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Remedying Underinclusive Entitlement Statutes: Lessons from a Contrast of the Canadian and U.S. Doctrines

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COMMENT

REMEDYING UNDERINCLUSIVE ENTITLEMENT STATUTES: LESSONS FROM A CONTRAST OF THE CANADIAN AND U.S. DOCTRINES

I. INTRODUCTION	122
II. THE CANADIAN DOCTRINAL APPROACH: <i>SCHACHTER v. CANADA</i>	123
A. <i>Reading Down</i>	124
B. <i>Reading In</i>	125
C. <i>Delayed Enforcement</i>	129
D. <i>The Concurring Opinion</i>	129
III. THE U.S. DOCTRINAL APPROACH	130
A. <i>Welsh v. United States</i>	131
B. <i>Weinberger v. Wiesenfeld</i>	132
C. <i>Califano v. Westcott</i>	132
D. <i>Heckler v. Mathews</i>	135
E. <i>Federal Courts and State Entitlement Statutes</i>	136
F. <i>U.S. Courts and the Insertion of Language into Statutes</i>	137
IV. SEPARATION OF POWERS: THE ROLES OF THE JUDICIARY AND THE LEGISLATURE	139
V. UNCOVERING THE LEGISLATURE'S REMEDIAL INTENT: A REAL SOLUTION OR JUST SMOKE AND MIRRORS?	141
A. <i>The Enacting Legislature</i>	142
B. <i>The Current Legislature</i>	146
VI. THE ROLE OF THE JUDICIARY AND THE PARTY SEEKING RELIEF: STANDING.....	147

VII. THE REMEDIAL ALTERNATIVES	150
A. Nullification of the Statute and Its Benefits	150
B. Extension of Benefits	151
C. Delaying Enforcement of an Extension Judgment	152
D. Delaying Enforcement of a Nullification Judgment	154
E. Severability Clauses	155
VIII. CONCLUSION	156

I. INTRODUCTION

When a court finds an entitlement¹ statute sufficiently underinclusive² to be unconstitutional on equal protection grounds, the court must provide a remedy.³ Deciding which remedy is appropriate has plagued both U.S. and Canadian courts because applying traditional maxims of statutory construction and elision⁴ would only leave everyone out in the cold⁵ until the legislature re-enacted a constitutional version of the statute.

To circumvent this problem courts have often broadened statutes to include classes that the legislature never intended, while at the same time purporting to give effect to the legislature's intent. The courts of both the United States and Canada believe that adopting the legislatures' preferred remedy is their proper function.⁶ Canada has adopted a methodology that uses legislative intent along with constitutional normative values to read new language into an underinclusive entitlement statute to save it from nullification. Courts in the United States have not explicitly

1. An entitlement is a "[r]ight to benefits, income or property which may not be abridged without due process." BLACK'S LAW DICTIONARY 532 (6th ed. 1990). This Comment focuses on statutory government benefits, such as social security, disability, medical, welfare, housing, and family leave benefits.

2. A statute is underinclusive when it contains a classification which does not include all persons similarly situated with respect to the purpose of the law. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348 (1949).

3. See generally Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1112-16 (1969).

4. The general rule for a court's proper remedial function is to strike down offensive legislation, either in whole, or in part if removing the offending part does not eviscerate the statute. See *infra* notes 22-26 and accompanying text.

5. For example, if the Court failed to extend the statute considered in *Califano v. Westcott*, 443 U.S. 76, 82 (1979), children of unemployed women might literally have found themselves out in the cold. See *infra* part III.C.

6. See *infra* part IV.

adopted this position, but similarly have neutralized discriminatory language in statutes by changing the classifications.

This Comment, in contrasting the Canadian doctrinal approach announced in *Schachter v. Canada*⁷ to current U.S. methodology argues that courts should generally declare the statute invalid and leave its repair to the legislature by delaying judgment. Part II on Canadian Law and Part III on U.S. law detail each country's current methodology. Part IV contrasts the relative roles of the judiciary and the legislature to explain why courts step outside their institutional sphere when they make the decision to extend or nullify. Part V explores judicial treatment of legislative intent. Part VI scrutinizes U.S. standing doctrine to determine whether differences in the views of the U.S. and Canadian courts stem from differing normative assumptions of the judiciary's mission. Part VII contrasts the remedial alternatives, and Part VIII proposes the solution of delayed enforcement for both Canada and the United States.

II. THE CANADIAN DOCTRINAL APPROACH: *SCHACHTER V. CANADA*

In *Schachter v. Canada*,⁸ the Supreme Court of Canada addressed the question of whether a court can properly broaden the class of recipients rather than strike down legislation that offends equal protection. In *Schachter*, the Unemployment Insurance Act of 1971⁹ granted one adoptive parent of either sex up to 15 weeks of benefits to care for a newly adopted child. Natural¹⁰ parents, however, received a less flexible entitlement. A separate statute provided similar benefits for natural mothers, but allowed the natural father to receive benefits *only* if the mother was disabled or deceased.¹¹

Two natural parents challenged the statute on equal protec-

7. 93 D.L.R.4th 1 (1992).

8. *Id.* at 10.

9. Unemployment Insurance Act, 1971, ch. 48, § 30, 1970-1972 S.C. 996, *amended by* ch. 150, § 4, 1980-1983 S.C. 4166 (current version at R.S.C. ch. U-1, § 18 (1985), *amended by* ch. 40, § 12, 1990 S.C. 762); Unemployment Insurance Act, 1971, ch. 48, § 32, 1970-1972 S.C. 998, *amended by* ch. 150, § 5(1), 1980-1983 S.C. 4167 (current version at R.S.C. ch. U-1, § 20(1) (1985), *amended by* ch. 40, § 14, 1990 S.C. 763) (Can.).

10. 93 D.L.R.4th at 6-7 (the Court labelled the biological parents "natural" parents).

11. See Unemployment Insurance Act, 1971, ch. 48, § 32, 1970-1972 S.C. 998, *amended by* ch. 150, § 5(1), 1980-1983 S.C. 4167 (current version at R.S.C. ch. U-1, § 20(1) (1985), *amended by* ch. 40, § 14, 1990 S.C. 763) (Can.).

tion grounds.¹² The Federal Court, Trial Division, found that section 32 of the statute violated section 15 the Canadian Charter of Rights and Freedoms because section 32 discriminated between natural and adoptive parents with respect to parental leave.¹³ The Federal Court of Appeal affirmed.¹⁴ By the time the case reached the Supreme Court of Canada, the remedial issue was moot because the legislature had already amended the statute to include natural parents.¹⁵ The Court, however, still heard the appeal, and though it denied relief to the plaintiffs, it awarded them costs¹⁶ and announced a new remedial approach.¹⁷

The Court focused on whether the enacting legislature would have passed the benefits in the Court's remedied form.¹⁸ It also balanced this policy of legislative deference with the need to fulfil the purposes of the Charter.¹⁹ The Court discussed three remedial alternatives and several extrinsic factors which future courts could use in determining the proper result. The remainder of this part highlights the *Schachter* Court's analysis.

A. Reading Down

The Court began by affirming that section 52 of the Constitu-

12. 93 D.L.R.4th at 6.

13. [1988] 3 F.C. 515 (Fed. Ct.) (granting declaratory relief under § 24(1) of the Charter and extending to natural parents the same benefits granted to adoptive parents under § 32 of the Unemployment Insurance Act).

14. [1990] 2 F.C. 129 (Fed. Ct. App.).

15. See Act to Amend the Unemployment Insurance Act, ch. 40, §§ 12, 14, 1990 S.C. 762 (Can.). The Court took this factor into account in its decision. 93 D.L.R.4th at 7.

16. 93 D.L.R.4th at 33.

17. *Id.* at 27-32. Since the remedial issue was moot by the time it reached the Supreme Court of Canada, the approach set down by the Court is entirely dicta. All the Justices, concurring and majority, were concerned that the Court was handling the question entirely in the abstract.

It is interesting to note that because the factual dispute was moot, there is no one to complain about the Court's using its new remedy of reading in. The legislature may not complain too loudly, since this decision had no actual effect. The Court amended no statute in its ruling. The litigants received tangible relief because the legislature amended the statute to include their class and because the Court awarded them litigation costs. Everyone prefers that entitlements be extended, rather than nullified, where possible. Yet, this case now stands as a precedent for the remedy of reading in. Query whether the Court's selecting a moot entitlement case to assert this new remedy was a way for it to step in and seize power from a vacuum. That question, although worthy of discussion, is beyond the scope of this article.

18. *Id.* at 14-15, 22, 24-25.

19. *Id.* at 13-25.

tion Act, 1982²⁰ mandates that any law inconsistent with the Constitution be struck down, but only "to the extent of the inconsistency."²¹ Like U.S. courts, Canadian courts strike down laws only as a last resort and preserve the parts that do not offend the Constitution.²² The objective is to preserve as much of the legislative intent behind the statute as possible.²³

The doctrine of severance in Canadian courts is an ordinary part of constitutional adjudication.²⁴ Like U.S. courts, Canadian courts will not sever a clause from a statute when the remainder is so inextricably bound to the invalid part that the remainder cannot survive independently.²⁵ Nor will courts sever a clause if they determine that the legislature would not have enacted the statute without the invalid portion.²⁶

B. Reading In

In *Schachter*, the Canadian Supreme Court announced that the justifications for severing a statute apply equally to a remedy that it termed "reading in."²⁷ In the case of severance, the constitutional infirmity is due to that which is improperly *included* in a statute.²⁸ In the case of reading in, the constitutional infirmity is due to that which is wrongly *excluded*.²⁹

The *Schachter* Court held that if a statute is found unconstitutional, a court can extend the reach of the statute by reading in

20. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 52 [hereinafter CAN. CONST.].

21. *Schachter*, 93 D.L.R.4th at 11. The Charter of Rights and Freedoms provides an additional remedy, exclusive of § 52. Section 24 of the Charter provides the courts with the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms . . . have been infringed or denied." CAN. CONST. pt. I, § 24(1). The Court held that utilizing § 24 to grant a remedy, rather than § 52, would be appropriate when the statute was not unconstitutional on its face, but in its application. *Schachter*, 93 D.L.R.4th at 33. Section 24(1) would provide an individual remedy for the person whose rights were infringed. *Id.* at 34.

22. *Schachter*, 93 D.L.R.4th at 11.

23. *Id.* at 12.

24. *Id.*

25. *Id.*

26. *Id.* For the Canadian test for severance, see Attorney General for Alberta v. Attorney General for Canada, 4 D.L.R. 1, 11 (1947), cited with approval in *Schachter*, 93 D.L.R.4th at 12. For the U.S. test for severance, see, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987).

27. 93 D.L.R.4th at 12-14.

28. *Id.* at 12.

29. *Id.* at 12-14.

new language.³⁰ The Court stated "[i]t would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy[, an approach which] is entirely inappropriate."³¹ Rather, "[o]nce a person has demonstrated that a particular law infringes his or her Charter rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy."³²

The *Schachter* Court thus assumed that there is no logical difference between severing language from a statute and inserting new language.³³ The majority's reasoning does not confine the application of this remedy to underinclusive entitlement statutes, and thus, the Court may seek to apply it in future cases as a general remedial method.³⁴

The Court claimed that nothing in section 52 suggests that courts must be restricted to the "verbal formula" employed by the legislature.³⁵ Rather, whether a court strikes out language or reads

30. *Id.*

31. *Id.* at 13.

32. *Id.* (quoting *Knodel v. British Columbia (Medical Services Commission)*, 58 B.C.L.R.2d 356, 388 (1991) (Can.)). "To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution." *Id.* (quoting *Knodel*, 58 B.C.L.R.2d at 388).

33. 93 D.L.R.4th at 13. The Court quoted a passage from *Knodel* in making this assertion:

[W]here B's Charter right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B.

The first example would require the court to "read in" the words "and B," while the second example would require the court to "strike out" the words "except B." In each case, the result would be identical.

Id. (quoting *Knodel*, 58 B.C.L.R.2d at 388).

34. The Court, stated:

Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter.

93 D.L.R.4th at 16.

35. *Id.* at 13. The Court reasoned:

Section 52 does not say that the *words* expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a *law* is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

Id.

The extent of the inconsistency can be defined in substantive, rather than merely verbal

in new language, the focus "should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result."³⁶ The Court feared that if the remedy of reading in was unavailable under the Charter, it would frustrate the social purposes that the Charter was enacted to secure.³⁷

To determine which remedy is proper according to the checklist in *Schachter*, a court must first define the extent of the infirmity.³⁸ It must then determine whether that infirmity may best be dealt with by way of severance, reading in, or nullification.³⁹

Under the *Schachter* approach, courts should not read in where "there is no manner of extension which flows with sufficient precision from the requirements of the Constitution."⁴⁰ Thus, if a court cannot determine what new language is appropriate to comply with both legislative intent and constitutional requirements, it should defer to the legislature.⁴¹ A remedy which so substantially intrudes into budgetary policy that it changes the nature of the legislative scheme is inappropriate for the judiciary to apply.⁴² Hence, a court must consider budgetary repercussions.⁴³ As any remedy will have some budgetary impact, "the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so."⁴⁴ Finally,

terms. *Id.* (citing *Andrews v. Law Soc'y of B.C.*, [1989] 1 S.C.R. 143 (where the extent of the inconsistency was defined conceptually rather than in the manner in which the statute was drafted)); see also, Evan H. Caminker, *A Norm Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185 (1986) (advocating a similar approach for U.S. courts).

36. 93 D.L.R.4th at 13 (quoting *Knodel*, 58 B.C.L.R.2d at 388).

37. 93 D.L.R.4th at 15; see also *Phillips v. Social Assistance Appeal Bd.*, 73 N.S.R.2d 415 (1986) (holding that the court could not extend welfare benefits to single fathers from a statute which provided benefits only to single mothers because § 15 of the Charter merely requires equal benefits, and thus the only option was for the court to nullify the benefits to single mothers, frustrating the purpose of the Charter); Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints": A Comment on R. v. Schachter*, 36 MCGILL L.J. 1 (1991).

38. *Schachter*, 93 D.L.R.4th at 16. The Court adopted the test from *R. v. Oakes*, [1986] 1 S.C.R. 103, for this purpose.

39. 93 D.L.R.4th at 18.

40. *Id.* at 19; see also *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 168-69 (holding that establishing a scheme of procedural safeguards is inappropriate for the courts); *Rocket v. Royal College of Dental Surgeons of Ont.*, 71 D.L.R.4th 68 (1990) (holding that drafting rules to allow for only legitimate advertising would be a complex endeavor that courts could not accomplish with precision).

41. *Schachter*, 93 D.L.R.4th at 19.

42. *Id.* at 21; see also, Andr  e Lajoie, *De l'Interventionnisme judiciaire comme apport    l'  mergence des droits sociaux*, 36 MCGILL L.J. 1338, 1344-45 (1991).

43. *Schachter*, 93 D.L.R.4th at 21.

44. *Id.*

courts should not read in when the legislature's choice of means is "unequivocal." Furthering "the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain."⁴⁵

In choosing extension or nullification, courts should also look to the relative sizes of the favored and the excluded groups.⁴⁶ Where the excluded group is much smaller than the favored group, extending the benefits rather than nullifying them will usually be far less intrusive upon the legislation.⁴⁷ Extension to a relatively small group will not generally result in a significant change in the entitlement program. In contrast, if the excluded group is much larger than the favored group, extension may not be the appropriate remedy.⁴⁸ For budgetary reasons, or simply because it significantly changes the program, it would be more tenuous to assume that the enacting legislature would have passed the present benefit scheme in its judicially amended form.⁴⁹

Courts may also consider the significance and history of the benefit that remains⁵⁰ and whether the statute provides a protection that is "constitutionally encouraged."⁵¹ Where the government has no obligation to provide the benefit, it may be inappropriate

45. *Id.* at 20-21; see also *R. v. Swain*, [1991] 1 S.C.R. 933 (Court could not read in procedural safeguards where Parliament had deliberately left the discretion to the Lieutenant Governor to decide whether to commit a person found not guilty by reason of insanity).

46. *Schachter*, 93 D.L.R.4th at 22.

47. *Id.* at 23; see also, e.g., *Knodel v. British Columbia (Medical Services Commission)*, 58 B.C.L.R.2d 356 (1991). In *Knodel*, the Supreme Court of British Columbia confronted regulations under the Medical Services Act, which defined "spouse" to exclude coverage to homosexual couples. The Court held that this classification violated § 15(1) of the Charter because it improperly discriminated on the basis of sexual orientation. Since the number of homosexual couples was small in comparison to heterosexual couples, the Court declared that the remedy that was "appropriate and just in the circumstances" was a declaration that homosexual partners were included in the definition of "spouse" under the regulations. *Knodel*, 58 B.C.L.R.2d at 370-92.

48. *Schachter*, 93 D.L.R.4th at 23. Even when the excluded group is very large, extension is sometimes appropriate. See, e.g., *R. v. Hebb*, 89 N.S.R.2d 137 (1989) (where the court ordered that persons over 65 receive the benefits that Parliament explicitly restricted to persons under 65).

49. *Schachter*, 93 D.L.R.4th at 23.

50. *Id.* at 23-25; see also *Rossow v. B.C. (A.G.)*, 35 B.C.L.R.2d 29, 34-35 (1989) (holding that it was safe to assume the legislature would have enacted the permissible portion without the impermissible portion due to the long period of time that the provision had been in force).

51. *Schachter*, 93 D.L.R.4th at 24; see also *R. v. Hebb*, 89 N.S.R.2d 137 (1989) (holding that though both severance and nullification would interfere with the intent of Parliament, extension should be favored because the protection in question was "constitutionally encouraged"); *Duclos & Roach*, *supra* note 37, at 23-38; *Caminker*, *supra* note 35, at 1192-93.

for the court to extend it.⁵²

C. *Delayed Enforcement*

The *Schachter* Court also discussed a third remedy: temporary suspension of the invalid portion of the statute.⁵³ In applying this remedy, a court would declare the legislation or provision unconstitutional, but suspend the effect of the declaration until Parliament could repair the legislation.⁵⁴ This remedy, according to the Court, is appropriate where striking down the provision poses a potential danger to the public,⁵⁵ threatens the rule of law,⁵⁶ or results only in the deprivation of benefits from deserving persons without benefiting those whose rights were violated.⁵⁷

The Court cautioned that delaying the effect of a declaration of unconstitutionality is a serious matter since it allows a violation of the standards embodied in the Charter to continue for a period of time.⁵⁸ It also infringes upon the legislature's domain by forcing the matter onto the legislative agenda at a time and in a manner not of the legislature's choosing.⁵⁹ However, the Court declared that considerations of how the remedy could affect the public would prevail over the institutional roles of the courts and the legislature.⁶⁰

D. *The Concurring Opinion*

Though the concurring Justices in *Schachter* agreed that reading in "substantially amounts to the same thing" as severance,⁶¹ they emphasized that since Parliament had already amended section 32, the issue was moot and the Court should not elaborate entirely in the abstract.⁶² These Justices cautioned against using

52. *Schachter*, 93 D.L.R.4th at 26.

53. *Id.* at 25.

54. *Id.* at 26.

55. *Id.*; see also *R. v. Swain*, [1991] 1 S.C.R. 933.

56. *Schachter*, 93 D.L.R.4th at 26; see also *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

57. *Schachter*, 93 D.L.R.4th at 26.

58. *Id.*

59. *Id.* at 26-27.

60. *Id.* at 27. The Court indicated that it may have delayed enforcement in *Schachter* if the issue had not been moot.

61. *Id.* at 34.

62. *Id.*

the new remedy in contexts other than cases "involving a scheme of social assistance."⁶³ They asserted that:

it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not Reliance should not be placed on the courts to repair invalid laws.⁶⁴

III. THE U.S. DOCTRINAL APPROACH

In the United States, courts generally construe statutes to avoid constitutional difficulty whenever "fairly possible."⁶⁵ This maxim has often led courts to warp the meaning of a statute to avoid rendering it unconstitutional.⁶⁶ Nevertheless, the general rule is that courts may not rewrite statutes to make them constitutional.⁶⁷ Courts must apply the statute as drafted. If the statute violates constitutional provisions, courts must invalidate it, but only to the extent that the statute violates the Constitution.⁶⁸

Although extension is generally not an appropriate judicial remedy,⁶⁹ the Supreme Court has carved out a narrow exception for statutes challenged on equal protection grounds.⁷⁰ Courts may, where appropriate, extend the benefits of a statute to an excluded class.⁷¹ Courts can extend the benefits by severing the language that limits the class, by reading this language very broadly to

63. *Id.*

64. *Id.* at 35.

65. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). When a statute is "'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). Although "[t]he canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases . . . it is 'not a license for the judiciary to rewrite language enacted by the legislature.'" *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991) (quoting *United States v. Monsanto*, 491 U.S. 600, 611 (1989)). Statutes are also construed to avoid constitutional questions. *United States v. Batchelder*, 442 U.S. 114, 122 (1979); see also NORMAN SINGER, 2A SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 45.11 (5th ed. 1992) [hereinafter SUTHERLAND'S STATUTORY CONSTRUCTION].

66. See *infra* part III.A.

67. See *infra* note 126 and accompanying text.

68. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 515-16 (1926).

69. See, e.g., *West Va. Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138 (1991) (refusing to extend a statute which granted attorney's fees in civil rights cases).

70. See *infra* notes 87-91, 99-101 and accompanying text.

71. See *infra* notes 87-91, 99-101 and accompanying text.

sneak in the disfavored class, or by neutralizing the discriminatory words.⁷²

In practice, U.S. courts nearly always extend rather than nullify. Yet, U.S. court decisions are often inconsistent in both their reasoning and their result.⁷³ Many of the relevant decisions omit any discussion of the remedy.⁷⁴ Those which do look to different factors.⁷⁵ To glean an insight into how U.S. courts address this question, this section presents cases in which courts have attempted to formulate a doctrinal approach for remedying underinclusive statutes.

A. *Welsh v. United States*

The modern invalidation versus extension debate began when Justice Harlan, in *Welsh v. United States*,⁷⁶ advocated extension as a remedy in constitutional cases.⁷⁷ *Welsh* involved a federal statute⁷⁸ which exempted from military service persons who were conscientiously opposed to war due to their religious beliefs. The majority construed religious beliefs to include moral or ethical opposition to war.⁷⁹ Thus, to avoid striking down the statute, the Court expanded the class of persons subject to the statute by broadening the definition of the legislative classification.

Justice Harlan believed that this was a perversion of statutory interpretation, and in his concurrence, he urged the Court to admit that it was not construing the statute, but extending it.⁸⁰ Justice Harlan advocated that extension was an entirely appropriate remedy in this case and so should be accomplished openly.⁸¹ He proposed the following test:

72. See *infra* part III.B. One could argue that when a court makes a legislative classification gender neutral, it has, in effect, inserted language into the statute.

73. Candice S. Kovacic, *Remedying Underinclusive Statutes*, 33 WAYNE L. REV. 39, 49-56 (1986) (detailing the relevant case law and coming to the conclusion that "[t]his makes comparability of cases difficult, and predictability from precedent elusive").

74. *Id.* at 56.

75. *Id.* at 57.

76. 398 U.S. 333, 364 (1970) (Harlan, J., concurring).

77. *Id.* at 361.

78. Universal Military Training and Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612 (1948) (codified at 50 U.S.C. § 456(j) (Supp. IV 1964)).

79. 398 U.S. at 342. Specifically, the Court held that a person's conscientious objection to war is "religious" even when motivated by moral or philosophical views. *Id.* at 343-44.

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

81. *Id.* at 365-66.

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 the exclusion.⁸²

B. *Weinberger v. Wiesenfeld*

In *Weinberger v. Wiesenfeld*,⁸³ The Court found unconstitutional a provision of the Social Security Act which authorized "child in care" payments to the widow of a male wage earner, but did not provide benefits to a similarly situated widower.⁸⁴ To remedy the statute, the Court, in effect, substituted the word "parent" for "mother."⁸⁵ The majority found support for its conclusion in the legislative history which made clear that the underlying purpose of the entitlement was to provide children deprived of one parent with the opportunity for the personal attention of the other.⁸⁶

C. *Califano v. Westcott*

The Supreme Court in *Califano v. Westcott*⁸⁷ again confronted an underinclusive statute which could avoid nullification only if the Court modified the legislative classification. The Court unanimously adopted Harlan's test from *Welsh*,⁸⁸ although it split five to four on the choice of whether to nullify or extend. The statute under review⁸⁹ granted benefits to unemployed fathers with

82. *Id.* at 361.

83. 420 U.S. 636 (1975).

84. *Id.* at 637-38.

85. *Id.* at 652-53. Courts commonly neutralize gender-based language to remedy equal protection violations. See, e.g., *Califano v. Jablon*, 430 U.S. 924 (1977) (spousal benefits), *summarily aff'g* 399 F. Supp. 118 (D.C. Md. 1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (survivor's benefits); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military quarters allowances and medical and dental benefits); *In re Jessie C.*, 164 A.D.2d 731, 735 (N.Y. App. Div. 1991) (striking a gender exemption to preserve a statute because "given a choice between striking the gender bias or striking the statute in its entirety, the Legislature . . . would opt to gender-neutralize").

86. 420 U.S. at 648-49.

87. 443 U.S. 76 (1979).

88. *Id.* at 89.

89. Social Security Amendments of 1967, Pub. L. No. 90-248, § 407, 80 Stat. 882 (1968) (current version at 42 U.S.C. § 607(a) (1991)).

children, but not to similarly situated unemployed mothers. The *Westcott* Court remedied the statute by extending the benefits to the unemployed mothers.⁹⁰ In essence, the Court, by affirming the district court's opinion, replaced "father" in the statute with its gender-neutral equivalent, "parent."⁹¹

The Court also rejected a middle-ground solution.⁹² The Commissioner of Massachusetts sought to modify the district court's order by asking the Supreme Court to insert the words "principle wage-earner" into the statute.⁹³ Granting benefits only to the children of an unemployed principle wage-earner would have provided a gender-neutral solution and greatly reduced the added costs by decreasing the number of eligible recipients.⁹⁴ Concerned that the Commissioner's proposal "would involve a restructuring of the Act that a court should not undertake lightly,"⁹⁵ the Supreme Court rejected this position. It reasoned that "[w]henever a court extends benefits to a program to redress unconstitutional underinclusiveness, it risks infringing legislative prerogatives."⁹⁶ Inserting the words "principle wage-earner" would have also required the Court to redefine the meaning of "unemployment" within the Act,⁹⁷ which it was unwilling to do.⁹⁸

The Court expanded the program because it saw the remedy of extension as generally more consistent with the congressional intent than nullification.⁹⁹ The Court further recognized that although the choice between "extension" and "nullification" is within the "constitutional competence of a federal district

90. 443 U.S. at 92.

91. *Id.* This is, of course, similar to the Canadian remedy of reading in.

92. *Id.* at 82.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 92-93.

98. *Id.* Interestingly, Congress amended the statute in 1981, adopting the "principal earner" solution. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 §§ 2313(a)(2), 2313(a)(3), 95 Stat. 853 (1981) (current version at 42 U.S.C. § 607 (1992)).

99. 443 U.S. at 91-93. The Court considered extension to be the "simplest and most equitable" remedy. *Id.* at 93. Suspending the program would impose hardships on those needy children which Congress intended to protect. *Id.* at 89. The Act's severability clause evidenced an intent to maintain social welfare programs whenever possible. *Id.* None of the parties to the litigation were seeking nullification, and previous Supreme Court decisions had "routinely . . . affirmed district court judgments ordering extension of federal welfare programs." *Id.* at 91.

court,"¹⁰⁰ ordinarily "extension, rather than nullification, is the proper course."¹⁰¹

Four Justices, dissenting in part, argued nullification was the proper remedy because the legislative history afforded no basis for determining what Congress would have done in enacting the statute had it known the statute would later be declared unconstitutional due to underinclusion.¹⁰² The dissenters were also concerned that extending the benefit to new classes of persons might bring hardship to the current beneficiaries due to limited funding.¹⁰³ They argued that Congress could mitigate any hardship caused by nullification by quickly reinstating the program in a constitutional form "providing promptly for retroactive payments."¹⁰⁴ The fact that none of the parties were seeking nullification was irrelevant because the "issue should turn on the intent of Congress, not the interests of the parties."¹⁰⁵ Further, the dissenters were troubled that the relief ordered by the Court "ensure[d] the irretrievable payment of funds to a class of recipients Congress did not wish to benefit."¹⁰⁶ They stressed that even if extension is ordinarily the proper course, the Court "should not use its remedial powers to circumvent the intent of the legislature."¹⁰⁷

The dissenters believed the better approach was, once the Court declared the statute unconstitutional as underinclusive, the legislative branch should make its own decision in light of the judicial opinion by making whatever changes it deemed appropriate.¹⁰⁸ The dissenters worried that in cases where the allocation and distribution of funds would be affected, courts would be overstepping their bounds because "the allocation and distribution of . . . funds are peculiarly within the province of the Legislative Branch."¹⁰⁹ Extension of benefits by definition results in additional costs, and thus such a decree by the judiciary was tantamount to ordering an allocation of funds.

100. 443 U.S. at 91.

101. *Id.* at 89.

102. *Id.* at 95-96 (Powell, J., dissenting in part); *see also infra* part V.A.

103. 443 U.S. at 96.

104. *Id.*

105. *Id.* at 96 n.2.

106. *Id.* at 96.

107. *Id.* at 94.

108. *Id.* at 95.

109. *Id.* The dissenters cite *Califano v. Jobst*, 434 U.S. 47 (1977); *Maher v. Roe*, 432 U.S. 464, 479 (1977); and *Dandridge v. Williams*, 397 U.S. 471 (1970), for this contention. 443 U.S. at 95.

D. Heckler v. Mathews

The Supreme Court faced a similar question in *Heckler v. Mathews*.¹¹⁰ The District Court for the Northern District of Alabama ruled that a provision of the 1977 Social Security Amendments¹¹¹ violated equal protection due to underinclusiveness.¹¹² The amendments excepted certain dependent women from an offset of retirement benefits against Social Security spousal benefits, but did not except similarly situated men.¹¹³ In this statute, the legislature had "clearly expressed its preference for nullification"¹¹⁴ by including a severability clause which specifically referred to the discriminatory provision and which urged nullification if the judiciary were to declare the provision unconstitutional.¹¹⁵

Justice Brennan, writing for a unanimous Supreme Court, reversed two of the district court's findings: that the statute violated equal protection; and that the statute's severability clause was unconstitutional.¹¹⁶ The Court held that the statute did not violate equal protection because the classification was substantially related to the achievement of an important government objective: protecting the reliance interests of beneficiaries.¹¹⁷

Although the Court did not have to fashion a remedy because it upheld the statute, it was forced to address the remedial issue to determine whether the plaintiff had standing. The Court defined the injury as the stigmatization caused by gender discrimination, not the denial of Social Security benefits.¹¹⁸ Justice Brennan rea-

110. 465 U.S. 728 (1984).

111. Social Security Amendments of 1977, 42 U.S.C. § 402(b)(4)(A), 402(c)(2)(A), 402(n) (1982). Congress enacted these amendments partly in response to the Court's decision in *Califano v. Goldfarb*, 430 U.S. 199 (1977), which held that a gender-based classification in the spousal-benefit provisions of the Social Security Act violated the right to equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment. *Mathews*, 465 U.S. at 731-32.

112. *Mathews*, 465 U.S. at 731.

113. *Id.* at 731-34.

114. *Id.* at 739 n.5.

115. *Id.* at 738.

116. *Id.* at 737-39.

117. *Id.* at 748.

118. *Id.* at 739-40. The Court wrote:

[T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community can cause serious non-economic injuries

soned that since the right invoked was equal protection, the appropriate remedy was "a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class."¹¹⁹

By defining the injury as stigmatization, the Court was able to grant standing because it was possible to redress the stigmatization through nullification.¹²⁰ The Court also avoided a clash with Congress by proposing a remedy consistent with the severability clause that expressed a preference for nullification.

E. Federal Courts and State Entitlement Statutes

When a case involves a state entitlement statute, the Supreme Court normally identifies the equal protection problem but remands to the state court to decide whether the class should be expanded or whether the benefit should be nullified.¹²¹ In some cases, however, the Court has extended benefits to disfavored classes under state statutes.¹²²

Id. (citations omitted).

Commentators have sharply criticized basing the injury on the effects of discrimination rather than the loss of entitlements. For a thorough critique of the *Mathews* decision, see Bruce K. Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews*, 20 HARV. C.R.-C.L. L. REV. 79 (1985) [hereinafter Miller, *Constitutional Remedies*]; Bruce K. Miller & Neal E. Devins, *Constitutional Rights Without Remedies: Judicial Review of Underinclusive Legislation*, 70 JUDICATURE 151 (1986). However, these criticisms are unwarranted due to concerns raised by the standing doctrine. See *infra* part VI.

119. *Mathews*, 465 U.S. at 740 (citing *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931)). The Court re-affirmed that though ordinarily "'extension, rather than nullification, is the proper course,' the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature' and should therefore '... consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Mathews*, 465 U.S. at 739 n.5 (quoting *Califano v. Westcott*, 443 U.S. 76, 76, 89, 94 (1979)).

120. *Id.* at 740; see also *infra* part VI.

121. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (statute which provided widows with a presumption of dependency upon their spouses for worker's compensation declared unconstitutional but remanded to state to decide whether to include widowers or invalidate the presumption); *Orr v. Orr*, 440 U.S. 268 (1979) (finding an Alabama law allowing alimony to wives but not to husbands unconstitutional on equal protection grounds but remanded for the state to decide whether to extend or nullify the benefit).

122. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (one-year residence requirement for county-paid medical care violated equal protection); *Gomez v. Perez*, 409 U.S. 535 (1973) (benefits for children created by a state cannot be withheld from an illegitimate child); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972) (state cannot deny unacknowledged illegitimate children recovery under worker's compensation statute while allowing recovery to legitimate children); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state

The Court generally views the revision of an underinclusive state entitlement statute as a question of state policy, outside the purview of the federal courts.¹²³ Federalism concerns force federal courts to tread lightly when confronting the constitutionality of a state statute.¹²⁴ Further complicating matters is the fact that a federal court's interpretation of a state statute is not binding on a reviewing state court.¹²⁵

F. U.S. Courts and the Insertion of Language into Statutes

The general rule is that U.S. courts will not rewrite statutes or insert language to remedy an unconstitutional statute.¹²⁶ However,

may not deny welfare benefits to otherwise eligible recipients simply because the residents lived in the state for less than one year); *Levy v. Louisiana*, 391 U.S. 68 (1968) (once state recognizes wrongful death recovery for child, state cannot hold that the term "child" excludes illegitimate children), *reh'g denied*, 393 U.S. 898 (1968).

123. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152-53 (1980) ("Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation.").

124. See, e.g., *Hill v. City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986) (holding "[t]he principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance"), *aff'd*, 482 U.S. 451 (1987); *Welsh v. United States*, 398 U.S. 333, 362 n.15 (1970) (Harlan, J., concurring) (noting that the Court has wider discretion to extend federal law than it does to recast "a policy for the States even as a constitutional remedy"). But see Ruth B. Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 313 (1979) (listing several cases where the Supreme Court has tacitly extended state legislation, theorizing that in those cases the Court may have thought it obvious that the state legislature would want the statute to survive).

125. See *Moore v. Sims*, 442 U.S. 415, 428 (1979) (holding that this situation "render[s] the federal-court decision advisory and the litigation underlying it meaningless").

126. "The canon favoring constructions of statutes to avoid constitutional questions does not . . . license a court to usurp the policy-making and legislative functions of duly-elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741 (1984) (citing three cases: *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 508-511 (1979); *United States v. Sullivan*, 332 U.S. 689, 693 (1948)); see also *West Va. Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) ("[t]o supply omissions transcends the judicial function") (quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) (stating "we will not rewrite a state law to conform it to constitutional requirements"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (Court noted its own prior decisions that had refused to narrow a statute by "reading into it limitations not contained in the statutory language"); *Bount v. Rizzi*, 400 U.S. 410, 419 (1971) ("it is for Congress, not this Court, to rewrite the statute"); *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute' . . . or judicially rewriting it.") (quoting *Scales v. United States*, 367 U.S. 203, 211 (1961)); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (holding that adding limitations to a statute is "legis-

courts will occasionally strain the language of a statute practically beyond recognition in interpreting its meaning.¹²⁷ Courts also routinely neutralize gender-discriminatory language in statutes, even when doing so broadens the class of persons subject to the statute.¹²⁸

Occasionally, the "plain meaning" of statutory language leads to "absurd or futile results."¹²⁹ When this occurs, courts may look "beyond the words to the purpose [of the statute]." Even if the plain meaning does not produce absurd results "but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'"¹³⁰ In extreme circumstances, courts will interpret and enforce a statute contrary to its literal and unambiguous wording if the legislative intent indicates a result contrary to what is written in the statute.¹³¹ This would be the case where, for ex-

lative work beyond the power and function of the court"); *United States v. Reese*, 92 U.S. 214, 221 (1875) (holding an unconstitutionally broad penal statute could not be repaired by the Court inserting new language because to do so "would be to make a new law, not to enforce an old one"). *But see United States v. Thirty-Seven Photographs*, 402 U.S. 363, 370-73 (1971) (where the Court, based on legislative intent, supplied time limits to forfeiture proceedings pursuant to a federal statute).

The circuits are also in accord. *See Eubanks v. Wilkinson*, 937 F.2d 1118, 1127 (6th Cir. 1991) (holding federal courts when reviewing state statutes must sever and may not draft limiting conditions so that "[t]he State may pursue its own policy choices in fashioning new legislation"); *Wilson v. NLRB*, 920 F.2d 1282, 1289 (6th Cir. 1990) (calling a request for a court to judicially redraft statutory language "a request for this court to perform a legislative function"), *cert. denied*, 112 S. Ct. 3025 (1992); *Hill v. City of Houston*, 789 F.2d 1103, 1112 (5th Cir. 1986) ("[f]ederal courts do not sit as a super state legislature"), *aff'd*, 482 U.S. 451 (1987); *Consumer Party v. Davis*, 778 F.2d 140, 147 (3d Cir. 1985) (canon to preserve constitutionality of statutes does not "give a court a license to rewrite a statutory scheme"); *Universal Amusement Co. Inc. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) (holding that federal courts "cannot judicially rewrite the Texas statutes and rules to incorporate . . . safeguards"), *aff'd*, 445 U.S. 308, *reh'g denied*, 446 U.S. 947 (1980); *see also Baird v. Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978) (court found it was not possible to rewrite a statute because "[r]egardless of whether a statute says too much, or too little, . . . the legislature intended it to be constitutional"), *aff'd*, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979).

127. *See supra* part III.A.

128. *See supra* note 85 and accompanying text.

129. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

130. *Id.* (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)); *see also* 2A SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 65, § 45.12 ("departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result").

131. *See Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). For a lengthy list of citations, *see Abdella v. Commissioner*, 647 F.2d 487, 496-97 (5th Cir. 1981); *see also King Ranch, Inc. v. United States*, 946 F.2d 35, 37 (5th Cir. 1991) (reviewing the line of cases and finding the common thread is "application of the statute was so absurd 'as to shock the general moral or common sense'" (quoting *Crooks v. Harrelson*, 282 U.S. 55,

ample, a statute unqualifiedly makes escape from prison a felony, but a prisoner breaks out because the prison is on fire.¹³²

IV. SEPARATION OF POWERS: THE ROLES OF THE JUDICIARY AND THE LEGISLATURE

Nearly two centuries ago the United States Supreme Court declared in *Marbury v. Madison* that it is inherently the province of the judiciary "to say what the law is."¹³³ Utilizing this authority, U.S. courts have assumed broad remedial powers when faced with legislation that conflicts with the letter or the spirit of the Constitution.¹³⁴ Canadian courts have taken on a similar, if not more activist, role in constitutional adjudication.¹³⁵

In both the Canadian and U.S. schemes, legislatures are primarily responsible for formulating policy, enacting law, and appropriating funding.¹³⁶ Courts will generally give legislative intent great deference and presume that the legislature intended to create a constitutional law.¹³⁷ This is proper to maintain a system of checks and balances. Courts have the power to review acts of the legislature, but whenever possible must enforce the legislation. Because legislators represent the democratic will, courts should not lightly venture to tread upon the expression of legislative intent.

When the legislature creates an entitlement, it must debate fundamental aspects of policy, the most critical of which is funding. Legislatures must carefully consider the number of people who will receive the new benefits, the costs of the benefits, and the pro-

60 (1930)); 2A SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 65, § 45.12.

132. See *Church of the Holy Trinity*, 143 U.S. at 461.

133. 5 U.S. (1 Cranch) 137, 176 (1803).

134. See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

135. See David Beatty, *Human Rights and Constitutional Review in Canada*, 13 HUM. RTS. L.J. 185 (1992); see also *R. v. Oakes*, [1986] 1 S.C.R. 103 (providing an analytical framework within which to measure the constitutionality of any law under review).

136. See generally PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 79-88 (2d ed. 1977). The U.S. system of government is tripartite, with each branch having defined functions delegated to it by the Constitution. "While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

137. See *Welsh v. United States*, 398 U.S. 333, 355 (1970); see also *supra* notes 65-68 and accompanying text. For a list of additional cases, see 2A SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 65, § 45.11.

cedure for disbursing the benefits.¹³⁸

When courts extend entitlements to new groups of persons they usurp this process. Courts are not in as good a position to determine proper costs, funding, and implementation; these are legislative tasks.¹³⁹ Moreover, by enacting the entitlement in the first place, the legislature has already made the decision of how to maximize the distribution of limited resources.¹⁴⁰ When a court orders that a class be expanded, it is judicially redrafting that legislation, regardless of the gloss it gives its reasoning by using a consequentialist perspective.

An expanded class will cost more, both in the actual benefits paid out and in administrative costs. When a court greatly expands class size, it is reasonable to assume that the legislature would find its existing scheme of distribution inadequate.¹⁴¹ Since the legislature must pay the additional costs resulting from the extension, the court is also, in effect, ordering the legislature to make an appropriation.¹⁴²

Although deference to the legislative process is important, what about the interests of recipients whose benefits are cut when a court declares the statute discriminatory? These recipients may have come to rely on the benefits for their daily survival,¹⁴³ and they would suffer great hardship from the loss. They are not responsible for the legislature's discriminatory classification. This concern has caused the courts of both the United States and Canada to depart from traditional remedial doctrine. The courts, however, do not have the final word. The legislature may nullify the statute or extend the benefits in a different fashion, so long as the new distribution scheme is free of constitutional defects.¹⁴⁴

138. See Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 323, 327 (1987).

139. See *Schachter v. Canada*, 93 D.L.R.4th 1, 31 (1992); *Califano v. Westcott*, 443 U.S. 76, 93 (1979); see also Ross, *supra* note 138, at 323 ("Because courts are less able to weigh facts and policies in a principled manner, they should abstain and defer to the legislature.").

140. Ross, *supra* note 138, at 323, 327.

141. See, e.g., *Schachter v. Canada*, 93 D.L.R.4th 1 (1992) (where the legislature prior to the judicial resolution changed the period from 15 to 10 weeks to offset the added costs of extension).

142. See *Califano v. Westcott*, 443 U.S. 76, 94-95 (1979) (Powell, J., concurring in part and dissenting in part).

143. Many entitlements provide the means of subsistence for economically disadvantaged persons.

144. See *Heckler v. Mathews*, 465 U.S. 728, 739 (1984); see also Arthur B. LaFrance, *Problems of Relief in Equal Protection Cases*, 13 CLEARINGHOUSE REV. 438, 439 (1979);

Taking both sides into account, a better solution to this quandary is for the judiciary to declare the statute or provision unconstitutional, but leave its repair to the legislature: "When the court passes on the constitutionality of a statute in [these] cases, it concludes its essentially judicial business. If it declares the statute unconstitutional as written, the remaining task is essentially legislative."¹⁴⁵

V. UNCOVERING THE LEGISLATURE'S REMEDIAL INTENT: A REAL SOLUTION OR JUST SMOKE AND MIRRORS?

When searching for the proper remedy, a court must consider two legislative intents. The first is the underlying purpose of the entitlement. A reviewing court may determine this purpose by examining the social purposes declared by the legislature at the time of enactment.¹⁴⁶ This will assist the court in determining the social importance of the entitlement.¹⁴⁷ The second intent at issue is the legislature's preferred remedy—extension or nullification.

Constitutions generally require few entitlements.¹⁴⁸ Entitle-

Kovacic, *supra* note 73, at 39, 89. *But see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 92-93 (1982). Calabresi asserts that the trouble with saying judge-made rules are conditional and subject to legislative revision is "that, taken literally, it can justify any law, however instituted or arrived at, so long as a legislature or other majoritarian body can reject it. It says lawmaking by any body, of any sort, is consistent with democratic theory if the people can have the last word." *Id.*

Creating an entitlement program injects a certain amount of inertia into the process. The legislature will likely find it difficult to remove the benefits from the expanded class once it is granted. *See* Caminker, *supra* note 35, at 1187 n.6; Kovacic, *supra* note 73, at 89.

145. Ginsburg, *supra* note 124, at 317 (1979).

146. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636, 648-49 (1975); *see also* 2B SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 65, § 56.01, at 303.

147. *Id.* *But see* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 154 (1972) [hereinafter Note, *Legislative Purpose*] ("the discussion of a statute's rationality [of purpose] is a meaningless and confusing exercise").

148. The United States does not recognize a fundamental right to entitlements, regardless of whether they are "necessities of life." *Dandridge v. Williams*, 397 U.S. 471 (1970) (welfare); *see also* *Harris v. McRae*, 448 U.S. 297 (1980) (abortion or other medical treatment); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing). Nor does Due Process require that the government provide aid to its citizens. *Deshaney v. Winnebago County Dep't. of Social Services*, 489 U.S. 189, 196 (1989) ("the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("As a general matter, a state is under no constitutional duty to provide substantive services for those within its border."). *But cf.* *Plyler v. Doe*, 457 U.S. 202 (1982) (suggesting there may be a right to minimal education); *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) ("Public assistance . . . is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves

ments are created because the legislature desires to grant a benefit to a particular group of people. When courts hold an entitlement statute unconstitutional on equal protection grounds, it is because the statute does not dispense the benefits in a constitutional manner, not because the Constitution prohibits or requires the benefits.¹⁴⁹ Because the statute reflects a legislative desire, and not a constitutional mandate, courts focus their remedial inquiry on legislative intent.

Subpart A discusses how a court can ascertain the enacting legislature's intent. Subpart B explores whether courts can determine which remedy the present legislature would prefer in a given case.

A. *The Enacting Legislature*

This Comment questions whether courts are really uncovering legislative intent or just waving the magician's cape. An answer to this question requires examination of the methods that legislatures use to evince their intent and the methods courts use to uncover legislative intent.

The primary purpose of statutory construction is to give effect to the intent of the legislature.¹⁵⁰ Courts generally use four methods to determine legislative intent: Courts first examine the plain language of the specific statutory provision;¹⁵¹ they may also consider the entire statute, if appropriate;¹⁵² they may review the legislative history;¹⁵³ or finally, courts may consider a severability

and our Posterity.'") (quoting U.S. CONST. pmbl.). For the view that some entitlements in the United States are constitutionally required, see Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. L.Q. 659. *But cf.* Robert H. Bork, *Commentary: The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. L.Q. 695 (criticizing Michelman's view). In Canada, some entitlements are "constitutionally encouraged." See *Schachter*, 93 D.L.R.4th at 24-25.

149. Of course, "even where Congress need not act at all, if it chooses to act, it must act constitutionally." LaFrance, *supra* note 144, at 439.

150. See, e.g., *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940).

151. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975).

152. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (quoting *United States v. Boisdore's Heirs*, 49 U.S. (8 How.) 113, 122 (1849)).

153. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1150 (1992) (Stevens, J., concurring). Courts do not ordinarily use legislative history to interpret a statute when it is plain and unambiguous on its face. See *Ex Parte Collette*, 337 U.S. 55, 61 (1949).

clause, if one exists.¹⁵⁴

The intent of the legislature in enacting an entitlement is sometimes difficult, if not impossible to discern. The court will know, *a priori*, that the legislature intended to grant the benefit to the favored group. Determining the preferred legislative remedy is another matter.¹⁵⁵ The court must determine whether the legislature would favor enlarging the scope of the entitlement to include the new classes of persons, or whether the legislature would favor terminating the benefit altogether. There is no middle ground. The court cannot consider whether the legislature would prefer extension with a reduction in per capita distribution or some other cost defraying scheme.¹⁵⁶

The U.S. doctrine creates, in essence, a presumption that the legislature prefers extension,¹⁵⁷ but a court may review the actual legislative intent to rebut this presumption. The Canadian courts share a similar view.

In the best circumstances, there would be a severability clause which the court could consider.¹⁵⁸ Yet, even severability clauses leave room for doubt. Nearly all such clauses are general, in that the legislature merely declares a preferred remedy in the event that any provision of the statute is declared unconstitutional. Severability clauses generally do not address the specific provision at issue.¹⁵⁹ This is only logical, because legislatures generally do not knowingly draft statutes with unconstitutional provisions.¹⁶⁰

In the worst circumstances, the legislature is either silent on its intent, or dissension among its members obscures it, allowing reviewing judges merely to cite those legislators with whom they agree. Unfortunately, there is usually at least some dissension, and

154. See *Heckler v. Mathews*, 465 U.S. 728, 737 (1984).

155. See, e.g., Miller, *Constitutional Remedies*, *supra* note 118, at 89-90 (concluding that when an underinclusive statute is unconstitutional the search for the remedial preference is probably futile).

156. See *Califano v. Westcott*, 443 U.S. 76, 93 (1979) ("This Court, in any event, is ill-equipped both to estimate the relative costs of various types of coverage, and to gauge the effect that different levels of expenditures would have upon the alleviation of human suffering."). Presumably, if a severability clause provided a clear, middle ground solution, the Court would enforce it.

157. *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984); *Westcott*, 443 U.S. at 89.

158. Severability clauses are virtually unknown in Canada. Duclos & Roach, *supra* note 37, at 17.

159. See Kovacic, *supra* note 73, at 45.

160. See *Welsh v. United States*, 398 U.S. 333, 364 (1970); see also Note, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 98 (1937).

in any event, most statutes represent nothing more than compromise.¹⁶¹ In such cases, reliance on the legislature's presumed intent is illegitimate.¹⁶²

Reviewing subsequent legislative history is also problematic in this context because it may not reveal the legislative intent at the time the statute was passed.¹⁶³ It may, however, reveal what the legislature later thought it had enacted. Theoretically a court could reason backward, using the legislature's subsequent treatment of the statute to show the legislature's intent at the time of enactment. However, it does not necessarily follow that the statute's later application and treatment conforms with the original legislative intent. Rather, how a legislature treats a statute subsequent to enacting it may only be indicative of the changing policies, priorities, or membership of the congress.

In some cases the legislature may actually intend to discriminate,¹⁶⁴ but the court will struggle valiantly to find any possible interpretation of the statute that would avoid conflict with the Constitution.¹⁶⁵ Courts should face the fact that the legislature en-

161. See Note, *Legislative Purpose*, *supra* note 147, at 135.

162. See Miller, *Constitutional Remedies*, *supra* note 118, at 90 ("the legislative preference 'discovered' in such a case is likely to be based on little more than [the judge's] personal assessment of the relative worth of social welfare legislation compared to the demands of fiscal frugality—in other words, on the particular judge's political and social philosophy").

163. See *Chapman v. United States*, 111 S. Ct. 1919, 1927 n.4 (1991) ("subsequent history [is] an unreliable guide to legislative intent"); see also, e.g., *Pierce v. Underwood*, 487 U.S. 552, 556-57; *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992).

164. This is often the case when legislatures make distinctions based on sexual orientation, marital status, race, and gender. See, e.g., *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (holding a gender classification was "not substantially related to the attainment of any important and valid statutory goals," but rather was "part of the 'baggage of sexual stereotypes,' that presumes the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of the home and family life'") (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979); *Stanton v. Stanton*, 421 U.S. 7, 10 (1975); and then *Taylor v. Louisiana*, 419 U.S. 522, 534 n.15 (1975)). One need only review the plethora of equal protection cases to see that there is a long-standing tradition of discrimination against many groups. The case law also demonstrates that even the courts are not immune to long-standing prejudices in society. See *infra* notes 244-45 and accompanying text; Kovacic, *supra* note 73, at 75 ("No cases other than the widows' presumption and women's overtime cases have inconsistent results because no other cases refused to extend underinclusive beneficial statutes."). Kovacic also reviews several cases concerning illegitimate children, *id.* at 49-52, and gender, *id.* at 68-75.

165. For example, in *Knodel v. British Columbia (Medical Services Commission)*, 58 B.C.L.R.2d 356 (1991), the British Columbia Supreme Court held that a statute which defined "spouse" to include "a man or woman who, not being married to each other, live together as husband and wife" must include homosexual couples because "[t]he use of the

acted what it enacted and openly declare invalid any discriminatory intent of the enacting legislature. Courts cannot rely on legislative intent which is itself violative of equal protection or any other constitutional protection.¹⁶⁶ Courts, moreover, should not use the intent of the enacting legislature to provide a remedy when the legislature's underlying purpose was discriminatory. Courts should instead base their remedial decision of extension, invalidation, or delayed enforcement on other factors, such as budgetary impact, or the importance of the benefit to the present recipients.¹⁶⁷

The most serious problem with seeking the enacting legislature's intent is that the court is trying to determine an intent that never existed. That is, "the court is trying to interpret a statute that the legislature never passed."¹⁶⁸ Courts ask whether the enacting legislature would have preferred extension or nullification had the legislature known that the statute would later be declared underinclusive, or in the alternative how the enacting legislature would have corrected the constitutional infirmity.¹⁶⁹

Unless there is a severability clause directly referring to the impugned language, courts seeking to find such answers are forced to engage in pure speculation.¹⁷⁰ Focusing only on the intent behind the benefit scheme does not reveal whether the legislature

word 'as' suggests a particular type of relationship that involves both emotional and sexual aspects." *Id.* at 373. The phrase "live together as husband and wife" was "intended to exclude other types of relationships that [exist] between, for example siblings or between other adult persons who live together but who do not share an emotional and sexual commitment." *Id.*; see also *supra* note 65.

166. See United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534, 537 (1973); Schachter v. Canada, 93 D.L.R.4th 1, 16-17 (1992) (citing R. v. Big M Drug Mart Ltd., [1984] 1 S.C.R. 295). Perhaps the fear is that if judges declare that the statute has a discriminatory purpose the whole statute must fall. If true, this concern may be unwarranted, at least in the United States. See Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 472 n.7 (1981) ("The question for us—and the only question under the Federal Constitution—is whether the legislation violates [equal protection], not whether its supporters may have endorsed it for reasons no longer generally accepted."); 2A SUTHERLAND'S STATUTORY CONSTRUCTION, *supra* note 65 § 45.11 at 50 ("The fact that invalid motives were behind what became a valid enactment will not lead to invalidation.").

167. See *infra* part VII.

168. See Kovacic, *supra* note 73, at 58.

169. See Welsh v. United States, 398 U.S. 333, 355-56 (1970); see also *People v. Liberta*, 474 N.E.2d 567, 578 (N.Y. 1984) ("[t]his court's task is to discern what course the Legislature would have chosen to follow if it had foreseen our current conclusions as to underinclusiveness"); *Schmoll v. Creecy*, 254 A.2d 525, 529-30 (N.J. 1969); Kovacic, *supra* note 73, at 58; Ginsburg, *supra* note 124, at 308-10; Deborah Beers, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROBS. 115, 121 (1975); Caminker, *supra* note 35, at 1188-89.

170. Kovacic, *supra* note 73, at 58.

would choose extension or nullification.¹⁷¹ Recall that the court's methodology is to *change* the legislative classifications by interpretation, severance, or reading in.

B. *The Current Legislature*

Some have argued that searching for what the legislature would have wanted at the time the statute was enacted is the wrong inquiry. Rather, they argue, courts should determine what the current legislature would do if it were now enacting the legislation for the first time.¹⁷² A lengthy period of time may have passed since the legislation's enactment, the class sizes may have changed, and reliance interests may have grown or declined considerably. Therefore, seeking the intent of the enacting legislature could yield results inconsistent with the present distribution scheme.

Although these are important concerns, any problems that might exist in determining legislative intent at the time of enactment are multiplied exponentially if the court applies the inquiry proposed by these commentators. Unless the problem is put to a vote, how is the court supposed to find the current legislature's intent? The court may examine subsequent legislative history, but this will generally be unrevealing.¹⁷³ The only way for the court to really know how the current legislature would amend the statute is to wait and see the amendment.

Were the judiciary to adopt the position of these commentators, it would be merely a pretence for judges to inject their own views of social policy into the remedial process, for any reasoning from this position would be mere fiction.¹⁷⁴ It would also expose

171. *Id.*

172. *Id.* at 57-58 ("current legislative actions are relevant in the modern approach"); Caminker, *supra* note 35, at 1189 n.9. *But cf.* Beers, *supra* note 169, at 128 (favoring this approach but concluding that "it is doubtful . . . that many courts would be willing to deal with the issue in this manner").

173. *See supra* note 163 and accompanying text; *see also* West Va. Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1148 (1991) ("The 'will of Congress' we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of 'interpreting' the law but of 'intuiting' or 'predicting' it. Our role is to say what the law, as hitherto enacted, is; not to forecast what the law, as amended, will be."); Duclos & Roach, *supra* note 37, at 19 ("Trying to divine legislative intent from . . . a wide array of legislative provisions enacted at different times by different Parliaments is manifestly futile."); *cf.* Clark v. Helms, 576 F. Supp. 1095 (D.N.H. 1983); Grover v. Indus. Comm'n of Colo., 759 P.2d 705 (Colo. 1988).

174. Duclos & Roach, *supra* note 37, at 18.

the judiciary to the charge of completely usurping the legislative function.¹⁷⁵

VI. THE ROLE OF THE JUDICIARY AND THE PARTY SEEKING RELIEF: STANDING

Under Canadian law, section 24 of the Charter liberally grants standing to persons who have been denied benefits under an entitlement statute.¹⁷⁶ Courts have not been so fortunate in the United States and therefore, must grapple with this muddled doctrine.¹⁷⁷

The standing doctrine consists of both constitutional limitations on the jurisdiction of federal courts and prudential concerns.¹⁷⁸ Article III of the United States Constitution authorizes federal courts to hear only cases and controversies.¹⁷⁹ To satisfy this requirement, courts ask whether the plaintiff has "such a personal stake in the outcome of the controversy" as to warrant [the] invocation of federal-court jurisdiction and to justify [the] exercise of the court's remedial powers on [the plaintiff's] behalf."¹⁸⁰ To demonstrate a "personal stake" in the outcome of the litigation,

175. *Id.* But see Kovacic, *supra* note 73, at 60. Kovacic argues that since extension and nullification both intrude into the legislative process "not wanting to usurp the legislature is a meaningless factor and should not be considered." This argument assumes that in any given case extension and nullification would intrude equally into the legislative scheme. This, of course, is incorrect. Kovacic ignores extrinsic variables, such as relative class sizes and budgetary concerns which will affect the degree of intrusion. A further consideration arises when a severability clause is present. If the court extends where the severability clause seeks nullification, it is certainly intruding further into the legislative process than were it to simply nullify. Moreover, courts should not be in the business of writing legislation. See *supra* part IV.

176. See *supra* note 21. For a general explanation of the standing doctrine in Canadian courts, see WALTER S. TARNOPOLSKY & GÉRALD-A. BEAUDOIN, *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS—COMMENTARY* 13-14, 493-508 (1982).

177. Interestingly however, most courts do not even address the standing problem. See Kovacic, *supra* note 73, at 81. For an inquiry into third party standing, see *id.* at 81-88; see generally TRIBE, *supra* note 134, §§ 3-14 to 3-22, at 107-56. The standing question for litigants challenging underinclusive statutes is worthy of an entire law review article. "Standing . . . is one of the most criticized doctrines of United States Constitutional Law." TRIBE, *supra* note 134, at 109-10.

178. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982).

179. Article III, § 2 provides in relevant part: "The judicial power shall extend to all Cases, in Law and Equity arising under this Constitution, the laws of the United States . . . and to Controversies to which the United States shall be a party . . ." U.S. CONST. art. III, § 2.

180. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

the plaintiff must have suffered "a distinct and palpable injury"¹⁸¹ that bears a "'fairly traceable' causal connection" to the challenged conduct.¹⁸² Accordingly, "the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision."¹⁸³ In addition to these constitutional requirements, prudential limitations which stem from the "concern about the proper—and properly limited—role of the courts in a democratic society"¹⁸⁴ allow the judiciary to deny standing "if as a matter of judicial self-restraint it seems wise not to entertain the case."¹⁸⁵

The requirement of redressability makes standing in underinclusive entitlement cases problematic. Courts choose nullification or extension based on legislative intent, not the interests of the parties.¹⁸⁶ If the remedy of extension is likely, the plaintiff will have standing because however the injury is defined, the successful plaintiff can receive relief: extension redresses the injury by making the plaintiff a beneficiary or by ending any stigma caused by the discrimination.¹⁸⁷ However, if the relief is likely to be nullification, redressability may not be satisfied. Nullification as a remedy redresses stigmatic injury, but it does not provide benefits to redress an economic injury. Thus, a plaintiff could have a difficult time gaining standing to challenge an underinclusive entitlement statute if the court defines the injury as economic and continues to have the remedial inquiry turn on legislative intent.¹⁸⁸

181. 422 U.S. at 501.

182. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 (1977)).

183. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

184. *Warth*, 422 U.S. at 498.

185. 13 CHARLES ALLEN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531, at 345 (2d ed. 1984).

186. See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984).

187. *Id.* at 740 n.9 (1984); see also Kovacic, *supra* note 73, at 93 ("[e]xtension as the sole remedy would also eliminate most of the standing problems").

188. See *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984); see also Miller, *Constitutional Remedies*, *supra* note 118, at 130. Miller argues that the injury was mischaracterized in *Welsh* and *Mathews* as stigmatization or stereotyping rather than economic injury so that the Supreme Court could avoid colliding with Congress over the power to fashion constitutional remedies. *Id.* at 104-10. Miller also claims that severability clauses asking for nullification are impermissible curtailments of the courts' Article III jurisdiction. *Id.* at 132-41.

Miller is extremely critical of the Court's decision to base the injury on noneconomic factors. What Miller ignores is that an entitlement statute does not create a constitutionally

Even if the litigants establish the basic requirements of injury in fact, causation, and redressability, they "may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import."¹⁸⁹ However, in *Heckler v. Mathews* the Court ruled that when litigants are denied benefits that similarly situated persons receive they do not make a general "claim of 'the right possessed by every citizen, to require that the Government be administered according to law.'"¹⁹⁰ This ruling eliminates at least one major prudential hurdle.

The standing inquiry highlights one of the major differences between the U.S. and Canadian doctrines. Courts in the United States are reluctant to entertain challenges by citizens against government institutions, policies, regulations, and redistributions. The standing doctrine requires litigants to resort to the legislative process rather than the judiciary when the latter is not in a position to provide a "proper" remedy. Thus, U.S. doctrine indirectly encompasses the ideology that the remedy determines the right. Canadian courts, by ignoring standing in this context, appear to favor a judicial philosophy that the right determines the remedy. Canadian courts try to construct a remedy granting relief to the litigant, even if they must depart from the Charter's text and resort to its "deeper social purposes."¹⁹¹

required positive right to the benefit. The right is to equal treatment. *See supra* notes 119, 149 and accompanying text. Therefore, if the Court had not defined the injury as stigma, it would have risked denying standing to litigants. If the Court had attempted to circumvent the standing problem by providing an *economic* remedy to redress the litigant's *economic* injury, the Court would have allowed its remedy to exceed the scope of the right to equal treatment.

The *Mathews* decision has actually expanded standing in other contexts. *See, e.g.*, *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991) (allowing Native Americans standing to challenge a statute making peyote possession illegal on the grounds that "[t]he Supreme Court recognizes that illegitimate unequal treatment is an injury unto itself, 'not co-extensive with any [injury due to denial of] substantive rights to the . . . party discriminated against'" (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 (1984))); *High Tech Gays v. Defense Indus. Security Clearance Office*, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987) (granting standing based on *Mathews* to homosexuals challenging the Department of Defense's policy of subjecting them to expanded investigations and mandatory adjudications), *rev'd on other grounds*, 895 F.2d 563 (9th Cir. 1990).

189. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979).

190. *Heckler v. Mathews*, 465 U.S. 728, 740 n.9 (1984) (quoting *Baker v. Carr*, 396 U.S. 186, 208 (1962)).

191. *See Schachter v. Canada*, 93 D.L.R.4th 1, 15 (1992).

VII. THE REMEDIAL ALTERNATIVES

This section contrasts the remedial alternatives proffered by both the Canadian and U.S. doctrines and proposes a workable solution to this complex problem. Each system has strengths and weaknesses. Although similar in analysis, the U.S. doctrine is more convoluted than the Canadian approach which offers the reviewing court more discretion. Where one favors the discretion to rest probably depends on one's ideological view of the relative roles of the judiciary and the legislature.

There are essentially three remedies that a court might apply to an underinclusive entitlement statute: (1) The court may nullify the statute and its corresponding benefits; (2) it may extend the benefits to cover the disfavored class; (3) the court may declare the statute unconstitutional, but delay enforcement to allow the legislature time to formulate its own remedy. When the statute includes a severability clause, courts must also determine whether and to what extent they will enforce it.

A. Nullification of the Statute and Its Benefits

When a reviewing court nullifies an underinclusive entitlement statute, all of its benefits cease. The legislature may then re-enact the statute in a nondiscriminatory form with or without retroactive payments, or it may choose not to re-enact the statute at all. This remedy, although closest to traditional methodology, is the one most criticized by commentators.¹⁹²

Nullification's primary benefit is that it prevents the judiciary from usurping the legislative process.¹⁹³ By extending the reach of a statute without a definitive legislative announcement, a court includes groups that the enacting legislature never intended. It is in effect, redrafting legislation,¹⁹⁴ incompetently acting as a legislative proxy.¹⁹⁵

Courts and commentators severely criticize nullification for three reasons. First, nullification cuts off needy persons from bene-

192. See Beers, *supra* note 169, at 144-45; Kovacic, *supra* note 73, at 45-46; Miller, *Constitutional Remedies*, *supra* note 118, at 110-30.

193. See *supra* notes 138-142 and accompanying text.

194. See *supra* part IV.

195. See *supra* part IV.

fits upon which they have come to rely.¹⁹⁶ Second, nullification discourages potential plaintiffs from bringing lawsuits because it denies them the very benefits they were seeking, resulting only in the denial of benefits to everyone.¹⁹⁷ By discouraging plaintiffs from bringing lawsuits, nullification frustrates judicial review of underinclusive entitlement statutes. Third, when a court nullifies legislation, it in effect adjudicates the rights of the present recipients who are not properly before the court.¹⁹⁸ Because of this, one commentator concludes that courts should never nullify an underinclusive entitlement statute.¹⁹⁹

B. Extension of Benefits

Extension broadens the reach of an underinclusive entitlement statute by embracing the disfavored class. A court may extend the entitlement in four ways. First, the court may sever the restricting language from the statute.²⁰⁰ Second, it may read the language of the statute very broadly to encompass the disfavored class regardless of the legislative intent.²⁰¹ Third, it may neutralize the discriminatory language.²⁰² Fourth, it may read new language into the statute.²⁰³

Commentators favor extension over nullification.²⁰⁴ From a utilitarian perspective, extending benefits to the disfavored group, rather than removing them from the favored group, should do the greatest good for the greatest number of people.²⁰⁵ Extension versus invalidation is a classic battle of process (the means) versus consequences (the end).²⁰⁶ The end is the disbursement of benefits

196. Kovacic, *supra* note 73, at 89-90.

197. Miller, *Constitutional Remedies*, *supra* note 118, at 97; Beers, *supra* note 169, at 144.

198. LaFrance, *supra* note 144, at 440.

199. *Id.*

200. *See supra* part II.A.

201. *See supra* part II.A.

202. *See supra* notes 83-86 and accompanying text.

203. *See supra* notes 27-37 and accompanying text.

204. *See* Kovacic, *supra* note 73, at 45 (advocating the appropriate remedy should always be extension of beneficial statutes unless a severability clause specifically requests nullification); Beers, *supra* note 169, at 139 (advocating that the judiciary should consider extension important when the benefits themselves provide "food, shelter, and other necessities of life") (quoting *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969)).

205. *See, e.g.,* C. Edwin Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39 (1974).

206. *See* Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36

to needy people. The means is the legislative and judicial process which effectuates the entitlement.

The most serious problem with extension is that increasing the number of recipients raises the entitlement program's costs.²⁰⁷ Because the additional funding must come from somewhere,²⁰⁸ extension may take money away from other important programs.²⁰⁹ Thus, rather than achieving the greatest good by extending, the court may be only redistributing funds from other needed programs.²¹⁰ There is only one pie, but an infinite number of ways to slice it. The legislature is uniquely responsible for adjusting either the size of the slices or adjusting the size of the pie.²¹¹ Therefore, courts that extend the benefits of an underinclusive entitlement statute are invading the unique province of the legislature.

When a court orders extension to the disfavored class, it also disregards the legislature's possible preference for an intermediate position, such as a reduction in per capita benefits or a different distribution scheme that defrays the additional costs.²¹² Moreover, courts lack the institutional competence to find this middle ground between extension and nullification.²¹³ For these reasons, courts should be especially wary of extension when the excluded class is as large or larger than the favored class, or when extension results in significant additional expenditures.

C. *Delaying Enforcement of an Extension Judgment*

One commentator recommends that a court should always extend the benefits to the disfavored class unless a severability clause clearly provides for nullification.²¹⁴ However, where the legislature

UCLA L. REV. 447 (1989).

207. See *Schachter v. Canada*, 93 D.L.R.4th 1, 21 (1992).

208. See *Califano v. Westcott*, 443 U.S. 76, 95-96 (1979) (Powell, J., concurring in part and dissenting in part).

209. *Id.* Middle ground extensions made by legislatures may also take benefits away from the favored class. *E.g.*, *Schachter*, 94 D.L.R.4th at 7.

210. *Id.*

211. *Id.* at 95 ("allocation and distribution of . . . funds are peculiarly within the province of the Legislative Branch").

212. This is exactly what happened in *Schachter*. 93 D.L.R.4th at 7. Parliament's amended statute reduced the maternity leave time from 15 to 10 weeks to defray the added costs. See *supra* note 15. The legislature also adopted an intermediate position after the Court's decision in *Califano v. Westcott*. See *supra* note 98 and accompanying text.

213. See *supra* note 156 and accompanying text.

214. Kovacic, *supra* note 73, at 88-89.

is likely to repeal the extension, the court should delay the enforcement of its *extension judgment*.²¹⁵ This commentator's proposal solves the dilemma of judicial termination of the present recipients' benefits.²¹⁶ It may even help litigants overcome the hurdle of standing, since this commentator's presumption of extension can satisfy the requirement of redressability.²¹⁷ Finally, it is consistent with the existing presumption that legislatures generally prefer extension over nullification.²¹⁸ Extension of underinclusive entitlement statutes, at first blush, makes perfect sense.

A deeper inquiry casts some doubt on this proposal, however. First, this proposal does not resolve the theoretical inconsistencies associated with a court making assumptions about the enacting legislature's intended remedy.²¹⁹ Second, it does not lessen the difficulties associated with determining the present legislature's remedial intent.²²⁰

Under this commentator's suggestion, the court must discover the present legislature's remedial preference—how likely it is to repeal the extension. Such an inquiry is purely fictitious, since there is no principled way to uncover what the present legislature would do if given the choice.²²¹

Additional concerns also question the wisdom in delaying enforcement of extension judgments. First, extrinsic factors such as the relative sizes of the classes and budgetary impact might cause the present legislature to prefer a middle ground solution. However, courts should not seek this middle ground due to separation of powers concerns and because courts are ill-equipped to undertake such an endeavour.²²² Second, this presumption ignores the reality of limited resources because the class of beneficiaries cannot be expanded without increasing costs. Third, principles of federalism interfere with a federal court's determination of state policy, rendering such an approach untenable in this context.²²³ Finally, the presumption of extension may be inconsistent with the right invoked in an equal protection suit. Extension as the sole

215. *Id.*

216. *Id.* at 89-90.

217. *Id.* at 93-95; see *supra* notes 186-188 and accompanying text.

218. See Kovacic, *supra* note 73, at 90-93.

219. See *supra* part V.A.

220. See *supra* part V.B.

221. See *supra* part V.B.

222. See *supra* notes 92-98, 156 and accompanying text.

223. See *supra* part III.E.

remedy may exceed the scope of the right to equal treatment.²²⁴

D. Delaying Enforcement of a Nullification Judgment

The Canadian doctrine allows the reviewing court to strike down an entitlement statute, but delay enforcement of its order to give Parliament time to amend the statute.²²⁵ The U.S. doctrine generally does not allow this option.²²⁶ Delayed enforcement is not without precedent in the United States, however. The Supreme Court has permitted unconstitutional statutes to remain in effect for specified periods of time to give the legislature an opportunity to amend.²²⁷

Delayed enforcement of nullification judgments is the least intrusive method of judicial interdiction. Courts of both the United States and Canada should reconsider their use of this remedy. Courts fulfil their legitimate remedial function when they grant relief to the litigant by declaring the statute unconstitutional. Courts need not repair the problem themselves. By delaying enforcement, the courts transfer the problem to the legislature by putting the legislature on notice that the statute will be stricken unless amended.

A court does not overstep its bounds by "ordering" the legislature to act, since the legislature need not act at all. The legislature may take no action and the court will strike down the statute and

224. See *supra* notes 118-19 and accompanying text.

225. See *supra* part II.C.

226. See *supra* part III.E. However, when reviewing state entitlement statutes, federal courts often allow the statutes to remain in force while they remand the case to the state court for application of the remedy. See *supra* note 121 and accompanying text. In *Heckler v. Mathews*, the Court advocated delaying enforcement to protect reliance interests. 465 U.S. 728, 746 (1984) (dictum).

227. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982) (plurality opinion). The Court in staying its declaration of invalidity for three months stated "[w]e think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Article III in the way that will best effectuate the legislative purpose" *Id.* at 88 n.41. The Court concluded the limited stay would "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication without impairing the interim administration of the bankruptcy laws." *Id.* at 88; see also *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976) (per curiam) (Court stayed its declaration of invalidity for 30 days to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the [sustained] provisions"); *Beers, supra* note 169, at 146 (advocating delayed enforcement for nullification judgments to provide additional "flexibility which is most likely to lead to a 'rational result' in any given case").

its benefits. If the legislature amends the statute, it can achieve its intent directly by reformulating the classes, funding, and implementation. It may amend, or re-enact the statute as it wishes. The court need not be a proxy for the legislative will; the delayed enforcement remedy allows the current legislature to assert its own prerogative.

Because entitlements are not constitutionally required in the United States, when a court rules that the *disbursement* of an entitlement statute is discriminatory, the nullification and extension remedies are equally legitimate. The right invoked is equal treatment, not a right to the benefits themselves.²²⁸ All similarly situated persons must equally receive the benefits, or all must be denied the benefits. If the remedies are intrinsically equal under the U.S. Constitution, the reviewing court has no constitutional basis on which to choose one remedy over the other. The court must therefore rely entirely on policy and legislative intent.²²⁹ What courts have done in fact is dress up policy as legislative intent.

Delayed enforcement solves this dilemma by allowing two equal branches to perform their respective functions: courts fulfil their role by granting relief to injured parties; and legislatures fulfil their role by redrafting the legislation. If courts truly desire a constitutional remedy which implements the legislative will, their own competence and legitimacy dictates that they leave the repair to the legislature.²³⁰

E. Severability Clauses

Some commentators argue that in this context courts should not allow the legislature to use severability clauses.²³¹ They argue that allowing the legislature to declare what the constitutional remedy should be for the unconstitutional statute is actually usurping the judicial function.²³² More importantly, they assert, al-

228. See *supra* notes 118-19 and accompanying text.

229. Those who argue that there are normative values embodied in constitutions are really making policy arguments. There is no principled method of ascertaining those values, and no principled method of weighing them against each other when they are in competition. Rather, in any given instance, the weight of each factor will depend on the decisionmaker's evaluation of the factor's intrinsic worth.

230. Duclos & Roach, *supra* note 37, at 19.

231. See, e.g., Miller, *Constitutional Remedies*, *supra* note 118, at 132-37; Miller & Devins, *supra* note 118, at 156.

232. See Miller, *Constitutional Remedies*, *supra* note 118, at 132-33, 137.

lowing the legislature to express a preference for nullification would pose a threat to judicial review by removing the incentive to bring lawsuits.²³³

What these commentators overlook is that the U.S. Constitution does not mandate entitlements. Their existence depends solely on the legislative intent behind their enactment and continued operation. If the enacting legislature evinced an intent to nullify rather than extend, the court should nullify. Legislatures subsequent to the statute's enactment could have removed or altered the severability clause. Moreover, if the present legislature is unhappy with the nullification, it can quickly re-enact the statute in whatever form suits it, within constitutional parameters. The legislature can also provide retroactive payments to the recipients.²³⁴

This quandary again highlights the utility of delayed enforcement. A court can nullify the statute pursuant to the severability clause, and then the present legislature can cure the infirmity before the nullification judgment takes effect.

VIII. CONCLUSION

Finding a judicial remedy for underinclusive entitlement statutes is a significant, perplexing problem. The Canadian Supreme Court's new methodology is more judicially activist than the current U.S. doctrine. By allowing a court to read new language into a statute to extend the class, and by allowing delayed enforcement of nullification judgments, the Canadian approach is certainly more flexible than U.S. doctrine. Because of its checklist approach, it is also more coherent.

But does it go too far? The answer depends on what the judiciary is doing when it adds language to a statute or delays enforcement of its judgment to allow the legislature to intervene.

Is adding language the logical equivalent of severance? Admittedly, the effect may be the same. In either case the legislative will may be enforced, or perverted as the judiciary wields its mighty pen (or eraser). Both methods may do violence to the statute and the legislative will, yet both are uniquely powerful tools to effect positive social change.

The real problem with judicial redrafting by adding language

233. See Miller & Devins, *supra* note 118, at 152-53.

234. See *Westcott*, 443 U.S. at 96 (Powell, J., concurring in part and dissenting in part).

is the source of the new language. If a court adds language to a statute, it must be able to justify its source. The Canadian Supreme Court believes the language should come from legislative intent and constitutional normative values, which it refers to loosely as the "deeper social purposes of the Charter."²³⁵ There are two problems with the Canadian approach. First, there is a conceptual difficulty with using legislative intent to insert language. Second, the Court's reliance on normative values ignores legislative intent and substitutes unaccountable judicial policy for a democratic legislative policy.

There is an inherent contradiction in using legislative intent to insert new language. Even if the court can unequivocally discern the legislative intent, the legislature intended to enact only what it enacted. It could intend nothing more.²³⁶ A court engages in fictitious reasoning when it imputes a desire to the enacting legislature for the court to add new words, unless the enacting legislature actually indicated this in the statute.

Perhaps the Canadian Supreme Court, like the United States Supreme Court, seeks to solve this conundrum by merely asserting a presumption that the enacting legislature would favor extension and would prefer the judiciary to insert new language on Parliament's behalf if reading in is minimally intrusive and saves the statute from nullification.²³⁷ Like the U.S. doctrine, this presumption can be rebutted by evidence of a contrary legislative intent.

Yet, both U.S. and Canadian courts face a major hurdle in embracing these presumptions. In presuming the legislature would favor extension, the court has merely made a *policy* judgment based upon knowledge of what the legislature favors generally.²³⁸ Once the court describes extrinsic factors such as increased costs and relative class sizes, it leaves the realm of legislative intent. It immerses itself entirely in policy, even if it tries to cloak that policy as legislative intent. The court can only speculate as to what

235. *Schachter v. Canada*, 93 D.L.R.4th 1, 13-14, 20-21 (1992); see also Duclos & Roach, *supra* note 37, at 24-27. Caminker refers to these norms or values as "substantive constitutional norms" and suggests that they should "guide the choice between nullification and extension [to] implement whichever remedy best furthers the legislative purposes animating the underlying statutory scheme." Caminker, *supra* note 35, at 1185. This "constitutional hints" approach is new to Canadian jurisprudence. Duclos & Roach, *supra* note 37, at 24-26.

236. See Kovacic, *supra* note 73, at 58; see also *supra* part V.

237. See *Schachter v. Canada*, 93 D.L.R.4th 1, 25 (1992).

238. *Id.* (stating the Court's reasoning was "sensible given [its] knowledge of how legislatures act generally").

the enacting legislature would wish given a circumstance it never foresaw,²³⁹ or on what the present legislature would wish, if it were able to make that wish known.²⁴⁰

The second problem with justifying the insertion of language is the Canadian Court's reliance on normative constitutional values. Norms are wonderfully vague. Their use gives the judiciary considerable latitude in enforcing citizens' rights. Unfortunately, they give the judiciary too much discretion; in fact, nearly total discretion.²⁴¹ A substantive constitutional norm is anything the judiciary says it is. Consider the words of Karl Llewellyn on normative generalizations:

To see that something is *right*, or that something is *a right*, is to generalize. There is no practicable way, in ordinary life, to get at the notion of rightness without having, somewhere in your mind, a *general* picture or pattern which the case in hand fits into and fits under. You do not have to put the standard into words; you do not have to see it and know it as being a standard; it can be as vague as "somehow." But it is there: the *sensation*, if that be all it is, that somehow "cases like this ought to be dealt with this way," or that action like this is out of line with what action ought to be in *general* Being creative action, this normative generalizing can fasten on *anything* for its base, and can move from that base in any range and any direction. Even a fairy story—a single fairy story—can call up a normative generalization about the right behavior of mice and pumpkins, and of fairy godmothers and princes who have been experienced only in a newly created imaginary environment.²⁴²

By juggling values the judiciary may be undermining its own legitimacy.²⁴³ If constitutional values change with the Constitution's interpreter, they are not constitutional values at all, but are

239. See *supra* notes 168-171 and accompanying text.

240. See *supra* part V.B.

241. "The inescapable reality of the *Charter* era is that the judiciary will inevitably be drawn into making fundamental value choices. The issue is not whether . . . political choices will be made by courts. The issue is whether those choices will be made well or badly." PATRICK MONAHAN, *POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA* 135 (1987).

242. Karl N. Llewellyn, *The Normative, The Legal, and The Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1335, 1359-60 (1940).

243. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2814 (1992) (in an effort to adhere to the doctrine of *stare decisis* and to protect the Court's legitimacy, the majority refused to impose its own values on the decision of whether to make abortion illegal).

only the values of the interpreters. A review of United States Supreme Court decisions further reminds us that courts are not entirely apolitical,²⁴⁴ and judicial demagoguery may make even well-meaning judges instruments of tyranny.²⁴⁵

There is a doctrinally sound solution. The remedy of delayed enforcement deserves more attention both in Canada and the United States. This remedy does the least violence to the doctrine of separation of powers, is the most pragmatic of all the remedies, and recognizes that entitlements are not generally constitutional requirements.

The judiciary may want to exert its influence directly on the choice of extension or nullification, since remedies are uniquely its business. In the case of underinclusive entitlement statutes, however, once the judiciary pronounces the statute unconstitutional, it has fulfilled its proper institutional function. It should generally remand the remedial option entirely to the legislature so that the legislature can decide, consistent with the Constitution, whether it

244. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2619, 2622 (1991) (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking It takes little real detective work to discern just what has changed since [the decisions of two previous cases]: this Court's own personnel."); *Lochner v. New York*, 198 U.S. 45 (1905) (launching the "Lochner-era" of judicial activism in laissez-faire economics); *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (holding "equal but separate accommodations for the white and colored races" were constitutional); *Dred Scott v. Sanford*, 60 U.S. 393 (1856) (holding blacks were not "persons" under the Constitution). Judges exacerbate this problem when they step outside the judicial sphere and usurp the basic function of another branch. "Basic to the constitutional structure established by the Framers was their recognition that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'" *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality opinion) (quoting *THE FEDERALIST* No. 47, at 300 (H. Lodge ed., 1888) (James Madison)).

245. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (where the Court used national security and deference to the Executive Branch to justify internment of Japanese-Americans in concentration camps during World War II); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (where the Court on utilitarian grounds refused to strike down a Virginia statute which required the sterilization of mentally retarded persons: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind Three generations of imbeciles are enough."); *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (holding "equal but separate accommodations for the white and colored races" were constitutional); *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating the public accommodations sections of the 1875 Civil Rights Act); *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872) (affirming a state court's denial of a license to practice law because the applicant was female: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life [T]he domestic sphere . . . properly belongs to the domain and functions of womanhood.") (Bradley, J., concurring).

favours extension, extension with reduction in per capita distribution, or outright nullification. The legislature is best suited to make the correct decision. Although the temptation is great to extend the benefits to everyone, courts should not rely on the legislature to correct judicial mistakes. Courts therefore should generally delay enforcement of nullification judgments to allow the legislature time to formulate the best solution.

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