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ADDRESS

SOME THOUGHTS ON JUDICIAL AUTHORITY TO REPAIR UNCONSTITUTIONAL LEGISLATION*

RUTH BADER GINSBURG**

I. INTRODUCTION

Among governing institutions, the judiciary has been described as "the least dangerous branch."¹ Courts in our system have the awesome power to declare laws unconstitutional, but judges command no troops, and are said to lack the power of the purse.² My remarks address a facet of the purse power supposition: When a legislative product is constitutionally infirm because it is underinclusive, what remedies lie within the judicial province? Discussion will focus on the question whether a court may order inclusion of a category of persons left out by the legislature, a question particularly pointed when the court's inclusion order would mandate increased government spending.

II. AN ADVOCATE'S PERSPECTIVE

A. A Paradigmatic Case: Weinberger v. Wiesenfeld

Judicial enlargement of a statute was the remedy sought in a series of cases in which I served as counsel to a party or an amicus, cases advancing a constitutional, sex-equality principle.³ A prime illustration is

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* This text provided the basis for an address delivered by Professor Ginsburg as the Sixteenth Cleveland-Marshall Fund Visiting Scholar Lecture on November 9, 1979, at the Cleveland-Marshall College of Law of the Cleveland State University.

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Weinberger v. Wiesenfeld, a case the Supreme Court decided in March 1975.

Stephen Wiesenfeld challenged a provision of the Social Security Act that authorizes "child in care" payments when a wage earner dies with a young child surviving. If the wage earner was a man, there were monthly benefits for widow and child. If the wage earner was a woman, there were no benefits for the widower. Wiesenfeld was an ideal case to demonstrate the insidious side of legislative classifications drawn on the basis of gender. Summarizing the argument that yielded a unanimous Supreme Court judgment for Stephen Wiesenfeld:

The...“child in care” Social Security benefit, furnished to the surviving spouse of a male insured individual, but not to the surviving spouse of a female insured individual, reflects the familiar stereotype that, throughout [our] Nation’s history, has operated to devalue women’s efforts in the economic sector. The female insured individual, who is treated equally for Social Security contribution purposes, is ranked as a secondary breadwinner for purposes of determining family benefits due under her account. Just as the female insured individual’s status as a breadwinner is denigrated, so the parental status of her surviving spouse is discounted. For the sole reason that [Stephen Wiesenfeld] is a father, not a mother, he is denied benefits that would permit him to attend personally to the care of his infant son, a child who has no other parent to provide that care.

The child, who supplies the raison d'etre for the benefit in question, is the person ultimately disadvantaged by the...gender line. A social insurance benefit, which is designed to facilitate close parent-child association, is not constitutionally allocated when it includes children with dead fathers, but excludes children with dead mothers.

Congress had labeled the payment Stephen Wiesenfeld sought as a “mother’s benefit”; the Supreme Court judgment turned the provision into a “parent’s benefit.” In effect, the Court wrote into the statute the fathers Congress had left out.

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6 Id. Congress has not yet amended the statute to conform to the Supreme Court’s judgment.
7 The Court divided 5-2-1 on the appropriate rationale for the judgment. Justice Rehnquist has since recanted. His concurring vote in Wiesenfeld was an aberration, an error as he now views the matter. See Califano v. Boles, 443 U.S. 282, 294 n.12 (1979) (Rehnquist, J.).
9 The Court affirmed a lower court judgment 1) declaring the provision unconstitutional insofar as it discriminates against widowers on the basis of their
"By what right," asked several of my law teaching colleagues. They allowed that the Court perhaps might nullify the mother's benefit and leave it to Congress to start over from scratch. But lacking the power of the purse, the Court went out of bounds, they suggested, when it ordered payment to Stephen Wiesenfeld and others similarly situated. The Government initially entertained the same view. Before the district court, it urged dismissal of Stephen Wiesenfeld's complaint. As stated in the memorandum supporting the Government's motion to dismiss: "It is clear . . . plaintiff does not complain about what Congress enacted [a mother's benefit]—he complains about what Congress has not enacted. Plaintiff therefore has chosen the wrong forum to obtain the relief he seeks. He should take his complaint to Congress." But that argument, were it accepted, would immunize from judicial review statutes that confer benefits unevenly. The legislature would have power, unchecked by the judiciary, to contract the equal protection principle in a significant class of cases.

The question was first put to me by the dean at a well-known law school I visited the week the Wiesenfeld judgment was announced by the Supreme Court.


The remedial issue discussed here has surfaced in the wake of High Court decisions uncabining the equal protection guarantee. See generally Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1 (1977). Occasions for judicial attention to the issue were fewer when equal protection was regarded as "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.).


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B. First Encounters: Moritz, Frontiero, Kahn

I had briefed the case for judicial extension of underinclusive statutes on three occasions prior to Wiesenfeld. Moritz v. Commissioner\(^\text{13}\) awakened me to the intriguing qualities of the issue. Charles Moritz was a lifelong bachelor. Although well past sixty-three, he took good care of his mother. She lived with him, and for the hours he worked away from home, a nurse was engaged to care for her. At that time, the Internal Revenue Code allowed to a never-married daughter, but not to a never-married son, an income tax deduction for part of the cost of a nurse hired under those circumstances. Charles Moritz had no complaint against dutiful daughters. He did not seek withdrawal of the deduction the statute afforded them. Rather, he sought, and the Tenth Circuit granted, the same benefits for dutiful sons.\(^\text{14}\)

My next encounter was Frontiero v. Richardson.\(^\text{15}\) Sharron Frontiero, an Air Force lieutenant, sought a housing allowance and health care for her spouse Joseph, benefits accorded automatically to a married serviceman, but denied to a married servicewoman unless she supplied over three-fourths of the couple's support. The Frontieros succeeded; the Supreme Court held the statutory scheme invalid only insofar as it required a female service member to prove the dependency of her spouse.\(^\text{16}\)

On the third occasion, Kahn v. Shevin,\(^\text{17}\) labor on the remedial issue proved futile. Mel Kahn, a Florida widower, sought a real property tax exemption state law gave to the blind, the totally disabled, and widows.\(^\text{18}\) The Court upheld the gender classification, a decision out of step with its subsequent rulings,\(^\text{19}\) but one that rendered moot argument directed to appropriate relief for the excluded widowers.\(^\text{20}\)

\(^{13}\) 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973).

\(^{14}\) In Wiesenfeld, the Government sought to distinguish Moritz on this basis: "By extending the [tax] exemption to include [never married men], the Court did not require the expenditure of funds from the Treasury." Memorandum in Support of Motion to Dismiss, supra note 11, at 9. The distinction between funds that go out and funds that do not come in to the Treasury, however, seems less than fully persuasive. See generally Dodyk, The Tax Reform Act of 1969 and the Poor, 71 COLUM. L. REV. 758, 758-59 (1971).

\(^{15}\) 411 U.S. 677 (1973).

\(^{16}\) Id. at 691 n.25.

\(^{17}\) 416 U.S. 351 (1974).

\(^{18}\) See FLA. STAT. ANN. § 196.202 (West Supp. 1974-75). At the tax rate applicable when the case was litigated, the exemption yielded a $15 tax saving.


\(^{20}\) Widower Kahn had urged that whatever the status of the exemption in the future, widows were accorded the exemption during the years in question, hence a denial of equal protection could be repaired only by according widowers the exemption for that period. Reply Brief for Appellants at 7, Kahn v. Shevin, 416 U.S. 351 (1974).
In Moritz, the deduction extended to never-married men was small ($600 maximum), the class benefited by the judicial repair (lifelong bachelors who cared for incapacitated relatives) was limited, and the legislative will was minimally touched. (Congress, prior to the Tenth Circuit decision, had made the repair itself for subsequent tax years.) Similarly, in Frontiero, relatively few persons were immediately affected. The military was overwhelmingly male (in part the result of highly restrictive quotas on the enlistment of women), and few female members were married to civilians. The Department of Defense, prior to the Frontiero judgment, had reported to Congress that according female members benefit entitlement on the same basis as male members would result in no increased budget requirements.

Was there a tenable distinction between the judicial repair work sought by Charles Moritz and Sharron Frontiero and the claim pressed by Stephen Wiesenfeld? The Government emphasized that one difference was money. The Frontiero judgment cost a comparative pittance, the Government suggested. But HEW price-tagged the “child in care” benefits at stake in Wiesenfeld at 20 million dollars annually, a figure escalating to some 500 million dollars, the Solicitor General claimed, if “very closely analogous” social security gender lines should be held unconstitutional and repaired by extension. The Government did not feature cost as a reason to choose invalidation over extension. Rather, it raised the price-tag in the context of the anterior question: Should the underinclusion pass constitutional review? But whatever influence budgetary considerations may have on equal protection adjudication generally, the Court has formally rejected fiscal economy as a justification for a classification that attracts heightened judicial scrutiny.

III. SUPREME COURT APPROACHES

In 1970, when I began work on the Moritz case, I found few words in
court opinions and commentary addressed to the remedy question. While lines penned were sparse, some notable repairs had in fact been accomplished by judicial judgment. Today, explicit discussion of the issue remains thin, but in the 1970s there was notable growth in the catalog of judgments declaring statutes infirm because underinclusive, and extending their scope to render them constitutional.

A. Express Consideration in Iowa-Des Moines National Bank, Skinner, and Welsh

By the start of the current decade, three Supreme Court decisions referred expressly to the remedial problem entailed when a measure is held impermissibly underinclusive: *Iowa-Des Moines National Bank v. Bennett* in 1931; *Skinner v. Oklahoma* in 1942; and *Welsh v. United States* in 1970. In *Iowa-Des Moines National Bank v. Bennett*, state officials, misapplying Iowa law, had exacted tax from a national and a state bank at a rate higher than that applied to corporations in competition with them. The Iowa Supreme Court acknowledged systematic discrimination against the banks but said the assessments they paid were correct. The error lay in collecting too little from their competitors. Extending the error to the banks by granting their petition for a refund would compound, not right the wrong, the Iowa Supreme Court concluded. The United States Supreme Court, in a unanimous opinion written by Justice Brandeis, reversed and held the two banks "entitled to . . . refund of the excess in taxes exacted from them." At issue, Justice Brandeis said, was the "legal effect under the federal law of [the] wrongful administration of the state law." He explained why the banks had a right to the favor accorded their competitors:

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29 See text accompanying notes 53-97 infra.

30 284 U.S. 239 (1931).

31 316 U.S. 535 (1942).


33 284 U.S. at 247.

34 Id. at 241. The national bank relied on a federal statute permitting states to tax national bank shareholders on condition that the tax rate not exceed
It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. . . . The right invoked is that to equal treatment; and such treatment will be attained if either [the banks'] competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.35

Iowa-Des Moines National Bank presented no challenge to the validity of any state statute; the proper remedy for unequal administration of state law was the issue. But the relief accorded the banks would have been no less appropriate had the law itself, rather than official misapplication of it, generated the discrimination. In that event, moreover, due process related concepts of reliance and fair notice would impede state officials from reaching back to impose and collect "additional taxes from the favored competitors."36

Next in time, Skinner v. Oklahoma37 held Oklahoma's Habitual CriminalSterilization Act incompatible with equal protection. The Act encompassed "felonies involving moral turpitude," including larceny, but specifically exempted violations of "prohibitory laws, revenue acts, embezzlement, or political offenses."38 A "conspicuously artificial" line assessments on other moneyed capital in the hands of state citizens. Both banks invoked the equal protection clause of the fourteenth amendment, the state bank placing sole reliance on that clause. Id. at 244, 245.

50 Id. at 247.
51 Id. But c.f. Huntington v. Worthen, 120 U.S. 97 (1887), where a statute on the taxation of all railroads exempted specified property (embankments, tunnels, cuts, ties, trestles, and bridges) from assessment. The state constitution, however, provided that "all laws exempting property from taxation other than is provided [in the constitution] shall be void." On advice of the state attorney general, the railroad commissioners treated the statutory exemptions as invalid and assessed tax on all railroad property within the state. The state supreme court upheld this action on the ground that the exemption clause of the statute was inconsistent with the state constitution. The United States Supreme Court affirmed, rejecting a claim that taxing property excluded by the state statute violated due process. The conflict between the statutory exemption and the state constitution was "obvious," the Court said; therefore the railroad commissioners' disregard of the exemption and their assessment of all property was an appropriate course. Apparently, in this setting, the Court regarded as strained any claim that taxing the specified property was unforeseeable, or that justified reliance had been placed on the exemptions.

38 Id. at 536-37.
separated larceny from embezzlement, Justice Douglas pointed out. Under the laws of Oklahoma the two crimes involved "intrinsicly the same quality of offense," the only real distinction being the time when the fraudulent or felonious intent arose. Sterilization for the one crime but not for the other thus violated "the constitutional guaranty of just and equal laws." In a cryptic conclusion, the Supreme Court "left for adjudication by the Oklahoma court" the question whether the law could be salvaged by application of the Act's broad severability clause to enlarge, or to contract, the class of criminals subject to sterilization.

The suggestion that the Oklahoma court might respond to a larcenist's plea to be spared sterilization by spreading the penalty to embezzlers merited closer analysis. Prospective enlargement of the Act by excising the exemption for embezzlers would not have altered larcenist Skinner's situation. The law would have remained uneven as applied to him absent retrospective application to embezzlers. But retrospective enlargement, even if an answer to the equal protection problem, would cure one infirmity by substituting another. Such adjustment could not accommodate regard for a due process fair notice requirement.

Welsh v. United States yielded a more comprehensive analysis, but not in an opinion for the Court. The analysis appeared in a concurring opinion by Justice Harlan to which no other justice subscribed.

Welsh concerned the military service exemption Congress provided for conscientious objectors opposed to all wars "based on religious training and belief." Welsh, a conscientious objector who expressly denied entertaining "religious" beliefs, but grounded his opposition on moral and ethical beliefs, had been convicted for refusal to submit to induction. The Supreme Court reversed the conviction. The prevailing opinion, to
which four justices adhered, interpreted the word "religious" broadly; the exemption, as written, covered Welsh, the opinion ventured, despite his characterization of his beliefs as "nonreligious."

Justice Harlan thought his brethren's construction at odds with the meaning Congress intended. Congress plainly had limited the exemption to theistic beliefs, he concluded, but that limitation ran afoul of the first amendment's establishment clause, Justice Harlan maintained. Given the context in which the question was presented, the only result consistent with the Constitution was reversal of Welsh's conviction, Harlan said. For exemption had been accorded others "whose beliefs were identical in all respects to those held by [Welsh] except that they derived from a religious source." This "religious benefit" unconstitutionally fenced out Welsh, who would "go remediless" if the conviction were allowed to stand.

Harlan described the relief he thought mandated for Welsh as "tantamount to extending the statute," and said he would have voted for extension, even if the question had been presented in a declaratory judgment or injunction suit. In that event, assuming Harlan was right that leaving out the nontheistic objector violated the establishment clause, Welsh would have been placed on the same footing as "religious" objectors before any criminal conviction could eventuate. Hence, the Court would have faced a choice between enlargement and abrogation of the exemption.

As to the authority of the Court to add a class (nontheistic objectors) deliberately left out by Congress, Harlan wrote:

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation [as Harlan thought the prevailing opinion had done] the analytically sound approach is to accept responsibility for [the] decision. Its justification cannot be by resort to legislative intent, as that term is usually

45 Id. at 362 (Harlan, J., concurring).
46 Id. But see People v. Henry, 131 Cal. App. 82, 21 P.2d 672 (1933) (criminal statute by its terms applicable to defendant exempted others similarly situated; court declared the exemption unconstitutional and affirmed defendant's conviction).
47 398 U.S. at 363-64 (Harlan, J., concurring). Justice White, joined by Chief Justice Burger and Justice Stewart, dissenting, agreed with Justice Harlan that Congress had excluded the "nonreligious" objector, but thereafter parted company with him. The dissenters thought the Court had no warrant to rewrite the statute; hence, if the limitation to "religious" objectors violated the establishment clause, the draft exemption should fall. But Welsh would not benefit from such a holding, they said, therefore he lacked standing. But see note 103 infra. Alternately, the dissenting opinion continued, even if Welsh had standing, his conviction should be affirmed because limiting conscientious objector status to those with religious beliefs did not violate the first amendment. 398 U.S. at 367 (White, Stewart, JJ., Burger, C.J., dissenting).
employed, but by a different kind of legislative intent, namely, the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional. 48

Citing *Skinner* and *Iowa-Des Moines National Bank*, Harlan elaborated: "Where a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit or it may extend the coverage of the statute to include those who are aggrieved by exclusion." 49 Factors relevant to the choice, he said, included the presence or absence of a severability clause, 50 the intensity of the legislative commitment to the policy at issue (in *Welsh*, exempting conscientious objectors), and "the degree of potential disruption of the statutory scheme [or other legislative goals] that would occur by extension as opposed to abrogation." 51

The remedial discussion in *Welsh* remained expressly identified with only one justice until June 1979 when, in *Califano v. Westcott*, 52 all members of the Court embraced the Harlan analysis, although they divided sharply (5-4) on its application to the statute before them. I will comment on the *Westcott* decision after spotlighting the remarkable development that preceded it.

B. Tacit Extensions

Without calling attention to or explaining its remedial choice, the Supreme Court effectively extended several benefit statutes upon finding them vulnerable to equal protection challenge. High court decisions from 1968 to 1978 implicitly holding extension rather than nullification the proper course may be sorted into three categories: (1) cases in which a member of the class excluded by the legislation sought recovery from a private person; (2) cases involving government benefit programs in which the remedy did not call for increased spending, but required division of a fixed amount among a larger beneficiary class than the legislation specified; (3) cases, like *Frontiero* 53 and *Wiesenfeld*, 54 in which the

48 Id. at 355-56 (Harlan, J., concurring).

49 Id. at 361 (Harlan, J., concurring).

50 Id. at 364 (Harlan, J., concurring). But see *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968); Note, supra note 27, at 1036 (discounting practical significance of severability clause).

51 398 U.S. at 365 (Harlan, J., concurring).


extension remedy necessitated payments beyond those the legislature authorized.

*Levy v. Louisiana* typifies the first category. The Court declared inconsistent with equal protection legislative exclusion of children born out of wedlock from a right to recover against a tortfeasor for the wrongful death of their mother. More recently, in *Gomez v. Perez*, the Court extended to children of unwed parents a right to paternal support Texas law posited only for children of wed parents.

*Weber v. Aetna Cas. & Sur. Co.* illustrates the no-cost repair to a state-operated benefit program. Louisiana's workers' compensation scheme stipulated a maximum recovery for surviving dependents; unacknowledged children born out of wedlock could share in the recovery only if amounts allocated to others did not exceed the maximum. The Court held dependent children, regardless of birth status, entitled to equal portions of the stipulated maximum recovery. *Weber v. Aetna Cas. & Sur. Co.* was dispositive of later cases challenging a similar ranking of children in federal social security legislation.

The first and perhaps still most spectacular entry in the third category—the one in which judicial extension immediately increased the toll on the public fisc—was *Shapiro v. Thompson*. The Court confronted the determination of at least forty states and Congress, legislating for the District of Columbia, that public money should not be spent on welfare aid to persons who had not satisfied a durational (one-year) residence requirement. The judgment invalidated the waiting period, thereby adding the newcomers to the public assistance rolls. The *Shapiro v. Thompson* route was followed in *Memorial Hospital v. Maricopa County*, in which the Court invalidated Arizona's requirement that an indigent reside in a county for one year before qualifying for non-emergency medical care at county expense.

Extensions of the same genre were effected in *Graham v. Richardson*, when the Court ruled state legislatures had unconstitutionally excluded resident aliens from public assistance programs, in

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55 409 U.S. 535 (1973). In this case, as in *Levy*, the defendant was not sympathetically situated to complain that the retroactive change in the law made by court decree denied him fair notice that the conduct in which he engaged might generate a monetary obligation. Nor could defendant plausibly claim justified reliance on exemption from responsibility.


60 403 U.S. 365 (1971).
New Jersey Welfare Rights Organization v. Cahill, in which the Court invalidated exclusion of families with parents who were not "ceremonially married to each other" from New Jersey's program for "Assistance to Families of the Working Poor," in United States Dep't of Agriculture v. Moreno, when the Court struck down a congressionally-imposed limitation on food stamp distribution to households in which members are related, and in Jiminez v. Weinberger when the Court held Congress had unconstitutionally excluded from social security disability benefits certain children born out of wedlock after the onset of the wage earner's disability.

Presented with this array of expensive sub silentio extensions, the Court held to the same course when the gender classification social security cases following up Frontiero and Wiesenfeld came before it, cases the Solicitor General had price-tagged at 500 million dollars. In Califano v. Goldfarb and companion cases, the Court held Congress violated equal protection by authorizing derivative social security benefits for wives and widows without regard to dependency, but withholding such benefits from husbands and widowers unless the wage-earning wife supplied at least three-fourths of the couple's support. As in Frontiero, the scheme was held invalid only insofar as it required husbands and widowers to prove their dependency.

C. The Federalism Concern

In Welsh v. United States, Justice Harlan, citing Skinner v.

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63 413 U.S. 528 (1973).
64 Cf. Department of Agriculture v. Murry, 413 U.S. 508 (1973) (invalidating on a due process "conclusive presumption" ground rather than straight equal protection analysis another limitation in the Food Stamp Act).
68 See text accompanying notes 24-26 supra.
70 Id. at 204-17. The price-tag may have influenced some votes on the Court. The comfortable 8-1 count in Frontiero and unanimous judgment in Wiesenfeld dwindled to a close 5-4 in Goldfarb. On the congressional response to Goldfarb, see note 100 infra.
71 See text accompanying note 16 supra.
Oklahoma, noted that the Supreme Court enjoys wider discretion to extend federal law than it does to recast "a policy for the States even as a constitutional remedy." But state legislation was tacitly extended in Levy v. Louisiana, Gomez v. Perez, Weber v. Aetna Cas. & Sur. Co., Shapiro v. Thompson, Memorial Hospital v. Maricopa County, Graham v. Richardson, and New Jersey Welfare Rights Organization v. Cahill. Nothing was said in these 1968-1974 decisions of the Supreme Court's "more limited discretion" to extend state legislation. Perhaps the Court thought it obvious in this string of cases that the state legislature would want the statute to survive. In three of the seven cases, litigation was initiated in a federal forum, thus disposition on remand would not be in the hands of state court judges.

In 1975, in Stanton v. Stanton, however, the Court focused on the federalism concern alluded to by Justice Douglas in Skinner and noted by Justice Harlan in Welsh. Utah law required a parent to support a son until age twenty-one, a daughter only until age eighteen. Litigation was pursued in the Utah courts to impose on James Stanton the obligation to support his daughter Sherri for the period between her eighteenth and twenty-first birthdays. Reversing the Utah Supreme Court, the United States Supreme Court held the sex line could not survive equal protection attack. Justice Blackmun, writing for the Court, concluded the opinion by observing that "[t]he appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit." The age at which a support right terminates had to be the

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73 316 U.S. 535 (1942), described in text accompanying notes 37-42 supra.
74 398 U.S. at 363 n.15 (Harlan, J., concurring).
75 391 U.S. 68 (1968).
77 406 U.S. 164 (1972).
80 403 U.S. 365 (1971).
82 New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969). See Dorcy v. Kansas, 264 U.S. 286, 291 (1924), observing that the Supreme Court will decide a severability question regarding state legislation when the case comes from a lower federal court, and may (but is not obliged to) decide such a question when the case comes from a state court.
83 But lower federal courts, most notably when diversity jurisdiction is invoked, are accustomed to deciding the issues as they believe a state tribunal would. See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 708-10 (2d ed. 1973).
84 421 U.S. 7 (1975).
85 Id. at 18. But see text accompanying notes 132-34 infra (suggesting equal protection may have required support for the daughter in Stanton until 21 even if 18 thereafter became the age of majority for both sexes).
same for boy and girl, that was the federal command; but whether the age should be eighteen or twenty-one, Justice Blackmun said, "was plainly an issue of state law to be resolved on remand." 86

In *Orr v. Orr*, 87 decided four years after *Stanton*, the Supreme Court similarly deferred to state court decision makers. William Orr resisted paying alimony to his former wife. In the Alabama courts he urged, unsuccessfully, that the state law, which provided that husbands, but not wives, may be required to pay alimony, violated equal protection. 88 On appeal, the United States Supreme Court reversed. It held the gender classification unconstitutional and left it to the Alabama courts to decide whether to extend (permit awards to husbands as well as wives) or invalidate (deny alimony to both parties). 89

D. High Court Views in the Most Recent Return: Califano v. Westcott

*Califano v. Westcott* 90 marks the Court’s latest and fullest consideration of the remedial problem inherent in challenges to underinclusive statutes. *Westcott* also displays the full Court’s sharpened perception of the equal protection infirmity in statutes that classify explicitly on the basis of gender.

At issue in *Westcott* was the public assistance program Congress had structured for families with two able-bodied parents in the home. Congress authorized family benefits where children had been deprived of parental support because of the father’s unemployment, but allowed no benefits when the mother’s unemployment occasioned the deprivation. Complainants were couples whose benefit applications were rejected because the father did not have a prior work force history sufficient to qualify the family, although the mother did. The Court held unanimously that the gender classification lacked the requisite close relationship to the attainment of an important government goal. The line drawn by Congress was freighted with the "baggage of sexual stereotypes," the Court said, presumptions that man’s principal work is breadwinning, while woman’s is hearthtending. "Legislation that rests on such presumptions, without more," all agreed, cannot survive equal protection scrutiny. 91

86 *421 U.S.* at 17-18. By comparison, in *Craig v. Boren*, 429 U.S. 190 (1976), the Court held inconsonant with equal protection an Oklahoma law that allowed girls to purchase 3.2 beer at 18, but required boys to wait until age 21. The case had come up from a lower federal court. The Supreme Court did not refer, as it did in *Stanton*, to the task left to the tribunal below on remand. Rather, it simply noted that "the Oklahoma Legislature is free to redefine any cut off age . . . provided that the redefinition operates in a gender-neutral fashion." *Id.* at 210 n.24.

87 *440 U.S.* 268 (1979). For further comment on *Orr*, see text accompanying notes 115-17, 135-36 infra.

88 *440 U.S.* at 271.


90 *443 U.S.* 76 (1979).

91 *Id.* at 89.
All agreed as well that Justice Harlan in Welsh had correctly framed the remedial alternatives: nullification of the statute, thus withdrawing benefits from the class the legislature intended to cover, or extension of the statute’s coverage to encompass those aggrieved by the exclusion. Further, all agreed that a third course, proposed by the Massachusetts Public Welfare Department Commissioner, was unacceptable.

The Commissioner had urged adding on a principal wage earner criterion. Either parent’s unemployment would count, but to qualify the family, one parent would have to show that he or she is both unemployed and the family’s principal wage earner. Perhaps the Commissioner’s proposal captured what Congress in fact intended, the full Court speculated. But this approach posed “definitional and policy questions” judges are ill-equipped to resolve. For example, is the principal breadwinner one who earns fifty-one, fifty-five, or seventy-five percent of the family’s income? Over what time span must the breadwinner earn the requisite principal share? What income counts in the calculation? Restructuring involving fine tuning of that variety, the Court regarded as a task properly left to the legislature.

Thereafter, the justices split. A bare majority approved straightforward extension as the “simplest and most equitable” remedy for these reasons: (1) suspending the program would impose hardship on needy children Congress plainly meant to protect; (2) the Social Security Act’s “strong severability clause” evidenced congressional intent to maintain social welfare programs intact whenever possible; (3) no party sought nullification; and (4) previous Supreme Court decisions had “routinely . . . affirmed district court judgments ordering extension of federal welfare programs,” thus indicating the constitutional competence of federal courts to grant such relief.

Four justices dissented in part in an opinion written by Justice Powell. Nullification should have been the remedy, they argued,
because: (1) the legislative history of the particular benefit program afforded no secure basis for predicting what Congress would have done had it known the classification it adopted constituted impermissible gender-based discrimination; (2) extension sparing hardship to current beneficiaries might occasion "other hardships... in the allocation of limited [welfare] funds"; (3) Congress could mitigate benefit termination hardship by reinstating the program in the form it deems appropriate and "providing promptly for retroactive payments." It is "irrelevant," Justice Powell noted, that no party sought an order declaring the statute a nullity, for the intent of Congress, not the interests of the parties, should control.

IV. SOME THREADS PULLED TOGETHER

A. Extension or Invalidation: A Temporary Legislative Remedy

On first reading, Justice Powell's dismissal of the interests of the parties in Westcott as "irrelevant" may startle and disconcert. Doesn't that notion clash with a basic premise of our system that the parties, not the court, define the boundaries of the case or controversy? To borrow from the Government's characterization in the lower court in Wiesenfeld, in the right or benefit extension cases, the challengers complained about what the legislature excluded, not about what it included. The complainants did not invoke the "mutual suffering" theory; they confined their complaint to what the legislature left out. A judgment withdrawing rights or benefits from others would be a pyrrhic victory for the challengers, it would not conform to the contours of the controversy shaped by the parties. But can the parties subject the court to Hobson's choice—if the benefit statute is found unconstitutional as written, must the court extend because the parties propose that remedy only? I think Justice Powell supplied the right answer, and will try to explain why.

Preliminary, I should note my agreement with the Westcott majority that extension was the proper remedy in that case. The probable will of the legislature, not simply what the parties sought, seems to me to support the majority's judgment. The marked congressional trend has been to eliminate gender-based differentials in benefit statutes by enlarging coverage; in no instance has Congress effected equalization by closing

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96 Id. at 94-96 (Powell, J., dissenting).

97 Id. at 96 n.2 (Powell, J., dissenting). For recent, clear state court analysis, see Tomarchio v. Township of Greenwich, 75 N.J. 62, 379 A.2d 848 (1977) (extending to spouse of female worker workers' compensation death benefits statute authorized only for spouse of male worker).

98 See text accompanying note 11 supra.

99 See, e.g., 5 U.S.C. § 7152 (1976) (any law providing a benefit to a male federal employee, his spouse or family shall be deemed to provide the same benefit to a female federal employee, her spouse or family); 5 U.S.C. § 2108 (1976); 38 U.S.C. § 102(b) (1976) (preferences and allowances for wives or widows of veterans fully extended to husbands and widowers). Cf. U.S. DEPT OF LABOR,
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But assume the dissenters were right in *Westcott*, that in this instance Congress would have preferred demolition of the entire program to salvage by extension. If a court concludes the legislature would not want the statute to survive, is nullification nonetheless foreclosed because the challengers urged only extension and had no interest in pursuing a claim to invalidate the program? The answer, I believe, turns on candid recognition of the role the court assumes when it reaches the remedy question.

When the court passes on the constitutionality of a statute in cases like *Westcott*, it concludes its essentially judicial business. If it declares the statute unconstitutional as written, the remaining task is essentially legislative. The legislature, however, cannot be convened on the spot. The interim solution, therefore, must come from the court. The court's function, then, is to serve as short-term surrogate for the legislature. In performing that function, the court cannot be hemmed in by the parties' presentation. It must focus principally on the legislative design, not the parties' pleadings.

In sum, the underinclusive benefit statute cases pose a dilemma for the courts. If they eschew a remedy that entails "legislating," they must withdraw from the field, leaving line drawing to the political branches without judicial oversight. If they accept responsibility for constitutional review of allegedly discriminatory classifications, they must also recognize that a challenger who prevails on the constitutional issue is not necessarily entitled to a court decree awarding the benefit he or she seeks. Indeed, if the court responds by invalidating the benefit, not only will the challenger fail to achieve positive relief, but the benefit will be withdrawn from those the legislature plainly intended to aid. In my


Because the court acts only provisionally, it uses primary colors and does not attempt shading in adjusting the design. See text accompanying note 94 supra.

See note 12 supra and accompanying text.

So long as the constitutional claim offers the challenger a prospect for the remedy he or she seeks, standing and "case or controversy" requirements would
view, abandoning constitutional review is an unacceptable course. Therefore, I think the Supreme Court is on the right track in adjudicating challenges to underinclusive benefit statutes while recognizing that the parties cannot control the choice between extension and invalidation.

B. Considerations Relevant to the Choice Between Extension and Invalidation

Earlier, I noted two general guides to the choice between extension and invalidation Justice Harlan set out in Welsh: the strength of the legislature's commitment to the residual policy or program in question, and the disruption a solution one way or the other would entail. Among more particular decision-influencing factors, a prominent consideration is the size of the class extension would encompass, in comparison to the size of the class the legislature included.

When a member of a relatively small class seeks access to a right or benefit enjoyed by a substantially larger class, it seems a fair guess that the legislature would prefer to preserve what it authorized even if preservation requires enlarging the benefited class. That was the picture in the string of cases in which Supreme Court judgments tacitly extended both federal and state legislation. For example, denying paternal support to all Texas children because the state had excluded children born out of wedlock would have been a bizarre result in Gomez v. Perez. Similarly, terminating welfare assistance to all because states had excluded newcomers would have been a perverse resolution in Shapiro v. Thompson.

But suppose extension would yield a large percentage increase in persons covered by the statute. That was apparently the case in Bastardo v. Warren, in which male agricultural workers sought extension to them of a state minimum wage law applicable by its terms only to appear satisfied. See Orr v. Orr, 440 U.S. 268, 271-73 (1979). As to potential due process objections by persons from whom benefits would be withdrawn, see text accompanying notes 119-22, 127-37 infra.

104 See note 51 supra and accompanying text.
105 For an attempt to enumerate guides in more detail, see Note, supra note 3.
108 See note 59 supra and accompanying text.
women and children. The federal district court judge indicated he was prepared to decide whether the statute was constitutional as written, but was not inclined to extend its coverage. There was substantial doubt whether the legislature would have enacted the statute, he thought, "had it known that the [provision] would be construed to protect men as well as women and minors."\(^{\footnotemark[10]}\)

**C. Relief From a Burden**

Analysis of extension versus invalidation problems is further aided by distinguishing between claims for access to a benefit and requests for relief from a burden. When the legislature has provided a benefit, the challenger is ordinarily a person left out who seeks to be let in.\(^{\footnotemark[11]}\) When a burden is imposed, however, the challenger will be a person covered by the statute who seeks to be let out. Criminal and tax statutes are prime examples. Retroactive extension of criminal legislation is inhibited by the ban on ex post facto laws.\(^{\footnotemark[12]}\) Due process considerations of reliance and fair notice would deter such extension in both categories.\(^{\footnotemark[13]}\) Nor is prospective extension of a tax, penalty or other burden an altogether satisfactory response, for that would leave the challenger unrelieved with respect to past unequal treatment.\(^{\footnotemark[14]}\) But no across-the-

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\(^{\footnotemark[11]}\) But see cases cited in note 110 supra, in which employers urged removal of an arguable benefit from female employees because state law did not require providing the benefit to male employees.

\(^{\footnotemark[12]}\) U.S. CONST. art. I, § 9, cl. 3 (federal law); WIS. CONST. art. I, § 10, cl. 1 (state law).

\(^{\footnotemark[13]}\) See cases cited in note 42 supra; text accompanying notes 36, 42 supra.

\(^{\footnotemark[14]}\) See *Tatro v. State*, 372 So. 2d 283 (Miss. 1979), in which a conviction under the state's "Fondling Statute" was overturned on appeal. The statute made it a felony for any "male person" over 18 "to handle ... any part of [the] body" of a child under 14 for the purpose of "gratifying his lust" or "indulging his depraved licentious sexual desires." The sex-based classification denied men equal protec-
board rule will accommodate the range of human situations burden-imposing legal regulations address. In some settings, burden extension may be a course more appropriate than invalidation. Orr v. Orr\textsuperscript{115} is a case in point.

William Orr persuaded the Supreme Court that Alabama law authorizing alimony for wives, never husbands, was inconsistent with equal protection. But he had not sought alimony for himself. Rather, he was attempting to avoid a judgment ordering him to pay his wife. The remedy he requested was invalidation. On remand,\textsuperscript{116} the Alabama court held William Orr should not be relieved of the alimony judgment outstanding against him. The constitutional defect in the law, the court ruled, should be cured by extension. That disposition preserved the dominant legislative purpose; abolishing alimony would have thwarted the core policy.\textsuperscript{117}

The Orr case does not parallel Iowa-Des Moines National Bank\textsuperscript{118} in which the Iowa banks sought and, by Supreme Court command, obtained a refund of taxes imposed on them but not on their competitors. William Orr could assert no disadvantage vis-à-vis a commercial competitor, as the Iowa banks could. It may be that in the past financially secure wives in Alabama had escaped paying husbands in need. William Orr complained of his disfavored treatment in comparison to the hypothesized well-to-do wives. But the past failure of hypothetical needy husbands in Alabama to mount constitutional challenges against their financially secure wives (challenges the decisions in Orr in the Supreme Court and, on remand, in Alabama, indicated would have succeeded) seems an inadequate

tion, the court ruled. Extension was not a possible response, a six-member majority thought, for it was the clear legislative intent to exclude females. Moreover, the majority said, the court could not create a crime by construction.

Three justices dissented, agreeing that the statute as written was unconstitutional, but maintaining that extension was the appropriate solution in view of the overriding child-protective purpose of the legislation. Striking the word male would not violate due process or the prohibition against ex post facto laws, the dissenters said, so long as the statute’s application to females was not retroactive. The male defendant could not complain because he had notice; females who “fondled” after a court declaration extending the statute would also have notice. Not explicitly considered in the dissenters’ analysis is the point made by Justice Harlan in Welsh v. United States, 398 U.S. 333 (1970). See text accompanying notes 45-47 supra. The Constitution mandated relief for defendant Welsh, Harlan reasoned, because persons similarly situated, i.e., “religious” objectors, were not subject to prosecution at the time Welsh, the nontheistic objector, was tried and convicted. 398 U.S. at 362-63 (Harlan, J., concurring).

\textsuperscript{115} 440 U.S. 268 (1979), discussed in text accompanying notes 87-89 supra.


\textsuperscript{118} See notes 30, 33-36 supra and accompanying text.
ground on which to sustain William Orr's proposed interim solution—elimination of alimony until the legislature convenes and rewrites the law.

D. Impact on Persons Not Before the Courts

A judgment invalidating a benefit statute takes something of value from a class not before the court. Similarly, a judgment extending a burden imposes an obligation on a class that has not participated in the proceeding. In *Bastardo v. Warren*, for example, nullification of the state minimum wage law would withdraw a benefit from female agricultural workers, and in *Orr v. Orr*, affluent Alabama wives were made subject to alimony claims by needy husbands. Are persons so affected by a court's judgment denied due process? If the point is well taken that the court, when it decides on the remedy, is in fact legislating, albeit provisionally, the answer, at least to the extent the judgment operates prospectively, must be no. No tenable constitutional objection could be raised to a legislative act terminating a state minimum wage provision, or to a legislative measure removing gender as a factor in alimony awards. Thus no objection should be available

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119 If an extension remedy is granted, a corresponding obligation will be imposed, normally on the defendant, for example, the tortfeasor in *Levy v. Louisiana*, 391 U.S. 68 (1968), the father in *Gomez v. Perez*, 409 U.S. 535 (1973), a public authority in the social welfare cases, see notes 58-71 supra. But see *Bastardo v. Warren*, 4 Empl. Prac. Dec. 5500 (W.D. Wis. 1970) (cost of extension sought by plaintiffs in proceeding against state authorities would be borne by employers). The burden extension situation treated here, however, is not the reverse side of a benefit extension. Rather, the case is one in which a burdened challenger seeks invalidation, but the court's judgment calls for extension, thus leaving the challenger where he or she started, while effecting equalization by imposing the burden on similarly situated persons not before the court.


122 On the remedial issue, the interests of the challenger and of the affected persons not before the court coincide. A challenger seeking access to a benefit will urge preservation of the statute, one seeking to avoid a burden will urge it should be imposed on none. On the constitutional issue, the party seeking to uphold the statute as written generally has an interest compatible with that of the class whom invalidation of a benefit or extension of a burden would effect. Contrast the situation presented in a “reverse discrimination” case, for example, a claim by an unsuccessful male applicant charging that an employer or educational institution unlawfully prefers women. *E.g.*, *Cramer v. Virginia Commonwealth Univ.*, 586 F.2d 297, 299-300 (4th Cir. 1978). Given notice and the opportunity to participate, the women affected might establish that no preference in fact existed, or that past discrimination by the defendant justified a remedial preference. The defendant employer or institution, on the other hand, although willing to describe its conduct as “voluntary affirmative action,” may not vigorously defend against the charge of preference and is unlikely to plead its own past discrimination. See generally Comment, *The Case for Minority Participation in Reverse Discrimination Litigation*, 67 CAL. L. REV. 191 (1979).
when the court functions, of necessity, as short-term surrogate for the legislature.

E. Relief for Past Unequal Treatment

There remains the question of relief for past unequal treatment. I alluded to a facet of the problem earlier in relation to criminal and tax legislation. In *Welsh v. United States,* Justice Harlan indicated he would hold the challenger entitled to reversal of his conviction (because "religious" objectors at the time of Welsh's trial were not subject to prosecution) even if Harlan believed Congress would opt to invalidate rather than extend the conscientious objector exemption. Similarly, in *Iowa-Des Moines National Bank v. Bennett,* Justice Brandeis held the banks entitled to a refund of taxes already paid, although he recognized that for future years, state officials could tax all similarly situated enterprises at the higher rate.

In *Iowa-Des Moines National Bank* and *Welsh,* government (or the public at large) would bear the cost of retroactive adjustment. Since government or government officers were responsible for the uneven law or official treatment, redress for the past appeared just, perhaps, as Justice Harlan put it, even mandated by the Constitution. Is retrospective relief equally appropriate when a private individual or entity would bear the cost of correcting past, officially-sanctioned discrimination? Countervailing due process considerations must be weighed in such cases.

*Bastardo v. Warren,* the case in which plaintiffs sought extension of the state minimum wage for women to male agricultural workers, is illustrative. Even if the court were inclined to extend the statute, relief for the past exacted from the pockets of employers would seem inconsistent with notions of fair notice and justified reliance. The employment in question was not covered by federal minimum wage and equal pay requirements, and the vulnerability of the state law to equal protection attack was not evident. Indeed, at the time litigation was initiated, the

121 Id. at 362-63 (Harlan, J., concurring).
122 284 U.S. 239 (1931), discussed in text accompanying notes 33-36 supra.
123 See text accompanying notes 45-47 supra.
125 As a further impediment to such relief in *Bastardo,* suit had been brought against state authorities charged with administration of the state minimum wage law. Employers were not participants in the proceeding.
127 C.f. note 36 supra (taxing of property excluded by state statute did not violate due process). As to the application of Title VII's ban on discrimination "against any individual with respect to his compensation ... because of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1) (1976), see note 110 supra.
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Supreme Court had not yet held any gender line unconstitutional.\textsuperscript{131}

Contrast \textit{Stanton v. Stanton},\textsuperscript{132} a case in which, it seems to me, the equal treatment claim outweighed any argument for the defendant-father resting on repose, reliance or fair notice. Sherri Stanton, the daughter for whom paternal support was sought until age twenty-one, was an ultimate loser. The Utah Supreme Court, on remand,\textsuperscript{133} chose eighteen, not twenty-one as the determinative age. That left Sherri disadvantaged vis-à-vis boys born the same year who, with the law's backing, had already received support until twenty-one. Utah could well set the age at eighteen for both sexes prospectively, but practically, it could not "equalize down" retroactively. James Stanton, Sherri's father, did not create the uneven line, but his situation seems barely distinguishable from that of the unwed father required to provide child support in \textit{Gomez v. Perez}.\textsuperscript{134}

\textit{Orr v. Orr}\textsuperscript{135} perhaps falls between \textit{Bastardo}, in which the due process claim against retroactive extension seems overriding, and \textit{Stanton}, in which the equal treatment interest seems paramount. Well-to-do wives in Alabama are now subject to alimony claims by husbands in need. But no affluent wife figured in \textit{Orr}, and a finality interest exists regarding relations already severed. It appears that a time-bar would operate in Alabama to preclude a husband who did not seek alimony in the divorce proceeding from asserting a claim for maintenance belatedly.\textsuperscript{136}

These illustrations hardly cover the waterfront, but they do suggest a few guideposts. The case for retrospective relief seems stronger when government rather than a private person will bear the cost of curing laws written or administered with an uneven hand.\textsuperscript{137} When a private


\textsuperscript{132} 421 U.S. 7 (1975), discussed in text accompanying notes 84-86 supra.

\textsuperscript{133} 552 P.2d 112 (Utah 1976), vacated and remanded, 429 U.S. 501, thereafter resolved, 564 P.2d 303 (Utah 1977).

\textsuperscript{134} 409 U.S. 535 (1973). The constitutional ruling in \textit{Stanton} did not represent a dramatic change in the law. In 1973, at the time \textit{Stanton} was initially presented in the Utah courts, the Supreme Court had already indicated that sex classifications would be subjected to meaningful equal protection review. See \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973); \textit{Reed v. Reed}, 404 U.S. 71 (1971). Further, the Supreme Court reported in its \textit{Stanton} opinion that, Utah aside, its investigation revealed only one other state that retained a sex-based 18/21 age of majority differential. 421 U.S. at 15.

\textsuperscript{135} 440 U.S. 268 (1979); discussed in text accompanying notes 115-17 supra.

\textsuperscript{136} See 440 U.S. at 288 n.3 (Powell, J., dissenting). Justice Powell pointed to Alabama authority holding constitutional attacks on divorce legislation would not be heard unless presented at the time the divorce is contested.

\textsuperscript{137} Sovereign immunity is not a bar where the statutory scheme provides generally for retroactive benefits. Wright v. Califano, 603 F.2d 666 (7th Cir. 1979), cert. denied, 48 U.S.L.W. ____ (1980). Relief might be limited, however, whether the remedy is against government or a private person, when the ruling on the merits departs markedly from past precedent or long-established practice and retroactive
person would pay the toll, notice, reliance and finality interests may sometimes call for an extension remedy with prospective, but not retroactive, effect.

V. CONCLUSION

I have tried to discuss intelligibly with you an issue that has attracted my attention in two capacities: first as an advocate in cases where success for a party I supported, Sharron Frontiero or Stephen Wiesenfeld, for example, turned on the Court's willingness to grant an extension remedy; then as a law teacher concerned with problems that lack easy answers. Indicative of the difference in the advocate's and the teacher's roles, it was far less difficult for me to write a legal brief in support of extension than it was to pen these remarks.

But at least I have been spared the schizophrenia that sometimes attends practice and teaching activities in the same field. The courts act legitimately, I am convinced, when they employ common sense and sound judgment to preserve a law by moderate extension where tearing it down would be far more destructive of the legislature's will. Yes, extension does mean "legislat[ing] a bit,"\textsuperscript{138} in fact, appreciating that the court is legislat[ing] seems to me the key to proper analysis of the issue.\textsuperscript{139} The legislation is, of course, tentative; ultimate authority to recast or scrap the law in question remains with the political branches.

As Professor Tribe has pointed out, few jurists today subscribe to "a wooden notion that each branch must 'be limited to the exercise of the powers appropriate to its own department and no other.'"\textsuperscript{140} The function the courts perform in choosing between extension and invalidation of a constitutionally infirm statute seems to me entirely harmonious with a view that sees our institutions of government not as rigidly compartmentalized but as interdependent.

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\textsuperscript{138} Stanton v. Stanton, 552 P.2d 112, 113 (Utah 1976) (on remand). The Supreme Court disposition of \textit{Stanton} is discussed in text accompanying notes 84-86, 132-34 supra.

\textsuperscript{139} See text accompanying notes 98-103 supra.