Notes:

Standing, Still? The Evolution of the Doctrine of Standing in the American and Israeli Judiciaries: A Comparative Perspective

Abstract

The doctrine of standing plays an important role in limiting the classes of cases or controversies that are appropriate for judicial resolution; considered with other justiciability doctrines, judicial standing necessarily reflects the broader role of the court in society. Though the American judiciary had rather generous standing policies in place at the time of the founding, with the rise of the administrative state in the aftermath of the New Deal, progressive justices saw fit to restrict judicial standing as a means of insulating regulatory programs from industry challenge. In contradistinction, the young Israeli society has some of the most accessible courts in the world; the doctrine of standing poses no meaningful limitation on access to a judicial forum and the nonexistence of standing is a reflection of the role the Israeli society expects its courts to play in calling the government to account for its actions. This Note provides a historical account of the evolution of the American doctrine of standing, followed by an account of the Israeli doctrine of standing. Highlighting the key distinctions between the judiciaries of the United States and Israel, this Note identifies the challenge posed to the legitimacy of the Israeli judiciary should it continue permitting unfettered access to judicial forums with no meaningful standing limitations.

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I. INTRODUCTION

Courts serve as a meeting place for all factions of society. In formalized democracies, meaningful access to a legislative forum is often predicated on influence, power, wealth, and connections. In this *quid pro quo* world, those lacking power and influence may be left in the cold, naturally funneling their aggravations to the judicial process. Because courts often have lower barriers to entry than legislatures, they frequently serve as the site of the most pointed interactions amongst government, the citizenry, social movements, political groups, business entities, and others. Access to a judicial forum sometimes has a formal bar to entry,[1] but the typical predicate question to forum access is whether the proposed plaintiff has suffered a legal wrong that can be resolved by the exercise of judicial power.[2] And depending on the level of generality used to determine the scope of rights,[3] the breadth of constitutional obligations,[4] and the self-perceived role of the court *vis-à-vis* other facets of government, access to the judicial forum may be granted.

Views on the role of courts are as wide and varied as the questions posed above, and the limits of judicial authority are enforced in no small part through doctrines of justiciability, including standing. The doctrine of standing is the overarching boundary of judicial authority—it demands a litigant fulfill its requirements as a prerequisite to forum

1. *See, e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) ("The Supreme Court has described standing as a 'sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'").

2. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (requiring three elements to satisfy the standing doctrine: (1) injury in fact; (2) causation by defendant; and (3) the ability of the court to provide redress).

3. *See, e.g.*, United States v. Carolene Prod. Co., 304 U.S. 144, 150–53 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.").

4. *Id.*

entry.[5] In the United States, this controversy first played out in *Marbury v. Madison*, the case in which the Supreme Court defined its jurisdiction and set forth the core premise from which American jurisprudence has since sprung.[6] In that case, the Supreme Court limited its own authority in accordance with Article III of the U.S. Constitution and interpreted its role as the stringent enforcer of boundaries between the three branches of American government.[7] Building on this original decision, the judge-made doctrine of standing has developed to restrict entire classes of cases, including those claims based on statutory grievances granted by Congress but that in practice lack the concreteness of injury required by current judicial interpretation to satisfy the case or controversy requirement.[8]

During the ratification debates around the U.S. Constitution, political theorist and philosopher Alexander Hamilton argued for a powerful national judiciary with the authority of judicial review when he said that "the courts were designed to be an intermediate body between the people and the legislature . . . to keep the latter within the limits assigned to their authority."[9] To Hamilton and many other founders who experienced the heavy handedness of unchecked executive power, a court empowered to enforce structural limitations on government exercises of authority was of vital importance.[10] In other words, Hamilton understood the purpose of the judiciary to be a lubricating power for democracy, empowered to prevent the aggrandizement of power unto the executive or legislature thereby safeguarding liberty.[11] He viewed the Supreme Court as the arbiter of constitutional complaints, the institution tasked with resolving conflicts between political subdivisions, and the vindicator of rights not necessarily beloved by an impassioned majority.[12]

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5. *See* F. Andrew Hessick, *Understanding Standing*, 68 VAND. L. REV. EN BANC 195, 196 (2015) (discussing standing as an affirmative limit on the exercise of judicial power).

6. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (determining that access to federal courts is to be limited to the specific cases or controversies permitted explicitly or implicitly in Article III).

7. *Id.*

8. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–78 (1992) (denying plaintiff standing based solely on a citizen suit provision because the injury asserted was speculative and lacked the imminence required by the constitutional limitation on access to the federal judicial forum). *But see* Massachusetts v. EPA, 549 U.S. 497, 498–99 (2007) (allowing states special solicitude as quasi-soverigns to sue even if a private plaintiff in the same position would be precluded by the doctrine of standing).

9. THE FEDERALIST NO. 78, at 145 (Alexander Hamilton) (Andrew Hacker ed., 1976).

10. *See id.* at 143 (describing the importance of the judiciary to enforce the Constitution's structural limitations on exercise of power not specifically within the jurisdiction of each branch of government).

11. *See id.*

12. *See id.* at 145.

Practically, courts serve as mediators between the people and government actors.[13] But a predicate inquiry to accessing a judicial forum is whether the case at bar is justiciable in accordance with the limitations imposed on courts by external constitutional or statutory constraints, or by jurisprudential limitations on the exercise of judicial power.[14] The inquiry of justiciability asks whether courts are the appropriate forum for the settlement of a controversy.[15] The doctrines of ripeness, mootness, and standing are all wrapped up in this inquiry, which has been interpreted to contain various limitations describing the circumstances under which the discharge of judicial power is appropriate.[16] These limitations on the exercise of judicial power differ from society to society; in the rules of justiciability, there is no "one size fits all" approach.[17]

The American story of justiciability has not been static over the course of history. The doctrines that set forth the limitations on court access have ebbed and flowed throughout many distinct moments of American legal history, depending on the era-specific needs of the society and the necessary and proper role for the court in a particular political or legal moment.[18] Some commentators and theorists point to Article III of the U.S. Constitution as the foundation of the doctrine of standing,[19] while others point to Anglo–American history and tradition to explain the ascendance of the doctrine. In Israeli society, the High Court of Justice has never had a constitutional constraint on the exercise of judicial power. From the time of its birth, Israel's founders expected courts to act forcefully and powerfully to contribute common law rulings to the mishmash body of law that prevailed in the nascent state.[20]

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13. *See id.* ("[C]ourts were designed to be an intermediate body between the people and the legislature.").

14. For example, the doctrine of standing, mootness, and other justiciability questions precede access to a judicial forum. These doctrines are affirmative reflections of the position a court holds in a society, and are rooted in constitutional and jurisprudential limitations on the exercise of judicial power. *See* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372–73 (1988) (discussing the results of a world without standing requirements).

15. *Justiciability*, CORNELL LAW SCH., https://www.law.cornell.edu/wex/justiciability (last visited Feb. 27, 2019) [https://perma.cc/3PGG-QQ74] (archived Jan. 5, 2020).

16. *Id.*

17. *See, e.g.*, THE POLITICAL ROLE OF LAW COURTS IN MODERN DEMOCRACIES 6–30, 108–28, 199–215 (Jerold L. Waltman et al. eds., 1988) (cataloguing the role of courts in major modern democracies, including the United States, England, Japan, and others).

18. Winter, *supra* note 14, at 1394–95 (describing the evolution of the standing doctrine over the saunter of American legal history).

19. *See* Scalia, *supra* note 1, at 882–84 (describing standing as part and parcel of Article III).

20. *See* G. Tedeschi & Y.S. Zemach, *Codification and Case Law in Israel*, *in* THE ROLE OF JUDICIAL DECISION AND DOCTRINE IN CIVIL AND MIXED JURISDICTIONS 272–79 (Joseph Dainow ed., 1974) (describing how the Israeli court system began as "one of the 'overseas colonies' of the common law.").

Because of the importance of courts in the adjudication of controversies and the interdependence of courts and other democratic institutions, the standing inquiry is wrapped up in more fundamental questions dealing with the role of courts in a democracy, and questions about the scope of countermajoritarian authority held by the court. Disagreements about justiciability between formalists and functionalists are common in the many societies that have considered the appropriate role for courts in society, and by extension the burden a presumptive plaintiff must fulfill to access a judicial forum.[21]

Each of the world's democracies is unique in countless ways; chief among these differences are varied views on the role of courts in society. Some conceive of courts as cloistered bodies with limited discretion to make injured parties whole in accordance with the law.[22] Others task courts with policing the boundaries between various branches of government.[23] Still others think of courts as the countermajoritarian venue for adjudication of grievances suffered by an unpopular minority at the hands of a tyrannical majority.[24] Furthermore, the way in which a judiciary interacts with society is not static and is liable to shift based on external political pressures,[25] changes in bench membership,[26] and through natural evolution of a society and its legal culture.[27]

This Note posits that the doctrine of standing, which poses a barrier to entry to a judicial forum, is restricted and loosened based upon the health of the democratic process, the era-specific need for a countermajoritarian institution to uphold the core values of the society

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21. *See generally* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE (Kenneth M. Holland ed., 1991) (comparing the role of courts in eleven countries).

22. *See, e.g.*, Hiroshi Itoh, *Judicial Activism in Japan*, *in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE, *supra* note 21, at 189, 195 ("Judicial review and case law have been firmly established in Japan, but the country is still *run* by statutory law.") (emphasis added).

23. *See, e.g.*, Scalia, *supra* note 1, at 881 ("[T]he judicial doctrine of standing is a crucial and inseparable element of [the principle of separation of powers]."); *see also* Lujan v. Defenders of Wildlife, 504 U.S. at 555, 567–69 (1992) (using the requirement of redressability to emphasize that courts cannot bind agencies with rulings if the agency itself is not a party).

24. *See, e.g.*, Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (requiring federal courts to administer local school board integration plans as to ensure *equity* amongst African-American and white students and to remedy failure of the political branches to address long-standing discrimination).

25. Massachusetts v. EPA, 549 U.S. 497 at 498–99 (2007) (holding that a state had standing to sue the federal government for 'inaction' for its refusal to regulate car emissions which had been tied, by science, to global warming, and rising sea levels).

26. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1743 (1999) (analyzing the Court's reasoning on five standing cases in which the votes of the justices aligned perfectly with otherwise political affiliations).

27. *Compare* Flast v. Cohen, 392 U.S. 83, 106 (1968) (granting standing for taxpayer to sue government for unconstitutional use of taxpayer resources), *with Lujan*, 504 U.S. at 578 (denying standing to a litigant who claimed injury under congressionally granted citizen-suit provision).

as enshrined in superlegislative texts,[28] and the society's need for an institution to "bridge the gap" between law and society.[29] As a preliminary inquiry, standing is an outward expression of external constraints placed on courts by charter texts (constitutions) and internal constraints imposed by judges wary of overstepping their roles as apolitical adjudicators. The malleability of the doctrine is a testament to the flexible role many societies expect their courts to play in the development of governments through kind-specific exercises of particular power. Part I contends that broad access to courts, and thus, relaxed standing limitations, are common at the genesis of young democratic nations that depend on courts to participate in the development of a legal culture and framework capable of effectively representing the majoritarian preferences in a way that reflects broader social values codified in foundational texts (i.e., constitutions or their equivalents). Part II will lay out a narrative of the development of the American doctrine of standing that will reveal that as the American government system expanded and matured with the development of the administrative state, the doctrine of standing was tightened. Part III describes the development of the Israeli judiciary and the Israeli conception of standing, which is in stark contrast to the doctrine's relatively restrictive application in the American judicial system. And Part IV predicts that as the Israeli society and legal system continue to evolve, at least some aspects of the standing doctrine will be amended to restrict access to judicial forums.

II. THE DEVELOPMENT OF THE AMERICAN DOCTRINE OF STANDING

The U.S. Supreme Court has developed a standing doctrine premised on the text of the Constitution which limits the kinds of "[c]ases" and "[c]ontroversies"[30] the Supreme Court is empowered to adjudicate. As interpreted by the Supreme Court, standing acts to preclude forum access for parties whose attenuated or generalized grievances are better addressed by the political process.[31] Limiting cases granted access to a court, the argument goes, is not only commanded by the Constitution but also protects the role of the court

28. For example, basic laws or constitutions which are viewed as the supreme law, or the "law above the law" against which all acts of government can be compared to determine legality.

29. AHARON BARAK, THE JUDGE IN A DEMOCRACY 177 (2006) (describing the judicial power as a gap-filling authority which can and should mediate between lawmaking branches and the citizenry).

30. U.S. CONST. art. III, § 2, cl. 1.

31. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 738 (1984) ("[F]ederal courts may exercise power only in the last resort and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process.").

as a branch of government separate from the overtly political branches, thereby protecting the independent judiciary from charges of politicization.[32] Though Article III of the Constitution does not explicitly limit access to the judiciary by its text, the Supreme Court later identified a constitutional limitation on the exercise of judicial power in Article III.[33]

In his formative article on the doctrine of standing, then-Judge Antonin Scalia noted:

> There is no case or controversy, the reasoning has gone, when there are no adverse parties with personal interest in the matter. Surely not a linguistically inevitable conclusion, but nonetheless an accurate description of the sort of business courts had traditionally entertained, and hence of the distinctive business to which they were presumably to be limited under the Constitution.[34]

However, not all scholars find the originalist interpretation of the Constitution sufficient to bind the courts, and instead consider standing to be a function of *stare decisis* and constitutional common law development rather than textual dictates.[35] Professor Cass Sunstein notes "[t]he first reference to 'standing' as an Article III limitation can be found in *Stark v. Wickard*, decided in 1944."[36] Further, Sunstein documents that "injury in fact" did not exist as a constitutional limit on the discharge of judicial power until *Barlow v. Collins* in 1970.[37]

The role of standing in granting litigants access to American federal courts has long been castigated as a fundamentally unintelligible doctrine[38] that is easily malleable by members of the judiciary to advance their ideological agendas.[39] Even after the famous case of *Lujan v. Defenders of Wildlife*, in which the Supreme Court

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32. *See, e.g.*, Scalia, *supra* note 1, at 892 ("The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon when and at whose instance they are permitted to address them.").

33. *See infra* Part I.B.

34. Scalia, *supra* note 1, at 882.

35. Cass R. Sunstein, *What's Standing After Lujan—Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992) ("The relevant question is instead whether the law– governing statutes, the Constitution, or federal common law–has conferred on the plaintiffs a cause of action.").

36. *Id.* at 169.

37. *Id.*

38. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983).

39. *See* Richard H. Fallon, Jr., *How to Make Sense of Supreme Court Standing Cases—A Plea for the Right Kind of Realism*, 23 WM. & MARY BILL RTS. J. 105, 105 (2014) (arguing that the view that Supreme Court Justices manipulate legal doctrine to further their own political ideologies would not be so prominent if it was baseless); *see also* Henry P. Monaghan, *Constitutional Adjudication: The Who and When,* 82 YALE L.J. 1363, 1380 (1973) (arguing that the standards of standing have become "confused and trivialized"); *see also* Winter, *supra* note 14, at 1372 ("[T]he concept of standing is 'among the most amorphous in the entire domain of public law.'").

dramatically announced a concise, reformulated standing test, academics and lower court judges have expressed confusion about the disorderly doctrine promoted by the Supreme Court as clear and settled law.[40] As the doctrine of standing developed in successive cases, what emerged was a tangled web of incoherent doctrine whose application differs based upon the identity of the parties,[41] the statutory significance of the claim,[42] and even the statistical probability of an actual injury occurring.[43] However, notwithstanding the complexity of the doctrinal scheme, the general consensus remains that it is comparatively difficult to gain access to a federal judicial forum for the adjudication of controversies that are borne from anything less than cut-and-dried arm's length interactions.[44]

Standing did not always exist as a tidy three-part doctrine. Rather, the Supreme Court has constricted and expanded the doctrine to accommodate era-specific needs of society as to ensure that a venue exists to adjudicate controversies arising from rights granted by Congress or administrative regulations.[45] The next subpart reviews several of the distinct eras of American legal history during which the doctrine of standing was changed, reinterpreted, or amended.

A. *Standing in the Nascent Nation from 1788–1921*

At the time of the founding, the doctrine of standing had yet to emerge.[46] The inquiry that preceded the exercise of judicial power was whether Congress or the common law had granted a private right of action to a particular class of litigants. From the founding until the 1920s, no alternative federal forum existed that could exercise judicial power. The administrative state during this era had control over only

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40. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (laying out the three requirements for standing); *see also* Sunstein, *supra* note 35, at 166 (lamenting the *Lujan* decision as one that further obfuscates the doctrine of standing).

41. Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 170–75 (noting that after Lujan, a party must show that they personally have a stake in the outcome of the litigation).

42. *See* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38–39 (1976) (noting that as interpreted by the court, a plaintiff must have a significant stake in litigation for standing to be achieved).

43. *See* Clapper v. Amnesty Int'l, 568 U.S. 398, 422 (2013) (finding that speculative harms are not sufficient to meet the Article III standing requirements, and instead, a plaintiff must show a high probability of a harm occurring in order to access a federal judicial forum).

44. *See, e.g.*, *id.*

45. *See* Akhil R. Amar, *Law Story*, 1025 FACULTY SCHOLARSHIP SERIES 688, 703 (1989).

46. *See* Winter, *supra* note 14, at 1394–95 ("[T]he English, colonial, and post-constitutional practices suggest that the contemporaneous understanding of the "case or controversy" clause considered as justiciable actions concerning general governmental unlawfulness, even in the absence of injury to any specific person, and even when prosecuted by any common citizen with information about the alleged illegality.").

limited financial regulation and the military apparatus.[47] During this time, courts had an open-door policy for redress of grievances so long as the law granted an affirmative right for an individual to enter the court for a judicial resolution of a statutory, common law, or constitutional right.[48]

To access a court, plaintiffs had to plead a cause of action under an existing statute created by Congress and the remedy requested had to be within the power of the court to grant.[49] Inherent in this approach is a strain of legal positivism that prioritized giving effect to the will of Congress. From its earliest decision, the Supreme Court has consistently recognized the principle that legal wrongs require judicial remedies.[50] In *Marbury v. Madison*, the Supreme Court's first chief justice endorsed a longstanding English common law view of judicial forum access with an often-quoted segment of dictum that has come to define that era's view on the doctrine of standing:

> It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . For it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.[51]

This opinion recognized the role of courts as the appropriate venue for adjudicating controversies and reviewed the role played by courts in safeguarding the rule of law:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the

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47. *See* Paul P. van Riper, *The American Administrative State: Wilson and the Founders–An Unorthodox View*, 43 PUB. ADMIN. REV. 477, 479 (1983) ("A simple, hierarchical departmental structure was quickly erected under the president by the first Congress, which also explicitly gave the president the power of removal, at best only implied in the Constitution.").

48. *See generally* Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997) (discussing the connection between early American conception of justiciability and the English system which allowed adjudication of harms so long as the legislature had provided for a right).

49. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (declining to exercise original jurisdiction over the claim because the Constitution required such remedies be sought first at a lower court).

50. *See id.* at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainty cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). However, it is also important to note that not all legal wrongs necessarily have a judicial remedy. For example, 42 U.S.C. §1983 provides monetary damages against state and local officers who violate constitutional rights, and *Bivens* provides a parallel right against federal officers, but the requirement imposed by court to prove not only the fact of a violation, but also proof of fault often precludes even the most deserving plaintiff of a remedy for the constitutional tort perpetuated against her. *See* John C. Jefferies, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999).

51. *Id.*

> United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[52]

The *Marbury* opinion, often cited as the case establishing the Supreme Court's unique authority to review government action for compliance with constitutional commands, was also the most acclaimed early Supreme Court case recognizing the prudential limitations on the exercise of the judicial power.[53]

B. *The Gilded Age of Agreement from 1921–1930*

Beginning in 1920, the doctrine of standing arose as the justices interpreted Article III to contain an insinuated limit on the exercise of judicial power.[54] In a venerated empirical study of the doctrine of standing throughout American history, Professor Daniel E. Ho and coauthor Erica L. Ross define the period of 1920–1930 as a time of judicial unanimity.[55] The authors argue that the unanimity may have been less ideological and more rooted in a gentlemanly tradition of judicial deference, which viewed dissenting and concurring opinions as appropriate only in cases of fundamental disagreement.[56] Further, the authors note that perhaps the agreement between conservative and progressive justices was rooted in a convergence of interests between progressives and conservatives.[57] Progressives who sought to insulate administrative action from judicial challenges found common ground with conservatives concerned with protecting "*Lochner*ian" interest in precluding judicial review for non–common law interests.[58] Lastly, the authors argue that practical concerns about managing a rapidly increasing mandatory workload at the Supreme Court motivated the agreement to limit judicial access.[59]

C. *The New Deal to the Modern Era from 1930–1992*

If the 1920s set the stage, the 1930s provided the standing doctrine with its opening salvo—its introduction to the legal world as

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52. *Id.* at 163–66.
53. *See id.* at 174–77 (holding that though withholding the commission was unconstitutional, the Supreme Court could not grant the requested remedy as a matter of constitutional and jurisprudential limitation on authority).
54. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Emperical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 634 (2010) (noting that during this period, only eight standing cases were contested, whereas thirty-five cases that expressly discussed standing were decided unanimously).
55. *See id.*
56. *Id.* at 635.
57. *Id.*
58. *Id.*
59. *Id.* at 637.

a powerful doctrine that transformed the requirements needed to access a judicial forum. The sea change of the doctrine of standing began with the rise of the administrative state in the aftermath of the Great Depression.[60] From the brink of economic ruin, the modern American administrative state was birthed as the "fourth branch" of government in the 1930s.[61] Tasked with administering the rapid expansion of new rights precipitated by the New Deal's reimagination of the American government, much of the power granted to the nascent agencies was wrestled away from the legislative and judicial branches. James Landis, an icon of early American administrative law, played a pivotal role in the development of the regulatory state and wrote a book about his experiences.[62] In that book, Landis describes the administrative process and remarks on the inadequacy of the former functioning of government, and the superiority of administrative agencies to ensuring effective administration of congressional mandates.[63] Landis also recognizes that the New Deal's expansion of federal government precipitated a change in the way controversies were adjudicated with the "administrative process" replacing the judiciary as the primary form of legal implementation.[64]

With the rapid rise of the administrative state in New Deal legislation came an increase in adjudicative venues empowered to hear cases that would formerly have been resolved in a judicial forum.[65] Federal administration of justice was no longer exclusively within the domain of Article III courts, Article II agencies could play a role in hearing cases and controversies, and this expansion lessened the necessity of access to courts in the first instance. Further, progressive Supreme Court justices, concerned with waves of facial attacks on New Deal legislation and regulatory reforms, saw heightened standing as a means of limiting court access for ideological plaintiffs.[66] Justices Brandeis and Frankfurter, seeking to "insulate progressive and New Deal legislation from frequent judicial attack . . . repudiated constitutional attacks on legislative and administrative action by

60. *See* Winter, *supra* note 14, at 1456 ("The liberals were interested in protecting the legislative sphere from judicial interference. Their goal was to assure that the state and federal governments would be free to experiment with progressive legislation.").

61. *See* van Riper, *supra* note 47, at 479–85.

62. *See* Louis L. Jaffe, *Foreword* to JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS xxi (1938) (reflecting on Landis' innovation in the academic field of administrative law).

63. *Id.* at 1.

64. *See generally id.* (discussing the rise of the administrative state in light of the separation of powers doctrine).

65. Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1589–90 (2013) (explaining the birth of adjudicative agencies as marking a shift in the power dynamic between Article III courts and Article II agencies, but recognizing that administrative action remained subject to judicial review).

66. *See* Winter, *supra* note 14, at 1443–45.

invoking justiciability doctrines."[67] The key doctrine cited by the progressive justices was a requirement that the plaintiffs have standing to invoke the judicial power to "invalidate democratic outcomes."[68]

The central argument advanced by proponents of heightened standing was that the doctrine exists to enforce the structural limitations of the Constitution.[69] An early precursor to the modern doctrine of standing was considered in *Frothingham v. Mellon* in which the Supreme Court held:

> The party who invokes the [equity] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . If a case for preventative relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official . . . . Here the parties plaintiff have no such case. Looking through the forms of words to the substance of their complaint, it is merely that officials of the executive . . . will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy.[70]

In this case, the Supreme Court recognized a limit to judicial authority and refused to find standing for the plaintiff who simply wished to challenge a political determination of a government official.[71] The Supreme Court, particularly, held that the plaintiffs had not asserted a sufficient injury-in-fact for a court to exercise its power.[72] It was this case that would later come to be seen as a foundational precedent for the doctrine of standing in its modern form.

D. *The Modern Standing Doctrine*

Standing determines whether a particular litigant has access to a judicial forum as of right. Underlying this inquiry is the question of whether there is a cognizable legal interest that a court can effectively vindicate.[73] To make this case, a litigant must plead facts sufficient to give a judge reason to believe that the harm asserted is actual, is caused by the defendant, and is capable of judicial resolution.[74] Though clear in principle, the application of this concept is much more convoluted, since the questions necessarily implicate the subjective

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67. *See* Sunstein, *supra* note 35, at 179–80.
68. *Id.* at 180.
69. *See, e.g.*, Scalia, *supra* note 1.
70. Frothingham v. Mellon, 262 U.S. 447, 488–89 (1923).
71. *Id.* at 486–89.
72. *Id.*
73. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) ("[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").
74. *See id.*; *see also* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222–23 (noting that the standing inquiry determines whether the plaintiff has asserted a cognizable right and is fairly seen as a substantive judicial inquiry).

views of the judge adjudicating the controversy, and the stringency of their application of the tripart requirement.

In *Sierra Club v. Morton*, the Supreme Court rejected an attempt by a conservation organization to halt development permits because the group was unable to show a particular harm and instead asserted vague, general associational interests in environmental protection.[75] The Supreme Court determined that the link between the plaintiffs and the asserted injury was too attenuated to justify adjudication and dismissed the case for lack of standing.[76] In *Allen v. Wright*, the Supreme Court held that parents of African American children could not sue the IRS for failing to enforce a policy revoking the tax-exempt status of schools, which pulled white students away from public schools at the expense of diversity.[77] The Supreme Court held that the line of causation between the Internal Revenue Service exemption policy and the *de facto* resegregation was too attenuated for judicial resolution and also was a general grievance better suited for resolution in the political arena.[78]

And in *Clapper v. Amnesty Int'l USA*, the Supreme Court denied the plaintiff standing to challenge a provision of the Federal Intelligence Surveillance Act[79] that allowed the attorney general to obtain foreign intelligence by surveilling foreign targets. In ruling against the plaintiffs, the Supreme Court held that fear of surveillance alone did not grant standing for two reasons; first because plaintiff's fear of surveillance was not certainly impending since surveillance powers granted by Congress were enforced according to the independent judgment of a mediating decisionmaker.[80] Second, the Supreme Court noted that the costly measures taken by the plaintiffs to avoid surveillance were self-inflicted and were thus not fairly caused

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75. *See* Sierra Club v. Morton, 405 U.S. 727, 740–41 (1972) (finding no standing for plaintiffs promoting ideologies without an actual injury).

76. *Id.* ("The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process. The principle that the Sierra Club would have us establish in this case would do just that.").

77. Allen v. Wright, 468 U.S. 737, 739–40 (1984).

78. *Id.* at 756–57.

79. *See* Foreign Intelligence Surveillance Act of 1978 (FISA) § 702, 50 U.S.C. § 1881a (2018) (The U.S. Attorney General may surveil foreign persons for up to a year if jointly agreed upon with the Director of National Intelligence).

80. *See* Clapper v. Amnesty Int'l, 568 U.S. 398, 418 (2013) ("For the reasons discussed above, respondents' self-inflicted injuries are not fairly traceable to the Government's purported activities under § 1881a, and their subjective fear of surveillance does not give rise to standing.").

by the defendant.[81] The aforementioned cases reflect the difficultly many plaintiffs have accessing a judicial forum to adjudicate controversies based on ethereal harms.

The prudential limit to judicial access is imposed by the Supreme Court itself; this limitation was developed over the centuries as a recognition that judicial discretion should be exercised carefully and with due deference to political branches whose determinations ostensibly reflect majoritarian preference.[82] The intellectual underpinnings of this restraint can be seen as far back as the ratification debates.[83] In Federalist 78, Hamilton argued that it would be the duty of Article III courts to "declare all acts contrary to the manifest tenor of the Constitution void."[84] This oddly phrased sentence notably does not say the courts will "declare all acts contrary to the Constitution void," but rather implies a restraint in that judicial review will be exercised only when the act of a legislature violates the clear meaning of the text.[85] These limits on judicial access are self-imposed limitations and are waivable by Congress.[86] Primarily, standing finds its foundation in limits imposed by the "[c]ases and [c]ontroversies" clause of Article III,[87] which explicitly limits the exercise of judicial power to specific cases between parties, or to particular classes of controversies that are clearly described in the text of Article III.[88] This is often described as the "constitutional limit" to judicial access.[89]

There are two main perspectives regarding the appropriateness of broadly granting standing for plaintiffs to access judicial forums. Formalists believe that the text of Article III of the Constitution, paired with the two other "vesting clauses," restricts access to a judicial forum to particular plaintiffs asserting particular wrongs, and leaves broad controversies to the legislative branch.[90] In contradistinction, functionalists contend that the Constitution places no restriction on the role of courts in adjudicating generalized harms and that courts should exercise maximal jurisdiction in deciding the appropriate

81. *Id.*

82. *See generally* Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727 (2009) (outlining the history of the prudential limits of standing).

83. *See, e.g.*, Hamilton, *supra* note 9, at 144.

84. *Id.* Sunstein, *supra* note 35, at 179–80.

85. *See* Sohn, *supra* note 82, at 732 (explaining that prudential standing requirements may be waived by Congress, while Constitutional standing requirements cannot).

86. *Id.* at 751.

87. U.S. CONST. art. III, § 2, cl. 1.

88. F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 674 (2017).

89. *See id.* (explaining that the Supreme Court has found limits on access to courts based on the Constitution).

90. *See generally* Scalia, *supra* note 1 (describing the formalistic perspective as to the role of Article III standing in safeguarding the American separation of powers system).

outcome in even the most generalized controversies.[91] Constitutional formalists argue that stringent standing requirements protect the integrity of the three-branch system by precluding democratically unaccountable courts from reviewing cases or controversies for which political branches are better positioned to resolve.[92] Furthermore, proponents of this theory note that restricting court access to only those plaintiffs that meet the particular standards of the doctrine funnels energy into the machinery of democracy, encourages strong legislative responsiveness, and reserves an independent role for the judiciary outside of the hot-button political controversy of the day.[93] Those precluded from court access are not up a proverbial creek, but instead—the theory goes—must advance their interests through the legislative process in coalition with other similarly situated nonplaintiffs.[94]

Before his appointment to the Supreme Court, then-Judge Scalia argued that construing standing broadly will "inevitably produce . . . an overjudicialization of the process of self-governance."[95] Under this theory, broad standing would act to position courts, rather than legislatures, as the preeminent forum for the development of appropriate solutions for controversies that impact the general population.[96] Scalia adds that "the degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them."[97] In other words, standing plays a gatekeeping role in excluding court access to political controversies and those controversies that invite judges to perform law-making rather than law-applying function. Scalia feared that broad standing would inevitably open courts to political quandaries that would tarnish the independence of the judiciary, and position

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91. *See* Kent H. Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 674–75 (2016) (comparing the shortcomings of both formalism and functionalism in light of Constitutional interpretation).

92. *See* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 473 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show "injury in fact" resulting from the action which they seek to have the court adjudicate.").

93. *See* Scalia, *supra* note 1; *see also* Bennett v. Spear, 520 U.S. 154, 162 (1997) ("Like their constitutional counterpart, these judicially self-imposed limits on the exercise of federal jurisdiction are founded in concern about the proper—and properly limited—role of the courts in a democratic society.") (citations omitted).

94. John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 298–300 (2016) (describing the difference between prospective rule making and retroactive rule application as the primary distinction between judicial and legislative authority).

95. Scalia, *supra* note 1, at 881.

96. *Bennett*, 520 U.S. at 891.

97. *Id.* at 892.

judges as little more than superlegislative policymakers debating remedies for generalized harms to the general public.[98]

Conversely, proponents of broad access to courts argue that restrictive standing prevents courts from intervening in situations in which an injury is widely shared, thereby denying redress for aggrieved parties who may be marginalized in a majoritarian political system.[99] In *United States v. Students Challenging Regulatory Agency Procedures*, this functionalist perspective prevailed, as the Supreme Court held that "[to] deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[100] Couched in the "injury-in-fact" language developed by the Supreme Court over many successive standing cases, the functionalists broadly expanded jurisdiction to adjudicate even generalized harms.[101] Under a broad standing doctrine, courts, as countermajoritarian institutions, are positioned to address even tangential or inconsequential harms that otherwise would go unaddressed by the legislature.[102]

As discussed above, the doctrine of standing has been applied differently during several iterations of American history.[103] Each shift in the doctrine's applicability appears to be designed to match the political and legal needs of a changing society whose views on the role of courts in society shifted as circumstances changed.[104] By the mid-1990s, the new proponents of restricting court access were often judges concerned with enforcing the formal structure of the Constitution.[105] And in 1992, Justice Scalia was chosen by the Supreme Court to write an opinion that is oft cited as the decision that carved the modern

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98. *Id.*

99. *See* Flast v. Cohen, 392 U.S. 83, 111 (1968) (Douglas, J. concurring) (noting that federal courts should serve as adjudicatory bodies rectifying the power differential between harmed litigants and powerful governments).

100. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973).

101. *Id.*

102. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1986) (describing courts as counter-majoritarian institutions focused on vindicating the rights of minorities and oppressed members of society).

103. *See supra* Part I.B.

104. *See, e.g.*, Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*, 102 MICH. L. REV. 689, 689–90 (2004) (describing the doctrine of standing as a *modern* limitation on the cases or controversies granted access to a judicial forum).

105. *See* C.K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal Courts*, 53 J. POLITICS 175, 178–83 (1991) (finding that Republican appointed justices are more likely to deny standing to "underdog" plaintiffs).

standing doctrine into stone with its three tidy requirements: (1) injury-in-fact, (2) causation, and (3) redressability.[106]

In *Lujan v. Defenders of Wildlife*, the Supreme Court effectively reworked the rules of standing in American courts and forced a sea change of standing requirements for access to federal courts.[107] The plaintiffs in *Lujan* brought a citizen suit under the Endangered Species Act of 1973 (ESA), which explicitly granted private citizens a right-of-action against the government for failure to comply with the mandates of the legislation.[108] The ESA required the government to ensure that expenditures of government finances did not pose a threat to the existence of any endangered species.[109] The Department of the Interior initially interpreted the statute to require an assessment of the impact of international expenditures on endangered species.[110] Later, the agency rescinded the regulation and precluded consideration of foreign expenditures under the ESA.[111] Plaintiffs sued the government, claiming that the government's failure to consider international expenditures would undoubtedly harm endangered species inhabiting environments that the plaintiffs planned to revisit.[112] The Supreme Court determined that because the plaintiff could not identify a specific date of return to observe the endangered species, their claim was void.[113]

The *Lujan* opinion did not nullify the plaintiff's claim based *solely* on a glaring lack of a concrete injury.[114] Rather, the Supreme Court struck down the very statutory vehicle that granted a procedural injury which purported to allow private litigants to sue for the executive's failure to enforce laws a certain way. In other words, the opinion struck down Congress's ability to grant procedural standing to citizens unless they fulfilled the requirements of Article III. In Justice Scalia's construction, the concrete injury requirement of the doctrine of standing contained important separation of powers significance that disallowed Congress from converting generalized interests into specific rights inducible in the court.[115] The Supreme Court was concerned that such *carte blanche* delegations permit "Congress to transfer from the

106. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992); *see also* Sunstein, *supra* note 35, at 164–65 (emphasizing the impact of Justice Scalia's standing requirements in *Lujan*).

107. *See Lujan*, 504 U.S. at 560–63 (describing the requirements of standing in federal courts).

108. *Id.* at 557–58.

109. *See* 16 U.S.C. § 1536(a)(2) (1988).

110. *See Lujan*, 504 U.S. at 555–61 (finding that the FWS and NMFS promulgated the joint regulation extending § 7(a)(2) to actions abroad, but the Interior Department later modified that position).

111. *See id.*

112. *Id.* at 563–64.

113. *Id.* at 563–64, 567.

114. *Id.* at 568.

115. *Id.* at 559–60.

President to the courts the Chief Executive's most important Constitutional Duty, to 'take care that the Laws be faithfully executed.'"[116] The Supreme Court went on to draw a stark distinction between cases in which a plaintiff has a specific, personal interest in a case, and those cases in which the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation of someone else."[117] In *Lujan*, the Supreme Court built upon its past decision in *Association of Data Processing Service Organizations v. Camp*[118] and clearly defined the factors required to allow a potential litigant access to federal court.[119]

At a minimum, a litigant is required to show that their controversy qualifies for adjudication under the "Case or Controversy" prong of Article III.[120] To meet this standard, the litigant must have: (1) suffered an injury, which must have been (2) caused by the defendant, and it must (3) be within the ability of the court to provide a solution, commonly known as "redressability."[121] The development of the standing doctrine, brought about in the lucid *Lujan* opinion, clarified what had yet been left unclear; an injury-in-fact, according to the Supreme Court, must be something more than simply a legal right.[122] A plaintiff must show that they have suffered a tangible injury.[123] The general requirements set out in *Lujan* are augmented by the Supreme Court's decision in *Hunt v. Washington State Apple Advertising Commission* in which the Supreme Court developed a three-part test to determine the requirements of associational standing.[124]

> An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested require the participation of the individual members of the lawsuit.[125]

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116. *Id.* at 556 (quoting U.S. CONST. art II § 3).

117. *Id.* at 562–63.

118. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 686 (1973) (setting forth a two-part test requiring that plaintiff seeking access to federal court show "injury in fact" and that the "interest sought to be protected . . . be . . . within the zone of interest").

119. *See Lujan*, 504 U.S. at 560–63.

120. *Id.*

121. *Id.* (setting forth the requirements of the eponymous *Lujan* three-part standing test).

122. *Id.*

123. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 176–79 (ruling that a general taxpayer had not standing to force the CIA to reveal expenditures because such an injury is generalized).

124. Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (expounding on the *Lujan* factors for standing).

125. *Id.* at 343.

These doctrines, rooted in Article III and in common-law limitations have limited access to the courts.[126] Now, regulated industries are given more access to courts than are citizens who claim generalized harms or express merely ideological concerns.[127] For all of the clarity provided by the *Lujan* opinion, the Supreme Court has often varied in its construction and application of the test to cases before it, arriving at distinct conclusions depending on the way in which it views the demands of the various factors on the individual parties before the Supreme Court.[128] For example, in *Massachusetts v. EPA*, the Supreme Court determined that the EPA's failure to effectively regulate greenhouse gases had sufficiently caused a harm to the state of Massachusetts in the form of lost coastline.[129] Though the harm of lost coastline was widely shared, the Supreme Court described the special sovereign status of the state together with measurability of lost coastline as sufficient injuries to convey standing on the Supreme Court to adjudicate the controversy.[130]

Notwithstanding the aberrations of the doctrine's application, over the past twenty years, the Supreme Court has continued its saunter in stringently tightening standing requirements, thereby restricting access to federal judicial forums.[131] *In United States v. Richardson*, the Supreme Court quoted from a famous standing case known as *Ex parte Lèvitt* to describe the Supreme Court's historic requirement that a plaintiff assert a sufficiently tangible injury to access a court:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct

126. *Id.*

127. The limits on associational standing preclude an association from merging the otherwise generalized harms of membership to access a judicial forum. While this limit seems insurmountable, associations need find only a single representative plaintiff who fulfills the constitutional standing limits to access the forum.

128. *See* Heather Elliott, *Standing Lessons: What We Learn When Conservative Plaintiffs Lose under Article III Standing Doctrine*, 87 IND. L.J. 551, 552–53 (2012) (observing that conservative causes have traditionally been granted standing more often, but how that has changed); *Compare* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 488–90 (1982) (taxpayers are without standing to sue), *with* Massachusetts v. EPA, 549 U.S. 497, 538 (2007) (a state has special solicitude to sue on behalf of its citizenry).

129. Massachusetts v. EPA, 549 U.S. at 420–23.

130. *Id.* at 518–20.

131. *See, e.g.*, Woolhandler & Nelson, *supra* note 104, at 689–90 (noting the shift in stringency with which the modern Supreme Court interprets the constitutional limits of standing as compared with the period of time between the founding and the modern era).

> injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.[132]

Implicit in the *Ex parte Levitt* reasoning is concern for separation of powers. Before a plaintiff may invoke the constitutional judicial power thereby putting a coequal branch of government at odds with its peer, a sufficient injury must be pled.[133] Such is the approach of formalists who view stringent standing as being required constitutionally in addition to being good policy.[134]

III. THE DEVELOPMENT OF THE ISRAELI DOCTRINE OF STANDING

The Supreme Court of Israel is more open to, and, indeed, invites citizen challenges to the legality of official government action.[135] Further, the High Court of Justice (HCJ or the High Court) is much less prone to deference to executive and legislative action than its American counterpart.[136] Whereas American courts defer to reasonable administrative action in accordance with the commands of the *Chevron v. NRDC*[137] case, Israeli courts hold that the construction of Israeli statutes is uniquely within the realm and responsibility of the judiciary.[138] Armed with the sword of tremendous jurisdiction, and the shield of judicial supremacy, the judiciary in Israel has amassed unto itself the power to be the ultimate and final arbiter of Israeli values and the final decider on the legality of any law.

Judicial—and, some would say, political—activism is a natural function of the Israeli judiciary.[139] The predicate court to the Israeli

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132. United States v. Richardson, 418 U.S. 166, 177–78 (1974) (quoting *Ex Parte* Lèvitt, 302 U.S. 633, 634 (1937)).

133. *See generally* Scalia, *supra* note 1, at 882–84 (describing standing as an important mechanism for enforcing the separation of powers required by the Constitution).

134. *Id.*

135. *See* Ariel L. Bendor, The Israeli Constitutionalism: Between Legal Formalism and Judicial Activism 1 (2004) (unpublished manuscript) (on file with the Univ. of Chicago Center for Comparative Constitutionalism).

136. *Id.*

137. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (commanding lower courts to defer to agency interpretations of agency promulgating statutes so long as the interpretation is reasonable).

138. *See* Menachem Hofnung & Mohammed S. Wattad, *The Judicial Branch in Israel*, *in* OXFORD HANDBOOK ON ISRAELI POLITICS AND SOCIETY (2019) (discussing the Israeli High Court's application of strict formal criteria to review administrative action).

139. *See* Gary J. Jacobsohn, *Judicial Activism in Israel*, *in* JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE, *supra* note 21, at 90 (discussing the High Court's view that it, and it alone, is empowered to enforce the basic values of the society by reviewing government action for legality); *see also* Martin Edelman, *The Judicial Elite of Israel*, 13 INT'L POL. SCI. REV. 235, 238 (1992) ("There can be no doubt that Israeli leaders have deliberately sought to create a judicial system insulated from an otherwise highly politicized society.").

HCJ was established in 1922 in Article 46 of the Palestine Order-in-Council of 1922, which assumed the incompleteness of Israeli statutory law and expected the judiciary to amend and addend the nascent state's body of law with judicial inputs from other common law jurisdictions, including England and the United States.[140] This prospective mandate saddled courts with the responsibility of contributing to the legal and political development of the reborn state in the same way one would expect a legislature or executive to contribute.[141] And the expectation that courts create law in parallel with the legislature undoubtably inflected the evolution of the HCJ toward its current prominent status at the center of Israeli cultural and political life.[142]

Israeli society has developed a judicial system in which the court behaves as a powerful adjudicatory body focused on the "realization of public values," meaning that the court is focused on ensuring that legislative, executive, and military actions are wise, appropriate, and reflective of social norms.[143] Being a parliamentary democracy, the politics of Israeli society encourage vigorous exchange of ideas which sometimes plays out in spectacular clashes among various small parties vying for parliamentary relevance.[144] This historic appreciation for aggressive democratic engagement is matched by the society's deeply rooted appreciation for the rule of law. "Without a written Constitution, Israelis perceive that the rule of law is the only way to limit some of the most egregious consequences of highly partisan politics. And like the rest of the Western world, Israelis see the courts as the guardians of that value."[145]

The doctrine of standing as a limitation on judicial authority in Israel is nonexistent.[146] Israeli society has long demanded strong judicial review of executive and legislative action to ensure compliance with Israeli Basic Law.[147] Justice Elyakim Rubinstein recently noted that "[o]ver the years, for various reasons including the wish to give the public better access to the Court in administrative matters, and

140. Tedeschi & Zemach, *supra* note 20, at 276–77.

141. *Id.* at 277–81.

142. *See id.* (describing the role of the Israeli court in determining the basis of the country's legal system).

143. *See* Suzie Navot, *The Israeli Supreme Court*, COMPARATIVE CONSTITUTIONAL REASONING 477–78 (András Jakab et al. eds., 2014) (explaining the expansion of issues the Israeli Supreme Court into what would be considered unjustifiable in other countries, such as military decisions).

144. *See* Benjamin Akzin, *The Role of Parties in Israeli Democracy*, 17 J. POLITICS 507, 535–45 (1955).

145. Martin Edelman, *The Judicialization of Politics in Israel*, 15 INT'L POL. SCI. REV. 178 (1994).

146. *See* Hofnung & Wattad, *supra* note 138, at 6 ("[T]he question of standing has not created an obstacle in bringing constitutional matters for the court's determination.").

147. Basic Law is the Israeli equivalent of a higher authority—or informal constitution—to which all other laws must conform.

also to provide access to Palestinians from the territories administered by Israel, the Court has basically abolished the 'standing' requirement."[148]

The Academic College of Law and Business v. The Minister of Finance provides an example of a generalized grievance deemed sufficient for adjudication.[149] In the case, two Israeli law professors sued the Israeli government, arguing that legislation aimed at privatizing then public prisons was contrary to Israeli basic law and was therefore a "per se violation of human rights."[150] The two plaintiffs were not prisoners, and the law in question would have posed no harm to them greater than that suffered by society on the whole, and yet the court permitted the suit to advance.[151] Furthermore, the court addressed the controversy directly by enjoining the government from advancing its privatization agenda and forcing the private company to abandon its efforts.[152]

Unlike the American judicial system which was created by the national Constitution, the state of Israel was founded without a formal constitution.[153] The Israeli Declaration of Independence, published on May 15, 1948, established the state of Israel and called on the newly established representative legislature to draft a constitution "not later than October 1, 1948."[154] October 1 came and went, but the Israeli Constitution was not drafted. Members of the new society, though, saw the importance in a "law above the law" and sought to establish the aspirations of the Declaration of Independence as supreme text against which other government action could be judged.[155] Three of the first ten cases to reach the Israeli Court of Justice asked the court to repeal

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148. Posner, *infra* note 262, at 2413.

149. *See generally* HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance PD 1 (2009) (Isr.).

150. *Id.*

151. *Id.*

152. *Id.* at 76 ("[The] imprisonment of a person in a privately managed prison is contrary to the basic outlook of Israeli society . . . with regard to the responsibility of the state, which operates through the government, for using organized force against persons subject to its authority and with regard to the power of imprisonment being one of the clear sovereign powers that are unique to the state. When the state transfers the power to imprison someone, with the invasive powers that go with it, to a private corporation that operates on a profit-making basis, this action — both in practice and on an ethical and symbolic level — expresses a divestment of a significant part of the state's responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise.").

153. *See* GIDEON SAPIR, THE ISRAELI CONSTITUTION 11 (2018) (discussing the order of events of the founding of Israel; the nation was born with no formalized constitution, and though the Elected Constituent Assembly was tasked with developing a constitution, but after several years of debate, no language could be agreed upon, and the constitutional plan was lost).

154. OFFICIAL GAZETTE: NUMBER I; Tel Aviv, 5 Iyar 5708 14.5.1948, I.

155. *See* SAPIR, *supra* note 153, at 3–5 (reviewing litigation in which plaintiffs asked the HCJ to strike Knesset action as inconsistent with the Declaration of Independence).

several acts of the Constitutional Assembly as inconsistent with the Declaration of Independence, but the High Court refused.[156] In refusing to give supreme status to the Declaration, the High Court explained that it rejected "the claim that this document is the constitution that should be used to test the legitimacy of laws, before the fundamental constitution, which the Declaration itself speaks of, has been framed by the Constitutional Assembly."[157]

The first act of the elected constitutional assembly was to give itself status as the supreme governing body which named itself the "First Knesset."[158] Though the Knesset debated the possible contents of a constitution, there was no agreement and thus there was no constitution.[159] Instead, the Knesset adopted a compromise proposed by Knesset member Yitzhak Harari.[160] The Harari compromise tabled the constitutional process and gave breathing room for continued debate on a possible constitution into the foreseeable future.[161] The compromise noted:

> The First Knesset assigns the Constitution, Law, and Justice Committee the task of preparing a constitution proposal for the country. The constitution will be made up of chapters so that each one is a separate basic law onto itself. The chapters will be submitted to the Knesset as the Committee completes its work. And all the chapters together will be collected into the constitution of the country.[162]

This approach gave each side the opportunity to play the long game with the constitutional structure and to build the necessary coalitions to achieve a preferred constitutional outcome.[163] Between 1950 and 1992, the Knesset passed a total of nine basic laws, which at that point dealt mostly with structural questions,[164] separation of

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156. *See, e.g.*, HCJ 7/48 Al-Karbutali v. Minister of Defense 2 PD 5, 25 (1949) (Isr.).

157. *See* SAPIR, *supra* note 153, at 12–13 (citing HCJ 10/1948 Zvi Zeev v. The Acting District Commissioner of the Urban Ara of Tel Aviv (Yehoshua Gubernik) and Another 85 PD 1 (1948) (Isr.)) ("The only object of the Declaration was to affirm the fact of the foundation and establishment of the state for the purpose of its recognition by international law. It gives expression of the vision of the people and their faith, but it contains no element of constitutional law that determines the validity of various ordinances and laws, or their repeal.").

158. The Transition Law, Art. 1 (1949) (Isr.).

159. Samuel Sager, *Israel's Dilatory Constitution*, 24 AM. J. COMP. L. 88, 88–90 (1976) (describing the order of events surrounding Israel's founding and early debates about a national constitution).

160. *See* HCJ 7/48 Al-Karbutali v. Minister of Defense 2 PD 5, 25 (1949) (Isr.).

161. Divrei HaKnesset 5 1783 (1950) (Isr.).

162. *Id.*

163. *See* Samuel Sager, *supra* note 159, at 90–91 (describing the discord that existed in early Knesset debates about the wisdom and utility of a constitution).

164. Basic Law: The Knesset, 1958, http://knesset.gov.il/laws/special/eng/BasicLawTheKnesset.pdf (last visited Nov. 10, 2019) [https://perma.cc/RC5C-VVVK] (archived Nov. 10, 2019).

powers,[165] high government officers,[166] and the status of Jerusalem.[167] Most members of the Knesset were unaware that passage of basic laws would eventually have the consequence of stripping supremacy from the Knesset and granting the judiciary the unique authority to review government action against the basic laws for conformance.[168]

The High Court of Justice and lower Israeli courts did not sit idly by awaiting a constitution to neatly spell out the limits of judicial authority; rather, the judiciary acted as the arbiter of common law rights and as the body responsible for applying Knesset law to controversies.[169] However, over time, the absence of a formalized constitution with clear jurisdictional limits left a gap for the judiciary to rapidly extend its authority to adjudicate controversies outside of the Basic Law framework.[170] Eventually, the Basic Law of Israel would be given constitutional status through a series of decisions of the High Court of Justice which elevated all of the Basic Law as the supreme law of the land.

From the founding of the state in 1947, the Israeli judiciary has experienced rather drastic shifts in its self-perceived role in the society, and thus in the way it is perceived by other branches of government, and the citizenry more broadly.[171] Israeli Supreme Court Justice

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165. Basic Law: The Government, 2001, http://knesset.gov.il/laws/special/eng/BasicLawTheGovernment.pdf (last visited Nov. 10, 2019) [https://perma.cc/87UT-BVFV] (archived Nov. 10, 2019) ("Passed initially on August 13, 1968, by the Sixth Knesset. On March 18, 1992, the 12th Knesset replaced the law in order to change the electoral system, with the purpose of creating a direct prime ministerial elections system from the 14th Knesset and onward.").

166. Basic Law: The President of the State, 1964, http://knesset.gov.il/laws/special/eng/BasicLawThePresident.pdf (last visited Nov. 10, 2019) [https://perma.cc/MZ6R-3YZ8] (archived Nov. 10, 2019).

167. Basic Law: Jerusalem The Capital of Israel, 1980, http://knesset.gov.il/laws/special/eng/BasicLawJerusalem.pdf (last visited Nov. 10, 2019) [https://perma.cc/H53C-K27Q] (archived Nov. 10, 2019).

168. *See* SAPIR, *supra* note 153, at 84 ("The age of innocence soon passed, however, when the Court proclaimed the constitutional revolution and embarked in a flurry of activity relying on the new Basic Laws as a source of legitimation.").

169. Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 CARDOZO L. REV. 2013, 2020 (1989) ("From the outset, the Israeli judges accepted the basic premise of legislative supremacy. Even with this acceptance, however, there were two different judicial responses available: to follow a course of unquestioning deference to legislative enactments and by extension to the actions of Cabinet ministers directly responsible to the Knesset; or to offer only grudging acquiescence and to claim a role for independent judicial scrutiny by narrowly construing legislation and confining ministerial discretion. During the two decades following independence, the Supreme Court pursued both alternatives notwithstanding their apparent inconsistency.").

170. *Compare* Eliahu Likhovski, *The Courts and the Legislative Supremacy of the Knesset*, 3 ISR. L. REV. 345, 351 (1968) ("The [Israeli] courts will not enforce or adjudicate on 'political' questions even if they are inherent in the law of Knesset."), *with* BARAK, *supra* note 29, at 177–89 (listing the various political controversies that Israeli courts regularly adjudicate, including questions of discretion and policy).

171. *See* Shoshana Netanyahu, *The Supreme Court of Israel: A Safeguard of the Rule of Law*, 5 PACE INT'L L. REV. 1, 2; *see also* Or Bassok, *The Israeli Supreme Court's Mythical Image – A Death of a Thousand Bites*, 23 MICH. ST. INT'L. L. REV. 39, 41 (2014)

Shoshana Netanyahu notes that between the 1970s and the late 1990s, the view of the High Court in the eyes of the ordinary citizen shifted from "resolving disputes" to "safeguarding the rule of law."[172] This newfound perspective harkened to the days of nascent Israel when the government depended on the judiciary to supplement the statutory law with common law decisions that would, in many cases, form the baseline for future Knesset actions.[173]

The judiciary's struggle for supreme authority in matters of review of governmental action came in piecemeal fashion. At the founding, the Israeli government vested supreme authority in the Knesset, which would serve as the democratically elected sovereign to which other branches of government—including the judiciary—would be subservient.[174] The Knesset's supremacy was evidenced by the fact that it could "make or unmake" any law without review of any court.[175] By design, the Israeli system of parliamentary supremacy reflected the English legal system.[176] The British occupation of Mandatory Palestine set the foundational principles of Israeli democracy including that of legislative supremacy and judicial subservience.[177] However, the judiciary was not an afterthought; courts adjudicated controversies, but initially lacked the authority of judicial review.[178] The Knesset granted courts the authority to order any public official to "do or refrain from doing any act in the lawful exercise of his functions."[179] This legislation also endowed the High Court with original jurisdiction to review administrative action—both procedural and substantive—for compliance with the judiciary's notions of justice.[180] Though the Judiciary Statute did not empower the judiciary with supremacy of judicial interpretation, the intonation of the

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(discussing the drastic growth in the Court's jurisdiction as a reason for its lessened legitimacy in Israeli society).

172. *See* Netanyahu, *supra* note 171, at 2.

173. *See* Tedeschi & Zemach, *supra* note 20.

174. Likhovski, *supra* note 170, at 347 (discussing the relationship between the Knesset and the Court and highlighting the tensions based on what the Knesset views as "jurisdictional usurpation").

175. *Id.*

176. Burt, *supra* note 169, at 2015 ("Israeli jurisprudence had an alternative to the American model for judicial conduct–the British example of judicial deference to legislative supremacy. At the outset, Israeli judges explicitly relied on this model to explain their subordinate relation to the Knesset, the Israeli Parliament. Large portions of Israeli law had been directly carried over from the British Mandatory Authority in Palestine.").

177. *See* Eli M. Salzberger, Judicial Activism in Israel 9–11 (2007) (unpublished manuscript) (on file with the Univ. of Haifa, Faculty of Law) (discussing the impact of the British judiciary on the Israeli judiciary).

178. *See* Burt, *supra* note 169, at 2014–15.

179. Basic Law: The Judiciary, 1984, http://knesset.gov.il/laws/special/eng/BasicLawTheJudiciary.pdf (last visited Nov. 10, 2019) [https://perma.cc/MU6C-ZTL9] (archived Nov. 10, 2019).

180. *See* Zeev Segal, *Administrative Law*, *in* INTRODUCTION TO THE LAW OF ISRAEL 64–65 (Amos Shapira et al. eds., 1995).

legislation reflected the Knesset's intention to grant tremendous discretion for judges to compare government actions with broad notions of justice and such discretion would soon be put to use in codifying the Basic Law as the supreme law of Israel.[181]

"The Basic Law: Judiciary" codified a shift in the way in which the various branches of government interacted. And with no intelligible limit to judicial authority neatly spelled out, the judiciary quickly become a forum for the adjudication of controversies that otherwise escaped political resolution.[182] Unlike the American system, which points to both textual[183] and jurisprudential[184] limits on standing, the Israeli system has no such textual limitation and thus the only limit to access to a judicial forum is the discretion of the judge.[185] The impact of the judiciary statute was immediate, and the Knesset's recognition of judicial authority combined with an increasingly relaxed approach to standing flung wide the doors of the courts and welcomed almost any controversy as capable of judicial resolution.[186] This expansion of power was a zero-sum game and as the judiciary expanded its role as an institution capable of adjudicating politicized controversies, executive and legislative authority waned in acquiescence.[187]

The language of the statute recognized a broad authority in the judicial system and granted explicit authority for the High Court to "provide relief in the interest of justice" and to require executive agencies to comply with its interpretation of statutory demands.[188] The limits of the Basic Law permitted the court to grant a remedy in the form of injunction or specific order, but did not specify the appropriate deference level, nor the tier of scrutiny the court should use to determine the legitimacy of regulatory action.[189] Statutory silence as to the appropriate mechanisms of judicial procedure simply left room for the court to gap fill with its best judgment as to what justice demands. The law further vested courts with remedial power and allowed judicial discretion to determine the duties of administrative actors and to develop substantive rights.[190] Having been borne out of the expectation of providing a foundation from which the statutory law

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181. *See* Basic Law: The Judiciary, *supra* note 179.

182. *See* Shimon Shetreet, *The Critical Challenge of Judicial Independence in Israel*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, CRITICAL PERSPECTIVES FROM AROUND THE WORLD 233, 235 (Russell et al. eds. 2001).

183. U.S. CONST. art. III, § 2, cl. 1.

184. For example, the American judiciary often dismisses cases if it is thought that the political branches are better positioned to adjudicate the question at hand.

185. *See* Netanyahu, *supra* note 171, at 7 (noting that as viewed by the HCJ "everything is normatively justiciable").

186. *See* Shetreet, *supra* note 182, at 235.

187. *See id.*

188. *See* Basic Law: The Judiciary, *supra* note 179.

189. *Id.*

190. *See, e.g.*, HCJ 840/79 Israeli Contractors and Builders Centre v. Minister of Housing 34(3) PD 729 (1980) (Isr.).

could grow and develop, the HCJ immediately stepped into its newly recognized role and paved a trail of precedent that would eventually lead to the codification of the Basic Law as the Constitution of Israel.[191]

Throughout Israeli history, the HCJ has typically understood its power to extend beyond statutory mandates.[192] The court is permitted to impose obligations on agencies, and may insinuate protections for beneficiaries that simply do not exist within the statutory framework.[193] Israeli administrative law is therefore as much judicial construct as it is a statutory framework.[194] A role for judges as protectors of democratic values and defenders of overarching constitutional principles places courts in the position of *creating* public rights rather than simply *adjudicating* statutory rights.[195]

However, even with the markedly broad provisions discussed above, the Israeli judiciary's role was limited to particular controversies between private parties, or between the government and private parties; the HCJ had not yet designated its own authority as superior to that of the Knesset.[196] Before 1992, basic laws were simply structural laws that dealt with the interrelationship between the branches of government, and other than procedural restrictions on government action, had no impact on private parties.[197] However, the Knesset's passage of basic laws dealing with Human Dignity and Liberty, and the Freedom of Occupation in 1992, provided the HCJ with an opportunity to reenvision its own authority.[198]

The passage of these basic law provisions granted substantive rights to private parties and ultimately opened the door for the judiciary to seize power, and in so doing to reshape the role of courts in Israeli society.[199] In *The Mizrahi Bank v. Migdal*, a bank challenged

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191. *See* Basic Law: The Judiciary, *supra* note 179; *see also* Shetreet, *supra* note 182, at 235–240.

192. *See, e.g.*, HCJ 840/79 Israeli Contractors and Builders Centre v. Minister of Housing 34(3) PD 729 (1980) (Isr.).

193. *See id*; *see also* Hofnung & Wattad, *supra* note 138, at 8 ("One of the significant effects of the 1992 constitutional reform has been the evolution of a constitutional dialogue whereby the courts can affect future legislation and review administrative decisions" by comparing the action to fundamental social values.).

194. *See* Hofnung & Wattad, *supra* note 138, at 8 (noting that when making administrative, legislative, or regulatory decisions, Knesset lawmakers, and government regulators often ask not what is in the best interest of society, but rather "what has the best chance to survive" exacting judicial scrutiny).

195. *See* Segal, *supra* note 180, at 65.

196. *See* SAPIR, *supra* note 153, 31–48 (describing the timeline of Basic Law constitutionalization).

197. *See Basic Laws of the State of Israel*, THE KNESSET, https://knesset.gov.il/description/eng/eng_mimshal_yesod.htm (last visited Nov. 10, 2019) [https://perma.cc/R3ZX-YKCX] (archived Jan. 5, 2020).

198. *See* Basic Law: Human Dignity and Liberty, 1992, http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf (last visited Nov. 10, 2019) [https://perma.cc/5KD7-36LA] (archived Nov. 10, 2019).

199. *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 (1995) (Isr.).

the validity of Knesset legislation that reduced the debt owed by *kibbutzim* and *moshavim*[200] as a means of alleviating economic pressure that threatened to dissolve the villages.[201] The thrust of the bank's challenge rested on a portion of the Basic Law of Human Dignity and Liberty that guaranteed the right to property and therefore to debts owed.[202] While the HCJ declined to overturn a lower court's determination, the judges sitting in a nine-member *en banc* panel authored a lengthy opinion recognizing the authority of the Knesset to promulgate the law in controversy and annoncing the authority of courts to review legislation against basic laws.[203] It was this decision that served as the Israeli edition of *Marbury v. Madison* and, like its American inspiration, it created the theoretical framework through which the HCJ may review acts of the Knesset for constitutionality.[204]

Before 1995, the HCJ was limited in its authority to review executive compliance with statutory law, but with limited exception,[205] the High Court had no power to strike down statutes for lack of compliance with basic law provisions.[206] However, the newly elevated basic laws provided a comparative by which other laws could be judged. Critics of the *Mizrahi Bank* decision argued that constitutionalizing the Basic Law and allowing the judiciary to review statutes for conformity would lead to an activist court that would undoubtedly strike down any statute that failed to conform with the subjective preferences of the judge overseeing the litigation.[207] Many argued that only the Knesset had the authority to endow the judiciary with the power of judicial review.[208] Others expressed concern that such broad-based, standard-less jurisdiction for courts would undoubtedly politicize them and undermine their legitimacy as independent

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200. Kibbutzim and moshavim are traditional communal villages built around agrarian microeconomies.

201. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village 49(4) PD 221 (1995) (Isr.).

202. *Id.* at 2.

203. *Id.* at 3.

204. *Id.* at 3–4.

205. *See* HCJ 98/69 Bergman v. Minister of Finance 23(1) PD 693, 697 (1969) (Isr.); *see also* 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, 107 (2016) (citing HCJ 148/73 Prof. Kniel v. Minister of Justice 27(1) PD 794 (1973) (Isr.)). The Supreme Court intervened only when legislation violated the requirements of Section 4 of the Basic Law: The Knesset which required equality in Knesset elections. Before 1992, the Supreme Court struck only two law cases based on procedural, rather than substantive injury due to the laws being passed through Knesset without requisite majorities.

206. *See* Posner, *infra* note 262, at 2421–22.

207. Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349, 350–51 (discussing the "vehement debate" in Israel sparked by the *Mizrahi Bank* decision which empowered courts to review legislation against Basic Law dictates).

208. *See generally* SAPIR, *supra* note 153, at 54–58 (discussing the controversy of the *Mizrahi Bank* decision in political circles).

arbiters.[209] On this point, however, critics' doomsday predictions have not come to pass, as the Knesset has passed many pieces of legislation with the HCJ striking only fifteen for failure to comport with basic law requirements as of 2016.[210]

However, broad judicial authority to review statutes for compliance with the basic law or to adjudicate any flavor of controversy depends on a doctrine that allows access to the forum in the first place.[211] The scope of judicial power is, of course, not dictated solely by, or even primarily by, its authority to strike statutes or to serve as a check on administrative action.[212] Instead, judicial power is premised on the doctrine of standing that determines who is allowed access to the forum and under what circumstances.[213] Meeting this triggering threshold thus provides judges with an opportunity to comment on and review administrative action or enacted legislation against judicially determined standards. As the Israeli society's perspective on the appropriate role of courts has expanded to include review of government acts for consistency with fundamental social values, so too has the doctrine of standing been relaxed to permit forum entry for plaintiffs alleging even the most speculative of harms.[214] This broadened scope of judicial power opened the doors of the courthouse and has provided a window for the adjudication of all manner of controversy with no injury-in-fact requirement.[215]

Though the source of all laws governing the operation of the Israeli judiciary is found in the "Basic Law: Judiciary," the statutory language does not set a clear limit on the exercise of the judicial authority, nor did it define the appropriate standard by which to adjudge whether a case is ripe for adjudication.[216] Rather, the language is broadly drafted and allows courts to provide relief to parties aggrieved by public actors.[217] The rules governing the exercise of jurisdiction did not occur all at once, but rather were created over time in the slow saunter of

209. *See generally* Netanyahu, *supra* note 171, at 8 (broadly recognizing the affirmative steps taken by the Court to prevent politicization of the court when adjudicating controversies that affect political actors).

210. SHIMON SHETREET & WALTER HOMOLKA, JEWISH AND ISRAELI LAW–AN INTRODUCTION 198 (2017).

211. *See* Posner, *infra* note 262, at 2413 ("Over the years, for various reasons, including the wish to give the public better access to the Court in administrative matters, and also to provide access to Palestinians from the territories administered by Israel, the Court has basically abolished the 'standing' requirement.").

212. *See, e.g.*, *id.*

213. *Id.*

214. *See* BARAK, *supra* note 29, at 190–91 ("Liberal rules of standing have also allowed judicial review of claims challenging the legality of civil servants' behavior even where no individual interest were harmed.").

215. *Id.*

216. *See* Basic Law: The Judiciary, *supra* note 179.

217. *Id.*

common law doctrinal development.[218] By the early 1990s, the High Court had an established view of standing that allowed litigants to bring cases arguing against governmental corruption,[219] asking for review of government action that purported to intrude on fundamental rights[220] or governmental failures to appropriately enforce laws.[221]

The case most often cited by scholars as the pivotal case that transformed the doctrine of standing in Israeli courts is *Ressler v. Minister of Defence*.[222] In *Ressler*, an attorney and officer in the IDF military reserve sued the Minister of Defence for permitting deferment from military service to *Yeshiva*[223] students.[224] The granting of deferment for young seminarians had been allowed in various rounds of Knesset legislation since the founding of the state and was a common topic of debate regarding the appropriateness of special treatment for certain religious communities.[225] Though similar controversies on the legitimacy of the religious exemption to the draft had been dismissed thrice in 1970, 1979, and 1982 for lack of standing, in 1986, Ressler advanced one final complaint against the Minister of Defense and was granted standing to bring his complaint to bar.[226] Though Ressler lost on the merits, the fact that his complaint was permitted access to the High Court demarcated a drastic shift in the form and function of the Israeli judiciary's conception of standing because, in this case, the court determined that an individual need not specify a concrete injury to gain entry to a judicial forum.[227]

In *Ressler*, the High Court did not incidentally or accidently broaden access to the judiciary, but rather it used the case as an opportunity to announce the willingness of the judicial branch to

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218. *See* BARAK, *supra* note 29, at 190–96 (recounting the development of the standing doctrine in the Israeli judiciary).

219. Shimon Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT'L & COMP. L.Q. 979, 984 (noting that the judges have investigative power to investigate corruption charges against government bodies and officials).

220. *See generally* Academic College of Law and Business, *supra* note 144 (permitting standing to several academics to challenge the privatization of public prisons as violative of Israeli Basic Law).

221. *See generally* HCJ 428/86 Barzilai v. State of Israel 40(3) PD 505 (1986) (Isr.) (extending standing to six Knesset Members and a number of academics petitioning the government to extradite an Israeli citizen to France for a criminal trial).

222. HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441 (1988) (Isr.).

223. Yeshiva is the Hebrew word for a specialized Orthodox Jewish seminary.

224. HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441 (1988) (Isr.).

225. THE LAW LIBRARY OF CONGRESS, ISRAEL: SUPREME COURT DECISION INVALIDATING THE LAW ON HAREDI MILITARY DRAFT POSTPONEMENT 1 (2012) ("The military draft deferment enjoyed by members of the ultra-Orthodox Haredi community in Israel has been a controversial issue throughout the history of the State of Israel. Adopted by David Ben-Gurion, Israel's first minister of defense, the draft deferment was the subject of numerous debates; a 1988 report by the State Comptroller; Israel Defense Forces (IDF), ministerial, and parliamentary committee hearings; and numerous decisions by Israel's Supreme Court.").

226. Netanyahu, *supra* note 171, at 4.

227. HCJ 910/86 Ressler v. Minister of Defense 42(2) PD 441, 441–58 (1988) (Isr.).

adjudicate controversies of all kinds without need for a litigant to show a particularized or individualized harm or grievance.[228] In the majority opinion, Chief Justice Barak made clear that the High Court's ruling was posed as a fundamental shift in the role of standing in limiting access to adjudication:

> You cannot formulate the rules of standing if you do not formulate for yourself an outlook about the nature and role of the rules in public law. In order to formulate an outlook about the nature and role of the rules of standing, you must adopt a position on the role of judicial review in the field of public law . . . [I]n order to formulate an outlook with regard to the role of judicial review, you must adopt a position on the judicial role in society and the status of the judiciary among the other branches of the state. A judge whose judicial philosophy is based merely on the view that the role of the judge is to decide a dispute between persons with existing rights is very different from a judge whose judicial philosophy is enshrined in the recognition that his role is to create rights and enforce the rule of law.[229]

After *Ressler*, the determination of the appropriateness of judicial resolution of a controversy depends not on any limiting statute or basic law doctrine, but rather flows solely from the discretionary determinations of the justices who decide whether they view a controversy as sufficiently important to merit adjudication.[230] A simple way of viewing the way in which justices have wielded this discretion is described by Shimon Shetreet, a preeminent Israeli legal historian and scholar:

> The court formulated a more liberal approach based on a pragmatic balancing between two competing considerations: the importance of recognizing public petitions as safeguards for the rule of law and fear of overburdening the court with petitions. The court held that a proper balance between these two considerations would be struck by granting standing to a petitioner who was able to point to an issue of special public importance, or to a seemingly serious fault in the action of the authorities, or to the fact that the act in dispute is of special constitutional importance.[231]

IV. COMPARATIVE PERSPECTIVE AND PREDICTIONS AHEAD

In many ways, the Israeli judiciary's conception of "standing" is reminiscent of the doctrine's place in American courts between the time of the founding and the first major shifts, which occurred 133 years later.[232] During that juncture, American judges asked not

228. *Id.*
229. *Id.* at 458.
230. *See* Netanyahu, *supra* note 171, at 8 (noting that even though the High Court has tremendous discretion to accept any and all cases, the Court often dismisses cases on jurisprudential grounds to avoid adjudicating cases on "subjective grounds").
231. *See* SHETREET & HOMOLKA, *supra* note 210, at 193.
232. *See supra* Part I.C.

whether there was a sufficient injury and causation, but, rather, they simply asked whether the Constitution, Congress, or the common law had created a right and whether the court could grant the remedy sought. Similarly, the Israeli judiciary allows judges tremendous discretion to adjudicate controversies so long as the complaints of the parties are rooted in a statutory or basic law right that has been infringed by the government or other defendants. It is thus worth inquiring into the similarities and differences between the immediate post-founding American government, and the government of the young Jewish state. And because of the role standing plays in accessing a judicial remedy to a perceived harm, the doctrine of standing poses fundamental questions about the role of the judiciary in society and the appropriate mechanisms for the exercise of that role.[233]

A credible judiciary serves as an important institution in safeguarding the long-term viability of a legal system through enforcement of legal norms codified in foundational legal documents. Fundamentally, a court in a democracy is called upon to enforce structural limitations on the exercise of power, thereby ostensibly reflecting the culture and values of the citizenry. "Given the primacy of judicial review in most new regimes, courts are well positioned to ensure that other governmental actors are subject to the constraints of law."[234] Courts can also serve as a check on the exercise of coercive governmental power on individual citizens, or on institutions of the society. "An effective judiciary can protect and enable these processes of vertical accountability by ensuring governmental respect for the individual rights that underlie them."[235]

Nascent democracies may not have the luxury of dependence on legislatures or unitary executives to effectively adjudicate controversies in the best interest of the new national order. Too many disparate interests tug the juvenile state in idiosyncratic ways, and the judicial body must be charged with setting down authoritative determinations of law and to act as a cushion between overarching societal values and momentary popular passions that may seek to override earlier decided constitutional norms. This tension is often discussed in the literature as the "countermajoritarian difficulty," which views the role of a Supreme Court as exercising control against the prevailing political majority in the interest of safeguarding minority protections codified in a constitution.[236]

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233. If one is unable to get access to the judicial power, there will be no procedure for a sought remedy outside of the political process, or in drastic situations, revolution. Thus standing, which precedes judicial access is fundamental to the understanding of the appropriate role of a court in a society.

234. Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT'L L. 423, 431 (2013).

235. *Id.*

236. BICKEL, *supra* note 102, at 17.

The Article III judiciary was created against the backdrop of powerful state judicial systems which had general jurisdiction over all manner of controversy—including federal rights.[237] The Constitution created only a Supreme Court; the establishment of lower federal courts was left to Congress as a matter of discretion.[238] State governments, wary of a powerful federalist system, ensured the lower federal courts were simply optional and wished to retain primacy over judicial affairs in state supreme courts.[239] The federal judiciary (i.e., the Supreme Court) was envisioned as the institution tasked with managing intrastate conflicts, conflicts involving foreign dignitaries, and those implicating rights "arising under" the federal law, including the U.S. Constitution.[240] In other words, between federal and state courts, a judicial remedy was never far out of reach for an aggrieved party.[241]

It was against this backdrop that Article III was drafted with the "[c]ases" or "[c]ontroversies" limitation on the federal judiciary's jurisdiction.[242] Though, as noted in Part I, at the time of the founding, the doctrine of standing posed no meaningful limit, and the language of Article III would in a later era come to serve as a limit on the exercise of judicial power.[243] At this phase of American legal history, the judicial power was thought to extend to any pleading implicating rights created by Congress.[244] "Law was that body of rules that defined the rights of citizens and, concurrently and coextensively, provided a remedy to an injured party."[245] The Supreme Court did not consider whether the Constitution barred entry to a judicial forum, but instead it asked whether a matter fit within an existing cause of action. By the time of the New Deal, the American government structure had been remade, and with the rise of the administrative state also came the doctrine of standing.[246]

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237. *See* Hamilton, *supra* note 9, at 145 (discussing the role the Federalists imagined American federal courts to play in the broader governmental scheme).

238. U.S. CONST. art. III, § 2, cl. 1.

239. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. REV. 499, 503 (1928).

240. *See* U.S. CONST. art. III, § 2, cl. 1.

241. *See* Frankfurter, *supra* note 239, at 503 ("A division of judicial labor among different courts, particularly between a dual system of federal and state courts, is especially subject to the shifting needs of time and circumstance.").

242. U.S. CONST. art. III, § 2, cl. 1.

243. *See supra* Part I.

244. *See* Winter, *supra* note 14, at 1395 (citing Osborn v. Bank of the United States, 22 U.S. 738, 819 (1824)) ("[Judicial] power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case.").

245. *See id.*

246. *Id.* at 1374 ("[T]he modern doctrine of standing is a distinctly twentieth century product that was fashioned out of other doctrinal materials largely through the conscious efforts of Justices Brandeis and Frankfurter.").

This prominent theory known as "insulation" argues that Justices Brandeis and Frankfurter sought to limit the kinds of cases capable of judicial resolution as a means of insulating the New Deal regulatory programs from industry challenges that would seek to stifle administrative agency action as violative of substantive due process rights.[247] Standing, the argument goes, would limit the forms of action acceptable to courts and would give breathing room for the New Deal's reinvention of American government. Standing was thus a "calculated effort"[248] by liberals to "assure that the state and federal governments would be free to experiment with progressive legislation."[249] Some argue that this was a moment of great judicial restraint while others see it as unrestrained judicial activism.[250]

The rise of the standing doctrine occurred in a period of social transition and in reaction to the successful implementation of the New Deal agenda.[251] In other words, the doctrine emerged not only as a progressive resistance to the ill-founded effects of *Lochner*-era regulation but also as recognition that the generalist courts ought defer to the expert determinations of agency regulators on issues relating to the national economy.[252] In the New Deal era, the courts prioritized continuity of President Roosevelt's aggressive reimagination of the American government system as preeminent and developed a fairly stringent standing precursor to access of a federal forum.

The New Deal regulatory agencies served both quasi-legislative functions in regulating the economy and were also empowered by Congress to adjudicate controversies falling within their regulatory domain. The New Deal brought about an era of regulatory adjudication authority that diminished the need for Article III judicial forums to vindicate many congressionally mandated rights.[253] Justices Frankfurter and Brandeis viewed the equitable relief provided in the administrative adjudicative venue to be sufficient to vindicate newly created rights, which thereby vitiated the need for a party to access an Article III court. Furthermore, the "insulation period" occurred with a backstop of powerful state courts whose doors were not restricted by the heightened federal standards, meaning that closing the federal courts to some controversies did not necessarily cut the parties off from process in a purely judicial forum.

From its founding in 1948, Israeli society has endured tremendous trauma, war, and terror, but its legal framework and judicial system have not been subject to dramatic transformation. Unlike the dramatic

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247. *Id.*
248. *Id.* at 1455.
249. *Id.* at 1456.
250. *See* Ho & Ross, *supra* note 54, at 600.
251. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436–38 (1988).
252. *Id.*
253. *See, e.g.*, *id.*

jurisprudential shifts that occurred in the United States in response to New Deal legislation,[254] the Israeli judiciary has been transformed in the common law tradition—case-by-case. The High Court of Justice in Israel serves as an important check on the momentary passions of the Knesset and the political branches in ensuring that the actions of the government comport with the values codified in the basic laws which have become the quasi-constitution of the country by means of judicial implementation.[255] The Israeli judiciary operates very much as the American courts did at the time of the American founding, in that the standing doctrine poses no meaningful bar to entry. However, notwithstanding the similarities between the early American judiciary and that of modern-day Israel, it is worth noting several differences between the two systems to clarify the contrast.

As noted above, judicial activism in the Israeli judiciary is fundamental to the history and nature of the courts and to their self-perceived, society-endorsed role as enforcer of minority rights and check on momentary political passions. The notion that the HCJ exists as an institution dedicated to the discovery of "public values" recognizes the potential shortcomings of Knesset determinations and removes from the realm of public legislative control issues of special sensitivity, namely broad social values[256] and issues around human rights.[257]

The HCJ's self-perceived role as the protector of social values undermines the doctrine of standing and permits court access to *any* member of society pleading *any* social harm. The HCJ has effectively adopted a rule that when an individualized harm is asserted, the aggrieved has standing to sue, and when there is a major violation of a right, *any citizen* has standing to sue.[258] It is the view of Chief Justice Aharon Barak that "[c]losing the doors of the court to a petitioner with no injury in fact who warns of a public body's unlawful action means giving that public body a free hand to act without fear of judicial

254. *See supra* Part III.

255. *Id.*

256. As compared with religious values; the religious parties in Israel hold outside influence based on their alliance with the conservative secular parties namely the Likud party. *See* Chemi Shalev, *By Emasculating High Court, Religious Minority Exposes Itself to Tyranny of Israel's Secular Majority*, HAARETZ (May 8, 2018), https://www.haaretz.com/opinion/.premium-in-weak-high-court-israel-s-religious-exposed-to-secular-majority-1.6071406?v=100E3DA34A3B1274E269B0D7BBC5A17E (last visited Nov. 10, 2019) [https://perma.cc/S5SD-HBTW] (archived Nov. 10, 2019) ("Their ability to preserve the status quo and to further entrench religious influence over the country is a function of the decisive influence wielded by their representatives in the Knesset and the governing coalition.").

257. *See The Question of Palestine*, UNITED NATIONS, https://www.un.org/unispal/human-rights-council-resolutions/ (last visited Nov. 10, 2019) [https://perma.cc/YX7H-3TTR] (archived Nov. 10, 2019) (listing the human rights council resolutions condemning Israel for alleged human rights violations).

258. See BARAK, *supra* note 29, at 193 ("[W]hen the claim alleges a major violation of the rule of law . . . every person in Israel has legal standing to sue.").

review."[259] Inherent in Chief Justice Barak's view on the role of courts is the view expressed by Chief Justice Marshall that "every right, when withheld, must have a remedy."[260] And in the Israeli conception, in order to deliver a remedy, the High Court must be open to any and all challenges, regardless of whether the challenger is personally affected.[261]

Judge Richard Posner, a luminary Seventh Circuit judge, persuasively argues that the role of the judiciary envisioned by Chief Justice Barak elevates (or denigrates) judges into "enlightened despots" accountable to no one and nothing other than their own consciences and conceptions of that which justice demands.[262] Judge Robert Bork, a famed conservative judicial philosopher, commented that Barak's view "establishes a world record for judicial hubris."[263] Underlying these critiques are normative views on the appropriate role for judges and courts in democratic societies.[264] The American view prefers judicial modesty and judges who defer to political branches on most matters—meaning that standing is constricted to permit only the most concrete of harms into the forum.[265]

Overlooked in these critiques of the notably powerful and activist Israeli judiciary are three significant distinctions of the Israeli system compared with its American counterpart. First, the Israeli court system has no bifurcation of the judicial power like the United States. In the United States, judicial authority is split between state and federal courts, and a lack of standing in a federal forum is not an automatic disqualifier of access to a local judicial forum.[266] Thus, while American federal courts are restrained by various constitutional and jurisprudential limitations on exercise of judicial power, states are not subject to the same constraints but are limited only by state constitutions, and potential jurisdictional qualifiers in federal statutory or constitutional rights.[267]

Second, Bork and Posner's pointed critiques listed above deemphasize the uniqueness of the Israeli national birth story. The state of Israel predates its Basic Law,[268] and unlike the federal American judiciary, which was empowered by the Constitution, the Israeli national court system began its work in pre-state Palestine with

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259. *Id.* at 194.
260. Marbury v. Madison, 5 U.S. 137, 147 (1803).
261. *See supra* Part II.
262. Richard Posner, *Enlightened Despot*, NEW REPUBLIC (Apr. 22, 2007), https://newrepublic.com/article/60919/enlightened-despot [https://perma.cc/KF97-XUQV] (archived Nov. 10, 2019).
263. *Id.*
264. *See supra* Part I.
265. *Id.*
266. *See generally* Frankfurter, *supra* note 239.
267. *See generally* LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS (2002).
268. *See supra* Part II.

an activist mentality focused on assisting in the creation of the Jewish state's national legal system.[269] This mentality has never been wrung out of the system, and between the nation's founding and the "constitutional revolution" culminating in the constitutionalizing of the Basic Law, the judiciary has consistently seen its role as coequal with the political branches in securing the future for Israeli democracy by protecting the values underlying the very society.[270]

Third, the critiques fail to take into account the national security context that in many ways informs the judiciary's powerful role in society. Israel has existed in a state of constant conflict since its founding; conflict (and fear of conflict) with neighbors, and terrorism from nonstate actors is the backdrop against which the political system of Israel operates. And the Israeli Knesset and military apparatus have never flinched in their resolve to secure their future through the use of military force and the homeland security apparatus.[271] In this context of war and violence, the importance of an independent judiciary becomes keener still because judges are insulated from the "eye for an eye politics" that often characterize wartime decision making and they, and sometimes only they, have the political power to point decision makers back to "fundamental values" that underlie the nation-state. Chief Justice Barak commented on the challenge posed by terrorism to democratic societies this way:

> Terrorism creates tension between the essential components of democracy. One pillar of democracy, the rule of the people through its elected representatives (formal democracy), may encourage taking all steps effective in fighting terrorism, even if they are harmful to human rights. The other pillar of democracy, human rights, may encourage protecting the rights of every individual, including terrorists, even at the cost of undermining the fight against terrorism. Struggling with this tension is primarily the task of the legislature and the executive, which are accountable to the people. But true democratic accountability cannot be satisfied by the judgement of the people alone. *The legislature must also justify its decisions to judges*, who are responsible for protecting democracy and the constitution. We the judges in modern democracies

269. *Id.*

270. *Id.*

271. Israel Defense Forces, *The State: Israel Defense Forces*, ISR. MINISTRY OF FOREIGN AFFAIRS, https://mfa.gov.il/mfa/aboutisrael/state/pages/the%20state-%20israel%20defense%20forces%20-idf-.aspx (last visited Nov. 10, 2019) [https://perma.cc/BWT8-KPR9] (archived Jan. 5, 2020) ("To ensure its success, the IDF's doctrine at the strategic level is defensive, while its tactics are offensive. Given the country's lack of territorial depth, the IDF must take the initiative when deemed necessary and, if attacked, quickly transfer the battleground to the enemy's land. Though it has always been outnumbered by its enemies, the IDF maintains a qualitative advantage by deploying advanced weapons systems, many of which are developed and manufactured in Israel for its specific needs. The IDF's main resource, however, is the high caliber of its soldiers.").

> are responsible for protecting democracy both from terrorism and from the means the state wants to use to fight terrorism.[272]

Chief Justice Barak views the role of a judge in society as serving as an affirmative "permission giving" check on exercise of any government power. This remarkable quote perhaps describes the distinctions between the American and Israeli conceptions of the role of a judiciary more coherently than any of the preceding analysis can. And inherent to this view is one on the role that standing should play in minimizing or maximizing access to judicial forums for adjudication of controversies. The Israeli view on standing distills down to the following: because courts are coequals in the governing process, the court doors should be open to all controversies.

But this view put forward by the High Court of Justice has not come without controversy. Naftali Bennett, leader of the Jewish Home party, recently introduced legislation to return the Israeli government to the system that predated the 1992 constitutional revolution. "The Supreme Court has basically turned itself into the sovereign, the highest authority on everything. That's not what they're supposed to do. They're not supposed to govern. We've been elected. They have not."[273] Even powerful Premier Benjamin Netanyahu has backed legislation that would remove the High Court's ability to strike Knesset legislation.[274] Heretofore, the proposals to minimize the influence of the High Court have failed to garner majority support in the Knesset.[275] But the jurisdiction stripping proposals have found many allies in the center right of the Knesset.[276] In 2018, the Knesset committee tasked with reviewing the proposal voted eleven to one to refer the legislation to the full Knesset.[277]

It remains unclear whether the jurisdiction stripping proposals can garner majority support. But it is clear that the High Court of Justice is paying attention to the developments and is actively engaged in halting the legislation's advance.[278] However, should the HCJ

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272. *See* BARAK, *supra* note 29, at 285 (emphasis added) (internal quotations omitted).

273. Rauol Wootliff, *Checking Supreme Court's powers, Bennett looks to 'rebalance' Israeli Democracy*, TIMES OF ISRAEL (May 31, 2018), https://www.timesofisrael.com/checking-supreme-courts-powers-bennett-looks-to-rebalance-israeli-democracy/ [https://perma.cc/LAR2-HNYL] (archived Nov. 10, 2019).

274. Toi Staff, *Netanyahu Backs Bill to Remove High Court's Ability to Strike Down Laws*, TIMES OF ISRAEL (Apr. 11, 2018), https://www.timesofisrael.com/netanyahu-backs-bill-to-remove-high-courts-ability-to-strike-down-laws/ [https://perma.cc/J3Q2-6FG4] (archived Nov. 10, 2019).

275. *Id.*

276. Shahar Hay, *Knessett Committee Approves Override Power Over High Court*, YNET NEWS (May 6, 2018), https://www.ynetnews.com/articles/0,7340,L-5252771,00.html [https://perma.cc/JM69-T3TS] (archived Nov. 10, 2019).

277. *Id.*

278. *Id.* (discussing the Prime Minister's meeting with Supreme Court Chief Justice Esther Hayut in which the two discussed the jurisdiction stripping proposals).

decisions continuously accrue to the detriment of politically powerful leaders incensed by the High Court's usurpation of legislative authority, the proposals will likely gain support and, in tandem, increase pressure on the HCJ to restrict its authority and necessarily to tighten the requirements of judicial standing. For an institution that views its role as an important check on the legislative branches, such a powerplay will prove untenable and will require the judiciary to weigh the costs and benefits of compliance with popular demands (i.e., self-restriction), which can be accomplished, for example, by restricting the categories of cases and controversies appropriate for judicial adjudication through a more stringent application of standing or risk a wholesale usurpation of jurisdiction by the court.

The Israeli judiciary's broad standing rules allow the judiciary tremendous leeway to call the political branches into account by opening the doors of the court to any plaintiff who can point to a government act that violates a "public value." Thus, as the judiciary has expanded its jurisdiction over the short time period of Israeli legal history, the legislative and democratically accountable branches have diminished in acquiescence. This broad doctrine has been useful in the development of the Israeli legal system heretofore and has allowed the judiciary to contribute to the society's evolution and legal development. But the current stasis of judicial authority at the expense of executive power may be unsustainable considering the opposition of many powerful political leaders incensed by the "enlightened despotism" of the Israeli judiciary. Standing has never been strictly enforced in Israel, but as the judiciary continues to invite all manner of controversy for judicial resolution, the political branches take note and political pressure increases on the Knesset to restrict the jurisdiction of the courts. To retain its salience, authority, and independence into the future, the Israeli judiciary ought to learn from its American counterpart and narrow the rules by which court access is granted. Heightening the doctrine of standing will promote democratic accountability and will ensure that the Israeli judiciary continues standing tall as a living monument to justice and law.

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* J.D. Candidate, 2020, Vanderbilt Law School; B.S., 2012, Arizona State University. I am grateful to Professor James F. Blumstein for inspiring me to research the Israeli judiciary. Thank you also to my mentor Professor Lisa Schultz Bressman for teaching me the doctrine of standing and for encouraging me to think carefully about the law. To my mother, Vicki Lyn Hoyt, thank you for providing me with a world-class education at home and for always nurturing my intellectual curiosity. Thank you to Consul General David Siegel, Deputy Consul General Uri Resnick, and the staff of the Israeli Ministry of Foreign Affairs for giving me an opportunity to engage with the government and people of Israel. My deepest thanks goes to my brilliant wife Misha Goetz Hoyt who provided helpful editorial comments on this piece, and on my life choices more generally. To my son, Caleb Vincent Hoyt, thank you for providing needed study breaks during the hundreds of hours spent researching and writing.