# On the Nexus between Separation of Powers and Judicial Power

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In a forthcoming article, "On the Nexus Between the Strength of the Separation of Powers and the Power of the Judiciary," I make 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, we 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. I identify 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, I argue that they are all connected; and (4) courts understand that the content of each of the doctrines is affected by considerations related to the separation of powers. Yet – while developing these common law doctrines – the courts, too, have failed to connect between these various doctrines as well as 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.

## Comparing Two Judicial Decisions

I support my 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. The first is the Adalah decision from 2006, which is the first Israeli Supreme Court case that dealt with a legislative ban on family unification of Israeli citizens with relatives from the West Bank and Gaza. This ban prevents such relatives from gaining legal status in Israel, including a permit to stay, reside or become naturalized citizens. Though this policy requires the government to reinstate it with legislative approval on an annual basis to verify that its security rationale is still valid, it has been in effect for the past twenty years. The Supreme Court of Israel is currently reviewing, for the third time since 2006, renewed petitions against this ban, which have led some to denounce Israel as an apartheid regime. The second is the 2018 Supreme Court of the United States (SCOTUS) decision, dealing with then-President Trump's Executive Order (and later proclamation), which denied foreigners from eight, primarily Muslim, countries entry to the US. President Biden overturned the Order, often referred to as the (Muslim) Travel Ban on his first day in office, denouncing it as xenophobic and rooted in religious animosity.

The two judicial decisions are based in common law jurisprudence. Furthermore, neither country has an explicit constitutional right to family unification in their constitutions. Nonetheless, both Courts justified judicial review by citing the need to protect their citizens' interests in family life. Both countries also actively learn from each other's immigration arrangements.

## Exposing the Inner Workings of the Separation of Powers

In both countries, the Courts dealt with a similar dilemma, and reached similar results of non-intervention. Not surprisingly, 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 strategies that the political branches feel strongly about. The judicial systems in both countries were able to influence the political branches to mitigate their policies in the shadow of the legal proceedings, but ultimately the supreme courts in both countries denied remedies.

Yet, the reasoning of both Courts was vastly different. By analyzing how the US and Israel, which are located on the opposite sides of the spectrum regarding separation of powers, construct their judicial reasoning to a similar problem, I aim to examine the inner workings of both systems' separation of powers. I contend that these different structures lead to vastly different common law doctrines that inform judicial reasoning.

## Strength of Separation of Powers and Common Law Doctrines

The US adheres to a strong separation of powers principle that is reflected in its constitutional structure of federalism (division of power between central and state governments), bicameralism (two-house legislative structure), and presidentialism (an independent, separately elected, Executive) and is anchored in an entrenched constitution. I argue that ultimately, this constitutional structure also led indirectly to a constellation 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 persevere.

I show how such a system with a supreme entrenched constitution and strong separation of powers that relies on the people's representatives to provide checks and balances leads to an array of common law judicial doctrines that are all aimed at limiting judicial intervention in deference to the constitution and the political branches. All of these doctrines are manifested in US jurisprudence, such as: (1) deference to the executive in administrative matters that restrains 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 reenact 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 supposedly limit judicial interpretive power; (3) a constrained approach to the recognition of implied constitutional rights, i.e., those rights not explicitly enumerated in the constitution, in this case the right to family unification; (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); (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 even 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) refusal to use comparative law as a tool to decide constitutional cases in deference to the Constitution and domestic political branches.

The opposite common law doctrines may develop in systems with a weak separation of powers, where there is a parliamentary system with no federalism, bicameralism, or an entrenched constitution with supremacy over ordinary laws. In this type of system, with limited checks and balances on the political branches, the courts may feel more justified in asserting greater judicial power to oversee the political branches and develop supporting common law

doctrines, knowing also that the costs of judicial error are lower, and the legislature may easily address them. The political branches may tolerate these judicial doctrines because the judiciary itself is exposed to swift political retaliation, which in turn, restrains its actions.

## Political Retaliation

Israel's current common law jurisprudence regarding all these doctrines—interpretation, deference, justiciability, etc.—places greater power in the hands of its judiciary, as compared to the power granted to the American judiciary. I argue that this jurisprudence reflects the fact that Israel's separation of powers is weak, with a parliamentary, unicameral, unitary constitutional structure protected through a flexible, largely non-entrenched constitution that may be amended by simple legislative majorities. However, I argue that this very weak separation of powers also acts as a constraint on the Court. Though people tend to forget, Israel's entire constitutional structure is fragile, as has become more and more evident recently, with the severe concentrated political attack on the judiciary.

In Israel, it is this very weak separation of powers which also hinders the Court. Indeed, the Court could easily intervene in favor of rights. For example, the Court can easily read rights into the Constitution. However, it is just as easy for the Knesset to retaliate by amending the Constitution to include both an immigration ban and the curtailment of judicial power. In other words, the stakes and the potential outcomes of the Israeli constitutional game are starkly different from the American one.

The new coalescing coalition in Israel, following the 2022 election, seeks to change the status quo, claiming that the judiciary usurped the legislature's powers and must be constrained. Thus, it proposes adopting an override clause that would give politicians the final say in constitutional matters. The coalition is also mulling changes to the judicial appointment process to grant politicians the majority needed to appoint and remove judges. They also consider 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). 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.

## Conclusion

This exercise in comparative constitutional law shows how, paradoxically, positioning a country on either side of the spectrum of separation of powers structures may lead to similar curtailment of the judiciary's power, though courts in the two opposing regimes may use very different, and even opposing, judicial doctrines to reach similar non-interventionalist results. Moreover, though scholars typically study these common law judicial doctrines independently of one another, they are all a manifestation of how strong or weak the separation of powers in a given country is. Ultimately, the judicial branch may supplement, but not *supplant*, the democratically elected political branches, irrespective of the separation of powers in the country in question.

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