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On the Nexus Between the Strength of the Separation of Powers and the Power of the Judiciary

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ON THE NEXUS BETWEEN THE STRENGTH OF THE SEPARATION OF POWERS AND THE POWER OF THE JUDICIARY

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This Article makes four novel arguments: (1) There is an inverse relationship between the strength of a separation of powers structure and the strength of the judiciary. In a strong separation of powers structure, one should expect a weaker judiciary, and vice versa. This nexus exists empirically, and is supported on normative and strategic grounds. (2) This nexus is manifested through a web of common law doctrines that developed to support a given separation of powers structure and shape the judicial oversight of the political branches. This Article identifies a list of common law doctrines—including standing, justiciability, deference, and judicial interpretation techniques—which substance is derived from the strength of the separation of powers in a given system. (3) Though scholars traditionally study these common law doctrines independently from each other, this Article argues that they are all connected. (4) Lastly, courts understand that the content of each of these doctrines is affected by considerations related to the separation of powers. Yet, while developing these common law doctrines, the courts have failed to connect these various doctrines, and to identify the connection between the strength of the separation of powers and the resulting content of common law doctrines that are required to support it. The courts are not alone in their failure to see the connection; scholars of comparative law often apply doctrines from one system to another without being aware of this nexus.

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This Article supports its argument by juxtaposing two Supreme Court decisions from two democratic common law countries dealing with similar dilemmas: whether immigration bans based on nationality are constitutional, even though they prevent citizens from uniting with their foreign family members. In both countries, the Courts dealt with a similar dilemma, and reached similar results of non-intervention. Yet, the reasoning of both Courts vastly differed. By analyzing how the United States and Israel—which are located on the opposite sides of the spectrum regarding separation of powers—construct their judicial reasoning to a similar problem, this Article aims to examine the inner workings of both systems' separation of powers. This Article contends that these different structures lead to vastly different common law doctrines that inform judicial reasoning.

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INTRODUCTION

One of the most fascinating aspects of constitutional law is the way societies construct their citizenry. This issue has come to the forefront of Israeli politics because the Knesset (Israel's legislature) has repeatedly banned Palestinians from the West Bank and Gaza from gaining "civilian status" in Israel, including permits to stay, reside, or naturalize.[1] This ban on immigration overwhelmingly prevents Israeli citizens from uniting with their Palestinian immediate family members, unless they are minors, or over a certain age and thus deemed by the Israeli security establishment to be less likely to commit terrorist attacks.[2] This legislative policy is so hotly contested and ill-reputed that many have utilized it to undermine the legitimacy of Israel's very existence by arguing that it makes Israel an apartheid regime, even outside the Occupied Territories.[3] Across the Atlantic, President Trump's Executive Order (and later proclamation), which prevented foreigners from

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[1] Citizenship and Entry into Israel (Temporary Provision) Law, 5763-2003 S.H. 544 (Isr.). This Act was renewed annually until it lapsed on July 6, 2021. On March 10, 2022, the Knesset re-enacted a new version of the law titled: Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 S.H. 808 (Isr.). The Act also applies to citizens and residents of "hostile" states, identified as Iran, Lebanon, Syria, and Iraq.

[2] *See* Daphne Barak-Erez, *Israel: Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights*, 6 INT'L J. CONST. L. 184, 185–86 (2008). Some Israeli Arabic citizens define themselves as "Israeli Palestinians." This Article uses the term Palestinians to describe Arabic persons living in the West Bank and Gaza.

[3] *See, e.g.*, Zena Al Tahhan, *'Devastating': How Israel Is Pulling Palestinian Families Apart*, AL JAZEERA (Mar. 15, 2022), https://www.aljazeera.com/features/2022/3/15/devastating-how-israel-is-pulling-palestinian-families-apart [https://perma.cc/6A48-9X8F]; *Israel's Apartheid Against Palestinians*, AMNESTY INT'L, https://www.amnesty.org/en/latest/campaigns/2022/02/israels-system-of-apartheid/ [https://perma.cc/7B6Q-X6FD] (last visited Mar. 1, 2023).

eight primarily Muslim countries from entering the United States, has been decried as racist and xenophobic.[4] Much has been written about these policies from a normative perspective,[5] but this Article tackles these issues from a comparative law angle. It seeks to juxtapose two Supreme Court decisions from two different Western democratic common law countries, the United States and Israel, dealing with similar dilemmas—constraints on the judiciary in the context of immigration, when national security and individual rights conflict.[6] These two countries lack an explicit constitutional right to family unification. They also actively learn from each other's immigration arrangements, which balance security needs and open borders.[7]

In both countries, the Courts reached similar results of non-intervention.[8] Yet, the reasoning of both Courts was vastly different. By analyzing how the United States and Israel, which are located on the opposite sides of the spectrum regarding separation of powers, construct their judicial reasoning to a similar problem, this Article aims to examine the inner workings of both systems' separation of powers. In the process, this Article provides a template and paves a new way of studying comparative constitutional law by disclosing the connections between separation of powers structures and common law doctrines that shape judicial oversight of the political branches.

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[4] *See, e.g.*, Jamelle Bouie, *The Racism at the Heart of Trump's 'Travel Ban'*, N.Y. TIMES (Feb. 4, 2020), https://www.nytimes.com/2020/02/04/opinion/trump-travel-ban-nigeria.html.

[5] For a normative discussion of the Israeli Ban, see Guy Davidov, Amnon Reichman, Ilan Saban & Jonathan Yovel, *State or Family?: The Citizenship and Entry Into Israel Law (Temporary Order) 2003*, 2 HEARAT DIN 61, 643 (2004); Yaacov Ben-Shemesh, *Constitutional Rights, Immigration and Demography: Following the High Court of Justice Judgment Concerning the Constitutionality of the Citizenship and Entry Into Israel Law*, 10 L. & GOV. 47 (2006); Barak-Erez, *supra* note 2, at 184; Aviad Bakshi & Gideon Sapir, *Justifying the Nation-State: On the Lack of Nation-State Considerations in Judicial Rulings on the Citizenship and Entry into Israel (Temporary Order) Law (5763-2003)*, 36 TEL-AVIV U. L. REV. 509, 513 (2013); Tally Kritzman-Amir, *Parents and Children: Family Reunification in Israel*, 44 MISHPATIM 361, 381 (2014); Yael Flitman, *The Story of Six Women: Different Faces in the Issue of Family Reunification*, *in* THE LEGAL ASPECTS OF JEWISH-ARAB RELATIONS IN ISRAEL 335, 336 (Ilan Saban & Rael Zreik eds., 2016); AMNON RAMON & YAËL RONEN, RESIDENTS, NOT CITIZENS: ISRAELI POLICY TOWARDS THE ARABS IN EAST JERUSALEM, 1967–2017, at 268 (2017).

[6] HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 202 (2006) (Isr.) (English translation is *available at*: https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Defense.pdf) [https://perma.cc/2F7Q-K4GT]; Trump v. Hawaii, 138 S. Ct. 2392, 2404 (2018).

[7] *See* Rivka Weill & Tally Kritzman-Amir, *Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Entrants in Israel in a Comparative and International Context*, 41 U. PENN. J. INT'L L. 43, 49–50 (2019).

[8] *See infra* Section III.B.

This Article makes four novel arguments: First, there is an inverse relationship between the strength of a separation of powers structure and the strength of the judiciary. In a strong separation of powers structure, one should expect a weaker judiciary, and vice versa. This nexus exists empirically and is supported on normative and strategic grounds.[9] Put differently, the principle of separation of powers requires the judiciary to tailor its response to the type of "checks and balances" structures that exist between the political branches. Second, this nexus is manifested through a web of common law doctrines that developed to support a given separation of powers structure and shape the judicial oversight of the political branches. This Article identifies a list of common law doctrines—including standing, justiciability, deference, and judicial interpretation techniques—which substance is derived from the strength of the separation of powers in a given system.[10] Third, though scholars traditionally study these common law doctrines independently from each other,[11] this Article argues that they are all connected. Fourth, courts understand that the content of each of the doctrines is affected by considerations related to the separation of powers.[12] Yet, while developing these common law doctrines, the courts have failed to connect these various doctrines, and to identify the connection between the strength of the separation of powers, and the resulting common law doctrines that are required to support it. The courts are not alone in their failure to see the connection; scholars of comparative law often apply doctrines from one system to another without being aware of this nexus.[13] Thus this Article illustrates why engaging in comparative constitutional law is a worthwhile exercise.

This Article focuses on analyzing the first Israeli Supreme Court decision regarding the legislative immigration ban which prevents the reunification of Israeli/Palestinian families: the *Adalah* case.[14] This Article focuses on this decision because it sets out the main arguments for and against judicial intervention to invalidate this hotly contested statute. Interestingly, the *Adalah* case is the only decision addressing the constitutionality of statutes in which President Barak—who favored the invalidation of the contested statute—found himself in the minority.[15]

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[9] *See infra* Parts III, IV & Appendices.

[10] *See infra* Parts III, IV & Appendices.

[11] *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

[12] *See infra* Parts III, IV & Appendices.

[13] *See, e.g.*, DANIEL FRIEDMANN, THE PURSE AND THE SWORD: THE TRIALS OF ISRAEL'S LEGAL REVOLUTION (2016) (arguing against the Israeli judiciary's accumulation of unprecedented power in comparative terms through common law doctrines).

[14] *Adalah*, 61(2) PD at 202.

[15] For Barak's otherwise unparalleled leadership of the Israeli Supreme Court, see Rivka Weill, *The Strategic Common Law Court of Aharon Barak and Its Aftermath: On Judicially-Led Constitutional Revolutions and Democratic Backsliding*, 14 L. & ETHICS HUM. RTS. 227, 265 (2020) [hereinafter Weill, *Strategic Court*].

This Article will then juxtapose *Adalah* against the U.S. Supreme Court's decision to refrain from staying Trump's Executive Order, "Trump's Travel Ban," even though it also prevented American citizens from uniting with their family members.[16] It was President Biden, rather than the Court, who canceled the Travel Ban.[17]

The experience of both countries shows that it is very difficult for judiciaries to intervene in favor of constitutional rights in immigration policies which manifest sovereign power to control state boundaries, and to thereby undo policies about which the political branches feel strongly. Yet, in both countries, the judiciaries' ability to address these problems face different types of constraints.

In the United States, the difficulties arise primarily from judicial doctrine. The judiciary largely refrains from intervening in such controversies due to cumulative common law developments: the U.S. Supreme Court's prevalent method of interpretation, its constitutional scrutiny jurisprudence, its approach to the constitutional right to equality, and its deference standard in matters of immigration and national security.[18] In essence, this Article argues that, though legal scholars customarily analyze these features of the American constitutional system as independent of one another, they are reflective of considerations regarding the preservation of the separation of powers.[19] The United States adheres to a strong separation of powers principle that is first reflected in its constitutional structure of federalism, bicameralism, and presidentialism.[20] This Article argues that this constitutional structure ultimately led indirectly to this web of judicial doctrines, which were developed to maintain it. In a system with a rigid, supreme Constitution that has withstood the test of time, separation of powers is a well-honored principle that enables the Constitution to persist.

In contrast, Israel's current common law jurisprudence on all these issues (interpretation, deference, equality, etc.) places greater power in the hands of its judiciary compared to the power granted to the American judiciary.[21] This Article argues that this jurisprudence reflects the fact that Israel's separation of powers structure is weak with a parliamentary, unicameral, unitary constitutional structure protected through a flexible, largely non-entrenched constitution. However, this Article argues that this very weak separation of powers structure also acts as a constraint on the Israeli Supreme Court. Until the election of a hard-right government in 2022, people tended to forget that Israel's entire constitutional structure is fragile.[22]

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[16] Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

[17] *See infra* note 266 and accompanying text.

[18] *See infra* Part III and Appendices.

[19] For the virtues of this passive judicial approach, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 159–61 (1962).

[20] U.S. CONST. arts. I–IV.

[21] *See infra* Part III and Appendices.

[22] *See, e.g.*, Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349, 350–51 (2012) [hereinafter Weill, *Hybrid Constitutionalism*].

Israel has adopted "Basic Laws" over the years via the same legislative process as any other laws with simple majorities. These Basic Laws set the structure of separation of powers and, since 1992, embody a partial bill of rights. Each of these Basic Laws may typically be amended by simple or absolute legislative majorities.[23] Yet, in 1995, Israel's Supreme Court's decision in *United Mizrahi Bank* recognized the Basic Laws as amounting to Israel's formal, supreme Constitution.[24] Since the decision, which many regard as a constitutional revolution, the Israeli courts are authorized to exercise judicial review over primary legislation to protect the supreme status of the Basic Laws, and may declare statutes or provisions thereof invalid.[25]

Of these laws, Basic Law: Human Dignity and Liberty is the main mechanism for protecting constitutional rights. Basic Laws: Human Dignity and Liberty explicitly requires the Knesset to respect the rights to life, liberty, dignity, bodily integrity, property, and privacy.[26] The Court has also read the Basic Law as implicitly embodying other rights like free speech and equality.[27] The Knesset may enact a statute that infringes upon one of these constitutional rights only if the law meets a cumulative test. The law must comply with the values of a Jewish and democratic state, and be for a proper purpose, as well as proportional.[28]

Thus, although the Court can easily read rights into the Basic Laws, it is just as simple for the legislature to retaliate and constrain the Court's judicial power.[29] In other words, the possibilities and stakes of the Israeli constitutional game are starkly different than the American one. This Article's exercise in comparative constitutional law shows that systems with diverging separation of powers structures may lead to similar curtailment of the judiciary. Though, courts in the two opposing regimes may use very different, and even opposing, judicial doctrines to reach similar non-interventionalist results. Ultimately, the judicial branch may supplement, but not supplant, the democratic representative branches, irrespective of the separation of powers structure of the country in question.

This Article proceeds as follows. Part I focuses on the *Adalah* decision. It analyzes the background of the immigration ban's enactment, as well as the majority and minority judicial opinions. Part II discusses Trump's Travel Ban, and the dispute among the Justices regarding its legality and constitutionality. Part III provides

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[23] *See generally* Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457 (2012) [hereinafter Weill, *Reconciling*].

[24] CivA 6821/93 United Mizrahi Bank Ltd. v. Migdal Collective Village, 49(4) PD 221 (1995) (Isr.) (English translation *available at* https://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village [https://perma.cc/9LB6-JWA3]).

[25] *See generally* Weill, *Hybrid Constitutionalism*, *supra* note 22.

[26] Basic Law: Human Dignity and Liberty, 5752-1992, SH (1992) (Isr.).

[27] Weill, *Hybrid Constitutionalism*, *supra* note 22.

[28] For discussion of proportionality, see *infra* Part I.

[29] *See* Weill, *Hybrid Constitutionalism*, *supra* note 22, at 352.

a novel exercise in comparative constitutional law, showing how the different separation of powers structures in the two countries shaped common law doctrines that affect judicial oversight over the political branches. Part IV shows how the common law doctrines operate by examining how *Adalah* would have been decided in the United States. It then analyzes the constitutional challenges facing the Israeli Supreme Court in light of the petitions in 2022 against the re-enactment of the immigration ban. This Article concludes with general lessons for comparative study.

I. THE ISRAELI IMMIGRATION BAN

A. Enacting an Immigration Ban

1. The Longevity of the Ban

In September 2000, the Second Intifada erupted causing casualties to civilians and military personnel alike.[30] By the time the Court decided the *Adalah* case in 2006, more than a 1,000 Israelis died, and approximately 6,500 Israelis were wounded.[31] Many became severely disabled.[32] Most of the attackers originated from Gaza and the West Bank.[33] Thus, Israel's security establishment deemed it unsafe to allow residents of these places to freely roam in highly populated areas inside Israel.[34]

In 2003, the Knesset passed the Citizenship and Entry into Israel (Temporary Provision) Law, 5763-2003 (Citizenship and Entry Act or Act).[35] This law prohibited the Minister of Interior from providing civilian status—including permits to stay, reside or naturalize—to residents of Gaza and the West Bank who were not Israeli citizens, with some exceptions.[36] The Citizenship and Entry Act almost entirely prevented these individuals from gaining civilian status to unite with their family members in Israel.[37] Israel's security establishment feared that these people would abuse their right to enter Israel thanks to their marital status in order to facilitate or commit acts of terror.[38] These fears were based on twenty-six occasions

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[30] HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 2 at 265 (2006) (Isr.) (opinion of President Barak).

[31] *Id.*

[32] *Id.*

[33] *See id.*

[34] *Id.* at 266.

[35] *Id.* at 268. The Act was renewed annually until it lapsed in July 2021. Aaron Boxerman, *With Ban on Palestinian Family Unification Expiring, What Happens Next?*, TIMES OF ISRAEL (July 6, 2021, 8:53 PM), https://www.timesofisrael.com/with-ban-on-palestinian-family-unification-set-to-expire-what-happens-next/ [https://perma.cc/QK26-VXA5].

[36] § 3(1)–(2), Citizenship and Entry into Israel (Temporary Provision) Law, 5763-2003 (Isr.); *see supra* note 1.

[37] *Adalah*, 61(2) PD at 264 (opinion of President Barak).

[38] *Id.* at 276 (opinion of President Barak).

in which people who entered Israel on the basis of their marriage perpetrated terrorist attacks.[39]

While this Israeli legislation is neutrally worded and affects all Israeli citizens—Jewish as well as Arabic—who marry Palestinians from the West Bank and Gaza,[40] such marriages are rarely found among Jewish Israelis. Those mainly affected by the legislation are Arabic Israelis.[41] It must be noted that Israel's constitutional law recognizes the identity of the State as Jewish and democratic.[42] In the context of immigration, Israel commits, in its Declaration of Independence, to be a sanctuary state for the Jewish people from around the world.[43] This, in turn, is reflected in its Law of Return, which grants almost automatic citizenship to Jewish people and their family members.[44]

However, the Israeli Supreme Court interpreted the Law of Return to mean that the State's obligation to treat its citizens equally prevents Jewish citizens from enjoying the right to grant automatic citizenship to their spouses, just as Israel's Arabic citizens may not do so.[45] Thus, Jewish non-citizens may grant more rights to their family members to enter and naturalize in Israel than Israeli citizens, Jewish and Arabic alike. Throughout the years, the Court has consistently ruled that, while Israel is a Jewish state in the sense that the Jewish people have a special access "key" to naturalization, the State may not discriminate between its citizens based inter alia on race, nationality, or religion.[46] This remains true after Israel's adoption of Basic Law: Israel—The Nation State of the Jewish People, which the Court has interpreted as implicitly embodying a commitment to equal treatment to all its citizens to save the Basic Law from a constitutional challenge.[47] At the same time, under Israel's jurisprudence, Israel's obligation to equality does not extend to its treatment of foreigners who seek entry.

Thus, the legislative ban preventing Palestinians from the West Bank and Gaza from gaining civilian status is hotly contested. Yet, some Knesset Members (MKs)

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[39] *Id.* at 276 (opinion of President Barak).

[40] *See* Citizenship and Entry into Israel (Temporary Provision) Law, 5763-2003 (Isr.).

[41] *Adalah*, 61(2) PD at 307 (opinion of President Barak).

[42] *See, e.g.*, § 1a, Basic Law: Human Dignity and Liberty, 5752-1992, SH (1992) (Isr.).

[43] The Declaration of the Establishment of the State of Israel, 1 O.G. 14.5.1948 p. 1, English translation *available at* https://m.knesset.gov.il/en/activity/pages/basiclaws.aspx#:~:text=Basic%20Law%3A%20The%20President%20of,the%20President%20shall%20be%20Jerusalem.

[44] Law of Return, 5710-1950, SH 51 159 (Isr.).

[45] HCJ 3648/97 Stamka v. Minister of Interior, 53(2) PD 728, 759 (1999) (Isr.).

[46] *See, e.g.*, HCJ 6698/95 Ka'adan v. Israel Land Admin., 54(1) PD 258, 282 (2000) (Isr.).

[47] Basic Law: Israel—The Nation State of the Jewish People (Isr.), https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawNationState.pdf [https://perma.cc/3EFQ-HSGU]; *see* Rivka Weill, *A Covert Constitutional Revolution? Is Basic Law: Israel—the Nation-State of the Jewish People Democratic?*, BALKINIZATION (Dec. 19, 2021), https://balkin.blogspot.com/2021/12/a-covert-constitutional-revolution-is.html [https://perma.cc/Z2QP-EMY9] (explaining the Court's revolutionary use of constitutional avoidance doctrine).

from Ra'am, an Israeli Arabic political party, were willing to vote in support of re-enacting this legislation in July 2021.[48] These MKs were members of the government coalition and conditioned their support on the government's commitment to apply a case-by-case individual review process for 1,600 families, representing roughly 8,000 people, who were among those affected by the legislation.[49] They further required that the Act would be in force for only six months.[50] This agreement led other Arabic MKs to severely criticize these Ra'am MKs, arguing they were compromising the Palestinian narrative.[51] Ultimately, the Act was re-enacted in 2022 through cooperation between coalition and opposition parties, rather than through satisfying the demands of the Arabic party within the coalition.[52] In fact, this legislation was the first and one of the very few pieces of legislation that the coalition and opposition parties were able to agree on during the 24th Knesset.[53] While politicians from all sides debate the correct approach to tackling the challenge posed by Palestinian immigration, families in need of unification cannot rely on the State to grant their Palestinian family from the West Bank and Gaza civilian status.

The Israeli Supreme Court weighed in on this issue in 2006 and 2012.[54] So far, the Court's majority has declined to intervene in the legislation.[55] Some Justices, however, held "surprising" positions that did not necessarily align with the "political" position typically ascribed to them by commentators.[56] In recent years, the topic has become so divisive in Israeli politics that the politicians among the members of the Judicial Selection Committee regularly screened candidates to the Israeli Supreme Court to verify that they hold the "right" principled position, because the Committee members expected the legislation to be constitutionally challenged for the third time.[57] As foreseen, a few private non-governmental organizations, as well

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[48] DK, 24th Knesset, Session No. 38 (2021) 604 (Isr.).

[49] *Id.* at 467; *see* Arutz Sheva Staff, *Citizenship Law Crisis: Shaked in Contact with Mansour Abbas*, 7 ISR. NAT'L NEWS (July 5, 2021, 8:04 PM), https://www.israelnationalnews.com/news/309307 [https://perma.cc/B5C4-EXQ3]. "The average size of a Palestinian family [in the West Bank and Gaza] is 5.1." *The National Significance of Israeli Demographics at the Outset of a New Decade*, INST. FOR NAT'L SEC. STUD. (July 2021), https://strategicassessment.inss.org.il/en/articles/israeli-demographics/ [https://perma.cc/4BTG-48WA].

[50] DK, 24th Knesset, Session No. 38 (2021) 436 (Isr.).

[51] DK, 24th Knesset, Session No. 109 (2022) 126 (Isr.).

[52] Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

[53] Aaron Boxerman, *After Coalition Battle, Knesset Reauthorizes Ban on Palestinian Family Unification*, TIMES ISR. (Mar. 10, 2022, 11:37 PM), https://www.timesofisrael.com/after-coalition-battle-knesset-reauthorizes-ban-on-palestinian-family-unification/ [https://perma.cc/5C9Q-9VHP].

[54] HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 202 (2006) (Isr.); HCJ 466/07 Gal-On v. Attorney General, Nevo Legal Database (Jan. 11, 2012) (Isr.).

[55] *Adalah*, 61(2) PD at 566.

[56] *See infra* Section I.E.

[57] Ayelet Shaked, *At Least Two of the Justices Chosen Will Be on the Right Side of the*

as Israeli citizens whose immediate Palestinian family members are barred from gaining civilian status, have petitioned the Israeli Supreme Court to challenge the re-enacted ban of March 2022.[58]

2. The *Adalah* Case

The Citizenship and Entry Act was controversial from the beginning. The ban was initially formulated in a government decision in 2002; then, petitioners argued that no statutory basis granted the government such authority.[59] The Knesset responded by enacting the Citizenship and Entry Act as a temporary provision on August 6, 2003.[60] The provisions were set to expire in a year, with a provision that permitted the government to extend the Act's duration on a yearly basis subject to Knesset's approval, and after reexamining whether the rationales behind it were still valid.[61] The Act had been extended a few times by the time *Adalah* was decided.[62] The Act was challenged soon after its initial enactment, leading the Court to issue temporary injunctions that halted deportation procedures for the Petitioners' relatives who were already present in Israel on November 9, 2003.[63] On March 1, 2005, the Knesset amended the Act in the shadow of the judicial proceedings, and expanded the exceptions to the ban.[64] The changes granted the Minister of Interior discretion to permit individuals to stay in Israel for family unification purposes in the following scenarios: (1) minors whose caretaker parents lived in Israel, and (2) women older than twenty-five or men older than thirty-five.[65] This last exception was based on the alleged rationale that older men and women were supposedly less likely to be involved in terrorist attacks, according to Israel's security establishment.[66]

Citizenship Act, MAKOR RISHON (Feb. 21, 2022, 10:51 AM), https://www.makorrishon.co.il/news/460051/ [https://perma.cc/DZT8-RXNC]. The Committee consists of three Supreme Court Justices, one of whom is the President of the Supreme Court; two members of the Israeli Bar; two ministers, one of whom is the Minister of Justice; and two Knesset members. *See* Rivka Weill, *The Tangible and Imminent Threat to Israel's Judicial Independence*, VERFASSUNGSBLOG (Nov. 18, 2022), https://verfassungsblog.de/the-tangible-and-imminent-threat-to-israels-judicial-independence/ [https://perma.cc/U7RQ-AA3P].

[58] Pet. 1, 3. HCJ 1777/22; Pet. 2,5. HCJ 2741/22; HCJ 2826/22 Jerusalem Center for Human Rights v. Minister of Interior (held first hearing on December 1, 2022).

[59] *Adalah*, 61(2) PD at 267 (opinion of President Barak).

[60] *Id.* at 268 (opinion of President Barak).

[61] § 5, Citizenship and Entry into Israel (Temporary Provision) Law, 5763-2003 (Isr.).

[62] One of the extensions was done by a statutory amendment, and others by government order with legislative approval. *Adalah*, 61(2) PD at 268 (opinion of President Barak).

[63] *Id.* at 279 (opinion of President Barak).

[64] *Id.* at 279–80.

[65] The Law of Citizenship and Entrance to Israel (Temporary Order), 5765-2005, as amended (Isr.).

[66] *Adalah*, 61(2) PD at 338 (opinion of President Barak).

Then, in the *Adalah* decision of May 2006, Israel's Supreme Court upheld the constitutionality of the Citizenship and Entry Act in a majority decision.[67] According to Israel's judicial doctrine, petitioners who were personally harmed by a state action, as well as public actors who were not personally affected, both enjoy standing to petition the Supreme Court *directly* in its unique, secondary identity as High Court of Justice, rather than the final court of appeals.[68] In *Adalah*, the Court recognized the standing of Israelis whose family members were forbidden from acquiring civilian status in Israel, without discussing the standing or the constitutional rights of the foreign, non-Israeli family members.[69] The Petitioners with a personal interest in the case were married couples, where one spouse was an Israeli Arabic citizen and the other was a non-Israeli resident of Gaza or the West Bank.[70] In addition, public Petitioners included: Knesset members, political parties, the Supreme Monitoring Committee for Arab Affairs in Israel, and human rights organizations (Adalah, the Association for Civil Rights in Israel, and the Centre for the Defence of the Individual).[71] The Respondents were the Minister of Interior and the Attorney General.[72]

The Petitioners argued that the Citizenship and Entry Act infringed on their right to unite with their family members and to conduct family life in their country, in violation of Israeli and international law.[73] Furthermore, they asserted that the Act impaired their right to equality as it discriminated against them on the basis of their ethnicity.[74] In addition, the Act infringed on their rights to privacy, liberty, and dignity, since it painted a minority population in Israel as disloyal and violent.[75]

The Petitioners argued these infringements of their constitutional rights did not meet the requirements of the Limitation Clause, which is a provision in Israel's Basic Law: Human Dignity and Liberty that allows a law to infringe on a constitutional right if the law meets the proportionality criteria.[76] The Petitioners attempted to undermine the Act's constitutionality under the proportionality criteria from a few angles. First, they argued that the State failed to show a legitimate, compelling interest for its enactment since the true motivation behind the law was not protecting national security, but rather a demographic objective to maintain the Jewish majority in Israel.[77] As such, the law's purpose was not compatible with Israel's democratic

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[67] *Id.* at 566.
[68] HCJ 910/86 Ressler v. Minister of Defense, 42(2) PD 1, 101 (1988) (Isr.).
[69] *Adalah*, 61(2) PD at 280 (opinion of President Barak).
[70] *Id.* at 272–73 (opinion of President Barak).
[71] *Id.* at 273–74.
[72] *Id.*
[73] *Id.* at 274.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 275; § 8, Basic Law: Human Dignity and Liberty, 5752-1992, SH (1992) (Isr.).
[77] *Adalah*, 61(2) PD at 275, 337 (opinion of President Barak).

values.[78] Second, they contended that the law's infringement of their rights was not proportional since the State could have achieved its security objective by implementing a process using case-by-case analysis, which would have assessed the security risk posed by each individual seeking civilian status.[79] The Petitioners added that the Act was not adequately legislated, as not enough empirical information was presented to the Knesset to support the State's claim that the Act was critical to maintain Israel's national security.[80] Therefore, the Petitioners asked the Court to declare the Act unconstitutional and void.[81]

The Respondents reiterated that the individuals banned from entry posed a serious security risk given their alleged dual loyalty to Israel, as well as to their area of origin which is in a state of conflict with Israel.[82] Respondents claimed that, since these individuals have immediate family members in the West Bank and Gaza, terrorist organizations may easily coerce them to cooperate by threatening their loved ones.[83] They pointed out that fifty Israelis lost their lives, and more than one hundred were injured, in terror attacks perpetrated by people from Gaza and the West Bank who gained civilian status in Israel through family connection.[84] They distinguished between temporary entrants, who entered Israel for daily work and returned to the restricted areas, and those who were granted permanent, uncontrolled residence in Israel due to family ties.[85] The permanent residents posed a much greater risk to national security because it was virtually impossible to monitor them, and their movements could not be restricted in times of heightened security risk, unlike workers who could enter only in times of peace.[86]

In addition, Respondents argued the Act did not violate the right to equality as it did not discriminate between individuals based on *irrelevant* factors.[87] Rather, it considered a relevant factor—namely, the risk of committing a terror attack—in deciding who should be given civilian status in Israel.[88] Furthermore, the Act did not discriminate between *citizens* of Israel. The law applied to both Jewish and Arabic Israeli citizens who married people from Gaza and the West Bank.[89] If anything, it discriminated between potential immigrants who, because they are foreigners, are

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[78] *Id.* at 275.
[79] *Id.*
[80] *Id.* at 275–76.
[81] *Id.*
[82] *Id.* at 276.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 277.
[87] *Id.*
[88] *Id.* at 277–78.
[89] *Id.* at 278.

not entitled to a constitutional right of entry.[90] Finally, Respondents argued that the State was entitled to broad discretionary powers to decide whom to allow to immigrate, and whom to restrict.[91]

B. Treating the Immigration Ban as Unconstitutional

President Barak wrote the main dissenting opinion in the *Adalah* case.[92] He stated that there were not two different legal systems—one for times of peace, and the other for war—such that the Court should always scrutinize possible constitutional infringements with equal diligence.[93] However, Barak did mention that in wartime it may be easier for the State to justify constitutional infringement, since the likelihood of the risks to public safety materializing increased, and may thus better justify infringing on constitutional rights of individuals.[94]

With this issue settled, Barak examined the potential infringements. He decided that the constitutional right to family life—implied in the explicit constitutional right to human dignity—did not end with the ability to marry and have children, but also included citizens' right to have family life *in Israel*.[95] Barak further stated that when an individual's spouse was not allowed to reside in Israel the citizen faced an unbearable choice: either emigrate to the spouse's location, or separate.[96] This choice, in essence, compromised citizens' core constitutional right to family life. To that end, Barak cited Section 8 of the European Convention on Human Rights (ECHR), as well as the American *Fiallo v. Bell* decision.[97] Hence, Barak extended the constitutional right to family life to also include the right of Israeli children to live with their parents *in Israel*, and the right of Israeli parents to raise their children *in Israel*.[98]

Furthermore, Barak argued that the Citizenship and Entry Act's current version infringed upon the Israeli Arabic citizens' right to equality because the law clearly primarily affected them.[99] Arabic Israelis, who consist of roughly twenty-one percent of Israel's population, were those most likely to marry people from Gaza and

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[90] *Id.*
[91] *Id.* at 277.
[92] *Id.* at 202–363.
[93] *Id.* at 283–84.
[94] *Id.* at 283.
[95] *Id.* at 285–90.
[96] *Id.* at 287.
[97] *Id.* at 299–303 (citing Fiallo v. Bell, 430 U.S. 787 (1977)). It should be noted that Israel never ratified the ECHR.
[98] *Id.* at 285–303 (stating that under Israeli law, a child born in Israel to a citizen of the State is entitled to citizenship by birth).
[99] *Id.* at 307.

the West Bank.[100] Barak decided that this aspect of the right to equality, as well as the aforementioned right to family unity, are implied constitutional rights derived from the right to human dignity,[101] which is explicitly recognized in Israel's Basic Law: Human Dignity and Liberty.[102] Since the Act infringed on these rights, it must meet the standards set by the Limitation Clause, primarily the proportionality test, to pass constitutional scrutiny.[103]

Barak acknowledged that the State managed to present a compelling interest—national security.[104] He rejected the Petitioners' claim that the law's enactment was also based on demographic considerations.[105] He accepted the State's position that national security was the true motivation behind the enactment.[106]

Regarding proportionality, Barak first determined that the State had demonstrated a rational link between the Act and the protected public interest that it was enacted to fulfill.[107] Through empirical data, the State had proven the law would restrict the immigration of individuals who share characteristics with those responsible for twenty-six terror attacks in the years leading to the ruling.[108] Therefore, restricting their immigration to Israel would, in fact, be a rational move in the fight against terrorism.[109] Barak dismissed attempts to equate temporary entrants and permanent residents of Israel; just because Israel has not implemented *every* possible policy to combat terrorism did not imply that the policies it did implement lacked a rational link to national security.[110]

Barak then considered the second test of proportionality: whether the State's objective could be achieved while infringing the plaintiffs' rights to a lesser extent.[111] The Petitioners argued a case-by-case evaluation of immigration applications would reduce the infringement of their rights while allowing the State to monitor the potential immigrants.[112] But Barak determined that this process would not accomplish the State's objective as well as an absolute ban would because it would risk

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[100] *Id.*; Kali Robinson, *What to Know About the Arab Citizens of Israel*, COUNCIL ON FOREIGN RELS. (Oct. 28, 2022, 11:00 AM), https://www.cfr.org/backgrounder/what-know-about-arab-citizens-israel [https://perma.cc/3JVV-T3DZ].

[101] *Adalah*, 61(2) PD at 280–311 (opinion of President Barak).

[102] §§ 1A, 2, 4, Basic Law: Human Dignity and Liberty, 5752-1992, SH (1992) (Isr.) (enumerating the explicit right to human dignity).

[103] *Adalah*, 61(2) PD at 313–14 (opinion of President Barak).

[104] *Id.* at 337–40.

[105] *Id.* at 337.

[106] *Id.* at 338–40.

[107] *Id.* at 340–42.

[108] *Id.* at 340.

[109] *Id.* at 340–42.

[110] *Id.* at 341.

[111] *Id.* at 342.

[112] *Id.*

mistakes and miscalculations, which might harm Israel's national security and cost Israeli citizens their lives.[113]

Nevertheless, Barak decided the law did not pass the third test of proportionality *stricto sensu*.[114] The added benefit resulting from an absolute ban in comparison to an individualized evaluation process did not enhance national security enough to justify its greater infringement on constitutional rights.[115] In a democratic state, Barak argued, national security could not override all other calculations.[116] Thus, there are cases in which the State must accept security risks to protect other values. The exception that allowed the temporary workers' entrance exemplified this principle.[117] Furthermore, Barak acknowledged that some efforts can be made to ensure the efficiency of the case-by-case evaluation process for screening individuals who posed a security threat.[118] In addition, the fact that the statute made no humanitarian exceptions to the sweeping ban on acquiring civilian status further suggested that it disproportionally infringed on the Plaintiffs' constitutional rights.[119] Overall, President Barak decided that the law was unconstitutional, and should therefore be declared void.[120]

C. Treating the Immigration Ban as Constitutional

Deputy President Cheshin, writing for the majority, not only disagreed with Barak, but disagreed vehemently. Above all, he believed that Barak was championing unrealistic standards that Israel could not afford to meet, given its exceptional security needs. He opened his opinion in storyteller fashion using a parable to illustrate the impossibility of Barak's vision.[121] According to Deputy President Cheshin's narrative, President Barak had led him to "an island in the middle of the ocean," where they were greeted by none other than Thomas Moore, who authored the famous book *Utopia*.[122] In the words of Cheshin:

> "And what is this place?" we asked.

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[113] *Id.* at 343–45.

[114] *Id.* at 345–51.

[115] *Id.* at 345–46. *See generally* Rivka Weill, *Did the Lawmaker Shoot a Cannon to Hit a Fly? On Proportionality in Law*, 15 L. & BUS. (REICHMAN U. L. REV.) 337, 337–415 (2012) [hereinafter Weill, *Did the Lawmaker*] (discussing Barak's general approach to proportionality).

[116] *Adalah*, 61(2) PD at 347 (opinion of President Barak).

[117] *Id.*

[118] *Id.* at 348.

[119] *Id.* at 349.

[120] *Id.* at 351.

[121] *Id.* at 363–64 (opinion of Deputy President Cheshin).

[122] *Id.*

> "You are in the state of Utopia," the man replied. . . .
> "Interesting, very interesting," we said, "And as persons of the law, let us also ask you this: what is the legal system in Utopia? Is it similar to the legal system in Israel?" (Our assumption was, of course, that this wise man knew the Israeli legal system).
> Mr. Moore immediately answered: "I am sorry, but there are vast differences between the two legal systems, and it will be a long time before Israel reaches the level of Utopia. *At this time, you are fighting for your lives, for the existence of the state, for the ability of the Jewish people to have a communal and national life like all peoples.* The laws of Utopia—in the position you find yourselves in at present—are not for you. Not yet. Take care of yourselves, do the best you can, and live." Thus spoke the man, and he said no more.
> Then I awoke, and it was a dream.[123]

After kicking off with this endorsement of national security considerations, Cheshin transitioned to legal logic.

He acknowledged that the Citizenship and Entry Act indeed restricted Israeli citizens from living in Israel with their family members from Gaza and the West Bank.[124] However, he concluded that this restriction did not unconstitutionally infringe upon their constitutional rights.[125] There was no question, in his mind, that the right to family life (i.e., the right to marry, have kids, etc.) is indeed a constitutional right, which derives from the right to human dignity.[126] However, this constitutional right does not extend to the right of a citizen to have a foreign family member immigrate to Israel.[127] In other words, the constitutional right to family life is not also the right to family unification *in Israel*, since the recognition of such a right would potentially jeopardize the rights of the rest of the citizens. After all, accepting individuals into society grants them rights similar to those of citizens who already form part of the body politic in a way which might alter society's nature.[128] Citizens should not be able to automatically dictate who is accepted into the citizenry through marriage without giving other citizens a say in the matter.[129] In Cheshin's opinion, recognizing such a constitutional right and allowing citizens to bring their family

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[123] *Id.* at 364.
[124] *Id.* at 367.
[125] *Id.*
[126] *Id.* at 399–400, 411.
[127] *Id.* at 402–11.
[128] *Id.* at 407.
[129] *Id.*

members to Israel without restrictions would, in fact, infringe upon the constitutional right to dignity of Israel's other citizens.[130]

Cheshin reflected on Barak's use of comparative law by stating that even "the countries of the world do not recognize in general the existence of an absolute right, a basic right that the citizen has to have a foreign spouse immigrate into the state."[131] In addition, Cheshin argued that comparative law can only have a limited impact on this particular dilemma, given the differences between Israel and its security situation and the states to which President Barak alluded, which were mainly European states that did not face terrorist threats similar to Israel's at the time by any magnitude.[132] He stated that even if he were to recognize the right of citizens to have their spouses immigrate to Israel as a constitutional right, it would not apply to individuals whose spouses are subjects of a hostile entity with which Israel was currently in a state of conflict.[133]

Cheshin also determined that the Citizenship and Entry Act does not infringe on the right to equality. He agreed that while it does not explicitly discriminate between Arabic Israelis and Jewish Israelis, Arabic Israelis are disproportionately affected.[134] However, Cheshin also stressed that a *lack of similar treatment* between individuals or groups does not always amount to an infringement of the *constitutional right to equality*.[135] Different treatment of individuals would infringe on their right to equality only when the difference is based on *irrelevant,* invalid grounds.[136] Hence, if the State was to provide a sufficient rationale for its differential treatment, no constitutional infringement would occur. In this case, the State did just that: the law was enacted in light of the hostile situation between Israel and the Palestinian Authority (PA).[137] Therefore, treating spouses who are citizens of a hostile entity differently than spouses who are citizens of allied or neutral entities was justified, since a citizen of a hostile entity posed a much greater risk.[138]

Finally, Cheshin determined that wartime justifies a *total* ban on the entrance of nationals from hostile entities.[139] Since the struggle between Israel and the PA could be characterized as a state of war, the ban was indeed justified.[140]

Cheshin could have ended the constitutional inquiry at this point, because he did not identify any infringement of constitutional rights. Yet, he added that even if the

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130 *Id.*
131 *Id.* at 410.
132 *Id.* at 421.
133 *Id.* at 424–27.
134 *Id.* at 431.
135 *Id.* at 432.
136 *Id.*
137 *Id.* at 433.
138 *Id.* at 435.
139 *Id.*
140 *Id.*

Court were to recognize a constitutional right to family unification, and even if the Act would be found to infringe upon such a right, this infringement would have nevertheless withstood the Limitation Clause's requirements, and, therefore, would have been upheld as constitutional.[141]

President Barak and his deputy, Cheshin, agreed the Act had a justified purpose: national security. This purpose, Cheshin added, not only allowed but *necessitated* the State to pursue actions in order to protect the lives and security of Israel's citizens.[142] Cheshin also joined President Barak in deciding that there was a rational link between the law and its justified purpose, as it would limit the entrance of potentially dangerous individuals.[143] He concurred that the exceptions made for temporary workers did not break the rational link between the law and its purpose.[144] As for the second test of proportionality, Cheshin agreed that the law was the least infringing mechanism to achieve the intended purpose.[145]

Regarding the third test of proportionality, Cheshin disagreed with Barak, determining that the law's benefits did, in fact, exceed its harm.[146] He argued that a case-by-case evaluation may indeed reduce the danger posed by potential immigrants to some effect, but would not suffice to achieve the Act's purpose.[147] Cheshin noted that it would be difficult, if not impossible, to judge an individual's hidden intentions *in advance* of them taking action.[148] Furthermore, it is not unlikely that a terrorist organization would conscript an individual into its ranks only *after* they were admitted to Israel, making it difficult to point out such affiliation in advance.[149] This fear is not a mere hypothetical, and has materialized on dozens of occasions in the past.[150] Cheshin also held that since the erection of the security wall separating Israel and parts of the PA, terrorist organizations became more desperate to recruit Palestinians who became Israeli citizens through family unification.[151] Therefore, the Act's benefits, in terms of national security, did, in fact, exceed its negative effect on constitutional rights.[152] As a final note, Cheshin added that it would not have been unreasonable to expect the State to include a humanitarian exception to the absolute ban, which would allow, in some extreme cases, the stay of individuals from Gaza and the West Bank.[153]

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[141] *Id.* at 435, 454.
[142] *Id.* at 435–36.
[143] *Id.* at 437–39.
[144] *Id.* at 438–39.
[145] *Id.* at 439–40.
[146] *Id.* at 441–54.
[147] *Id.* at 448–50.
[148] *Id.*
[149] *Id.* at 444.
[150] *Id.* at 446.
[151] *Id.* at 438.
[152] *Id.* at 448.
[153] *Id.* at 455.

Thus, in *Adalah*, decided in 2006, Deputy President Cheshin denied that a citizen's right to family unification amounted to a constitutional right, or, at the very least, it was not a right if the spouse was a non-citizen. However, he presided over the *Stamka* case in 1999 that recognized the very same right but in the administrative context, and held that the courts may overrule executive decisions to protect the right to family unification.[154] Justice Cheshin, writing for the Court, used a very different rhetoric in *Stamka,* to hold the following: (1) Israel may not discriminate between its Jewish and Arabic citizens.[155] Thus, neither may grant their spouses automatic citizenship.[156] (2) The Minister of Interior must accommodate Israeli families by providing easier access to naturalization for spouses of Israeli citizens.[157] In fact, this ruling opened the gates for Arabic Israelis married to Palestinians from the territories to request naturalization for their spouses. With the breakout of the Second Intifada and the passage of the Citizenship and Entry Act, Justice Cheshin refused in *Adalah* to take the legal protection of family unification to the next level, and recognize its constitutional nature.[158]

D. Deciding in the Shadow of Korematsu

The dissenting Justices, Procaccia and Joubran, raised concerns that the law's true purpose might be demographic.[159] Justice Procaccia found the national security justification uncompelling.[160] Between 1994 and 2002, from the time of the Oslo Accords and until the enactment of the Act, 130,000 entrants were allowed to permanently immigrate from Gaza and the West Bank, yet individuals of this group took part in only twenty-six terror attacks,[161] whereas Israeli-Arabic citizens participated in 247.[162] Furthermore, no empirical data disclosed the number of terror attacks perpetrated by individuals who gained entry on temporary worker permits.[163] Justice Procaccia also referenced the Knesset discussions preceding the Act's enactment, in which multiple MKs recognized the demographic argument as its main, if not only, justification.[164]

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[154] *See, e.g.*, HCJ 3648/97 Stamka v. Minister of Interior, 53(2) PD 728 (1999) (Isr.).
[155] *Id.* at 759.
[156] *Id.* at 759.
[157] *Id.* at 976.
[158] *Compare Stamka*, 53(2) PD 728, *with Adalah*, 61(2) PD 202.
[159] *Adalah*, 61(2) PD at 494, 500–09 (opinion of Procaccia, J.); *id.* at 486–87 (opinion of Joubran, J.).
[160] *Id.* at 507–09 (opinion of Procaccia, J.).
[161] *Id.* at 501.
[162] *Id.*
[163] *Id.*
[164] *Id.* at 502.

Justice Procaccia added that the absolute ban manifested the danger in treating entire populations purely based on the actions of the few.[165] The U.S. Supreme Court's (SCOTUS) *Korematsu* decision exemplified such a failure of a court to uphold constitutional rights.[166] During World War II, American citizens of Japanese descent were required to stay at internment camps, because they were suspected of collaborating with Japan, which was then an enemy of the United States (since the Pearl Harbor attack).[167] Admittedly, the circumstances in *Korematsu* were vastly different from those presented to the Israeli Supreme Court.[168] However, SCOTUS's decision to blindly take Congress and the military establishment at their word and refrain from further investigation once the words "national security" were uttered should, in the opinion of Procaccia, serve as a warning to the Israeli Supreme Court not to make the same mistake.[169]

However, Justice Naor, whose view was accepted by Cheshin,[170] stated that Procaccia's comparison to *Korematsu* had limited value given the enormous differences between the cases.[171] While *Korematsu* was indeed a wrong decision, it was enough to point out that, in *Korematsu*, the United States put *American citizens* in internment camps, while the Citizenship and Entry Act restricted the immigration of *foreign nationals* into Israel.[172] A more accurate comparison would be to ask whether the United Kingdom would have allowed entry and naturalization of thousands of Germans during World War II.[173]

E. Determining the Majority Opinion

President Barak's opinion did not garner enough support and, thus, was the minority opinion. In fact, this was the only constitutional case that dealt with the validity of a statute in which he found himself in the minority.[174] It happened on the eve of his retirement from the Court in September 2006.[175]

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[165] *Id.* at 509–11.

[166] *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

[167] *Id.* at 218–19, 221.

[168] *Adalah*, 61(2) PD, at 511 (opinion of Procaccia, J.).

[169] *Id.*

[170] *Id.* at 460–61 (opinion of Deputy President Cheshin).

[171] *Id.* at 535–36 (opinion of Naor, J.). Based on Israel's seniority system, Justice Naor served as the President of Israel's Supreme Court in 2015–2017.

[172] *Id.*

[173] *Id.* at 536 (opinion of Naor, J.).

[174] *Id.* at 566 (President Barak is in the minority, stating that the statute in question violates basic constitutional rights).

[175] *See generally Barak, Aharon*, CARDOZO ISRAELI SUP. CT. PROJECT, https://versa.cardozo.yu.edu/justices/barak-aharon [https://perma.cc/W38A-WYHF] (last visited Mar. 1, 2023); *Adalah*, 61(2) PD 202.

The Court was split. Four Justices sided with President Barak and four with Deputy President Cheshin.[176] Justice Levy's opinion thus became the tiebreaker. He deemed the law unconstitutional, because the case-by-case evaluation would have achieved the objective while minimizing infringement of constitutional rights.[177] However, he thought that the State should be given enough time (nine months) to amend the law instead of striking it down.[178] Therefore, Justice Levy joined Deputy President Cheshin's majority in terms of outcome, reasoning that the Act should not be declared void since it should soon expire anyway, because of its temporary nature.[179] Nonetheless, he thought that if the Act would not be amended in the upcoming nine months it would be hardly possible to find it constitutional, thus falling closer to Barak's reasoning.[180]

Following the *Adalah* decision, the daily newspapers somehow obtained and published a personal letter from President Barak to the American Judge Guido Calabresi, a former Dean of the Yale Law School.[181] In the letter Barak purportedly explained to Calabresi that, though he was in the minority in terms of outcome as he thought that the statute should be invalidated, he was in the majority in terms of reasoning, since Justice Levy agreed that the statute could not be renewed without amendment.[182]

Interestingly, Justice Levy's position in *Adalah* significantly breaks with his prior track record. In 2005, he challenged the validity of the Implementation of Disengagement Plan Act, which compelled Israelis to evacuate their homes in the Gaza strip as part of Israel's unilateral withdrawal from Gaza.[183] He thought that the coerced evacuation was unconstitutional, while the other Justices intervened only to increase the level of damages awarded as compensation.[184] Since his judicial opinion's acceptance of the Israeli settlers' petition against their evacuation from Gaza marked him as right-wing in the public perception,[185] his support of the Israeli Arabic Petitioners' case in *Adalah* is of particular note.

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[176] *See Adalah*, 61(2) PD at 566 (opinion of Levy, J.).

[177] *Id.* at 564–65 (opinion of Levy, J.).

[178] *Id.* at 565.

[179] *Id.*

[180] *Id.* at 565–66.

[181] Yuval Yoaz, *Barak Believes Court Will Overturn Citizenship Law if MKs Extend Statute*, HAARETZ (May 18, 2006), https://www.haaretz.com/2006-05-18/ty-article/barak-believes-court-will-overturn-citizenship-law-if-mks-extend-statute/0000017f-e6c8-df5f-a17f-ffdeb9150000?mid7408=open [https://perma.cc/6R5Y-HXJM].

[182] *Id.*

[183] HCJ 1661/05 Gaza Coast Council v. Knesset, 59(5) PD 481, 813 (2005) (Isr.) (Levy, J., dissenting).

[184] *Id.* at 747–49.

[185] Ofer Sitbon, *Complicated Justice: Must Occupation Be the Litmus Test for the Left?*, +972 MAG. (Mar. 29, 2014), https://www.972mag.com/http972mag-comedmund-levy-not-as-right-wing-as-you-may-think89069/ [https://perma.cc/68XD-A9W9].

II. THE TRUMP TRAVEL BAN

A. Enacting a Travel Ban

Shortly after taking office, President Trump issued Executive Order No. 13769 (EO-1).[186] Popularly known as the original "Trump Travel Ban," or "Muslim Ban," this controversial Executive Order banned foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States for ninety days.[187] Congress, as well as previous administrations, had previously labeled these seven countries as posing heightened terrorism risks.[188] Subsequently, numerous court challenges were filed.[189] The District Court for the Western District of Washington "entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government's request to stay that order."[190]

In response, President Trump revoked EO-1 and replaced it with Executive Order No. 13780 (EO-2).[191] EO-2 excluded Iraq from the list of suspended nations, given its general cooperation with the United States, and implemented a case-by-case waiver process.[192] Once again, the Order was challenged in courts, and the District Courts in Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the Travel Ban.[193] Using different grounds, the respective Courts of Appeals upheld those injunctions.[194] SCOTUS granted stay to the injunctions only with respect to "foreign nationals who lack any bona fide relationship with a person or entity in the United States."[195] The temporary restrictions on travel set in EO-2 expired before SCOTUS took any action. Therefore, it "vacated the lower court decisions as moot."[196]

On September 24, 2017, the President issued a third ban in the form of a Proclamation (EO-3).[197] EO-3 sought to restrict entry to the United States of people

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[186] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

[187] *Id.*

[188] *See* Immigration and Nationality Act, 8 U.S.C. § 1187(a)(12).

[189] *See generally Muslim Ban Litigation*, BRENNAN CTR. FOR JUST. (Feb. 3, 2020), https://www.brennancenter.org/our-work/court-cases/muslim-ban-litigation [https://perma.cc/6Q5H-KN63] (detailing examples of cases filed in response to the Executive Order).

[190] Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018); *see* Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017).

[191] Exec. Order No. 13780, 82 Fed. Reg. 13209, 13212 (Mar. 6, 2017).

[192] *Id.*

[193] Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 755–56 (9th Cir. 2017).

[194] *See Int'l Refugee Assistance Project*, 857 F.3d at 572; *Hawaii*, 859 F.3d at 755–56.

[195] Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam).

[196] Trump v. Hawaii, 138 S. Ct. 2392, 2404 (2018); *see* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017); Trump v. Hawaii, 138 S. Ct. 377 (2017).

[197] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017). This Article uses the

whose entrance would be "detrimental" to United States' interests.[198] More specifically, it aimed to protect American citizens from "terrorist attacks and other public-safety threats."[199] This time, before the Proclamation was issued, the Department of Homeland Security completed a review process and established a "baseline criteria" of necessary information it needed foreign nations to provide in order to improve the current vetting process for entry of foreign nationals.[200] The review identified several nations which did not meet the standard for managing and sharing information about their nationals.[201] Subsequently, the State Department initiated a spree of diplomatic engagements with these nations, which led many to undertake reform.[202] Ultimately, EO-3 placed entry restrictions on the nationals of eight foreign states: Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.[203] Of these countries, Somalia was the only country whose information sharing process was deemed acceptable, but was still added to the list based on the Secretary of Homeland Security's recommendation, mostly because of the "significant terrorist presence" within its territory.[204]

Again, a court case was initiated. The Plaintiffs were Hawaii, the Muslim Association of Hawaii, and United States citizens or lawful permanent residents who were separated from family members seeking to enter the United States.[205] They argued that multiple statements of the President, before and after his inauguration, made it clear that EO-3 was not driven by national security concerns, but by his animosity towards Muslims.[206] Thus, EO-3 was unconstitutional as it infringed on the Establishment Clause of the First Amendment, which prohibits different treatment by the State based on religious grounds.[207] The Plaintiffs further argued that EO-3 contradicted clauses in the Immigration and Nationality Act (INA)[208]: Section 1182(f) requires the President to make sufficient findings that allowing these foreign nationals to enter the United States would harm the national interest.[209] Section 1152(a)(1)(A) protects immigrant visa applicants from discrimination on the basis

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terms Executive Order and Proclamation interchangeably. *See* MARGIT COHN, A THEORY OF THE EXECUTIVE BRANCH: TENSION AND LEGALITY 150–52 (2021).

[198] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

[199] *Id.* § 1(a).

[200] *Id.* § 1(c).

[201] *Id.* § 1(d)–(e).

[202] *Id.* § 1(f).

[203] *Id.* § 1(h)–(i); *see* Trump v. Hawaii, 138 S. Ct. 2392, 2405 (2018).

[204] *Id.*

[205] *Id.* at 2399.

[206] *Id.* at 2406.

[207] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

[208] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 187 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).

[209] 8 U.S.C. § 1182(f).

of nationality.[210] The Hawaii District Court accepted these arguments with respect to the INA, and granted a nationwide injunction barring enforcement of the entry restrictions, stating that "EO-3's findings are inconsistent with and do not fit the restrictions that the order actually imposes, and because EO-3 improperly uses nationality as a proxy for risk, Plaintiffs are likely to prevail on the merits of their statutory claims."[211] The Court of Appeals for the Ninth Circuit partially affirmed the District Court's decision, and permitted EO-3 enforcement only regarding foreign nationals who lack "a bona fide relationship with the United States."[212]

B. Upholding the Travel Ban

The case ultimately was elevated and accepted by SCOTUS for review. First, SCOTUS decided whether the case was justiciable.[213] The government argued that since foreign nationals did not enjoy a constitutional right to enter the country, and because restrictions on immigration were a fundamental act of sovereignty, the Court was not allowed to review the decision unless specifically authorized to do so by an act of Congress.[214] Since the INA only authorized judicial review when plaintiffs were physically present in the United States, the Court could not review the current challenge.[215] However, the Court decided that since the Government did not point out any provision in INA which explicitly *forbade* the Court from reviewing the decision, it would proceed without deciding and assume that the issue was, in fact, justiciable.[216]

1. Statutory Challenge

The Court's opinion, written by Chief Justice Roberts, first dealt with arguments concerning the legality of EO-3 in light of the INA.[217] The Court rejected the Plaintiffs' argument, which stated that § 1182(f) of the INA only grants the President a

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[210] § 1152(a)(1)(A).

[211] Hawaii v. Trump, 265 F. Supp. 3d 1140, 1155–60 (D. Haw. 2017). It is important to mention that the District Court did not base its decision on the alleged violation of the Establishment Clause, referring only to the violations of the INA in its ruling.

[212] Hawaii v. Trump, 878 F.3d 662, 702 (9th Cir. 2017).

[213] Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018).

[214] *Id.*

[215] *Id.*

[216] *Id.*; *cf.* Sale v. Haitian Center Council, Inc., 509 U.S. 155, 177–79 (1993) (referencing that the Court moved directly into assessing the merits of applying § 243(h) and Article 33 of the United Nations Protocol Relating to the Status of Refugees to actions taken by the United States Coast Guard without addressing reviewability).

[217] *Hawaii*, 138 S. Ct. at 2408.

residual power to temporarily restrict the admissibility of "a discrete group of aliens engaged in harmful conduct,"[218] and the Plaintiffs' claim that EO-3 violated § 1152(a)(1)(A) of the INA because it discriminated based on nationality.[219]

As for the first claim, the Court concluded that the INA delegates to the President the authority to restrict entry of foreign nationals to the United States.[220] The Court stated that the "sole prerequisite set forth in § 1182(f) is that the President 'find[]' that the entry of the covered aliens 'would be detrimental to the interests of the United States.'"[221] Thus, the Court decided that it was questionable whether it even had the authority to inquire into the "persuasiveness of the President's justifications,"[222] considering the extended, unrestricted authority that the Act granted the President.[223] Nevertheless, the Court deemed that the President fulfilled this requirement by ordering the Department of Homeland Security and other agencies to conduct a thorough investigation, and evaluate the possible threats and shortcomings of the current screening process.[224] In addition, the Court pointed out that EO-3 was more detailed than any previous Executive Order issued under § 1182(f).[225]

As for the second claim, the Court distinguished between visa issuances and admissibility into the United States. As the Court explained, even if individuals do obtain a visa, their admission into the United States may still be rejected.[226] The Court stated *that the letter of the law* clearly dictated that § 1152(a)(1)(A) applied only to the issuance of an immigrant visa, but not to admission to the United States.[227] It therefore became clear that, while the State could not discriminate based on nationality when deciding whether to grant an individual immigrant visa, it could refuse to admit individuals to the United States based on their nationality.[228] The Court further pointed out that if it were to interpret the provision as proposed by the Plaintiffs, multiple former Executive Orders of a similar nature to EO-3 would also be considered illegal.[229]

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[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.* at 2409; *see also The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 277, 329 (2018).
[223] *Hawaii*, 138 S. Ct. at 2409.
[224] *Id.* at 2408–09.
[225] *Id.* at 2409.
[226] *Id.* at 2413–14.
[227] *Id.* at 2414.
[228] *Id.*
[229] *Id.* at 2414–15 (referencing proclamations made by President Jimmy Carter, who banned the entrance of Iranians following the Iranian Embassy crisis in 1979, and President Ronald Reagan, who banned the entrance of Cuban nationals in 1986).

2. Constitutional Challenge

After dismissing the Plaintiffs' statutory claims, the Court moved to address their constitutional challenge. Here, the Court needed to make a determination whether the Plaintiffs had standing.[230] Standing requires "a concrete and particularized injury."[231] The ban, however, was not directed at the Plaintiffs, but at foreigners seeking entry to the United States. The Court did not determine whether the Plaintiffs enjoyed standing based on their own dignitary interest in religious freedom, nor the discrimination they personally faced as Muslims as a result of EO-3.[232] Rather, the Court decided that the *individual* plaintiffs had standing because of a "more concrete injury,"[233] as purportedly EO-3 affected them directly by separating them from certain family members who are foreign nationals from the designated nations.[234] The Court did not call this right one of family unification, but agreed that "a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury."[235]

Citing the *Kleindienst v. Mandel* decision, in which the Court upheld the refusal to grant a visa to a Marxist academic,[236] the Court stated that the legislature had a fundamental authority to grant or refuse entrance to the United States, power which it delegated to the Executive through the INA.[237] Therefore, the Court would typically only exercise circumscribed judicial inquiry, limiting itself to the question of "whether the policy is facially legitimate and bona fide."[238] The Court narrowed the scope of the already limited inquiry in matters concerning national security to a "highly constrained" analysis.[239]

It referred to the policy as "facially neutral"[240]: a policy that does not appear to be discriminatory in and of itself. Applying *Mandel* would supposedly mean that the Court should refuse to look "behind the face of the [p]roclamation,"[241] for other, illegitimate motives driving a President's decision to exercise the authority to restrict foreign nationals' entry to the United States. Nor would the Court typically test it by balancing state interests, and constitutional rights.[242]

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230 *Id.* at 2415–16.
231 *Id.* at 2416.
232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 Kleindienst v. Mandel, 408 U.S. 753 (1972).
237 *Hawaii*, 138 S. Ct. at 2418–19.
238 *Id.* at 2419–20.
239 *Id.*
240 *Id.* at 2418.
241 *Id.* at 2420.
242 *Id.* at 2419.

However, the Court agreed to depart from that standard in this case.[243] It justified this departure by stating that the government agreed, and even suggested, to do so.[244] Therefore, the Court applied the *rational basis* level of review, a standard which considers "whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes."[245]

Even after considering Trump's statements expressing religious animosity towards Muslims, the Court upheld EO-3 as it found that EO-3 had independent "legitimate grounding."[246] In other words, EO-3 was grounded in national security considerations.[247] Finally, the Court addressed Justice Sotomayor's dissent, which compared the Court's decision to *Korematsu*.[248] The Court emphasized that while *Korematsu* was "morally repugnant," the comparison was "wholly inapt" because of EO-3's "facially neutral" nature.[249]

C. Reasoning Against the Travel Ban's Constitutionality

In Justice Sotomayor's dissent, which was joined by Justice Ginsburg, she acknowledged that the EO-3 effectively disfavored a particular religion—Islam.[250] Thus, the correct standard of review should be "whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion."[251] Under this standard of review, the Court would usually investigate the history behind EO-3, and statements made by the decision makers.[252] Given President Trump's unequivocal record of statements, which included multiple statements before and after taking office about implementing a "Muslim ban," she argued the decision cannot be said to be driven by a legitimate interest; instead, the decision must be driven primarily by sheer animosity towards Islam.[253] Therefore, EO-3 could not even pass under the rational review standard, as it is "inexplicable by anything but animus."[254]

As mentioned above, Justice Sotomayor compared the current decision to *Korematsu*.[255] In both cases, the Government invoked the "national security" justification in order to enact a sweeping order which, "[a]s here . . . was rooted in

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[243] *The Supreme Court, 2017 Term—Leading Cases*, *supra* note 222, at 330.
[244] *Hawaii*, 138 S. Ct. at 2420.
[245] *Id.*
[246] *Id.* at 2421.
[247] *Id.*
[248] *Id.* at 2423.
[249] *Id.*
[250] *Id.* at 2433 (Sotomayor, J., dissenting).
[251] *Id.* at 2434; McCreary Cnty. v. ACLU, 545 U.S. 844, 862, 866 (2005).
[252] *Hawaii*, 138 S. Ct. at 2434–35.
[253] *Id.* at 2438, 2442.
[254] *Id.* at 2441 (quoting Romer v. Evans, 517 U.S. 620, 632, 635 (1996)).
[255] *Id.* at 2447.

dangerous stereotypes."[256] In both cases, the Government refused to reveal its intelligence agencies' assessment of the security concerns, and, in both cases, there was ample evidence that the decision was rooted in illegitimate motives.[257] In essence, Justice Sotomayor concluded the majority replaced "one 'gravely wrong' decision with another"—replacing *Korematsu* with *Trump v. Hawaii*.[258]

Overall, the Court, by a five to four majority, reversed the Ninth Circuit's ruling, concluding that the Plaintiffs failed to sufficiently show that the challenge was likely to succeed, and, therefore, were not entitled to a temporary injunction.[259] The Court remanded the case for further proceedings.[260] Thus, Trump's infamous Travel Ban survived in the very decision that declared *Korematsu* repealed. The Court also removed the temporary injunction which allowed foreigners with *bona fide* relationships with American citizens to enter the United States, despite the ban.[261]

D. Following the Ruling

After *Trump v. Hawaii* was decided, EO-3 stayed unchanged until 2020, with the exception of Chad's removal from the list of banned countries.[262] Then, on January 31, 2020, President Trump issued Proclamation 9983,[263] which expanded the number of banned countries to also include "Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania, until those countries address their identified deficiencies."[264] Most of the restrictions that the President had set affected immigration visas.[265] On January 20, 2021, on the very day of President Biden's inauguration, one of his first actions in office was revoking Trump's Travel Ban in its entirety because he deemed it "a policy rooted in religious animus and xenophobia."[266]

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[256] *Id.*

[257] *Id.*

[258] *Id.* at 2448.

[259] *Id.* at 2423 (majority opinion). In a concurring opinion, Justice Thomas questioned the authority of federal courts to issue nationwide injunctions. *Id.* at 2429.

[260] *Id.*

[261] *Id.* at 2423 ("Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion.").

[262] Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020).

[263] *Id.*

[264] *Id.*

[265] *Id.*; Zolan Kanno-Youngs, *Trump Administration Adds Six Countries to Travel Ban*, N.Y. TIMES (Jan. 31, 2020), https://www.nytimes.com/2020/01/31/us/politics/trump-travel-ban.html [https://perma.cc/6QWY-KYUF].

[266] Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021); *Fact Sheet: President-elect Biden's Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises*, WHITE HOUSE (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/ [https://perma.cc/3HLM-MUV9].

III. AN EXERCISE IN COMPARATIVE CONSTITUTIONAL LAW

A. Standing and Justiciability in the Context of Immigration

In both cases, the question of whether the Plaintiffs/Petitioners had standing in front of the Court arose. *Trump v. Hawaii* demonstrates that, in the United States, petitioners need to show that they have suffered a personal, specific injury to raise a constitutional challenge.[267] In contrast, in Israel, public petitioners also have standing to raise a general grievance, like the human rights organizations that participated in *Adalah*.[268]

Since petitioners may approach the Israeli Supreme Court directly, in its capacity as a High Court of Justice, to raise grievances against public authorities, the legislature not only factors in the Court's anticipated reaction when drafting bills (as may also happen in other countries), but must grant this consideration almost decisive weight.[269] There is no extended political play before a constitutional challenge reaches the Court's docket.[270] The threat of judicial intervention is thus even more effective in restraining the political branches than the very exercise of judicial review power. The Court's influence is amplified considering that, as the High Court of Justice, Israel's Supreme Court is the first and last—the *only*—adjudicator in the chain of appeals.[271] In contrast, SCOTUS considered whether it even had the authority to review decisions regarding immigration policy, given the Court's tradition of deference to executive discretion.[272] The Court ultimately decided to proceed with the inquiry, as it did in *Mandel*,[273] but used a circumscribed standard of review.[274] The Israeli Court, on the contrary, assumed it was allowed to review immigration policy, despite Deputy President Cheshin's remarks about the state's fundamental sovereign authority to restrict immigration.[275] SCOTUS's stricter approach to standing and justiciability highlights the centrality of the separation of powers principle in the United States system, in contrast to Israel.[276]

While the Israeli Supreme Court has an overall more lenient approach to standing and justiciability,[277] both countries do not typically grant constitutional rights to

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[267] *See* 138 S. Ct. 2392, 2416 (2018).
[268] *See supra* Section I.A.
[269] *See* Weill, *Strategic Court*, *supra* note 15, at 242–44.
[270] *Id.*
[271] *Id.* at 241–45.
[272] *Hawaii*, 138 S. Ct. at 2407.
[273] Kleindienst v. Mandel, 408 U.S. 753, 754 (1972).
[274] *Hawaii*, 138 S. Ct. at 2402.
[275] HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 202, 402, 412 (2006) (Isr.) (opinion of Deputy President Cheshin).
[276] Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018).
[277] *See supra* note 68 and accompanying text.

non-citizens. *Trump v. Hawaii* dealt with a ban on entry into the United States. If a person cannot enter the United States, they cannot gain an immigration status either. In contrast, the Israeli ban focused on preventing Palestinians from the West Bank and Gaza rights to stay or reside in the country. It perpetuated their status as foreigners. It may be argued that the State owes greater legal, and possibly constitutional, obligations towards people who enter its territory (Israel's ban), as opposed to those who never set foot in it (Trump Travel Ban).[278] Nonetheless, in both cases, the courts used a similar technique to bypass this challenge. They reviewed the cases because of alleged infringements of the constitutional rights of the citizens who were kept from their relatives, and not the asserted rights of the foreign nationals. This common technique enabled the courts to review immigration policies; however, the political branches typically enjoy broad discretion in forming immigration policies as part of the manifestation of states' sovereign power.

B. Type of Judicial Review: Statutory or Constitutional

The Knesset enacted Israel's immigration ban. The Trump Travel Ban, however, was a Proclamation, relying on the Immigration and Nationality Act, which delegated the legislature's authority to the Executive in this context.[279] Therefore, SCOTUS also considered whether the Trump Travel Ban had exceeded the President's delegated authority, or contradicted certain provisions of the INA.[280] Only after addressing this question could SCOTUS consider the constitutional argument.[281] In contrast, the Israeli case focused on the constitutional review of the statute alone.[282]

Generally speaking, it is easier for courts to intervene in cases of executive, rather than legislative, discretion, because that intervention could be undone by legislative action. When the courts invalidate an executive decision, they may justify it in the name of democracy: ensuring that the will of the legislature is obeyed. The courts may reason that the executive surpassed the authority granted to it by statute when its action was *ultra vires* or unreasonable.[283] Nonetheless, in both the Israeli and American cases, the Courts abstained from intervening. What may explain this outcome?

Here, the differing natures of the Israeli and American separation of powers structures come into play: Since the United States is a presidential system, the presidency and legislature could be controlled by different political parties. In addition, the

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[278] *See* Weill & Kritzman-Amir, *supra* note 7, at 76; *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (according to the government, the INA "authorizes judicial review only for aliens physically present in the United States").

[279] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

[280] *Hawaii*, 138 S. Ct. at 2408–10.

[281] *See supra* Section II.B.

[282] *See supra* Sections I.B–I.C.

[283] *See* Rivka Weill, *Juxtaposing Constitution-Making and Constitutional-Infringement Mechanisms in Israel and Canada: On the Interplay Between Common Law Override and Sunset Override*, 49 ISR. L. REV. 103, 103–30 (2016).

President enjoys a direct, personal mandate from the people. Thus, SCOTUS does not intervene lightly in cases of executive discretion. This judicial restraint is reflected in the American doctrine of judicial deference towards executive discretion.[284]

In contrast, in Israel's parliamentary system—under which voters elect the legislature alone, and the governing coalition is comprised of MKs that enjoy legislative support—the same majority controls both the legislature and the executive. Thus, the Israeli Supreme Court is more willing to intervene in executive decisions, and has developed no similar deference standard, knowing that the representatives can more easily pass an authorizing statute to legitimize executive actions and overrule judicial decisions.[285] Thus, had the Israeli legislature not enacted the immigration ban but left it to government fiat, the Court would have most likely struck it down, an action not taken by SCOTUS regarding Trump's Proclamation. In fact, at first, Israel's government formulated the immigration ban. But when it was challenged in the High Court of Justice, and in the shadow of the petitions, the government quickly codified the ban in a statute.[286]

C. The Constitutional Rights Endangered

In *Adalah*, the Petitioners argued that the Act infringed on their constitutional rights for family life, and equality; the Plaintiffs in the United States claimed primarily that the policy infringed the Establishment Clause of the First Amendment, because the State's restriction of immigration of individuals who were specifically from Muslim-majority countries amounted to favoring some religions over others. Interestingly, while SCOTUS granted the Plaintiffs standing based on the Act's impact on them as family members of potentially refused visitors/immigrants, the Court did not consider the alleged infringement of their right to family life.[287] There was no recognized right to family unification in the context of immigration in the United States to warrant serious discussion of potential infringement, President Barak's reliance on *Fiallo* notwithstanding.[288] In contrast, the Israeli Justices seriously debated whether the right to family unification was, or should be recognized as a constitutional right in the context of immigration, even though Israel's Basic

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[284] *See Hawaii*, 138 S. Ct. at 2408–10; *see also* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (on deference standard).

[285] *See* Weill, *Did the Lawmaker*, *supra* note 115, at 366–67 (on the lack of deference doctrine in Israel). *See generally* Rivka Weill, *Judicial Intervention in Parliamentary Affairs to Prevent a Coup D'état*, 81 MD. L. REV. 297 (2021) (discussing the effects of Israeli parliamentary system on the nature of judicial review).

[286] HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 202, 267–68 (2006) (Isr.) (opinion of President Barak).

[287] *See supra* note 233 and accompanying text.

[288] This conclusion is also supported by *Kerry v. Din*, which did not recognize even a procedural due process right for citizens whose spouses were denied visas to the U.S. *See* 576 U.S. 86, 97–100 (2015).

Laws don't include an explicit constitutional right to that effect.[289] To the contrary, Israel's Basic Law: Human Dignity and Liberty specifically grants the constitutional right of entry only to citizens, while it uses the term "human being" to describe those entitled to the other enumerated constitutional rights.[290] The Justices did not put any emphasis on this choice of words. Thus, while SCOTUS exhibits a constrained judicial approach towards recognizing implied constitutional rights, the Israeli Court is more open to such recognition.[291]

This Article argues that strong separation of powers structure acts as a major constraint on the Court from recognizing new constitutional rights, while a weak one opens room for more maneuvering on the part of the Court. This is especially so when the representatives may easily amend the constitution in a system with a weak separation of powers structure if they dispute the Court's constitutional interpretation. Thus, the costs of judicial error are lower in a flexible system.

The textualist and/or originalist interpretive approaches are intensely contested in the United States.[292] They seek to restrain judicial interpretation to the task of "exposing" the intent of the constitutional drafters (*textualism* or *intentionalism*), or the public understanding of the constitutional text at the time of its adoption (*originalism*).[293] This Article argues that these interpretive approaches assume that the constitutional text reflects broad consensus and the popular will. Thus, the Court must grant the text decisive weight to preserve the superiority of the popular will as reflected in the Constitution over the will of the representatives, as part of the principle of separation of powers. This is why the Court must be careful about recognizing implied constitutional rights.

In contrast, in a weak separation of powers system, one election cycle might be enough to bring a small majority to power that will revolutionize the constitutional system. This Article argues that the courts respond to this potential threat through purposive interpretation. Under purposive interpretation, the courts interpret the constitutional text not only according to the subjective intent of its drafters but in a way that aligns with the basic values of the constitutional system as consolidated over time through constitutional provisions, statutes and judicial opinions.[294] This purposive interpretive approach reduces the risk that a transient majority might

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[289] *See supra* Sections I.B, I.C.

[290] § 6(b), Basic Law: Human Dignity and Liberty, 5752-1992, SH (1992) (Isr.).

[291] In fact, Barak and Cheshin framed their debate over the extent of the right to human dignity as a dispute over the meaning of separation of powers: whether it requires more exercise of judicial review over primary legislation (Barak) or less (Cheshin). *Compare Adalah*, 61(2) PD at 356–57 (opinion of President Barak), *with id.* at 397–98 (opinion of Cheshin, J.).

[292] *See generally* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

[293] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW (2012).

[294] AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 89–90 (2005).

overtake the constitutional system and revolutionize it in an irreversible manner.[295] Purposive interpretation, in turn, allows to read also implied rights more easily into the constitutional text to enable a more coherent constitutional identity.[296]

While the American case focused on the Establishment Clause, the Israeli case did not require discussion of the separation of church and state since no such separation forms part of Israel's constitutional law. To the contrary, the secular state applies religious laws in personal matters of marriage and divorce, and financially supports religious education and institutions for the different religions.[297] It should be clarified, however, that when religious law is part of Israeli law, this is derived from the State secular law's choice to adopt it. Moreover, though Israel's constitutional law defines Israel as a Jewish and democratic state, its Jewish character is secular and national.[298] The Court defined its "Jewish" constitutional identity as requiring the Law of Return, the centrality of the Hebrew language, and that Israel's main holidays and national symbols reflect Jewish culture.[299] The lack of separation between church and state creates greater risk to individual liberty, and, in turn, requires a more activist judiciary that will preserve the rights of religious minorities.

D. Assessment of Constitutional Infringement of Equality Based on Disparate Impact

Overall, the SCOTUS majority decision relied mostly on the Proclamation's text, and the letter of the law in its constitutional inquiry.[300] After SCOTUS found, *on its face*, that the Trump Travel Ban did not discriminate between religions, the constitutional inquiry ended.[301] Little weight was given to the *intentions* of the individuals behind the Ban—namely President Trump, who explicitly spoke of a "Muslim" ban. Nor did SCOTUS's majority consider the *impact* of the Trump Travel Ban, which disproportionally targeted Muslim majority states. The discriminatory effect did not matter to the majority determination, because the Court only considered text, and to a lesser degree intention, but not outcome.[302]

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[295] *Id.* at 390.

[296] *Id.* at 389–90.

[297] On the effects on family rights of the lack of separation between religion and state in Israel, see generally Rivka Weill, *The Power of Understatement in Judicial Decisions*, 30 ANNUAIRE INT'L DE JUSTICE CONSTITUTOINNELLE 125 (2014).

[298] Religious law applies to marriage and divorce because it is "saved" from constitutional invalidation through a special "Savings Clause" despite its discriminatory effect. *See* Rivka Weill, *Bills of Rights with Strings Attached: Protecting Death Penalty, Slavery, Discriminatory Religious Practices and the Past from Judicial Review*, *in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 308, 326–30 (Geoffrey Sigalet et al. eds., 2019).

[299] *See, e.g.*, EC 11280/02 Central Election Committee v. MK Tibi, 57(4) P.D. 1, 22 (2003) (Isr.).

[300] Trump v. Hawaii, 138 S. Ct. 2392, 2407–15 (2018).

[301] *Id.* at 2418.

[302] *See supra* Section II.B. That disparate impact is not determinative in equal protection

By contrast, the Israeli Court's President, Barak, and to some extent Deputy President Cheshin, investigated the *impact* that the Act's implementation had on the Petitioners in assessing its alleged violation of their constitutional rights. Barak stated that while the Act does not explicitly discriminate between Jewish citizens and Arabic citizens on its surface, it disproportionately impacts Israeli Arabic citizens, as they are more likely to seek to marry residents from Gaza and the West Bank.[303] This determination led him to examine whether the Act was proportional.

The refusal of SCOTUS to go beyond the Executive text and examine its impact attests, yet again, to the strength of separation of powers in the United States. In contrast, the lenient separation of powers structure in Israel allows the Israeli Court more leeway to investigate, and even question the effects of legislative policies. In fact, under Israeli law, it is enough that either the legislative intent or the statute's effect is discriminatory to prompt full constitutional review of the statute's proportionality.

E. The Persuasiveness of the National Security Purpose

In both countries, the Executives argued that the immigration ban was based on security considerations, and their inability to assess the risk of every individual seeking entry and staying. They emphasized, *inter alia*, that the authorities at the area/state of origin of those denied entry or stay did not, or could not, provide credible information.

Before the Citizenship and Entry Act's enactment, Israel was in the middle of a quasi-war with the PA, which lead to the deaths of over one thousand Israeli citizens and two thousand Palestinians between 2000 and 2005.[304] As stated above, individuals who immigrated to Israel by right of marriage perpetrated twenty-six terrorist attacks. In *Adalah*, the Justices treated non-Israeli Palestinians as nationals of a hostile entity. By contrast, in *Trump v. Hawaii* different countries were included under the ban for different reasons, which were not necessarily a result of a country's hostility towards the United States.[305] Moreover, in the United States, there was a relatively limited threat of terror attacks by Muslim individuals in the years leading to the Trump Travel Ban.[306] It therefore seems that, while Trump's Travel Ban

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cases. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[303] HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 1, 307 (2006) (Isr.) (opinion of President Barak), https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Adalah%20Legal%20Centre%20for%20Arab%20Minority%20Rights%20in%20Israel%20v.%20Minister%20of%20Defense.pdf [https://perma.cc/E5PM-FP39]. *See supra* Sections I.B & I.C.

[304] Numbers provided by Israel's Ministry of Foreign Affairs. *See The Situation on the Eve of the Second Intifada*, MINISTRY FOREIGN AFFS., ISR. (2000), https://www.gov.il/en/Departments/General/the-situation-on-the-eve-of-the-second-intifada.

[305] *Hawaii*, 138 S. Ct. at 2403–06.

[306] *See generally* Risa A. Brooks, *Muslim "Homegrown" Terrorism in the United States*,

had limited empirical data to support its necessity, the Israeli government could point to more evidence to justify the security rationale behind the Act.

However, it is important to note that both then-President Trump and Israeli officials and legislators have publicly expressed, multiple times, motives for the Trump Travel Ban and the Act, respectively, which deviated from the official justifications that their respective representatives had claimed in court. In Trump's case, he had repeatedly stated that the true purpose of the bill was to limit the entrance of Muslims into the United States,[307] while his administration cited the national security risk caused by the inadequate screening processes that the specific nations conducted.[308] In Israel's case, multiple MKs affirmed that, in their opinion, the Act was introduced in order to limit the mass immigration of Palestinians into Israel, and in that way, maintain the Jewish majority in the State.[309]

In both cases, the States claimed in court that national security was the sole justification for their policies and denied ulterior motives. In contrast, the Petitioners/Plaintiffs argued in both cases that there was actually a hidden objective behind the policies. In Israel, Petitioners cited a demographic objective: restricting Palestinian immigration to maintain a Jewish majority in Israel. Regarding EO-3, the Plaintiffs accused Trump of animosity towards Muslims. In both cases, the majority opinions accepted the governments' position that the alleged hidden purpose did not prompt the policies.[310] Yet, some of the Justices in the minority opinions raised doubts, and were more receptive to the arguments that the hidden, illegitimate purposes may have truly motivated the policies. This, in turn, may have contributed to the dissenters' decision to find the policies unconstitutional.[311] This possibility is most apparent in Justice Sotomayor's dissent that repeatedly treated the national security rationale as "repackaging,"[312] "façade,"[313] and "window dressing."[314]

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36 INT'L SEC. 7 (2011); Charles Kurzman, *The 6 Countries in Trump's New Travel Ban Pose Little Threat to U.S. National Security*, CONVERSATION (Feb. 6, 2020, 8:45 AM), https://theconversation.com/the-6-countries-in-trumps-new-travel-ban-pose-little-threat-to-us-national-security-131130 [https://perma.cc/W299-MTFY]; Daniel Milton, *Does the Cure Address the Problem? Examining the Trump Administration's Executive Order on Immigration from Muslim-Majority Countries Using Publicly Available Data on Terrorism*, 11 PERSPS. ON TERRORISM 87–88 (2017); Matthew Levitt, *Trump's Travel Ban Might Be Legal, But It's Bad Policy*, WASH. INST. (Apr. 25, 2018), https://www.washingtoninstitute.org/policy-analysis/trumps-travel-ban-might-be-legal-its-bad-policy [https://perma.cc/HP72-NQXW]; William Clapton, *The Exceptionalism of Risk: Trump's Wall and Travel Ban*, 6 EUR. J. INT'L SEC. 129 (2021).

[307] *See supra* note 253 and accompanying text.

[308] *See supra* note 188 and accompanying text.

[309] *See supra* note 164 and accompanying text.

[310] *See supra* Sections I.C, II.B.

[311] *See supra* Sections I.E, II.C.

[312] Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

[313] *Id.*

[314] *Id.* at 2440.

Though both countries are located on the opposite ends of the spectrum regarding the strength of their separation of powers structure, the majorities in both cases denied that the immigration policies were ill-motivated to advance a hidden unconstitutional purpose. What may explain this judicial attitude? This Article argues that when the Courts rule out a state's objective, it entails a serious confrontation with the political branches since the state is blocked from achieving its policies by other means. The courts would thus not easily undertake such action, even in systems with weak structures of separation of powers.[315] This type of judicial intervention is qualitatively different from striking down a policy for not being proportional, or the least restrictive means of balancing between rights and state interests. In the latter cases, the state does not have to give up on its goals, but only seek better ways of achieving them.

F. The Level of Judicial Scrutiny

SCOTUS, when addressing possible ulterior motives, used a circumscribed level of scrutiny, assessing only whether there was a rational basis for the Proclamation. Unlike the Israeli Court, SCOTUS does not employ the same constitutionality test to every constitutional challenge, instead employing a different level of scrutiny depending on the type of constitutional rights infringed.[316] SCOTUS found that the executive policy enjoyed an independent justification other than animosity towards Muslims—national security.[317] Thus, SCOTUS did not apply strict scrutiny.[318] Since the Israeli Citizenship and Entry Act passed the first test of proportionality (i.e., a rational link between purpose and measure) according to both the majority and dissenting opinions,[319] it seems that, had Israel applied a lower level of scrutiny like the United States, the Act would have been found constitutional.

The American categorization of different levels of scrutiny is the result of common law development. The Court created these levels of scrutiny over time to rank constitutional rights, as well as state interests.[320] The most important rights deserve enhanced protection, while lesser ones should more easily give way to state interests.[321] Since strict scrutiny is not easily employed, and even when it is it does

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[315] For development of this argument, see Weill, *Did the Lawmaker*, *supra* note 115, at 390–97 (critically reviewing Aharon Barak's approach to proportionality).

[316] *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (8th ed. 2017). Justice Sotomayor in dissent criticized the majority opinion for failing to apply "a more stringent standard of review," even though it was an Establishment Clause case. Trump v. Hawaii, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting).

[317] *Hawaii*, 138 S. Ct. at 2420–21.

[318] *Id.*

[319] *See supra* Section I.B.

[320] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–71 (2007).

[321] *Id.*

not amount to the test of proportionality *stricto sensu*,[322] American doctrine carves out more room for the representatives to achieve their policies. This system of varying levels of scrutiny, too, is the workings of a strong structure of separation of powers. This may explain why the majority in *Heller* denounced Justice Breyer's attempt to use proportionality as "judge empowering."[323] In contrast, proportionality stricto sensu might be especially intervening in the workings of the political branches. It requires courts to examine the added benefit from a statute in comparison to an alternative, not yet tested or maybe even rejected by the political branches. In the Adalah case, the minority held the statute invalid because an individualized examination of applications for family unification was less intrusive on rights than a total ban. But, while this alternative might burden fewer constitutional rights, the Israeli security establishment held that it could not sufficiently prevent terror attacks. Put differently, this level of scrutiny might require the political branches to compromise, even if their objectives are pressing and the means are needed to achieve the purpose.

G. The Transience of the Policies

In both cases, the States opted to adopt their policies on a transient basis. In Israel, the temporary Act was originally set to expire after a year, but the government was authorized to annually extend it with Knesset's approval.[324] In the United States, the executive policy was to be assessed every 180 days in order to determine whether some of the countries made sufficient improvements to justify lifting the restrictions.[325] Thus, unlike the Israeli immigration ban, EO-3 was not time-bound to expire by default, and did not require legislative or executive action to extend its duration. Supposedly, Israel's approach should have hastened the policy's final expiration, and guaranteed that renewing it through legislative approval would extract a political price from its supporters.[326]

The choice to codify the policies on a temporary basis attests to the representatives' awareness of the policies' problematic nature. It amounts to a form of public admission that the government is aware that these policies should not linger.[327] At the same time, by taking the burden upon themselves to periodically review the policies, the representatives signal to the courts that, on separation of powers grounds, they should not intervene.[328]

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[322] *See supra* note 114 and accompanying text.

[323] District of Columbia v. Heller, 554 U.S. 570, 683 (2008).

[324] *See supra* note 61 and accompanying text.

[325] Proclamation No. 9645, 82 Fed. Reg. 45161, § 4 (Sept. 24, 2017).

[326] *See* Weill, *supra* note 283, at 122.

[327] On sunset mechanisms as a form of accountability, see Weill, *supra* note 283.

[328] The 180-day review period in the Travel Ban may have been designed to align with the language of section 1182(f) of the INA that uses the language of "suspend," suggesting some type of temporality. *See* 8 U.S.C. § 1182(f).

In both countries, the policies lingered. In the United States, it took a new administration to abolish the ban,[329] while in Israel the policy has been in effect for the past twenty years with no end in sight. Thus, while temporariness promises that the topic remains constantly on the public agenda, it should not be mistaken for necessarily lessening the infringement on constitutional rights. Nonetheless, the Justices do seem to treat temporariness as a means to mitigate the infringement of rights.[330]

H. Sweeping Policy or Case-by-Case Evaluation

Israel's Act made exceptions only concerning age—for minors or individuals above a certain age (men above thirty-five and women above twenty-five)[331]—and initially included no humanitarian exemptions. These were added only following the *Adalah* decision.[332] In fact, the Petitioners challenged the Act primarily for not providing an individualized screening process. The Court could live with an assumption that individuals from the West Bank and Gaza posed a potential security risk, but wanted to have a process that would enable individuals to rebut this presumption of threat.[333]

The Trump Travel Ban, on the other hand, included built-in humanitarian exemptions from the beginning, as well as a case-by-case process to obtain a waiver, added in EO-2 after the courts restrained the application of EO-1.[334] Anecdotal evidence presented to the Court, mentioned in Justice Breyer's opinion,[335] showed that waivers were implemented much more sparingly than could be reasonably expected. For example, a Yemeni child with a life-threatening condition initially was rejected entry.[336] After international public backlash, the child was admitted.[337]

Israel's sweeping ban redefined the relationship between the legislature and the executive regarding the grant of civilian status to Palestinians from the West Bank and Gaza. The Ban explicitly stated that it prevents the Ministry of Interior from exercising authority, as well as discretion, to act, except for those actions stated in the Act. If not for Israel's parliamentary system and flexible constitution, such negation of executive discretion to make individualized decisions may have been found unconstitutional on the grounds of separation of powers.

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[329] Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021).

[330] *See, e.g.*, Adalah Legal Ctr. for Arab Minority Rts. in Israel v. Minister of Interior, 61(2) PD 202, 450 (2006) (Isr.) (opinion of Deputy President Cheshin).

[331] § 3, Citizenship and Entry into Israel (Temporary Provision) Law, 5763-2003 (Isr.).

[332] *See supra* notes 64–66, 119, 153 and accompanying text.

[333] *See supra* Section I.A.

[334] *See supra* Section II.A.

[335] Trump v. Hawaii, 138 S. Ct. 2392, 2432–33 (2018) (Breyer, J., dissenting).

[336] *Id.* at 2432.

[337] *Id.*

I. The Shadow of Korematsu

In both cases, the dissenting opinions compared the Courts' current dilemmas to *Korematsu*, warning against a decision which would repeat the mistake made by SCOTUS at the time.[338] The similar circumstances are understandable, as both cases were defended through *de facto* deference to the Executive's authority regarding national security, especially in times of war or threat of terrorism.

In both cases, the minority opinions treated the cases as comparable to *Korematsu* because of the sweeping immigration ban that seemed to categorically discriminate against an entire group of people based on their nationality or religion. However, the majority opinions valiantly rejected the comparison's legitimacy by emphasizing their differences.[339] In *Korematsu*, government action directly discriminated against citizens, not foreign nationals.[340] Moreover, in the immigration ban cases, foreigners were banned from entering or settling in the United States and Israel, not placed in internment camps that severely limited their liberties.[341] In addition, citizens of both countries were free to marry and have children.[342] They were, however, prevented from bringing their family members into their country.[343]

The SCOTUS dissent's resorting to using an American anti-canon—*Korematsu*—as a rhetorical device is not surprising. In fact, Justice Sotomayor suggested that Trump justified his Travel Ban, "by noting that President Franklin D. Roosevelt 'did the same thing' with respect to the internment of Japanese Americans during World War II."[344] But raising a foreign anti-canon in the Israeli context may seem perplexing.

This Article argues that part of a separation of powers structure is the size of a country, as the American Founding Fathers acknowledged.[345] In a small country with no federalist structure, such as Israel, the Court needs to resort to comparative law to gain domestic credence for its decisions. It cannot rely on numerous lower courts' decisions to build legitimacy for contested decisions, as naturally happens in federalist systems. Thus, the Court resorts to comparative law to leverage its powers, suggesting to the domestic audience that its decisions are justified because they align with acceptable standards of other democratic countries.[346] This strategy partially protects the Court from the wrath of the political branches, because they, too, understand that the country is in constant need of international acceptance.[347]

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338 Korematsu v. United States, 323 U.S. 214 (1944).
339 *See supra* Sections I.D, II.B–C.
340 *Korematsu*, 323 U.S. at 219.
341 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2405–06 (2018); *supra* Section I.D.
342 *See Hawaii*, 138 S. Ct. at 2405–06; *Adalah*, 61(2) PD at 202.
343 *See Hawaii*, 138 S. Ct. at 2405–06; *Adalah*, 61(2) PD at 202.
344 *Hawaii*, 138 S. Ct. at 2435 (Sotomayor, J., dissenting).
345 THE FEDERALIST No. 51 (James Madison).
346 Weill & Kritzman-Amir, *supra* note 7, at 90–92.
347 Weill, *Strategic Court*, *supra* note 15, at 262–64.

In contrast, many consider the use of comparative law to decide American constitutional cases as usurpation of judicial power. The political branches may, and are even advised to, resort to comparative law when formulating laws. However, the Court's task is to interpret what these branches, not other countries, have adopted.[348]

J. The Outcome of the Cases

In both cases, each Supreme Court upheld either directly (*Adalah*) or indirectly (*Trump v. Hawaii*) the constitutionality of the decision of the political branches. Both were decided with a single vote as a tiebreaker.[349] However, the Israeli decision was concerned with the heart of the matter and its decision was final, whereas SCOTUS's decision concerned the temporary injunction that the Plaintiffs sought and, after the Court's decision, the case was remanded for further proceedings.[350] Yet, as with many things in life, temporary is the new permanent. SCOTUS's refusal to intervene contributed to the Trump Travel Ban's long life before President Biden took office.[351]

IV. SHORTCOMINGS OF THE JUDICIARY

A. The Likely Fate of Adalah *Under American Jurisprudence*

To examine how the common law doctrines developed in the United States operate to protect separation of powers, it is worthwhile to pinpoint the different deliberation processes that SCOTUS would have utilized had it been presented with a case like *Adalah*. In *Trump v. Hawaii*, SCOTUS used a textualist interpretive approach, and decided that EO-3 did not discriminate against Muslims by looking mainly at the letter of the law.[352] Had the same method been implemented in *Adalah*, it seems as if it would have been difficult to reach the conclusion that the Act discriminated against Arabic citizens, since the letter of the Citizenship and Entry Act did not specifically indicate that individuals of diverse ethnicities would be treated differently.[353] Disparate impact alone does not trigger strict scrutiny.[354]

In addition, while Israel's Court only recognized some types of family relations as granting constitutional rights, SCOTUS used the term "relatives," which seems

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[348] Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

[349] *Hawaii*, 138 S. Ct. at 2392; *Adalah*, 61(2) PD at 566.

[350] *See supra* Section II.C.

[351] *See supra* note 266 and accompanying text.

[352] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (justifying adherence to text and originalism).

[353] *See supra* Section I.A.

[354] *See supra* note 302 and accompanying text.

much broader on its face.[355] Nevertheless, it seems that SCOTUS would have implemented a highly circumvented level of scrutiny in the context of immigration, examining only whether the State had presented a *facially legitimate*, *bona fide* justification, like in *Mandel*.[356] Or, at most, whether the State had presented a rational basis for its decision, similar to *Trump v. Hawaii*.[357] Since both the majority and dissenting opinions in *Adalah* agreed that the Act passed these tests and the dissenting opinion only deemed that the Act failed the more advanced levels of scrutiny,[358] SCOTUS would have most likely upheld the Act's constitutionality.

Furthermore, even if the plaintiffs were to prove that the Act had a hidden, illegitimate purpose, it would not have necessarily caused the Act to be struck down as unconstitutional in the United States. With either level of scrutiny, the State only needs to present a legitimate reason or a rational basis for the Act's enactment.[359] Under both tests, the State does not need to prove the absence of other, illegitimate interests.[360] Thus, as long as national security is an independent, legitimate reason for the decision, the Court would not intervene. This is especially true when taking into account the Court's rhetoric about the deference that the Executive and legislature enjoy overall, particularly in matters of immigration and national security.[361]

In addition, SCOTUS seldom uses comparative law in its decisions.[362] Therefore, unlike *Adalah*, SCOTUS would not feel bound to international standards, even partially, when allowing restrictions on the immigration of individuals. SCOTUS did not recognize a right to family unification in the context of immigration, while the Justices in Israel relied on comparative as well as international law considerations to recognize such a right. In fact, Barak mistakenly cited the American *Fiallo* decision as an authority for recognizing a constitutional right to family unification.[363] The Basic Laws themselves grant only citizens a right of entry to Israel, and do not explicitly recognize the family unit.[364]

There are geographical differences between the relationship of the United States to the banned countries and the relationship of Israel and the PA. Israel and the PA are much more intertwined, and have a much greater economic impact on each

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[355] *See supra* note 235 and accompanying text.

[356] Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

[357] *See supra* Section II.B.

[358] *See supra* Section I.B.

[359] Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

[360] Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

[361] *See, e.g.*, DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER (2016).

[362] Dorsen, *supra* note 348, at 531.

[363] *See supra* Section I.B. Justice Naor noted Barak's mistake in her concurrence. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rts. *in* Israel v. Minister of Interior, 61(2) PD 202, 525 (2006) (Isr.) (opinion of Naor, J.). She stated, "Americans have no *constitutional right* to compel the admission of their families." *Id.* (quoting Fiallo v. Bell, 430 U.S. 787, 807 (1977) (Marshall, J., dissenting) (emphasis added)).

[364] § 6(b), Basic Law: Human Dignity and Liberty, 5752-1992, SH (1992) (Isr.).

other.[365] In addition, Israel belligerently occupies parts of the PA's territory.[366] Therefore, SCOTUS may be less inclined to allow limitations on immigration from a geographically and culturally closer place, compared to the faraway countries that have fewer ties and less political and economic impact on the United States that were covered by the Trump Travel Ban.[367] On the other hand, the security risks from neighboring territories may be more substantial than from faraway countries, especially considering Israel's small size in terms of population and territory. Israel's population consists of 9.603 million residents while the United States' population is 332.579 million. Thus, the United States' population is almost thirty-five times the size of the Israeli population.[368] In addition, Israel's territory is about 8,630 square miles, which is roughly the size of the state of New Jersey.[369] In addition, Israel is in a constant military conflict with the West Bank and Gaza, which may have led the SCOTUS justices to give greater deference to security considerations had the situation been reversed.

Overall, it seems highly likely that SCOTUS would not have intervened had it encountered a dilemma similar to the one presented to the Israeli Supreme Court in *Adalah*. This conclusion is based on the cumulative factors of method of interpretation, level of constitutional scrutiny, judicial treatment of equality, and deferential standard in immigration as well as security matters. Each of these doctrines and their cumulation manifest the workings of separation of powers in the United States.

B. The Third Litigation Round Facing the Israeli Supreme Court

President Biden abolished the Trump Travel Ban.[370] In contrast, the immigration ban is still fiercely debated in Israel. On March 10, 2022, the Knesset re-enacted the

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[365] *Palestinian Territories*, WORLD BANK (2022), https://thedocs.worldbank.org/en/doc/292b21f1554e93803dc499e4f4a8aede-0280012022/original/mpo-sm22-palestinian-territories-pse-kcm6.pdf [https://perma.cc/T5D4-UZ69].

[366] Israel never annexed the West Bank and Gaza. *See, e.g.*, Gaza Coast, 59(5) PD 481 (Isr.).

[367] Though, the Court's jurisprudence regarding U.S. territories may suggest otherwise. *See, e.g.*, Sherry Levin Wallach, *The Insular Cases Must Be Overturned*, BLOOMBERG L. (Aug. 3, 2022, 4:00 AM), https://news.bloomberglaw.com/us-law-week/the-insular-cases-must-be-overturned [https://perma.cc/76EG-TGPZ].

[368] CENT. BUREAU OF STATS., ISR., https://www.cbs.gov.il/he/pages/default.aspx [https://perma.cc/4QBX-26WC] (last visited Mar. 1, 2023); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/P3Z3-ACVX] (last visited Mar. 1, 2023).

[369] *Israel—Size and Dimension*, MINISTRY OF FOREIGN AFFS., ISR., https://www.gov.il/en/Departments/General/israel-size-and-dimension [https://perma.cc/S9ZM-K8QX] (last visited Mar. 1, 2023); *Quick Facts: New Jersey*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/NJ [https://perma.cc/J9Y5-UXF3] (last visited Mar. 1, 2023).

[370] Scott Simon & Iman Awad, *Biden Has Overturned Trump's 'Muslim Travel Ban.' Activists Say That's Not Enough*, NPR (Mar. 6, 2021, 7:58 AM), https://www.npr.org/2021/03/06/974339586/biden-has-overturned-trumps-muslim-travel-ban-activists-say-thats-not-enough. [https://perma.cc/3M78-4BP5].

immigration ban.[371] The Act is a mixed bag in comparison to previous bans.[372] On the one hand, it includes provisions that protect family rights better than previous enactments by ensuring greater accountability, and creating a more tiered decision-making process along the way.[373] The Act undertakes the following specific steps: (1) The status of spouses who reside in Israel with a permit was upgraded, if they are over fifty and lived in Israel for at least ten years, and there is no security consideration to the contrary.[374] (2) The temporary residence permit will be valid for a two-year period, as opposed to one year today.[375] (3) The Minister of Interior will be obligated to operate an additional designated humanitarian committee which would assess requests, within three months of filing, if based on family abuse.[376] (4) The Minister of Interior will report the number of requests and status of residence permits to the Knesset International Affairs and Security committee, as well as to the Interior committee, on a quarterly basis.[377] (5) Renewal of the Act requires, in addition to Knesset's approval, the approval of a designated Knesset committee.[378]

The Act, however, raises new challenges regarding the following issues: (1) It explicitly states that:

> [T]he purpose of this law is to establish restrictions on citizenship and residence in Israel by citizens or residents of hostile countries or from the area [West Bank and Gaza], alongside irregular arrangements for residence licenses or permits to stay in Israel—all while taking into consideration the fact that Israel is a Jewish and democratic state, and in a manner that will ensure safeguarding of vital interests for the [S]tate's national security.[379]

(2) The Minister of Interior will be required to cancel the residence permit if the permit holder was proven to have committed a disloyal act (terrorist act, espionage, or treason).[380] (3) The Act sets a maximal quota for humanitarian permits that will be equal to the number of approved requests in 2018 (671 permits).[381]

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[371] Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).
[372] *Id.*
[373] *Id.*
[374] *Id.* § 5.
[375] *Id.* § 10.
[376] *Id.* § 7(b).
[377] *Id.* § 13.
[378] *Id.* § 18.
[379] *Id.* § 1.
[380] *Id.* § 12.
[381] *Id.* § 7(g); *see* Ariena Elmasi, *The Number of Applications for the Grant of Citizenship or Permanent Residency to Palestinians Residing in the West Bank and Gaza Strip as Part of Family Reunification and the Approvals Granted to Them* 5 (Knesset Research and Information Center, December 5, 2022) (on file with author).

Since the pending petitions against the constitutionality of the Act request the Court to decide the matter for the third time, they might face a higher bar. They might need to persuade the Court why *stare decisis* does not substantively settle the case at hand.[382]

Nevertheless, in contrast to SCOTUS, the Israeli High Court of Justice does not operate on a *certiorari* basis. Therefore, it is worthwhile to examine the issues that may affect the Court's decision.[383] The Israeli Supreme Court will need to confront four dominant issues pertaining to the identity of the constitutional rights at stake, the true nature of the legislative purpose, as well as the proportionality of the prolonged ban.

The first issue would be whether the security interest is serious enough to warrant a sweeping ban, rather than an individualized procedure to assess risk. In the past, the debate focused on the question of whether twenty-six terrorists out of a group of 130,000 people justified a total ban, or whether the ban was disproportionate.[384] Supporters of the ban focused on the number of victims of these acts, rather than the number of terrorists, to assess risks.[385] Supporters of the 2022 ban raise new statistics in favor of the ban. The then–Minister of Communications, Yoaz Hendel, for example, stated that, according to the data of Israel's Security Agency (ISA), between 2001 and July 2021, 165 Palestinians who were allowed to reside in Israel by right of family unification, or their children, were involved in terrorist attacks.[386] Furthermore, thirty-eight percent of the individuals arrested during the violent incidents in the Negev in 2022, which arose after the Jewish National Fund planted trees there, were descendants of individuals who reside in Israel by right of family unification.[387] The ISA argues that members of these mixed families are more willing to commit terrorist attacks, because they more readily identify with their immediate relatives who are part of the Palestinian population in the West Bank and Gaza.[388] The ISA further argues that the kind of preventive measures it may apply to Palestinians that enter Israel on a daily basis are not legally at its disposal once these people acquire civilian status.[389]

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[382] Under Basic Law: The Judiciary, the Supreme Court is not obligated to follow its own precedents, though its decisions are binding on the lower courts. § 20(2), Basic Law: The Judiciary, 5748-1984, SH (1984) (Isr.).

[383] The Court may, however, decide not to issue an *order nisi* that will force the political branches to justify their position.

[384] *See supra* Section I.B.

[385] *See supra* Section I.C.

[386] W. Bader Tshafab, *Citizenship Act Passed First Reading*, KNESSET NEWS (Feb. 7, 2022, 10:10 PM), https://main.knesset.gov.il/News/PressReleases/Pages/press07.02.22a.aspx (Hebrew).

[387] *Citizenship Act Passes First Reading in Knesset Plenum*, KNESSET NEWS (Feb. 8, 2022), https://m.knesset.gov.il/EN/News/PressReleases/Pages/press8222y.aspx (English).

[388] *Id.*

[389] ISR. SEC. AUTH., 2010 ANNUAL REPORT.

Second, previous constitutional challenges accepted the ban's security rationale, despite the fact that MKs also raised demographic concerns. However, this renewed ban states in its purpose that it intends to protect the identity of the State as Jewish and democratic.[390] Moreover, the then–Minister of Interior, Ayelet Shaked, explicitly stated that "[t]he State of Israel will not hide anymore behind the security justification alone. From now on, the State of Israel will put on the table its essence as the homeland of the Jewish people as well."[391] It is clear under Israeli constitutional law that one of the features of a Jewish state is a Jewish majority.[392] Without a Jewish majority, there will be no political will to maintain the State as Jewish. It is equally clear under Israel's constitutional law that *not* all means are constitutional to achieve the goal of maintaining a Jewish majority. The question is whether the Court will treat the security rationale as the dominant and independent purpose of the ban to justify its constitutionality, despite the demographic issue raised. Moreover, the State's denial of the demographic rationale in court may make it easier for the Court not to tackle the matter.

Even if the Court decides to address the demographic purpose, it might interpret the demographic rationale as confined to security considerations alone, as suggested in the Act's purpose. MKs argued that the need to maintain a Jewish majority was "existential."[393] Some may mean that without a Jewish majority, the Jewish population will face a serious risk of persecution and even extinction, as evident in other parts of the world where national conflicts exist. Others may mean that without a Jewish majority, there will also be no democratic state. Israel is surrounded by Arabic states that are nondemocratic. Still, others may mean that if the Israeli Arabic population identifies too heavily with the Palestinian population in the West Bank and Gaza they may want to secede and join them, especially in places bordering the PA. This outcome will endanger the territorial integrity and national unity of the State.[394] To address these concerns, the Act does allow for naturalization, if the Minister is convinced that the person identifies with the State and acted to promote its interests.[395]

The third challenge is the judicial recognition of an implied constitutional right to family unification. It is still hotly debated whether the right to family unification

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[390] § 1, Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

[391] Shaked, *supra* note 57.

[392] *See, e.g.*, HCJ 6427/02 Movement for Quality Gov't v. Knesset, 61(1) PD 619 (2006) (Isr.), 15, 25 (opinion of Deputy President Cheshin); EA 11280/02 Cent. Election Comm. v. MK Tibi, 57(4) PD 1, 22 (2003) (Isr.) (opinion of President Barak).

[393] Eric Bender, *After Hours of Deliberations: The Citizenship Law Was Passed on Second and Third Readings in the Knesset Plenum*, MAARIV (Mar. 10, 2022, 9:35 PM), https://www.maariv.co.il/news/politics/Article-903378 [https://perma.cc/F8YB-B5ZQ] (citing MK Nir Orbach).

[394] *See generally* Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO L. REV. 905 (2018) (for this type of dynamic occurring globally).

[395] § 9, Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

in the context of immigration is constitutional. While a majority of Justices answered positively in the *Gal-On* decision of 2012,[396] the Court is not obligated to follow its own precedents.[397] The question remains hotly contested since Basic Law: Human Dignity and Liberty grants only citizens the constitutional right to enter Israel.[398] The difficulty is that the Knesset, which may amend the Basic Law in a two to one majority,[399] expressed its opinion that it does not treat the right to family unification as constitutional by repeatedly re-enacting the Ban.

The fourth question is about the duration of the Ban. A temporary Act with an annual sunset provision became a permanent feature of the constitutional landscape.[400] With it, thousands of families are perpetually in a state of limbo: their Palestinian family members from the territories are unable to upgrade their civilian status from permits to stay, to reside, or to full naturalization.[401] This outcome, in turn, affects the question of whether the measure is proportional. To address this concern, the Act allows the Minister of Interior to grant people over fifty that legally stayed in Israel for at least ten years to upgrade their status to temporary residents.[402] It is questionable whether the Court would treat this concession as sufficient.

Since the *Adalah* decision, the Ban has affected approximately no more than 0.05% of the Israeli Arabic population.[403] Moreover, since 2006 and until June 2020, 66.5% of the requests for status were granted, with an average annual approval rate of sixty-eight percent.[404] Yet, both sides of the political aisle use the immigration ban as a means to rally their camps, and castigate each other as traitors.[405] The extremist supporters of the Ban argue that without it Israeli Arabic citizens would marry Palestinians from the territories in the hundreds of thousands to effectively exercise "the right of return" to Israeli territory through marriage with the intent to annihilate Israel as a Jewish state.[406] The Ban prevents such "flooding."[407] The

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[396] Gal-On v. Att'y General, Nevo Legal Database (Jan. 11, 2012) (Isr.).

[397] § 20(2), Basic Law: The Judiciary, 5748-1984, SH (1984) (Isr.).

[398] § 6(b), Basic Law: Human Dignity and Liberty, SH (1992) (Isr.).

[399] Weill, *Reconciling*, *supra* note 23; Weill, *Hybrid Constitutionalism*, *supra* note 22, at 405.

[400] Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

[401] *See generally* ANTIGONA ASHKAR, HAMOKED & B'TSELEM REPORT, PERPETUAL LIMBO: ISRAEL'S FREEZE ON UNIFICATION OF PALESTINIAN FAMILIES IN THE OCCUPIED TERRITORIES (2006).

[402] § 5, Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

[403] The data is derived from yearly reports of Israel's Central Bureau of Statistics. *See* https://www.cbs.gov.il/he/pages/default.aspx [https://perma.cc/36RC-KWD2].

[404] Elmasi, *supra* note 381, at 4–5.

[405] *See supra* Introduction.

[406] HUMAN RTS. COUNCIL, A/HRC/40/CRP.2, HUMAN RIGHTS SITUATION IN PALESTINE AND OTHER OCCUPIED ARAB TERRITORIES: REPORT OF THE DETAILED FINDINGS OF THE INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON THE PROTESTS IN THE OCCUPIED PALESTINIAN TERRITORY ¶ 137 (2019).

[407] *See* Citizenship and Entry into Israel (Temporary Provision) Law, 5782-2022 (Isr.).

extremist opponents argue that this Act is the "most racist" statute in the Israeli statute book, amounting to an Apartheid regime within Israel's territory.[408] Israel pays a heavy reputational price in the international arena for this policy.[409] It is doubtful that the Court will be able to settle this dilemma for the political branches, by overcoming their will, when the political branches are so keen to prove their loyalty to the ban to the point of proposing to incorporate the ban into the constitution.[410]

CONCLUSION

This Article juxtaposes two Supreme Court decisions from two common law, democratic countries dealing with a similar dilemma: are immigration bans which are based on nationality constitutional even though they prevent citizens from uniting with their foreign family members? Both countries do not include an explicit constitutional right to family unification in their constitutions. This Article shows how even though these countries are positioned on either side of the spectrum of separation of powers structures, there may be similar curtailment of the judiciary from intervening in favor of rights when national security and immigration policies converge. The judicial systems in both countries were able to encourage the political branches to mitigate their policies in the shadow of the legal proceedings, but ultimately their superior courts denied long lasting, legal remedies.

But while these structures may cause similar, non-interventionist judicial results, these different separation of powers structures also lead to the development of vastly different common law doctrines that govern judicial reasoning. By analyzing how the United States and Israel, which are located on the opposite sides of the spectrum regarding separation of powers, construct their judicial analysis of a similar problem, this Article shows the inner workings of both systems' separation of powers structures. This Article shows how a strong separation of powers structure—including federalism, presidentialism, bicameralism, and an entrenched supreme constitution—leads to an array of common law judicial doctrines: (1) deference in administrative matters restraining the courts from intervening in light of the fact that, in a presidential system, courts cannot assume that the legislature will muster the majority needed to re-enact a presidential order; (2) a textualist/originalist interpretation approach to the constitutional text that seeks to "expose" the constitutional drafters' intent or the public meaning of the text at the time of its adoption, and

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[408] NGO MONITOR, ADALAH'S DATABASE OF LAWS: IMAGINING RACISM TO DEMONIZE ISRAEL (2014).

[409] *See supra* note 3 and accompanying text.

[410] Simcha Rothman, *Instead of "Temporary Provisions," It's Time for a Thorough Citizenship Law*, MIDA (July 7, 2021), https://mida.org.il/2021/07/07/%D7%9E%D7%93%D7%95%D7%A2-%D7%97%D7%95%D7%A7-%D7%99%D7%A1%D7%95%D7%93-%D7%94%D7%94%D7%92%D7%99%D7%A8%D7%94-%D7%98%D7%95%D7%91-%D7%99%D7%95%D7%AA%D7%A8/.

supposedly limit judicial interpretive power; the judiciary grants the text decisive weight to preserve the superiority of the popular will as reflected in the Constitution over the will of the representatives, as part of the principle of separation of powers; (3) a constrained approach to the recognition of implied constitutional rights—i.e., those rights not explicitly enumerated in the constitution; (4) strict standing and justiciability requirements, such that only those with an actual vested interest may initiate judicial proceedings and only if the matter is not entrusted to a different branch of government. This limits the courts' power to choose cases in which to intervene, by limiting both the number of available cases (standing) and the type of cases (justiciability); since there is a strong system of checks and balances, the judiciary understands that its intervention is rarely needed. (5) limited use of the heightened strict scrutiny standard of judicial review and even this rarely used standard does not rise to the level of proportionality *stricto sensu*; (6) reviewing text—and perhaps intent, but rejecting a disparate impact test—to examine violations of equal protection of constitutional guarantees, unless the political branches expressly entrusted the courts with such review, as exists under Title VII; and (7) even refusal to use comparative law as a tool to decide constitutional cases in deference to the Constitution and the political branches.

The opposite common law doctrines may develop in systems with weak separation of powers structures, where there is a parliamentary system with no federalism, bicameralism, or an entrenched supreme constitution. In systems with limited checks and balances on the political branches, the courts may assert greater judicial power to supervise the political branches, because there is a greater need to provide for checks and balances. They may justify such power knowing that the costs of judicial error are low, and the legislature may easily address them. The political branches may tolerate these judicial doctrines, because the judiciary itself is exposed to swift retaliation, which in turn, restrains its actions. Put differently, weak separation of powers systems may lead to the development of common law doctrines that enable potentially greater judicial intervention. But, even in such systems, courts act with restraint because they know that the political branches may easily cripple their power. The judicial rhetoric may be activist, but the outcome of cases will tell a story of judicial caution.

Though scholars typically study these judicial doctrines independently of one another, this Article argues that they are all a manifestation of how strong or weak the separation of powers structure is in a given country.

EPILOGUE

This Article was written and edited before the elections of Israel's twenty-fifth Knesset, which took place on November 1, 2022.[411] Since then, two developments

[411] Claire Parker & Shira Rubin, *Israeli Results Show a Netanyahu Comeback Powered by the Far Right*, WASH. POST (Nov. 2, 2022, 12:00 PM), https://www.washingtonpost.com

are noteworthy. The first is that a hardcore right-wing coalition formed in Israel. It intends to restructure the power balance between the courts and the political branches, most likely by adopting an override clause that would give politicians the final say in constitutional matters.[412] The coalition is also offering changes to the judicial appointment process to grant politicians the majority needed to appoint and remove judges, thus threatening judicial independence.[413] There are other proposals, inter alia, curtailing the access to the Supreme Court sitting as the High Court of Justice by passing a law that narrows the right of standing, the type of issues subject to judicial review (the doctrine of justiciability), and even the standard of judicial review (reasonableness and proportionality).[414]

The political branches argue that the Israeli Supreme Court augmented unprecedented judicial power, and thus they must curtail its power.[415] Opponents counter that there is nothing unique about the Court's power. Moreover, a strong Court is needed, especially considering the fact that Israel's separation of powers structure is weaker than most other countries.[416]

Each of the sides can marshal evidence to support its claims, yet they have failed to provide a convincing argument for their respective views because none has been able to prove the connection between the strength of the separation of powers and the strength of the judiciary. It is extremely difficult to furnish such evidence as there are so many variations worldwide for both separation of powers structures and judicial power. Yet, this Article can furnish the evidence for the nexus between separation of powers and judicial power. It reveals that the mechanisms through which different separation of powers structures translate into different strengths of the judiciary are the common law doctrines such as standing, justiciability, deference, interpretation, and levels of scrutiny. These doctrines may carry the same title in different countries, but their content would be totally different and determined by the strength of separation of powers in a given country. My work demonstrates the dangers in restricting the Court's powers without a corresponding reform in the structure of the separation of powers to enhance checks and balances in the political branches.

The second, possibly related, development, is that on December 1, 2022, in a three-Justice panel (out of fifteen Justices), the Court held a five-hour live, open

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/world/2022/11/02/israel-election-results-netanyahu-coalition/ [https://perma.cc/58VM-YK8B].

412 Rivka Weill, *The High Stakes Israeli Debate over the Override*, VERFASSUNGSBLOG (Nov. 25, 2022), https://verfassungsblog.de/the-high-stakes-israeli-debate-over-the-override/ [https://perma.cc/DE6K-LJB8].

413 *See* Weill, *supra* note 57.

414 *See, e.g.*, Joshua Davidovich, *Justice Minister Rolls Out Controversial Plan to Overhaul Judiciary, Shackle Court*, TIMES OF ISRAEL (Jan. 4, 2022), https://www.timesofisrael.com/liveblog-january-4-2023/ [https://perma.cc/Y8NK-YWWQ].

415 *Id.*

416 Eliav Breuer & Michael Starr, *Israel's New Gov't Proposes Controversial Reforms to Justice System*, JERUSALEM POST (Jan. 4, 2023, 10:33 PM), https://www.jpost.com/israel-news/politics-and-diplomacy/article-726637 [https://perma.cc/G2WX-Q36R].

session in which it heard the parties to the case regarding the validity of the new legislative ban.[417] President Hayut, who presided over the case, also sat in the *Adalah* case. In 2006, she joined Barak's minority opinion that the statute should be invalidated. Supposedly, the passage of time only worsened the infringement on constitutional rights of those affected.

The Court decided on December 4, 2022, to request the State to answer within ninety days whether it would be willing to amend the statute to: (1) define "residents" of the West Bank and Gaza as excluding people who are registered in the PA population registry, but have no true ties to it; (2) accommodate same sex couples; (3) allow women over forty or those who legally resided in Israel for at least five years to upgrade their civilian status to temporary residence; and (4) not set an a priori maximum quota for humanitarian cases.[418] The two branches are set on a colliding course.

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[417] *See* Judiciary Spokeswoman, *Session in the Supreme Court on the Petitions Regarding the Citizenship and Entry into Israel (Temporary Provision) Law, 2022*, YOUTUBE (Dec. 1, 2022), https://youtu.be/_J39kWn8Ato [https://perma.cc/25RA-M4BL].

[418] HCJ 1777/22 Adalah v. Minister of Interior (2022) (Isr.) (*available at* https://supreme decisions.court.gov.il/Home/Download?path=HebrewVerdicts/22/770/017/v09&fileName =22017770.V09&type=4 [https://perma.cc/Z9NQ-U7FJ]) (Interim decision, Dec. 4, 2022).

APPENDIX

I. COMPARATIVE FACTORS CHART

Topic	Discussion
Background	
The policies' background: security concerns	Both states justified their sweeping ban on security grounds.
The transience of both decisions, and the default expiration date of the decisions	In Israel, the law was enacted as a temporary statute. In the United States, the decision was an Executive Order, with a mechanism for review every 180 days. Although both decisions were temporary, the default option in Israel's case was the expiration of the statute after a year, while in the United States the decision would remain in force until otherwise specified.
Sweeping Ban vs. Case-by-Case Waiver	In Israel, the law exempted spouses above a certain age or children under a certain age, but there were no humanitarian exceptions in *Adalah*. The humanitarian exceptions were set after the ruling and in response to it. By contrast, the Trump Travel Ban included humanitarian exemptions, and allowed for a case-by-case evaluation process.
Normative Hierarchy—Primary vs. Secondary Legislation	
Normative Hierarchy: Statute vs. Executive Order	The Citizenship and Entry into Israel (Temporary Provision) Law enjoyed the status of primary legislation. In contrast, EO-3 is a Proclamation, and inferior to federal statute.
Legal vs. Constitutional Challenge	The kind of legal arguments that can be presented against a decision is influenced by the normative level of the policy in question. In Israel, the policy was embedded in an act of the legislature, and therefore could only be challenged on constitutional grounds. Contrastingly, the Executive Order in the United States was an act of secondary legislation, which receives its authority from the INA, therefore making it possible to challenge the order based on both statutory and constitutional grounds.

Topic	Discussion
Presidential vs. parliamentary system	The nature of the constitutional system (presidential or parliamentary) affects the willingness of courts to intervene in executive decisions. Courts may find it easier to intervene in executive orders in parliamentary systems, because the judicial decision may be overcome by the legislature. This assumption does not apply in presidential systems, where the legislature may be under the control of a different political party than that controlling the Presidency.
Facts and the Identity of the Plaintiffs/Petitioners	
Does the Constitution Apply to Foreigners?	Both cases raise the question of whether the Constitution is applicable to non-citizens. The Justices in both cases opted to review the constitutionality of the policies through the lens of the rights of the relatives of those who were refused entry, since the relatives *were* citizens and therefore enjoyed constitutional rights.
How Foreign Are the Foreigners?	Is the relationship of Palestinians from the West Bank and Gaza to Israel similar to the relationship of foreigners to the United States? No. This cuts both ways: making the security risk more potent, but also requiring more consideration on the part of the authorities to the plight of the population.
The Public Appellant	*Trump vs. Hawaii* demonstrates that in the United States Plaintiffs need to show a specific injury that they suffered in order to approach the Court, and cannot challenge a policy in the name of the public alone. However, in Israel, public petitioners are recognized to have standing. Since petitioners may directly approach the Supreme Court in Israel to raise a public grievance, the legislature grants decisive weight to the Court's anticipated reaction when drafting enactments. Moreover, the Israeli Supreme Court acted as the first and last adjudicator in this case.

Topic	Discussion
The Policies' Purpose	
Official Purpose: Homeland Security	In both cases, the State justified the policy in the name of national security.
Plaintiffs or Petitioners Alleged a Hidden Unconstitutional Purpose	*Petitioners argued in Adalah*, that the statute served demographic concerns. *Plaintiffs argued in Trump v. Hawaii that* animosity towards Muslims prompted the ban. In both cases, the majority opinions accepted the Governments' position that the hidden purpose did not prompt the policies. But some of the Justices in the minority accepted that the hidden, illegitimate purpose may have been the true motivation.
Legal Questions	
Infringed Rights	*Adalah*—Petitioners mainly focused on two constitutional arguments: the infringement of the right to family life, and the infringement of the Arabic minority's right to equality. The Justices seriously debated whether the right to family unification was part of Israel's constitutional law in the immigration context. In contrast, the constitutional discussion in *Trump v. Hawaii* mainly centered around the ban on Muslims and freedom of religion. There was no recognized right to family unification in the immigration context in the United States to warrant serious discussion, although Chief Justice Roberts' opinion recognized it as an interest.
Justiciability and Standing	*Trump*—SCOTUS considered whether Plaintiffs had standing, and whether the subject of immigration policy was judicially reviewable. *Adalah*—The Court did not discuss these issues (except for the prior question of the Basic Laws' applicability to foreigners). SCOTUS's consideration of standing, and justiciability highlights the centrality of the separation of powers principle in the United States system, in contrast to Israel.

Topic	Discussion
Separation of Church and State	The Establishment Clause of the First Amendment of the U.S. Constitution requires the separation of church and state. Therefore, the question was whether the ban on the entrance of foreigners in the Proclamation violated this clause. In Israel, there is no such requirement.
Reasoning	
Proportionality vs. Levels of Scrutiny	Israel—The Court applied a stringent review standard as part of the Limitation Clause (specifically, the proportionality tests), allowing the restriction of constitutional rights under certain criteria. United States—The Court applied the rational basis standard of review, which is only the first step in Israel's constitutional scrutiny method.
Constitutional Review in Times of War, and Treatment of Foreigners Who Are Nationals of Hostile Entities	In *Adalah*, the Court discussed whether there is a difference between constitutional scrutiny at times of peace, and at times of war. Although the legal system and set of values are the same on both occasions, the Justices treat foreign Palestinians as nationals of a hostile entity. In contrast, in *Trump*, the reasons for the inclusion of countries in the ban vary, and are not necessarily a result of the country's hostility towards the United States.
How Do the Courts Assess Whether Rights Were Violated? What counts: (1) enactment language; (2) drafters' intent; or (3) policies' impact?	The majority opinion in *Trump* used, primarily, the EO-3's text, and executive intent, in the margins, to determine whether the ban violated any constitutional rights. In contrast, the Israeli constitutional analysis of infringement centered on the *impact* of the statute on the Arabic population.
Theory vs. Reality: Dissenting Opinions	Both the dissenting opinions of Justices Breyer and Barak focus on the distinction between the policies' theoretically neutral language, and their practical disparate implications. Justice Breyer showed how the waiver system did not actually make a difference.

Topic	Discussion
The Shadow of *Korematsu*	In both cases, the dissenting opinions warned of the danger of repeating the mistakes done in *Korematsu* (which upheld detaining United States citizens in internment camps), whilst the majority argued that the comparison was illegitimate. While the minority resort to *Korematsu* as an anti-cannon serves as a strong rhetorical denunciation of the majority opinion, in Israel this reliance is surprising as *Korematsu* is not part of Israeli law.
The Ruling	
Discussion of the Rulings' Results	Both *Trump v. Hawaii* and *Adalah* allegedly arrived at the same conclusion. The Courts ruled that the Government was allowed to pursue its objectives. Both cases were decided on the edge of a single vote.
Distinction Between a Temporary Remedy (*Trump v. Hawaii*) and Final Ruling (*Adalah)*	*Adalah*—The Court ruling is final. *Trump*—The decision was only an interim one, but *de facto* contributed to the Proclamation's endurance until President Biden took office.

II. A THOUGHT EXPERIMENT CHART: DECIDING *ADALAH* UNDER U.S. LAW

Topic	Discussion
Interpretation Method: Textualist v. Purposive Approach	In *Trump*, the majority used the textualist method to interpret the Proclamation. The majority decided that the text showed a rational link to its purpose, and thus did not discriminate against Muslims on its face. The majority awarded little weight to the historical context of the order, and Trump's previous public statements as manifesting animosity towards Muslims. Meanwhile, the Justices in *Adalah* used purposive interpretation to assess the constitutionality of the law. Had *Adalah* been decided in the United States, it is questionable whether the Justices would have found the statute unconstitutional under a textualist interpretive approach.

Topic	Discussion
Prima Facie vs. Impact	Under United States law, the Court assessed the letter of the order, and the intention of the decision makers. In Israel, the Justices used a consequential test: whether the Act's results were discriminatory. Under a prima facie review, the Israeli ban seems to apply equally to all.
Use of Comparative Law	In *Trump*, the Court did not examine comparative law, since the use of comparative law is contested in United States law, and SCOTUS rarely references it when deciding constitutional cases. On the contrary, in *Adalah*, the Court analyzed examples from comparative law, including American precedents. The lack of comparative measurement eases the need to align with international expectations regarding the treatment of those seeking entrance to a country.
The Limitation Clause—Proportionality vs. Levels of Scrutiny Analysis	Under American law, unlike Israeli law, there is no Limitation Clause. The existence of the Limitation Clause's tests influences the ability of the State to violate constitutional rights. The United States' substitute for the Limitation Clause is the 'Levels of Scrutiny' doctrine. In *Trump*, the Justices utilize a low level of scrutiny, as they assessed only whether there was a rational basis for the order. The Court presumed that in matters concerning immigration, the political branches enjoy a high level of deference, and therefore it would only seldom intervene in their decisions. Thus, it is doubtful whether SCOTUS would have intervened in the *Adalah* case.
Judicial Deference to the Representative Branches	American doctrine accords judicial deference to the Executive branch. No similar deference is accorded under Israeli law. This Article argues that this is a manifestation of the different structures of separation of powers existing in the two countries.
The Relations Between Those Denied Entry and the Rejecting Country	There is a difference in the relations between Israel and the PA and the relations between the United States and the banned countries. Israel is much closer geographically to the PA. The two entities are more intertwined, and affect each other economically, militarily, and otherwise. Israel also belligerently

Topic	Discussion
	occupies parts of the West Bank. This consideration may cut in both directions. On the one hand, the security risks are greater when those banned come from a neighboring territory. On the other hand, those seeking entry to Israel through family unification are not wholly "foreigners" to it.
Discussion of Whether There Is a Right to Family Unification in the Immigration Context, and Its Extent	In *Trump*, the Court did not assess the question of whether there is a constitutional right to family unification, and what is its extent. The Court assumed that citizens sustained injury by the fact that their family members were denied entry to the United States. In contrast, in *Adalah*, the Court deliberates on the extent of the right to family unification. On the other hand, the Israeli Court restricted the right to family unification to close, immediate family connections (children, spouses), unlike *Trump* where the Justices talk about 'relatives' in general, a term which seems broader. But overall if the main thrust of *Adalah* is the constitutional right to family unification, it seems that it would not have been recognized in the United States, in the context of immigration.
Separation of Powers and National Security	In *Trump*, the Court implemented a more careful approach towards intruding and amending the decisions of the other branches, especially in matters of national security and immigration.

III. THE NEXUS BETWEEN COMMON LAW DOCTRINES AND SEPARATION OF POWERS STRUCTURE

Common Law Doctrines	Weak Separation of Powers	Strong Separation of Powers
Reasonableness and Deference	Courts will be less inclined to develop a deference standard to executive discretion, knowing that even if they invalidate an executive order, the representatives may easily pass an authorizing statute to overrule such judicial decisions.	Courts may more easily develop a deference standard in administrative matters. Such standard will restrain the courts from intervening in light of the fact that, in a presidential system, courts cannot assume that the legislature will muster the majority needed to re-enact a presidential order.

Common Law Doctrines	**Weak Separation of Powers**	**Strong Separation of Powers**
Type of Interpretive Technique	Courts may adopt a purposive interpretive approach to reduce the risk that a transient majority might overtake the constitutional system and revolutionize it in an irreversible manner.	Courts may adopt a textualist/originalist interpretation approach to limit judicial interpretive power. The judiciary might grant the text decisive weight to preserve the superiority of the popular will as reflected in the Constitution over the will of the representatives, as part of the principle of separation of powers.
Implied Constitutional Rights	Purposive interpretation allows to read implied rights more easily into the constitutional text to enable a more coherent constitutional identity.	Courts may exhibit a constrained approach to the recognition of implied constitutional rights in line with the textualist/originalist approach.
Constitutional Equality	The lenient separation of powers structure may allow courts more leeway to investigate, and even question the effects of legislative/executive policies.	Courts might be more reluctant to go beyond the executive/legislative text and examine its impact.
Standing and Justiciability	Courts will allow easier access to them and treat issues as more readily justiciable. They know that in a weak separation of powers system, without judicial review, there would be no substantial supervision of the elected branches.	Courts will develop strict standing and justiciability requirements that limit the courts' power. Since there is a strong system of checks and balances, the judiciary understands that its intervention is rarely needed.
Standard of Constitutional Scrutiny	Proportionality stricto sensu might be especially intervening in the workings of the political branches, especially when the courts examine the added benefit from the statute in comparison to an imaginary alternative, not yet enacted. It might treat the imaginary alternative as the least restrictive means to infringe constitutional rights, though the legislature may	The American categorization of different levels of scrutiny is the result of common law development. The Court created varying levels of scrutiny over time to rank constitutional rights, as well as state interests. The most important rights deserve enhanced protection, while lesser ones should more easily give way to state interests. Since strict scrutiny is not easily employed, and even when it is, it does not amount to the test

Common Law Doctrines	**Weak Separation of Powers**	**Strong Separation of Powers**
	reject this imaginary alternative.	of proportionality stricto sensu, this doctrine carves out more room for the representatives to achieve their policies.
Use of Comparative Law	The courts might resort to comparative law to leverage their powers, suggesting to the domestic audience that their decisions are justified because they align with acceptable standards of other democratic countries.	Courts may refuse to use comparative law as a tool to decide constitutional cases in deference to the constitution and the political branches.
Activist Court?	Common law doctrines will assert great judicial power. However, the courts would act with restraint, knowing that the political branches may easily cripple their power. There would be a great gap between judicial reasoning (*activist*) and cases' outcome (*restraint*).	Already the common law doctrines will reflect a restrained judicial approach towards the judicial role because there is a strong system of checks and balances among the representative branches and the courts may act as last resort.