Remedying Underinclusive Statutes.pdf

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# REMEDYING UNDERINCLUSIVE STATUTES

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I. INTRODUCTION

A California employer who does not want to comply with California's mandatory unpaid pregnancy leave statute has reached the United States Supreme Court. The employer seeks to have the statute invalidated, claiming it is preempted by the Pregnancy Discrimination Act of Title VII of the Civil Rights Act of 1964. The employer is arguing that the California pregnancy leave act is fatally underinclusive because it does not provide similar employment protection for workers with short-term disabilities. The district court agreed with the employer; the court of appeals did not. The Su-

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2. The California Fair Employment and Housing Act provides:

It shall be unlawful employment practice unless based upon a bona fide occupational qualification:

(b) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions .

(2) To take a leave on account of pregnancy for a reasonable period of time, provided, such period shall not exceed four months.

CAL. GOV'T CODE § 12945 (West 1980).

The Pregnancy Discrimination Act of Title VII of the Civil Rights Act of 1964 provides in part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.


3. California Fed. Sav. & Loan Ass'n v. Guerra, 33 EMPL. PRAC. DEC.
preme Court will decide which court is right.

This case raises interesting, unresolved remedial issues beyond the merits of the claim. If the Supreme Court holds that the California pregnancy leave statute is preempted because it is underinclusive, that Court, or the court to which it remands the case, must determine the fate of the statute. Current law or comment provides little guidance for making that determination.

A statute is underinclusive if it fails to cover a class of people who are protected from unequal treatment by the equal protection provisions of the United States Constitution, a state constitutional provision, or a statute that mandates equality of treatment. In California Federal Savings & Loan Association v. Guerra, the employer argued that the state's pregnancy leave statute is underinclusive because a federal statute requires employers to treat employees with short-term disabilities and pregnant employees equally. Statutes that are invalid because they are underinclusive differ from statutes that are substantively invalid. With the former, the legislature has the power to enact the law; the problem is that it incorrectly limited the coverage of the statute. With the latter, the legislature lacks the power to enact the statute.

(CCH) ¶ 34,227 (C.D. Cal. 1984), rev'd, 758 F.2d 390 (9th Cir. 1985), cert. granted, 106 S. Ct. 783 (1986).

4. California Federal, 758 F.2d at 396.

5. In California Federal, the argument for preemption is that the language of the Pregnancy Discrimination Act requires pregnancy to be treated like other disabilities. Therefore, a state statute singling out pregnancy for favorable treatment conflicts with the federal statute. See Brief for the Petitioners (unless otherwise indicated, all briefs cited in this Article refer to California Fed. Sav. & Loan Ass'n v. Guerra, Docket No. 85-494 (pending in the U.S. Supreme Court)). The arguments for the validity of the state statute are that it equalizes employment treatment for women by ensuring that they do not lose their jobs because of childbirth just as men do not risk losing their jobs when they become a parent, and that the Pregnancy Discrimination Act is not inconsistent with the state statute. See Brief of Respondents. Further, inadequate leave policies that do not allow employees to return to work after pregnancy have a disproportionate impact on women. Neutral policies that disproportionately disfavor women are prohibited by Title VII. See Brief of Equal Rights Advocates, et al., Amici Curiae at 10-23.

6. See infra note 25.


8. 758 F.2d 390 (9th Cir. 1985), cert. granted, 106 S. Ct. 783 (1986).


10. For example, in Sloan v. Lemon, 413 U.S. 825 (1973), the state statute providing aid to parents of children attending private school was deemed substantively invalid since much of the aid would go to parents of children in religious schools in violation of the first amendment.
There are basically two types of underinclusive statutes—those that confer benefits unequally and those that penalize unequally. A statute that confers benefits can do so in two ways. It can affirmatively order the government or a third party to confer a benefit, or it can exempt a group of people from certain burdens such as taxes or regulations. In the latter case, the overall statute is burdensome. Some statutes both confer benefits and impose burdens unequally. For example, a gender-specific alimony statute that confers the benefit of alimony on needy wives but not needy husbands burdens wealthy husbands but not wealthy wives. But the class that is benefitted unequally is different from the class that is burdened unequally. Most underinclusive statutes treat one, not two, classes of people unequally. Although any statute that confers a benefit on one group penalizes the entity conferring the benefit, the entities burdened generally are not burdened unequally. For example, although employment regulation statutes burden employers, typically all similarly situated employers have the same burden.

One can generally distinguish between the two types of underinclusive statutes by determining whether the excluded or included class member is bringing suit. When a statute confers benefits unequally, the excluded class member will sue to be included in the statute. When a statute penalizes unequally, the class member covered by the statute generally will bring suit to invalidate the statute. In addition, with respect to the statutes that confer benefits, the providers of the benefits, who generally are not members of a class treated unequally, will sue to invalidate the statute. With respect to the statutes that penalize, parties not unequally penalized cannot bring suit to extend a statute to penalize those not covered.

14. But see Burrow v. Kapfhammer, 284 Ky. 753, 145 S.W.2d 1067 (1940) (independent restaurant owner, but not hotel restaurant owner, required to pay minimum wage).
18. But see Burrow, 284 Ky. 753, 145 S.W.2d 1067.
19. See, e.g., California Federal, 758 F.2d 390.
20. See Linda R.S. v. Richard D., 410 U.S. 614 (1973). In Linda R.S., the mother of an illegitimate child attempted to have the child's father prosecuted, seeking to extend the statute penalizing fathers of legitimate children for nonsupport to fathers of illegitimate children. The Supreme Court held that prosecution would not necessarily assure child support and that "a citizen lacks standing to contest the
Although in some cases it may be difficult to determine whether the statute confers a benefit or imposes a burden, this Article will focus on the problems of statutes that affirmatively confer benefits. The Article will not discuss statutes that impose burdens unequally or burdensome statutes that have unequal exceptions.

The articulated remedial approach for an underinclusive beneficial statute offers a court two options: extend the statute to encompass the excluded group, or invalidate the statute by withdrawing its application to the covered class. Thus, in California Federal the Supreme Court could extend job protection to people with short-term disabilities or withdraw that protection from pregnant women.

The existence of two inconsistent remedial options creates problems that courts have not addressed. The purpose of this Article is to identify those problems and to propose an alternative remedial approach. This Article will use the California Federal case to illustrate the problems inherent in the current remedial approach. California Federal exemplifies a beneficial statute that is being challenged by a third party who is not a member of the class unequally treated. Nevertheless, the problems described and the solution proposed in this Article extend beyond that case to any case involving an underinclusive beneficial statute. In 1976, Justices White & Blackmun acknowledged an unresolved conflict in the circuits regarding the remedial approach taken with the underinclusive women's overtime statutes. The problem remains unresolved and few courts or commentators have addressed the issue.

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21. See infra text accompanying notes 287-94.
23. In California Federal, a remedy of extension could be analyzed in two ways. First, the pregnancy leave statute could be said to extend to protect people with short-term disabilities. Second, Title VII could be interpreted to require employers to provide people with short-term disabilities with the same protections that the pregnancy leave statute provides to pregnant women. In that case the statute remains intact and another law requires that the employers' burden of providing benefits be extended. The analysis that courts use has been the same in determining whether to extend a statute or whether Title VII requires the employer to provide the extension. Compare the cases discussed infra notes 187-234 and accompanying text (widows' dependency presumptions), with those discussed infra notes 235-68 and accompanying text (women's overtime statutes).
25. See Ginsburg, supra note 15, at 306 ("explicit discussion of the [remedial] issue remains thin" (article favors extension, requires application of legislative intent)); see also id. at 306 n.27 (discussion of cases); Miller, Constitutional Reme-
A case involving the tax exempt status of nonprofit corporations presented a similar remedial problem. In *Taxation with Representation of Washington v. Regan*, a nonprofit organization that lost a favored tax-exempt status due to excessive lobbying claimed that the statute permitting veterans' organizations with the favored tax-exempt status to lobby was underinclusive in violation of the equal protection clause. The court of appeals agreed and, rather than extend the less restrictive tax exemption statute to cover the plaintiff, invalidated the veterans' permission to lobby. The veterans' organizations had not been parties to the suit and challenged the propriety of the invalidation remedy. The Supreme Court reversed the court of appeals on the merits and thus did not reach the remedial issue.

The problems with the remedial approach for underinclusive statutes can be classified into three categories that will be discussed in detail below. First, the factors that the courts use to determine which remedial option to choose are too broad to be meaningful, are not applied consistently, or are not discussed. Thus, because the courts do not apply the same elements or do not apply them consistently, results are unpredictable. The outcome of litigation becomes a gamble. Apparently, the most inconsistent cases are those in which invalidation of statutes will take benefits away from women. Such statutes are frequently nullified. In other areas, the courts extend the protection of statutes held to be underinclusive so that beneficiaries do not lose benefits. Second, because the remedies are inconsistent and mutually exclusive, anomalous situations arise. Although a plaintiff can win on the merits, the defendant can win on the remedy. Or, the litigation can produce strange bedfellows with two

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27. Id. at 743.
29. 461 U.S. 540.
30. See infra notes 66-137 and accompanying text.
31. See infra notes 171-303 and accompanying text.
32. See infra notes 66-137 and accompanying text.
plaintiffs, or one plaintiff and amici curiae, arguing consistently with respect to the merits but inconsistently with respect to the remedy.\textsuperscript{33} The anomalous situations present standing problems. A plaintiff who can win on the remedy but lose on the merits usually lacks standing,\textsuperscript{34} but not in these cases. In addition, when two plaintiffs with the same position on the merits have opposing remedial interests, one of those plaintiffs is generally relying on the substantive rights of the other. This third party standing is frequently disallowed in other contexts, but is not discussed in underinclusive statute cases.\textsuperscript{35} Third, the suits that withdraw benefits from a formerly covered class of people upset the expectations of those who had been relying upon those benefits. The people who lose benefits were generally not represented in the suit.\textsuperscript{36}

This Article proposes that the appropriate remedy should be extension of beneficial statutes.\textsuperscript{37} If a court thinks such an extension is likely to be repealed, that court can stay its judgment for a period of time.\textsuperscript{38} If the underinclusive statute specifies what should happen if the statute is held to be underinclusive, however, that provision should govern.\textsuperscript{39} Most severability clauses do not address whether a provision held to be underinclusive should be extended or invalidated.\textsuperscript{40}

A number of reasons support this proposal. First, the courts should not hastily invalidate the substance of a law because its coverage is underinclusive.\textsuperscript{41} In fact, most courts do not invalidate underinclusive statutes. Extension is the usual remedy, except in certain cases involving sex discrimination.\textsuperscript{42} Those cases need not be governed by separate rules. Extension was also the usual remedy when statutes were challenged under the privileges and immunities clause of the United States Constitution.\textsuperscript{43} Second, extension is con-

\begin{itemize}
\item \textsuperscript{33} See infra notes 304-08 and accompanying text.
\item \textsuperscript{34} See infra notes 315-23 and accompanying text.
\item \textsuperscript{35} See infra notes 324-57 and accompanying text.
\item \textsuperscript{36} See infra notes 358-80 and accompanying text.
\item \textsuperscript{37} In some cases, determining the difference between beneficial and burdensome statutes is difficult. See infra text accompanying notes 287-94.
\item \textsuperscript{38} See infra note 382.
\item \textsuperscript{39} One commentator has argued that if such a clause insulates legislative action from judicial review the clause should not be given effect. See Miller, supra note 25, at 132-41; see also A Norm-Based Model, supra note 25, at 1207; cf. Mathews, 465 U.S. 728 (clause does not foreclose judicial review). This Article does not address that issue.
\item \textsuperscript{40} See infra text accompanying notes 162-64.
\item \textsuperscript{41} See infra text accompanying note 392.
\item \textsuperscript{42} See infra notes 66-137 & 390-406 and accompanying text.
\item \textsuperscript{43} See Note, The Effect of an Unconstitutional Exception Clause Upon the Remainder of a Statute, 55 Harv. L. Rev. 1030, 1035 (1942) [hereinafter cited as Unconstitutional Exception] ("The courts have adopted the theory that the privi-
sistent with principles of case and controversy and the judicial restraint in third party standing cases. Extension also is consistent with the remedial principle that for every wrong there is a remedy. Third, interests of fairness require giving the person who would lose benefits a chance to argue to retain them or to change the classification of beneficiaries to one that does not deny equal treatment to similarly situated people. If the act is extended and the legislature seeks to repeal it, those persons could be heard during hearings on the repeal. If the act is invalidated and never reintroduced, those voices would not be heard because there would be no legislative hearing and because they were probably not parties to the suit in which the statute was invalidated. In addition, the people who would lose benefits if the statute were invalidated typically have less political clout than those who seek invalidation. Thus, extending the statute helps equalize the power since the more powerful will need to instigate the political process. Finally, because repeal is probably easier than reenactment, requiring the repeal process to be invoked also tends to equalize the power.

II. Problems Caused by the Remedial Options for Underinclusive Statutes

A. The Factors Used Are Not Meaningful

1. Historical Analogy

When a statute is too broad but could be narrowed, or when a portion of a statute is substantively invalid and must be voided, courts face a remedial issue similar to that faced when the statute is underinclusive. In the underinclusive situation the question is whether to extend the statute to cover the class or to nullify the statute. In the overly broad cases, a court must decide whether the

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44. See infra notes 304-57 & 408-16 and accompanying text.
45. See infra notes 309-14 & 408-16 and accompanying text.
46. See infra notes 388-89 and accompanying text.
47. Id.
48. See supra text accompanying note 22.
statute can be applied as narrowed or must be nullified. At the turn of the century, the Supreme Court frequently found statutes to be too broad because Congress had not limited their scope to the commerce clause, the fifteenth amendment, or other federal powers. Frequently, those statutes were invalidated, but not always.

In cases in which a statute is partially invalid, a court must decide whether to preserve the valid portion of the statute or to invalidate the entire statute. If a section of the statute is invalid because it is underinclusive, a court must make two decisions. First, it must decide whether to extend or invalidate the underinclusive section. If it invalidates that section, the court must then decide whether the remainder of the statute can stand alone. The partial invalidity cases do not always involve problems of underinclusivity, however. A subsection of a statute may be substantively invalid. For example, a court may hold that a section of the statute exceeds the power of the legislature. The court must then decide whether the remainder of the statute can stand. In the early half of this century, the Supreme Court held that sections of statutes were invalid because Congress did not have certain powers, such as the power to set minimum wages and hours. Frequently, the whole statute was invalidated.

49. See, e.g., Butts v. Merchants & Miners Transp. Co., 230 U.S. 126 (1913) (federal law prohibiting racial discrimination in public accommodations invalid because not limited to District of Columbia, federal territories, and high seas); Employers' Liab. Cases, 207 U.S. 463 (1908) (federal law making employers liable for job related death and injury invalid because not limited to employees working in interstate commerce); Illinois Cent. R.R. v. McKendree, 203 U.S. 514 (1906) (federal order prohibiting cattle from crossing quarantine line invalid because not limited to cattle in interstate commerce); James v. Bowman, 190 U.S. 127 (1903) (federal statute prohibiting election bribery invalid because not limited to federal elections); Trade-Mark Cases, 100 U.S. 82 (1879) (federal trademark statute invalid because not limited to commodities in interstate commerce); United States v. Reese, 92 U.S. 214 (1875) (federal criminal law forbidding interference with right to vote invalid because not limited to cases of racial discrimination).

50. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (National Labor Relations Act valid as limited to transactions that burden interstate commerce); The Abby Dodge, 223 U.S. 166 (1912) (federal law prohibiting sale of sponges valid as limited to sponges gathered outside territorial limits); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (federal statute prohibiting labor contracts with foreigners valid as exempting ministers); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (federal piracy statute valid as limited to American vessels). For cases in accord, which upheld state freight taxes limited to intrastate freight or commodities, see, e.g., Singer Sewing Mach. Co. v. Brickell, 233 U.S. 304 (1914); New York ex rel. Hatch v. Reardon, 204 U.S. 152 (1907); Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888); Telegraph Co. v. Texas, 105 U.S. 460 (1881); Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872).


52. See, e.g., id. (Bituminous Coal Conservation Act of 1935, including price fixing provisions, invalid because Congress lacked authority to regulate wages and
but not always.\textsuperscript{53}

During the first part of the New Deal, courts invalidated many statutes because of overbreadth or an invalid section.\textsuperscript{54} The modern trend, however, has been to sustain the valid portion of statutes that are overbroad or contain a substantively invalid part.\textsuperscript{55} From 1900 through the first part of the New Deal in 1936, the courts also invalidated entire statutes because they violated substantive due process, infringing upon the freedom of contract or the marketplace.\textsuperscript{56} That analysis has fallen into disfavor and the courts defer to legislatures for the substantive validity of economic regulation.\textsuperscript{57} Today courts scrutinize regulations that disfavor groups protected by equal protection mandates or that disfavor fundamental rights.\textsuperscript{58}

In 1938, when litigants challenged the validity of statutes with varying results, Robert L. Stern published an article in which he asked, "Can these diverse holdings be reconciled on any ground?"\textsuperscript{59} Stern asserted that the Court's approach in these various cases "enables the Court to select arbitrarily and without satisfactory explanation from conveniently conflicting formulas the one which it wishes to use in a particular case."\textsuperscript{60} He demonstrated that the decision as to the validity of the statute turned on the Justices' views of the substance of the statute.\textsuperscript{61} He also noted that, although an early

\textsuperscript{53} See, e.g., Chicago Bd. of Trade v. Olsen, 262 U.S. 1 (1923) (§§ 5, 6 of Future Trading Act separable from invalid penalty clause). This case involved the same §§ 5, 6 of the Future Trading Act at issue in Hill v. Wallace, 259 U.S. 44, but a different penalty clause.

\textsuperscript{54} See J. Nowak, R. Rotunda & J. Young, Constitutional Law (3d ed. 1986) § 11.3.


\textsuperscript{56} See J. Nowak, R. Rotunda & J. Young, supra note 54, § 11.3, at 343 (substantive due process requires court to determine whether statute relates to a legitimate end, and to determine what is a legitimate end).

\textsuperscript{57} Id. § 11.4.

\textsuperscript{58} Id.

\textsuperscript{59} Stern, \textit{Separability and Separability Clauses in the Supreme Court}, 51 \textit{Harv. L. Rev.} 76, 87 (1937).

\textsuperscript{60} Id. at 101.

\textsuperscript{61} Id. at 114; see J. Nowak, R. Rotunda & J. Young, supra note 54, § 11.4, at 352 ("[T]he justices upheld laws which they personally agreed would be necessary to protect important social goals even though the legislation involved some restraint on commerce, while they struck down as arbitrary legislation laws they
case that refused to narrow a statute to save it did not view legislative intent as relevant, most cases purported to regard that factor as relevant to the decision whether to invalidate the statute. Many cases discussed the existence of a separability clause, but Stern demonstrated that cases did not turn on the existence of that clause. He said, "[T]he statement of the general principles for determining separability is necessarily phrased in such broad language that the Court can easily hold any statute separable or inseparable, as it chooses." He noted that, although some cases could be explained depending upon whether they were criminal or civil and state or federal, the cases did not articulate a rationale based on those grounds. Thus, although the courts generally relied on the intent of the legislature, sometimes evidenced by the existence of a separability clause, as the decisive factor for selecting which remedy to apply, that factor was not applied consistently.

2. Cases Have Inconsistent Results

Today courts are reaching inconsistent results in cases involving the issue of the continuing validity of an impermissibly underinclusive statute. In the 1960s and 1970s, the Supreme Court extended a variety of underinclusive statutes. It extended to illegitimate children state and federal statutes that conferred welfare benefits or parental support rights upon legitimate children. It extended welfare benefits, nonemergency medical care, and veterans' benefits to people who did not meet durational residency requirements, and welfare considered to tamper unnecessarily with the free market system.” (footnotes omitted).

64. Id. at 111.
65. Id. at 87-94.
benefits to people who lived together but were not related.\(^{68}\) It extended the right to object to adoption to unmarried, supportive fathers.\(^{69}\) It extended federal and state benefits to aliens.\(^{70}\) It extended social security benefits and air force benefits to nondependent husbands\(^{71}\) and family benefits to households in which a mother is unemployed.\(^{72}\)

During that same time, lower federal courts and state courts also extended underinclusive statutes that conferred benefits in a variety of situations. The courts extended federal and state statutes and the common law to protect illegitimate as well as legitimate children\(^{73}\). Wives were able to sue for loss of consortium as were husbands,\(^{74}\) and received the same property tax exemption for property devised to them by their husbands that their husbands would have received had their wives devised them property.\(^{75}\) Husbands received the right to obtain alimony\(^{76}\) and social security retirement of one year).

\(^{68}\) United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (food stamps); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (unmarried parents not excludable from assistance).

\(^{69}\) Caban v. Mohammed, 441 U.S. 380 (1979) (New York statute allowing mother but not father to veto adoption of children born out of wedlock unconstitutional; Court reversed opinion granting adoption, but did not discuss statute; Court extended the right to this father and therefore to all supportive fathers sub silentio).

\(^{70}\) Plyler v. Doe, 457 U.S. 202 (1982) (extending funds to school districts for education of illegal aliens); Graham, 403 U.S. 365 (extending welfare benefits to resident aliens).


\(^{75}\) In re Legatos, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969).

\(^{76}\) Loyacano v. Loyacano, 358 So. 2d 304 (La. 1978) (unnecessary to change alimony statute because equity permits alimony award to needy husband), vacated and remanded sub nom. (for further consideration in light of Orr v. Orr, 440 U.S. 268 (1979)) Loyacano v. Le Blanc, 440 U.S. 952 (1979); Orr v. Orr, 374 So. 2d
benefits,\textsuperscript{77} bachelors received a tax exemption reserved for single women,\textsuperscript{78} conscientious objectors received veterans' benefits,\textsuperscript{79} a widow could sue for the wrongful death of her minor husband,\textsuperscript{80} short-term residential indigents received nonemergency medical expenses and welfare benefits,\textsuperscript{81} women could get dependents' unemployment benefits for children even if the women did not contribute 100\% of the children's support,\textsuperscript{82} a sister could get unemployment dependency benefits\textsuperscript{83} and, until reversed on a procedural ground, a court extended employment protection to people with short-term disabilities.\textsuperscript{84} The Supreme Court and the lower court cases involved benefits from governments and from private parties. The governmental benefits included workmen's compensation,\textsuperscript{85} unemployment insurance\textsuperscript{86}


80. Harrigfeld v. District Ct., 95 Idaho 540, 511 P.2d 822 (1973) (wrongful death statute permitting only parents to bring action for death of minor also allows widow of husband under 21 to bring suit; age of majority was 18 for women and 21 for men).


84. Miller-Wohl Co. v. Commissioner, 515 F. Supp. 1264, 1267 (D. Mont. 1981), \textit{vacated and appeal dismissed}, 685 F.2d 1088 (9th Cir. 1982) (district court held Title VII required employers to provide pregnancy leave because neutral leave policy had disparate impact on women, company should provide reasonable leave period for all first-year employees rather than preclude sick leave for pregnant employees; court of appeals dismissed case for lack of jurisdiction because employer's challenge was federal defense to state claim).

social security benefits, welfare benefits, medical expenses, welfare benefits during a housing shortage, military benefits, and tax exemptions. Benefits from private parties included the right to parental support, the right to sue for wrongful death, the right to sue for loss of consortium, and the right to sue for alimony.

Despite the varying situations in which benefits have been extended, extension is not always the remedy for underinclusive beneficial statutes. Statutes providing that women must be paid overtime have met inconsistent fates. One federal circuit extended such a statute to benefit men. One federal circuit court, two federal district courts, and three state courts invalidated that law. One state court

to include dependent illegitimate grandchildren).

87. Westcott, 443 U.S. 76 (aid to families with dependent children benefits); Goldfarb, 430 U.S. 199 (male spousal benefits); Wiesenfeld, 420 U.S. 636 (male spousal benefits); Graham, 403 U.S. 365 (welfare benefits to resident and nonresident aliens); Jablon, 399 F. Supp. 118 (retirement benefits); Silbowitz, 397 F. Supp. 862 (retirement benefits); Griffin, 346 F. Supp. 1226 (illegitimate children benefits); Davis, 342 F. Supp. 588 (illegitimate children benefits).
88. Moreno, 413 U.S. 528 (food stamp program cannot exclude households on basis of household containing members unrelated to each other); Cahill, 411 U.S. 619 (unmarried parents cannot be excluded from assistance); Shapiro, 394 U.S. 618 (welfare benefits cannot be withheld from residents who have not resided one year within jurisdiction granting benefits).
89. Memorial Hosp., 415 U.S. 250 (medical expenses extended to short-term residents); Valenciano, 323 F. Supp. 600 (extended hospitalization and medical care to indigent persons residing in county less than preceeding 12 months at county expense).
90. Demiragh, 476 F.2d 403 (invalidated durational requirement of one-year residency for welfare eligibility during a housing shortage).
91. Soto-Lopez, 106 S. Ct. 2317 (state cannot have residency requirements to determine eligibility for veterans' benefits); Frontiero, 411 U.S. 677 (independent spouses of women military members entitled to same dependent status as spouses of male members for housing benefits); Robison, 352 F. Supp. 848 (veterans' benefits extended to conscientious objectors); Miller, 349 F. Supp. 1034 (illegitimate children entitled to medical benefits of military personnel).
92. Moritz, 469 F.2d 466 (IRS income tax deduction extended to unmarried man for nursing care of his parent); Legatos, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (state inheritance tax benefit extended to women).
93. Gomez, 409 U.S. 535 (illegitimate children have right to parental support); Sharp, 163 N.J. Super. 148, 394 A.2d 381 (all illegitimate children have same right to intestate inheritance from parent as legitimate children).
94. Levy, 391 U.S. 68 (illegitimate children can recover for wrongful death of mother); Harrigfeld, 95 Idaho 540, 511 P.2d 822 (age of majority for men 18, same as women, enabling wife to recover for wrongful death).
95. Rodriguez, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (each spouse has cause of action for loss of consortium).
96. Loyacano, 358 So. 2d 304 (unnecessary to change alimony statute because equity permits alimony awarded to needy husband); Orr, 374 So. 2d 895.
98. Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir.
case had a vigorous dissent. Statutes that provide a widow with a presumption of dependency upon her spouse for the purpose of receiving workmen's compensation death benefits also have been remedied inconsistently. Three state courts extended that presumption to widowers, three state courts invalidated the presumption, and the Supreme Court remanded that remedial issue to a state court rather than decide upon the remedy. On remand, the state court extended the presumption.

Since the 1960s, the only cases that did not extend underinclusive beneficial statutes are those in which the group to lose benefits upon invalidation were women. This is not to say that courts nullified every statute that benefited women. On the contrary, many have been extended. In the cases in which benefits were extended, however, had the statutes been invalidated, men as well as women would have lost benefits. No statute has been invalidated whereby a class


99. Fairfield, 260 Ark. at 281-84, 538 S.W.2d at 700-02 (Roy, J., dissenting).


104. One court did nullify a statute in which a group other than women lost benefits, but that court was ultimately reversed. In Taxation with Representation of Wash. v. Regan, 676 F.2d 715 (D.C. Cir. 1982), rev'd, 461 U.S. 540 (1983), a court of appeals invalidated veterans' organizations' permission to lobby under the statute regulating tax exemptions rather than extending the permission to lobby to other organizations. The Supreme Court reversed because a rational distinction existed between veterans' organizations and others. Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983).

105. Goldfarb, 430 U.S. 199 (social security benefits for widows extended to widowers); Wiesenfeld, 420 U.S. 636 (social security benefits for widows with surviving children extended to widowers); Frontiero, 411 U.S. 677 (housing benefits extended to independent husbands of air force wives); Legatos, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (husbands' property tax exemption, for property devised by wives, extended to wives).

106. Goldfarb, 430 U.S. 199 (widows would have lost social security benefits from their husbands' contributions); Wiesenfeld, 420 U.S. 636 (widows and children would have lost social security benefits from their husbands' contributions); Frontiero, 411 U.S. 677 (air force independent wives and their husbands would have lost
other than women would have lost benefits.

In the cases in which the Supreme Court extended a statute, if the Court had not done so, legitimate children would not be able to sue for the wrongful death of the mother,\textsuperscript{107} parental support,\textsuperscript{108} or social security death benefits;\textsuperscript{109} Connecticut, Pennsylvania, and the District of Columbia would have no welfare benefits;\textsuperscript{110} resident indigents would have lost medical care benefits;\textsuperscript{111} related people in households would have lost food stamps and assistance;\textsuperscript{113} widows would have lost child care benefits and widows' benefits;\textsuperscript{116} air force families with working wives would have lost household benefits;\textsuperscript{116} families with unemployed fathers would have lost assistance;\textsuperscript{117} and residents would have lost welfare, social security, and education benefits.\textsuperscript{119}

In the state cases, had the statutes been invalidated, legitimate children would have lost military medical care and the right to inherit,\textsuperscript{121} legitimate grandchildren would have lost workmen's compensation,\textsuperscript{122} husbands would not be able to sue for loss of consortium,\textsuperscript{125} widowers and single women would have lost a tax exemption, and wives would have lost alimony.\textsuperscript{125}

Contrastingly, in the cases in which statutes were invalidated, working women lost the right to overtime pay and widows lost the presumption of entitlement to workmen's compensation death benefits. Both of those groups could face hardships. The working women could have relied on their overtime pay. If the definition of dependency in workmen's compensation statutes is like that in the social housing benefits); \textit{Legatos}, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (husbands would have lost property tax exemption for property devised by wives).

\textsuperscript{107} Levy, 391 U.S. 68.
\textsuperscript{108} Gomez, 409 U.S. 535.
\textsuperscript{110} Shapiro, 394 U.S. 618.
\textsuperscript{111} \textit{Memorial Hosp.}, 415 U.S. 250.
\textsuperscript{112} Moreno, 413 U.S. 528.
\textsuperscript{113} Cahill, 411 U.S. 619.
\textsuperscript{114} \textit{Wiesenfeld}, 420 U.S. 636.
\textsuperscript{115} Goldfarb, 430 U.S. 199.
\textsuperscript{116} \textit{Frontiero}, 411 U.S. 677.
\textsuperscript{117} Westcott, 443 U.S. 76.
\textsuperscript{118} Graham, 403 U.S. 365.
\textsuperscript{119} Plyler, 457 U.S. 202.
\textsuperscript{120} Miller, 349 F. Supp. 1034.
\textsuperscript{121} Sharp, 163 N.J. Super. 148, 394 A.2d 381.
\textsuperscript{122} Carr, 124 N.J. Super. 382, 307 A.2d 126.
\textsuperscript{123} Rodriguez, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765.
\textsuperscript{124} \textit{Legatos}, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910; \textit{see also Moritz}, 469 F.2d 466.
\textsuperscript{125} Orr, 374 So. 2d 895; Loyacano, 358 So. 2d 304.
security statute, a spouse can fail to qualify as a dependent if she earns only slightly over one-fourth of the household income.\textsuperscript{126} Loss of her husband's earnings by his death and loss of the statutory death benefit could cause a hardship.

Not only is there inconsistency between the many cases that routinely extend underinclusive statutes and the mixed remedial cases involving women's overtime or widows' dependency presumptions, but also there is inconsistency in the Supreme Court's handling of underinclusive state statutes. Although the Court has extended state statutes that discriminate against nonresidents,\textsuperscript{127} illegitimate children,\textsuperscript{128} unrelated households,\textsuperscript{129} and aliens,\textsuperscript{130} in sex discrimination cases involving state statutes, the Court has remanded the cases to the state courts rather than extend the statute. Those cases involved alimony,\textsuperscript{131} age requirements for support,\textsuperscript{132} age requirements for access to 3.2% beer,\textsuperscript{133} and, as mentioned above, widows' presumption of dependency in workmen's compensation cases.\textsuperscript{134}

On remand, had those statutes been invalidated, wives would have lost the right to alimony—which could cause substantial hardship to women, particularly those who raised a family and developed no employment skills;\textsuperscript{135} widows would have lost the automatic right to workmen's compensation death benefits;\textsuperscript{136} boys aged eighteen through twenty-one might lose rights to parental support;\textsuperscript{137} and girls

\begin{itemize}
  \item \textsuperscript{126} \textit{Frontiero}, 411 U.S. 677, 689-90 n.23.
  \item \textsuperscript{127} \textit{Memorial Hosp.}, 415 U.S. 250; \textit{Shapiro}, 394 U.S. 618.
  \item \textsuperscript{128} \textit{Cahill}, 477 U.S. 619.
  \item \textsuperscript{129} \textit{Moreno}, 413 U.S. 528.
  \item \textsuperscript{130} \textit{Pyler}, 457 U.S. 202.
  \item \textsuperscript{131} \textit{Orr}, 440 U.S. 268.
  \item \textsuperscript{132} \textit{Stanton v. Stanton}, 421 U.S. 7 (1975).
  \item \textsuperscript{133} \textit{Craig v. Boren}, 429 U.S. 190 (1976).
  \item \textsuperscript{134} \textit{Wengler}, 446 U.S. 142; see \textit{supra} text accompanying note 83. The Court also remanded two cases not involving sex discrimination. In \textit{Skinner v. Oklahoma}, 316 U.S. 535, 538 (1942), a habitual criminal sterilization act was held to violate equal protection because it required sterilization of larcenists but not embezzlers. This Act was not a beneficial underinclusive statute. In \textit{Zobel v. Williams}, 457 U.S. 55, 65 (1982), the Court invalidated an Alaskan statute that distributed monetary benefits based upon length of residency. That statute contained a clause providing that if any portions were invalidated the remainder would also be invalid.
  \item \textsuperscript{135} Instead, on remand that statute was extended. \textit{Orr}, 574 So. 2d 895.
  \item \textsuperscript{136} Instead, on remand that statute was extended. \textit{Wengler}, 601 S.W.2d 8.
  \item \textsuperscript{137} In \textit{Stanton}, 421 U.S. 7, the issue was whether a statute requiring parental support for boys until age 21 and girls until age 18 was constitutional. The son had received support until age 21; the daughter had not. If the statute were invalidated, the daughter would not receive support equivalent to that of the son. On remand, the Utah Supreme Court viewed the female age of majority separately from that of males and held that 18 as the statutory age of majority was constitutional. \textit{Stanton v. Stanton}, 552 P.2d 112, 114 (Utah 1970). The United States Su-
might lose access to 3.2% beer. With those age statutes, total invalidation by a court does not make sense. If the statutes were nullified, parents would have no duty to support children, and anyone of any age could drink 3.2% beer. One of the age provisions must be changed.

3. Factors Used to Determine the Remedy

Apparently, Stern’s criticisms fifty years ago about the courts’ method of choosing whether or not to invalidate statutes are applicable to today’s underinclusive statute cases, unless these inconsistent results can be explained as involving different facts applied to the same law. Unfortunately, however, the law used to justify the remedy varies. This makes comparability of cases difficult, and predictability from precedent elusive.

Many of the cases that extend the underinclusive statute omit any analysis of the remedy. The cases are not all unanimous, but the dissents focus on the merits of declaring the statute invalid. Only the dissent in one Supreme Court case discussed the propriety of the remedy for a statute found invalid due to underinclusive-ness, although others objected to the finding of invalidity because of the resulting cost. The cases that analyze the remedy do so with

preme Court vacated that judgment, holding that males and females must be treated equally. Stanton v. Stanton, 429 U.S. 501, 503 (1977). The Utah Supreme Court then held that 18 was the age of majority for both sexes. Stanton v. Stanton, 564 P.2d 303, 305 (Utah), reh’g denied, 567 P.2d 625 (1977).


141. Memorial Hosp., 415 U.S. at 287 (Rehnquist, J., dissenting); Frontiero,
different factors.\textsuperscript{142}

Those factors may include differing aspects of legislative intent, disruption of the status quo, and occasionally the presence of a severability clause. These three factors appear in Justice Harlan’s concurrence in \textit{Welsh v. United States}.\textsuperscript{143}

In \textit{Welsh}, a man who objected to war on philosophical, but not religious, grounds argued that the first amendment entitled him to the same conscientious objector status received by those objecting to war on religious grounds. Four of the Justices interpreted the conscientious objector statute to cover the plaintiff’s situation.\textsuperscript{144} Three dissented.\textsuperscript{145} Justice Harlan concurred with the majority but indicated that their interpretation was not valid in light of statutory language excluding philosophical disagreement to war from statutory coverage.\textsuperscript{146} Justice Harlan would have held that the statute was underinclusive. He articulated the two remedial options of extension or invalidation\textsuperscript{147} and specified factors to consider in deciding which option to apply: the existence of a severability clause,\textsuperscript{148} the degree of legislative commitment to the statutory policy,\textsuperscript{149} and the amount of disruption implicated by either extension or invalidation.\textsuperscript{150} The problem with these factors is their breadth. As a result, courts use a variety of subfactors to analyze legislative intent or disruption. The direction of a court’s focus can determine the outcome, but that court’s focus is generally not determined by precedent. Thus, outcomes of cases are unpredictable. As will be demonstrated below, legislative intent and disruption of the status quo can be analyzed in a number of ways, none effectively.\textsuperscript{151}

\section*{4. Basic Problems with Legislative Intent, Disrupting the Status Quo, and Severability Clauses as Criteria}

An initial problem with legislative intent is that there are two different legislatures to which a court can refer.\textsuperscript{152} A court can con-

\textsuperscript{141} U.S. at 691 (Rehnquist, J., dissenting) (citing Frontiero v. Laird, 341 F. Supp. 201 (N.D. Ala. 1972)).
\textsuperscript{142} See infra notes 187-268 and accompanying text.
\textsuperscript{144} Id. at 342-43 (Black, Douglas, Brennan & Marshall, J.J.).
\textsuperscript{145} Id. at 367 (Burger, C.J., White & Stewart, J.J., dissenting).
\textsuperscript{146} Id. at 344-45 (Harlan, J., concurring).
\textsuperscript{147} Id. at 361 (Harlan, J., concurring).
\textsuperscript{148} Id. at 364 (Harlan, J., concurring).
\textsuperscript{149} Id. at 365 (Harlan, J., concurring).
\textsuperscript{150} Id. at 366-67 (Harlan, J., concurring).
\textsuperscript{151} See Miller, supra note 25, at 83 (legislative intent analysis is “deficient”); \textit{A Norm-Based Model}, supra note 25, at 1191 (legislative intent analysis is “impoverished”).
\textsuperscript{152} See \textit{A Norm-Based Model}, supra note 25, at 1188 n.9.
sider what the enacting legislature would have done, or what the current legislature would do if faced with a recent court decision invalidating a statute. Different evidence is relevant depending upon what type of legislative intent is analyzed. Historic legislative actions will be relevant in a historical approach, while current legislative actions are relevant in the modern approach. Some courts will view the present legislature’s extension of the statute determinative for extending the old statute to cover cases occurring before the new enactment. Other courts will ignore current law.

A more serious problem with legislative intent is that the court is trying to interpret a statute that the legislature never passed. Most cases using legislative intent involve interpretation of ambiguous language that the legislature had enacted. With an underinclusive statute, however, the court seeks to determine an intent the legislature never had; that is, what it would have done if it had enacted the statute in a different way or if it had known that the only two choices were to expand the statute it had enacted or not to enact the statute. Courts often miss this aspect of legislative intent and focus on the intent expressed in the statute that the legislature initially passed. Focusing only on that intent, however, does not illuminate what the legislature would do if faced with an all or nothing legislative option with respect to the subject matter.

Because the courts frequently overlook the fact that they are analyzing a “what if” type of legislative intent—what would the legislature enact if it knew it constitutionally could not enact what it did enact—the courts do not recognize the problem of using legislative intent to determine the remedy. The problem is that this intent is speculative. A court must guess whether the legislature would prefer continuing the benefits for those covered or making sure that those not covered do not receive benefits. Engaging in this specu-

156. See Welsh v. United States, 398 U.S. at 355-56; Schmoll v. Creecy, 54 N.J. 194, 202-03, 254 A.2d 525, 529-30 (1969); see also Ginsburg, supra note 15, at 309-10; Stern, supra note 59, at 97-99; Extension versus Invalidation, supra note 25, at 121; A Norm-Based Model, supra note 25, at 1188-89.
158. See, e.g., Bastardo v. Warren, 4 EMPL. PRAC. DEC. (CCH) ¶ 7635 (W.D. Wis. 1970).

For example, a legislature might weigh the interests of employers, on the
lation causes courts to consider factors other than legislative intent. These can be categorized as factors of disruption.

Courts often discuss cost and size factors when considering the extent of disruption of the status quo of invalidating a statute. As with legislative intent, however, these factors have varying viewpoints. Cost and size considerations apply to both classes affected. The class that will lose benefits has a size, and the cost of the loss of benefits could be substantial to individuals in that class. Similarly, the group to which the benefits will be extended has a size and the cost to the provider of the benefits may be substantial. The courts rarely compare these figures, however, and the figures are not always known. Rather, a court may discuss the cost of extending the benefit and omit discussion of the cost to the group that will lose the benefit. Alternatively, a court may discuss the importance of the statute to the protected group and not discuss the cost of extension. Some courts do both.

The severability clause is rarely a useful factor and courts rarely discuss it. It is generally not written with the idea that a portion of a statute may need to be extended or invalidated; rather, the clause is designed to address what happens to the valid portion of a statute when a portion of it has been substantively invalidated and must be voided. Usually the clause provides that the remainder of

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one hand, and female and minor employees, on the other, and decide that any adverse effects imposed on employers by a minimum wage law are offset by the benefits accruing to women and children. But if such a law could not constitutionally fail to include adult males, a legislature might decide that it is better to have no minimum wage law at all. *Id.* at 5503; see also Miller, *supra* note 25, at 86-91 (impossible to determine legislative intent; judge assesses worth of legislation).


163. But see *Jablon v. Secretary*, 399 F. Supp. 118 (D. Md. 1975), aff'd mem., 430 U.S. 924 (1977). In *Jablon*, the court pointed to the Social Security Act's separability clause, 42 U.S.C. § 1303 (1982), as a basis for extending the wives' dependency presumption to husbands for obtaining retirement benefits. 399 F. Supp. at 131-32. That clause provides that if any provision or application of the Act is invalid, the remainder or application to other situations "shall not be affected." *Id.* (citing 42 U.S.C. § 1303). That clause could be read to support either remedy. Either the invalid provision is the one denying retirement benefits to dependent husbands and the provision affecting wives should not be nullified, or the provision affecting wives is invalid as underinclusive and should be nullified.
the statute will survive.\textsuperscript{164}

Another problem is that courts do not want to "usurp" the legislative prerogative,\textsuperscript{166} but courts vary as to what type of judicial action is legislative. Many courts consider extending a statute legislative.\textsuperscript{166} Others consider invalidating a statute as legislative, "countermanding" a legislative pronouncement.\textsuperscript{167} In fact, both courts are correct and both actions are legislative.\textsuperscript{166} Enacting and repealing statutes are both legislative functions. Thus, not wanting to usurp the legislature is a meaningless factor and should not be considered. The court should not refrain from extending or nullifying the statute because either remedy is legislative. Such judicial inaction would cause uncertainty as to whether the recipients could continue to receive benefits until the legislature addresses the problem. That could result in significant delay.\textsuperscript{169} Nor should the court refuse to address issues of underinclusiveness because the remedy is legislative. That inaction "would immunize from judicial review statutes that confer benefits unevenly. The legislature would have power, unchecked by the judiciary, to contract the equal protection principle in a significant class of cases."\textsuperscript{170} Several cases illustrate the types of problems encountered in the current remedial approach for underinclusive statutes.

\begin{itemize}
\item \textsuperscript{164} See A Norm-Based Model, supra note 25, at 1188. But see Heckler v. Mathews, 465 U.S. 728 (1984). In Heckler, Congress responded to the Supreme Court's extension of social security benefits in Califano v. Goldfarb, 430 U.S. 199 (1977), to nondependent widowers by requiring both widows and widowers to deduct from those benefits any federal or state pensions. Congress made the set-off applicable to widowers immediately, but delayed its application to widows for five years to avoid upsetting their reliance interests. Congress wrote a clause specifically addressing the potential underinclusive problem providing that should the disparate timing be invalid, the delay provision for widows would fall. The Supreme Court affirmed the provision on the merits, finding that it did not violate the equal protection clause. The Court did not reach the remedial issue. For a critique of Heckler, see Miller, supra note 25.
\item \textsuperscript{165} See Homemakers, 509 F.2d 20, 22; Doctors Hosp., Inc. v. Recio, 383 F. Supp. 409, 417 (D.P.R. 1974); Bastardo, 4 Empl. Prac. Dec. (CCH) \textsuperscript{1} 7635, at 5503.
\item \textsuperscript{166} See, e.g., Arp, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293; Day, 412 Mich. 698, 316 N.W.2d 712.
\item \textsuperscript{168} See Ginsburg, supra note 15, at 317 ("If [a court] declares the statute unconstitutional as written, the remaining task is essentially legislative."); see also Miller, supra note 25, at 114 (repealing legislation is legislative, referring to Justice Harlan's concurrence in Welsh v. United States, 398 U.S. 333, 344, 361 (1970)).
\item \textsuperscript{169} See generally Unconstitutional Exception, supra note 43, at 1032-33.
\item \textsuperscript{170} Ginsburg, supra note 15, at 303 (footnote omitted); see also id. at 317-18.
\end{itemize}
5. Cases Demonstrate Problems

a. Califano v. Westcott

In Califano v. Westcott, the Justices disagreed about the remedy. Westcott dealt with the Social Security Act's Aid to Families with Dependent Children statute, which provided that a family with dependent children could receive benefits if the father, but not the mother, became unemployed. The Court unanimously ruled that the statute was underinclusive under the equal protection clause. The Court also unanimously held that Justice Harlan's concurrence in Welsh correctly recognized two remedial options for an underinclusive statute. The Court split five to four, however, on the choice of the option. The majority ordered the statute extended to provide benefits to families in which either parent becomes unemployed. The Court applied the three factors of legislative intent, existence of a severability clause, and disruption. The Court did not specify which legislative intent was relevant, but focused on the commitment of the legislature to the beneficiaries of the Social Security Act stating, "Congress plainly meant to protect" needy children. This intent was bolstered by a "strong severability clause" indicating an intent not to nullify benefits. With respect to disruption, the Court discussed the hardship to needy children that would result from loss of benefits. Although extending benefits under the statute would increase costs for state governments, the Court noted that the federal government provides most of the cost through its matching grant program and that the states could choose not to provide these benefits. The Court also deemed it significant that no party sought nullification.

The Court's disinclination to withdraw benefits from the current recipients was illustrated by its rejection of the remedy proposed by

173. The Court stated: "Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [the statute] 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."

174. Id. at 90.
175. Id.
176. Id. at 92.
177. Id. at 93. Query whether the majority is implying that a cost to the federal government is not a cost to be considered in determining a remedy.
178. Id. at 90-91.
the Commissioner of Massachusetts. The Commissioner argued that the statute should be changed from providing benefits to unemployed fathers to providing them to unemployed principle wage earners.\textsuperscript{179} Noting that some families might lose benefits under that approach, the Court stated, "we would hesitate to terminate needy families' entitlement to statutory benefits merely because the unemployed father cannot prove 'breadwinner' status."\textsuperscript{180}

The dissent applied different aspects of the same factors to contend that nullification was the appropriate remedy. In looking at legislative intent, Justice Powell referred to a Congress of twelve years earlier that had changed the gender neutral provision of the statute to the one under challenge. Justice Powell said that the majority had "compel[led] exactly the extension of benefits Congress wished to prevent."\textsuperscript{181} It is not clear, however, that Congress would have enacted no unemployment protection had it known that the gender specific statute was invalid. Justice Powell did say, "[w]e cannot assume that Congress in 1968 would have approved this extension if it had known that ultimately payments would be made whenever either parent became unemployed."\textsuperscript{182} But he could not assume Congress would approve of withdrawing benefits from all families, either.

With respect to disruption, Justice Powell focused on the hardship of a government having to allocate limited funds and noted that Congress had discretion to pass retroactive benefits to those harmed.\textsuperscript{183} The majority had noted that the state was free to cease benefits.\textsuperscript{184} Since in both situations a legislature can always override a court, one remedy is not more justifiable than the other.

Justice Powell in \textit{Westcott} indicated that he is of the "extension is legislative" school. He said, "Rather than thus rewriting [the section of the statute], we should leave this task to Congress."\textsuperscript{185} But repealing is also legislative.\textsuperscript{186} Thus \textit{Westcott} illustrates that the factors used for determining the remedy can be applied to either extension or nullification by shifting the focus of each factor.

\textbf{b. Widows' Dependency Presumptions}

The spousal dependency cases also illustrate that courts arrive at different results by using different aspects of legislative intent.

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{179} \textit{Id.} at 91.
\item \textsuperscript{180} \textit{Id.} at 92.
\item \textsuperscript{181} \textit{Id.} at 95 (Powell, J., concurring in part and dissenting in part) (footnotes omitted).
\item \textsuperscript{182} \textit{Id.} at 95-96.
\item \textsuperscript{183} \textit{Id.} at 96.
\item \textsuperscript{184} \textit{Id.} at 93.
\item \textsuperscript{185} \textit{Id.} at 95 (Powell, J., concurring in part and dissenting in part).
\item \textsuperscript{186} \textit{See supra} text accompanying notes 167-68.
\end{itemize}
\end{footnotes}
Some courts have extended the widow's dependency presumption to widowers in workmen's compensation statutes.187 Others have invalidated the presumption.188 Most of the courts use legislative intent to justify their result. Although one could expect the cases from different jurisdictions to have disparate results if the differing legislatures had different intents, the differences in result are due to inconsistent analyses, not differing intents. The spousal dependency cases involve statutes that provide benefits to a wife or widow with a conclusive presumption that she is or was dependent on her husband, but provide benefits to husbands or widowers only if they can prove dependency. The first cases to consider this issue involved military, social security, or railroad retirement benefits. In those cases, the Supreme Court held that the differential treatment violated the equal protection provision of the fifth amendment, and extended the presumption to cover men.189

The Supreme Court cases generally offered little analysis for the remedy and merely cited other cases that extended statutes.190 In Silbowitz v. Secretary,192 the district court gave no rationale for extending to husbands the wife's presumption of dependency for social security retirement benefits, but the court discussed several statutes in which Congress had made similar extensions.193 Thus, Silbowitz implicitly used a current legislative intent analysis. Jablon v. Secretary193 involved the same social security provision as in Silbowitz. The Jablon court held that although the increased costs would not preclude extension, extending the presumption of dependency in the case at bar would be cheaper than the cost of individualized determi-

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192. Id. at 868-69.
nations. The Jablon court also held that the Social Security Act's provision providing that valid sections should survive the invalidity of other sections mandated extension. However, that severability clause does not explicitly address what happens to the underinclusive clause.

The court in Kalina v. Railroad Retirement Board, which extended to husbands the wife's presumption of dependency upon her husband for a retirement annuity, held that to invalidate the presumption would be legislative, saying that invalidation "would be contrary to the considered decision of Congress that spouses of male railroad workers are to be conclusively presumed dependent." The court also said that the provider of benefits "should address its concern for the solvency of the retirement fund to Congress." In 1980, in Wengler v. Druggists Mutual Insurance Co., the Supreme Court, with one dissent, held that a state workmen's compensation statute that required widowers but not widows to prove dependency on the deceased spouse to recover workmen's compensation death benefits violated the equal protection clause of the fourteenth amendment. The Court remanded the case to the state court, stating that "[b]ecause 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." The Missouri state court in Wengler, following its legislature, extended the statute. If the statute had been invalidated, widows would have to prove dependency and those that could not would no longer receive benefits.

Three state cases extended the spousal dependency in workmen's compensation cases and three nullified it. Of these six cases, only two were decided after Wengler and both of them invalidated the presumption. The difference in the rationale between the cases that extended and those that nullified the statute parallels the difference between the majority and dissent in Westcott.

In Tomarchio v. Township of Greenwich, which extended the

194. Id. at 132.
195. Id. at 131-32.
196. See supra text accompanying notes 162-64.
198. Id. at 1210.
199. Id.
200. 446 U.S. 142 (1980).
201. Id. at 152-53.
203. See supra notes 187-88.
204. Day, 412 Mich. 698, 316 N.W.2d 712; Davis, 603 S.W.2d 718.
presumption, the New Jersey Supreme Court focused on the legislative intent to protect the beneficiaries, without specifying which legislature's intent was relevant. The Court did not want to "countermand the Legislature's concern for the welfare of the widows of working men," believing that to require sacrifice by widows would be more disruptive of the legislative plan. The court did not discuss the cost of extending the benefits.

Another court that extended the widows' dependency presumption did so noting that the legislature could "require or not, as it sees fit, that a surviving spouse demonstrate dependency as a condition for eligibility for death benefits." A third court held that to invalidate the presumption "is altogether inequitable and unnecessary as the means of curing the Constitutional defect found." It also followed the state legislature, which had extended the presumption, and applied the extension to cases governed by the prior statute. This court thus focused on the current legislature. Seemingly, recently enacted legislation on point would be dispositive, but closely related legislation was not so in one case. In *Homemakers, Inc. v. Division of Industrial Welfare*, the court refused to extend women's overtime to men despite a legislative enactment that authorized an executive agency to prescribe overtime payments for men and women.

The three courts that failed to extend the dependency presumption in workmen's compensation cases sought to determine the intent of legislatures over fifty years ago. In Michigan in 1927 and in California in 1917, the widowers' presumption was deleted from what had been a gender neutral spousal presumption of dependency. Both the Michigan and California courts concluded that those legislatures had retained the widows' dependency presumption for administrative convenience purposes, not for concern for widows.

206. *Id.* at 76-77, 379 A.2d at 854-55. However, *Tomarchio* did not extend all of the statutory benefits. The New Jersey death benefit statutes provided that widowers but not widows would receive benefits even upon remarriage, but for no more than 450 weeks, and that widows would receive benefits for their lifetime if they did not remarry and no benefits if they did. The court combined the provisions and held that everyone would get lifetime benefits that would terminate upon remarriage. If the court had extended both benefits, it would have established a benefit that the legislature had not created—lifetime benefits regardless of remarriage.


208. *Davis*, 603 S.W.2d 718, 721.

209. *Id.* at 721.

210. *Id.*


212. *See supra* note 188.

213. *Arp v. Workers' Compensation Appeals Bd.*, 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Day v. W.H. Foote Memorial Hosp., Inc.*, 412 Mich. 698, 316 N.W.2d 712 (1982). To determine that the legislature was not concerned with compensating widows, the *Day* court compared the compensation pro-
Neither court used legislative reports to support its position. Both courts invalidated the presumption of dependency based on the fact that the legislatures excluded widowers from the presumption. It does not follow from the fact that the legislature had eliminated the widower's presumption and had retained the widow's presumption for administrative convenience purposes, however, that the legislature would have preferred to have no dependency presumption if the widower exclusion was invalid. Presumably by retaining the widow's presumption, the legislature intended that provision to be operative.

A Georgia court in Insurance Co. of North America v. Russell examined the intent of the 1920 and 1930 legislatures. Those legislatures had never deleted men from the statute, but had originally passed a gender specific presumption, presumably because, according to the court, "husbands most often supported their wives and wives were dependent upon husbands." The court did not believe that "given the choice, [the legislature] would have provided that an able-bodied widower should be entitled to death benefits absent a showing of dependency upon his deceased wife." Therefore, the court invalidated the presumption, extending the widows' definition of dependency to widowers. However, the court also invalidated the restrictive provision applicable to widowers requiring that proof of dependency include proof of cohabitation, incapability of self-support, and actual dependency on his spouse.

All three of the courts discussed some aspect of cost. In the Michigan case, Day v. W.H. Foote Memorial Hospital, Inc., the court said that the cost of extending the presumption to widowers provided by the workmen's compensation statute for widows of deceased employees with the compensation for relatives of single deceased workers, 412 Mich. at 707-08, 316 N.W.2d at 716. Although it did not spell out the analogy, perhaps the court was comparing independent widows with the relatives of single people, most of whom would be independent. The analogy is imprecise since death benefits to a nondependent for the death of a single person and death benefits to an independent wife for the death of her husband could be viewed differently. A legislature could determine that a widow had a unique economic interrelationship with her husband that other relatives do not have with each other. With respect to the administrative convenience rationale, the Day court said, "[T]he decision not to carry forward the presumption for surviving husbands may have reflected an expanding female work force and the judgment that many women who worked did not contribute to their husbands' support." 412 Mich. at 706-07, 316 N.W.2d at 715-16 (footnote omitted). This statement minimizes the importance of women's work.

214. Arp, 19 Cal. 3d at 410, 563 P.2d at 856, 138 Cal. Rptr. at 301-02; Day, 412 Mich. at 701, 704, 316 N.W.2d at 713, 714.
216. Id. at 272, 271 S.E.2d at 181.
217. Id.
218. Id. at 272-73, 271 S.E.2d at 182.
might exceed the cost of proving dependency.\textsuperscript{220} This statement had no factual basis and the court did not analyze whether the legislature intended to allocate any money for adjudicating every surviving spouse claim rather than using that money to provide benefits. The court in \textit{Jablon},\textsuperscript{221} which extended a dependency presumption to husbands for purposes of collecting retirement benefits, found that the cost of extending the benefits would be $411 million, but that the cost of individual determinations of dependency would be $1 billion.\textsuperscript{222} Some courts hold that the cost of a remedy does not justify withholding the remedy.\textsuperscript{223}

In the California case, \textit{Arp v. Workers' Compensation Appeals Board},\textsuperscript{224} the court noted that extending the presumption to widowers would probably not increase the cost of workmen's compensation insurance because few women are killed in industrial accidents.\textsuperscript{225} Nonetheless, the court invalidated the provision.\textsuperscript{226}

The \textit{Arp}, \textit{Russell}, and \textit{Day} courts discussed the effect of invalidation of the dependency presumption on the widows who would be able to prove dependency, but only two discussed the effect of invalidation on those who would lose benefits entirely.\textsuperscript{227} Both \textit{Arp} and \textit{Russell} discussed the impact of nullifying the presumption on independent widows. Both courts noted that under the workmen's compensation statutes, dependent widows would still recover benefits after proving dependency, and independent widows with children would recover death benefits to put the family in the same position as if the widow had recovered. Partially dependent widows would recover, although the courts did not say whether the partially dependent spouse would receive full or only partial benefit.\textsuperscript{228} Both courts noted that the only people who will be hurt are "childless, financially self-sufficient wives" and that the legislature can remedy that harm.\textsuperscript{229} The \textit{Arp} court, however, wanted to avoid "severe and unforeseen hardships" and made the decision prospective only,\textsuperscript{230} thus

\begin{itemize}
\item \textit{Id.} at 707, 316 N.W.2d at 716.
\item 399 F. Supp. 118.
\item \textit{Id.} at 132. But see Moss, 408 F. Supp. 403, 414 n.13 (counsel for the government disputed the statistics discussed in \textit{Jablon}, 399 F. Supp. 118).
\item \textit{See}, e.g., \textit{Jablon}, 399 F. Supp. at 130 and cases cited therein.
\item 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977).
\item \textit{Id.} at 409, 563 P.2d at 857, 138 Cal. Rptr. at 301. As women assume more jobs traditionally limited to men, this statistic could change.
\item \textit{Id.} at 411, 563 P.2d at 857, 138 Cal. Rptr. at 302.
\item \textit{Id.} at 409-10, 563 P.2d at 857-58, 138 Cal. Rptr. at 301-02; \textit{Russell}, 246 Ga. 273, 271 S.E.2d at 182.
\item \textit{Arp}, 19 Cal. 3d at 410, 563 P.2d at 857, 138 Cal. Rptr. at 301; \textit{Russell}, 246 Ga. at 272-73, 271 S.E.2d at 181-82.
\item \textit{Arp}, 19 Cal. 3d at 410, 563 P.2d at 857-58, 138 Cal. Rptr. at 302; \textit{Russell}, 246 Ga. at 273, 271 S.E.2d at 182.
\item \textit{Arp}, 19 Cal. 3d at 411, 563 P.2d at 858, 138 Cal. Rptr. at 302.
\end{itemize}
acknowledging the potential hardship of invalidation.

The Day court did not discuss the definition of dependency or the potential harm to independent widows. As mentioned before, in the social security cases a person is independent if she earns more than half of her support, which is slightly more than one-fourth of the family income. The legislature could have determined that, on the whole, working widows earn less than widowers since women's wages generally remain less than men's wages. Although sex as a proxy for need is unacceptable, invalidating a statute without considering the impact on those it protects also should be unacceptable. The courts that do not extend the widows' presumption of dependency to widowers take away a benefit from independent widows in the name of equality, even though the women may have earned considerably less than their husbands.

The cases that invalidated the widows' dependency presumption did so after finding that the early legislatures did not intend to benefit widows. As will be seen below, the cases that invalidated women's overtime statutes found that early legislatures did intend to benefit women, but found that intent impermissible. In these cases, the women lose benefits because the legislatures intended both to benefit them and not to benefit them. The women are in a no win position and legislative intent as a predictive factor is not useful.

c. Women's Wage Statutes

Cases involving regulation of wages also illustrate the problems with the current lack of guidelines for determining the appropriate remedial alternative for underinclusive statutes. There is a split among the circuits, with one case extending to men a statute providing overtime to women and one federal court of appeals and two district courts invalidating such a statute. Moreover, three state courts also invalidated the women's overtime statute, one over a

231. See text accompanying note 126.
233. See supra text accompanying notes 212-17.
234. See infra text accompanying notes 249-51 & 256-57.
vigorously. Again, these courts considered different factors. The arguments in favor of extending the statutes focused on the policy behind the overtime statute and the importance of providing adequate wages to working people. The arguments for invalidating the overtime statutes, however, varied. Some courts believed that they lacked the power to "usurp" the legislative function. As with the widows' dependency cases that invalidated the statute, some courts looked at the fifty-year-old legislative history of the women's overtime statutes. One court discussed the cost of extension. None of the cases discussed the cost to women of losing the right to overtime pay.

The case that extended a state statute providing overtime benefits to women was Hays v. Potlatch Forests, Inc. The Arkansas statute at issue required employers to pay women a premium for overtime work. In Hays, an employer sought to declare the law invalid as underinclusive under Title VII. The court held that discrimination against men could be cured by extending the overtime act's provisions to cover men. The court looked at federal rather than state intentions, possibly because federal law required extension, which made the state intention irrelevant. The court found a policy of extension in the Equal Pay Act that requires an employer, when equalizing the wages of men and women who perform the same work, to increase the wages of the lower paid worker, not to decrease wages. In discussing the factor of disruption, the court noted that although the financial burden on employers might be onerous, federal labor laws have burdened employers for thirty years. The employer could seek repeal of the legislation or arrange the work schedule so as to avoid or minimize overtime. The court also noted that the employer contended it was already paying the men the same

App. 1978). The Fairfield case involved the same statute that the eighth circuit had extended in 1982. Hays, 465 F.2d 1081. The legislators apparently had not repealed the extension.


239. Hays, 465 F.2d at 1083-84; Fairfield, 260 Ark. at 282-83, 538 S.W.2d at 701 (Roy, J., dissenting).

240. Homemakers, 509 F.2d at 23; Doctors Hosp., 383 F. Supp. at 417; Idaho Trailer, 95 Idaho at 913-14, 523 F.2d at 46; Bastardo, 4 EMPL. PRAC. DEC. (CCH) ¶ 7635, at 5503.

241. Homemakers, 509 F.2d at 22-23; Fairfield, 260 Ark. at 280, 538 S.W.2d at 699-70.

242. Homemakers, 509 F.2d at 23.

243. 465 F.2d 1081 (8th Cir. 1972).

244. Id. at 1083.

245. Id.

overtime.\textsuperscript{247}

Four years later the Arkansas Supreme Court refused to follow *Hays* and invalidated the statute over a vigorous dissent. In *State v. Fairfield Communities Land Co.*,\textsuperscript{248} the Department of Labor brought suit to collect overtime payments on behalf of some female employees. After *Hays*, it is puzzling that the department did not also seek to collect those payments on behalf of men. In *Hays*, the majority held that the statute was underinclusive under Title VII, but could not be extended. Unlike *Hays*, the *Fairfield* court looked at state, not federal intent. The court noted that the wage act for women, which was passed in 1915, included limitations on employment for women and was upheld by the state supreme court as necessary to protect women's health.\textsuperscript{249} The *Fairfield* court further noted that unreasonably based distinctions between men and women are invalid. The court then said, "Of course it follows that if the Arkansas act is now invalid, its benefits cannot simply be extended to male employees under the Potlatch rationale."\textsuperscript{250} This reasoning is odd because it implies that the overtime statute is substantively invalid rather than underinclusive. The court did not really focus on legislative intent. Rather, the court combined two judicial theories of over fifty years apart to limit legislative action. The earlier theory, prohibiting the legislature from passing a wage act, was based on freedom of contract and is presumably no longer valid in Arkansas as in federal law.\textsuperscript{251} The modern limitation is based on prohibiting sex discrimination. By combining both judicial limitations to bar extension, the court created for this case a limitation on legislative action that is not applied to other legislation. Modern legislative enactments are governed by principles of equality but are no longer prohibited from regulating contractual relationships. The *Fairfield* court did not discuss what either the enacting or modern legislature would have done if either had known that overtime for women alone was invalid. The court did not discuss the fact that the legislature had not repealed the statute that the *Hays* court had extended.

The dissent in *Fairfield* believed that nullifying the law thwarted both state and federal policies. The dissent said,

For compelling reasons the Arkansas overtime act should be preserved. It is a law which serves untold numbers of working people. Neither repeal of the law nor judicial leg-

\begin{itemize}
\item \textsuperscript{247} *Id.* at 1083.
\item \textsuperscript{248} 260 Ark. 277, 538 S.W.2d 698, *cert. denied*, 429 U.S. 1004 (1976).
\item \textsuperscript{249} State v. Crowe, 130 Ark. 272, 274-75, 197 S.W. 4, 6-7 (1917). The *Crowe* court would have invalidated a wage act without such justification on the ground that it would impair freedom to contract.
\item \textsuperscript{250} 260 Ark. at 280, 538 S.W.2d at 700.
\item \textsuperscript{251} *See supra* text accompanying notes 54-58.
\end{itemize}
islation is necessary, but a fair and reasonable accommodation is warranted . . . . There is nothing more fundamental to the welfare of the Arkansas citizenry than adequate wages...

The dissent would have stricken those portions of the act that restricted women’s employment opportunities and would have preserved the wage provision, extended to similarly situated men. Another court that examined historic legislative history was *Homemakers, Inc. v. Division of Industrial Welfare.* In *Homemakers,* a company brought suit to restrain the state agency from enforcing the women’s overtime law. The court held that the law was invalid under Title VII and could not be extended. Its rationale was that extension “would usurp the legislative power vested exclusively in the state.” The court held that historically the law had been enacted to afford special protection for women, but that such a purpose was now discriminatory. In refusing to extend the statute, the court made two mistakes. First, because the legislature had intended to discriminate in favor of women does not mean that the law was substantively invalid and could not be extended to men. The court appeared to doubt its power to extend the act. Second, the court did not consider what the legislature would enact if faced with an all or nothing situation—whether to preclude overtime pay for anyone, including the women the legislature chose to protect, or to have overtime pay for all. The court’s concern about usurping the legislature appears factually misplaced since the court noted that the California legislature had reenacted legislation over a veto to allow the state agency to prescribe overtime for both men and women. The court said that the significance of this enactment was to demonstrate the legislature’s awareness that the prior law was invalid. The court, however, did not discuss the new act as evidence of legislative intent to extend overtime.

Two other courts claimed to lack the power to extend underinclusive women’s overtime pay acts. In *Doctors Hospital, Inc. v. Recio,* the court said, “This Court cannot order [the overtime provisions] applicable to female employees, [to] be extended to male employees . . . [t]hat would amount to usurpation of the legislative power . . . .” In *Bastardo v. Warren,* the court said, “enjoining

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252. *Fairfield,* 260 Ark. at 283, 538 S.W.2d at 701 (Roy, J., dissenting).
254. Id. at 23.
255. Id. at 22.
256. Id. at 23.
257. Id.
259. Id. at 417.
defendants from excluding men from the protection of [minimum wage act for female agricultural employees] presents a non-justiciable issue." But the courts do have that power. In Idaho Trailer Coach Association v. Brown, the court said that a minimum wage rate is "a function . . . peculiarly within the legislative sphere." In that case, the defendant state official had argued that the legislative policy underlying the overtime act and state antidiscrimination acts required extending the overtime provision to men. The court responded that if the legislature had intended that men be paid the same overtime as women, the legislature "could easily have so provided." The court then nullified the women's overtime act which nullified the legislative intent to have employers pay women overtime. If there was an explicit intent to have employers pay women overtime and an implicit intent to not require employers to pay overtime to men, why should a court nullify the explicit rather than implicit intent?

In Vick v. Pioneer Oil Co., a female employee sued to recover overtime wages. The court held the statute underinclusive under Title VII and held that the Texas legislature had purposely excluded men from the statute. The court said that the women's overtime statute had been voided by a federal court, but cited no authority. The court then said that the legislature reenacted the statute to apply only to women.

Thus, the cases used a wide variety of rationales to deal with the same issue. Most reached the same result, one did not. None of the cases invalidating the women's overtime pay act discussed the effect nullification of the act would have on women.

260. 4 EMPL. PRAC. DEC. (CCH) ¶ 7635 (W.D. Wis. 1970).
261. Id. at 5503.
262. See supra text accompanying notes 22 & 173.
264. Id. at 914, 523 P.2d at 46.
265. Id. at 913, 523 P.2d at 45.
267. Id. at 634.
268. Id. The court did not explain why the legislature would reenact a voided law. Nor did the court explain why the legislature's intention to exclude men was stronger than its intention to protect women and thereby warranted nullifying the overtime statute. Another court that extended a wrongful death statute to allow illegitimate children to bring suit said that the legislature's unsuccessful attempt to pass a wrongful death statute that would include illegitimate children could not be interpreted as an intent to exclude the children. It could only be interpreted as non-action. Schmoll v. Creecy, 54 N.J. 194, 202, 234 A.2d 525, 529-30 (1969).
d. Wage Cases With Similar Results But Different Reasoning

A major problem with the rationale pursuant to which courts are invalidating the wage statutes is that the conclusions do not necessarily follow from it. The same conclusions to nullify employers' obligations to pay minimum wage in 1940 and overtime in the 1970s followed from different and inconsistent rationales. In *Burrow v. Kapfhammer*, an owner of a restaurant not located in a hotel brought suit to invalidate the state's minimum wage act. The owner argued that the act's exemption of domestic work, which was defined to include hotel labor, was arbitrary, violating the equal protection clause. Noting no distinction between hotel restaurant workers and independent restaurant workers, the court of appeals agreed that the exemption was unconstitutional. The court did not nullify the entire minimum wage act because it covered a broad subject, had a wide scope, and included governing boards and officers. The question was what to do about the unconstitutional exemption of domestic workers. The court held that to strike it would be a legislative function. The court said, "[T]he legislature had expressly said that the statute should *not* apply to that class, and the court had no power or authority to legislate contrary to such express legislative provisions." The court expanded the exemption to encompass restaurant workers rather than invalidate either of the legislature's express statements, the minimum wage act itself, or the exemption of domestic workers.

*Burrow* and the cases that invalidated female overtime statutes reach a similar result—all exempt certain workers from legislation guaranteeing them a minimum or overtime wage. In *Burrow*, the workers were restaurant workers. In *Fairfield*, *Homemakers*, and *Extension versus Invalidation*, the courts were more consistent in striking the invalidating legislation and changing the ruling to encompass all workers rather than removing the exemption. The same rationale often applied in both cases. In *Burrow*, the court held that it was not its place to legislate contrary to the express wishes of the legislature. It did not nullify the entire minimum wage act because it was a broad statute.

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269. 284 Ky. 753, 145 S.W.2d 1067 (1940).
270. *Id.* at 760-61, 145 S.W.2d at 1072.
271. *Id.* at 761, 145 S.W.2d at 1072.
272. *Id.* at 762, 145 S.W.2d at 1072 (emphasis in original).
273. *Burrow* has been referred to as a case that uses the remedy of extension. For its time, this may have been a liberal opinion because it did not invalidate protective labor legislation. However, neither the *Burrow* opinion nor its commentators discussed one of the groups affected by the decision, the restaurant workers. The decision exempted these workers from the minimum wage statute, leaving their employers free to pay them lower wages. See Ginsburg, *supra* note 15, at 306 n.27; *Extension versus Invalidation*, *supra* note 25, at 120; *id.* n.22; Note, *Unconstitutional Discrimination of Exemption Clause Remedied by Adding Plaintiff to Class Exempted*, 54 *Harv. L. Rev.* 1078 (1941) [hereinafter referred to as *Unconstitutional Discrimination*].
Vick,276 and Doctors Hospital,277 the workers were women.278 To obtain this same result, the court in Burrow employed a rationale contrary to that used in the women's overtime cases. In the women's overtime cases, the courts held that they could not extend to men the express legislative statement protecting women because that would usurp the legislative function.279 Therefore, they nullified the express statute. In Burrow, the court held that it could not invalidate an express legislative statement and thus extended an exemption.280 Further, in the women's overtime cases the court invalidated a labor statute that covered many working women, while in Burrow the court held that a labor statute that had a broad scope could not be invalidated.281

The net result in both cases caused certain people to lose employment benefits. The fact that the rationales conflict is based on the form of the statutes. Burrow contained an exemption clause, exempting hotel but not independent restaurant workers. The women's cases did not exempt men; men were not mentioned. To extend a statutory provision in those cases, therefore, would produce opposite results. Extending the exemption took protection from the restaurant workers in Burrow; extending the affirmative obligations of the women's overtime statute would have provided protection to the men. One court found invalidation legislative;282 the others found extension legislative.283 Thus, the term legislative as a factor for determining the remedy for an underinclusive statute loses its usefulness when its application turns on the form of the statute. Protections can be taken away either by extending an exception or by invalidating an act. If the women's overtime statute had been a general statute that exempted men, extension of the exemption would produce the same result as not extending the affirmative statute.

At first glance, these cases seem consistent despite inconsistent reasoning because the courts declined to extend statutory obligations; they do not impose burdens on people not already regulated. Employers of domestic workers and employers of men do not have to pay higher wages. Thus, according to these cases and at least one commentator, the cases are not legislative.284 However, the cases are legislative because they take away benefits from restaurant workers

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278. See supra text accompanying notes 236-37.
279. See supra text accompanying notes 255 & 259-60.
280. Burrow, 284 Ky. at 762, 145 S.W.2d at 1072.
281. Id. at 760-61, 145 S.W.2d at 1072.
282. Id. at 762, 145 S.W.2d at 1072.
284. Unconstitutional Discrimination, supra note 273, at 1080.
and female workers, people the legislature chose to protect.  

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.

e. Distinction Between Benefits and Burdens Is Not Always Clear

Determining whether a statute is beneficial or burdensome can be difficult. This difficulty is apparent in *Burns v. Rohr*, in which a male employee brought suit to extend to men a statute mandating rest breaks for women. The company defended on the ground that the state statute requiring rest breaks was preempted by Title VII and therefore invalid. The plaintiff countered that protective underinclusive legislation should be extended. The court held that it could not characterize the rest break statute as protective since it reduced a woman's forty hour work week by 100 minutes. The court found the law restrictive and refused to extend it. Following the "extension is legislative" school, the court added that extension of a statute usurps the legislative function. *Burns* also held that statutes that make women less desirable for hiring should be invalidated. This begs the invalidation/extension argument because if the statute were evenly applied, women would not be less desirable as employees than men.

In determining whether to extend an underinclusive statute, therefore, the courts must distinguish between beneficial and burdensome statutes. For example, *Hays v. Potlatch Forests, Inc.*, which extended the overtime statute to men, distinguished cases that invalidated hour and weight lifting restrictions for women on the ground that those statutes "restricted employment opportunities and were, therefore, invalid."
f. California Federal Demonstrates Factors' Lack of Utility

That legislative intent as a factor is not useful can be seen in the briefs filed in California Federal.\(^9\) The parties or amici curiae used legislative intent to justify opposing remedies. Those seeking nullification of the pregnancy leave act argued that the court cannot "usurp" or "infringe" the legislative prerogative or rewrite state laws.\(^9\) They argued that if the court were to extend the California statute, it would be undertaking a "major legislative initiative" that no state\(^9\) had enacted, or that the court would be "legislating a disability benefit."\(^9\) These litigants did not mention that they seek repeal of a state initiative that eight other states have enacted or promulgated.\(^9\)


296. See Brief for the Petitioners at 48; Brief Amicus Curiae of the Chamber of Commerce at 19-22; Brief Amicus Curiae of the Equal Employment Advisory Council of the United States at 21-23; Brief for the United States as Amicus Curiae at 23-24. To the extent that there are arguments that courts lack power to extend the act, they are incorrect. See Westcott v. Califano, 443 U.S. 76, 89, 94 (1978) (Powell, J., concurring in part and dissenting in part).


Those seeking extension also used legislative intent, arguing that the legislative history of the pregnancy leave act shows an intense commitment to the policy and that "extension would not constitute usurpation of state authority; it would be less disruptive than striking a benefit California clearly intended to provide." In terms of disruption, the petitioner and the amici curiae favoring nullification argued that extension would be expensive for employers. They do not discuss the effect of invalidation upon pregnant women. Contrastingly, an amicus curiae seeking extension argued that most employers have short-term disability leave already so that extension would not be disruptive. Thus, the factors of legislative intent and disruption are used to justify either remedial option.

B. Inconsistent Remedial Options Produce Anomalous Situations and Standing Problems

Problems with inconsistent remedial options for an impermissibly underinclusive statute extend beyond the lack of clear criteria for choosing the appropriate option. The inconsistent options create unusual relationships among litigants and between litigants and the lawsuit itself.

1. Unusual Coalitions Among Litigants

Among the litigants are strange bedfellows. In California Federal, the employer plaintiff was joined by amici curiae Chamber of Commerce, whose members are businesses; the Equal Employment Advisory Council, whose members are employers, and the United States on both the merits and the remedy. These groups argued that the pregnancy leave statute is preempted by Title VII and should be invalidated. California Federal Savings was joined by the American Civil Liberties Union, the National Organization for Women,

2-310 to -311 (1986). In addition, Hawaii, Illinois, New Hampshire, Ohio, and Washington have promulgated regulations that operate in much the same way. See Brief of Respondents at 40 nn.28-29.


302. Brief Amicus Curiae of the Chamber of Commerce of the United States at 21 n.30; Brief for the Petitioners at 48.


304. Brief for the Petitioners at 33-36; Brief Amicus Curiae of the Chamber of Commerce of the United States at 12-16; Brief Amicus Curiae of the Equal Employment Advisory Council at 19-25; Brief for the United States as Amicus Curiae at 8-9.
and the American Federation of Labor and Congress of Industrial Workers on the merits, but not the remedy. These groups agreed that employees with short-term disabilities must be treated like pregnant employees. On the remedy these groups argued that the operation of Title VII requires employers to extend the California statute to include all employees with short-term disabilities. The defendant Guerra, the Director of the California Department of Fair Employment and Housing, disagreed with all of these organizations on the merits, arguing that Title VII does not preempt the California pregnancy leave statute. The state did not discuss what remedy would be appropriate if the Court rejected the state's assessment of the merits. Some amici curiae agreed with the state and also failed to discuss the remedial issues. Lillian Garland, the real party in interest who wants her job back with California Federal Savings, and the National Conference of State Legislatures agreed with the state and addressed the remedial issue by seeking extension.

2. Unusual Relationship Between Cause of Action and Remedy

An unusual relationship between a litigant and the lawsuit arises when a plaintiff can win on the merits but lose with respect to the remedy. For example, California Federal Savings could win on the issue that Title VII preempts the California pregnancy leave statute, but could lose its remedial argument that it should not have to guarantee a pregnant employee the right to return to her job. Rather, California Federal Savings might have to extend such job guarantees to all employees with short-term disabilities.
versely, had the plaintiff been an employee with a short-term disability, the employee could win on the merits but lose on the remedy—the Court could determine that short-term disability benefits cannot be granted exclusively to pregnant women yet find that no one should receive job protection.

This possibility raises an anomalous situation. Two plaintiffs seeking mutually inconsistent remedies may share the same interests on the merits. Although both claim to be wronged by the same action, only one can obtain the relief sought. This potential scenario conflicts with the general remedial notion that for every wrong there is a remedy and is at variance with the typical relationship between cause of action and a remedy. Typically, a plaintiff who prevails on the cause of action is entitled to a remedy that will rectify the proven injury. In proving entitlement to the remedy, the plaintiff must prove the nature of her own injury. In the case of an underinclusive statute, the proof required by the plaintiff does not involve the plaintiff but instead involves the intent of the legislature and the disruption of the status quo. This last factor may be considered in framing interlocutory equitable relief. A court may deny a motion for a preliminary injunction believing that the denial best protects the status quo. But the plaintiff can then proceed to trial to seek a permanent injunction. Based on the public interest or practicality of enforcing an injunction, a court might limit the extent of the final equitable decree, or a court might decide not to award equitable relief. However, the court will not award affirmative relief contrary to that which the plaintiff seeks. It will simply award no relief, enabling the plaintiff to seek legal damages.

When a statute is underinclusive the court must order a remedy. The court will either invalidate or extend the challenged statute. The court does not maintain the status quo as does a court that declines to provide the returning employee with another similar and suitable position.” Brief for the Petitioners at 6. If such a position is not available, the policy does not require California Federal Savings to reinstate the employee. Id.

310. See Extension versus Invalidation, supra note 25, at 145.

311. See F.W. Maitland, The Forms of Action at Common Law 6 (1948); see also Miller, supra note 25, at 104 (arguing constitutional right to remedy, citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

312. For example, in a suit seeking money damages, a plaintiff must prove that she was damaged by the amount claimed. D. Dobbs, Remedies §§ 3.2-.3 (1973). If a plaintiff seeks equitable relief, that plaintiff must show that his or her legal remedy is inadequate, id. §§ 2.1, 2.5, or that he or she is statutorily entitled to relief. See R. Leavell, J. Love & G. Nelson, Equitable Remedies and Restitution 131-32 (3d ed. 1980) (comparing cases that provide equitable relief with those that also require independent assessment of equities before granting an injunction authorized by a statute).

313. See D. Dobbs, supra note 312, § 2.10.

314. Id. § 2.5.
to order interlocutory equitable relief in the typical case. Thus, the status quo will be disrupted by the remedy. In addition, the plaintiff who fails to receive his or her desired remedy will not have an alternative remedy available to offer redress.

3. Case or Controversy Standing Problems

The anomalous relationship between the cause of action and the remedy creates problems of standing. Case and controversy standing requires parties to have an injury in fact and "a substantial likelihood that the remedy will redress the injury." In the underinclusive statute cases, all of the various plaintiffs have injury in fact. Parties excluded from benefits are injured by the exclusion. Parties paying benefits from which a similarly situated person is exempt are injured by the payments. Parties paying benefits, although not paying unequally, are also injured by the payments.

The optional nature of the remedy poses standing problems because it is not necessarily "substantially likely" that the remedy will redress the injury. Only one option will satisfy the plaintiff. However, as demonstrated above, in certain sex discrimination cases it is difficult for the plaintiff to know what remedy the court will select.

In the older cases in which statutes were challenged on the basis of overbreadth, the courts often held that plaintiffs could not raise the rights of third parties and were not themselves among the class of persons with respect to whom the act would be unconstitutional. At other times, however, the courts permitted plaintiffs to raise the rights of others to invalidate a statute. Although at least one commentator has noted the inconsistency between these cases, others have distinguished them on the basis of standing in relationship to the remedy chosen. If the court chose to strike the overbroad por-

316. Only the first two of the three will be injured by the violation of their own rights. See infra notes 325-28 and accompanying text.
317. See supra notes 66-137 & 187-268 and accompanying text.
318. See, e.g., United States v. Raines, 362 U.S. 17 (1960); Hatch v. Reardon, 204 U.S. 152 (1904).
320. Stern, supra note 59, at 94-95.
tions rather than invalidate the entire statute, the challengers' injury could not be remedied and thus they had no standing. If the invalid portion rendered the entire statute void, then the challengers' injury could be redressed, even if they raised the rights of third parties.

When a court extends an underinclusive statute, then providers of the benefit, not themselves unequally treated, would lack standing to challenge the statute. Extension would not remedy their injury of making payments, and they themselves are not injured by unequal treatment. If the court knew what remedy would be granted, the parties' standing could be determined readily. The courts in the underinclusive statute cases have permitted standing based on the possibility that the plaintiff might recover. This differs from the "substantial likelihood" test. One Supreme Court case indicated that the injury is the unequal treatment, and that removal of the inequality, even if not the remedy that the plaintiff seeks, confers standing. This standing only refers to persons unequally treated and not to providers who are not themselves unequally treated. Currently, most courts do not address the standing problem that is intertwined with the remedial problem. Thus, in an underinclusive statute case, plaintiff's injury is not deemed relevant to the determination of the remedy.

4. Third Party Standing

Some underinclusive statute cases raise third party standing problems. As discussed above, two different plaintiffs can have consistent positions on the merits but inconsistent positions on the remedy. One of those plaintiffs will be seeking to have the statute extended to receive its benefits. The other plaintiff, a provider of the benefit, will be seeking to have the statute invalidated.

The first plaintiff bases his or her cause of action on the fact that he or she is being treated unequally by being deprived of a benefit that is given to a similarly situated person. The provider plaintiff seeking to have the statute invalidated bases his or her cause of action on one of two possible theories. The provider may have a


324. See supra notes 304-08 and accompanying text.

claim of unequal treatment if the statute requires him or her to pro-
vide benefits but does not require similarly situated individuals to
provide those benefits. For example, in Orr v. Orr,\(^326\) wealthy hus-
bands, but not wealthy wives, were required to pay alimony. In Bar-
row v. Kapfhammer,\(^327\) independent restaurant owners, but not hotel
restaurant owners, were required to pay their employees a minimum
wage.

Alternatively, the provider plaintiff may seek to invalidate the
statute because someone else has received unequal treatment. This is
the situation in California Federal. The employer is not required to
provide unpaid pregnancy leave when a similarly situated employer
has no such obligation. Rather, the employer is raising the rights of
a third party, the person with a short-term disability who is not re-
ceiving the same benefit as a pregnant woman. When a plaintiff
seeks relief because the rights of a third party, who is usually not a
party to the suit, have been violated, that plaintiff seeks third party
standing.\(^28\) Typically, third party standing is not permitted.\(^29\) For
example, in California Bankers Association v. Shultz,\(^330\) banks chal-
lenged certain record keeping and reporting requirements and sought
to invalidate them because they infringed on the privacy rights of
depositors. The Supreme Court held that the banks could not raise
the third-party depositors' rights.\(^331\) Some older cases also prohibited
a plaintiff from invalidating a statute or governmental order by as-
serting the rights of a third party. In Jeffrey Manufacturing Co. v.
Blagg,\(^332\) an employer challenged the constitutionality of a work-
men's compensation statute covering employers with five or more
employees. The Court held that the employer's equal protection
rights were not violated and that the employer could not raise the
equal protection rights of its employees.\(^333\) The Court noted that
"[n]o employ[ee] is complaining."\(^334\) In Erie Railroad Co. v. Wil-
liams,\(^335\) the Court rejected an employer's challenge of a statute that
required it to pay some employees twice a week. The Court did not

\(^{326}\) 440 U.S. 268 (1979). The veterans' organizations moved to intervene in
the court of appeals and the Supreme Court. Both motions were denied.
\(^{327}\) 284 Ky. 753, 145 S.W.2d 1067 (1940).
\(^{329}\) Although third party standing is generally not permitted, these suits are
not jurisdictionally barred for lack of case or controversy standing. Rather, courts
do not permit most parties to bring suits based on the rights of others as a matter of
judicial restraint. Id. at 193. See Rohr, supra note 321, at 394; Sedler, supra note
321, at 1319.
\(^{331}\) Id. at 68-70.
\(^{332}\) 235 U.S. 571 (1915).
\(^{333}\) Id. at 576-77.
\(^{334}\) Id. at 576.
\(^{335}\) 233 U.S. 685 (1914).
allow the employer to raise whatever equal protection rights its employees might have. The Court, as in Jeffrey, noted that "employ[ees] are not complaining." In Davis & Farnum Manufacturing Co. v. Los Angeles, a subcontractor working on a landowner's property was not able to invalidate a city ordinance prohibiting work on the land by raising the rights of the landowner. In Farmers & Mechanics Savings Bank v. Minnesota, a savings bank's equal protection challenge to a tax statute covering banks, savings banks, and trust companies failed. The Court held that separate treatment of savings banks was constitutional and that "it is for present purposes unnecessary to inquire whether the act discriminates against other banks and trust companies." In the cases that invalidated the women's overtime statutes, employers, as plaintiffs seeking to invalidate the law or as defendants sued by the state or female employees to recover overtime pay, were allowed to invalidate the law by raising the Title VII rights of male employees. The courts did not discuss why third party standing was permitted in these cases.

In limited situations, courts have permitted parties to raise the rights of third parties. Schools have been permitted to raise the rights of their students to religious or segregated education, white sellers have been permitted to raise the rights of blacks to purchase property, and doctors and organizations have been able to raise the abortion rights of pregnant women. Likewise, sellers or distributors of contraceptives have been able to raise the rights of users of contraceptives, widowers have been permitted to raise the rights of their deceased wives to equal social security benefits, and a liquor retailer has been able to raise the rights of young men to

336. Id. at 705.
337. 189 U.S. 207 (1903).
338. 232 U.S. 516 (1914).
339. Id. at 530 (citations omitted).
340. See supra notes 235-68 and accompanying text.
342. Runyon v. McCrory, 427 U.S. 160 (1976). In Runyon, the court acknowledged the school's third party standing but affirmed the appellate court's holding that the school's students did not have a right to segregated education. Id. at 186.
equal access to 3.2% beer.\footnote{347} Not all commentators agree that the plaintiffs in these cases should have standing.\footnote{348} Some explain the standing in some of these cases by noting that the plaintiff's own rights were violated, for example, the right to sell property to blacks.\footnote{349}

The commentators disagree as to what factors must be present before a plaintiff may proceed with third party standing.\footnote{350} In Singleton v. Wulff,\footnote{351} a plurality argued that in permitting third party standing a court should examine the relationship between the plaintiff and the person whose rights are being asserted to determine whether the plaintiff will be an effective proponent. The court should also determine whether obstacles exist that might deter the person with the rights from bringing suit.\footnote{352} In some cases, however, the Supreme Court has permitted third party standing even when there were no obstacles to the person with the rights. For example, in Craig v. Boren,\footnote{353} the issue was whether a statute allowing women to buy 3.2% beer at age eighteen and men at age twenty-one was constitutional. The young man who was the plaintiff became twenty-one, which rendered the suit moot. Problems with his standing could have been avoided by fashioning the suit as a class action, but instead, a retailer was permitted to continue the suit, raising the young man's rights.\footnote{354}

Despite liberal factors for permitting third party standing, the Supreme Court has never permitted a person to raise the rights of another when the plaintiff seeks a remedy in conflict with that which the third party would seek. In fact, plaintiffs have been denied standing because of a conflict of interest between them and the person whose rights they seek to assert. For example, in Mercer v. Michigan State Board of Education,\footnote{355} a teacher was not permitted to raise the rights of her students and their parents to challenge a law barring discussion of birth control because all of her students and their parents might not have wanted to oppose the law.\footnote{356}


\footnote{349} \textit{Id.} at 282, 297-301. \textit{See also} Sedler, \textit{supra} note 321, at 1328-35.


\footnote{351} 428 U.S. 106 (1976).

\footnote{352} \textit{Id.} at 116-17.

\footnote{353} 429 U.S. 190 (1976).

\footnote{354} \textit{Id.}


\footnote{356} \textit{Id.} at 584. \textit{See generally} Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576
When a provider of benefits seeks to avoid paying or extending benefits because the law does not require him or her to provide benefits to all similarly situated people, the provider is seeking a remedy that those similarly situated people would not seek. If they were to bring suit, they would seek extension of the law to obtain the benefits. Thus, a clear conflict exists between the providers and the people whose rights they assert. Third party standing could create unfavorable precedent for the person with the rights and the plaintiff may not be the most effective advocate of those rights. These concerns are present in underinclusive statute cases brought by providers raising third party rights.

C. Effect on Nonparties

If an underinclusive statute is nullified, the recipients of the benefits will lose them. The loss could cause the former recipients substantial hardship and upset their reliance interests. Generally, there is no source to whom the recipient can turn to replace the benefits. If the statute is extended, the provider, usually the government or an employer, must provide more benefits. Although this may be financially burdensome, the providers may have the opportunity to shift the cost of such benefits to taxpayers or consumers.

(1915) (employer cannot challenge workmen’s compensation law based on employees' equal protection rights because “[n]o employ[ee] is complaining of the act in this case”); Erie R.R. Co. v: Williams, 233 U.S. 685, 705 (1914) (employer cannot challenge periodic payment law based on equal protection rights of employees because “employ[ees] are not complaining, and whatever rights [they] may have, plaintiff cannot invoke”).

357. Singleton, 428 U.S. at 114. Other reasons given for denying third party standing were that the third party whose rights were being asserted might not want to bring suit or might be unaffected. Id. at 113-14. At least one scholar has argued against permitting any third party standing. Sedler, supra note 321, at 1319. Another would regularly grant third party standing unless the third parties oppose the result sought by the litigant. Rohr, supra note 321, at 455.

358. See supra notes 187-268 and accompanying text.

359. See supra notes 66-137 and accompanying text.

360. Extension, however, is not always a burden for the provider. For example, in Frontiero v. Richardson, 411 U.S. 677 (1973), the defendant noted that extending the presumption of dependency to husbands of air force women to enable them to receive extra money for housing benefits would cost so little that it would not have budgetary implications. Ginsberg, supra note 15, at 305 (citing Department of Defense Report to Congress, S. Rep. No. 1218, 92d Cong., 2d Sess. 2 (1972). Presumably this was because the budget was large and the increase would be a relatively small amount in percentage terms, and because not many women were in the air force. As roles in the workplace equalize, the second factor could change. Even when the cost of extension is substantial, such as in the cases involving welfare or medical benefits to nonresidents, the courts have extended the statutes. Many courts note that cost is not a reason to avoid remedying a constitutional violation. See, e.g., Jablon v. Secretary, 399 F. Supp. 118, 130 (D. Md. 1975) (and cases
Although both recipients and providers will be affected by the remedy in underinclusive statute cases, only one is always a party. The provider is a party but the recipients of the challenged benefits frequently are not. The provider is a party because he or she is either the plaintiff, seeking to invalidate the statute, or the defendant, being sued by someone excluded from coverage and seeking inclusion. In both of those cases, the recipient of benefits is not a party to the suit. The recipient would be a party only if he or she were suing for statutory benefits that the provider had withheld. In this case, the provider is still a party and will raise the underinclusiveness of the statute as a defense, seeking to have the statute invalidated.

In California Federal, the employer sued the state agency administering the pregnancy leave act to have the act declared invalid. The employee who sought to regain her job after an absence due to pregnancy attempted to intervene in the district court to appeal the judgment. Her motion was denied and she participated as an amicus curiae.

In another case, Taxation with Representation of Washington v. Regan, an en banc court of appeals struck tax benefits to veterans’ organizations to remedy an underinclusive statute. In doing so, the court reversed decisions of both a district court and a panel of the court of appeals, which held that lobbying restrictions imposed on certain tax-exempt organizations but not imposed on veterans’ organizations did not violate the equal protection clause. After re-
versing this holding, the court had to decide whether to extend the beneficial lobbying treatment accorded to veterans' groups to all tax-exempt groups, or whether to nullify the veterans' ability to lobby. Having reviewed the legislative history and finding the current treatment of veterans to be inadvertent, the court held, "It seems evident that the legislative judgments expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations." 370

The veterans' organizations were not parties to any of the proceedings that resulted in the remedial conclusion that the veterans could no longer lobby and retain their tax-exempt status. 371 After deciding the appropriate remedy, the court of appeals instructed the district court to invite the veterans' organizations to "participate in framing the relief." 372

Having sought unsuccessfully to participate as a party, 373 the veterans' organizations participated in the Supreme Court as amici curiae. The veterans' groups claimed that their interests were not adequately represented by the defendant Secretary of the Treasury who had not presented evidentiary material to defeat the equal protection challenge on the merits. The veterans also pointed out procedural benefits in being able to litigate as a party rather than as amici curiae. 374 Because the Supreme Court reversed the court of appeals decision on the merits, the remedial issue was never reached. 375

Invalidating a statute that results in removing benefits from people or organizations who were not parties to the litigation poses fairness problems. These people may have had no ability to control the litigation by choosing strategies or presenting evidence. As discussed above, 376 they may never be permitted to intervene, even if they knew of the litigation and had the means to seek to join it.

organizations are not tax deductible by the donors. I.R.C. § 501(c)(4). Taxation demonstrates that the benefit need not be affirmative. It can also be an exemption from a burden, such as a prohibition against lobbying.

370. Taxation, 676 F.2d at 743.
372. Taxation, 676 F.2d at 744.
373. The veterans' organizations moved to intervene in the court of appeals and the Supreme Court. Both motions were denied. Regan v. Taxation with Representation of Wash., 458 U.S. 1120 (1982). The defendant opposed the motion to intervene. The plaintiff groups seeking tax-exempt status consented to the motions. See Disabled American Veterans' Motion to Intervene, supra note 371, at 4.
374. Disabled American Veterans' Motion to Intervene, supra note 371, at 12.
376. See supra text accompanying notes 366 & 373.
The interests of the recipients of benefits may be substantial. They may have been relying on the benefits conferred by the statute. Although the benefits are not vested property rights and can be revoked,\textsuperscript{377} that revocation is usually a legislative function that follows hearings that would include all who are interested; it is not usually a judicial function that follows a proceeding in which the beneficiaries were not parties. Although the recipients do not have a property interest in the statutory benefits and thus have no due process rights,\textsuperscript{378} basic fairness should grant these people a voice in what happens to them. One scholar has suggested that a combination of the arguments of the defendant and the plaintiff in underinclusive statutory litigation represents all of the interests of the recipients.\textsuperscript{379} For example, if someone excluded seeks inclusion, that party will argue that the statute is invalid and will seek extension. That extension argument seeks to protect the recipients. The defendant will argue that the statute is valid, which would also protect the recipients. Since the arguments arise from opposing parties, the focus of each argument is different than if made by one party. In addition, such an argument does not address third party standing cases. In cases such as \textit{California Federal}, a provider may challenge the validity of the statute as underinclusive and seek invalidation. As in \textit{California Federal}, the defendant may defend the validity of the statute but take no position on the remedy should the court find the statute invalid.\textsuperscript{380} Thus, no party assumes the position that the statute should be extended. The recipients can be represented only as amici curiae or by intervention, which may be denied.

\textbf{III. Proposed Remedial Solution}

To solve the problems of cases with inconsistent and unpredictable results, of parties with inconsistent positions and also questionable standing, and of nonparties harmed, courts should extend underinclusive beneficial statutes, unless the statute contains a clause


\textsuperscript{378} But see Miller, \textit{supra} note 25, at 98 (members of favored class have due process right to intervene before nullification allowed).

\textsuperscript{379} See Ginsburg, \textit{supra} note 15, at 321 n.122.

\textsuperscript{380} In his brief, the defendant Guerra, Director of the California Department of Fair Employment and Housing, argued that the pregnancy leave statute was valid, but took no position on whether it should be extended to cover people with short-term disabilities if the court were to rule that statute invalid. \textit{See} Brief of Respondents.

During the oral argument, the attorney for the respondent Guerra said the state would have no objection to the Court's holding that Title VII requires employers to provide job protection to people with short-term disabilities. \textit{Oral Argument, supra} note 306.
explicitly addressing the potential problem of underinclusiveness.\textsuperscript{381} However, if the court thinks the likelihood of legislative repeal is substantial, it should stay the extension.\textsuperscript{382} Several reasons support this proposal.

A. Extension Equalizes Future Legislative Imbalance

The legislature can undo whatever the court does. Nevertheless, it may be more difficult for a legislature to reintroduce, reenact, or modify affirmative legislation than for it to repeal existing legislation.\textsuperscript{383} Thus, extending the legislation equalizes the imbalance that might otherwise favor invalidating underinclusive statutes.

B. Extension Retains Benefits for the Needy and Equalizes the Legislative Advantages

A beneficial underinclusive statute generally aids needy individuals including the poor, children, widows, female workers, and pregnant workers. When a statute is invalidated, the intended benefits are lost. In cases in which underinclusive statutes were nullified, those who lost benefits were women employees and widows. In other cases, had the statute been nullified rather than extended, the poor and children would have lost benefits.\textsuperscript{384} Thus, nullification has undesirable consequences, contrary to the benefits contemplated for the needy by the legislature. Nullification does, however, benefit the economic interests of providers. Extension of benefits may be less burdensome on providers of benefits than nullification of the statute would be on recipients of those benefits. This is because providers may shift the costs of providing the benefits to taxpayers and consumers. By contrast, recipients of benefits may have nothing with

\textsuperscript{381} See supra note 39 and text accompanying note 40.


\textsuperscript{383} Reenacting affirmative legislation may be more difficult than repealing existing legislation because so many variations and alternatives can be proposed. See, e.g., A Norm-Based Model, supra note 25, at 1206 & n.81 (legislative inertia makes legislature reluctant to reconsider sensitive issues). Compare TVA v. Hill, 437 U.S. 153 (1978) (court order to stop construction of dam because of conflict with the Environmental Protection Act overturned by Congress, see N.Y. Times, Sept. 26, 1979, at A17, col. 3), with Grove City College v. Bell, 465 U.S. 555 (1984) (antidiscrimination law held to cover only educational programs, not institutions, receiving federal funds, contrary to enforcement practice not overturned because bill to overturn it met many procedural hurdles, see Wash. Post, Mar. 12, 1986, at A22, col. 1).

\textsuperscript{384} See supra text accompanying notes 107-25.
which to buffer the loss. Thus, the recipients of benefits generally need the statutory protections more than the providers need relief from providing those benefits. The legislature is free to nullify or modify the statute, but in the interim, courts should preserve intended benefits for the needy. Those to whom the statute is extended will also receive benefits unless the court stays the extension to give the legislature time to respond.

Moreover, the needy typically have less political clout than providers such as employers. Many organizations represent the interests of employers, such as the Chamber of Commerce and the Equal Employment Advisory Council. Both organizations filed briefs on behalf of the employer in California Federal. Unlike organizations that protect the needy, business organizations may have financial backing from large economic institutions. They are less reliant on contributions from individuals. Because the needy generally have less clout, giving them the advantage of legislation in place tends to equalize the power. They should not have to initiate the legislative process to reenact the statute. Thus, giving the needy an initial advantage helps equalize the legislative disadvantage they would face in attempting to reenact affirmative legislation.

C. Extension Offers Recipients of Benefits A Voice in Determining the Proper Remedy

Recipients who lose benefits when a statute is nullified are frequently not parties to the litigation in which the nullification is ordered. When a statute is nullified and never reintroduced in the legislature, those recipients' only opportunity to express their viewpoint would have been to have intervened or to have litigated as amicus curiae. Intervention is not always granted.

If the statute is extended and repealed, presumably the legislature will hold hearings, extending to anyone affected the opportunity to submit comments or evidence. Thus, the recipients would have an opportunity to be heard.

D. Extension Is the Usual and Proper Remedy

As demonstrated above, extension is the usual remedy. The cases not providing the extension remedy involved sex discrimination

385. See Miller, supra note 25, at 144; A Norm-Based Model, supra note 25, at 1187.
386. See supra text accompanying note 382.
387. See supra note 343.
388. See supra notes 358-80 and accompanying text.
389. See supra text accompanying notes 366 & 373.
390. See supra notes 66-137 and accompanying text; see also Heckler v. Ma-
issues in which women lost benefits.\textsuperscript{391} Surely the courts do not intend to apply the remedy of invalidation in a discriminatory fashion. Extension will eliminate the inconsistent remedies.

In addition, the fact that extension is the usual remedy demonstrates that underinclusive statutes are not substantively invalid. When a court nullifies a statute, it is as if the statute were declared substantively invalid. But the concern with underinclusive statutes is not what the legislature chose to do but that the legislature did too little. The widespread substantive invalidation of legislation by courts early in this century has become disfavored.\textsuperscript{392} When courts nullify underinclusive statutes, they essentially reintroduce this disfavored result.

Further, most courts that extended rather than nullified underinclusive statutes did so without any discussion of the remedies.\textsuperscript{393} This indicates that consideration of legislative intent and disruption is not mandatory. Although courts may not have discussed those factors merely because of oversight, this only indicates that those factors were not a vital concern. Moreover, in the context of underinclusive statutes, discussion of legislative intent is inconclusive because it is speculative.

Additionally, although courts that do not extend a statute argue that extension is inappropriately legislative, nullification of a statute also is legislative.\textsuperscript{394} Since either remedy is legislative, that term should not be a factor that distinguishes the remedial options. Finally, the fact that extension is the usual remedy for an underinclusive, substantively valid statute indicates that the ramifications of extension are not inappropriate. One reason for this is that a legislature can repeal or modify the statute as extended.

During oral argument in \textit{California Federal}, Justice Rehnquist posed a hypothetical situation in which a state statute required recent immigrants to be paid a higher minimum wage than other workers on the assumption that recent immigrants were particularly needy.\textsuperscript{395} Under the proposal in this Article, that minimum wage statute, like the women's overtime wage statute, would be extended to other workers. However, the Court could stay the extension, giving the legislature time to respond. It follows that if the legislature has determined that the minimum wage was inadequate for recent immigrants because they are needy, then the legislators have implicitly determined that the minimum wage is inadequate for needy peo-
ple in general. Since people working at the minimum wage are generally the lowest paid workers, increasing the minimum wage aids the needy. Thus, extending the legislation advances implicit assumptions in the name of fairness. Increasing the minimum wage might not be as expensive as it seems. Many employers may be paying more than the minimum wage already. Some employers, who employ those eligible for the higher rate, may already be paying all their employees the higher rate to prevent employee morale problems. If the employer can show that the increased minimum wage is too onerous, however, the legislature can repeal it.

In the women's overtime cases, the legislatures could have determined that women should receive overtime pay because as a group they were needier than men. In response to an extension of the statute or a holding that Title VII requires employers to provide men with the benefits statutorily conferred on women, a legislature might modify the statute to address explicitly the concern for the needy. The statute could be revised to require overtime payments for jobs paying up to a certain amount above the minimum wage. Extension, or a modified legislative enactment, would not necessarily cause all employers great expense. Some might already be paying all workers the overtime pay required to be paid to women. Others might have work shifts that minimize the need for overtime.

In the widows' dependency cases, extension of benefits to widowers likewise is not necessarily costly to all employers. Because of women's greater longevity, there may be substantially fewer widowers. Also, as the court in Jablon pointed out, the cost of requiring individualized determinations of dependency could exceed that of providing the benefits to widowers.

In the unpaid pregnancy leave case too, the costs of extension may not be excessive. Many employers may already hold jobs open for up to four months for people who become ill or injured. In addition, California's regulations provide that the employer can raise

396. Workers not covered by minimum wage laws may be paid less than workers that are covered by minimum wage laws.
397. See supra note 23.
398. The employer in Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1083 (8th Cir. 1972), claimed that it was paying male and female employees the same premium overtime rate.
401. Id. at 132.
402. The employer's practice in California Federal was to make every effort to hold jobs open for four months. Brief for Petitioner at 6.
a business necessity defense for not holding a job open.\textsuperscript{403}

Further, the legislature might be able to modify the effect of extending Title VII by extending the statute to cover short-term disabilities, subject to some exceptions. For example, the legislature might exclude disabilities caused by negligent accidents. Or the legislature may use the opportunity to extend coverage for substance abuse related illnesses, thereby encouraging unproductive employees to seek treatment to cure their dependency and ultimately increase their productivity. Although Title VII does not mandate that all disabilities be treated alike, the fourteenth amendment requires that distinctions not be arbitrary.

Of course, many courts have extended statutes even if the remedy was costly to the providers of the benefits.\textsuperscript{404} Some courts have specifically stated that cost does not justify withholding a remedy.\textsuperscript{405} Perhaps courts extend most underinclusive statutes because the alternative of invalidating the statute would significantly harm large numbers of people.\textsuperscript{408} But in cases in which statutes have been invalidated, such as in women’s overtime and widows’ presumption of dependency cases, the invalidation could also cause substantial hardship to many people.

E. A Single Option Eliminates Remedial and Standing Problems

Choosing one option will eliminate the problem of litigants seeking opposing remedies based on the same cause of action.\textsuperscript{407} Since the option recommended in this Article is extension, the judicial remedy of invalidation would be eliminated unless a statute expressly provided otherwise.\textsuperscript{408} Persons seeking to invalidate the statute would no longer be able to do so on the ground that the statute was underinclusive. Rather, they would need a substantive basis for invalidation. Moreover, those seeking to expand a statute would not be supported on the merits by those seeking nullification.

Extension as the sole remedy would also eliminate most of the standing problems. A plaintiff seeking inclusion in the statute would have standing since extension would remedy the wrong. The goal of remedying the wrong would likewise be met.\textsuperscript{409}

The provider of benefits who acquires standing only by raising

\begin{itemize}
  \item \textsuperscript{403} Joint Appendix at 45, 50, \textit{California Federal}, Docket No. 85-494 (pending in the U.S. Supreme Court). California is interpreting its statute as providing a business necessity defense consistent with a proposed regulation.
  \item \textsuperscript{404} See supra notes 66-96 and accompanying text.
  \item \textsuperscript{405} See, e.g., Jablon, 399 F. Supp. 118, 130, and cases cited therein.
  \item \textsuperscript{406} See supra text accompanying notes 107-25.
  \item \textsuperscript{407} See supra notes 304-08 and accompanying text.
  \item \textsuperscript{408} See supra text accompanying note 40.
  \item \textsuperscript{409} See supra notes 309-14 and accompanying text.
\end{itemize}
the equal treatment rights of others would not be able to obtain a remedy. However, this would not defeat the goal of remedying wrongs. If a provider is not a member of the injured class, he or she is not entitled to remedies based on violation of his or her own rights. Without the likelihood of a remedy, the provider would have no standing. This lack of standing, in turn, would be consistent with the general rule against third party standing.\footnote{10}

With extension the sole remedy, one group would be left without a remedy; the group of providers who could previously challenge a statute either because it was underinclusive as to a group to which they did not belong, or because it burdened them unequally as providers by exempting those similarly situated from having to provide benefits.\footnote{11} \textit{Orr v. Orr}\footnote{12} and \textit{Burrow v. Kapfhammer}\footnote{13} depict such providers. Ordinarily a statute that imposes burdens unequally does not also provide benefits unequally. Such a statute can be challenged by the unduly burdened person or organization. Frequently the remedy in those cases was nullification of the burden.\footnote{14} At times, however, the courts extended the burden.\footnote{15} How those cases should be treated is beyond the scope of this Article, except to the extent that invalidation of the burden would also deprive people or organizations of tangible benefits, as in \textit{Orr} or \textit{Burrow}. In those cases, invalidating the burden deprived someone else of a direct benefit. In \textit{Burrow}, by extending the exemption from minimum wage payments to independent restaurant owners, the court deprived independent restaurant employees of the benefit of receiving the minimum wage. In \textit{Orr}, if the alimony statute had been invalidated, needy wives would have lost significant protection. Thus, while in cases like \textit{Orr} and \textit{Burrow}

\footnote{10. \textit{See supra} notes 324-57 and accompanying text.}
\footnote{11. \textit{See supra} text accompanying notes 325-27.}
\footnote{12. 440 U.S. 268 (1979).}
\footnote{13. 284 Ky. 753, 145 S.W.2d 1067 (1940).}
\footnote{14. \textit{See, e.g., James v. Strange}, 407 U.S. 128 (1972) (state statute permitting state to recover cost of successful public defense from formerly indigent criminal defendants but not civil debtors invalid and nullified); Tatro v. State, 372 So. 2d 283 (Miss. 1979) (statute making certain fondling by males but not females a crime invalid and nullified; dissent would strike word “male” and extend); Affiliated Distillers Brands Corp. v. Sills, 60 N.J. 342, 289 A.2d 257 (1972) (statute prohibiting some liquor wholesalers from retailing originally extended to those exempt but court on rehearing invalidated the law since, if extended, the burden would affect one-third of the state’s retailers). \textit{See generally Iowa-Des Moines Nat’l Bank v. Bennett}, 284 U.S. 239 (1931) (application of statute assessing banks higher taxes than others violated equal protection; banks must receive refund to receive equal treatment).
\footnote{15. Huntington v. Worthen, 120 U.S. 97 (1887) (property tax exemption severed, extending tax); People v. Henry, 131 Cal. App. 82, 21 P.2d 672 (1933) (criminal statute requiring transportation agent to obtain license but which excluded sellers of transportation of private carriers operating on highways beyond those served by certified carriers violated equal protection).}
both the providers and the excluded recipients of benefits are treated unequally, only one group can receive their desired remedy.

In concluding that the group that should be remedied is the group to which benefits should be extended, this Article makes a policy judgment that the recipient group needs the remedy more than the provider group. 416

IV. CONCLUSION

Extension of benefits conferred by an underinclusive statute will benefit those most in need, produce consistent results, and resolve problems of questionable standing. It ensures that the beneficiaries of the statutes have a voice in that which affects them. Since extension is the usual remedy for underinclusive statutes, following precedent causes no major dislocation for the courts. The legislature is free to undo any remedy the court selects, but extension initially equalizes the power between those who lose legislative benefits and those who have an economic interest in not providing them.

416. See supra notes 384-87 and accompanying text; see also Miller, supra note 25, at 146-48 (decision as to remedy in Orr is a policy one). In fact, in his dissent that would have denied standing in Orr, a case in which the Court had remanded the remedial issue to the state courts, Justice Rehnquist said, “The possibility that Alabama will turn its back on the thousands of women currently dependent on alimony checks for their support is, as a practical matter, nonexistent.” Orr, 440 U.S. at 296 (Rehnquist, J., dissenting).