaccia reframed the day as a "day of leisure" which must allow individuals to pursue recreational activities as they please.[281] While *McGowan*'s reframing was out of legal necessity, Justice Procaccia's is out of social necessity.

The proponents of secular accommodation on both Sundays and Saturdays encounter the same value judgment: increasing access to leisure activities negates the value of a "uniform day of rest," since there will be fewer workers who will have off from work.[282] The American and Israeli publics' fierce demand for recreational activities on Saturdays and Sundays may indicate their willingness to sacrifice its uniform day of rest, and signals to both Israeli and American courts that a "day of leisure" better captures the public's perception of Saturday's or Sunday's social purpose than does a "uniform day of rest."[283]

Critics of both *McGowan* and *Design 22* contend that upholding the Sunday

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276. McGowan v. Maryland, 366 U.S. 420, 572 (1961) (Douglas, J., dissenting).

277. *See* HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig 2005 (1) Isr. L. Rep. 340, 359 [2005] (stating that Israel's Jewish values "well befit the prohibition of employing persons and working during the weekly rest").

278. *Id.* at 359.

279. *Id.* at 372 (finding that the social aspects of the Sabbath may justify a departure from the religious ban on work in order to accommodate leisure activity).

280. *See id.* at 360, 363 (finding that the Sabbath laws serve the social interest of facilitating family time and the national interest of preserving the national religion).

281. *Id.* at 371.

282. This is an argument in favor of the Sabbath and Sunday closing laws. For thoughts on how this argument applies to the U.S., see Marc A. Stadtmauer, *Remember the Sabbath? The New York Blue Laws and the Future of the Establishment Clause*, 12 CARDOZO ARTS & ENT. L.J. 213, 234–35 (1994) (recognizing that "allowing shopping on Sundays would require workers to work on that day, and thereby deprive them of the opportunity to spend it with their families[,]" but concluding that American social interests and public sentiments call for the laws' repeal).

283. Still, American and Israeli legal authorities could determine that the culture they are trying to cultivate is so important that "the limitations such [cultural] laws may impose on individuals who are not concerned about the culture themselves may nonetheless be justified." Gavison, *supra* note 29, at 413.

or Sabbath laws is a form of religious coercion.[284] In both cases, that position was rightfully rejected; mandatory business closures are not equivalent to forced worship or even cessation from all labor. The HWRL contains no restrictions specifically linked to actual Sabbath observance, and in the United States, the current Sunday restrictions are predominantly prohibitions against alcohol sale.[285] Neither system contains a single clause resembling an obligation to attend services, to engage in prayer, or to participate in other forms of observance.[286] At most, the laws' explicit intention is to cultivate an atmosphere of tranquility in the public sphere.[287] Although it seems compelling that Sunday and Sabbath laws are a form of religious paternalism, it would be difficult to find that they are religiously coercive.

VI. LOOKING FORWARD: BALANCING SECULAR AND RELIGIOUS NEEDS ON THE SABBATH

As it currently stands, secular and religious citizens in Israel are at an impasse, and signs of cooperation or concessions are nowhere in sight. One model compromise (the Gavison-Medan Proposal) has been put forth, and other solutions (localization and the five-day work week) also exist, but none appear ready to achieve nation-wide recognition in the near future.

A. The Gavison-Medan Proposal

Ruth Gavison, a secular Hebrew University law professor, and Yaakov Medan, an Orthodox rabbi, collaborated in composing the Gavison-Medan Proposal.[288] The proposal was meant to put forth a possible law that would not be perceived as religiously coercive, but would still maintain a shared day of rest and preserve "the special character of the Sabbath as part of ancient Jewish culture."[289] The proposal itself, entitled the *New Covenant for State and Religion Issues among Jews*, is a broader project to achieve a compromise on religion and state issues among Jews in Israel, and contains one chapter addressing the Sabbath:

> *Chapter Three: The Sabbath*
>
> 1. A Basic Law will establish the Sabbath as the official day of rest of the State of Israel.

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284. McGowan v. Maryland, 366 U.S. 420, 572 (1961) (Douglas, J., dissenting); Lawrence-Hammer, *supra* note 187, at 1297; see also HCJ 5026/04 Design 22 Shark Deluxe Furniture Ltd. v. Rosenzweig 2005 (1) Isr. L. Rep. 340, 345 [2005].

285. Lawrence-Hammer, *supra* note 187, at 1279–80 ("[B]y far the most prevalent specific blue laws are those restricting the sale of alcohol.").

286. *See id.* (describing the restrictions imposed by Sunday closing laws without mention of Sunday requirement laws); Hours of Work and Rest Law, 5 LSI 125.

287. However, arguably the strictest form of Sunday laws did intend to encourage church attendance by making inaccessible other, more popular or engaging activities. There is no indication that Israel's secular majority, which enacted the HWRL, had any intention of encouraging synagogue attendance or actual Sabbath observance.

288. Gavison, *supra* note 29, at 398.

289. *Id.* at 389.

2. Government offices, educational institutions, factories, banks, services and commercial establishments will be closed on the Sabbath. The prohibition will apply in all places. Essential industries, hospitals and services will operate under a limited regime.

3. Employees have the right not to work on the Sabbath. Non-Jewish employees have the right not to work on their religious days of rest. No Sabbath-observing individual will be discriminated against in terms of hiring or promotion in the workplace. A self-employed person will not ask employees to work on the Sabbath. Workplaces operating on the Sabbath will engage employees to work on that day on a rotating basis, and to the extent possible will give Sabbath-observing employees the opportunity to perform higher-paid work during the week.

4. It will not be forbidden for restaurants and places of entertainment to operate on the Sabbath, provided they do not disturb public peace. It will not be forbidden for a limited number of small grocery stores, gas stations and pharmacies to operate on the Sabbath. A permission to operate on the Sabbath will be awarded on a rotating basis, for a special fee. Restaurants, museums and other places of entertainment that are open on the Sabbath will close on another day of the week.

5. Transportation routes will remain open during all hours of the day and all days of the week. In towns or neighborhoods having a solid majority of Sabbath-observing residents, or in other locations where traffic should be limited to certain times, transportation routes may be closed for all or part of the Sabbath as per an authorized decision of the local authority. Transportation arteries will not be closed for reasons of Sabbath observance.

6. Limited public transport will be permitted on the Sabbath on a reduced schedule, in order to afford mobility to those who depend on public transport while preserving to the extent possible the character of the Sabbath in the public domain and restricting the need to work on the Sabbath. It is recommended that Sabbath public transportation will not be operated by the companies operating during weekdays, and that the vehicles used be smaller than regular buses.

7. The possibility of transferring sporting and other events which are currently held on the Sabbath to weekdays will be examined.

8. A comprehensive effort will be made to adopt a five-day work week, in order to enable joint social, family, sporting and cultural events on days other than the Sabbath. An employee required to work on the Sabbath will not be required to work on the other general day of rest as well.

9. Sabbath arrangements will not apply to local authorities with a majority of non-Jewish residents.

10. Particulars of the arrangements, the specification of essential institutions and Sabbath frameworks will be determined by special local committees. For arrangements on the national level, the committee will be chosen by the Prime Minister. With regard to local arrangements, the committee will be chosen by the head of the local authority and the Interior Minister, in consultation with representatives of all municipal

> parties. The above arrangements will be strictly and systematically enforced in order to effectively preserve the character of the public domain on the Sabbath.[290]

Notably, the proposal puts forth a new standard for restaurants and places of entertainment for operating on the Sabbath: "provided they do not disturb the public peace."[291] It also supports adoption of a five-day work week (currently, the work week in Israel is Sunday through Friday), to provide another day for family and social outings other than Saturday.[292] It proposes a localized model for making specific determinations about commercial and institutional operations, whose explicit purpose is "to effectively preserve the character of the public domain on the Sabbath."[293]

The Gavison-Medan Proposal was well-received by many secular and religious leaders, and a private bill, which was endorsed by the Forum of Mayors, called for its implementation.[294] A similar bill is part of the proposed constitution.[295] However, as Gavison herself admits, the proposal is unlikely to be enacted formally any time soon.[296] Although religious parties have reportedly expressed interest in supporting the measure, they do not want to be the ones to advance it, and secular forces are unwilling to limit commercial activity for the sake of gaining access to cultural institutions or places of entertainment.[297]

B. Localization and Self-Segregation

Yishai Blank, a Tel Aviv University law professor, does not discuss regulation of Sabbath laws specifically, but identifies the phenomenon of localization of religion in Israel.[298] Israel is divided into approximately 200 localities (and hundreds of sub-localities) ranging in population from more than 500,000 to fewer than 2,000 residents.[299] Blank points out that local government became "heavily involved in mediating religious tensions and in regulating religion in the public sphere alongside—and not instead of—the constant involvement of the state in these affairs."[300]

Local governments are empowered to take religious considerations into account under certain special enablement laws, which allow "localities to shape the

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290. *Id.* at 399–400.
291. *Id.* at 399.
292. *Id.* at 400.
293. *Id.*
294. Gavison, *supra* note 29, at 404–05.
295. *Id*.
296. *Id.* at 405.
297. *Id*.
298. Blank, *supra* note 22, at 3.
299. CENTRAL BUREAU OF STATISTICS OF ISRAEL, LOCAL COUNCILS AND MUNICIPALITIES (2009) *available at* http://www1.cbs.gov.il/reader/newhodaot/tables_template_eng.html?hodaa=200924244 (listing 197 Israeli localities).
300. Blank, *supra* note 22, at 10.

public space within their jurisdiction in a religious fashion."[301] Under the Municipalities Ordinance, localities may take into account "religious considerations" when granting business licenses and permitting or prohibiting operation on the Sabbath and holidays.[302] The "enabling laws were a compromise between religious and secularist members of Knesset":[303]

> The combination of their regular local powers, special enablement laws and fiscal powers (taxing and spending) make localities prime sites for the consideration of religious sentiments and for the regulation of religious liberty in Israel. Cities prohibit or allow selling pork meat, limit or permit the opening of stores on the Sabbath and other religious holidays, ban or sanction sex stores, close down or open up roads during the Sabbath, and spend money on and give tax breaks to synagogues or LGBT centers.[304]

Blank argues that localization is crucial to Israel in particular, "given the monopoly that orthodox Judaism enjoys in the government."[305] He maintains that local authorities are in the best position to regulate religion and control religious liberty, since the country is unable to come to a nationwide consensus about religion-state issues, while localities are extremely homogeneous.[306] Thus, Blank theorizes that the only way for Israel's religious diversity to find expression and to reflect Israel's "real plurality"[307] is through localization. Moreover, "the greatest threat to religious liberty comes . . . from the central government and the Knesset establishing religion, since it will always be one dominant religion: orthodox Judaism. Decentralization is the cure since it incentivizes people to form religious sects that would fight against such dominance."[308] Localization offers marginalized or minority groups structural protection against the dominance of any one religion.[309] Accordingly, localization also incentivizes self-segregation rather than living in a diverse setting, so as to maximize one's ability to live in a community whose practices and policies will match one's ideals.[310]

Frank Ravitch proposes a similar solution based on his "ebb and flow" of values model, which recognizes the values of preferentialism, liberty, equality, accommodation, and pragmatism.[311] Ravitch posits that in this matter an approach

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301. *Id.* at 15.

302. *Id*.

303. *Id.*

304. *Id.* at 24.

305. *Id.* at 7.

306. Blank, *supra* note 22, at 4.

307. *Id.* at 28.

308. *Id.* at 26.

309. *Id.* at 33.

310. Self-segregation also has its downsides, including exacerbation of local tensions between Jews and Muslims and between secular and Haredi Jews, which has led to religious and political radicalization. *See id.* at 30. *But see Judaism in Israel*, *supra* note 16 (positing that self-segregation has resolved religious/secular tension by isolating those who would impose religious limitations on secular neighbors).

311. Ravitch, *supra* note 26, at 890–93.

of accommodation is the most appropriate to minimize these tensions in Israeli society.[312] An "accommodation approach would recognize Orthodox authority in predominantly Orthodox communities" and non-Orthodox authorities in predominantly non-Orthodox communities.[313] Decision-making processes under this model also incentivize self-segregation and define one's choice of neighborhood as an ideological choice rather than an aesthetic one.

C. The Five-Day Work Week: An Avoidance Technique

A five-day work week is a component of the Gavison-Medan Proposal[314] and was also recently proposed by a former Finance Minister and Foreign Minister, Silvan Shalom.[315] A five-day work week would require a change in the HWRL, because it proposes to make both Saturday and Sunday official days of rest. The measure is said to be supported by the recent Minister of Interior Eli Yishai, as it would relieve pressure on businesses to stay open on Saturday and allow them to open on Sundays instead.[316] The new work week would necessitate longer hours during the week, as well as a drastic revamping of the country's commercial and educational system.[317] This model would avoid confronting head-on the tensions between the religious and secular, and would provide a quasi-solution without mutual concessions. Still, even going so far as to institute a five-day work week would not guarantee that businesses would close operations on Saturday; there may be businesses that prefer to close on Sunday and remain open on Saturday, or maintain commercial activity on both days. In sum, this model still may not guarantee a solution to the conflict and has the potential to exacerbate it further.

D. HWRL Amendment or Constitution: A Long-Term Solution?

The most sustainable and most long-standing solution would be for the Knesset either to: (1) amend the HWRL to provide greater secular accommodation by defining what is "essential" for the purposes of permitting employment on rest days, and spelling out specifically what the Minister of the Interior can or cannot weigh in on,[318] or (2) approve a Constitution which contains a graceful solution or compromise on the questions of secular accommodation and weekly rest, perhaps mandating that decisions related to religion and the state be localized.[319]

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312. *Id.* at 893.

313. *Id.*

314. Gavison, *supra* note 29, at 400.

315. Hillel Fendel, *Ex-Finance Minister Pushing Five-Day Work Week*, Feb. 28, 2011, http://www.israelnationalnews.com/News/News.aspx/142578.

316. *Id.*

317. *Id.*

318. See *supra* Part III.B, for a discussion on Justice Procaccia's broad interpretation of what services are "essential."

319. As discussed previously, Israel has yet to adopt a constitution, but a proposed version contains a clause stating: "On days of rest no one shall be employed and there shall be no commerce or production, except under conditions to be specified by law." Proposals for a Constitution, *supra* note 92. Whether or not such a proposed text could be adopted would depend on which conditions are specified by law.

Although such action, particularly the latter, may appear improbable or unattainable at this time, the tension within the Israeli population is only going to worsen with the burgeoning Haredi population and other demographic changes on the horizon. Furthermore, the potential nuclear threat from Iran and increased hostility from Israel's neighbors in the aftermath of the Arab Spring are added considerations in Israel's questions of identity and sustainability. Conditions more conducive to compromise are not expected to emerge any time soon, and this period may be viewed in retrospect as the window in which an amendment to the HWRL could have been passed, and perhaps more importantly, when a constitution could have been approved.

VII. CONCLUSION

There is much at stake in how Sabbath work restrictions are construed in Israel and whether they should be perceived and enforced as a day of rest or as a day of leisure. The HWRL represents an issue beyond ensuring that all workers have a weekly period of rest; the controversy surrounding the HWRL is a microcosm of religious-secular tensions in Israeli society. The HWRL is a conduit through which Israel's public, legislature, and court system debate religion in the public sphere, and it serves as a symbol of how Israelis attempt to define their society, their culture, and their identity as both a democratic and Jewish nation. Its interpretations are an opportunity to carve out precisely which Jewish and democratic values take precedence and which will prevail if they conflict.

The evolution of Sunday laws in the United States is a useful foil for the HWRL and *Design 22*, as it accentuates the dialectical relationship between "day of rest" and "day of leisure." Such a reframing solves (for now) the Establishment Clause problem under U.S. law, as it distances Sunday closings from their religious origins and instead portrays the day as socially motivated. However, this shift in the Israeli context does not neutralize the Sabbath restrictions, but rather provokes those who wish to retain the Sabbath's traditional character on a national level. Similarly, the appeal for secular accommodation may be met with fierce opposition.

However Israel's leadership responds to increasing calls for secular accommodation, and indeed, whether it does so at all, will indicate how it will grapple with broader issues of religion and state. Maintaining the status quo and the "status quo" compromise has grown increasingly unrealistic, and changing demographics and political movements will only complicate matters further. It is in Israel's best interest to adopt a long-term compromise on the role of religion in the state in the near future, before internal and external forces make it utterly infeasible.