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Adjudication of Freedom of Expression Cases under Israel's Unwritten Constitution

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NOTE

ADJUDICATION OF FREEDOM OF EXPRESSION CASES UNDER ISRAEL'S UNWRITTEN CONSTITUTION

INTRODUCTION

Israel does not have a written constitution or an entrenched bill of rights.[1] In the unwritten hierarchy of legal authority that is Israel's constitution,[2] statutes are the highest written legal norms. Traditionally, the courts have considered themselves powerless to strike down a validly enacted statute.[3] They have thus limited their decisions to interpretation and application of the statutes.

In cases arising under statutes that restrict expression, however, Israel's Supreme Court has often gone beyond this limited view of its power. In these cases, the Court has interpreted the statutes to narrow their application. It has based its interpretation on unwritten norms that it considers to be superior to statutes. According to the Court, these suprastatutory norms are among the foundations of Israel's legal system.

The objectives of this Note are to examine the adjudication of freedom of expression issues under Israel's unwritten constitution and to suggest implications of Israel's experience for adjudication under a written constitution.[4] The Note argues that the absence of a written constitution gives the Israel Supreme Court great flexibility to recognize freedom of expression interests in various contexts, but leads to inconsistent recognition of these interests.

Section I outlines the sources of the law applied in Israeli freedom of expression cases and sketches the evolution of Israel's unwritten constitution. Section II describes and analyzes the development of the Israel Supreme Court's activist approach to legislation restricting

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1. An entrenched law is a law that cannot be amended or repealed except by a law enacted by a special procedure. *See, e.g.*, U.S. CONST. art. V. On forms of entrenchment, see J. JACONELLI, ENACTING A BILL OF RIGHTS 159-72 (1980). Entrenched laws provide a basis for judicial review of statutes. In order to uphold entrenched laws, courts invalidate inconsistent laws that are not enacted by the required special procedure. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-79 (1803); *see infra* Section I.B.3.

2. "Constitution" is the accepted term for the legal structure even in countries where the structure is not set out in a document such as the United States Constitution. In England, for example, the classic treatise on constitutional law is entitled "INTRODUCTION TO THE STUDY OF THE CONSTITUTION" (A.C. Dicey, 8th ed. 1915). "Constitution" is defined as follows: "The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, . . . organizing the government, and regulating, distributing, and limiting the functions of its different departments . . . ." BLACK'S LAW DICTIONARY 282 (rev. 5th ed. 1979).

3. The Israel Supreme Court has invalidated laws that were inconsistent with entrenched laws and were not enacted by a special procedure. This review of the validity of the enactment of a law contains an element of substantive review. *See infra* Section I.B.3.

4. Comparison of freedom of expression cases in Israel and in the United States helps illustrate the differences between written and unwritten constitutions. *See infra* Section IV. Because the courts in both countries are guided by similar norms, only the variable that is being compared, the constitutional structure, differs. *See* Lahav, *American Influence on Israel's Jurisprudence of Free Speech*, 9 HASTINGS CONST. L.Q. 21 (1981); *see also infra* notes 105, 106, 110, 166 and accompanying text.

expression. Section III details trends in the Court's decisions after it took an activist role and shows the effects of the absence of a written constitution on the Court's performance. Section IV shows that there are similarities in adjudication under written and unwritten constitutions. Section IV also suggests that, to the extent the two kinds of adjudication are similar, Israel's experience can be instructive to American courts.

I. ISRAEL'S UNWRITTEN CONSTITUTION: HISTORICAL DEVELOPMENT AND SOURCES OF LAW

Israel's constitution is an unwritten hierarchy of legal authority that has evolved as the result of a number of political events, legislative acts, judicial decisions, and traditions observed on all levels of the legal system.[5] The unwritten constitution also establishes the sources of the law applied in the courts. Analysis of the Supreme Court's freedom of expression cases requires familiarity with the hierarchy of authority and the sources of law.

A. THE ESTABLISHMENT OF ISRAEL

In 1917, Britain defeated Ottoman forces in Palestine.[6] Five years later, the League of Nations recognized British rule, granting Britain the League of Nations Mandate for Palestine.[7]

The Mandate government vested legislative and executive powers

5. Unwritten constitutions have been called "flexible" constitutions, because they can accommodate new arrangements more easily than written constitutions, which usually can be amended only by special procedures and have therefore been called "rigid" constitutions. *See* C. MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 18 (1940).

6. The British commander immediately proclaimed martial law. In 1920, the military government was replaced with civilian administration. *See* 3 L.P.* 2590; E. LIKHOVSKI, ISRAEL'S PARLIAMENT 5 (1971). England claimed jurisdiction over Palestine on the basis of the Foreign Jurisdiction Act, 1890, 53 & 54 Vict., ch. 37, § 1. *See* Palestine Order in Council, 1922, Preamble, 3 L.P. 2569, 2570.

* The following abbreviations will be used in these footnotes: H.Ḥ. Hatza'ot Ḥok (legislative bills)

L.P. Laws of Palestine in Force on 31 December, 1933 (R. Drayton ed., rev. ed. 1934) (legislation by British Mandate government)

L.S.I. Laws of the State of Israel (authorized English translation of Israeli legislation)

N.V. Laws of the State of Israel [New Version] (authorized English text of pre-1948 legislation with post-1948 revisions)

O.Ḥ.Y. Osef Ḥukei Yisrael (unofficial collection of Israeli law including ordinances and regulations by British Mandate government)

P.D. Piskei Din (official law reports of the Israel Supreme Court)

S.Ḥ. Sefer Haḥukim (laws of the Knesset)

S.J. Selected Judgments of the Supreme Court of Israel (authorized English translations of Supreme Court decisions)

7. "The Mandatory power shall have full powers of legislation and of administration, save as they may be limited by the terms of this Mandate." Mandate art. 1. 3 LEAGUE OF NATIONS O.J. 1007 (1922).

in the High Commissioner.[8] The High Commissioner's executive measures ("Regulations") were subordinate to his legislative enactments ("Ordinances"), which in turn were subordinate to the King's Orders in Council. In cases in which these three sources of Mandate law did not provide a rule of decision, the courts were to apply Ottoman law as it was in force in Palestine at the outbreak of World War I. In the event that neither Mandate law nor Ottoman law provided a rule of decision, the courts were to apply English common law and equity.[9]

The United Nations General Assembly Resolution of November 29, 1947,[10] which called for the partition of Palestine into independent Jewish and Arab states, led to the termination of the British Mandate in Palestine on May 15, 1948. On May 14, the leaders of the Jewish population issued the Declaration of the Establishment of the State of Israel,[11] which provided for the creation of a legislative authority, the Provisional Council of State.[12] The Provisional Council's first legislative act, the Law and Administrative Ordinance, established continuity with Mandate law:

> The law which existed in Palestine on . . . [May 14, 1948] . . . shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the state and its authorities.[13]

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8. Palestine Order in Council, 1922, arts. 5, 17, 3 L.P. 2569, 2571, 2574. An elected Legislative Council, which was to assume legislative authority, never came into being because of conflict between the Arab and Jewish communities. *See* Palestine Order in Council, 1922, art. 17, *supra*; E. LIKHOVSKI, *supra* note 6, at 6-7. In 1923, the idea of a Legislative Council was abandoned, and legislative authority was permanently transferred to the High Commissioner. *See id.*; Palestine (Amendment) Order in Council, 1923, art. 3, 3 L.P. 2590, 2591.

9. Palestine Order in Council, 1922, art. 46, 3 L.P. 2569, 2580. Israel retained this link to English common law and equity, *see infra* text accompanying note 13, until 1980, when the link was replaced with a link to "Israel's heritage":

> 1. Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.
>
> 2. (a) Article 46 of the Palestine Order in Council, 1922 . . . is hereby repealed.

Foundations of Law, 5740—1980, 34 L.S.I. 181 (1979/80). On the possible influence of this provision on adjudication of individual liberties cases, see *infra* note 82.

Israel severed any remaining connections to pre-state sources of law when it invalidated the Mejelle, the Ottoman civil code. *See* Law to Invalidate the Mejelle, 5744—1984, § 1, 1119 S.H. 156 (1984). On the issue whether the Mejelle had any force after the enactment of Foundations of Law, § 2(a), *supra*, see Gavison, *Abolition of the Mejelle as a Source of Law* (Hebrew), 14 MISHPATIM 325 (1984).

10. General Assembly Resolution (181(II)A) on the Future Government of Palestine, Pt. I(A)(3), 1947-48 U.N.Y.B. 247, 248.

11. 1 L.S.I. 3 (1948).

12. Proclamation (issued with Declaration), May 14, 1948, 1 L.S.I. 6 (1948).

13. Law and Administration Ordinance § 11, 1 L.S.I. 7, 9 (1948).

Through this Ordinance, Israel inherited many Mandate laws that severely restrict expression.[14]

B. Legislative Sovereignty in Israel

1. The Failure to Adopt a Written Constitution

The Declaration of the Establishment of the State provided that an elected constituent assembly would draft and adopt a constitution.[15] The assembly convened in January of 1949, but failed to produce a constitution.[16] In addition to its constituent power, the assembly inherited the Provisional Council's legislative power.[17] The assembly's first enactment was the Transition Law,[18] which provided that the legislature would be called the "Knesset," that its enactments would be called "laws," and that the constituent assembly would be the first Knesset.[19]

The Knesset formalized the postponement of the adoption of a constitution in the "Chapter by Chapter Resolution."[20] This resolution assigned to the Constitution, Legislation, and Judiciary Committee the task of preparing a draft constitution comprising chapters called "Basic Laws," to be submitted for the Knesset's approval one by one. The Knesset has enacted eight Basic Laws on various subjects,[21] but has yet to adopt a written constitution.

Because there was no written constitution, the doctrine of legislative supremacy became the primary factor defining the structure of Israel's legal system. "The failure of the Constituent Assembly to

14. *See, e.g., infra* text accompanying notes 87, 112; notes 153, 165, 170. *See generally* Lahav, *Israel's Press Laws, in* Press Law in Modern Democracies 265 (P. Lahav ed. 1985).

15. 1 L.S.I. 3, 4 (1948).

16. The failure to adopt a constitution was the result of ideological differences and the majority party's resistance to restraint on its power. Representatives of the majority party argued that it would be imprudent to freeze the structure of government and constrain the legislature, because the country was undergoing drastic changes. Defense was insecure, the economy was embryonic, and immigration was rapidly increasing the population and changing its demography. Religious parties opposed the establishment of a supreme law other than the Torah. *See* debates in Divrei Haknesset (record of Knesset proceedings), Feb. 1, 1950, *reprinted in* Mishtar Medinat Yisrael 288-302 (Gutmann & Levi eds. 3d ed. 1976), *summarized in English in* A. Zidon, Knesset 289-92 (1967).

17. Constituent Assembly (Transition) Ordinance, 5709—1949, § 3, 2 L.S.I. 81 (1949).

18. Transition Law 5709-1949, 3 L.S.I. 3 (1949).

19. *Id.* §§ 1, 2(a).

20. The Resolution is reprinted in Shapira, *Judicial Review Without a Constitution: The Israeli Paradox*, 56 Temp. L.Q. 405, 410 (1983).

21. *See* Basic Law—The Knesset, 12 L.S.I. 85 (1957/58); Basic Law—Israel Lands, 14 L.S.I. 48 (1960); Basic Law—The President of the State, 18 L.S.I. 111 (1963/64); Basic Law—The Government, 22 L.S.I. 257 (1967/68); Basic Law—The State Economy, 29 L.S.I. 273 (1974/75); Basic Law—The Army, 30 L.S.I. 150 (1975/76); Basic Law—Jerusalem, Capital of Israel, 34 L.S.I. 209 (1979/80); Basic Law—Adjudication, 1110 S.H. 78 (1984).

adopt a Constitution as the supreme law of the land resulted of necessity in placing the Knesset at the apex of the legal system. It became the supreme lawgiver, and its [laws] were recognized by the courts as the supreme law."[22] The Supreme Court has stated the doctrine of legislative supremacy emphatically: "After a law has been passed in the Knesset, we must bow our heads before it and not question its prescriptions, determinations, or assumptions."[23]

2. *Other Factors Contributing to Legislative Power*

The Knesset is a particularly powerful legislature in that it has only one house. A unicameral legislature can act more quickly than a bicameral legislature such as the United States Congress.[24]

The traditions of Israel's party system also contribute to legislative power. Although the Knesset is legally sovereign, political control over the legislative process is largely in the hands of the executive branch. In Knesset elections, citizens vote for parties. The party coalition that controls a majority of Knesset seats forms a government. The tradition of collective responsibility normally requires that all parties in the coalition either vote for the government's legislative proposals or leave the coalition.[25] The Knesset almost always passes the government's legislative proposals; rejection is tantamount to a vote of no confidence in the government.[26]

3. *A Caveat to Legislative Sovereignty: Judicial Review to Protect Entrenched Laws*

The only inroad on the Knesset's sovereignty has been the Supreme Court's assertion of a limited power of judicial review in the context of Basic Laws with entrenched clauses, i.e., clauses that cannot be amended or repealed except by a special procedure. Entrenched laws are inconsistent with the doctrine of legislative sovereignty, which holds that the legislature can do anything except bind its

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22. E. LIKHOVSKI, *supra* note 6, at 17.

23. Bassul v. Minister of Interior, 19(1) P.D. 337, 349 (1965). *See generally* Likhovski, *The Courts and the Legislative Supremacy of the Knesset*, 3 ISR. L. REV. 345 (1968).

24. One unicameral legislature, New Zealand's, has been criticized as too powerful because it acts too quickly:

> The unrivalled simplicity of our unicameral Parliament . . . has not been accompanied by a heightened sense of restraint in the single chamber. . . . [T]he lightning speed of our legislative process is not one of those characteristics in our system which has excited either the admiration or emulation of democratic countries elsewhere. In short, we pass far too much legislation and we pass it far too quickly.

Palmer, *The Constitution and David Minogue*, N.Z.L.J. 481, 482 (1976).

25. *See* E. LIKHOVSKI, *supra* note 6, at 147, 164-65.

26. The coalition sometimes frees its members from collective responsibility and allows members to vote according to conscience. *Id.* at 165.

successors.[27]

Section 4 of Basic Law—The Knesset provides: "The Knesset shall be elected by general, national, direct, equal, secret and proportional elections . . . ."[28] The entrenching clauses of Basic Law—The Knesset provide that any law inconsistent with section 4 must be passed by a special majority of more than half of the Knesset's 120 members, as opposed to the normal majority of more than half of the members voting.[29] The Israel Supreme Court has protected the section 4 principle of equality by invalidating inconsistent laws in the three cases discussed below.

a. *Bergman v. Minister of Finance*

The first time that the Supreme Court invalidated a law of the Knesset was in *Bergman v. Minister of Finance*,[30] a case which some commentators have viewed as Israel's *Marbury v. Madison*.[31] The invalidated law contradicted the section 4 principle of equality and was enacted without the required special majority.[32] The law provided that only parties already holding seats in the outgoing Knesset could receive election campaign funds from the public treasury.[33] The Court rejected the Minister's argument[34] that "equal" under section 4 merely embodies the principle of "one person, one vote": "Each of the adjectives 'general, [national], direct, proportional' has two aspects. They point both towards the right to elect and towards the right to be elected, and there is no reason not to give the word 'equal' the same broad meaning."[35] The Court concluded that the "one person, one vote" interpretation would allow a one-party system, which would be

27. The classic statement of the doctrine of legislative sovereignty is that "Parliament can do everything but make a woman a man, and a man a woman." A.C. DICEY, *supra* note 2, at 5. In the academic controversy that followed the enactment of the first entrenched provisions in Israel, one school of thought argued that the provisions were unenforceable because of their inconsistency with legislative sovereignty. *See* Supreme Court Judge Witkon, *Justiciability*, 1 ISR. L. REV. 40, 55 (1966).

28. Basic Law—The Knesset § 4, 12 L.S.I. 85 (1957/58).

29. "[T]his section shall not be varied save by a majority of the members of the Knesset." Basic Law—The Knesset § 4, 12 L.S.I. 85 (1957/58). The only other entrenched laws are Basic Law—The Knesset §§ 44-45, 12 L.S.I. 85, at 89 (1958) and Basic Law—The Government § 42, 22 L.S.I. 257, 264 (1967/68).

30. 23(1) P.D. 693 (1969), *translated and commented on in* 4 ISR. L. REV. 559 (1969).

31. *E.g.*, Shetreet, *Judicial Independence and Accountability in Israel*, 33 INT'L & COMP. L.Q. 979, 980 (1984); Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217, 1218 (1970).

32. The law passed by a majority of the members of Knesset who were present, but at one stage of the voting the number in favor was only twenty-four. 23(1) P.D. at 696. *See supra* note 29 and accompanying text.

33. *See* Knesset and Local Authorities Elections (5730) (Financing, Limitation of Expenses, and Auditing) Law, 5729—1969, 23 L.S.I. 53 (1968/69).

34. *See* 4 ISR. L. REV. at 561-62.

35. *Id.* at 562.

inconsistent with Israel's conception of democracy.[36]

The Court did not confront the constitutional issue of its power to invalidate a law inconsistent with a Basic Law.[37] Instead, the Court relied on the Attorney General's waiving objections to the Court's deciding the case on its merits. Under the doctrine of legislative sovereignty, such a waiver by one of the parties, even the government, could not relieve the Court of its duty to uphold the Knesset's laws.[38] The Court also based its avoidance of the constitutional question on expediency: "the [substantive] problems . . . call for speedy solution and consideration of the preliminary constitutional questions would necessitate a lengthy hearing on its own."[39] This argument is also irrelevant under the doctrine of legislative sovereignty. The Court's invalidation of the law suggests that the Court was prepared to assume the role of a constitutional court in cases involving entrenched provisions. How-

36. *See id.* at 563-64.

37. The Court framed the issue in terms of "the *justiciability* . . . of the question whether in practice the Knesset observed any self-imposed restriction by way of 'entrenching' a statutory provision." 4 ISR. L. REV. at 560 (emphasis added). The issue is better defined as whether the Court had power to adjudicate. *See* Comment, *id.* at 577.

38. Support for this argument is found in an opinion casting doubt on the Court's power to hear petitions against actions by the military from inhabitants of occupied territories. The first time that the Court heard a challenge to the confiscation of land in the occupied territories, the government's attorney waived objections to the Court's jurisdiction. Such objections would be based on the generally accepted view that under international law the orders of military authorities in occupied territory have the status of legislation, and the courts of the army's home country do not have the power to question the validity of such orders. *See* Abu-Hilu v. State of Israel, 27(2) P.D. 169, 179-80 (1973) (Witkon, J., concurring).

Judge Witkon disapproved of the view that the government's waiver of objections to jurisdiction could be the basis for jurisdiction. "This consent [to a hearing on the merits], which is given occasionally, with regard to specific topics, and with no commitment that it will be given in all cases, makes our hearing a kind of arbitration conditioned on the consent of the defendant. In my humble opinion, that is not why this Court was created." *Id.* at 181. Despite his reservations, Judge Witkon joined the Court in hearing the case on its merits. The Court's decision to hear petitions against the occupation authorities despite doubts about jurisdiction was based on humanitarian concerns. "The judges . . . feared a situation in which the inhabitants of the territories would have no effective legal redress for their grievances against the military government." M. NEGBI, KVALIM SHEL TZEDEK 21 (1981).

Judge Witkon's doubts about the Court's jurisdiction in *Abu-Ḥilu* have even greater force in *Bergman*. In *Abu-Ḥilu*, the military's status as the legislative authority in the occupied territories was solely a matter of international law. Under domestic law, the military is controlled by the executive branch. Therefore, because the military was represented in the case by the Attorney General (an officer of the executive branch), the legislative authority in the occupied territories was also represented. In *Bergman*, the issue of legislative sovereignty had greater practical importance, because the Knesset's status as an independent branch of government is a matter of domestic law, which has greater force in domestic courts than international law. But the respondent, the Minister of Finance, was an officer of the executive branch. Therefore, unlike in *Abu-Ḥilu*, the legislative branch was unrepresented in *Bergman*, and the executive branch's waiver of objections to the Court's jurisdiction should have had no bearing on the question of the legislative branch's immunity from judicial review.

39. 4 ISR. L. REV. at 560.

ever, the Court's failure to address the source of its power to adjudicate suggests that the Court was not prepared to assume that role explicitly.

The Knesset responded to the *Bergman* decision ambivalently. On the one hand, the Knesset enacted a new law, introduced by the government, that granted election financing for parties unrepresented in the Knesset.[40] It is possible that the government could have achieved reenactment of the original law by the required special majority. Thus, the government's choice to remove the inequality from the law may indicate a willingness to submit to the Court's power to protect entrenched laws.[41] On the other hand, the Knesset passed, by the required special majority,[42] a law confirming the validity of all election laws that had been passed since Basic Law—The Knesset.[43] The purpose of the confirming law was to prevent *Bergman*-like challenges to those election laws. Although the Knesset did not deny the Court's power to review laws that the Knesset might enact in the future,[44] the confirming law has been criticized for its sweeping validation of existing laws that might have been inconsistent with the section 4 equality principle.[45]

b. *Derekh-Eretz Association v. Broadcasting Authority*

Derekh-Eretz Association v. Broadcasting Authority[46] involved another law that disadvantaged small parties.[47] This time the Knesset redistributed the statutory allocation of time for election propaganda broadcasts on the state-owned television and radio stations. Before 1981, each party had received twenty-five minutes of radio time and ten minutes of television time, plus four of radio time and four of TV time for every Knesset seat that the party held in the outgoing Knesset.[48] Less than three months before the 1981 elections, the Knesset amended the law so that each party received twenty-three minutes of

40. *See* Knesset and Local Authorities Elections (5730) (Financing, Limitation of Expenses and Audit) (Amendment) Law, 5729—1969, 23 L.S.I. 218 (1968/69).

41. An introductory note to the legislative bill states that the government proposed the amendment in order to comply with the directions of the *Bergman* decision. *See* 846 H.H. 318 (1969).

42. Shapira, *supra* note 20, at 413.

43. *See* Elections (Confirmation of Validity of Laws) Law, 5729—1969, § 1(a), 23 L.S.I. 221 (1968/69).

44. *See id.* § 1(b), 23 L.S.I. at 221; *see also* Explanatory Note, 846 H.H. 322 (1969).

45. *See* Comment, 4 ISR. L. REV. 565, 578 (1969).

46. 35(4) P.D. 1 (1981).

47. In the election year of 1981, the two largest parties in the outgoing Knesset held 75 of the Knesset's 120 seats. Shamir & Arian, *The Ethnic Vote in Israel's 1981 Elections*, in THE ELECTIONS IN ISRAEL—1981 (A. Arian ed. 1983) 91, 92. Ten parties won Knesset seats in the 1981 election. Arian, *Introduction*, *id.* at 1, 9.

48. *See* Elections (Modes of Propaganda) Law, 5719—1959, § 15, 13 L.S.I. 148 (1959), *as amended* 23 L.S.I. 216 (1969).

radio time, eight minutes of TV time, and six of each for every Knesset seat.[49] The amendment strengthened the position of established parties vis-á-vis fledgling parties with little or no representation in the Knesset. The Court unanimously held the amendment invalid because it violated the section 4 principle of equality and had not been passed by the required special majority.[50]

The judges' different approaches to the equality issue reflect different degrees of activism. All the judges agreed that it would be unreasonable to guarantee all parties equal time on television and radio, because established parties deserve more time than both new parties and parties that have failed in previous elections.[51] The judges, however, disagreed on how to decide whether the amendment violated section 4. Two judges argued that the Court was not competent to decide what degree of equality of opportunity is reasonable under section 4.[52] In the absence of clear criteria, they accepted the original law as a starting point, because the Knesset had confirmed the law's validity by a special majority. In their view, the amendment violated the equality principle merely because it increased the established parties' advantage.[53]

Two other judges, Judge Barak and Supreme Court President Landau, refused to use the original law as a starting point.[54] They held that the confirming law did not establish the original broadcast law's conformity to the equality principle and that the Knesset's deviation from the original law was irrelevant to the equality issue.[55] Therefore, they judged the amendment against an independent, abstract standard of equality: "is the [time allotted to the new parties] below the tolerable minimum?"[56] President Landau found it unnecessary to determine what distribution of time would be fair.[57] He based his decision on the amendment's legislative history, which showed that the Knesset "completely ignored the important problem of preserving the equality of opportunity of a new party."[58]

Judge Barak based his decision on broader grounds than did any of the other judges: "the eight minutes allotted to the new parties for

49. *See* Elections (Modes of Propaganda) (Amendment No. 6) Law, 5741—1981, 1019 S.H. 198 (1981).

50. *See Derekh-Eretz*, 35(4) P.D. at 5.

51. *See id.* at 7-8 (per Landau, P.); *id.* at 11-14 (Barak, J., concurring); *id.* at 18-24 (Shamgar, J., concurring); *id.* at 24-27 (Bejski, J., concurring); *id.* at 28 (Ben-Porat, J., concurring).

52. *See id.* at 23 (Shamgar, J., concurring); *id.* at 27 (Bejski, J., concurring).

53. *See id.* at 22-23 (Shamgar, J., concurring); *id.* at 27 (Bejski, J., concurring).

54. *See id.* at 8-9 (per Landau, P.); *id.* at 16 (Barak, J., concurring).

55. *See id.* at 9 (per Landau, P.); *id.* at 16 (Barak, J., concurring).

56. *Id.* at 9 (per Landau, P.); *see id.* at 16 (Barak, J., concurring).

57. *See id.* at 9.

58. *Id.* at 10.

television broadcasts is not enough to enable them . . . to present their positions to the public in a proper manner."[59] He admitted that presenting the issue in this manner allowed wide judicial discretion, but concluded that there was no better method than relying on a judge's "common sense, life experience, and sense of lawyerly expertise."[60] The positions of Judge Barak and President Landau indicate that at least some members of the Court will take an ambitious role in examining the substantive validity of laws that might conflict with entrenched clauses of Basic Laws.

c. *Rubinstein v. Chairman of the Knesset*

Rubinstein v. Chairman of the Knesset[61] invalidated an amendment that the Knesset passed after the 1981 elections to relieve the financial burdens of parties that had overspent on the election campaign. The Political Parties (Financing) Law of 1973[62] provides that parties that win at least one seat in the Knesset are entitled to reimbursement of a certain amount of their election expenses from the state treasury.[63] The law also provides that fifteen percent of the financing will be withheld if the party fails to limit its campaign expenses according to guidelines set out in the law.[64] After the 1981 elections, the Knesset amended the law so that only twelve percent of the financing would be withheld for the first fifteen-million shekels of overspending.[65] The amendment was applied retroactively to expenses from the 1981 elections.[66]

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59. *Id.* at 14.

60. *Id.* at 16. In justifying his choice of a standard allowing broad judicial discretion, Judge Barak stated:

> [I]f we do not have the tools to decide whether the reduction of the new parties' television time from ten to eight minutes violates the equality principle, we also do not have the tools to decide whether a reduction to . . . two minutes violates the equality principle. . . . [I]n exercising judicial discretion we are not acting in a precise, scientific manner, but I am afraid there is no better way.

Id. at 15-16.

After the Court's decision, the Knesset did not remove the inequality, but retained it by passing an amendment by an absolute majority. However, the Knesset's action does not appear to have been a display of disrespect for the Court. Apparently because of the urgency of making a decision before the election, the Court issued an order without an opinion. The Knesset subsequently enacted the new amendment. The Court published its opinion only after the election. *See* Klinghoffer, *Legislative Reaction to Judicial Decisions in Public Law*, 18 ISR. L. REV. 30, 33-34 (1983).

61. 37(3) P.D. 141 (1983).

62. Political Parties (Financing) Law, 5733—1973, 27 L.S.I. 48 (1972/73).

63. *Id.* §§ 3, 4, 27 L.S.I. at 49.

64. *Id.* §§ 7(a), 10(e), 27 L.S.I. at 51-52.

65. Political Parties (Financing) (Amendment No. 5) Law, 5742—1982, § 6, 1045 S.H. 84, 85 (1982).

66. *Id.* § 9, 1045 S.H. at 86.

The Court unanimously held that the amendment violated the section 4 equality principle because its retroactive application discriminated against parties that had kept their expenses within the statutory limits. These parties had relied on the original law and would have spent more if they had known that more financing would be available. For this reason and because the amendment passed by fewer than sixty-one votes, the Court struck it down.[67]

The most important aspect of *Rubinstein* was a statement by the Court on its power to adjudicate, an issue that it had avoided in *Derekh-Eretz* and *Bergman*. In both of those cases, the government waived the argument that the Court does not have the power to decide whether the Knesset is bound by entrenched provisions in Basic Laws.[68] In *Rubinstein*, the government once again waived this argument, seeking a decision on the merits, but noted that it reserved the right to raise the argument in future cases. The Court responded that the more times it decides such constitutional issues, the less likely it will refrain from deciding them in the future, even if the government should challenge the Court's jurisdiction.[69]

d. Significance of the Court's Review of Entrenched Laws

The section 4 cases do not have major practical consequences for the Knesset's freedom of action. First, only two Basic Laws have entrenched clauses, none of which contain absolute prohibitions.[70] Second, the Knesset can pass any law, notwithstanding entrenched clauses in Basic Laws, if the government mobilizes enough support to obtain a special majority in the Knesset. The Supreme Court is therefore limited to a determination of whether a law was properly enacted.

The section 4 cases nevertheless have great symbolic significance. Primarily, they show that the Supreme Court is ready to act as a constitutional court in the context of entrenched laws. Furthermore, section 4 has given the Court lawmaking power in a politically sensitive area. In deciding whether the Knesset has violated section 4, the Court must judge the propriety of election laws by referring to the abstract standard of "equality." If the Court finds that the Knesset has acted improperly, the Knesset's prestige suffers. Even if the government can mobilize enough Knesset support to reenact an invalidated law by a special majority, such an action could tarnish the government's image.

67. 37(3) P.D. at 147.

68. *See Bergman*, 4 ISR. L. REV. at 560; *Derekh-Eretz*, 35(4) P.D. at 6.

69. 37(3) P.D. at 147-48.

70. *See supra* note 29.

It is unclear whether the Knesset will enact more entrenched laws. The Knesset has been ambivalent to the Court's exercise of judicial review. Furthermore, the fact that the Knesset has not passed an entrenched law since the *Bergman* decision could mean that the Knesset does not want to limit further its freedom of action. Because of the executive's power in the legislative process, however, it is always possible that a government whose leadership wants to strengthen the judiciary will introduce more Basic Laws with entrenched clauses.

C. SUPRASTATUTORY NORMS

In deciding freedom of expression cases, the Israel Supreme Court does not review the validity of statutes as it does in cases involving section 4 of Basic Law—The Knesset. The government has regulated expression through laws that do not involve entrenched provisions in the Basic Laws. Therefore, the Court must resort to statutory interpretation to protect freedom of expression. To justify activist statutory interpretation, the Court invokes suprastatutory norms. Although these norms have no formal status as positive law, the Court characterizes them as fundamental to Israel's society and legal system.

A major source of suprastatutory norms is the Declaration of the Establishment of the State of Israel. The development of the Declaration's legal status illustrates the Court's understanding of its lack of power to overturn laws and its use of statutory interpretation to give preferential treatment to freedom of expression.

The Declaration of the Establishment of the State provides: "The State of Israel . . . will be based on freedom, justice and peace as envisaged by the prophets of Israel."[71] The Supreme Court first considered the legal status of the Declaration in one of its early opinions, *Zeev v. District Commissioner of Tel-Aviv*.[72] The petitioner contested the government's seizure of his home for its use pursuant to emergency regulations enacted by the Mandate government. He contended that the Declaration was a "law" under the Law and Administration Ordinance[73] and that the Declaration implicitly repealed the regulations because they were repugnant to the Declaration's guarantees of "freedom" and "justice." The Court rejected the suggestion that legislation should be struck down because of its inconsistency with the Declaration:

> [T]he 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 interna-

71. 1 L.S.I. 3, 4 (1948).
72. 1 P.D. 85 (1948), 1 S.J. 68 (1948-53).
73. *Supra* text accompanying note 13.

> tional law. It gives expression to the vision of the people and its faith, but it contains no element of constitutional law which determines the validity of various ordinances and laws, or their repeal.[74]

The Court continued to deny litigants resort to the Declaration[75] until *Kol Ha'am Co. v. Minister of Interior* (*Kol Ha'am II*),[76] the 1953 landmark freedom of expression case. In that case, the government had suspended the publication of a newspaper under a broad statutory grant of discretion.[77] The Court departed from the *Zeev* rule and referred to the Declaration in construing the government's discretion narrowly:

> It is true that the Declaration "does not consist of any constitutional law laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws" [quoting *Zeev*], but insofar as it "expresses the vision of the people and its faith" [*id.*], we are bound to pay attention to the matters set forth in it when we come to interpret and give meaning to the laws of the State . . . .[78]

Since the decision of *Kol Ha'am II*, the Court has used a wide variety of sources of suprastatutory norms to interpret laws restricting expression. In addition to the Declaration of the Establishment of the State, the other sources of suprastatutory norms that the Court has relied on are Israel's democratic form of government,[79] which requires the free exchange of ideas;[80] the individual's natural rights of self-expression and to receive information;[81] and the history of the Jewish people.[82]

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74. 1 S.J. at 71-72.

75. *See* El-Karbutli v. Minister of Defense, PSAKIM 'ELYON [a discontinued reporter] 97, 104 (1948). The Court stated: "This document [is not] a constitution, in light of which the validity of laws must be tested, before the Constituent Assembly sets the basic constitution about which the Declaration itself speaks."

76. 7 P.D. 1140 (1953), 1 S.J. 90 (1948-53).

77. *See infra* text accompanying note 87.

78. 1 S.J. at 105.

79. "The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy." *Id.*

80. The free exchange of ideas is "a process of investigating the truth, in order that the state may learn how to reach the most satisfactory objective and know how to select the line of action most calculated to bring about the achievement of that objective . . . ." *Id.* at 96.

81. [T]he right to freedom of expression serves not only as a means and instrument, but also as an aim in itself, seeing that the internal need that everyone feels to give open expression to his thoughts is one of the fundamental characteristics of man. . . . [T]he importance of [freedom of expression] lies in the security that it gives to the most thoroughly private interest, namely, the interest of every man, as such, in giving expression to his personal characteristics and capabilities; to nurture and develop his ego to the fullest extent possible; to express his opinion on every subject that he regards as vital to him . . . .

Id. at 97.

82. The history of many peoples, and of the people of Israel first and foremost, is full of examples without number, of men who have dared and ventured, without

II. THE ISRAEL SUPREME COURT'S VIEW OF ITS POWER IN FREEDOM OF EXPRESSION CASES

The Israel Supreme Court's view of its power in freedom of expression cases has evolved from strict deference to the legislature to limited activism. This Section describes the Court's initial deferential approach and its subsequent adoption of an activist approach. This Section also attempts to determine the limits of the Court's activism.

A. DEFERENCE IN THE EARLY YEARS

Two cases decided during the Court's first five years illustrate that the Court[83] recognized the value of freedom of expression but deferred to statutory infringements upon that freedom. In *Attorney*

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being deterred by the fear of punishment, to publish what their conscience dictated, notwithstanding its prohibition on the part of the ruling authorities.

Id. at 105-06.

Jewish law has provided suprastatutory norms in many Israeli cases, including some presenting civil liberties issues. *See* Albert, *Constitutional Adjudication Without a Constitution: The Case of Israel*, 82 HARV. L. REV. 1245, 1257-61 (1969). The role of Jewish law as a source of suprastatutory norms might increase as a result of the adoption of "Israel's heritage" as a supplementary source of law. *See* Foundations of Law § 1, *supra* note 9. The explanatory notes to the legislative bill introducing Foundations of Law suggest that the provision "Israel's heritage" has some connection to Jewish law, but avoid defining the connection:

> [T]he court will guide itself by "the principles . . . of Israel's heritage." This formulation was chosen from various proposals in order to refer the judge to the fundamental values and ethics of Israel's heritage, but without imposing on him every rule of Jewish law (as did [article 46 of] the King's Order in Council with regard to English law).

1361 H.H. 308 (1978). Two judges of the Supreme Court have predicted that the adoption of "Israel's heritage" as a supplementary source of law, *see supra* note 6, will give a new thrust to activist statutory interpretation. *See* Supreme Court Judge Agranat, *The Contribution of the Judiciary to the Legislative Endeavor* (Hebrew), 10 IYUNEI MISHPAT 233, 255 (1984); Supreme Court Judge Barak, *Judicial Law Making* (Hebrew), 13 MISHPATIM 25, 35 (1983/84). On the principles that judges might draw from "Israel's heritage" in freedom of expression cases, see M. CARMILLY-WEINBERGER, CENSORSHIP AND FREEDOM OF EXPRESSION IN JEWISH HISTORY (1977).

The Court has drawn on suprastatutory norms in other contexts besides freedom of expression, creating a "judicial bill of rights." Fogel v. Broadcasting Auth., 31(3) P.D. 657, 664 (1977). The Court has recognized the rights of equality before the law, bodily integrity and human dignity, freedom of assembly, freedom to pursue an occupation, and freedom of religious worship. *See* cases cited in Shapira, *supra* note 20, at 418-19 nn. 67, 69. The effect of recognizing these rights is that the Supreme Court narrowly construes legislative attempts to abridge them. *See* Cohen v. Minister of Defence, 16 P.D. 1023 (1962), 4 S.J. 160, 163 (1961-62).

83. Any description of the Court's positions must be qualified in light of the Court's practice of hearing cases in less than full panels, normally three judges. *See infra* text accompanying notes 185-90. Because the Court does not sit in full panel, its decisions are not conclusive evidence of the positions of the Court as a body. The difficulty of analyzing the Court as a body is exacerbated by the judges' tradition, apparently inherited from England, of publishing separate opinions based on very similar grounds of decision. This Note sometimes discusses individual opinions in detail in order to make maximal use of the available evidence about the Court's positions.

General v. Editor of "Davar",[84] the Court held that it did not have the power to use a summary procedure to punish for contempt defendants who had written critical comments about the Court. One judge's opinion rested on the importance of the freedom of the press: "The very existence of the power to punish by this summary method is likely to tie the hands of the press to too great an extent . . . ."[85]

In *Kol Ha'am Co. v. Minister of Interior*[86] (*Kol Ha'am I*), the Minister of Interior closed a Communist newspaper pursuant to section 19(2)(a) of the Press Ordinance. The Ordinance provides:

> The [Minister of Interior] . . . may . . . if any matter appearing in a newspaper is, in [his] opinion, . . . likely to endanger the public peace, . . . suspend the publication of the newspaper for such period as he may think fit . . . .[87]

The newspaper had published an article that attacked the Jews who were on trial in the Soviet "Doctors' Plot"[88] and accused Zionist organizations of "taking on the total defense of the anti-Soviet criminals of all kinds, including the fifth column of the Nazis."[89]

In upholding the Minister's order, the Court refused to review his factual determinations: "It is not for us to determine whether these slanderous statements are likely to enrage to the point that they can lead to a danger to the public peace. That is submitted by law to the determination of the Minister of Interior . . . ."[90] The Court held that the Minister's determinations were "not without foundation" and did not "exceed the confines of the statute."[91]

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84. 5 P.D. 1017 (1951).

85. *Id.* at 1054 (Agranat, J., concurring).

86. 7 P.D. 165 (1953) (per curiam).

87. Press Ordinance, 1933, O.H.Y. (Ordinances) 2920, 2933.

88. The "Doctors' Plot," an episode in Stalin's campaign of anti-Jewish terror, was a fabrication of an alleged conspiracy of Jewish doctors, employees of the Kremlin, to murder top Soviet leaders. *See* Y. GILBOA, THE BLACK YEARS OF SOVIET JEWRY 1939-1953 (1971).

89. 7 P.D. at 165-66.

90. *Id.* at 166.

91. *Id.* at 168. The Court showed similar deference in Stein v. Minister of Interior, 6 P.D. 867 (1952). The Minister revoked the petitioner's permit to publish a newspaper because of his failure to satisfy a statutory requirement that daily newspapers appear at least 12 consecutive days a month. The publisher asserted that the Minister revoked the permit because he opposed Yiddish newspapers. The Minister denied a discriminatory motive, but admitted that he enforced the statute leniently against Hebrew papers because of a policy to promote the knowledge of Hebrew. *Id.* at 872. Nevertheless, the Court upheld the revocation. In rejecting the publisher's discrimination argument, the Court equated the Minister's discretion with a prosecutor's discretion to enforce the criminal code differently against equally culpable defendants. *Id.* If the Court had been inclined to protect freedom of the press, perhaps it would have viewed the statute as granting the Minister discretion to distribute social benefits and would have decided whether he had distributed them according to reasonable criteria.

B. THE BREAK FROM THE EARLY VIEW: *KOL HA'AM II*

In *Kol Ha'am II*,[92] the Israel Supreme Court departed from its earlier deferential approach to applying statutes. The Minister closed two Communist newspapers by using his authority under section 19(2)(a) of the Press Ordinance, the statute that had been applied in *Kol Ha'am I*.[93] The Minister found objectionable material in articles that criticized the Israeli government's "anti-Soviet policy."[94]

In contrast to the approach taken in *Kol Ha'am I*, the Court did not decline judicial review because of the statute's grant of discretion to the Minister.[95] First, however, the Court paid lip service to the grant of discretion, describing its review of the Minister's decision as very limited. The Court stated that "the estimation of the effect of matters published on the public peace . . . is always within the sole jurisdiction of the Minister of Interior."[96] At the same time the Court warned that it would overturn a decision by the Minister if "he has paid no consideration—or, at all events has paid mere cursory consideration—to the important interest connected with the freedom of the press."[97] By reviewing the government's exercise of discretion, the Court assigned greater weight to freedom of the press than does the statute.[98] The Court's departure from the clear statutory grant of discretion[99] shows that the Court did not consider the doctrine of legisla-

92. Kol Ha'am Co. v. Minister of Interior, 7 P.D. 1140 (1953), 1 S.J. 90 (1948-53). The Court in *Kol Ha'am II* made no reference to *Kol Ha'am I*, even though it had been decided only six months previously. This fact, together with the following introductory remark, suggested that the Court had fundamentally reconsidered its role in freedom of expression cases:

> From time to time, a case reaches this court which raises some fundamental problem, demanding the reconsideration of ancient and well-worn principles. . . . We are called upon to define the relationship that exists between the right to freedom of the press . . . and . . . the power . . . to place a limit on the use of that right.

Id. at 94.

93. *Supra*, text acompanying note 87.

94. One article accused the government of offering the United States 200,000 Israeli soldiers in the event of war with the Soviet Union. The article stated: "the masses, who have started to understand [that] this government is dragging them . . . to death in the service of imperialism, . . . do not want this fate and will demonstrate their refusal." The articles also accused Prime Minister Ben-Gurion and his "henchmen" of "speculating in the blood of Israeli youth." 1 S.J. at 92-94.

95. Instead of treating its authority as a threshold question, the Court treated it in passing near the end of the opinion: "We would like to add . . . a word about the phrase 'in the opinion of the Minister of Interior . . . .'" *Id.* at 115.

96. *Id.*

97. *Id.*

98. A study of the history of Mandate press legislation concluded that the 1933 Press Ordinance was a conscious effort by the Mandate government to subjugate the interest in free expression to other needs. Lahav, *Governmental Regulation of the Press: A Study of Israel's Press Ordinance* (pt. 1), 13 ISR. L. REV. 230, 233-34 (1978).

99. The legislative history of the Ordinance shows that it was intended to free the Mandate government from the reliance on the courts that Ottoman law required to restrain the press. *Id.* (pt. 2) at 489, 509-11.

tive sovereignty to be sacred. The Court was unwilling, however, to challenge the doctrine explicitly.

The Court also recast the statute's substantive criteria so as to protect expression. The statute provides that to justify suppression, printed material must be "likely to endanger the public peace."[100] In interpreting the term "likely," the Court rejected the "bad tendency" test[101] in favor of a broad balancing test that it labelled the "probability" test.[102] The Court has interpreted the "probability" test as a hybrid[103] between the "clear and present danger" test[104] and Judge Learned Hand's modification of it in *Dennis v. United States.*[105] The Court also narrowly construed the provision "endangers the public peace." The Court stated that "any publication leading to the use of violence by others, to the overthrow by force . . . of the existing regime, to the breach of the law, to the causing of riots or fighting in public . . . endangers the public peace."[106] The Court lifted the suspension on publication, finding that the articles were not an "incitement to the use of violent means in order to bring about a change in [the] supposed policy of the Government" and did not advocate avoidance of conscription.[107]

Kol Ha'am II is important because it transformed the Court's role in freedom of expression cases. First, the Court asserted its authority to review administrative decisions.[108] Second, it liberally incorporated suprastatutory norms.[109] Finally, it read a vague breach-of-the-peace statute as if it were one of the very serious incitement statutes at issue in the American cases that guided the Court.[110] The principles and techniques of *Kol Ha'am II* served the Court in later

100. *Supra* text accompanying note 87.

101. Under the "bad tendency" test, governmental action is justified if "the publication reveals only a tendency—even a slight or remote tendency—in the direction of one of the consequences . . . included in the notion 'endangers the public peace.' " *Id.* at 102. *See* 1 S.J. at 102-06.

102. *Id.* at 110-13.

103. *See* Levi v. Southern Dist. Police Commander, 38(2) P.D. 393, 410-11 (1984).

104. "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenk v. United States, 249 U.S. 47, 52 (1919).

105. "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Dennis v. United States, 341 U.S. 494 (1951) 510 (quoting Hand, J., in lower court opinion) (quotation marks and citation omitted).

106. 1 S.J. at 102 (citing with approval Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing "breach of peace" conviction on overbreadth grounds)).

107. 1 S.J. at 117.

108. *See infra* note 184, and note 149 accompanying text.

109. *See supra* notes 79-82 and text accompanying note 78.

110. *E.g.*, Gitlow v. New York, 268 U.S. 652 (1925) (advocacy of criminal anarchy); Abrams v. United States, 250 U.S. 616 (1919) (inciting resistance to United States); Schenk v. United States, 249 U.S. 47 (1919) (causing insubordination in military).

cases involving statutes granting discretion to regulate expression for little or no reason.[111]

C. Cases Under Section 94 of the 1945 Emergency Defence Regulations

More than any other law in Israel, section 94 of the 1945 Emergency Defence Regulations reflects legislative disregard for the freedom of expression. Section 94 provides:

> (1) No newspaper shall be printed or published unless the proprietor thereof shall have obtained a permit under the hand of the District Commissioner . . . .
> (2) The District Commissioner, in his discretion and without assigning any reason therefor, may grant or refuse any such permit . . . and may at any time suspend or revoke such permit . . . .[112]

By exempting the Commissioner from stating the reasons for his decisions, paragraph 2 grants the Commission absolute discretion and deprives the courts of a basis for review of his decisions.[113]

The cases under section 94 have produced some of the Court's most bewildering opinions. Although no consistent approach to freedom of expression emerges from these cases, a survey of them sheds light on the limits of the Court's activism in statutory interpretation.

In *El-Ard v. Northern District Commissioner*,[114] the first challenge to the use of section 94, the petitioners sought to overturn a rejection of their application to publish a newspaper. They alleged that the Commissioner discriminated against them because they were Arabs. They further demanded that the Commissioner be forced to reveal the reasons for his refusal.[115] The Court refused to order the Commissioner to reveal his reasons, "because the petitioner did not point to any act or statement of the Commissioner" to substantiate the allegation of discrimination.[116]

Fifteen years later the next section 94 case came before the Court. In *El-As'ad v. Minister of Interior*,[117] the Minister revealed his reasons for denying an application to publish a magazine, even though he was not required to do so. He asserted that El-As'ad was a member of the Communist Party, which is illegal under Jordanian laws in force in the West Bank, and that El-As'ad intended his magazine to be an organ of the Communist Party in the West Bank.[118] However, on grounds of state security, the Minister refused to reveal the sources of the infor-

111. *See infra* Section III.A, B.
112. 3 O.H.Y. (Regulations) 1247, 1292.
113. El-Ard Co. v. Northern Dist. Comm'r, 18(2) P.D. 340, 345 (1964).
114. *Id.*
115. *Id.* at 344.
116. *Id.* at 345.
117. 34(1) P.D. 505 (1979).
118. *Id.* at 512.

mation on which he based his decision.[119]

The Court held that by revealing his reasons, the Minister subjected his decision to judicial review.[120] The Court also held that the absence of supporting evidence rendered evaluation of the Minister's assertions impossible.[121] Therefore, the Court overturned the denial of the application.

Despite the narrow basis of the holding, the Court made clear that it was unsympathetic to the Minister's decision. First, the Court stated that it saw little merit in the Minister's reasons for denying the license, because the petitioner did not write inflammatory material.[122] Second, the Court was strict with the government on a procedural point. The Court advised the government that in any future section 94 case in which it gives reasons but refuses on security grounds to disclose the evidence on which the decision is based, the government should ask the Court to rule that state security precludes disclosure of the evidence.[123] However, in *El-As'ad*, when the government asked the Court at oral argument to decide whether state security precluded disclosure of the evidence, the Court refused to rule on the request, stating that it was untimely.[124]

In the next section 94 case, *Maḥul v. Jerusalem District Commissioner*,[125] the government followed the procedure that the Court suggested in *El-As'ad*. The Commissioner refused the petitioner's application to publish a magazine, stating that "security reasons prevent him from revealing his reasons,"[126] and asked the Court to rule that state security precluded disclosure of the information on which his denial was based. After examining the government's evidence, the Court decided not only that considerations of state security precluded disclosure of the evidence, but also that there were "weighty reasons

119. *Id.* at 513.

120. *Id.*

121. *Id.* at 514-15.

122. I do not fear that granting the requested permit is liable to really harm state security. It is better not to harm, at least for now, the principle of freedom of expression and to put the petitioner and his magazine to the test of reality. And if it turns out that there was a basis for the Commissioner's stated reasons and that the magazine will serve as a platform for inciteful or inflammatory material, the Commissioner can immediately use his authority and revoke the permit, as provided in Regulation 94(2). In this context I will also note that *no examples of the petitioner's articles . . . were presented to us that indicate an inciteful or inflammatory tendency in his writing.*

Id. at 516-17 (emphasis added).

123. *See id.* at 515-16.

124. "I do not think that we should respond favorably to this suggestion, which comes at the last moment; rather, the matter should be adjudicated on the basis of the Commissioner's affidavits, which were certainly drafted after full consideration." *Id.* at 516.

125. 37(1) P.D. 789 (1982).

126. *Id.* at 791.

for the Commissioner's refusal of the petitioner's application."[127]

The Court should not have addressed the reasonableness of the denial of the application. The statute allowing evidence to be withheld on security grounds provides that if the Supreme Court finds the security interest overriding, the evidence is inadmissible.[128] The decision in *Maḥul* is inconsistent with this statute, because the Court used the evidence to decide whether the denial of the application was reasonable. Furthermore, the propriety of a decision based on evidence that the opposing party cannot rebut is questionable.[129] Most importantly, the Court's stature as a neutral body is compromised when it decides a case on the basis of protected evidence.[130] Finally, when the Court decides on the basis of protected evidence, it is impossible to analyze the Court's view of the merits of the case, and the Court is thus shielded from public accountability. Despite these problems, the Court has continued to decide section 94 cases on the merits, based on evidence that the petitioner cannot rebut.[131]

In *'Asli v. Jerusalem District Commissioner*,[132] however, the government presented some evidence, making it possible to analyze the Court's view of the merits of the case. The Commissioner had revoked the petitioner's newspaper license upon concluding that the newspaper was the mouthpiece of a terrorist organization, the Popular Front for the Liberation of Palestine.[133] The Minister asked the Court to protect information that showed that the Popular Front controlled the paper, but he submitted into evidence an analysis of the paper's content.[134]

The Court found that the paper's content did not support the government's contentions. Furthermore, the Court observed that the editors followed the regulations requiring submission of material to a military censor before publication.[135] Nevertheless, the Court upheld the Commissioner's revocation because the privileged information supported the government's contentions. "[T]he license was revoked not because of the content, but because of the close and direct connec-

127. *Id.* at 795.

128. Evidence Ordinance (New Version), 5731—1971, §§ 44-46, 2 N.V. 198-208. To make this determination, the Court must weigh the seriousness of the security interest against the justice that disclosure would serve. *Id.* §§ 44(a), 45.

129. *See El-Ard*, 18(2) P.D. at 344 (Berinson, J., concurring).

130. Rettig, *The Sting: Privileged Evidence, the Obligation to Give Reasons for Administrative Decisions, and Freedom of Expression* (Hebrew), 14 MISHPATIM 108, 115 (1984).

131. *See* Adib-Ayub v. Jerusalem Dist. Comm'r, 38(1) P.D. 750, 754 (1984); 'Asli v. Jerusalem Dist. Comm'r, 37(4) P.D. 837, 840 (1983).

132. 37(4) P.D. 837 (1983).

133. *Id.* at 838.

134. *Id.* at 839.

135. *See id.* at 838, 840.

tion between the newspaper and the terrorist organization."[136] This position contradicts *El-As'ad*, where the Court was more interested in the publisher's writing than his political ties.[137]

D. The Limits of the Court's Activism: Comparison Between Section 94 Cases and *Kol Ha'am II*

The section 94 cases point to some of the factors that limit the Court's activism in statutory interpretation. Those cases and *Kol Ha'am II* are on opposite ends of the spectrum of the Court's approach to statutory interpretation. A comparison between section 94 of the 1945 Emergency Defence Regulations and the statute in *Kol Ha'am II*, section 19(2)(a) of the Press Ordinance, leads to some conclusions about the factors that will determine the Court's position on that spectrum in a given case.

The most obvious difference between the two statutes is the language. Section 19(2)(a) sets forth the "likely to endanger the public peace" standard for the Court to apply in reviewing a suspension of publication. The Court interpreted this standard narrowly. Section 94, on the other hand, leaves little room for interpretation, because it sets no standard that the government must satisfy in order to refuse or suspend a license to publish. The Court has limited the potential use of section 94 by holding that a statement of reasons subjects the decision to judicial review. But the Court has consistently refused to require a statement of reasons unless the petitioner shows that the government acted out of discrimination,[138] i.e., with a motive that would be irrelevant to any legitimate state interest. The section 94 cases show that the Court still observes the doctrine of legislative sovereignty to some degree. Section 94 cannot be construed to conform to the freedom of expression principles of *Kol Ha'am II*. The Court apparently thinks that the only other way to uphold these principles—to refuse to apply section 94—would be too blatant an affront to legislative sovereignty.

Another difference between section 19(2)(a) and section 94 is their sources. Israel inherited section 19(2)(a) from the British Mandate, and the Knesset has not amended it. Although section 94 is also inherited, the Knesset has reinforced it. In 1958, the Knesset passed a law confirming provisions like section 94 that exempt administrative authorities from stating reasons for their decisions.[139] The Court has

136. *Id.* at 840.

137. *See supra* note 122.

138. *See Adib-Ayub*, 38(1) P.D. at 752-53; *Maḥul*, 37(1) P.D. at 792; *El-Ard*, 18(2) P.D. at 343.

139. *See* Administrative Procedure Amendment (Statement of Reasons) Law, 5719—1958, § 3(1), 13 L.S.I. 7 (1958/59).

cited the 1958 law in all the section 94 cases in which the government refused to state reasons.[140] In addition, as the Court has noted, the Knesset amended the Defence Regulations without amending section 94.[141] Therefore, section 94's survival is not the result of legislative oversight. The Court showed its sensitivity to the sources of statutes in *El-As'ad*, when it described section 94 as a "Draconian [rule] that was promulgated by a colonial regime."[142]

These factors suggest that the Court is more deferential to statutes passed or at least acted on by the Knesset than to pre-1948 statutes that have remained intact. In fact, in cases involving statutory barriers to judicial review similar to section 94, three judges have stated that in some circumstances pre-1948 legislation is entitled to less deference than the laws of the Knesset.[143]

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140. *See Adib-Ayub*, 38(1) P.D. at 752; *Maḥul*, 37(1) at 792; *El-Ard*, 18(2) P.D. at 342.

141. *See El-Ard*, 18(2) P.D. at 345.

142. *El-As'ad*, 34(1) P.D. at 513.

143. In Nationalist Circles v. Minister of Police, 24(2) P.D. 141 (1970), *noted in* Klein, *The Temple Mount Case*, 6 ISR. L. REV. 257 (1971), Judges Silberg and Agranat stated that the Court can strike down Mandate laws that are inconsistent with the principles underlying the establishment of the State. This position is similar to the one that the Court unanimously rejected in *Zeev, supra* notes 72-74 and accompanying text. *Nationalist Circles* involved interpretation of section 11 of the Law and Administration Ordinance, which provides: "[T]he law which existed in Palestine on 14th May, 1948 . . . will remain in force . . . *subject to such modifications as may result from the establishment of the state.*" *Supra* text accompanying note 13 (emphasis added). The Court first interpreted "modifications" in a challenge to the requisition of an apartment for government use under the Defence and Emergency Regulations. *See* Leon v. Acting Dist. Comm'r of Tel Aviv, 1 P.D. 58 (1948), 1 S.J. 41 (1948-53). The petitioner argued that one "modification" of pre-State law was an implicit repeal of these Regulations, because they were dictatorial and "were directed towards destroying . . . the development of the country by the Jews; thus they are incompatible with the establishment of a democratic, Jewish state." *Id.* at 48. The Court rejected this argument:

> It would require that this court first determine that the establishment of the State has brought about some change and the nature of the change; and then consider whether this change requires that a particular law be invalidated . . . .
>
> . . . .
>
> We are not prepared to . . . repeal laws which undoubtedly do exist but which are unacceptable to the public . . . , for in so doing we would infringe upon the rights of the existing . . . legislative authority . . . .

Id. at 52, 54.

The Court read "modifications" as referring only to technical changes in laws. For example, Allenby Bridge, which had been part of the Mandate territory but was in Jordanian territory after the establishment of the state, would be deleted from an order listing the lawful places of entry into Palestine. Similarly, the word "Palestine" would be replaced with "Israel" in all laws. *Id.* at 53. The technical interpretation of "modifications" became known as the "Allenby Bridge" approach.

Judges Silberg and Agranat abandoned the "Allenby Bridge" approach in *Nationalist Circles*. The petitioners sought to enjoin the police to allow Jewish prayers on the Temple Mount, a holy place to Islam, Judaism, and Christianity. The Court held that it lacked jurisdiction over the case because of section 2 of the Palestine (Holy Places) Order in Council, 1924: "[N]o cause or matter in connection with the Holy Places . . . shall be heard or determined by any Court in Palestine . . . ." 3 L.P. 2625. Judge Silberg argued that section 2 is invalid because the denial of jurisdiction is inconsistent with the establishment of a free,

The Court's greater deference to the laws of the Knesset suggests that the activist role that the Court played in *Kol Ha'am II* and other cases might end. If the Knesset enacts laws that are as repressive as section 94, and if the Court duly applies them, the *Kol Ha'am II* period will look like a transitional phase in which the Court merely oversaw the replacement of colonial laws with native counterparts.

The attitude of the government and the Knesset toward the Court indicates that this scenario is unlikely. The Knesset has not statutorily overturned any of the Court's freedom of expression decisions. Moreover, the Knesset has acceded, albeit somewhat begrudgingly, to the Court's exercise of the power of judicial review in cases concerning

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democratic state. This argument was based on an expansive interpretation of the "modifications" provision:

> I think it would . . . degrade the great historical event of the creation of a Jewish state in the land of Israel, if we were to [accept the "Allenby Bridge" interpretation]. . . . My heart of hearts is with those "maximalists" who see in our national independence . . . a renewal of national life. If this is the essence of independence, it is certainly possible . . . to examine the pulse of *every* Mandate law to see if it suits the spirit that pervades the laws of our free, independent state . . . .

24(2) P.D. at 158 (Silberg, J., concurring).

Judge Agranat, who held that section 2 remained in force, nevertheless departed from the "Allenby Bridge" approach as well:

> The Court must examine with great caution before it decides that a Mandate law is implicitly repealed because of a "modification" resulting from the establishment of the state; . . . the contradiction between the two must be so stark that there is no escape from the conclusion that in the state of Israel that law has lost its right to exist.

Id. at 279, 280 (Agranat, J., concurring). The only difference between the positions of Judges Agranat and Silberg on the issue of deference to Mandate laws is that Judge Agranat committed himself to the doctrine of constitutional avoidance. *See infra* text accompanying note 220.

Judge Sussman expounded an especially activist position on construing Mandate laws in Kardosh v. Registrar of Companies, 15 P.D. 1151, 4 S.J. 7, *further hearing*, 15 P.D. 1209 (1961), 4 S.J. 32, (1961-62). The petitioners in *Kardosh* contested the denial, on grounds of state security, of their application to form a publishing company. *See* 4 S.J. at 10-11. Mandate law gives the government "absolute discretion" to deny such an application. *See* Companies Ordinance, 1929, §§ 4, 14, 1 L.P. 169, 171-72, 175.

One of the issues was whether, in light of the grant of "absolute discretion," the Court had jurisdiction to review the government's decision. Judge Sussman refused "to attach decisive importance to the language of the legislator . . . . [M]ore important than his language is the subject dealt with . . . ." 4 S.J. at 36-37. In concluding that the Court had jurisdiction, Judge Sussman argued that circumstances had changed since the Companies Ordinance was enacted:

> It may be presumed that when in 1929 the High Commissioner under the Mandate reserved a discretion to refuse registration, . . . he had in contemplation the special circumstances of the territory of the Mandate, inhabited by a population divided into two communities between whom good relations did not reign. . . . But not only is the Government which inherited the powers of the High Commissioner bound, unlike him, by the jurisdiction of this court, but today in the State of Israel we are not obliged to decide as the court might have decided in 1922. Life changes and the law dare not become petrified.

Id. at 40. The Court overturned the denial of the application by a 3-2 decision. However, the other two majority judges avoided stating that Mandate laws are entitled to less than full deference. *See id.* at 22-26 (per Agranat, J.); *id.* at 28 (Witkon, J., concurring).

section 4 of Basic Law—The Knesset, even though the Court's power in this area is unclear. The government's use of section 94, especially in recent years, shows that the government is not enthusiastic enough about the Court's most liberal statements on freedom of expression to implement them through legislative reform. On the other hand, the government has acquiesced in the Court's decisions. For example, after *Kol Ha'am II*, section 19(2)(a) of the Press Ordinance "[fell] into disuse,"[144] and only one case involving section 19(2)(a) has reached the Court since *Kol Ha'am II*.[145] The government has also allowed the Court to review the use of section 94 of the 1945 Regulations. The conduct of the government and the Knesset suggests that the Court's prestige would prevent the Knesset from risking a constitu-

144. Lahav, *supra* note 99, at 519.

145. 'Omar Int'l, Inc. v. Minister of Interior, 36(1) P.D. 227 (1981). The political background of the *'Omar* case was the government's decision to replace the military administration in the occupied West Bank and Gaza Strip with a civilian administration. Arabs in the occupied territories protested the switch, sometimes using violent tactics. In one incident, Yussef El-Ḥatib, whom the Israeli authorities had appointed as a leader of an Arab group that cooperated with the authorities, and his son were shot. El-Ḥatib was critically injured, and his son was killed. *Id.* at 233. The Arab-owned, English-language weekly *Al-Fajr* reported the violence favorably. It also stated that nobody visited the El-Ḥatib family to express condolence after the shooting, accused El-Ḥatib of various acts of collaboration "against his own people," and stated that he had "sided with the Israeli occupiers." *Id.* at 234. Next to the article about El-Ḥatib was a cartoon modeled on the David and Goliath story. An Israeli soldier was trying to inflate a balloon with the name of El-Ḥatib's group written on it, and the balloon exploded when a boy shot a rock at it with a slingshot.

The government closed the paper under section 19(2)(a) of the Press Ordinance on the ground that the reporting of the violence in the territories was "praise of the acts of murder and terror and encouragement to continue them." *Id.* at 234. The Court agreed with this assessment and held that the government had acted properly under *Kol Ha'am II*'s "probability" test. *Id.* at 234-35.

In addition to the *Al-Fajr* case, the government decided to close a paper under section 19(2)(a) in 1975. Apparently fearing public reaction, the government planned to keep the decision secret until implementation. But news of the decision leaked to the press, and the government reversed its decision. M. NEGBI, *supra* note 38, at 151.

Professor Lahav has described the suspension of *Al-Fajr* under section 19(2)(a) as the breaking of a "taboo" that had existed since *Kol-Ha'am II*. Lahav, *supra* note 14, at 273. In her view, the government has returned to the use of sections 19(2)(a) and 94 in recent years because it perceives an increased tension between freedom of expression and national security:

> Until 1967, the Israeli press had been relatively homogeneous. The legitimacy of the State of Israel and the essence of Zionism—that the liberation of the Jewish people requires Jewish political sovereignty—were not quesitoned. Criticism, however intense, was conducted within this ideological framework. . . . This homogeneity did not survive the 1967 War. Palestinian newspapers, located in East Jerusalem, identified with Palestinian nationalism and expressed their support for the Palestinian cause as well as their opposition to Israeli policies, oftentimes in vociferous language. In the reaction of Israel's government one could see the dilemma of Israeli liberalism. On the one hand, the government wished to pursue its commitment to the democratic process and press freedom. On the other hand, it faced, for the first time, a coalition of experienced newspapers that viewed itself as an arm of the Palestinian struggle and expressed itself accordingly.

Id. (footnotes omitted).

tional confrontation through totally disregarding the Court's freedom of expression principles.

The scenario described above is also based on the unrealistic assumption that the Court would not stand its ground in a constitutional confrontation. It is true that the Court has adhered to the doctrine of legislative sovereignty in most of its rhetoric and has couched its decisions in terms of statutory interpretation. But the Court's decisions also show that it sees itself in part as a lawmaking body and would fight any serious threat by the Knesset to the values that the Court considers fundamental to Israeli society. The Court has placed itself above the legislature in several cases in the areas of freedom of expression, Knesset elections, and military administration of occupied areas.[146] The basis for the Court's power in these cases is often unclear, but the results suggest that in areas that the Court considers to be important, it will not easily submit to the Knesset.

III. ADVANTAGES AND DISADVANTAGES OF ADJUDICATION UNDER AN UNWRITTEN CONSTITUTION

A. FLEXIBILITY IN THE RECOGNITION OF RIGHTS

The absence of a written constitution gives the Israel Supreme Court great flexibility in recognizing the right to freedom of expression in contexts that it has not yet considered. Because the Court draws constitutional principles from an amorphous body of sources, it worries less about the characterization of rights than do American courts, who often wrestle with the Constitution's language when encountering an activity that resembles a protected activity but occurs in a new context.[147] One member of the Israel Supreme Court was especially candid in describing the Court's flexibile approach to protecting the individual against the government:

> I do not deny the well-known rule—which from abundant use has become

146. On the Supreme Court's review of the acts of the military government in the occupied territories, see generally M. NEGBI, *supra* note 38.

147. *See infra* section IV.A. In *Kol Ha'am II*, for example, the Court was not concerned about finding the precise name of the right at stake: "we regard the freedom of the press as one specific form of the freedom of expression, and we shall . . . not distinguish between the two concepts." 1 S.J. 90, 94 (1948-53). Similarly, when the Court recognized the right to freedom of assembly and procession, it was unconcerned about the right's exact source and name.

> [T]he law of the state of Israel recognizes fundamental human liberties, as commonly accepted in enlightened states. Among those liberties is the right of assembly and procession. *Whether we see those liberties as liberties that stand in and of themselves, or whether we see in them a manifestation of the freedom expression (and we need not decide this question)*, they have great importance in the formation of the character of our democratic regime.

Saar v. Minister of Interior, 34(2) P.D. 170, 171 (1980) (emphasis added).

> largely depreciated—that the High Court of Justice[148] will not substitute its discretion for that of a competent authority. Yet *when the matter is of high public importance* and the area of doubt does not necessitate special expertise but is open, clear and obvious to all—in such a case *we do not defer to the competent authority* but the court, if it sees fit, will reverse the decision of that authority.[149]

If the Court will assume an activist role whenever "the matter is of high public importance," it can recognize a wider range of individual liberties than can an American court reviewing legislative violations of prohibitions specifically set out in the Constitution.[150]

B. Inconsistent Recognition of Rights and Application of Doctrine

The danger in not having a written constitution is that by deferring to the legislature, courts can ignore rights established in earlier cases but asserted in new contexts. The following survey of cases subsequent to *Kol Ha'am II* shows that the Israel Supreme Court has been inconsistent in applying the principles of that case in new contexts.[151]

1. Recognition of Rights

Eight years after *Kol Ha'am II*, the Court decided *Forum Films Ltd. v. Film & Theatre Censorship Board.*[152] The Board[153] approved a

148. On the Supreme Court's jurisdiction as the High Court of Justice, see *infra* note 191.

149. Israel Film Studios Ltd. v. Geri, 16 P.D. 2407 (1962), 4 S.J. 208, 230 (1961-62) (Silberg, J., concurring) (emphasis added).

150. The United States Supreme Court has, however, recognized rights unexpressed in the Constitution, such as the right to travel and the right of privacy. When the Court acts in this fashion, it has as much flexibility as the Israel Supreme Court and is actually operating under an unwritten constitution. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 708-09 (1975). However, when the United States Supreme Court acts under the written Constitution, it encounters obstacles that the Israel Supreme Court does not face. *See infra* Section IV.A.

151. This survey of post-*Kol Ha'am II* cases does not evaluate whether the Court struck the proper balance between freedom of expression and the competing governmental interest. Such an evaluation would be unenlightening for the comparison of written and unwritten constitutions; courts in any system may misapply even the most protective standards. Rather, this survey evaluates the Court's consistency. See *infra* Section III.B.3. on the importance of consistency. For the purpose of this survey, a decision is consistent with *Kol Ha'am II* if the Court recognized a freedom of expression interest and gave it serious consideration, regardless of whether the Court preferred that interest over the governmental interest.

152. 15 P.D. 611 (1961).

153. The Cinematograph Films Ordinance provides:

> No cinematograph film shall be exhibited unless it shall have been authorised for exhibition by the [Censorship] Board. . . . The Board may *in its discretion* grant . . . or withhold authority for the exhibition of any film . . . .

Cinematrograph Films Ordinance, 1927, §§ 4(1), 6(2), 1 L.P. 135, 136 (emphasis added). The ordinance provides no criteria for the exercise of discretion.

German documentary about Israel, but required that the German narration be replaced with a Hebrew narration. The Court found this condition on approval to be reasonable, even though the Board had approved other German films without imposing such a condition.[154] The Court did not mention the existence of a freedom of expression issue.

The Court's approach was quite different in *Israel Film Studios Ltd. v. Geri.*[155] In this film censorship case, the Court applied the principles of *Kol Ha'am II.* The petitioner's newsreel depicted riots that started when police officers forcibly evicted squatters from a Tel Aviv slum. The Censorship Board banned the newsreel because its depiction of the officers' conduct was unbalanced and, the Board asserted, would encourage disrespect for the law. In overturning the ban, the Court stated that a camera cannot be everywhere during fast-moving events; balanced reporting may not be possible in a riot. The Court also based its decision on general principles established in *Kol Ha'am II*: the value in a democracy of discussion of public issues[156] and the individual's right to receive information.[157]

In a later film censorship case, *'Ein-Gal v. Film & Theatre Censorship Board,*[158] the Court again switched its focus by restricting *Israel Film Studios* to its facts. The Board banned 'Ein-Gal's film on the Jewish-Arab struggle over Palestine because it "maliciously distort[ed] historical facts."[159] 'Ein-Gal argued that even if the Board's finding were true, the ban would be unjustified under the principles of *Israel Film Studios.* The Court responded that while the *Israel Film Studios* petitioner faced an insurmountable technical obstacle to making a balanced presentation in a newsreel, 'Ein-Gal did not face such an obstacle when presenting facts in a historical film.[160] Moreover, the Court argued, the *Israel Film Studios* rule applies only to documentaries; 'Ein-Gal's film "pretended to be documentary but is actually a tendentious presentation of the historical facts."[161] The Court ignored the

154. [B]ecause the film is not just an entertainment film [as were the other German films that the Board had approved] but a documentary depicting the new reality in this country, it is not proper or in good taste that the narration . . . be in German.

The Board is a public, representative body; thus it was given wide authority under . . . the Cinematograph Films Ordinance; if it is of the opinion that German narration does not suit the content and purpose of the film, we are not prepared to say that this opinion was unreasonable.

15 P.D. at 613.

155. 16 P.D. 2407 (1962), 4 S.J. 208 (1961-62).

156. 4 S.J. at 216-17.

157. *See* 4 S.J. at 216-17; *see also supra* note 81.

158. 33(1) P.D. 274 (1979).

159. *Id.* at 275.

160. *Id.* at 277.

161. The Court purported to base its finding on the film's inciteful character and, citing *Kol Ha'am II,* on the probability of danger to the public peace:

statements in *Kol Ha'am II* and *Israel Film Studios* about a democracy's need for the free flow of information[162] and the individual's right to know.[163]

Other cases further illustrate the Court's inconsistent approach to freedom of expression cases. In *'Omer v. State of Israel*, the Court applied a balancing test.[164] The Court upheld a conviction under a statute prohibiting the holding and distribution of "obscene matter."[165] It recognized, however, the possibility that a "redeeming social value"[166] can outweigh the harmful aspects of pornography.[167] The Court held that under the circumstances the defendant's social message could not protect him from conviction.[168]

Two years later, in *Keynan v. Film & Theatre Censorship*

> If distortion of historical facts were the only issue, this would not justify banning the film . . . in a country in which the citizen is guaranteed the freedom of expression. But here the film's inciteful essence comes into play
>
> . . . .
>
> If this film were shown in this country, the danger is very present that because of the special power of persuasion contained in visual material, it would serve as an effective instrument for incitement and for preparing the hearts of Arabs . . . to assist in terrorist actions . . . , *and at the same time would capture the sympathy of young Jews who know no better and whose eyes have yet to see the truth of these times.*

Id. at 277-78 (emphasis added). This argument is internally inconsistent. If the Court had been concerned only with incitement, it would not have discussed the danger that the film would persuade young Jews; presumably the Court did not see a danger that they too would aid terrorism. The film's effect on Jews was only an issue of freedom to receive information; they should have been given the chance to decide whether the film distorted the facts.

162. *See supra* notes 79-80, text accompanying note 156.

163. *See supra* note 81, text accompanying note 157.

164. 24(1) P.D. 408 (1970).

165. Section 179 of the Criminal Code Ordinance, 1936, prohibits holding for sale or distribution any "obscene printed or written matter, or any obscene picture, photograph, drawing or model, or any other object tending to corrupt morals." 2 O.H.Y. (Ordinances) 810, 877.

166. 24(1) P.D. at 412 (*quoting* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966)).

167. "An enlightened view requires us, as is common nowadays, to tolerate even a considerable degree of erotic sexual descriptions, if they appear as an integral part of a work with literary or scientific value that compensates for its pornographic aspect." 24(1) P.D. at 412.

The Court has not always recognized a freedom of expression issue in obscenity cases. In Weiss v. State of Israel, 17 P.D. 2310 (1963), demonstrators in front of the American embassy who carried a poster saying "Americans go fuck yourselves with your H-Bomb" were convicted of "behav[ing] in an . . . indecent manner in [a] public place." *Id.* at 2313. In upholding the conviction, the Court rejected any consideration of a freedom of expression issue: "The clear political meaning of a poster does not cancel the indecent manner of the language in which it is written, and the figurative meaning of the words does not clad them with a fig leaf." *Id.* at 2324 (emphasis omitted). The *'Omer* Court, despite its different position, did not cite *Weiss*.

168. The defendant explained that his book's vulgar sexual references to God were meant to "awaken the public from its slumber" for a "cultural war" against ultra-religious Jews. 24(1) P.D. at 414-15.

Board,[169] the Court took a very different position. The Board banned a play on the ground that it violated a law against material "tending to outrage the religious feeling or belief of other persons."[170] The Court upheld the ban, stating that freedom of expression "must step back in favor of" religious sensibilities.[171] Thus, after applying a balancing test in *'Omer*, the Court categorically subordinated freedom of expression to other interests in *Keynan*.[172]

2. *Application of Doctrine*

The Israel Supreme Court has also been inconsistent in its application of doctrine under the unwritten constitution. Specifically, the Court has been inconsistent in its application of the *Kol Ha'am II* "probability" test, which the Court adopted instead of the repressive "bad tendency" test.[173]

Eleven years after *Kol Ha'am II*, in *Jiris v. Northern District Commissioner*,[174] the Court appeared to apply the "bad tendency" test, but neither explicitly adopted it nor rejected the "probability" test. The Court upheld the denial of an application to register as an association under the Ottoman Law of Associations.[175] The Court held that the group's goals[176] were inimical to the existence of the state, but it did

169. 26(2) P.D. 812 (1972).

170. "Any person who publishes any print, writing, picture or effigy calculated or tending to outrage the religious feeling or belief of other persons . . . is guilty of a misdemeanor." Criminal Code Ordinance, 1936, § 149(a), 2 O.H.Y. (Ordinances) 810, 867-68. The play reenacted the crucifixion of Jesus in a mocking way, portrayed Mary as a prostitute, satirized trade in religious artifacts, and described a woman who used religious objects for sexual purposes. *See* 26(2) P.D. at 813-14. The Court held that the play was a "serious offense to the religious feelings of Christians." *Id.* at 813.

171. *Id.* at 814.

172. The concurrence found room for balancing. Instead of applying literally the term "others" in the statute, the concurrence measured the offensiveness according to "the sensibilities of a majority or considerable part of [a religious community] and not . . . of a minority with extreme views." *Id.* at 812 (Etzioni, J., concurring). The analysis of *'Omar* and *Keynan* is based on Lahav, *Freedom of Expression in the Supreme Court* (Hebrew), 7 MISHPATIM 375, 419 (1976/77).

173. *See supra* text accompanying notes 100-05.

174. 18(4) P.D. 673 (1964).

175. Section 3 of the Ottoman Law of Associations prohibits the establishment of associations that are "founded on an illegal basis and opposed to law and morality, or whose goal is to harm the public order or the territorial integrity of the country." *Id.* at 674-75.

176. The group's goals included:

> The finding of a just solution to the Palestinian problem—seeing it as an indivisible unit . . . that restores its political existence . . . and sees it as having the first right to determine its fate for itself within the framework of the supreme aspirations of the Arab people.
>
> Support for the movement of liberation, unity, and socialism in the Arab world . . . .

Id. at 675.

not mention either the imminence of actual danger or the "probability" test.

A year after *Jiris*, in *Iredor v. Committee of Elections to the Sixth Knesset*,[177] the Court upheld the Committee's disqualification of the Socialist List from running for election to the Knesset on the ground that its goal was to subvert the state.[178] In affirming the Committee's finding, the Court did not assess whether the danger that the Socialist List would attempt action to implement its goals was imminent. Here, too, the Court neither explicitly adopted the "bad tendency" test nor mentioned the "probability" test.[179]

3. *Consequences of Inconsistency Under an Unwritten Constitution*

The inconsistency in these cases is attributable in part to the absence of a written constitution. Because no fixed, formal standard like the first amendment to the United States Constitution unites freedom of expression cases in Israel, the Court applies freedom of expression principles in new contexts on a case-by-case basis. When the Court chooses to uphold the government's use of broad statutory powers to regulate expression, the doctrine of legislative sovereignty allows the Court to defer without violating any written norms like the first amendment. Therefore, if the Court takes an activist position in one case, it can easily narrow or ignore that position in a later case, especially if the case arises in a different context.

When the Court cites legislative sovereignty as the sole reason for declining to protect freedom of expression, the Court impairs its legitimacy in this area. In order to maintain its legitimacy, the Court must exercise its power consistently.[180] Instead, the Court sometimes decides on the basis of the content of expression, taking an activist

177. 19(3) P.D. 365 (1965), *noted in* Guberman, *Israel's Supra-Constitution*, 2 ISR. L. REV. 455 (1967).

178. *Id.* at 386-90. The candidates on the list were members of the outlawed El-Ard group, *see supra* text accompanying notes 114-16, and had also tried to register as an association under the Ottoman Law of Associations, *see supra* notes 175-76 and accompanying text. 19(3) P.D. at 369 (Cohn, J., dissenting).

179. The dissent noted the applicability of the "probability" test and argued that it was not satisfied. *See id.* at 381 (Cohn, J., dissenting). This Note's analysis of *Iredor* and *Jiris* is based on Lahav, *supra* note 172, at 414-16.

180. The power of the English courts, which is substantial despite the formal constraints of parliamentary sovereignty, *see supra* note 27 and accompanying text, has been attributed to the courts' consistency, i.e., their obedience to their own rules:

> The manipulation by English courts of the rules concerning the binding force of precedent is perhaps most honestly described . . . as a successful bid to take powers and use them. Here power acquires authority ex post facto from success. . . . [W]hat makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by the courts from their unquestionably *rule-governed operations over the vast, central areas of the law.*

H.L.A. HART, THE CONCEPT OF LAW 150 (1961) (emphasis added).

posture when it disagrees with the government and deferring when it agrees. This exercise of "sporadic omnipotence"[181] damages the Court's prestige and makes its constitutional status unclear.[182]

C. CAUSES OF THE COURT'S INCONSISTENCY

One cause of the Court's inconsistency may be periodic lapses into a result-oriented approach. For example, some of the cases in which the government limited its review involved expression of Palestinian nationalist views. Judges might be lenient toward the government when it prevents the expression of views similar to those of groups involved in armed conflict with Israel. That was the argument of an Israeli critic of the *Iredor* and *Jiris* decisions:

> In both cases there were references to the finding of a solution to the Palestinian problem and to the defense of the Palestinian people's interests. . . . Many of us see in this idea a direct threat to our existence and political sovereignty. However, there is a great distance between an instinctive reaction [to deny expression] and a legal prohibition based on rational justification.[183]

The decisions in *'Ein-Gal* and *'Asli* provide further support for this argument.[184]

Another factor contributing to the Court's inconsistency is that it

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181. Arrowsmith v. Commissioner, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting).

182. For example, in Avidan v. Film & Theatre Censorship Board, 28(2) P.D. 766 (1974), it was unclear whether the Court's holding rested on the limits of its power of review or its agreement with the Censorship Board on the merits. The Board banned the petitioner's film on the ground that it was obscene and in bad taste. The Court noted that the Board represented a wide cross-section of society. *Id.* at 769. For this reason the Court considered itself inferior to the Board as a judge of good taste:

> I can hardly imagine a case in which the Board would approve or disqualify . . . a non-documentary entertainment film after careful and balanced consideration . . . and in which we would see ourselves as having more authority than [the Board] and free to reject its opinion.

Id. at 771. However, the Court watched the film and expressed its agreement with the Board's judgment of the content: "I was not very impressed with what the petitioner calls the liturgical and philosophical spirit that characterizes it. The sex scenes . . . are so numerous and bold that they cast a shadow over the rest . . . ." *Id.* at 769. Because the Court purported to base its decision on a lack of power of review, there was no reason to watch the film or express an opinion on it.

> I saw no point that we, as a court, view the film. The decision on the merits, whether such a film is worthy of being shown or not, can only be the result of the viewers' taste and world view. It is futile to ask here what the "reasonable man" says . . . .

Id. (Witkon, J., concurring). *See also supra* note 154.

183. Lahav, *supra* note 172, at 416.

184. *See supra* notes 132-36, 158-63 and accompanying text.

> The general rule is that in matters of national security, so long as the administrative agency has acted within the boundaries of its lawful jurisdiction, and in good faith, the Court will not intervene. . . . [I]n the early years of statehood, when security problems were graver, the Supreme Court was more willing than it is today to intervene in favour of the citizen in cases involving security problems.

Shetreet, *Reflections on the Protection of the Rights of the Individual: Form and Substance*, 12 ISR. L. REV. 32, 59 (1977) (citing, among other cases, *Kol Ha'am II*).

normally sits in three-judge panels,[185] even though there are currently twelve judges on the Court.[186] Contradictory decisions may result from differences in the judges' views of the necessary legislative deference and in their perceptions of the danger of free expression in a particular case.[187] The Court can also sit in panels of odd numbers over three by order of the President of the Court, the Deputy President, or the three-judge panel originally assigned to the case.[188] Five-judge panels heard all of the cases in which the Court invalidated laws that violated section 4 of Basic Law—The Knesset.[189] The use of five-judge panels in these critical cases implies that the Court recognizes a danger of inconsistency in the three-judge panel. The Court has even stated that it is more likely to follow a Supreme Court precedent decided by a five-judge panel than one decided by a three-judge panel.[190]

The Court's unclear self-image also contributes to its inconsistency. In its activist decisions, the Court seems to perceive itself as a constitutional court, i.e., a lawmaking body. But some elements in the Court's composition detract from the Court's image as a lawmaking body, suggesting instead a simple court of appeal. First, a three-judge panel does not project the powerful image of a lawmaking body that a court sitting in full panel would project. A three-judge panel may also be hesitant to make far-reaching pronouncements of law in the name of the Court. Second, the Court is, in part, a first court of appeal. Although part of the Court's jurisdiction is discretionary,[191] the Court

185. Courts Law [Consolidated Version], 5744—1984, § 26, 1123 S.H. 198, 202 (1984) (originally enacted as Courts Law, 5717—1957, § 3, 11 L.S.I. 157 (1956/57)).

186. Judges in Israel are appointed by the President on recommendation of a committee comprising three members of the Supreme Court, two lawyers elected by the bar association, two Members of Knesset, the Minister of Justice, and one other minister. Tenure lasts until the compulsory retirement age of seventy. Judges can be removed from office for statutorily specified causes upon a finding by a judicial disciplinary tribunal, which is made up mostly of Supreme Court judges. Judges Law, 5713—1953, §§ 5, 16, 17, 21-23, 7 L.S.I. 124, 125-28 (1952/53); Shetreet, *supra* note 31, at 992-93.

187. *Cf.* Goldman, *Conflict and Consensus in the United States Court of Appeals*, 1968 WIS. L. REV. 461, 481 ("an element of justice-by-lottery is inherent in the three-member panel device"). On ideological divisions among the judges of the Israel Supreme Court, see Shetreet, *supra* note 31, at 988; Shetreet, *supra* note 184, at 63-67.

188. Courts Law [Consolidated Version], 5744—1984, §§ 26(1)-(2), 30(a), 1123 S.H. 198, 202 (1984) (originally enacted as Court Law, 5717-1957, §§ 3(1), 8(a)-(b), 11 L.S.I. 157, 159 (1956/57).

189. See cases discussed *supra*, Section I.B.3.

190. Boronovski v. Chief Rabbi of Israel, 25(1) P.D. 7, 30 (1971); Neiman v. Chairman of the Cent. Elections Comm., Eleventh Knesset, 38(3) P.D. 85, 87 (1984). These two cases differ from an earlier case in which the Court stated, more formalistically, that a precedent by an enlarged panel had no extra weight. *See* Ramm v. Minister of Fin., 8 P.D. 494, 504 (1954), *discussed infra* note 194.

191. The Supreme Court has exclusive jurisdiction in its capacity as the High Court of Justice: it "shall deal with matters in which it deems it necessary to grant relief in the interests of justice and which are not within the jurisdiction of any other court or tribunal."

also must hear appeals against judgments by the district courts.[192] The district courts, which are one of Israel's two main types of trial courts, have a wide area of original jurisdiction covering crimes carrying a prison sentence of a year or more and non-real estate civil claims for over approximately two-thousand dollars.[193]

An early case holding that the Court is bound by its own precedents except in very rare circumstances, *Ramm v. Minister of Finance*,[194] is further evidence that the Court may not perceive itself as a lawmaking body. After *Ramm*, the Knesset freed the Court from its own precedents,[195] but *Ramm*'s minimalist view of the Court's lawmaking role probably continues to influence some judges.

Basic Law—Adjudication § 15(c), 1110 S.H. 78, 80 (1984) (originally enacted as Courts Law 5717—1957, § 7(a), 11 L.S.I. 157, 158 (1956/57)). The Supreme Court also has discretion to hear appeals from judgments that the District Courts render on appeals from decisions of the Magistrates' Courts and from interlocutory decisions of the District Courts in civil matters. Courts Law [Consolidated Version], 5744—1984, § 41, 1123 S.H. 198, 205 (1984), (originally enacted as Courts Law, 5717—1957, § 19(b), 11 L.S.I. 157, 161 (1956/57)).

192. Basic Law—Adjudication §§ 15(b), 17, 1110 S.H. 78, 80 (1984); Courts Law [Consolidated Version], 5744—1984, § 41(a), 1123 S.H. 198, 205 (1984), (originally enacted as Courts Law, 5717—1957, §§ 6, 19(a), 11 L.S.I. 157, 158, 161 (1956/57)).

193. Courts Law [Consolidated Version], 5744—1984, § 40 (District Courts' original jurisdiction), § 51 (Magistrates' Courts' jurisdiction over lesser crimes, civil claims for less than two million shekels, and claims concerning the possession, use, or partition of real property), 1123 S.H. 198, 204, 206 (1984), (originally enacted as Courts Law, 5717—1957, §§ 18, 28, 11 L.S.I. 157, 161 (1956/57)).

194. Ramm v. Minister of Fin., 8 P.D. 495 (1954) (unanimous five-judge panel). The Court listed the following exceptions to the binding effect of its precedents:

1) A judgment given without reasons does not bind the Court.
2) The Court is free to choose from conflicting precedents.
3) The Court is not bound if the previous judgment ignored a statute or regulation.
4) "if a long time after the precedent is established it becomes clear that circumstances have changed so thoroughly and unforeseeably that the precedent is absolutely unsuitable under present circumstances."

Id. at 503.

Some judges have held the opposite view: "If I have to choose between truth and certainty, I prefer truth." Yehoshua v. Appeals Tribunal, 9 P.D. 617 (1955), 2 S.J. 46, 60 (1954-58) (Witkon, J., dissenting) (quoting Rosenbaum v. Rosenbaum, 2 PSAKIM 'ELYON 5 (1949)). Judge Witkon's view was based on an ambitious perception of the Supreme Court's lawmaking function:

> We stand at the threshold of our development as a nation and as a society, and there is still a long road for us to tread before we reach a final form for our jurisprudence, and the shaping of the law in Israel. In such a situation one needs, sometimes, to look afresh at the rules, even if they have been but recently established and even if the conditions of our life cannot be said to have altered in the meantime.

2 S.J. at 60-61.

A year before Ramm, in *Kol Ha'am II*, the Court ignored a very recent precedent, but did not discuss the issue of the force of precedent. *See supra* note 92.

195. "A precedent established by the Supreme Court binds every Court, except the Supreme Court." Basic Law—Adjudication § 20(b), 1110 S.H. 78, 81 (1984), (originally enacted as Courts Law, 5717—1957, § 33(b), 11 L.S.I. 157, 163 (1956/57)).

D. PROPOSALS TO INCREASE THE COURT'S CONSISTENCY

Three proposed laws that have been before the Knesset for several years would bring more consistency to the Supreme Court's adjudication of freedom of expression issues. Two proposals for a bill of rights contain provisions for freedom of expression.[196] The proposed Basic Law—Legislation would establish a constitutional court with power to invalidate laws that are inconsistent with Basic Laws.[197] The constitutional court would be the existing Supreme Court sitting in a panel of nine or a greater odd number.[198]

The Knesset should enact a bill of rights and establish a constitutional court with powers of explicit review.[199] Substituting explicit review of laws for the Supreme Court's present implicit interpretative review would probably force the Court to state the grounds of its decisions more expansively and forcefully. Explicit review would make it harder for the Court to retreat subtly from the positions of earlier cases. Furthermore, deciding constitutional cases as a single body

196. Proposal for Basic Law—Bill of Fundamental Human Rights §§ 33-37, 1612 H.H. 110, 114-15 (1983) (freedom of expression, art, science, research, teaching, assembly, and association); Proposal for Basic Law—Human and Civil Rights §§ 10-13, 1085 H.H. 448, 449 (1973), *translated in* Ratner, *Constitutions, Majoritarianism & Judicial Review: The Function of a Bill of Rights in Israel and the United States*, 26 AM. J. COMP. L. 373, 395 (1978).

197. Proposal for Basic Law—Legislation § 13, 1364 H.H. 328, 332-33 (1978).

198. *Id.* § 13(b), 1364 H.H. at 332.

199. This Note argues that the Knesset should enact a bill of rights and establish a constitutional court to improve the Supreme Court's consistency in deciding freedom of expression cases. The argument is based on a premise that the Court considers itself empowered to overturn the legislature's will in some cases. If the Court exercises such power, it should do so explicitly and subject itself to rules defining that power. *See supra* Section III.B.3.

This Note does not take a position on the question of whether a bill of rights increases protection of individual rights. In countries that have considered adopting a bill of rights, the effectiveness of a bill of rights has been a subject of debate. Aside from the argument that judicial review is undemocratic, which does not address the need to protect the individual from society, two common arguments against a bill of rights hold that it cannot protect the individual:

1) The political process is the ultimate guardian of individual freedom; courts are too weak to stop a society intent on repressing minorities.

2) A bill of rights limits the protection of individual freedom to the enumerated guarantees; attempts to assert other freedoms in the political process will have a decreased chance of success because such freedoms were excluded from the bill of rights.

See Lloyd, *Do We Need a Bill of Rights?*, 39 MOD. L. REV. 121 (1976) (England); Schneiser, *The Case Against Entrenchment of a Canadian Bill of Rights*, 1 DALHOUSIE L.J. 15 (1973); Supreme Court Judge Landau, *A Constitution as Israel's Supreme Law?* (Hebrew), 20 HAPRAKLIT 30 (1971). *Contra* Supreme Court Judge Agranat, *The Contribution of the Judiciary to the Legislative Endeavor* (Hebrew), 10 IYUNEI MISHPAT 233 (1984) (calling for adoption of bill of rights); Lahav & Kretzmer, *A Bill of Rights for Israel: A Step Forward?* (Hebrew), 7 MISHPATIM 154 (1976/77) (same).

In the debate over the adoption of the United States Constitution, Alexander Hamilton went even further, arguing that a bill of rights would endanger the individual. The Federalist No. 84 (A. Hamilton), at 514 (C. Rossiter ed. 1961).

would enhance the Court's stature as a lawmaking body, and there would be less inconsistency resulting from ideological differences among the judges. Finally, the Knesset should restructure the appeals system to increase the Supreme Court's discretionary jurisdiction and to decrease appeals of right. By concentrating on cases chosen for their legal significance, the Supreme Court can better define its lawmaking function.[200] If the Knesset continues to refuse to establish a constitutional court, the Court should use enlarged panels in constitutional cases as often as its workload permits.

IV. A COMPARATIVE PERSPECTIVE ON CONSTITUTIONAL ADJUDICATION IN THE UNITED STATES

Comparison with the United States provides much of the perspective for Section III's evaluation of the Israel Supreme Court's performance and for the suggestions to improve it. Comparison between the two systems also points to implications for constitutional adjudication in the United States. Two factors make such a comparison possible. First, similar freedom of expression values guide both countries' courts.[201] Second, there are similarities between constitutional adjudication in Israel and the United States, as explained below.

A. ADJUDICATION UNDER THE AMERICAN "UNWRITTEN CONSTITUTION"

Professor Grey has noted that much of the American constitution, i.e., the suprastatutory norms that guide judicial review of legislation,[202] is unwritten:

> In the important cases, reference to an analysis of the constitutional text plays a minor role. The dominant norms of decision are those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified, in the written Constitution—dual federalism, vested rights, fair procedure, equality before the law.[203]

When courts make decisions that are difficult to couch in the Constitution's literal terms, they sometimes grasp at written rules instead of expounding the principles that guide their decisions. "[Our courts

200. *See* Editorial Note, *A High Court of Appeals* (Hebrew), 15 MISHPATIM 495 (1984); Quat, *On the Structure of the Supreme Court* (Hebrew), 22 HAPRAKLIT 249 (1965/66). *Contra* Supreme Court Judge Landau, *Trends in the Decisions of the Supreme Court* (Hebrew), 8 IYUNEI MISHPAT 500, 501 (1982) (the Supreme Court's "special power" comes from a blend of lawmaking and appellate functions; "the Court should not breathe the rarefied air of Olympus by dealing only with esoteric matters").

201. *See supra* note 4.

202. On this connotation of "constitution," see *supra* note 2.

203. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 707-08 (1975).

tend] to resort to bad legislative history and strained reading of constitutional language to support results that would be better justified by explication of contemporary moral and political ideals not drawn from the constitutional text."[204] When courts engage in semantics to infer constitutional rights and to exclude acts literally protected by the Constitution, they provide little guidance for other cases.

The United States Supreme Court has carved out exceptions to the first amendment's absolute protection of speech and extended protection to activities that are not literally speech. In construing the first amendment in terms of underlying values, the Court's performance has been mixed. The Court has candidly stated that the first amendment's protections are subject to balancing against competing societal interests, despite the amendment's absolute formulation.[205] The Court has also departed from the first amendment's literal terms in excluding "fighting words,"[206] obscenity,[207] libel,[208] and commercial speech[209] from first amendment protection.

In creating the commercial and libel exceptions, the Court did not sufficiently explain what was being excluded from protection. It merely referred to the common law definition of libel,[210] and it did not fully define commercial speech or justify its exclusion.[211] When the Court finally examined the commercial and libel exceptions in light of the policies underlying the first amendment, it abandoned the position that commercial speech and libel are completely unprotected.[212] Thus, the Court itself showed that its earlier, sketchily-reasoned decisions created confusing law.

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204. *Id.* at 706.

205. *E.g.*, Konigsberg v. State Bar of Calif., 366 U.S. 36, 49-51 (1961).

206. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

207. Roth v. United States, 354 U.S. 476, 484 (1957) ("implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance").

208. Beauharnais v. Illinois, 343 U.S. 250, 254-56, 266 (1952).

209. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

210. *Beauharnais*, 343 U.S. at 254-55. *Cf.* New York Times v. Sullivan, 376 U.S. 254 (1964):

> [Statements] of this Court to the effect that the Constitution does not protect libelous publications . . . do not foreclose our inquiry here. . . . [W]e are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "more labels" of state law.

Id. at 268-69 (footnote omitted).

211. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). *See also* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1192 (1965): "It is impossible to formulate a single role of first amendment protection for economic speech in these diverse areas. . . ."

212. *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 761-65 (1976) (commercial speech); New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (libel). *See also infra* note 217; 1 DORSEN, BENDER & NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 700 (4th ed. 1976).

The Court has been reluctant to develop a theory of the first amendment status of nonverbal expression. In cases in which the Court has protected nonverbal expression, it has avoided comprehensive discussions of policy, focusing instead on the particular circumstances of the case.[213] The Court has also relied on formalistic terms such as "pure speech,"[214] "speech" and "nonspeech" elements of the same conduct,[215] and conduct "akin to 'pure speech.' "[216]

Reliance on formal distinctions among types of expression creates uncertainty about the scope of the first amendment and invites courts to make subjective decisions on the basis of the content of the regulated expression.[217] The Supreme Court should be as forthright in extending protection beyond the first amendment's literal terms as it has been in qualifying the first amendment's absolute guarantees. Instead of manipulating the language of the first amendment to include or exclude an activity from protection in a single case, the Court should take a long-range view, gleaning the purpose behind the language and striving toward comprehensive definitions of rights.[218] In interpreting open-textured constitutional provisions such as the first amendment, courts should be candid about the fact that they are making constitutional law.[219]

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213. *See* Spence v. Washington, 418 U.S. 405, 408-11 (1974); Brown v. Louisiana, 383 U.S. 137, 141-142 (1966) (plurality opinion).

214. Cox v. Louisiana, 379 U.S. 536, 555 (1965) ("pure speech" gets more protection than speech mixed with conduct). *See also* Bigelow v. Virginia, 421 U.S. 809, 817 (1975).

215. United States v. O'Brien, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, . . . governmental interest in regulating the non-speech element can justify limitations on First Amendment freedoms").

216. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 508 (1969) (wearing armband as antiwar protest is "akin to pure speech"). *See* New Rider v. Board of Educ., 480 F.2d 693, 698 (10th Cir. 1973) (wearing hair in traditional Pawnee Indian style is not "akin to pure speech"), *cert. denied*, 414 U.S. 1097 (1973).

217. *See* Note, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 HASTINGS L.J. 167 (1974) (reliance on conduct/speech distinction has caused inconsistency in picketing cases). When the Supreme Court abandoned the commercial speech exception, it pointed out the inconsistencies in the cases that had applied the exception. *See* Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 758-60 (1976).

218. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 61 (1973) (symbolic speech should get full first amendment protection); Henkin, *Forward: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) (same).

This is not an argument to ignore the text of the Constitution. Some constitutional provisions provide clear answers for specific problems; such provisions should be applied according to their plain meaning. Other provisions require interpretation. The first amendment, for example, would make little sense if it were applied absolutely and to all speech. Even commentators who think that the Supreme Court has gone beyond legitimate lawmaking in interpreting the Constitution advocate interpreting the first amendment according to a specific view of its purpose, rather than literally. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-23 (1971) (protection should apply only to political speech).

219. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977).

B. Avoidance of Constitutional Questions

Under the doctrine of avoidance of constitutional questions, when a case involves a possibly unconstitutional application of a statute, the court will apply another interpretation, if available, in order to avoid deciding the constitutional question.[220] The reluctance to declare a law unconstitutional unless absolutely necessary stems from deference to the legislature and the federal courts' "case and controversy" jurisdiction.[221] In avoiding constitutional questions, courts occasionally so distort the statute that it is clear that the statute would be unconstitutional as applied.[222] In such cases the court has made a constitutional decision, but has couched it in terms of statutory construction.[223] This method of constitutional adjudication resembles the Israel Supreme Court's method of construing a statute to narrow or nullify its force.

Israel's experience suggests that, for the sake of consistency, American courts should not avoid constitutional questions that are squarely presented. Absence of a formal holding of unconstitutionality in a decision has enabled the Israel Supreme Court to ignore the constitutional basis of its original decision in later decisions. Similarly, if an American court leaves intact a statute whose application in a given case would be unconstitutional, that court and lower courts can easily ignore the unarticulated constitutional basis of the original decision. Furthermore, an unconstitutional law left on the books causes unremedied harm to people who do not challenge its enforcement.[224] Confrontation of clearly presented constitutional questions does not depart from an American court's proper deference to the legislature, because the duty to uphold the Constitution is superior to the duty to carry out the intent of the legislature.

CONCLUSION

Despite the absence of a written constitution, the Israel Supreme Court has established freedom of expression as a fundamental principle of Israeli law and has taken responsibility for protecting it. The

220. *See generally* Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Questions*, 53 COLUM. L. REV. 633 (1953).

221. *Id.* at 633 n.4, 646.

222. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 173 (1965) (interpreting conscientious objector statute to avoid requirement that objection be based on belief in God). "[W]e have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds." *Id.* at 180 (Douglas, J., concurring) (advocating invalidation of statute).

223. Note, *supra* note 220, at 638; Note, *Avoidance of Constitutional Issues in Civil Rights Cases*, 48 COLUM. L. REV. 427, 429 & n.12 (1948).

224. "The unnecessary postponement of decision on the validity of these enactments [infringing on civil rights] can vitally affect the forces of political restraint upon which the functioning of our government depends in so large a degree. *Id.* at 435.

legislative and executive branches have, on the whole, accepted the Court's role in this area.

The Court's protection of freedom of expression has been inconsistent, partly because the Court cannot openly refuse to apply a statute. When it finds that a statute improperly restricts expression, the Court explains its decision as an interpretation of the statute. The incomplete explanation of the decision makes it possible to reach a contradictory decision in a later case without openly confronting the earlier decision. A written constitution would increase consistency because the Court could openly refuse to apply unconstitutional laws.

Even under a written constitution, there is a danger of inconsistency. When the United States Supreme Court does not fully explain its interpretation of the first amendment's "freedom of speech" clause, it does not provide sufficient guidance for future cases. Thus, contradictions can occur for the same reasons they occur under Israel's unwritten constitution.

In order to maintain legitimacy in constitutional cases, courts must exercise their power openly and consistently. A written constitution enables them to exercise power openly, but does not guarantee consistency. Consistency is possible only if decisions are fully explained, and fully explained decisions sometimes require non-literal interpretation of constitutional provisions. If courts interpret such provisions comprehensively and with a long-range view, accepting that interpretation entails making constitutional law, they will enhance their legitimacy rather than diminish it.

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