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Introduction

When a court invalidates a law on equal protection grounds,[1] the process of judicial interpretation may have only just begun. The court must then fashion the appropriate remedy.

A violation of the equal protection clause presents the reviewing court with a peculiar remedial problem. When a substantive law offends equal protection principles, the law draws a constitutionally impermissible distinction between similarly situated persons.[2] A law may dispense its benefits or burdens unequally among similarly situated persons by bringing one class of persons under the legislative umbrella while excluding another. Should the operation of the invalidated law be extended or curtailed altogether? A court could achieve equal treatment under the law by bringing the formerly excluded group of similarly situated persons within the legislative net. Alternatively, the court could curtail the operation of the law altogether, uniformly negativing the effect of a law with respect to all persons. As a related problem, the court must also determine whether its ruling is to be given retroactive effect. These two problems, curtailment or extension and retroactivity, exist whether the invalidated law is a statute, an administrative regula-

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1. The equal protection clause of the United States Constitution provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

2. Tussman & tenBroek, *Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

tion, or a judicial ruling.

This article examines the factors influencing a court's choice between each of these remedial alternatives and proposes a framework for their simultaneous analysis.

I. Extension or Curtailment?

Reviewing courts rarely discuss the problem of extension or curtailment. Usually the disadvantaged or excluded class of persons who challenge the law on equal protection grounds will seek a specific remedy, either extending the law's benefits to or curtailing its adverse impact on themselves. The challenging party will ensure that the court takes cognizance of the remedy it desires. But the propriety of affording that particular remedy is a different question.[3]

Mr. Justice Harlan discussed the extension remedy in his concurring opinion in *Welsh v. United States*.[4] The petitioner in *Welsh* was denied conscientious objector status and was convicted of refusing to submit to induction into the Armed Forces. Welsh was deemed ineligible for conscientious objector status because his pacifist convictions were based on ethical and moral, rather than religious, beliefs. A majority of the Court reversed Welsh's conviction on principles of statutory construction, but Mr. Justice Harlan separately reached the constitutional question in his concurrence. He found the statute, on its face, violative of equal protection principles, and then discussed the constitutional remedy.

Justice Harlan acknowledged that two remedial alternatives were possible, total nullification of the statute or inclusion of the petitioner.[5] For guidance on the choice between alternatives, he looked to the broad severability clause of the statute. The existence of a severability provision " 'disclose[d] an intention to make the Act divisible and create[d] a presumption that, eliminating invalid parts, the legislature would have been satisfied with what re-

3. *See, e.g.*, Califano v. Westcott, 443 U.S. 76, 90 (1979) ("All parties before the District Court agreed that extension was the appropriate remedy.").

4. 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

5. "Where a statute is defective because of under-inclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Id.* at 361.

mained . . . .' "[6] In exercising discretion conferred by a severability clause, courts must also weigh the "intensity of commitment to the residual policy" and the relative "potential disruption of the statutory scheme" resulting from extension or abrogation.[7] Justice Harlan thus articulated three guiding considerations for choosing between the extension or curtailment: the legislative intent as to the severability, the policy and purpose of the statute, and the potential disruption of the statutory scheme.[8]

Harlan concluded that the benefits of conscientious objector status should be extended to Welsh rather than denied to everyone else, given that "[t]he policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever possible."[9] A policy of such longstanding historical and cultural significance constituted "a compelling reason for a court to hazard the necessary statutory repairs . . . even though they entail, not simply eliminating an offending section, but rather building upon it."[10]

The Supreme Court again tackled the problem of remedial alternatives in *Califano v. Westcott.*[11] In *Westcott,* the Court struck down section 607 of the Social Security Act[12] which provided benefits under the Aid to Families with Dependent Children (AFDC) program to families whose dependent children were deprived of parental support because of the unemployment of the father, but not of the mother.[13]

Addressing the choice of extension or invalidation, the Court noted that extension rather than nullification was the proper remedy in cases involving underinclusive federal benefits statutes.[14]

6. *Id.* at 364 (quoting Champlin Rfg. Co. v. Commission, 286 U.S. 210, 235 (1932)).
7. *Id.* at 365.
8. *Id.*
9. *Id.* at 365-66.
10. *Id.* at 366 (footnote omitted).
11. 443 U.S. 76, 89-93 (1979).
12. 42 U.S.C. § 607 (1980).
13. 443 U.S. at 89. *Cf.* Part III *infra.* Although *Westcott* was decided under the due process clause of the Fifth Amendment instead of the equal protection clause of the Fourteenth Amendment, the analysis was the same as in other sex discrimination cases. *See, e.g.,* Califano v. Goldfarb, 430 U.S. 199 (1977).
14. 443 U.S. at 89.

The Court then affirmed the district court's extension of the benefits to families in which either the mother or the father is unemployed.[15]

The Tenth Circuit Court of Appeals confronted the extension or curtailment dilemma in *Moritz v. Commissioner*.[16] *Moritz* held that former section 214 of the Internal Revenue Code,[17] which allowed an income tax deduction only to women, widowers, divorcees and married men, unconstitutionally discriminated against single men. The court extended the deduction to single men, rather than denying it to everyone else, due primarily to the ameliorative purpose of the deduction provision and the broad severability clause of the Code.[18]

Thus the Tenth Circuit based its choice of remedy in *Moritz* on the same three guiding factors articulated in *Welsh v. United States*: (1) the existence of a severability clause, (2) the purpose of the statute,[19] and (3) the degree of disruption of the statutory scheme resulting from invalidation, as opposed to extension, of the section.[20]

II. Retroactivity

In addition to choosing between extension or curtailment, a court must also determine the impact of its declaration of unconstitutionality in three distinct contexts: (1) in deciding other cases involving similar discrimination occurring *after* the date of that

15. *Id.* at 93.

16. 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

17. Int. Rev. Code of 1954, ch. 736, § 68A, Stat. 70 (repealed 1976).

18. 469 F.2d at 470.

19. *Id.*

20. *Id. Accord*, "Americans United" Inc. v. Walters, 477 F.2d 1169, 1173 n.5 (D.C. Cir. 1973), *rev'd on other grounds sub nom.* Alexander v. "Americans United" Inc., 416 U.S. 752 (1974). *Cf.* New Jersey Chapter, Am. Inst. of Planners v. New Jersey State Bd. of Professional Planners, 48 N.J. 581, 227 A.2d 313 (1967). Criminal statutes found defective on equal protection grounds may require different treatment. For example, in Tatro v. State, 372 So. 2d 283 (Miss. 1979), the Mississippi "Fondling Statute" was held to be unconstitutionally sexually discriminatory because it applied only to "male persons." Since the Mississippi Supreme Court could not create a crime by construction, the statute could not be extended to "female persons"; therefore the entire statute was void. *Id.* at 285. *But cf.* Plas v. State, 598 P.2d 966 (Alaska 1979), in which a prostitution statute prohibiting certain conduct "by a female" was invalidated on equal protection grounds. The court severed the restrictive gender-based provision from the statute, effectively bringing both sexes within its reach. *Id.* at 968-69.

declaration (prospective application), (2) in deciding other cases involving similar discrimination occurring *before* the date of that declaration (retrospective application), and (3) in shaping a remedy in the case at bar—the case that gave rise to the declaration of unconstitutionality.[21]

Judicial invalidation of a discriminatory law necessarily operates prospectively with respect to both the parties at bar and other potential victims of the discriminatory law.[22] But the typical judicial dilemma concerns retroactive application of the court's new rule to the parties at bar and to other victims of discrimination predating the court's ruling. Accordingly, contexts (2) and (3) above will be considered in order.

A. Retrospective Application to Prior Discrimination in Other Cases

In the past, the Supreme Court has given judicial invalidation of a law complete retroactive effect. In *Norton v. Shelby County*,[23] the Court held that the acts of county commissioners in issuing bonds were of no force and effect since the State Act vesting the board with authority was unconstitutional. The Court adopted Blackstone's view that since "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it is, in legal contemplation, as inoperative as though it had never passed.[24]

The Pennsylvania Court of Common Pleas recently applied

21. It is important to remember that we are discussing equal protection violations of substantive law, not procedural law. Therefore the three contexts for applying the new rule are based upon the time of the act which gave rise to the litigation, not the time of the litigation itself. In considering equal protection violations of procedural law, on the other hand, the contexts for applying the new rule are based on when the litigation occurred. Accordingly, in both civil and criminal litigation, there are actually four possibilities: (1) prospective application only, (2) retrospective application only to the parties at bar, (3) retrospective application to the parties at bar and to other pending litigation, and (4) retrospective application to the parties at bar, to pending litigation, and to litigation terminated by final judgment (complete retroactivity). State v. Nash, 64 N.J. 464, 469-70, 317 A.2d 689, 691-92 (1974).

22. *See generally* Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

23. 118 U.S. 425 (1886).

24. *Id.* at 442. *See generally* Linkletter v. Walker, 381 U.S. 618, 622-25 (1965).

this principle of absolute retroactive invalidity to strike down certain Pennsylvania divorce statutes as violative of the Equal Rights Amendment to the state constitution.[25] The court likened its role to that of a "jeweler [who] . . . state[s], after examining what is supposed to be a diamond, that it is in reality glass. He does not make it glass; he merely finds out that it is."[26]

The Second Circuit applied the principle of absolute retroactivity in *United States ex rel. Williams v. Preiser*.[27] In that case, the court reversed the manslaughter conviction of a doctor under an abortion statute subsequently invalidated on constitutional grounds by the Supreme Court in *Roe v. Wade*.[28] The Second Circuit applied *Roe* retroactively,[29] relying on *Norton v. Shelby County*.[30]

Reviewing courts have not, however, universally applied the rule of absolute retroactive invalidity. For example, in *Chicot County Drainage District v. Baxter State Bank*,[31] the Court held that bondholders of a state drainage district were estopped by principles of res judicata from raising the issue of constitutionality of a federal statute in a subsequent action, even though in the interim the Supreme Court had declared the statute unconstitutional. While basing its decision on principles of res judicata, the Court remarked that:

> [S]uch broad statements [in *Norton v. Shelby County*] as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and cor-

25. Frank v. Frank, 15 Pa. Lebanon County 61, 65 (1974). The Pennsylvania Constitution provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PA. CONST. art. 1, § 28 (Purdon's Pennsylvania Statutes Annotated erroneously cites the Equal Rights Amendment as PA. CONST. art. 1, § 27). *See also* Linkletter v. Walker, 381 U.S. 618, 627 (1965); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

26. Frank v. Frank, 15 Pa. Lebanon County 61, 65 (1974).

27. 497 F.2d 337 (2d Cir.), *cert. denied*, 419 U.S. 1058 (1974).

28. 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179 (1973).

29. 497 F.2d at 339.

30. 118 U.S. 425 (1886).

31. 308 U.S. 371 (1940).

> porate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[32]

In *Linkletter v. Walker*,[33] the Supreme Court adopted this principle of "limited retroactive" invalidity,[34] relying on the dicta of *Chicot County*. *Linkletter* involved the retroactive effect of the Supreme Court's own exclusionary rule—a judicially created rule used in criminal cases to exclude evidence obtained through unconstitutional searches.[35] Although *Linkletter* dealt with retroactivity in the context of criminal law, the Court suggested that retroactivity applies to judicial changes in all law—whether statutory, constitutional, or judicial, in both civil and criminal litigation.[36] Under *Linkletter*, retroactive treatment will depend on the degree of possible prejudice to those who have relied on the invalidated rule,[37] "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[38]

Indeed, the Fifth Circuit has recognized that "[t]here are no hard and fast rules . . . in the retroactivity area . . ." by saying, "[R]etroactivity is essentially a pragmatic, case-by-case, result-oriented process whereby the often competing interests of society, the accused . . . and the efficient administration of justice are balanced and weighed."[39]

The Supreme Court has, however, developed a three-pronged test to analyze whether or not a new judicial ruling of invalidity or

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32. *Id.* at 374 (footnote omitted).

33. 381 U.S. 618 (1965).

34. *Id.* at 625. *See also* MPI, Inc. v. McCullough, 463 F. Supp. 887, 901 (N.D. Miss. 1978); 15 Pa. Lebanon County 61, 65 (1974).

35. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961).

36. 381 U.S. at 625-27. *Accord,* Mitchell, 606 F.2d 1172 (D.C. Cir. 1979); State v. Nash, 64 N.J. 464, 470, 317 A.2d 689, 691 (1974); Planned Parenthood v. State, 138 N.J. Super. 450, 455, 351 A.2d 382, 384 (1976).

37. 381 U.S. at 627.

38. *Id.* at 629.

39. Vaccaro v. United States, 461 F.2d 626, 629 (5th Cir. 1972).

unconstitutionality should be applied retroactively. The courts will examine: (1) the purpose of the new ruling or of the constitutional principles at issue, (2) the reasonableness and extent of reliance on the overturned law, and (3) the effect on the administration of justice of a retroactive application of the new ruling.[40]

The doctrine of absolute retroactive invalidity will generally control; limited retroactive invalidity is the exception.[41] Accordingly, absolute retroactivity is applied in the absence of countervailing considerations as set forth in the three-pronged test.[42]

B. Retrospective Application to the Parties at Bar

Even in cases which are not given general retroactive application, the new rule is usually applied to the parties at bar,[43] so that " 'constitutional adjudications [may] not stand as mere dictum.' "[44] But the choice between retroactive or purely prospective application persists with respect to the parties at bar as well.

The Constitution does not forbid purely prospective judicial decisions.[45] The United States Supreme Court itself has fashioned such prospective remedies.[46] In *England v. Louisiana State Board of Medical Examiners*,[47] the petitioners, chiropractors, sought to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act.[48] They chal-

40. Gosa v. Mayden, 413 U.S. 665, 679-82 (1973); Radcliff v. Anderson, 509 F.2d 1093, 1095 (10th Cir. 1974), *cert. denied*, 421 U.S. 939 (1975); Vaccaro v. United States, 461 F.2d 626, 631 n.29 (5th Cir. 1972); State v. Nash, 64 N.J. 464, 471, 317 A.2d 689, 692 (1974); Planned Parenthood v. State, 138 N.J. Super. 450, 455, 351 A.2d 382, 384 (1976). *Cf.* Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971); Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979); Retail Clerks Local 1357 v. Leonard, 450 F. Supp. 663, 666-67 (E.D. Pa. 1978).

41. Robinson v. Neil, 409 U.S. 505, 507-08 (1973); United States *ex rel.* Williams v. Preiser, 497 F.2d 337, 339 n.4 (2d Cir. 1974).

42. United States v. Fitzgerald, 545 F.2d 578, 581-82 (7th Cir. 1976); Frank v. Frank, 15 Pa. Lebanon County 61, 65 (1974). *Cf.*, Retail Clerks Local 1357 v. Leonard, 450 F. Supp. 663, 666-67 (E.D. Pa. 1978).

43. *See generally* Currier, *supra* note 22; Levy, *supra* note 22; Note, *supra* note 22.

44. Desist v. United States, 394 U.S. 244, 255 n.24 (1969) (quoting Stovall v. Denno, 388 U.S. 293, 301 (1967)).

45. Johnson v. New Jersey, 384 U.S. 719, 733 (1966); Great N. Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 363-66 (1932); Currier, *supra* note 22, at 211, 216-34; Levy, *supra* note 22, at 13-16.

46. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); James v. United States, 366 U.S. 213 (1961); Currier, *supra* note 22, at 233-34. *See also* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863).

47. 375 U.S. 411 (1964).

48. La. Rev. Stat. Ann. §§ 1261-1290 (West 1964).

lenged the statute in federal district court on the ground that the act as applied to them violated the Fourteenth Amendment.[49] A three-judge court invoked the doctrine of abstention *sua sponte* and remanded the parties to state court.[50] The chiropractors renewed both their Fourteenth Amendment and state law claims in state court and lost on the constitutional questions.[51] Undaunted, the chiropracters then returned to federal court. The district court dismissed their complaint on the ground that they had foregone their right to return to federal court by submitting their constitutional claims to the state court.[52] On review, the Supreme Court held that a party need not litigate his federal claims in state court in order to preserve his right to return to federal court; he need only inform the state court of the federal claims so that the court can construe the state statute "in light of" the federal claims.[53] The Court, however, declined to apply the rule to the parties at bar, refusing to penalize them for their reasonable, albeit mistaken, reliance on *Government and Civic Employees Organizing Committee, CIO v. Windsor*,[54] a case which seemed to require that federal claims be litigated in the state court.[55]

Similarly, in *James v. United States*,[56] the Court did not apply its new rule to the party at bar, this time basing its decision on the concept of willfulness. The Court in *James* overruled *Commissioner v. Wilcox*[57] and held that embezzled money constitutes taxable income. Petitioner James had been convicted of willfully evading income tax by failing to include embezzled funds in his gross income. The Court held that willfulness could not be proven so long as the statute contained the gloss upon it by *Wilcox*. Accordingly, the conviction was not allowed to stand,[58] despite the fact that the Court overruled *Wilcox*.

Similarly, in *State v. Jones*,[59] the New Mexico Supreme Court

49. 180 F. Supp. 121 (E.D. La. 1960).
50. *Id.* at 124.
51. 126 So. 2d 51 (La. 1960).
52. 194 F. Supp. 521 (E.D. La. 1961).
53. 375 U.S. at 420.
54. 353 U.S. 364 (1957).
55. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. at 422-23.
56. 366 U.S. 213 (1961).
57. 327 U.S. 404 (1946).
58. 366 U.S. at 221-22. *Accord*, Kratz v. Kratz, 477 F. Supp. 463, 477-84 (E.D. Pa. 1979).
59. 44 N.M. 623, 107 P.2d 324 (1940) (overruling City of Roswell v. Jones, 41 N.M.

allowed one of its rulings only prospective effect. In 1937, the court had held that a "Bank Night," sponsored by the defendant movie theater, was not a lottery, and that therefore the operators of the theater were not guilty of violating an ordinance forbidding the conducting of lotteries.[60] But, only three years later, the court overruled its decision in a case involving the same ordinance, the same defendants, and the same issue.[61] The court applied its ruling prospectively because of the reliance factor.[62]

In the *England, James* and *Jones* cases, reliance on the newly discredited law warranted purely prospective operation of the decisions.[63] But these cases did not involve equal protection challenges. What factors would operate in equal protection cases to exempt the parties at bar from the ruling?

Lemon v. Kurtzman (*Lemon II*)[64] may offer some clues. In *Lemon I*,[65] the Supreme Court had invalidated a Pennsylvania statute which gave public aid to non-public religious schools on the grounds that the statute violated the establishment clause of the First Amendment.[66] Yet in *Lemon II* the Court permitted the state to reimburse non-public schools for services provided prior to the holding in *Lemon I*. In limiting the retroactivity of its holding in *Lemon I*, the Court in *Lemon II* acknowledged that it was really determining the proper scope of an equitable decree in the same case rather than determining its retroactive application to other cases. The Court characterized the relationship between *Lemon I* and *Lemon II* as a problem of equitable remedies rather than as a retroactivity problem. Nonetheless, the Court considered the same factors enunciated in other decisions involving retroactive application to like cases.[67] *Lemon II* suggests that the same three-pronged

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258, 67 P.2d 286 (1937)).

60. City of Roswell v. Jones, 41 N.M. 258, 67 P.2d 286 (1937).

61. State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940).

62. *Id.* at 630-31, 107 P.2d at 329.

63. Currier, *supra* note 22, at 234-35; Levy, *supra* note 22, at 8-9, 24-26.

64. 411 U.S. 192 (1973).

65. Lemon v. Kurtzman, 403 U.S. 602 (1971).

66. U.S. CONST. amend. I. The establishment clause provides: "Congress shall make no law respecting an establishment of religion . . . ."

67. 411 U.S. at 197-201; Thompson v. Washington, 551 F.2d 1316, 1321 n.6 (D.C. Cir. 1977). *See also* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 767 n.23 (1976). For another case characterizing retroactivity in terms of remedies, *see* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 495-502 (1968) (full retroactivity in determining the amount of damages in an antitrust case).

test, used to determine when retroactive application to the parties at bar is appropriate, will determine when retroactive application to other cases involving prior discrimination is appropriate. In both contexts, a reviewing court must examine: (1) the purpose of the new rule, (2) the degree of reliance on the old rule, and (3) the rule's effect on the administration of justice or on the public at large.[68] There will be a presumption in favor of full retroactivity.[69]

Although *Lemon I* and *Lemon II* involved a violation of the establishment clause of the First Amendment[70] rather than the equal protection clause of the Fourteenth Amendment,[71] Justice Harlan observed in *Welsh v. United States*[72] that certain kinds of religious discrimination require an "equal protection" mode of analysis.[73] Religious discrimination not only violates the disadvantaged class' right to equal protection and free exercise of religion, but also prefers the advantaged class in violation of the establishment clause, while another class may suffer infringement of its free exercise and equal protection rights.[74] Given the interconnection between the freedom of religion and equal protection analyses, *Lemon I* and *Lemon II* suggest that the Supreme Court would apply the same three-pronged test to an equal protection case if squarely faced with the issue.

Indeed, the Supreme Court may have implicitly adopted this approach in *City of Los Angeles Department of Water and Power v. Manhart*.[75] The plaintiffs in *Manhart* sought relief under Title VII of the Civil Rights Act of 1964[76] rather than under the equal protection clause. They challenged the Water Department's requirement that female employees make larger contributions to its pension fund than male employees. The Court held that the re-

68. *See* text accompanying note 40 *supra*.

69. *See* text accompanying notes 41-42 *supra*.

70. *See* note 66 *supra*.

71. *See* note 1 *supra*.

72. 398 U.S. 333, 357 (1970) (Harlan, J., concurring).

73. *Id.* at 356-58.

74. *See generally* Abrams, *Primary and Secondary Characteristics in Discrimination Cases*, 23 VILL. L. REV. 35, 63-64 (1977).

75. 435 U.S. 702 (1978).

76. 42 U.S.C. §§ 2000e to 2000e-17 (1980). Section 703(a)(1) of Title VII provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1).

quirement violated Title VII because it discriminated on the basis of sex, but disallowed any retroactive monetary recovery. As in *Lemon II,* the Court was determining the proper scope of an equitable remedy in the *same* case, rather than determining whether its holding should be applied retroactively in other cases.[77] Without citing *Lemon II,* the Court used the same three-pronged test: the purpose of the new rule, reliance on the old rule, and the effect of retroactivity on the public generally.[78]

Under the first prong of the test, the purpose of the new rule was to give men and women an equal stake in the pension fund by requiring equal contributions,[79] and since this purpose would be defeated by bankrupting the fund by assessing a large retroactive damage award, the Court determined that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result."[80] Under the second prong of the test, there had been substantial reliance on the former rules, and this reliance was reasonable in light of conflicting authorities on the subject.[81] Under the third prong of the test, retroactivity could have widespread effects on the economy and on the public at large. As the Court noted:

> Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties. If, as the courts below apparently contemplated, the plaintiffs' contributions are recovered from the pension fund, the administrators of the fund will be forced to meet unchanged obligations with diminished assets. If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contribu-

77. 435 U.S. at 717-23.

78. *Id.*

79. *Id.* at 717. Equal contributions from men and women may not necessarily result in equal benefits for men and women, since women have a longer life expectancy than men. *Id.*; EEOC v. Colby College, 439 F. Supp. 631 (D. Maine 1977), remanded for reconsideration in light of *Manhart,* 589 F.2d 1139 (1st Cir. 1978) (pension fund requiring employees to contribute equally but paying different benefits to male and female employees may not violate Title VII). *But see* Reilly v. Robertson, 266 Ind. 29, 34-35, 360 N.E.2d 171, 177-79 (1977) (separate actuarial tables for male and female retired teachers for computation of benefits paid violates equal protection clause).

80. *Id.* at 721 (footnote, indicating that Congress did not intend that result, omitted).

81. 435 U.S. at 720-22 and footnotes therein. *But see* authorities cited in note 79 *supra.* The *Manhart* Court called its own decision "a marked departure from past practice." 435 U.S. at 722.

tions of past employees.[82]

These considerations overcame the presumption in favor of full retroactivity,[83] and the Court found retroactive monetary recovery to be inappropriate.[84]

Taken together, *Lemon I, Lemon II* and *Manhart* suggest that the same criteria govern retroactivity of application, whether in shaping a remedy in the case at bar or in deciding other cases involving prior, similar denials of equal protection.[85] The criteria are: (1) the purpose of the new rule, (2) reliance on the newly discredited rule, and (3) effects on the public at large. The equities thus considered must be sufficiently weighty to dispell the presumption in favor of full retroactivity.[86]

III. Interconnection Between the Problem of Extension or Curtailment and the Problem of Retroactivity—A Proposal

When a court is called upon to determine the effects of an equal protection violation, it may face two separate but related problems.[87] The first is whether to cure the constitutional defect by extending the law to the excluded class or by nullifying the law altogether.[88] The second is whether the court's decision should be applied retrospectively or only prospectively.[89]

The court resolves the first problem by fashioning a new law which either extends or curtails the old law. The court decides whether to extend or curtail based on three factors: (1) the severability provisions of the old law, (2) the purpose of the old law to be extended or curtailed, and (3) the relative potential for disruption of the statutory scheme by extension or by curtailment.[90]

The retroactivity question is necessarily interrelated with at

82. *Id.* at 722-23 (footnotes omitted).

83. *Id.* at 719; Albermarle Paper Co. v. Moody, 422 U.S. 405, 421-23 (1975). *See* text accompanying notes 41-42 *supra.*

84. 435 U.S. at 721-23. *Accord,* Peters v. Wayne State Univ., 476 F. Supp. 1343 (E.D. Mich. 1979).

85. *See* text accompanying notes 64-84 *supra.*

86. *See* text accompanying notes 40-42 & 67-69 *supra.*

87. *See* Introduction *supra.*

88. Part I *supra.*

89. Part II *supra.*

90. Part I *supra.*

least two of these factors. The degree of disruption of the statutory scheme and the new law's effects on the legislative purpose behind the former law will both depend on whether and to what degree the new law is applied retroactively.

This interrelation operates in the opposite direction as well. In deciding whether to apply the new law retroactively, courts will examine: (1) the purpose of the new law, (2) the reliance on the old law, and (3) the effect of retroactivity on the administration of justice or on the public at large.[91] But the application of this three-factor test will vary depending on the new law—expanded or curtailed—to which it is applied. Therefore, a court's remedial choices—between extension or curtailment and between retroactive or prospective application—are interdependent questions; neither can be answered without some resolution, either implicit or explicit, of the other. No cases have squarely faced the interconnection between these remedial choices. Those cases that consider one problem, presuppose the answer to the other, which will often have a clear solution in some overriding consideration. For example, a severability clause may determine the choice of extension or curtailment;[92] the presumption of complete retroactivity may dispose of the other problem.[93] It is only where there are no such overriding considerations that the cases require that the interrelationship between these two problems be examined.

Under such circumstances, a court might best analyze the remedial alternatives together. Initially, the court could formulate six alternate remedies consisting of all possible combinations of the remedial choices, as shown below.

	Prospective Application Only	Retrospective Application Only To The Parties At Bar	Complete Retrospective Application
Extension of the Law	Remedy 1	Remedy 2	Remedy 3
Curtailment of the Law	Remedy 4	Remedy 5	Remedy 6

91. *See* text accompanying notes 40-42, 67-69 & 85-86 *supra*.

92. Stevens v. Califano, 448 F. Supp. 1313, 1323 (N.D. Ohio 1978), *aff'd per curiam*, 440 U.S. 901 (1979).

93. *See* text accompanying notes 41-42, 69 & 86 *supra*.

Then the court could consider the relevant criteria for resolving the extension or curtailment question and the retroactivity question. The court would examine: (1) the purpose of the old law, (2) the purpose of the new rule or remedy, (3) the reliance on the old law, and (4) the effect on the administration of justice or on the public at large, including the potential disruption of the statutory or regulatory scheme (hereinafter referred to as "the public effect").[94] The court could then pick the remedy which best accommodates the competing considerations. Certain alternate remedies that presented unacceptable conflicts or sacrificed one factor for another might be excluded at the outset.

In *Stevens v. Califano*,[95] a federal district court examined both problems, but did not consider their interconnection.[96] That court invalidated Section 607 of the Social Security Act[97] which enlarged the AFDC program to include certain two-parent families where the child "has been deprived of parental support or care by reason of the unemployment . . . of his father."[98] The so-called AFDC-U program thus reached families of unemployed fathers, but not families of unemployed mothers.[99] The court held that the statute violated the equal protection components of the Fifth and Fourteenth Amendments of the United States Constitution.[100]

The court next considered the scope of its remedy—whether it would extend the provision to two-parent families of unemployed mothers, or enjoin payments to two-parent families of unemployed fathers. In fashioning its remedy, the court chose extension over curtailment because of a broad severability clause[101] and the purpose of the AFDC-U program.[102] The court found that the legisla-

94. The severability issue and the presumption of total retroactivity are subsumed into this analysis, at least where they are not the type of "overriding consideration" which negates the need for the type of analysis suggested here. *See* text accompanying notes 92-93 *supra*.

95. 448 F. Supp. 1313 (N.D. Ohio 1978).

96. *Id.* at 1323-24.

97. 42 U.S.C. § 607 (1980). *See also* text accompanying note 12 *supra*.

98. 42 U.S.C. § 607(a).

99. *Id.*

100. 448 F. Supp. at 1323. This case was affirmed per curiam on the basis of Califano v. Westcott, 443 U.S. 76 (1979). *See* text accompanying notes 11-15 *supra*.

101. 42 U.S.C. § 1303 (1973). This clause states: "If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances shall not be affected thereby." *Id.*

102. 448 F. Supp. at 1323.

ture intended "to provide benefits for needy children who are needy because of the unemployment of their 'breadwinner.' "[103] Next, the court considered the reliance, purpose and public effect criteria, and denied all retrospective relief. The reliance, purpose and public effect factors weighed against retroactive relief because the case was one of first impression; some solvent families would receive funds in derogation of the purposes of the statute; and the increased financial burdens would not cure "[p]laintiffs' past suffering."[104]

Alternatively, the court could have determined that there were no overriding criteria sufficient to dispose of these two problems, and then used the analytic framework proposed here to reach the same result. First the court would have formulated the following six possible remedies:

Remedy 1: Extension of payments to two-parent families of unemployed fathers or mothers; prospective application only.

Remedy 2: Extension of payments as above; retrospective application to the parties at bar only.

Remedy 3: Extension of payments as above; retrospective application to the parties at bar and to all parties similarly situated.

Remedy 4: Curtailment of payments to two-parent families of unemployed fathers or mothers; prospective application only.

Remedy 5: Curtailment of payments as above; retrospective application to the parties at bar only.

Remedy 6: Curtailment of payments as above; retrospective application to the parties at bar and to all parties similarly situated.

Next the court could have excluded those proposed remedies which were unacceptable to it, applying the four interacting criteria to the remaining remedies. Remedies 5 and 6 would be immediately excluded as involving unjust and wholly impractical consequences. They would retroactively deprive two-parent families with unemployed fathers of benefits already received.[105] Reimbursement by such families would have adverse impacts on the public at large and the administration of justice.

103. *Id.*
104. *Id.* at 1324.
105. Califano v. Yamasaki, 442 U.S. 682 (1979).

Remedies 2 and 3 would adversely affect the public by "placing an additional burden on an already financially troubled [AFDC] program, [while failing to cure] the inequity suffered by plaintiffs."[106] Indeed, Remedy 3 presents the same danger as that posed by a retroactive application of *Manhart*,[107] namely, bankrupting the fund so that no one would receive any benefits.[108] Remedy 4 would entirely defeat the purpose of the old law by discontinuing benefits to all two-parent families. The only remedy that accommodates all four criteria is Remedy 1, the remedy selected by the court. This choice (1) accomplishes the purpose of the old law by providing benefits to needy children in families where the "breadwinner" is unemployed,[109] (2) accomplishes the purpose of the new rule by focusing on need rather than gender,[110] (3) avoids hardship due to reliance on the old law,[111] and (4) has no adverse effect on the statutory scheme, the public at large, or the administration of justice.[112]

Conclusion

As courts become increasingly willing to invalidate laws on equal protection grounds, they will have to re-formulate laws to make them nondiscriminatory. It is not enough to find constitutional violations; courts must determine the effects of, and fashion remedies for, the constitutional defects. This proposed analytical framework can help achieve this result.

106. *Id.*
107. *See* note 75 and accompanying text *supra.*
108. *See* text accompanying notes 79-80 *supra.*
109. 448 F. Supp. at 1323.
110. *Id.*
111. *Id.* at 1324.
112. *Id.*