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Time and Judicial Review: Tempering the Temporal Effects of Judicial Review

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TIME AND JUDICIAL REVIEW: TEMPERING THE TEMPORAL EFFECTS OF JUDICIAL REVIEW

Ittai Bar-Siman-Tov*

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This Article deals with a predicament inherent in judicial review: Under the traditional view, judicial declarations of unconstitutionality apply retrospectively, meaning that the law is treated as void from its inception—as if it was never enacted. This, however, means nullifying all the legal arrangements, rights, interests, and obligations that were established under its authority, which can have far-reaching ramifications for both public and private interests.

The Article explores the Israeli Supreme Court's approach for dealing with potential negative consequences of retrospective voidance of statutes. It focuses on three main remedial strategies for tempering the temporal effects of invalidating a statute: giving the judicial declaration of invalidity prospective effect; suspending the declaration of invalidity; and the relative voidance doctrine. It explains each strategy and analyzes the (frequently misunderstood) relationship between the three strategies. The Article also examines the use of these modulating strategies in practice, by analyzing all the cases in which the Court invalidated a law. This examination reveals some interesting developments, as well as surprising findings, as to the actual use of modulating strategies by the Court. Finally, the Article turns to a normative evaluation, defending modulated remedies, but advocating a preference of suspension and prospective application over relative voidance.

* Assistant Professor, Bar-Ilan University Faculty of Law. © 2013, Ittai Bar-Siman-Tov. I thank Patricia Popelier, Sarah Verstraelen and the participants of the expert seminar on the temporal effects of judicial decisions at the University of Antwerp Law Faculty. I am also grateful to Shany Winder and Chamutal Gillo for superb and dedicated research assistance.
1. Introduction

It took time and patience, but Major Ressler eventually won his battle in court. Since 1970 the Israeli Ministry of Defense’s policy of exempting ultra-Orthodox yeshiva students from military service has been repeatedly challenged in Court.\(^2\) In multiple petitions, over a period of 42 years, Ressler and fellow petitioners repeated essentially the same claim: that the exemption violated the right to equality of the majority secular population which shoulders

\(^1\) Leo Tolstoy, War and Peace, Bk. X: CH. 16.

\(^2\) The first petition was HCJ 40/70 Becker v Minister of Defense [1970] IsrSC 24 (1) 238.
the burden of mandatory conscription. In its 2012 Ressler decision, the Supreme Court finally granted petitioners' wish and held that the Deferment of Military Service for Yeshiva Students Law was unconstitutional.

"The practical result of this conclusion," stated the Court, "is that the Deferment Law is declared void..." This conclusion, however, presented the Court with a dilemma. This result would void a long-standing policy dating back to 1948, which has long been at the heart of a highly-charged political and societal debate. Moreover, it would nullify "many arrangements [that] were made in accordance with the rules established by the Law," and impact the lives of tens of thousands yeshiva students, who "planned their lives in accordance with its provisions."

This case exemplifies a predicament inherent in judicial review. Under the traditional view, judicial declarations of unconstitutionality apply retrospectively. This means that the law is treated as void from its inception (void ab initio)—as if it was never enacted. This, in turn, means nullifying all the legal arrangements, rights, interests, obligations, offices and acts that were established under its authority. As the Ressler case demonstrates, this result can have far-reaching ramifications for both public and private interests.

Admittedly, this problem is not unique to judicial decisions nullifying a law. Judicial decisions can often change the state of the law—for example, by overruling a previous precedent; by creating a new common-law rule; by adopting a new interpretation to constitutional, statutory or administrative provisions; etc. All these decisions raise the important question of the temporal effects of judicial decisions: Should the holding—and the new norm it establishes—apply from the moment of the decision onwards ("prospective" or "ex nunc" effect) or should it also apply to events that occurred before the decision ("retrospective" or "ex tunc" effect)? However, this question becomes particularly acute when the court invalidates an Act of Parliament.

This Article explores the Israeli Supreme Court's approach for dealing with potential negative consequences of retrospective voidance of statutes. It focuses on three main remedial strategies for tempering the temporal effects of in-
validating a statute: giving the judicial declaration of invalidity prospective effect; suspending the declaration of invalidity; and the relative voidance doctrine.

Part 2 describes the Israeli Court's general approach regarding the temporal effects of judicial decisions. Part 3 focuses on judicial decisions nullifying a law, exploring two main strategies for modulating their temporal effects: the doctrine of relative voidance and the suspension of the declaration of invalidity. It briefly explains each strategy and analyzes the relationship between the two strategies and the issue of temporal effects of judicial decisions. This analysis is important, as there seems to be great confusion, even among some of the Justices, about the distinction between these legal tools and the relationships between them. This confusion, moreover, is not unique to Israel.

Part 4 examines the use of these modulating strategies in practice, by examining the case law of the Israeli Supreme Court, and analyzing all the cases in which the Court invalidated a law. This examination reveals some interesting developments, as well as surprising findings, as to the actual use of modulating strategies by the Court.

Part 5 turns to a normative evaluation of these developments. Exploring the question from the perspectives of rights protection, separation of powers, the need for flexibility and the fear from unbridled judicial discretion, it defends modulated remedies, as well as a preference of suspension and prospective application over relative voidance. Part 6 concludes.

2 The General Rule about the Temporal Effects of Judicial Decisions

Given the great importance of the subject, it is surprising that until relatively recently there was no clear and settled rule about the temporal effects of judicial decisions in Israel. Unlike many other legal systems, there is no constitutional or statutory provision governing this issue. Indeed, with the exception of some academic scholarship and a few obiter statements by the Court, this issue has long been largely neglected.

Only in the 2006 Solel Boneh decision did the Court adopt an official

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9 See part 3.2.1 infra.
11 See Solel Boneh (n 8), 226.
12 See editors introduction to this book.
13 Interestingly, the draft of the proposed Basic Law: Legislation suggested by the Justice Ministry in March 2012 includes a suggestion to amend Basic Law: The Judiciary by adding the following provision: "When the Court holds that a law is invalid, it may give any order or remedy it sees fit under the circumstances, including determining the date in which the declaration of invalidity will take effect."
14 See Solel Boneh (n 8), 226; cf. ibid 208.
position on the subject. The majority opinion of the Court, written by President Barak, began with discussing the types of considerations for determining the rule about the temporal application of judicial decisions. The Court dismissed the relevance of jurisprudential and separation-of-powers arguments, mainly because the Blackstonian declaratory theory never garnered much acceptance in Israel, whereas the idea of judicial lawmaking is well accepted and is not seen as irreconcilable with separation of powers between legislators and judges. The Court held, therefore, that the question should be decided based upon practical considerations, such as which rule will lead judges to make better decisions about when to depart from previous precedents; which rule will provide the optimal incentives to litigants to argue that the law should be changed; which rule would be easier to apply in practice; etc. It concluded, however, that these considerations pull in both directions.

Eventually, the Court resolved this dilemma by adopting a general rule along with an exception to this rule. The Court held that, as a rule, judicial decisions have retrospective application, but also recognized its authority to depart from this rule and give its decisions merely prospective effect.

In articulating the conditions for giving a judicial decision prospective effect, the Court held that the main, and indeed essential, factor is the reliance interest of individuals and of private and governmental bodies. The Court should examine in each case the strength of the reliance interest (inter alia, whether the reliance on the previous state of the law was reasonable); its weight vis-à-vis the weight of conflicting considerations; and whether there are alternative legal tools that can sufficiently protect the reliance interest. The Court estimated that under these criteria, very few cases will justify prospective application.

Vice-President Cheshin wrote a separate concurring opinion. Justice Cheshin agreed that the practical considerations greatly outweigh the jurisprudential and constitutional considerations in resolving this issue. He also agreed on the need for flexibility and discretion, and therefore of avoiding an absolute blanket rule. His essential disagreement with the majority opinion was therefore on the question what should be the rule and what should be the exception. Justice Cheshin opined that the rule should be that judicial decisions have only prospective effect, whereas retrospectivity should be the exception.

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15 Solel Boneh (n 8).
18 Solel Boneh (n 8), 211-14, 216-17.
19 Ibid.
20 Solel Boneh (n 8), 216-17.
22 Ibid 226-27.
23 Ibid 225-26, 253, 255.
when considerations of justice require retrospective application. Justice Cheshin’s opinion remained a solitary opinion, however, among the seven-Judge panel that rendered the decision.

In sum, Solel Boneh established that the default rule in Israel is that judicial decisions have retrospective effect, but courts also have the power to depart from this rule and give their decisions merely prospective force in special circumstances, mostly pertaining to the reliance interest.

Solel Boneh established the general rule about the temporal effects of judicial decisions. It did not discuss the specific case of judicial decisions invalidating statutes (rather, the specific case there was a torts case that gave a new interpretation to a statute by overruling a previous interpretation). Nevertheless, the Court seemed to indicate that the same rule will be applicable to all areas of the law (be it public, criminal or private law) and to all types of cases in which a judicial decision changes the state of the law—whether by overruling a previous decision or by determining a new ruling; whether by developing the common law, filling a lacuna, interpreting or invalidating constitutional, statutory or regulatory provisions. Justice Cheshin criticized this effort to establish a uniform all-embracing rule, arguing, inter alia, that different criteria may apply when case law overrules case law in a common law matter and when a court declares a certain statute to be unconstitutional.

As the next parts show, the specific case of judicial invalidation of statutes is often treated by the Court not by the general rule established in Solel Boneh, but rather through judicial doctrines the Court developed to modulate the temporal effects of judicial invalidations of statutes.

3 Tempering the Temporal Effects of Judicial Decisions Invalidating Statutes

When a court holds that a certain statute or statutory provision is unconstitutional, it has a variety of remedies at its disposal, several of which (such as severability) can be seen as tools for modulating the effects of judicial invalidations of statutes. However, two remedies are particularly germane as strategies for tempering the temporal effects of such decisions. These are the doctrine of relative voidance and the suspension of the declaration of invalidity.

3.1 The Doctrine of Relative Voidance

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25 Solel Boneh (n 8) 207-08.
26 Solel Boneh (n 8) 226, 227, 236-38.
3.1.1 Absolute Voidance, Voidability, and Relative Voidance

In HCJ 6652/96 The Association for Civil Rights in Israel v. Minister of the Interior, the Court considered three possible approaches regarding the results of unconstitutionality: absolute voidance; voidability; and relative voidance.28

According to the absolute voidance approach, an unconstitutional law is completely null and void. It has no legal force whatsoever. It is treated as if it was merely a piece of paper. It is treated, moreover, as void from the outset (void ab initio), as if it never existed. Consequently, the judicial holding of unconstitutionality necessarily applies retrospectively from the moment of the law's enactment, nullifying with it all the acts and legal measures whose validity depended on that law.29 As Justice Field famously articulated, "[a]n unconstitutional statute is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."30

Under the voidability approach, an unconstitutional law is not void ab initio, it is only voidable—that is, susceptible to judicial invalidation. This means that the law remains valid and enforceable until the authorized court declares it invalid. The judicial invalidation may turn the law into complete nullity in the sense that it has no legal force whatsoever. However, the judicial invalidation is seen as constitutive rather than merely declaratory. Consequently, the court is authorized to determine whether its invalidation decision will apply prospectively or retrospectively.31

The relative voidance approach is based on two main ideas.32 One is that the legal concept of voidance or invalidity is a relative and flexible concept.33 The second idea is that the question of constitutionality is distinct and separate from the question of the results of unconstitutionality. That is, the mere determination of unconstitutionality—or the specific type of constitutional flaw—do not necessarily determine the result of unconstitutionality.34 Instead, courts

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28 HCJ 6652/96 The Association for Civil Rights in Israel v Minister of the Interior [1998] IsrSC 52(3) 117 [hereinafter: Association for Civil Rights].
29 Ibid 125; Barak, Constitutional Interpretation (n 27) 721-22.
30 Norton v Shelby (n 7) 442.
31 Association for Civil Rights (n 28) 126; Barak, Constitutional Interpretation (n 27) 722-23 (drawing heavily on H. Kelsen, General Theory of Law and State (Wedbery Trans., 1945) 157-61).
32 Israeli scholars have been struggling with the translation of this doctrine's name to English, calling it "relative voidance"; "relative voidness"; "relative invalidity"; and "relative voidability". I eventually chose "relative voidance" because a search on the Court's official English website (http://elyon1.court.gov.il/eng/home/index.html) reveals that this is the most commonly used term in the official translations.
34 This idea presents a dramatic shift from the traditional approach in Israeli public law (which, in turn, was based on the British tradition), which viewed the type of defect as determining the result of illegality or unconstitutionality. Under the traditional view, severe and
have wide discretion to determine the results of unconstitutionality and choose the proper remedy on a case-by-case basis.\(^{35}\)

Consequently, an unconstitutional law is not necessarily completely void in the sense of having no legal force whatsoever. Rather, the court has discretion to determine the extent of invalidity—ranging from complete validity to complete voidance. The court may decide to withhold a remedy altogether or to determine that the law will be considered invalid in some contexts and at the same time completely valid in other contexts. The court can hold, for example, that the law will be null and void regarding a certain set of circumstances or set of people, while continuing to be valid with regard to a different set of circumstances or people. Similarly, an unconstitutional law is not necessarily \textit{void ab initio}. Rather, the court may choose to apply its holding prospectively or retrospectively.\(^{36}\)

The proper remedy will be chosen in each case according to the severity of the unconstitutionality and to the circumstances of the case, including, inter alia, the degree of reliance on the statute; the extent of the reasonable expectations that it created; and the consequences that will arise from declaring it void.\(^{37}\)

Eventually, the majority opinion in the \textit{Association for Civil Rights} case officially endorsed relative voidance as the preferred approach for dealing with the effects of unconstitutional legislation. Justice Zamir reasoned that the absolute voidance approach can undermine legal certainty and social order and is simply unpractical. He argued that the experience of legal systems that follow this approach, such as the U.S. and Canada, shows that courts cannot follow through with this strict approach and are destined to adopt exceptions that in practice bring them close to the relative voidance approach. He therefore favored the flexibility of the relative voidance approach, which allows courts to reach the best result in each case.\(^{38}\) Justice Beinisch joined this opinion, stressing the advantages of the relative voidance approach for solving the difficult situations that a declaration of unconstitutionality may create. Indeed, she opined that the relative voidance doctrine, to a large extent, takes out the sting out of the difficulties and complexities involved in holding a statute unconstitutional.\(^{39}\)

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\(^{36}\) Association for Civil Rights (n 28) 126, 142; Barak, \textit{Constitutional Interpretation} (n 27) 724.

\(^{37}\) Ibid.

\(^{38}\) Association for Civil Rights (n 28) 141-42.

\(^{39}\) Ibid 144.
3.1.2 The Relationship Between Relative Voidance and Prospective Effect

In one respect, the relationship between the relative voidance doctrine and the question of the temporal effects of judicial decisions is straightforward. While the traditional absolute voidance doctrine necessitates giving judicial invalidations retrospective effects; the relative voidance doctrine (like the voidability doctrine) provides courts with discretion to choose whether the invalidation will apply retrospectively or prospectively.

In this respect, Association for Civil Rights can be seen as establishing the same rule as Solel Boneh, simply in a more specific context. That is, Solel Boneh established that courts have the authority to depart from the default rule that judicial decisions in have retrospective effects; whereas Association for Civil Rights established that courts have the authority to depart from the traditional rule that judicial invalidations of statutes have retrospective effects. Both decisions, moreover, left wide discretion for judges to decide when to give their decision merely prospective application, and both decisions stressed issues of reliance as a paramount consideration.

The relationship between the relative voidance doctrine and the question of the temporal effects of judicial decisions is more complex, however. The relative voidance doctrine does much more than allow courts to apply their invalidating decision prospectively. It is a broad doctrine, which allows courts wide discretion to choose among a spectrum of possible remedies, in which prospective application is but one option. This doctrine, moreover, is first and foremost a tool for alleviating the consequences of judicial declarations of unconstitutionality, mainly by allowing flexibility in determining the extent of invalidity.

This means that in addition to permitting prospective application, the relative voidance doctrine also provides alternative modulating options that can diminish the need for prospective application. Indeed, in Solel Boneh, the Court emphasized that a strong reliance interest is not enough for departing from the default rule of retrospective application, for courts must also examine whether there are other doctrines that can sufficiently protect the reliance interest. Tellingly, the Court chose the doctrine of relative voidance as its primary example of an alternative that can negate the need for prospective application.\(^{40}\)

In sum, the relative voidance doctrine should be understood as a broad modulating tool, which enables prospective application, but mostly constitutes an alternative to prospective application.

3.2 The Suspension of the Declaration of Invalidity

The general rule is that judicial rulings, including a judicial declaration

\(^{40}\) Solel Boneh (n 8) 218-19 (internal citations omitted).
of unconstitutionality, take effect at the moment they are given. However, courts may decide to suspend the entry into force of their ruling until some future time determined by the court. That is, the court may declare a certain statute invalid, but hold that the declaration of invalidity will only take effect at a later date. During this period until the declaration of invalidity takes effect, the unconstitutional law remains in force.

The Israeli Court recognized its authority to suspend its declaration of invalidity of statutes in HCJ 1715/97 The Israel Association of Investment Managers v. The Minister of Finance. In that case, the court declared that a certain statutory provision was unconstitutional and therefore void, but suspended its declaration of voidance by three months. The court noted that it will use its authority to suspend declarations of invalidity "only in special cases that will justify its use." However, it did not elaborate on the type of circumstances or considerations for recognizing such justified "special cases."

3.2.1 The Relationship Between Suspension and Prospective Effect

There seems to be great confusion about the relationship between suspension of the declaration of invalidity; retrospective or prospective effect of the judicial invalidation; and the doctrine of relative voidance. Part of the confusion stems from the fact that the Court itself often compounds suspension and prospective effect (or at least does not clearly distinguish between them), while also treating both as part of the relative voidance doctrine.

Suspension should therefore be distinguished from prospective application. Suspension deals only with the question of when the declaration of invalidity will come into effect: immediately or at some later date. It says nothing about the separate question of whether the declaration of invalidity will apply retrospectively or prospectively (that is, whether the law will be treated as invalid from its inception or only from the time in which the judicial declaration takes effect). Hence, suspension means that the declaration of invalidity will come into effect at some time in the future, but it does not necessarily mean that the declaration of invalidity will only apply to future events. Indeed, the suspension remedy can be used in conjunction with either retrospective or prospective application.

Suspension and prospective application can be seen as different means for dealing with potential negative consequences of retrospectively invalidating a

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41 This is also sometimes termed an effect "pro futuro." Editors intro (part 3.3).
42 HCJ 1715/97 The Israel Association of Investment Managers v The Minister of Finance [1997] IsrSC 51(4) 367, 415-16.
43 Ibid.
44 Ibid.
statute. Prospective application directly avoids retrospective invalidity, thereby allowing all the legal measures and acts that occurred prior to the judicial decision to remain intact. Suspension, in contrast, provides a grace period, which gives time for private and governmental parties to prepare for the consequences of retrospective invalidation, and for the legislature to pass legislation that will avoid or ameliorate these consequences.\(^{47}\)

Hence, suspension can be employed together with prospective application, when there is a special need to further soften the consequences of invalidating a statute. However, suspension can also be seen as an alternative to prospective application, for it provides alternative means to alleviate the concerns underlying prospective application. Thus, like relative voidance, the availability of the suspension option can serve as a consideration against prospective application.

### 3.2.2 The Relationship Between Suspension and Relative Voidance

Several judicial decisions insisted that suspension is part of the relative voidance doctrine.\(^{48}\) This position may be attributed to the tendency of equating the relative voidance doctrine with the general proposition that courts have discretion to choose the remedy that will ensure the best result according to the possible consequences and specific circumstances of each case.\(^{49}\) Undeniably, suspension, like relative voidance, is a tool for modulating the consequences of invalidating statutes and for alleviating similar concerns. Moreover, both involve judicial discretion and both could be seen as involving similar considerations in their application.\(^{50}\)

Nevertheless, suspension should be distinguished from relative voidance. Under relative voidance, the Court chooses the type of remedy, including discretion to treat an unconstitutional law as entirely valid or partially valid for certain circumstances. In contrast, suspension has nothing to do with choosing the substance of the remedy. It is limited to deciding when the remedy (whatever it may be) will take effect.\(^{51}\)

Furthermore, contrary to the prevalent judicial view,\(^{52}\) I do not believe that the analytical basis—or the source of judicial authority—to suspend the declaration of invalidity necessarily stems from the doctrine of relative voidance.\(^{53}\) Suspension is perfectly compatible with the view that unconstitutional laws are absolutely null and void \textit{ab intio}. The Canadian example, which has been the

\(^{47}\) Cf Choudhry and Roach (n 10) 226-33.

\(^{48}\) See HCJ 1437/02 Association for Civil Rights in Israel v Minister of Public Security [2004] IsrSC 58(2) 741, 763 and citations therein; Mersel (n 46) 46 n. 21.

\(^{49}\) See Noah (n 45) 270.

\(^{50}\) Mersel (n 46) 46-47.

\(^{51}\) Cf ibid 47.

\(^{52}\) Ibid 46-47.

\(^{53}\) Barak-Erez (n 34) 320.
major source of inspiration for Israel in this area.\textsuperscript{54} proves exactly that. Indeed, the suspension tool developed in Canada precisely because the court was cognizant of the consequences that may arise from the prevalent view at the time that an unconstitutional law is seen as if it has no existence and "never did exist."\textsuperscript{55} In fact, as I will argue in part 4.3, not only the Canadian experience, but even the Israeli experience, demonstrates that suspension operates in practice without recourse to the relative voidance doctrine.

In sum, I believe suspension should be understood more as an alternative to, than a part of, the doctrine of relative voidance.\textsuperscript{56} Suspension is distinct from prospective application and relative voidance. It operates independently of these remedial tools and can be used either in conjunction with or as an alternative to them.

4 From Theory to Practice: The Actual Use of Modulating Remedies

The previous parts discussed three remedial tools: prospective application, relative voidance and suspension. This part explores the use of these remedies in practice by examining and analyzing the Supreme Court's relevant case law. It begins by examining developments in the use of the \textit{Solel Boneh} ruling and of the doctrine of relative voidance. It than turns to the specific case of decisions invalidating statutes, by examining the remedies employed in all the cases in which the Israeli Supreme Court invalidated a statute.

4.1 The Application of \textit{Solel Boneh} in Later Cases

As of January 2013, the \textit{Solel Boneh} holding was cited in some 30 Supreme Court cases. Ten of these cases dealt with the application of \textit{Solel Boneh}'s ruling about the temporal effects of judicial decisions (albeit in two of these cases, the Court eventually held that the decision about the temporal effect of the decision can be deferred to a later date). Hence, so far, the \textit{Solel Boneh} ruling has been applied in nine Supreme Court cases (including the \textit{Solel Boneh} case itself). In seven of these cases, the Court followed the default rule, holding that the judicial decision will have retrospective application.\textsuperscript{57} In one case the Court adopted retrospective application with some limitation.\textsuperscript{58} Only in one case, in which there was very strong reliance interest, the

\textsuperscript{54} Mersel (n 46) 60.
\textsuperscript{55} Choudhry and Roach (n 10) 212.
\textsuperscript{56} Cf also Mersel (n 46) 93-94.
\textsuperscript{57} \textit{Solel Boneh} (n 8); LCA 4447/07 \textit{Mor v Barak ETC} (2010) (not yet reported); CrimA 5121/98 \textit{Issacharov v Chief Military Prosecutor} 2006(1) Isr. L. Rep. 320; CA 546/04 \textit{Jerusalem Municipality v Clalit Medical Services} (2009) (not yet reported); CA 8881/07 \textit{Lev v Toby} (2012) (not yet reported); LCA 5838/07 \textit{Aref v Awad} (2012) (not yet reported); HCJ 3514/07 \textit{Mivtachim v Furst} (2012) (not yet reported).
\textsuperscript{58} CFH 3993/07 \textit{Ikafood Ltd v Jerusalem Tax Assessor} (2011) (not yet reported).
Court opted for prospective application.\textsuperscript{59}  
Hence, so far it appears that prospective application of judicial decisions remains a rare exception. As of now, the Solel Boneh Court's estimation that very few cases will satisfy its criteria for prospective application holds true in practice.\textsuperscript{60}  
The cases applying Solel Boneh also demonstrate that while this case established the official rule regarding the temporal effects of judicial decisions, it has been less successful in providing clear guidelines as to how to apply its ruling. This was evidenced by the fact that one of the Supreme Court cases applying Solel Boneh has already led to a special "further hearing" procedure before an extended seven-Justice panel, dedicated entirely to the question of whether the Solel Boneh rule has been properly applied in that specific case. That rehearing procedure resulted in an 82-pages decision in which the Justices were deeply divided on Solel Boneh's proper application.\textsuperscript{61}

4.2 The Expansion and Prevalence of Relative Voidance in Israeli Law

Justices and court observers seem to be unanimous in their observation that the relative voidance doctrine has become well-established in Israel and is gaining more and more ground every day.\textsuperscript{62} This trend has been particularly dramatic in administrative law.\textsuperscript{63} In this area, there has been a steady expansion since the early 1980s in the number of cases, as well as in the type of cases, in which the court employed this doctrine.\textsuperscript{64} Indeed:

From a narrow doctrine applied sparingly to give legal effect to marginal breaches or to voidable acts of governmental agencies, the Supreme Court has increasingly used relative voidness to resuscitate void acts [which under the traditional approach would have been deemed null and void]. The Court has done so even when administrative decisions were reached ultra vires or in violation of fundamental principles of natural justice, such as the right to a hearing.\textsuperscript{65}

\textsuperscript{59} CA 4243/08 Dan County Tax Assessor v Perry (2009) (not yet reported). The Court, however, did apply the new ruling on the case in point, that is, to the parties of this specific case.

\textsuperscript{60} Solel Boneh (n 8) 217-20.

\textsuperscript{61} Ikafood (n 58).


\textsuperscript{63} Barak-Erez (n 34) 284.

\textsuperscript{64} Ibid 294-311; Bendor (n 62) 400.

\textsuperscript{65} Blum (n 62) 441.
There has also been an expansion in the remedies given under this doctrine. From a tool for giving a moderated remedy in lieu of absolute, retrospective voidance, the doctrine has been increasingly used to deny a remedy altogether. It has also increasingly been used as a means for providing particularly creative and complex remedies, not asked for by the parties.

The considerations and circumstances for the use of this doctrine also broadened with time. The doctrine was originally employed when it was deemed "crucial to protect individuals who acted in good faith or in reliance upon" the illegal act. "But the doctrine soon expanded; it was increasingly used to give general effect to decisions reached in violation of administrative law… often… invoked against individuals and in favor of the government, rather than the other way around."

The growing influence of this doctrine is not limited to administrative law. In recent years, this doctrine has been adopted in more and more areas of law, such as contracts, evidence and civil procedure. As Justice Cheshin observed in 2006, "[t]he doctrine came to us only recently, and it has taken control of spheres of law that our predecessors never imagined."

Indeed, relative voidance seems to be "all the rage" in Israeli law. The growing prevalence of this doctrine can also be demonstrated through the following graph, showing the number of Supreme Court cases mentioning the term "relative voidance" over four year periods since 1988:

![Graph showing the number of Supreme Court cases mentioning the term "relative voidance" over four year periods since 1988.]

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66 Bendor (n 62) 401.
67 Ibid 401-405.
68 Blum (n 62) 441.
69 Ibid.
70 Barak-Erez (n 34) 284 & n. 6.
72 Using the "Nevo" legal search-engine, at www.nevo.co.il.
Against this backdrop, one would expect that relative voidance will also be commonly employed in constitutional cases invalidating statutes, particularly since the Court explicitly endorsed it as the preferred approach in Association for Civil Rights. The next part, however, reveals surprising findings.

4.3 The Remedies Employed in Cases Invalidating Statutes

Constitutional judicial review—that is, the power of courts to review and invalidate primary legislation—is relatively new in Israel. Traditionally, Israel followed the traditional British model of parliamentary sovereignty, in which parliament was supreme and courts had no power to question the validity of its laws. In 1969, the Court recognized its power to exercise judicial review, but only in the specific and limited sense of enforcing constitutional provisions that entrenched certain rights or values through procedural entrenchment. In practice, for many years, only one constitutional provision in Israel had such procedural entrenchment, and only four cases invalidated laws violating this provision.

The Court only recognized its authority to exercise full-fledged substantive judicial review in the 1995 Bank Hamizrahi decision, which was given following enactment of Basic Law: Human Dignity and Freedom and Basic Law: Freedom of Occupation in 1992. Since Bank Hamizrahi, the Court invalidated 11 statutes or statutory provisions.

The following table summarizes all the cases (as of January 2013) in which the Supreme Court invalidated statutes or statutory provisions and the remedy chosen in each case.

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<tr>
<th>Case Name</th>
<th>Constitutional Remedy</th>
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<tr>
<td>1. H CJ 98/69 Bergman v Minister of Finance</td>
<td>Complete voidance, applies retrospectively.</td>
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<tr>
<td>2. H CJ 246/81 Derech Eretz Association v Broadcasting Authority</td>
<td>Complete voidance, applies retrospectively.</td>
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73 Bar-Siman-Tov (n 27) 370-71
75 Bergman (n 73); HCJ 246/81 Derech Eretz Association v Broadcasting Authority [1981] IsrSC 35(4) 1; HCJ 141/82 Rubinstein v Knesset Speaker [1983] IsrSC 37(3) 141; HCJ 142/89 Laor Movement v Knesset Speaker [1990] IsrSC 44(3) 429.
76 CA 6821/94 Bank Hamizrahi v Migdal Association Village [1995] IsrSC 49(4) 22. A few years before that the Court also recognized its authority to exercise judicial review of the legislative process, but it has never invalidated a law under that authority. See Bar-Siman-Tov (n 27) 371, 390.
77 [1969] IsrSC 23(1) 693.
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<th>Case Details</th>
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<td>3. HCJ 141/82 Rubinstein v Knesset Speaker(^{79})</td>
<td>Complete voidance, applies retrospectively.</td>
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<td>4. HCJ 142/89 Laor Movement v Knesset Speaker(^{80})</td>
<td>Complete voidance, applies retrospectively.</td>
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<tr>
<td>5. HCJ 1715/97 Israel Investment Managers Association v Minister of Finance(^{81})</td>
<td>Complete voidance, applies retrospectively + suspension for 3 months</td>
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<td>6. HCJ 6055/95 Zemach v Minister of Defense(^{82})</td>
<td>Complete voidance, applies retrospectively + suspension for 6 months</td>
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<td>7. HCJ 1030/99 Oron v Speaker of the Knesset(^{83})</td>
<td>Complete voidance, applies retrospectively</td>
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<td>8. HCJ 1661/05 Hof Azza Regional Council v The Knesset(^{84})</td>
<td>Complete voidance, applies retrospectively</td>
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<td>9. HCJ 8276/05 Adalah Legal Centre for Arab Minority Rights in Israel v Minister of Defense(^{85})</td>
<td>Complete voidance, applies retrospectively</td>
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<td>10. HCJ 2605/05 Academic Center of Law and Business, Human Rights Division v Minister of Finance(^{86})</td>
<td>Complete voidance, applies retrospectively</td>
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<td>11. CrimApp 8823/07 Anonymous v State of Israel(^{87})</td>
<td>Complete voidance, applies prospectively</td>
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<td>12. HCJ 4124/00 Yekutieli v Minister of Religious Affairs(^{88})</td>
<td>Complete voidance, applies prospectively + suspension for six months</td>
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<td>13. HCJ 6298/07 Ressler v The Knesset(^{89})</td>
<td>Complete voidance, applies prospectively + suspension for six months</td>
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\(^{79}\) [1983] IsrSC 37(3) 141.  
\(^{80}\) [1990] IsrSC 44(3) 429.  
\(^{81}\) [1997] IsrSC 51(4) 367.  
\(^{83}\) [2002] IsrSC 56 (3) 640.  
\(^{84}\) [2005] IsrSC 59 (2) 481.  
\(^{85}\) [2006](2) IsrLR 352.  
\(^{86}\) (2009) (not yet reported).  
\(^{87}\) (2010) (not yet reported).  
\(^{88}\) (2010) (not yet reported).  
\(^{89}\) (2010) (not yet reported).
14. HCJ 10662/04 Hassan v The National Insurance Institute of Israel\(^{90}\) Complete voidance, applies retrospectively + suspension for 6 months

15. HCJ 8300/02 Nasser v The Government of Israel\(^{91}\) Complete voidance + "reading in"; "reading in" applies prospectively; both remedies suspended for 12 months

Several important observations can be drawn from an analysis of these cases.

4.3.1 The Trend Towered Modulated Invalidations

In all four of the older, pre-Bank Hamizrahi cases, the court voided the statute without modulating the effects of the declaration of voidance.\(^{92}\) These decisions seemed to follow the view that an unconstitutional law is completely void \textit{ab intio} (although the Court did not necessarily articulate this idea in so many words). This is not surprising because these decisions were given when the ideas of constitutional review and constitutional remedies (including the ideas of prospective application, relative voidance and suspension of the declaration of invalidity) were still undeveloped in Israel.

In the post-Bank Hamizrahi cases, in contrast, the court voided the statute or statutory provision without modulating the effects of the declaration of voidance in only four out of eleven cases.\(^{93}\) In general, these were cases in which retrospectively voiding the law was not expected to have serious consequences. The invalidated law in all these cases was very recent, and in some cases, never went into effect due to an interim order against its application.\(^{94}\)

It appears, therefore, that in the post-Bank Hamizrahi era, immediate, retrospective voidance is becoming the exception, rather than the rule. This is true at least when such a hard, unqualified remedy can have negative consequences. The next sections argue, moreover, that even in the absence of potential negative consequences, moderated remedies may be becoming the new norm.

4.3.2 The Surprising Absence of Relative Voidance

Given the Court's withdrawing from hard, unqualified retrospective nullifi-

\(^{89}\) (2012) (not yet reported).
\(^{90}\) (2012) (not yet reported).
\(^{91}\) (2012) (not yet reported).
\(^{92}\) Bergman (n 73); Derech Eretz (n 74); Rubinstein (n 74); Laor (n 74).
\(^{93}\) Oron (n 82); Hof Azza Regional Council (n 83); Adalah (n 84); Academic Center of Law and Business (n 85).
\(^{94}\) See Academic Center of Law and Business (n 85) 35, 105; Oron (n 82) 650, 671.
cations, one would expect that the doctrine of relative voidance would take its place. This expectation is bolstered by this doctrine’s growing influence in Israeli law, and particularly administrative law. It is also to be expected given Association for Civil Rights’ holding that this doctrine would be the preferred approach in cases of unconstitutional statutes.

Surprisingly, however, none of the 15 decisions that declared a statute unconstitutional resorted to the doctrine of relative voidance. In none of these decisions did the Court modulate its decision by holding that the law will be only relatively or partially invalid. Strikingly, the term “relative voidance,” does not even appear in any of these cases, nor do any of these cases mention the Association for Civil Rights case.

Instead, other modulating tools—particularly suspension of the declaration of invalidity—emerged as the preferred approach.

4.3.3 The Emergence of Suspension as the Preferred Remedy

The Court suspended its declaration of invalidity in six cases. Suspension was already employed in Investment Managers—the first case that exercised the substantive judicial review authority recognized in Bank Hamizrahi and invalidated a law that violated the recently enacted Basic Laws pertaining to constitutional rights. Since then, suspension became more the norm than the exception—as it was used in over half (6 out of 11) of the post-Bank Hamizrahi cases. Moreover, of the seven post-Bank Hamizrahi cases in which voiding the law had potential negative consequences, suspension was employed in all but one case. Even in that one case, moreover, there was a minority opinion that suggested that the declaration of voidance be suspended.

An analysis of the decisions that employed suspension suggests that the relevant considerations for using it are reliance interests, avoiding a legal vacuum or significant societal, economic or security consequences, and allowing the legislature time to enact a new law. In practice, however, most of these decisions demonstrate that the Court may suspend its declaration of invalidity merely in order to give the political branches time for preparation and adjustment, even when no private reliance interests are at stake and there is no real

95 The only case which even comes close to alluding to the doctrine of relative voidance is Investment Managers (n 42) 411, when it mentions that in the comparative scholarship there are different opinions about the nature of voidance and its effect on acts that were undertaken prior to the declaration of voidance, but adds that these questions need not be resolved here.

96 Ibid 415-16.

97 Ibid 415-16; Zemach (n 81) 284; Yekutieli (n 87) [51]-[52]; Ressler (n 5) [62]; Hassan (n 89) [71]; Nasser (n 90) [54], [60]-[61].

98 Or in other words, if we exclude the four post-Bank Hamizrahi cases discussed in the previous section, in which voiding the law was not expected to have serious consequences.

99 Anonymous (n 86) (Naor J., concurring).

100 Investment Managers (n 42) 415-16; Zemach (n 81) 284; Yekutieli (n 87) [51]-[52]; Ressler (n 5) [62]; Hassan (n 89) [71]; Nasser (n 90) [54], [60]-[61]; Mersel (n 46) 58-59.
threat to public interests or the stability of the legal order.\textsuperscript{101}

The recent \textit{Hassan} case provides a good example. In \textit{Hassan}, the Court invalidated a statutory provision that automatically revoked the right to income support from income-support recipients who use or own a car. The only reason the Court gave for suspending the declaration of invalidity was that "naturally, given the fact that the State will have to formulate an alternative arrangement in place of the arrangement we are invalidating... it is proper to allow the legislature time for formulating a new arrangement."\textsuperscript{102} The Court cited no other private or public interests requiring suspension (and it is doubtful that there were any). On the other hand, the Court itself acknowledged two strong considerations against suspension: "the importance of the right in question and the fatal harm caused in the meantime to those who need income support as a last safety net."\textsuperscript{103} The Court decided, however, that the proper remedy in this case is not giving the invalidation decision immediate effect, but rather, limiting the suspension period to six months.\textsuperscript{104}

These observations about the prevalence of suspension and about the expansion of the type of circumstances in which it is used seem hard to reconcile with the Court's statement in \textit{Investment Managers} that suspension will be used "only in special cases that will justify its use."\textsuperscript{105} Indeed, this statement is particularly hard to reconcile with \textit{Hassan}'s suggestion that allowing the legislature time for formulating a new arrangement is a consideration that can by itself justify suspension, even when the Court acknowledges that the delay will cause "fatal harm" to those who are most in need of remedy.

\textit{Hassan}'s suspension decision is all the more puzzling considering that this case is the Israeli Court's most socially progressive decision to date. \textit{Hassan} is the first case in which the Court invalidated a law due to a violation of social rights, and it contains some important and far-reaching holdings about the constitutional status of social rights. Hence, there seems to be an inexplicable dissonance between the Court's sensitivity to social justice in the decision on the merits and its apparent insensitivity in the remedial decision.

This tension in \textit{Hassan}, however, may actually demonstrate and explicate the emerging function of suspension: from a tool for alleviating negative consequences to private and public interests from retrospective voidance, to a general tool for softening the sting of judicial review and demonstrating deference to the legislature.\textsuperscript{106} Under this new view of suspension, it makes sense that providing time to the legislature to enact new legislation is the primary and

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\textsuperscript{101} \textit{Investment Managers} (n 42) 415-16; Zemach (n 81) 284; \textit{Hassan} (n 89) [71]; \textit{Nasser} (n 90) [60]; \textit{Mersel} (n 46) 59, 72-76.
\textsuperscript{102} \textit{Hassan} (n 89) [71].
\textsuperscript{103} Ibid.
\textsuperscript{104} Ibid.
\textsuperscript{105} \textit{Investment Managers} (n 42) 415-16.
\textsuperscript{106} \textit{Mersel} (n 46) 59, 72-76. Interestingly, the same development occurred in Canada. Ibid 60-66.
\end{flushright}
sufficient consideration. It also makes sense to use suspension as a rule rather than as a limited exception for special circumstances when catastrophic consequences must be avoided. Finally, it makes perfect sense to use suspension in a case like Hassan. A landmark case in which the Court broadens the scope of judicial review towards new unremunerated constitutional rights is precisely the case in which a softened remedy should be employed in order to soften the blow for the legislature.

In sum, suspension seems to be establishing itself as the preferred remedy for modulating the impact of judicial invalidation of statutes. As the function of suspension develops toward a general tool for softening judicial review and deferring to the legislature, there is a correlating expansion in both the number of cases and the type of cases in which it is employed.

4.3.4 Prospective Application as the Latest Development

Prospective application of the invalidating decision is the most recent development in the case law. It was (apparently) first used in the 2010 decision of CrimApp 8823/07 Anonymous v. State of Israel, which invalidated a statutory provision that enabled a court to hold in absentia remand hearings of detainees suspected of committing security offences. In discussing the constitutional remedy, Justice Rivlin wrote that the unconstitutional provision in question "cannot stand." "From a constitutional perspective," explained Justice Rivlin, "this means that henceforth the law of detentions should be read as it were prior" to the unconstitutional provision.107

Admittedly, the Court could have been clearer and more precise in its phrasing as to the retrospective or prospective application of the invalidation. One the one hand, the phrase "the law of detentions should be read as it were prior to [the unconstitutional provision]" suggests that the invalidation applies retrospectively and that the state of the law returns to its position before the invalidated law was enacted. On the other hand, Justice Rivlin explicitly wrote that "henceforth the law of detentions should be read" in that manner, suggesting that this reading will only apply prospectively. Justice Rivlin also did not articulate his reasons for prospective application, but presumably, it was the fear from the security consequences of retroactively calling into question the detentions of all suspected terrorists affected by the ruling.108 The fact that the question has become moot with regard to the specific appellant may have also contributed to the remedial decision, as prospective application involved no injustice of denying a remedy to the appellant.

At any rate, since then, the Court gave its invalidating decisions prospective application in three additional cases, and has done a better job in clearly

107 Anonymous (n 86) [35].
108 But see ibid (Grunis J. concurring) (arguing that the remedy need not be suspended, in part because this provision was used in a very limited number of cases).
expressing its intention.\footnote{\textit{Yekutieli} (n 87) [51]; \textit{Ressler} (n 5) [62], [64]; \textit{Nasser} (n 90) [61].} Interestingly, however, none of these decisions mentions \textit{Solel Boneh}—indicating, perhaps, a tacit acceptance of Justice Cheshin’s opinion that \textit{Solel Boneh}’s holding should be limited to judicial decisions overruling previous case-law, whereas judicial invalidation of statutes should be treated as a separate issue.\footnote{See part 2 \textit{supra}.}

In \textit{Anonymous}, prospective application was used on its own, albeit one of the Justices advocated suspension (apparently without the addition of prospective application).\footnote{\textit{Anonymous} (n 86) (Naor J., concurring).} In the three later decisions, prospective application was employed in conjunction with suspension.\footnote{\textit{Yekutieli} (n 87) [51]; \textit{Ressler} (n 5) [62], [64]; \textit{Nasser} (n 90) [54], [60], [61].}

The three later decisions were also clearer in articulating their reasons for resorting to prospective application and for its use together with suspension. In \textit{Yekutieli}, the Court invalidated a budgetary item that provided income support benefits to \textit{kollel} students ("avrechim"). The Court held that providing this benefit only to \textit{kollel} students, while denying similar benefits to students of all other types of institutions, violated the right to equality. In discussing the remedy, the Court held that "the Budget item… cannot stand."\footnote{\textit{Yekutieli} (n 87) [51].} However, instead of invalidating it immediately and retrospectively, the Court "order[ed] that the Budget Item will remain in place as it appears in the [current] budget law[... however, it cannot continue to be included—at least not in its present format—in future budget laws."\footnote{\textit{Ibid.}}

In explaining its choice of suspended prospective effect, the Court stated:

we have done so in an effort to reduce the impairment to the interests of the benefit recipients who rely upon it. We cannot ignore the fact that the benefits have been paid to \textit{kollel} students for over two decades, and the immediate cessation of payments would cause harm to an impoverished population. Presumably, the families of the \textit{kollel} students receiving benefits rely on those benefits in calculating their monthly income for the purpose of basic subsistence. Therefore, we have seen fit to enable them to prepare to find alternative sources of income.

However, not only the reliance interest leads to the conclusion that the Budget Item in the present budget law should not be canceled. One of the problems arising from the fact that the income support payment arrangement for \textit{kollel} students has been included in the annual budget laws is that no comprehensive examination of it… has been made. Therefore, the decision to refrain from declaring the immediate cancellation of the Budget Item is also motivated by the desire to enable the legislator to examine the gamut of existing ar-
rangements, thereby giving the Knesset time to conduct practical discussions on the issue.\textsuperscript{115}

The 2012 \textit{Ressler} decision, discussed in the introduction to this Article, held that the statute exempting yeshiva students from military service was unconstitutional, as it violated the right to equality. In discussing the remedy, the Court held that "[t]he practical result of this conclusion is that the Deferment Law is declared void, or in other words, looking to the future, that it cannot be extended in its present form."\textsuperscript{116} In explaining her choice of suspended prospective effect, President Beinisch stated:

Along with this declaration, we must take into consideration the fact that the Deferment Law was enacted as a temporary order. The Law... is slated to expire on 1 August 2012. In view of the fact that many arrangements were made in accordance with the rules established by the Law, and bearing in mind that we may assume that many people planned their lives in accordance with its provisions, I would recommend to my colleagues that the declaration that the Law is void be held in abeyance, and that we allow the Law run its course. This period will allow the Legislature time to weigh our comments, and enact a new arrangement that will take into account this judgment, as well as the prior judgments.... The result is that the Law will remain in force until its expiry on 1 August 2012, and the Knesset will not be able to renew it in its present form.\textsuperscript{117}

Most recently, in \textit{Nasser}, the Court held that a statutory provision that distributed tax benefits in an arbitrary and discriminating fashion was unconstitutional. It therefore invalidated the provision that unjustifiably provided tax benefits to five Jewish municipalities. However, it suspended the declaration of invalidity, due to the economic consequences that cancelling the tax benefits will have on the lives of the residents of these municipalities, and in order to allow the legislature time to develop proper criteria for the distribution of the tax benefits.\textsuperscript{118} The Court also granted a "reading-in" remedy, ordering that the provision that listed the municipalities eligible for tax benefits should be read as including three non-Jewish municipalities that were unjustly excluded from the list. This remedy was given prospective effect due to its budgetary ramifications. It was also suspended, due to the importance of adopting a comprehensive solution to the problem and in order to allow the legislature time to develop proper criteria that will solve the problem of all similarly situated municipalities, including those whose case was not before the Court.\textsuperscript{119}

These cases suggest several common themes. The three latter cases were all equality cases in which the invalidation took away a benefit (income support, tax benefits, exemption from mandatory conscription) from a certain

\textsuperscript{115} Ibid [51]-[52].
\textsuperscript{116} \textit{Ressler} (n 5) [62].
\textsuperscript{117} Ibid [62], [64].
\textsuperscript{118} \textit{Nasser} (n 90) [54].
\textsuperscript{119} Ibid par 61.
group. The benefit, moreover, has typically been given for a significant amount of years, establishing a strong reliance interest. Hence, it appears that the essential common consideration in these cases is the need to avoid significant harm to third-parties who relied on the invalidated law. The other common consideration is allowing the legislature time to enact a new arrangement, but it appears that, contrary to cases that employ only suspension, this consideration alone will not suffice.

The *Anonymous* decision and the reading-in part of *Nasser* stand out. In these cases, the common consideration seems to be the public interest of avoiding negative security or budgetary ramifications (coupled with allowing the legislature time to adopt a new arrangement in *Nasser*). The Court, however, did not seem to conduct a serious assessment of the probability and graveness of these potential harms. Moreover, while in *Anonymous* there was no need to balance these harms with damage to the appellant (whose case became moot), it is not clear that the Court gave sufficient weight to the damage to the petitioners in *Nasser*. As the Court itself noted, these petitioners suffered a grave violation of their right to equality, which has been going on for years, as the Court waited ten years—in repeated efforts to let the legislature solve the inequality—before finally handing down its decision.\(^\text{120}\) Hence, it is doubtful that adding suspension to the prospective application was justified here.

In total, the Court opted for prospective application in four out of its last five decisions invalidating statutes. This may suggest that prospective application is not only the latest development, but perhaps also a beginning of a trend. It should be noted, however, that in most of the cases, prospective effect has been used in conjunction with, rather than as an alternative to, suspension. Moreover, unlike suspension, it seems that so far the Court has limited its use of prospective application to cases in which retrospective application would have serious consequences to private or public interests.

5 **Normative Evaluation**

The previous part revealed a trend towards modulated remedies and a preference of suspension and prospective application over relative voidance. This part turns to a normative evaluation of these developments. It explores this question from three perspectives: the relationship between remedies and the protection of rights; the relationship between remedies and separation of powers; and the proper balance between the need for flexibility and the fear from unbridled judicial discretion.

5.1 **Modulated Remedies and Rights**

One of the major justifications for judicial review is "[t]he necessity of

\(^{120\text{Nasser (n 90) [55].}}\)
vindicating constitutionally secured personal liberties."\textsuperscript{121} A strong remedy, which completely and immediately voids an unconstitutional law from its inception, provides the most forceful vindication of these rights. It represents the strongest unconditional pronouncement to the "general and indisputable rule, that where there is a legal right, there is also a legal remedy… whenever that right is invaded."\textsuperscript{122} Modulated remedies, on the other hand, necessarily mean that rights' vindication will be less than absolute. All the modulating tools discussed in this article necessarily mean that at least some aspect of the right's violation will go unremedied.

However, there is an important difference in the extent that these different modulating tools allow right violations to persist. Most extreme, of course, is relative voidance, which allows courts to completely withhold a remedy. This means that the Court is essentially declaring that the rights' violation may continue unabated, despite its holding on the merits that rights were violated to the extent of rendering the law unconstitutional.\textsuperscript{123} Relative voidance's more moderate option of allowing courts to declare a law only partially invalid, while treating it as valid in some circumstances, is slightly less problematic. Purely prospective application does not allow right violations to persist, but it leaves past violations unremedied, and worse still, it leaves the specific litigant without a remedy. Prospective application, combined with an exception for "the case in point," solves the latter problem.\textsuperscript{124} Finally, suspension allows rights' violation (and damage to the specific litigant) to persist, but only temporarily.

The extent to which the remedy vindicates the right (or allows its violation to persist) is important not only for the principle that right violations should be remedied or for preventing injustice in the specific case. It also has important implications for the extent that rights are valued and protected in society. When courts routinely withhold a remedy (either altogether under relative voidance or from the specific litigant in purely prospective application) or provide only delayed or watered-down remedies, they may create a disincentive to challenge unconstitutional laws. Such remedies, moreover, may lead to under-deterrence of legislatures from violating rights.\textsuperscript{125} They may also send a societal message that rights are valued in theory but not in practice, which may lead to the depreciation of rights in society.\textsuperscript{126}

On the other hand, the possible consequences of retrospectively voiding a law may over-deter courts from exercising judicial review. Hence, if courts have remedial tools for ameliorating these consequences they might be more

\textsuperscript{122} Blackstone (n 17) 23; Marbury v. Madison, 5 U.S. 137, 163 (1803).
\textsuperscript{123} Daphne Barak-Erez 'Relative Voidance and Judicial Discretion' (1995) 24 Mishpatim 519, 521-23.
\textsuperscript{124} See editors intro part 3.2.
\textsuperscript{125} Bendor (n 62) 401.
\textsuperscript{126} Barak-Erez (n 122) 521-23.
willing to recognize new rights, broaden the scope of rights, and invalidate laws that infringe these rights. As Daryl Levinson argues, "[n]onretroactivity facilitates—and may be a prerequisite for—the creation of new rights by reducing the cost of inventing them." Taking the famous Miranda v. Arizona decision as an example, he argues that

The Court would never have created the right in Miranda... if the warning requirement had applied retroactively so that every prisoner had to be released from custody on postconviction review. By making Miranda mostly nonretroactive, the Court eliminated the remedial deterrent threat of emptying the prisons and enabled the Miranda right to exist.128

Prospective application may have similarly made it easier for the Israeli Court to protect the procedural rights of suspected terrorists in the Anonymous decision discussed above, for it eliminated the specter of retroactively calling into question the detentions of all suspected terrorists affected by the invalidated law.129

The analysis of the decisions discussed in part 4 suggests, moreover, that Levinson’s argument can be broadened. Modulated remedies can facilitate strong protection of rights because they reduce the cost of exercising judicial review more generally. That is, in addition to alleviating the consequences of retrospective invalidation to private and public interests, modulated remedies can reduce the risk of negative consequences to the court as an institution. Because modulated remedies soften the blow of judicial review and can be seen as more respectful to the legislature, they decrease the risk of backlash and of damage to the legitimacy of the courts and their judicial review power.130

Indeed, this argument can help explain some of the decisions in which the justification for employing modulating remedies was not entirely clear. This was the case in Hassan, where no private or public interests required suspension, whereas delaying the remedy caused serious harm to those whose rights have been infringed.131 This was also the case in Nasser, where the justification for suspended prospective application of the "reading-in" part of the decision was questionable.132 What Hassan and Nasser have in common is that both broaden rights' protection in a novel and activist way. Hassan was the first case in which the Court invalidated a law due to a violation of social rights (which are not enumerated in the Israeli Basic Laws), and Nasser was the first time the Court employed the reading-in remedy.133 I believe the best explana-

129 See part 4.3.4 supra.
130 See part 4.3.3 supra.
131 See part 4.3.3 supra.
132 See part 4.3.4 supra.
133 As well as the first time in which the Court invalidated a law in a decision given by the
tion for the use of modulating remedies in these cases is not the need to avoid the negative consequences of retroactivity, but the need to soften the remedy in order to offset the activist nature of the decision.

Hence, it may be better to have remedies that provide less forceful vindication of rights, but encourage, or at least enable, courts to vindicate more rights, more often. In this way, modulated remedies can actually raise the overall level of rights protection by courts. In this way, modulated remedies may also actually contribute to deterring legislatures from violating rights. Indeed, research about deterrence in other contexts clearly demonstrates that the probability of "punishment" is a much more effective deterrent that the severity of the "punishment."134

The trick is to fashion a remedial approach that will incentivize courts towards an optimal level of rights protection, while avoiding too much damage to the incentives of litigants to challenge rights' violations and to the principle that rights' violations should be remedied. I believe such an approach should include a preference of modulating tools such as prospective application and suspension over remedial approaches such as relative voidance that allow complete withholding of remedies. Additionally, such an approach should include adopting a "case-in-point" exception to both prospective application and suspension.

5.2 Modulated Remedies and Separation of Powers

*Solel Boneh* gave the short shrift to the argument that allowing courts the authority to give their decisions prospective application is inconsistent with separation of powers.135 I believe the Court was correct in dismissing the argument that such an authority will make judges indistinguishable from legislators.136 However, there is truth at the core of this argument: the greater the authority and discretion given to judges in fashioning the remedy, the closer their role becomes to that of legislators. While authority to give their decisions prospective application does little damage to our modern perception of what separates judges from legislators, a remedial approach that will allow judges to write the content of the policy that will replace the invalidated law is much more problematic in maintaining the separation between judging and legislating.

The three modulating strategies discussed in this Article can be seen as representing different views about the proper allocation of authority between courts and legislatures in dealing with the results of declaring a law unconstitu-

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135 *Solel Boneh* (n 8) 211-14, 216-17.
136 Ibid.
tional. Under prospective application and (to a much greater degree) under relative voidance, courts take it upon themselves to fashion a remedy that will alleviate the consequences of retrospectively and completely nullifying a law. In contrast, suspension involves no such assumption of responsibility. It merely temporarily delays the consequences of the judicial invalidation and leaves it to other parties, especially the legislature, to choose the proper means to ameliorate these consequences.\(^{137}\)

### 5.3 The Need for Flexibility and the Fear From Unbridled Discretion

A major theme in the *Solel Boneh* and *Association for Civil Rights* decisions—and in the move towards modulated constitutional remedies in general—is the need for flexibility. Indeed, this development can be seen as part of a much broader trend in the jurisprudence of the Israeli Court from rigid, clear rules to flexible, discretion-laden principles.\(^{138}\)

I believe the Court is correct that a rigid exception-less rule such as the rule that a holding of unconstitutionality necessarily and automatically leads to immediate retrospective voidance is not workable.\(^{139}\) The complexity of the issue and the need to evade harmful consequences to private and public interests necessitate giving courts flexibility and discretion to modulate the remedy on a case-by-case basis.\(^{140}\)

The other side of the coin, however, is the fear of giving judges unbridled discretion. The common feature of *Solel Boneh*, *Association for Civil Rights* and *Investment Managers* is giving judges broad discretion with very little guidance on how and when to use it. I believe this problem is most severe with regard to the doctrine of relative voidance.\(^{141}\) Prospective application and suspension entail broad discretion in deciding when to exercise them, but the scope of the decision itself is narrow and defined: merely determining the temporal effect (retrospective or prospective) or timing (immediate or suspended) of the remedy. Prospective application and suspension entail no determination on whether to invalidate the law or on the scope of invalidation. These tools say nothing about the content of the remedy.

In contrast, relative voidance gives judges very broad discretion to fashion the remedy itself. It gives courts discretion to determine the extent of invalidity—which entails choosing along the broad spectrum from complete voidance to complete validity, as well as the option of limiting the invalidity to specific

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\(^{137}\) Choudhry and Roach (n 10) 226-33.
\(^{138}\) Barak-Erez (n 34) 316; Daphne Barak-Erez, 'Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint' (2009) 3 Indian J Constitutional L 118, 125-26, 137.
\(^{139}\) *Association for Civil Rights* (n 28) 141-42.
\(^{140}\) Dotan (n 34) 599-603.
\(^{141}\) Barak-Erez (n 122). But see Dotan (n 34) 637-39 (arguing that relative voidance does not provide enough flexibility and discretion).
circumstances. While this discretion is broad enough, this doctrine (at least as it has expanded in administrative law), also allows courts to fashion creative remedies not asked for by the parties, as well as to withhold a remedy altogether.

This authority to completely withhold a remedy, and to effectively validate an unconstitutional law, is most problematic.\textsuperscript{142} It is particularly problematic in light of the considerations that are supposed to guide this decision. Courts are essentially instructed to balance the severity of the unconstitutionality vis-à-vis the consequences of invalidating the law.\textsuperscript{143} While the other remedial tools ask whether the remedy should be softened to modulate the consequences of invalidation, this decision asks whether the Court’s duty to uphold the constitution and void a law that violates the constitution outweigh the consequences. While the other remedial tools are means for lowering the cost of exercising judicial review, relative voidance asks whether judicial review is worth the cost.

Furthermore, relative voidance purports to distinguish between the decision about constitutionality and the decision about the results of unconstitutionality, treating the remedial stage as a separate stage of the constitutional analysis.\textsuperscript{144} However, while there is much to be said in favor of treating the remedial decision as a separate stage of the analysis, relative voidance does exactly the opposite. By asking courts to assess the severity and essence of the unconstitutionality in choosing the remedy, it asks them to engage in an examination of the constitutionality on the merits once more in the remedy stage.

Just like the final proportionality subtest, "proportionality stricto sensu", asks courts to evaluate whether the measure’s benefits outweigh the costs incurred by the infringement; relative voidance asks courts to evaluate whether the severity of the unconstitutionality outweigh the costs incurred by invalidating the law. Relative voidance can therefore be conceptualized as adding a "judicial review stricto sensu" test at the remedy stage, after the court has already exercised the usual constitutional analysis and determined that the constitutional violation was severe enough to render the law unconstitutional. Needless to say, the criticisms of "proportionality stricto sensu" as essentially entailing a value-laden policy decision,\textsuperscript{145} applies with equal force against this "judicial review stricto sensu" test.\textsuperscript{146}

In sum, all the modulated constitutional remedies inevitably entail a tension between the need for flexibility on the one hand and the need to cabin judicial

\textsuperscript{142} Barak-Erez (n 122) 538-39.
\textsuperscript{143} See part 3.1.1 supra.
\textsuperscript{144} See part 3.1.1 supra.
\textsuperscript{146} See Barak-Erez (n 34) 317 (arguing that the decision under relative voidance is based on the court's subjective estimation of the balance of justice, and that such broad discretion is the essence of judicial activism).
discretion, on the other. I believe that with clearer criteria as to the circumstances that will justify their use, suspension and prospective application can represent a proper balance in this inescapable tradeoff. Relative voidance, however, tilts the balance too far towards unbridled discretion.

5.4 The Appropriate Approach

In conclusion, I believe the trend towards modulated remedies is a welcome and necessary development. However, the relative voidance doctrine (and particularly the authority to withhold a remedy altogether) is inappropriate. Courts should employ only suspension and prospective application as tools for tempering the temporal effects of retrospective invalidation of statutes.

Furthermore, courts should use suspension and prospective application in a more principled way, based on established criteria. In general, I believe that only strong reliance interests or significant public interests such as avoiding legal vacuum or very serious budgetary or security ramifications should be proper considerations for their use. Allowing the legislature time to enact new legislation should not, by itself, justify suspension.

Moreover, courts should actually assess the potential impact on reliance interests and public interests. Merely mentioning a potential risk of security or budgetary consequences, for example, should not suffice. Instead, it is proposed that after reaching the conclusion that a law is unconstitutional, courts should hold another hearing and allow the parties to argue about the proper remedy. This will allow courts to receive more information about the potential consequences of retrospectively voiding the law.

Finally, courts should employ suspension and prospective application in a way that will alleviate the damage to the parties who challenged the law. With prospective application, courts should routinely use the case-in-point exception. With suspension, courts could supplement suspension with an order that in the meantime the law may not be applied to the petitioners. This could be conceptualized as a sort of a limited, temporary as-applied remedy or as a "constitutional exemption," as the idea has been called in Canada.

6 Conclusion

Parts 2 and 3 presented the seminal Supreme Court cases that established the rules and announced the judicial policies on prospective application, rela-

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147 Indeed, this tension is not unique to modulated constitutional remedies. It is an inevitable tension in discussions about judicial remedies in all areas of the law. See generally Samuel L. Bray, 'Announcing Remedies' (2012) 97 Cornell Law Review 753 (discussing the advantages and disadvantages of allowing courts discretion to tailor remedies on a case-by-case basis in other areas of the law).

148 Mersel (n 46) 98

149 See editors introduction.

150 Mersel (n 46) 99.
tive voidance and suspension. Reading these cases, one would assume that the Court's preferred strategy for modulating decisions that invalidate statutes is relative voidance. One would also assume that prospective application and suspension are rare exceptions, used only in special cases. Despite the importance of these decisions, however, they only reflect the "law on the books."

Part 4 examined the "law in practice"—analyzing all the cases in which the Court concluded that a law was unconstitutional and was actually confronted with the need to choose a remedy. This examination revealed quite a different picture. Notwithstanding its official endorsement as the preferred approach in Association for Civil Rights, and the consensus among Justices and commentators about its dominance in Israeli public law, in practice, relative voidance was not resorted to, or even mentioned, in any of the decisions that invalidated statutes.

Investment Managers' announcement that suspension will be used "only in special cases" also no longer reflects reality. Suspension has established itself as the preferred modulating strategy, and perhaps even as the generally preferred remedy in all cases invalidating statutes, even when there is no special need to evade deleterious consequences of retrospective voidance. Suspension has been used more often than not in the post-Bank Hamizrahi cases, including in cases where no private reliance interests were at stake and there was no real threat to public interests.

Finally, Solel Boneh's announcement that prospective application will be the exception, which will rarely be used, remains true mostly with regard to judicial decisions that overrule previous case-law. In the special area of judicial decisions nullifying a statute, Solel Boneh has not been cited even once. More importantly, the most recent developments in the cases invalidating laws suggest growing receptiveness towards prospective application. In four of the last five cases invalidating laws, the Court chose prospective application.

In sum, the development in Israel has been towards modulated remedies, both in theory and in practice. The gap between the theory (or "the law on the books") and the practice has been with regard to which modulated remedies are preferred. The cases that invalidated legislation suggest a preference towards suspension, a new receptiveness towards prospective application, and an apparent tacit recoiling from relative voidance.

In part 5, I argued that these developments are normatively desirable. Exploring the question from the perspectives of rights protection, separation of powers, the need for flexibility and the fear from unbridled judicial discretion, I defended modulated remedies, as well as the preference of suspension and prospective application over relative voidance.

Will these trends continue? It is, of course, difficult to make any predictions. It is worth noting, however, that Justices Barak, Zamir and Beinisch—enthusiastic supporters of relative voidance and arguably the most influential

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151 Investment Managers (n 42) 415-16.
figures in its establishment in administrative law—have all retired by now. Some of the current Justices, on the other hand, recently expressed cognizance of the academic criticisms against relative voidance. Most interestingly, the most recently appointed Justice on the Court is a former administrative law professor, who as an academic has been one of the stoutest critics of relative voidance. The experience of Barak and Zamir, two former professors, has shown that their academic writing in the field found its way to the decisions of the Court, and has in fact been very influential. It remains to be seen whether Barak-Erez, the new professor-turned-Justice, will have a similar impact.

And finally, what does the future hold for Ressler and the exemption of yeshiva students from military service? In the 2012 Ressler decision, the Justices on the majority and minority sides of the decision actually engaged in a debate about whether the decision will have any real impact on the drafting of yeshiva students, delving into a broader debate about the ability of courts to bring about social change.

The Deferment of Military Service for Yeshiva Students Law expired on August 2012, and the Knesset has so far failed in its efforts to enact an alternative arrangement. In fact, that failure has been a significant reason for holding new Knesset elections in January 2013. Meanwhile, Ressler’s latest petition indicates that despite the Law’s expiration and the Court’s decision, the military is taking its time with drafting the yeshiva students. On the other hand, it should be remembered that less than a year passed since the decision and that Ressler has proven over the years that he is indefatigable.

So was Ressler’s placing his trust in the court a hollow hope? Will his triumph in court turn out to be a pyrrhic victory? Only time (and perhaps some more judicial review) will tell.

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152 Barak-Erez (n 34) 285 n. 7.
153 Bendor (n 62) 406.
154 Barak-Erez (n 34); Barak-Erez (n 122).
155 Compare, for example, the view of President Beinisch and Justice Grunis in Ressler (n 5).