

VOLUME XXIII, NUMBER 4, FALL 2023

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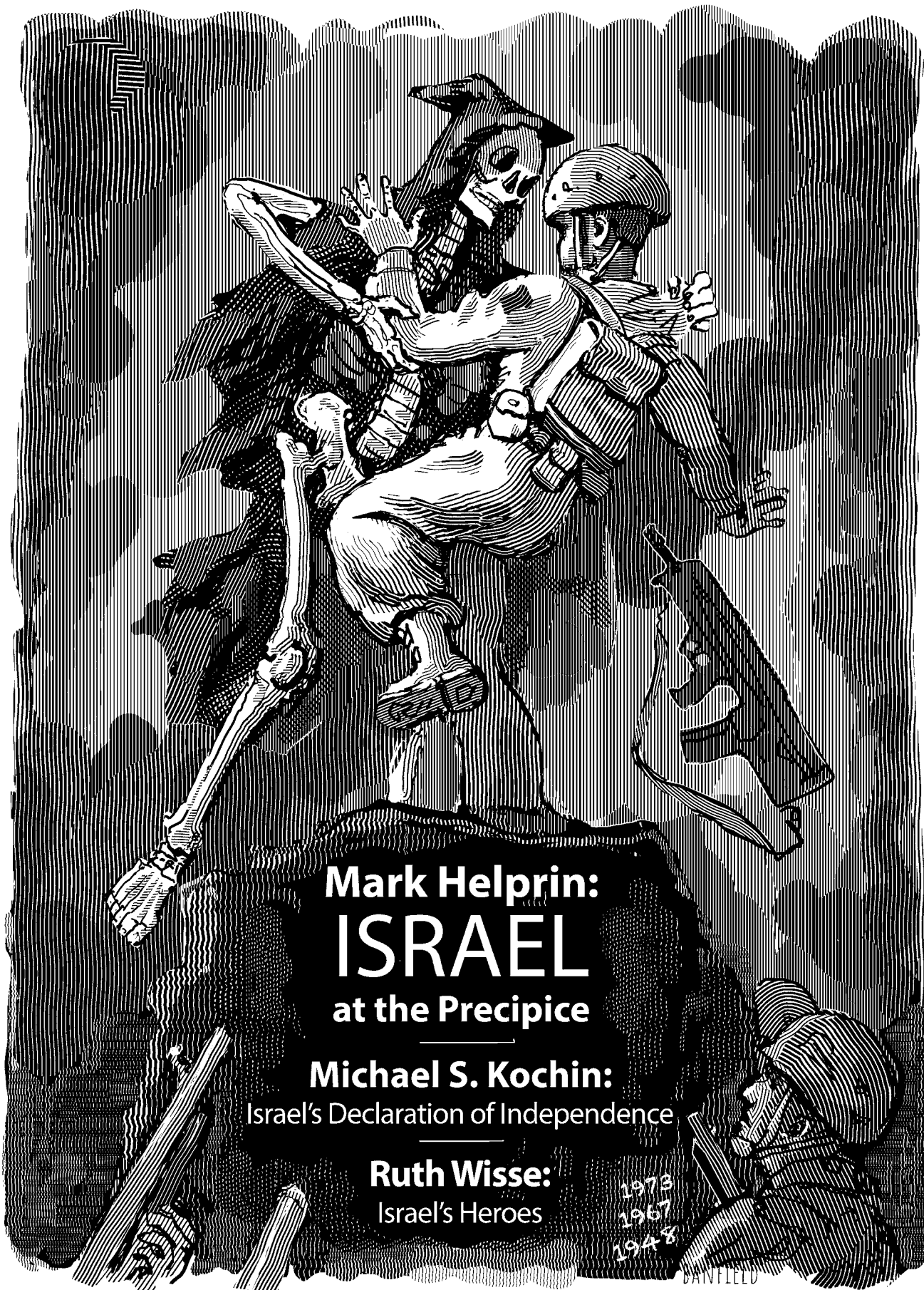
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A Publication of the Claremont Institute

PRICE: \$9.95

IN CANADA: \$14.95



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Book Review by Michael S. Kochin

# WHO FOUNDED THE STATE OF ISRAEL?

*Israel's Declaration of Independence: The History and Political Theory of the Nation's Founding Moment*,  
by Neil Rogachevsky and Dov Zigler. Cambridge University Press, 300 pages, \$39.99



IT TAKES AN EFFORT NOW TO RECALL, BUT prior to the raid by Hamas from Gaza on October 7, 2023, that killed over 1,200 Israelis, almost all of them civilian men, women, and children, Israel had been wracked by the worst political crisis over a purely domestic issue in its history. The crisis had been brought on by the Netanyahu coalition's proposed reforms to the judiciary. The coalition aimed to replace the rule of judges over every aspect of Israel's governance with the rule of law, and

put the appointment and dismissal of judges, including those on the Supreme Court, under democratic control. Faced with widespread protests, most of the reform package has been suspended, and what of it was passed by Israel's parliament, the Knesset, is, as of this moment, under judicial review and expected to be struck down.

Some partisans of continued judicial supremacy described themselves as loyal to the Declaration of the Establishment of the State

of Israel, proclaimed on May 14, 1948. Indeed, as Neil Rogachevsky and Dov Zigler explain in their pioneering study, *Israel's Declaration of Independence*, on the roots, context, drafting, and legacy of that document, the Israeli Supreme Court has invoked the Declaration as the preeminent source of principles by which the Court scrutinizes executive acts and interprets or strikes down legislation.

Israel has no precisely defined written constitution; the Constituent Assembly elected



in 1949 decided instead to turn itself into an ordinary parliament. Since then, the Knesset has issued a series of “Basic Laws” to constitute Israel’s government. In the mid-1990s, in what then-Supreme Court President Aharon Barak called his “Constitutional Revolution,” the Court held that all legislation had to conform to those Basic Laws—but as the Court, not the Knesset, interpreted them. What’s more, the Court has taken upon itself in a 2021 ruling to review Basic Laws themselves for their conformity to the “principles of the Declaration of Independence,” a move that chokes off any ability of the Knesset to instruct the Court authoritatively. Former Justice minister and would-be Court reformer Ayelet Shaked prophesied that this ruling would be “an earthquake” that would precipitate “war between the branches”—and it did.

**R**OGACHEVSKY, AN ASSISTANT PROFESSOR and associate director of Yeshiva University’s Straus Center, and Zigler, an economics researcher at Element Capital in New York, ably recount the history of the drafting of the Declaration, and the roles of differing lawyers, jurists, and politicians, as well as the contributions of natural rights discourse, international law, Labor Zionist theory, and theo-political practice, in the process that led to the final, resonant, even poetic, text.

The Zionist movement, especially as developed and led by Theodor Herzl and his successors, had aimed for more than 50 years at the creation of a Jewish commonwealth in the Land of Israel (the modern geographer’s “Palestine”). Great Britain announced its support for a “national home for the Jewish people” in its 1917 Balfour Declaration, which was incorporated into a League of Nations mandate in 1922 for the British to govern Palestine. Twenty-five years later, hostile to Jewish aspirations and exhausted by World War II, Prime Minister Clement Attlee’s Labour Government returned the mandate to the United Nations. After investigation, deliberation, and intensive lobbying, the United Nations on November 29, 1947, voted to partition Palestine into Arab and

Jewish States, retaining Jerusalem as a “Special International Regime” under its aegis.

**T**HE JEWS ACCEPTED PARTITION OF PALESTINE, and the Declaration of Independence is their letter of acceptance—issued by the Jewish state it established to the United Nations and to the rest of the world. The Arabs of Palestine and the surrounding Arab states, however, rejected partition, as Hamas and Fatah, the dominant Palestinian political parties, do to this day (see “Why Not a Palestinian Singapore?,” Summer 2018). As this book vividly depicts, the Declaration was drafted and ratified amidst a civil war that would become an interstate war when the Arab states responded to Jewish independence by invading Palestine.

But I think the story Rogachevsky and Zigler tell needs some revision. Although they acknowledge that the U.N. aimed at a more active role in partitioning and pacifying Palestine than it was able to achieve, they assume that what the U.N. wanted was impossible, when in fact the organization can do what its member states choose to do through it. The United States and the Soviet Union could, in theory, have worked together to establish on the ground the map of Palestine the U.N. had proclaimed. But as events unfolded, Cold War tensions came to dominate.

The Declaration itself claims as its collective author the *Moetzet Ha’Am*—“The People’s Council” made up of its signatories—calling it a “Provisional Council of State,” and specifies that “its executive organ, the People’s Administration [*Minhelet Ha’Am*] shall be the Provisional Government of the Jewish State.” Rogachevsky and Zigler follow the consensus among scholars by describing the *Moetzet Ha’Am* as an embryonic legislature and the *Minhelet Ha’Am* as the government, but this is only partially correct. A “council of state”—His Britannic Majesty’s Most Honourable Privy Council—was precisely what had governed Palestine until the British left. The British ruled Palestine through a series of “orders of King in Council” issued in the king’s name on the

advice of his responsible ministers. These ministers, each a “privy counsellor,” carried on the king’s government of Britain and her empire, as they do to this day, as a subcommittee of his Privy Council, known (originally in derision) as “the Cabinet.” Renouncing the mandate and departing from Palestine, the British left the seat of government there vacant. To fill the vacuum, the Jews created, albeit provisionally, a Council of State (the *Moetzet Ha’Am*) with a subcommittee government (the *Minhelet Ha’Am*) after the British model.

**T**HE MOETZET HA’AM, HAVING BEQUEATHED to Israel the Declaration of Independence and its principles, dissolved itself. The constituent power of the State of Israel, according to its judicial rulers, then, is not to be found in the people of Israel or in their elected legislators, but in the *Moetzet Ha’Am*—and it is for Israel’s judges to interpret the will of the permanently absent Council of State as expressed in the Declaration of Independence. The Declaration, as Rogachevsky and Zigler note, mentions elections but not democracy: as interpreted by Israel’s judges, it deprives Israel’s people of fundamental democratic power and leaves them no lawful way to regain it. The elected Knesset can pass Basic Laws, but then the Supreme Court decides which of them suit its understanding of the principles of the Declaration’s unamendable, irrevocable promises.

As I write, the war that Hamas brought on is far from over and no one can know its scope or repercussions. But when it ends—with Israel, God willing, bloodied but more secure—the questions of democratic power and legal theory that the constitutional crisis of 2023 brought to the surface will still be unresolved. Those who wish to think them through will do well to turn for guidance to Rogachevsky and Zigler.

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FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY.

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