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REFLECTIONS ON UNCONSTITUTIONALITY IN FUTURO:

SHAVERS V. ATTORNEY GENERAL AND ROBINSON V. CAHILL

The venerated doctrine that unconstitutional statutes are void *ab initio* has long ceased to hold sway in this country. Factors such as administrative problems and detrimental reliance have led courts to hold statutes unconstitutional prospectively from the date of the opinion.[1]

More recently, the rise in public law litigation has led to further judicial innovations in developing remedies which affect major societal institutions.[2] This article will discuss a judicial holding used recently by two state supreme courts which delays a statute's unconstitutionality to some date in the future beyond the date of the opinion. This holding, referred to as "unconstitutionality in futuro," has three distinct features: delayed effectiveness of the holding of unconstitutionality to some date beyond the date of the opinion, a set of suggested guidelines provided by the court for the benefit of the legislature or the executive which will, if followed, save the statute from being voided at a future date, and the retention of jurisdiction over the case by the court.

While unconstitutionality in futuro provides an effective means of judicial control over the response of the legislature or executive to actions of the judiciary, the doctrine raises serious concerns about the proper role of the judiciary. First, unconstitutionality in futuro may adversely affect judicial legitimacy, which is essential to the strength of the courts as an independent branch of government. Second, courts may lack the necessary competence to deal successfully with the ongoing problems present in litigation which addresses broad public issues, and may use unconstitutionality in futuro without first testing it against firm judicial standards. Third, since the court's remedy in a holding of unconstitutionality in futuro is dependent upon actions of the other branches of government, the long-term remedies may fail to provide relief for the parties. Finally, holdings of unconstitutionality in futuro must be re-

[1] *See* notes 12-15 and accompanying text *infra*.

[2] The problems presented to courts by public law litigation and the need for innovative judicial treatment of cases are not confined to the federal level. The jurisprudential issues confront both federal and state courts. Most of the discussion, however, is drawn from federal cases because that is where the focus of most commentators' analyses lie.

conciled with the separation of powers doctrine which restrains one governmental branch from exercising the powers of another branch.

In discussing these issues, this article will argue that holdings of unconstitutionality in futuro are difficult to reconcile with the separation of powers doctrine because they foster impermissible intrusions on the ability of the legislative and executive branches to act independently of the judiciary. It is further argued that in the two cases where courts have adopted the unconstitutionality in futuro approach, the failure to satisfy all of the proposed standards for the appropriateness of unconstitutionality in futuro and the further considerations of judicial legitimacy and competency should have led the courts to consider other less drastic alternatives before deciding to use unconstitutionality in futuro.

I. PUBLIC LAW LITIGATION AND INNOVATIVE JUDICIAL REMEDIES

A. Development of Prospective and Prospective-Prospective Holdings

Traditionally, civil adjudication has been primarily a process of resolving private disputes having immediate impact solely on the parties directly involved.[3] Courts today, however, are frequently confronted with complex litigation involving broad public issues which affect others than the parties involved in the suit. Such litigation demands of judges great sensitivity to the rights and duties of the parties before the court and also to the far-reaching ramifications which these cases will have for unrepresented parties and the public in general. A leading commentator has described suits with these characteristics as "public law litigation."[4]

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[3] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976). The traditional private litigation model is bipolar: the parties and interests are diametrically opposed, and only one can be the winner. The immediate consequences of prevailing in the action accrue solely to the parties to the suit. An example of the private litigation model is the simple contract case in which one party is awarded damages or specific performance by the court.

[4] *Id.* at 1284. Under this model, it is recognized that the litigation has far-reaching effects which are not confined to the persons on the other side of the traditional bipolar structure. The following features are characteristic of the public law litigation model: 1) the scope of the lawsuit is not exogenously given but is shaped primarily by the courts and parties, as is demonstrated in the liberalization of formal pleadings; 2) the party structure is not rigidly bilateral but sprawling and amorphous, as shown in the relaxation of joinder rules; 3) the factual inquiry is not historical and adjudicative but predictive and legislative; 4) relief is not compensatory for past wrong, but forward-looking and fashioned *ad hoc* along flexible lines; 5) the remedy is not imposed but negotiated; 6) the decree does not terminate judicial involvement — its administration requires the court's continued involvement; 7) the judge takes an active part in negotiating the remedy rather than remaining a neutral arbiter; 8) the subject matter is not a dispute between private individuals but a grievance about the operation of public policy. *Id.* at 1302.

In public law litigation the relationship between the relative rights of the parties, the holding of a case, and the remedy provided is changed. Under the traditional civil litigation model, right and remedy are interdependent. The scope of the remedial relief flows from the substantive legal violation on the theory that compensation is measured by the harm caused by the breach of duty.[5] Under the public law litigation model, right and remedy are separated. The remedy does not follow logically from a finding of a substantive violation but rather is decided in light of the circumstances in each case. The remedy is not a final transfer of money or services but instead is often a program which takes into account future consequences and other interests.[6]

Therefore, since public law litigation cases often cannot properly be settled by traditional remedies such as money damages, and often involve major institutional adjustments, courts have more frequently employed novel and quasi-legislative remedies. As a result, the role of judges has shifted from being that of primarily disinterested arbiters of private disputes to that of public policymakers and enforcers.[7]

The advent of public law litigation has demanded of judges a flexibility in their treatment of cases in which the common law has been overruled or statutes declered unconstitutional.[8] With one exception,[9] unconstitutional statutes or common law doctrines which have been overruled have traditionally been held void *ab initio*.[10] As such, the holdings in these cases have been given re-

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[5] *Id.* at 1282-83.

[6] *Id.* at 1293-94.

[7] *Id.* at 1286, 1302.

[8] *See* notes 18-20 and accompanying text *infra*.

[9] Decisions overruling prior state statutory interpretations affecting obligations on a contract are not given retroactive effect. Such a holding would contravene the Contract Clause of the United States Constitution, which prohibits states from passing any law "impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. *See, e.g.*, United States Trust of N. Y. v. New Jersey, 431 U.S. CONST. art. I, § 10, cl. 1. *See, e.g.*, United and New Jersey entered into a contractual agreement in 1962 concerning bonds issued by the Port Authority of New York and New Jersey. Both states passed legislation, effective in 1973, which made the 1962 agreement inapplicable. The Court held that the New Jersey law violated the Contract Clause of the U.S. Constitution. *But see* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). The Court upheld the validity of the Minnesota Mortgage Moratorium Act, reasoning that an emergency situation justifies the passage of state legislation which modifies or abrogates contracts already in effect.

[10] The void *ab initio* theory states that if a statute is unconstitutional now, it must have been unconstitutional at its enactment and therefore was never a law. *See* Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79, 79-80 & n.3 (1966). For an example of a void *ab initio* holding, *see* Stanton v. Lloyd Hammond Produce Farms, 400 Mich. 135, 253 N.W.2d 114 (1977). The Michigan Supreme Court held that the plaintiff's injuries had been sustained during the course of his employment. The injuries occurred before the statutory exclusion of agricultural workers from wage benefit coverage was declared unconstitutional, but they occurred after the injuries to the plaintiffs in the case in which the statutory exclusion was declared unconstitutional. The court decided, therefore, that its ruling would apply retroactively and the statute would be void from the date of its enactment.

troactive effect.[11] Today courts have universally displaced retroactive holdings with prospective holdings in situations where parties have relied on a statute or precedent, or where a retroactive holding would be unduly harsh or burdensome.[12] The constitutional validity of prospective holdings of unconstitutionality has been firmly established.[13] Prospective holdings may apply prospectively to the cases in which they are announced,[14] or they may be applicable not to the cases in which they are announced but to every case arising thereafter.[15]

At the federal level, prospective holdings have become particularly common in the area of criminal procedure.[16] They are also

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[11] A "retroactive" or "retrospective" rule of law relates back to transactions which occurred before it came into force. *See* Chicago, I. & L. Ry. Co. v. Hackett, 228 U.S. 559 (1913); Norton v. Shelby County, 118 U.S. 425 (1886); Horrigan v. Klock, 27 Mich. App. 107, 183 N.W.2d 386 (1970); Briggs v. Campbell, Wyant & Cannon Foundry Co., 379 Mich. 160, 150 N.W.2d 752 (1967). For a brief treatment of the reasons for retroactive application of rules of law, see Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79, 79-80 (1966).

[12] *See* Molitor v. Kaneland Community Unit Dist., 18 Ill.2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) (where the court abolished the rule of sovereign immunity from tort suits with respect to school districts, the court may restrict the application of the new rule to the instant case and to cases arising in the future, where retroactive application will result in hardship to those who have relied upon prior decisions of the court). *See also* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 7-16 (1960); Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437 (1947).

[13] Prospectivity was established as an alternative to retroactivity in the landmark decision, Great Northern Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). Certiorari was granted to the Supreme Court of Montana to review a judgment affirming a lower court decision in favor of the plaintiff in an action to recover payments alleged to be an overcharge for freight. The Court affirmed, rejecting the defendant's argument that the Due Process Clause of the United States Constitution was infringed by the prospective effect given its decision. *Id.* at 364. Finding that the Federal Constitution is silent on the matter, the Court held that a state, in defining the limits of adherence to precedent, may choose between the principle of forward operation and that of relation backward. *Id. See also* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), where the Court rejected the principle of absolute retroactive invalidity. The Court reasoned that the effect of the subsequent ruling as to a statute's invalidity should be considered in a number of aspects, with respect to particular individual and corporate relations and particular private and official conduct. "Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, or public policy in the light of the nature both of the statute and its previous application, demand examination." *Id.* at 374.

[14] *See, e.g.*, Molitor v. Kaneland Community Unit Dist., 18 Ill.2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

[15] *See, e.g.*, Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961). Plaintiff-executrix brought a wrongful death action against the city alleging that negligence caused her husband to fall down an elevator shaft. The court denied recovery to the plaintiff on the grounds of city immunity from suit, but stated that from that day forward, the doctrine of governmental immunity from tort suit was abrogated.

[16] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618 (1965), establishing that the decision whether to give a ruling of unconstitutionality retroactive or prospective effect should depend on the purpose to be served by the new constitutional rule. *Id.* at 629. In criminal procedure, the purpose is not to free properly convicted criminals, which retroactive application of the new rule would tend to do, but instead to curb illegal police practices. *Id.* at 637. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that an accused prisoner had the right to be apprised of all of his rights before interrogation. The Court did

common in civil cases,[17] especially in areas of important and enduring human interest, such as school desegregation,[18] school aid tax programs,[19] and voter reapportionment cases.[20]

At least three state supreme courts, in deciding cases with a significant public impact, have introduced a variation on the principle of prospective holdings, delaying the application of the new judicial rule beyond the date of its announcement.[21] This judicial approach

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not, however, apply this rule to cases brought before the date of the *Miranda* decision. Law enforcement agencies were thereby warned that they would have to modify their interrogation procedures. Prospectivity, however, is not the absolute rule in criminal procedure cases. For an appraisal of the prospectivity-retroactivity problem in this area, see Mishkin, *The Supreme Court, 1964 Term, Forward: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); *cf.* Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

[17] *See* notes 12-15 and accompanying text *supra*.

[18] Chayes, *supra* note 3, at 1295. *See, e.g.*, Brown v. Board of Educ. (*Brown I*), 347 U.S. 483 (1954). In this case, the Court declared that racial segregation in public schools violates equal protection principles, but it did not immediately issue a decree. Instead, the Court requested additional information from the parties to help it formulate an appropriate decree. One year later, in Brown v. Board of Educ. (*Brown II*), 349 U.S. 294 (1955), the Court decreed that programs of public school desegregation should be implemented "with all deliberate speed." *Id.* at 301. In stating that the compliance should occur with all deliberate speed, the Court recognized that changes in such a large area could only take place slowly. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968). In these cases the Court refined its *Brown II* remedy and required remedies which would cure the effects of past violations as well as present violations. Each of these remedies was effective prospectively.

[19] Lemon v. Kurtzman, 411 U.S. 192 (1973), *aff'g*, 348 F. Supp. 300 (E.D. Pa. 1972). The Court held that where the district court, pursuant to a decision of the Supreme Court, restrained payments to church-related schools, where the parties who had claimed the statute was unconstitutional had not sought interim injunctive relief, and where the church-related schools had relied on the forthcoming funds, the funds allocated to reimburse the schools for services rendered in the interim period could be paid. Thus, where the schools demonstrated reliance, the holding that the payments were unconstitutional was not allowed to have retroactive effect.

[20] Reynolds v. Sims, 377 U.S. 533 (1964), in which the Court held: 1) it is a basic constitutional requirement that seats in both houses of the Alabama legislature be apportioned on a population basis and 2) deviations are permissible so long as they are based on legitimate considerations of the effectiveness of a rational state policy. In adopting the "one man—one vote" principle, the Court affirmed a district court order calling for a temporary reapportionment of the Alabama legislature for the 1962 election and enjoining officials from holding future elections under what the court had previously decided were invalid proposed plans. *See* note 132 and accompanying text *infra*.

[21] Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). For a discussion of these three cases, *see* note 23 *infra*.

A recent twist on this judicial approach occurred in Whitney v. City of Worcester, 77 Mass. Adv. Sh. 1713, 366 N.E.2d 1210 (1977). In this case, the plaintiff's suit against the City of Worcester for negligence had been dismissed below on the basis of the doctrine of municipal tort immunity. The Massachusetts Supreme Judicial Court announced that if the Massachusetts legislature refused to enact legislation on the subject of municipal tort immunity before the adjournment of the 1978 legislative session, the court would abrogate the doctrine in the first case arising thereafter. *Id.* at 1715, 366 N.E.2d at 1212. The court further said that if it was forced by legislative inaction to abrogate the doctrine, the overruling would be retroactive to any claim arising after May 13, 1973. *Id.* at 1735, 366 N.E.2d at 1220. The court remanded to the trial court pending legislative or judicial action. *Id.* at 1736, 366 N.E.2d at 1220. For a critical response to *Whitney* which makes many of the same points regarding this approach, and which labels it prospective-retroactive overrul-

has been labeled "prospective-prospective overruling."[22] To date, it has not been used in cases where a statute has been held unconstitutional but rather when a common law or judicially-created rule embodying an established public policy determination has been abrogated.[23] The rationale for prospective-prospective overruling lies in an argument of fairness: if it is unfair to impose a new rule of law retroactively on persons who have relied on prior law, then it would be equally unfair to apply the new rule immediately without affording a period for adjustment and adaptation.[24] In extending the principle of prospectivity in this manner, courts have recognized that widespread changes in public behavior occur slowly.

B. Elements of Unconstitutionality In Futuro: Shavers *and* Robinson

Recently, two state supreme courts have gone one step beyond prospective-prospective overruling by holding a statutory scheme unconstitutional in futuro.[25] An unconstitutional in futuro holding

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ing, see Comment, *Prospective-Retroactive Overruling: Remanding Cases Pending Legislative Determination of Law*, 58 B.U.L. REV. 818 (1978).

[22] Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79, 80 (1966).

[23] *See, e.g.*, Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) (the Minnesota Supreme Court held that the defense of sovereign immunity would no longer be available to school districts and other governmental subdivisions with respect to torts committed after the adjournment of the next session of the Minnesota legislature); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977) (in a suit seeking damages for personal injuries resulting from an automobile accident, the Missouri Supreme Court held that the doctrine of sovereign immunity from tort liability is abrogated prospectively as to all claims arising on or after August 15, 1978, which was almost a full year after the issuance of the opinion); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962) (the court found that the doctrine of governmental immunity, being itself judicially created, may be changed or abrogated by judicial decision, reasoning that to enable the various public bodies to make the necessary financial arrangements, the effective date of the abolition of immunity would be approximately six weeks after the issuance of the opinion, but the decision would nonetheless apply to the case at bar).

[24] *See* Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79, 82-91 (1966), for a concise discussion of the background to prospective-prospective overruling and the theoretical justifications for it. *See also* Grant, *The Legal Effect of a Ruling that a Statute is Unconstitutional*, 1978 DET. C.L. REV. 201 (1978). The author examines the legislative approaches of several countries toward the consequence of each country's highest court ruling that a statute is unconstitutional. For example, the Austrian Constitution of 1920 provided that a statute which is ruled unconstitutional is automatically annulled. But the constitutional provision was qualified to recognize the legislative nature of the court's role in annulling the statute, so that it could delay the annulment up to a full year. *Id.* at 217. This practice is analogous to a court's use of discretion in prospective-prospective overrulings.

[25] Shavers v. Attorney General, 402 Mich. 554, 267 N.W.2d 72 (1978); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973). "Unconstitutionality in futuro" is the phrase used by Justice Ryan in referring to the majority's holding in *Shavers*, 402 Mich. at 656, 267 N.W.2d at 714 (Ryan, J., dissenting). Catherine Shavers and four other similarly situated plaintiffs brought an action for a declaratory judgment against the Attorney General, the Secretary of the State of Michigan, the Commissioner of Insurance, and several insurance companies challenging the constitutionality of the Michigan No-Fault Motor Vehicle Insurance Act, MICH. COMP. LAWS ANN. §§ 500.3101-.3179 (West Supp. 1978-79). The Michigan Supreme Court held: 1) the No-Fault Act is

delays the effect of a finding that a particular statute or provision is unconstitutional until sometime after the issuance of the court's opinion.[26] In this regard, unconstitutionality in futuro is similar to prospective-prospective overruling, but there are significant differences. A prospective-prospective holding merely provides notice that the law will be changed in a particular manner sometime after the date of the opinion.[27] Unconstitutionality in futuro has included, in both cases in which it has been used, court-fashioned programs which the legislature or executive is advised to adopt by a certain date, on pain of the statute being invalidated as unconstitutional.[28] Furthermore, the courts have retained jurisdiction in order to oversee compliance with remedial orders and to resolve any problems which might arise.[29] Therefore, the phrase "uncon-

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constitutional to the extent that it provides insurance benefits to victims of motor vehicle accidents without regard to fault as a substitute for tort remedies, which are partially abolished, and that the Act constitutionally accomplishes this goal; 2) the Act's property damage protection scheme reasonably relates to the valid public purposes of creating an incentive to build safer cars, encouraging group rates, and reducing costs by eliminating the necessity for fault investigation, and 3) while the Act is, theoretically, a valid rational response to problems affecting the general welfare, the actual mechanisms for protecting the welfare of individual Michigan motorists who are required by law to purchase No-Fault insurance are constitutionally deficient in failing to provide due process. *Id.* at 579-80, 267 N.W.2d at 114. *See also* notes 39-45 and accompanying text *infra*. The court declared the No-Fault Act unconstitutional, but stated that the ruling would not be effective until 18 months from the issuance of the opinion.

Similarly, in Robinson v. Cahill (Robinson I), 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1973), the New Jersey Supreme Court held an educational financing scheme unconstitutional, the holding to become effective sometime in the future. *See* notes 35-42 and accompanying text *infra*.

[26] While in Shavers v. Attorney General, 402 Mich. 554, 267 N.W.2d 72 (1978), the period of delay is both specific and lengthy (18 months), this feature is unusual in cases in which the existing statute or rule is not voided immediately. *Compare Shavers with* Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962), *and* Brown v. Board of Educ. (*Brown I*), 349 U.S. 294 (1955). In *Spanel*, discussed in note 23 *supra*, the period of delay was approximately 5 months. 1963 Minn. Sess. Laws Serv. (West). *Brown I* held that state action involved in segregated public schools violates the equal protection clause of the Fourteenth Amendment. Because of the massive adjustment necessitated by the decision, the Court in *Brown II* framed its remedy in terms of an equitable injunction calling for compliance "with all deliberate speed," which enabled the Court to put its new ruling into effect slowly. *See also In re* Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964), in which the Minnesota court held Totten trust assets subject to the forced share of the surviving spouse, but made this a prospective-prospective ruling. In this case, the court was even less specific than in *Spanel* as to the time which should elapse before the new rule would take effect: "We would prefer the Restatement rule . . . . However, in view of the widespread use of Totten trusts we do not feel free to adopt the Restatement rule without first giving the legislature an opportunity to provide for it by statute. . . ." *Id.* at 195, 130 N.W.2d at 481. There was thus no specification at all of when the ruling would be effective.

[27] *See* note 23 *supra*.

[28] *See* Shavers v. Attorney General, 402 Mich. 554, 607-08, 267 N.W.2d 72, 91 (1978); Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 519-20, 303 A.2d 273, 297 (1973).

[29] Some cases of prospective overruling feature suggested guidelines and retention of jurisdiction. For example, in Brown v. Board of Educ. (*Brown I*), 347 U.S. 483 (1954), the Court retained jurisdiction and asked for further information and reargument on the issue of an appropriate remedy. In Brown v. Board of Educ. (*Brown II*), 349 U.S. 294 (1955), the function of the delayed implementation of the Court's decree, which was a type of prospective holding, is slightly different from the function of delayed unconstitutionality in a

stitutionality in futuro'' refers to all holdings simultaneously exhibiting these three distinguishing features: the postponement of the effect of the holding, the inclusion of suggested guidelines for future legislative or executive action, and the retention of jurisdiction by the court. The coexistence of these three features distinguishes unconstitutionality in futuro from prospective and prospective-prospective holdings.[30]

The most recent example of a court's use of unconstitutionality in futuro is *Shavers v. Attorney General*.[31] In an action for a declaratory judgment challenging the constitutionality of the Michigan No-Fault Motor Vehicle Insurance Act, the Michigan Supreme Court held that the measures provided to assure that compulsory No-Fault insurance would be available to motorists at fair and equitable rates are inadequate and in violation of state due process principles. The court held the act defective for the following reasons: 1) the statutory protection against ''excessive, inadequate, or unfairly discriminatory'' rates was without the support of clarifying rules established by the Commissioner of Insurance, without a legislatively sufficient definition, and without any history of prior court interpretation, so that the legislative mandate was thus reduced to ''mere exhortation;''[32] 2) there were inadequate statutory

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holding of unconstitutionality in futuro. The function of the *Brown II* decree was primarily a practical one: to allow individual public school boards time to devise their own strategies for compliance which could not have been devised overnight. On the other hand, the function of the delayed unconstitutionality in a holding of unconstitutionality in futuro is not only to give the legislature or executive time to devise remedies of their own but to provide an impetus for adopting the court-suggested guidelines. If the legislature or executive fails to act, the responsibility for any further judicial action rests not with the court but with the branch that has failed to act.

[30] Of these three distinguishing features, only the timing aspect is present in prospective-prospective overruling. There is usually no need for the court to retain jurisdiction and no reason to suggest guidelines for future action in a case where the common law or a judicial rule has been abrogated. However, as in *In re* Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1964), a court may suggest that the legislature enact legislation to replace an abrogated common law rule. The public must in most circumstances simply prepare for and live with the new rule.

[31] 402 Mich. 554, 267 N.W.2d 72 (1978).

[32] *Id.* at 602, 267 N.W.2d at 88. The section of the Insurance Code dealing with rates charged to insureds states, *inter alia*: ''(1) All rates shall be made in accordance with the following provisions: . . . (d) Rates shall not be excessive, inadequate or unfairly discriminatory.'' MICH. COMP. LAWS ANN. § 500.2403(1) (West Supp. 1978-79). The section further states:

> (1) Every insurer authorized to write and writing automobile bodily injury liability and property damage liability insurance in this state shall participate in an organization for the purpose of: (a) Providing the guarantee that automobile insurance coverage will be available to any person who is unable to procure such insurance through ordinary methods. (b) Preserving to the public the benefits of price competition by encouraging maximum use of the normal private insurance system. (2) The organization created under this chapter shall be called the ''Michigan automobile insurance placement facility.''

MICH. COMP. LAWS ANN. § 500.3301(1) (West Supp. 1978-79). Standing alone, this section is procedurally vague. But Justice Ryan in his dissent notes that the ''various underwrit-

provisions available to a motorist to attack the validity of an individual rating decision:[33] and 3) there was no adequate statutory provision permitting an individual to challenge insurance refusal, discriminatory cancellation, or assignment to the "Automobile Placement Facility" with its presumptively higher rates.[34]

The Michigan Supreme Court acknowledged that the constitutional status of the Michigan No-Fault Act put it in "an extraordinary jurisprudential position:" the Act was held constitutional in its general thrust, but unconstitutionally deficient in its administrative mechanisms.[35] The court went on to say that it believed it necessary for "the purposes of general jurisprudence, the general welfare of the public and the administration of justice" to hold that the Act would remain in effect for eighteen months from the issuance of its opinion.[36] Furthermore, the court set out minimum standards which the No-Fault Act must meet in order to pass constitutional muster.[37] The Michigan legislature was invited by the court to implement these standards to save the Act. While it is true

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ing guidelines currently employed by state-regulated casualty insurers are not alleged to be arbitrary or discriminatory either by the majority or by the plaintiffs on appeal." 402 Mich. at 652 n.10, 267 N.W.2d 112 (Ryan, J., dissenting).

[33] *See* MICH. COMP. LAWS ANN. § 500.2406 (West Supp. 1978-79) (filings and supporting data for such rating decisions which have been submitted by insurers are open for public inspection only after filing becomes effective).

[34] 402 Mich. at 603-04, 267 N.W.2d at 89. *See* MICH. COMP. LAWS ANN. § 500.3365 (West Supp. 1978-79). The "Automobile Placement Facility" is a legislatively-created facility for those motorists who have been refused insurance coverage by private insurers, or who are unable to obtain it for any reason. The court states that a motorist who is placed in the Automobile Placement Facility "is subject to a statutory presumption that the rates charged will be higher than the rates for motorists in the open marketplace." 402 Mich. at 604, 267 N.W.2d at 89.

[35] 402 Mich. at 608-09, 267 N.W.2d at 91-92.

[36] *Id.* at 608-09, 267 N.W.2d at 91-92.

[37] *Id.* at 607-08, 267 N.W.2d at 91. The court stated that no-fault insurance does not satisfy minimum constitutional due process requirements unless:

> 1. The Legislature and/or the Commissioner of Insurance (pursuant to his present rule-making authority, MCL 500.2484; MSA 24.12484), give substantial meaning to the statutory standards "Rates shall not be excessive, inadequate or unfairly discriminatory" . . .
>
> 2. A filed rate, or a rate determined on administrative or judicial review, provides and sets forth:
>
> a) premiums reasonable to insured and insurer for the specific insurance coverage without regard to factors assertedly warranting differences in premiums among those insured;
>
> b) the factors which properly may be considered by the insurer in differentiating premiums among those insured, and;
>
> c) the amount of differential appropriate for each such factor.
>
> 3. Such information for each insurer is publicized in such a manner that every person affected can readily ascertain the factors and amounts of differentials applicable to him and calculate the premium the insurer may charge.
>
> 4. Every motorist has the opportunity to obtain a prompt and effective administrative review of an insurer's calculation of the factors, differentials and premium applicable to him and a prompt and effective administrative review of the basis for the refusal or cancellation of insurance.

Id. (footnotes omitted).

that the list of minimum standards did not constitute a court-ordered program which the legislature was obliged to follow, it was nonetheless a powerful signal to the legislature of what the court would find acceptable to cure the due process infringement. Finally, the court stated that "at an appropriate time before eighteen months from the issuance of [the] opinion, [it would] re-examine the constitutional status of the No-Fault Act in terms of remedying the present due process deficiencies."[38] At that time, an appropriate order reflecting the Act's constitutional status will be entered.

As precedent for its holding, the Michigan Supreme Court cited only one case, *Robinson v. Cahill (Robinson I)*.[39] In *Robinson I*, the New Jersey Supreme Court held that the state's educational financing scheme was unconstitutional because it failed to "furnish [a] thorough and efficient system of public schools. . . ."[40] It suggested that if the state desired to delegate the task of accomplishing its obligation to maintain and support a thorough and efficient system of free public schools, it must do so through a plan which would fulfill its continuing obligation.[41] More specifically, the state had to define adequately what that obligation was and compel local school districts to raise enough money to meet the ob-

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[38] *Id.* at 609-10, 267 N.W.2d at 92.

[39] 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1973) [hereinafter, references to the entire Robinson controversy will be to *Robinson* and references to the particular case before the court will be enumerated *Robinson I — Robinson VI*]. In this case, action was brought by residents, taxpayers, and various municipal officials challenging the constitutionality of the system of financing public schools in New Jersey. In handing down its decision that the New Jersey educational tax scheme was unconstitutional, the New Jersey Supreme Court suggested guidelines, which, if adopted, would ensure the enactment of a constitutional scheme; it delayed the effect of its holding until the end of the current school year, and retained jurisdiction in order to monitor compliance with its decree.

The New Jersey Supreme Court's first brush with *Robinson* did not dispose of the controversy, but marked the beginning of a lengthy period of administrative headaches for the court. During the next three years the case returned five times to the court, and each time the court delayed rendering a final decision by issuing provisional orders and holding that the existing statutory scheme should remain in force for the next school year. *See* Shavers v. Attorney General, 402 Mich. 554, 609 n.33, 267 N.W.2d 72, 92(1978), and *id.* at 670 n.5, 267 N.W.2d at 120 (Fitzgerald, J., dissenting). *See also* Note, *Robinson v. Cahill: A Case Study In Judicial Self-Legitimation*, 8 RUT.-CAMD. L.J. 508-25 (1977), which criticizes the New Jersey Supreme Court's issuance of the initial injunction and its subsequent handling of the case, stating that the first opinion has the "appearance of a judicial fiat [and that] [e]xacerbating this perception is the realization that 'the same small group of persons [were] responsible for making the initial determination of unconstitutionality now invoked as the compelling reason for a further assertion of power.' " *Id.* at 518 (footnote omitted). In finally disposing of the case, the court in Robinson v. Cahill (*Robinson VI*), 70 N.J. 155, 358 A.2d 457 (1976), issued an injunction which froze spending for public schools after the court in Robinson v. Cahill (*Robinson III*), 67 N.J. 333, 339 A.2d 193 (1975) had mandated an application of provisional remedies. These became unnecessary in light of the legislature's enactment of the Public School Education Act of 1975. The court later held that this Act facially met the requirements of an efficient system. Robinson v. Cahill (*Robinson V*), 69 N.J. 449, 355 A.2d 129 (1976).

[40] Robinson v. Cahill (*Robinson I*), 62 N.J. at 516, 303 A.2d at 294 (1973).

[41] *Id.* at 520, 303 A.2d at 297.

ligation.[42] Noting, however, that education must continue and that a period of adaptation was needed for the New Jersey legislature to enact another statute, the court stated that financial obligations thereafter incurred by state taxpayers pursuant to the existing statutes pertaining to education financing would be valid in accordance with the terms of the statutes.[43] The court then requested the further views of the parties and additional argument as to the remedies which should be provided. After hearing further argument, the court issued a per curiam opinion, of substantially the same form as the *Shavers* holding, stating that the court would not disturb the statutory scheme if legislation compatible with the court's decision was enacted by December 31, 1974, effective no later than July 1, 1975.[44] The court then retained jurisdiction to ensure compliance.[45]

Although *Shavers* and *Robinson* are presently the only cases upon which the efficacy of the unconstitutionality in futuro holding can be judged, together they provide clear examples of some of the practical and theoretical difficulties inherent in such holdings. Among the practical difficulties are the necessity of judicial supervision, which requires large expenditures of time and energy on a single case and the necessity of temporary solutions decided upon without legislative or administrative assistance, where such assistance would be desirable. These practicalities have perhaps taken the courts beyond the bounds of constitutional mandates and judicial competence. Among the concerns raised by the courts' use of this approach are the reconciliation of the unconstitutionality in futuro concept with the separation of powers doctrine and the need for the court to maintain its legitimacy. Furthermore, there is the jurisprudential problem that in issuing a holding of unconstitutionality in futuro, a court may fail to give definite relief to either of the parties by making the relief conditional on the response of a nonparty, the legislature, or the executive. These considerations should effectively limit the court's use of unconstitutionality in futuro as a remedy.[46]

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[42] *Id.* at 519, 303 A.2d at 297.

[43] *Id.* at 520-21, 303 A.2d at 298.

[44] Robinson v. Cahill (*Robinson II*), 63 N.J. 196, 198, 306 A.2d 65, 66 (1973) (The pertinent part of this case is cited in Shavers v. Attorney General, 402 Mich. at 609 n.33, 267 N.W.2d at 92).

[45] *Id.*

[46] "Remedy" here refers to the type of relief which is granted in the public law litigation sphere. It is complex and ongoing, and may be negotiated with help from the parties and with the judge's participation. It is not necessarily final, but may instead be temporary. Because the declared rights of the parties do not necessarily dictate the form of relief in public law litigation, courts have great leeway in deciding the form which the relief should take. *See* notes 4-6 and accompanying text *supra*.

II. LIMITS ON THE USE OF UNCONSTITUTIONALITY IN FUTURO

A. Judicial Legitimacy

The judiciary must possess and be perceived by the public as possessing legitimacy if it is to operate as one of the three distinct and equally powerful branches of government. It has been said that legitimacy attaches to actions of courts only when they perform the functions assigned to them in the manner assigned.[47]

A court will be accorded legitimacy if it stays within the bounds of its functions and if it displays competence in performing those functions. Thus, the concept of judicial legitimacy is strongly linked to the concepts of judicial function and judicial competence. The ultimate effectiveness of a court's decision depends on the willingness of society to comply with the decision because it is viewed as a legitimate exercise of the court's power. Societal compliance depends in the end upon approval and consensus.[48]

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[47] A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 104-05 (1976). Professor Cox eloquently discusses the importance of legitimacy to the United States Supreme Court:

> The power of the Supreme Court to command acceptance and support not only for its decisions but also for its role in government seems to depend upon a sufficiently widespread conviction that it is acting legitimately, that is, performing the functions assigned to it, and only those functions, in the manner assigned. The conviction of which I speak is the resultant of many voices, not all carrying equal weight: of the opinion of the legal profession, of attitudes in the Executive and in Congress, of the response in State governments, of the press, and of public opinion.

[48] *Id.* at 117-18. Professor Cox puts the matter thusly:

> Constitutional adjudication depends, I think, upon a delicate, symbiotic relationship. The Court must know us better than we know ourselves. Its opinions may . . . be the voice of the spirit, reminding us of our better selves. In such cases the Court . . . provides a stimulus and quickens moral education. But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must already be in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus.

See also A. BICKEL, THE LEAST DANGEROUS BRANCH 20 (1962). *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978). Professor Tribe states:

> Most of the worry about how far judges may go, however genuine it may be and however fashionable it is again becoming, strikes me as rote unreality, profoundly misconceived in light of the inevitable social and cultural constraints on judicial intention and impact . . . . The inescapable boundaries of societal context and consciousness argue not that judges should restrain themselves still further, but that they must raise distinctive voices of principle. Though I express occasional reservations about judicial initiative in specific settings, I reject the assumptions characteristic of Justices like Felix Frankfurter and scholars like Alexander Bickel: the highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, "to form a

Traditional representative democratic theory holds that legitimacy of judicial action derives from a delegation of power to the courts from the elected representatives of the people and that courts should therefore carry out the legislative will. On this theory, judicial review is countermajoritarian — by invoking the doctrine of judicial review to hold individual statutes or statutory schemes unconstitutional, courts act counter to the popular will as it is expressed in legislation.[49] But it is also generally accepted that there are some areas in which a majority should not control merely because it is the majority.[50] The judicial branch, and in particular the United States Supreme Court, has been given the power to define both majority and minority freedom through the interpretation of the Constitution.[51] In order to perform this task of defining the respective areas of freedom well, the judiciary must derive and be perceived as deriving its answers from the Constitution rather than imposing its own value choices.[52]

Both public and professional expectations of judicial neutrality play an important role in our legal tradition and are an important

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more perfect Union" between right and rights within that charter's necessarily evolutionary design.

[49] Chayes, *supra* note 3, at 1314. *See also* A. BICKEL, *supra* note 48, at 16. It must be noted, however, that in theory the popular will is also embodied in the United States Constitution and various state constitutions, and that courts therefore act in accord with the "popular will" when they determine whether a given statute is constitutional.

[50] Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1,2-3 (1971). Bork writes:

> If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model . . . we may for convenience . . . call "Madisonian."
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> A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason than they are majorities . . . . The model has also a countermajoritarian premise, however, for it assumes there are some areas of life a majority should not control . . . . These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

[51] *Id.* at 2. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803), Chief Justice Marshall stated concerning judicial review:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

[52] Bork, *supra* note 50, at 3. Bork writes concerning the power of the Supreme Court to define both majority and minority freedom through the interpretation of the Constitution:

> [I]t follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.

source of the judiciary's prestige and legitimacy.[53] In private law litigation, the judiciary's function is to be a neutral arbiter.[54] The judiciary's unique neutral function is highlighted when contrasted with the functions of the other branches. The other branches are assumed to respond to pressure or to interests which are sometimes highly organized.[55] Courts, on the other hand, render "legitimate" decisions only when they are perceived as seeking to disassociate themselves from individual or group interests and adjudicate by disinterested standards. Legitimacy derives from a realization that decisions are reached not because of some personal bias on the part of the judge but because they are consistent with principles which apply to all citizens at all times.[56]

Unconstitutionality in futuro poses a threat to the legitimacy of the judicial branch. Its three distinctive features may signal to the legislative or executive branch that the court finds fault with its work, and that the court is willing and able to replace the statutory scheme with a better one of its own creation. First, this approach suggests that the court is operating beyond the scope of an impartial arbiter, and is in fact performing a legislative function. Under the traditional view, the judicial function consists essentially in the investigation, declaration, and enforcement of liabilities under existing laws. In contrast, the legislative function is forward-looking and alters existing conditions by making policy judgments which are applied prospectively.[57] Unconstitutionality in futuro is used in public law litigation, where the line between judicial and legislative functions is not clear or rigid. Nonetheless, if a court through a holding of unconstitutionality in futuro seeks to weigh and balance the same interests which the legislature has already considered, or to urge its own solution on the legislature, its perceived neutrality is impaired.[58]

Second, the court must run the risk that it will in fact fail to implement a better program while becoming enmeshed in remedial problems. If it fails, a further loss of legitimacy may result. This

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[53] M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 31 (1964).

[54] Chayes, *supra* note 3, at 1283.

[55] For a classic and critical account of the roles interest groups play in the political arena, *see* C. MILLS, THE POWER ELITE (1964).

[56] A. COX, *supra* note 47, at 108-09.

[57] Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Mr. Justice Holmes explained:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

[58] Cox, *The Role of the Supreme Court in American Society*, 50 MARQ. L. REV. 575, 582-84 (1967).

loss may occur because the court is inattentive to contemporary currents of thought in society and seeks by its decisions either to hasten the process of societal change or to retard the growth of an attitude which it disfavors. The court may simply be incompetent to make complex policy decisions within the litigation framework.[59]

The risks are illustrated by both *Shavers* and *Robinson*. If the legislature fails to act after *Shavers*, the No-Fault Act could be declared void as of January, 1980, and motorists would revert to remedies under traditional negligence and tort laws, which would create chaos in the insurance field.[60]

A more likely judicial response is the issuance of a temporary remedy similar to the one issued in *Robinson I*.[61] The initial temporary remedy in *Robinson I*, which stated that obligations thereafter incurred under the existing statutes would be valid according to the terms of those statutes, marked the beginning of three years of administrative problems with the New Jersey education financing scheme.[62] Temporary remedies such as those provided in *Robinson I* aggravate the court's involvement in the remedial process. As provisional remedies they require a response from the affected parties, and will be altered by the court depending on the nature of the parties' response. The court's follow-up remedy could range from

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[59] In Justice Mountain's dissent in Robinson v. Cahill (*Robinson VI*), 70 N.J. 155, 164, 358 A.2d 457, 461-62 (1976), he identifies one frequently raised limitation on the judiciary's ability:

> Finally, removing a matter from legislative or executive control may often result in most unfortunate side effects.The Court may often be unable to view the governmental problem in its entirety and as a whole. For instance, in the case before us the obvious effort of the Court is to compel the raising of a very large amount of money and seeing that it is allocated to educational needs. Worthy as is this purpose, it takes no account of any number of public needs of which the Legislature is acutely aware. Welfare, public health, needed renovation and construction of public facilities including correctional institutions, mass transit and essential increases in the wages and salaries of public employees, to name but a few, are also very worthy purposes. . . . If the judiciary seeks satisfactorily to resolve the problem before it, may not compelling needs be forced to go unmet? The Legislature can, as it customarily does, take account of *all* public obligations, and allocate funds accordingly.

[60] The important point is not that a holding of unconstitutionality in futuro runs a greater risk of producing chaos than other types of holdings, such as prospective holdings. Rather, it is that courts should not think that they will always be avoiding chaos by simply employing a holding of unconstitutionality in futuro.

[61] The possibility that the 18 month deadline would be extended and that the Michigan Supreme Court would refuse to carry out its present plan to void the No-Fault Act if the Michigan Legislature does not respond satisfactorily was discussed by Chief Justice Coleman in a television appearance in March, 1979. Coleman stated that a principal criterion in deciding whether to extend the limit would be how close the leislature is to enacting a remedial measure, but said, "I wouldn't want to go on record saying the court will do something in a certain situation." 18 Michigan Report no.47, at 1 (Gongwer News Service, Inc., March 9, 1979) (on file with the *Journal of Law Reform*).

[62] *See* notes 39-45 and accompanying text *supra*.

finding the parties' response adequate for correcting the deficiency in the statute to involving the court in the development of an entirely new set of guidelines. Adaptation of this course would involve the *Shavers* court deeply in the remedial aspects of the case with no guarantee that the remedial process will do more than create protracted litigation as in the *Robinson* cases.[63]

Third, by outlining an acceptable response from the legislature or the executive, the court is resting its legitimacy on a response from a separate branch of the government which may not be forthcoming. Thus, a key question which any court that is contemplating use of an in futuro holding ought to consider is whether its mandate will impel the legislature or the executive to appropriate action. In *Shavers*, for instance, the Michigan legislature might refuse to act in accordance with the court's directives, because it is deadlocked over the provisions which would remedy the No-Fault Act, or because the eighteen-month period proves to be too short.[64] The court should also be aware of a possible collision between itself and the legislative or executive branch if, subsequent to the court's formulation of a temporary remedy, the other branches act on their own and adopt different programs.[65] At the very least, the court would be embarrassed by the public's tendency to view the legislative or the executive branch as the rightful source of policy and administrative decisions.

Fourth, there is an inherent danger that a court may undermine its legitimacy by avoiding its decision-making responsibilities when it issues a holding of unconstitutionality in futuro. Once a statute or statutory scheme has been declared unconstitutional in futuro, the court shifts the responsibility to the legislature or the executive to act or to demur. The court is no longer seen by itself and by others as responsible for whether the statute is in fact voided. Ironically, as the *Robinson* cases suggest, the legislature, in turn, may not consider itself the proper dicision-maker.

A court may also be avoiding its fundamental responsibility of ruling on the legal issues in cases which come before it. Paradoxically, by holding a statute unconstitutional in futuro, a court exercises its traditional judicial function in validating and legitimizing the use of an existing statutory scheme while simultaneously rendering an opinion regarding the statute's constitutionality. Argu-

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[63] See note 39 *supra* for a discussion of the *Robinson* litigation.

[64] While 18 months may seem like an adequate period, it may be that the legislature, knowing it unnecessary to act immediately, will indefinitely delay consideration of remedial legislation. *See* note 61 and accompanying text *supra*.

[65] *See* A. Cox, *supra* note 47, at 94-96. Professor Cox generally discusses the proper function of the Supreme Court within the government, and emphasizes the importance of each branch remaining within the bounds of its proper role.

ably, by declaring a statute unconstitutional and delaying the effect of that holding a court is upholding an unconstitutional statute.[66] In theory a statute or statutory scheme which has been held unconstitutional remains void until it is either remedied or replaced.[67] This, however, was not the *Shavers* court's intention, since it stated, "[a]t an appropriate time before 18 months from the issuance of this opinion, we will reexamine the constitutional status of the No-Fault Act in terms of remedying the present due process deficiencies."[68] This language indicates that the statute will not be unconstitutional until the court actually voids it at the end of the eighteen-month period. Under this alternative interpretation, the *Shavers* court's action constitutes a legal fiction which is a judicial attempt to sidestep the command of *Marbury v. Madison*[69] that courts review the legality of cases which come before them, including the constitutionality of the applicable statute.

Finally, because the legislative and administrative adjustments to the holdings are made easier by delaying the effect of the holding and by maintaining the status quo during the interim period, a court may more hastily conclude that a statute or statutory scheme is unconstitutional than if it could not delay the effect of its holding. As a result, more statutes or statutory schemes which are defective in ways which do not amount to traditionally conceived constitutional deficiencies may be held unconstitutional in futuro on the theory that this is an effective means of ensuring that the defect will be removed, and that there is correspondingly little risk that the court will have to void the statute.[70]

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[66] In *Shavers*, the court issued interim directives which included the requirement that until the legislature or appropriate agency responds to the deficiencies, the Commissioner is to enforce the present regulatory scheme in the spirit of the court's opinion to assure the availability of no-fault insurance at fair and equitable rates. Shavers v. Attorney General, 402 Mich. at 610-11, 267 N.W.2d at 92-93.

[67] *See* Jawish v. Morlet, 86 A.2d 96 (Mun.Ct.App. D.C. 1952) (The underlying principle is that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished, and that if the decision is reversed the statute is valid from its first effective date). *See also* Magnolia Petroleum Co. v. Carter Oil Co., 218 F.2d 1 (10th Cir. 1954), *cert. denied*, 349 U.S. 916 (1955) (by implication) (an unconstitutional statute may be amended into a constitutional one so far as its future operation is concerned by removing its objectionable provisions, or by supplying others, to conform it to the requirements of the Constitution).

[68] Shavers v. Attorney General, 402 Mich. at 609-10, 267 N.W.2d at 92.

[69] 5 U.S. (1 Cranch) 137 (1803).

[70] This observation is supported by recent events in the field of administrative law. There has been at least some recognition by members of the Department of Health, Education, and Welfare of a relaxation in judicial attitudes toward faulty agency regulations. HEW Memorandum from Galen Powers to Peter Libassi and Bob Derzon (March 23, 1978) (on file with the *Journal of Law Reform*). The author states that, in the area of rulemaking requirements under the Administrative Procedure Act (APA), the judiciary is increasingly willing to give agencies an opportunity to correct APA violations while allowing the rule to remain in effect pending substitution of a properly promulgated rule. *See* Rodway v. United States Dep't of Agriculture, 514 F.2 809 (D.C. Cir. 1975); Schupak v.

B. Judicial Competence

1. Ability to Provide a Remedy—Under the traditional model of private law litigation, the remedy flows more or less directly from the nature of the violation;[71] relief is given directly to the parties and the impact of the judgment is confined to them.[72] In contrast, one of the main features of public law litigation is the increasing importance of equitable relief that may have consequences for persons not before the court. One test of the court's competency in handling public law litigation is its ability to formulate a satisfactory program which will work for the parties presently as well as in the future.[73]

In holdings of unconstitutionality in futuro, there is no certainty that either party to the lawsuit will obtain relief. Because of the delayed effectiveness — and, thus, conditional nature — of the holding, the plaintiffs may never get the relief they sought and to which the court holds that they are entitled. A comparison of *Shavers* and *Brown v. Board of Education (Brown II)*[74] illustrates this point. Even though the *Brown II* Court did not begin to penalize the school districts for noncompliance immediately upon the issuance of its opinion, it is clear that if subsequently confronted with a comparable case, the Court would have held that the system violated the Equal Protection Clause of the United States Constitution and would have fashioned appropriate relief. Thus, for purposes of the remedy given to the parties to the lawsuit, the system was unconstitutional as of the day of the opinion. It is not so clear, on the other hand, how the Michigan Supreme Court would rule if another case like *Shavers* came before it within the eighteen-month interim period. The court refers to its holding that the No-Fault Act is unconstitutional on due process grounds for failing to provide adequate administrative remedies as something which it *has* done. This indicates that the No-Fault Act is presently unconstitutional,

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Mathews, No. 76-2016 (D.C. Cir., filed Nov. 7, 1977); American Health Care Ass'n v. Califano, 443 F. Supp. 612 (D.D.C. 1977); Humana of S.C., Inc. v. Mathews, 419 F. Supp. 253 (D.D.C. 1976).

The approach taken by the federal district courts and courts of appeals in these cases is roughly analogous to the Michigan Supreme Court's approach in permitting the No-Fault Act to remain effective during the 18 month interim period. An important difference, however, is the fact that in these federal cases, no statute has been declared unconstitutional and therefore it cannot be argued that the federal courts have encroached on the province of the legislature. Nonetheless, while no legislative action is required to correct the problems in *Rodway*, *Humana of S.C., Inc.*, *Schupak*, or *American Health Care Ass'n*, executive action is required.

[71] Chayes, *supra* note 3, at 1282-83. *See* notes 5-6 and accompanying text *supra*.

[72] Chayes, *supra* note 3, at 1283.

[73] *See id.* at 1298-1301.

[74] 349 U.S. 294 (1955).

at least as to its procedural provisions.[75] Even though the statute in *Shavers* has been declared unconstitutional, the court ruled that the Commissioner of Insurance should continue to apply the statute under pre-*Shavers* law. This is at best a pyrrhic victory for the plaintiffs in *Shavers*, who succeeded in having the statutory scheme they were attacking declared unconstitutional, only to be told by the court that relief, in the form of voiding the statute, would be withheld. More generally, there is the danger that future plaintiffs will also fail to receive immediate relief if they bring suit prior to the court's final determination of the constitutionality of the statute.

One commentator,[76] in analyzing recent United States Supreme Court decisions, identified three additional concerns with regard to judicial competence: the lack of judicial standards for prospective choices in complex policy matters; a court's competence to deal with large amounts of technical data; and a judge's ability to supervise and administer long-term decrees in a manner consistent with his traditional role as an aloof arbiter.[77] These concerns and their

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[75] Shavers v. Attorney General, 402 Mich. at 611, 267 N.W.2d at 93. The court stated:

> Although we have held the No-Fault Act's "compulsory insurance requirement" unconstitutional because of insufficient due process protections, effective as of 18 months from the issuance of this opinion, we again emphasize our concurrent holding that "[d]uring the interim period. . .the No-Fault Act's constitutionally valid provisions, as decided in this opinion and subsequent opinions, will remain in effect.

[76] Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. CIV. R. - C.L.L. REV. 1 (1978).

[77] *Id.* at 43-44. Goldstein analyzes Milliken v. Bradley, 418 U.S. 717 (1974), in which the Supreme Court declined to enforce a lower court order which reorganized the school districts of an entire metropolitan area and disregarded boundary lines between school districts, pursuant to an order to desegregate. At stake in this case was a metropolitan plan for bussing pupils from predominantly black schools to white schools, and pupils from predominantly white schools to black schools. The plan included not only the Detroit school district but also outlying suburban school districts, even though it had not been shown by any statistical data that there were implicit plans to maintain a certain ratio of white to black students. The Court stated that where interdistrict relief was ordered to remedy a constitutional violation occurring in several districts, boundary lines between those districts could be ignored. Otherwise, these lines could not be casually ignored or treated as administrative conveniences because local control over schools is a deeply rooted tradition and is thought to be essential to the maintenance of the quality of the educational system. 418 U.S. 717, 741-42 (1974).

Goldstein argues that, in so holding, the *Milliken* Court stressed the following aspect of judicial competence: it criticized the district court's attempt to create a metropolitan school district because it required the court to engage in making technical, bureaucratic, and financial decisions. Goldstein also notes that courts are considered no more competent to act as day-to-day administrators engaging in on-going supervision than as policymakers, that they are institutions designed "to act occasionally and on principle but not to respond on a continuing basis to newly arising practical problems." Goldstein, *supra* note 70, at 44-45 (footnote omitted). Perhaps the most recent expression of this concern by the Court is found in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), where the Court held that a federal agency's decision to

implications for unconstitutionality in futuro warrant consideration.

2. Proposed Judicial Standards—The potential lack of judicial standards is a problem in every variety of public law litigation. Even in abrogating old tort remedies or state immunity from suit, various state courts have had to replace old rules with new ones which are equally without firm judicial standards.[78] But unconstitutionality in futuro is particularly liable to abuse where no firm judicial standards exist because it is conducive to deepened court involvement with and control over litigation which is extremely important to society. With no judicial standards to guide it, a court employing unconstitutionality in futuro may substitute guidelines or a temporary scheme arbitrary and unresponsive to the public policy or political considerations underlying the original scheme.

In light of this admitted problem, it is helpful to consider a possible set of standards for deciding when a court should employ unconstitutionality in futuro. The standards proposed for guiding courts in using prospective holdings also offer a basis for judging the appropriate use of unconstitutionality in futuro.[79]

The first standard is whether there has been a clear demonstration that precedent must be overruled or a statutory scheme declared unconstitutional. A clear demonstration requires that there be no other viable alternatives available to the court except judicial overruling or declaring the entire statute unconstitutional. In *Shavers*, the court found the No-Fault Act procedurally deficient, while holding that the No-Fault Act, insofar as it provides benefits to victims of motor vehicle accidents without regard to fault, constitutionally accomplishes its goal.[80] Given this unique constitutional

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grant the plaintiff corporation a license to build a nuclear reactor would not be overturned simply on the grounds that the rule-making procedures adopted by the agency were inadequate, which they were not in this case. The Court, through Justice Rehnquist, stated that the Administrative Procedure Act, at 5 U.S.C. § 553 (1976), establishes the maximum procedural requirements which Congress was willing to have courts impose on federal agencies in conducting rule-making proceedings, and that while agencies are free to grant additional procedural rights in the exercise of their discretion, reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. *Id.* at 524. The Court nonetheless recognized that this is not an absolute rule: "This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare." *Id.*

[78] Note, *Prospective-Prospective Overruling*, 51 MINN. L. REV. 79, 80 (1966). *See* notes 21-23 *supra*.

[79] *See* Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533,561 (1977).

[80] 402 Mich. at 579, 267 N.W.2d at 77.

The court also stated:

> The constitutional status of the No-Fault Act places this Court in an extraordinary jurisprudential position: the No-Fault Act, which has substantially affected every Michigan motorist, every insurance company underwriting motor vehicle insurance in Michigan, and our entire system of civil justice for nearly five years,

situation, an alternative available to the court would have been to read the due process requirements into the statute.[81] This would not require the court to hold the entire statute unconstitutional in futuro and to risk voiding both the constitutionally sound and constitutionally infirm portions of the statute. Arguably, then, *Shavers* does not satisfy the first standard.

Robinson, on the other hand, seems more clearly to have met the requirement of the first standard. In light of the New Jersey Constitution's mandate to the legislature to provide for the maintenance and support of a thorough and efficient system of free public schools, the *Robinson* court decided that the 1970 Act which provided for school aid on the basis of local taxation and "weighted pupils" did not satisfy the state's constitutional obligation.[82] There is no other way that the *Robinson* court could have accomplished its purpose of assuring a thorough and efficient system of free public schools except by striking down the entire 1970 Act as unconstitutional. The fault lay with the entire Act, not simply its procedural provisions. While *Robinson* may satisfy this standard, however, it arguably raises significant separation of powers problems.[83]

One alternative to holding a statute unconstitutional in futuro, which was not available in either *Shavers* or *Robinson* because the statutory schemes had been challenged by plaintiffs alleging harm, is for the court to issue an advisory opinion. Advisory opinions have been given in Michigan[84] and also in New Jersey.[85] Advisory opinions issued in response to legislative action leave to the legislature the process of making the underlying political and policy decisions and minimize the courts' intrusion into these decisions. In rendering advisory opinions, courts simply perform the traditional judicial function of determining the constitutionality of a statute. Thus, where a court may issue an advisory opinion, it is preferable to holding a statute or statutory scheme unconstitutional in futuro. While the advisory opinion accomplishes the important end of warning of the constitutional infirmity of a statute or statutory scheme, it neither demands the compliance of another branch nor so clearly risks the disruption of the statutory scheme at a definite future date.

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is constitutional in its general thrust but unconstitutionally deficient in its mechanisms for assuring that compulsory no-fault insurance is available to Michigan motorists at fair and equitable rates.

Id. at 581, 267 N.W.2d at 78.

[81] *See* note 120 and accompanying text *infra*.

[82] Robinson v. Cahill (*Robinson I*), 62 N.J. at 515-19, 303 A.2d at 295-97.

[83] *See* Part II C *infra*.

[84] *See* Advisory Opinion re Constitutionality of 1974 P.A. 242, 394 Mich. 41, 228 N.W.2d 772 (1975).

[85] *See, e.g., In re* Public Utility Bd., 83 N.J.L. 303, 84 A.706 (1912).

The second standard is whether the new rule or set of guidelines is thought to be the best of all possible replacements. In most cases, this will amount to a less drastic means test, which would require the court to choose guidelines which are constitutionally sound but will disrupt the administration of a statutory scheme to a lesser degree than any other constitutionally sound guidelines. In these cases, the best possible replacement is that which causes the least possible disruption. The minimum due process guidelines which the *Shavers* court issued may be assumed to meet the second standard because of the court's undoubted competence to fashion constitutionally sound due process standards and because the guidelines were accompanied by an interim order to apply all of the present provisions of the No-Fault Act until the legislature acted to adopt those guidelines or until the eighteen-month period passes. Thus, if the legislature responds appropriately, there will be a minimum of disruption in the administration of the No-Fault Act.

Whether the *Robinson* court's desired changes and suggested guidelines satisfy the second standard as the best of all possible replacements is unclear. The court's yearly appropriations of educational funds together with its statement that the state, in order to impose a statewide property tax, must tax all taxable property in the state, or if assigned to local governments, the tax must fall uniformly upon all taxable property within the county or municipality,[86] failed to produce a satisfactory response for three years. In fact, instead of producing the least possible disruption of public education in New Jersey, the *Robinson* court's suggested guidelines and yearly appropriations finally resulted in the court's issuing an injunction against all spending for public education.[87] Even though the educational tax scheme had to be declared unconstitutional, the court could have minimized the disruption to the system through use of an alternative similar to that used in *Shavers*. Specifically, the court could have allowed the existing statutory scheme to remain in effect until the legislature acted rather than appropriating funds itself on a yearly basis and unilaterally altering the appropriations formula.[88] The second standard should also include a determination by a court that its use of unconstitutionality in futuro will appreciably increase the chance that it will not in the end have to institute its own drastic remedy. The practical problem with this suggestion, however, is that it is difficult for

[86] Robinson v. Cahill (*Robinson I*), 62 N.J. at 502-03, 303 A.2d at 288.
[87] Robinson v. Cahill (*Robinson VI*), 70 N.J. 155, 358 A.2d 457 (1976).
[88] *See, e.g.*, Robinson v. Cahill (*Robinson III*), 67 N.J. 333, 350-51, 339 A.2d 193, 201-02.

any court to foresee whether legislative compliance with the court's suggested guidelines is probable. The subsequent history of *Robinson* indicates that courts should not lightly assume that legislatures will be as anxious as they are to avoid disruption.

The third standard is whether the hardship on the group which has relied on the present rule or present statutory scheme outweighs the hardship on the party denied the benefit of the new rule or set of guidelines. Hardship should refer to both disruption of a social practice or institution and the injustice which is done as a result of maintaining the status quo until a determined time in the future compared with the injustice done by immediately instituting the new rule. The third standard thus requires courts to balance the relative social costs of abrupt or delayed implementation of a change which they have decided must take place.

The balancing required by the third standard limits unconstitutionality in futuro to cases in the public law litigation area which challenge pervasive social programs. Both *Shavers* and *Robinson* seem to satisfy the third standard. The hardship on motorists and injured victims which would be created by voiding the No-Fault Act as of the date of the opinion far outweighs the hardship on the plaintiffs who are denied the benefit of new minimum due process provisions. Likewise, the heavy reliance by the parties on the existing educational tax scheme in New Jersey far outweighs the benefits to be gained by ordering an immediate statutory shift.

Several conclusions may be drawn from the application of these three standards. The balancing test in the third standard will always favor the use of unconstitutionality in futuro so long as it is limited to challenges of broad social programs. The first two standards, however, limit the use of unconstitutionality in futuro within the public law litigation area. These sanction its use only when other alternatives are not available. When no other alternatives exist, the less drastic means test requires that a court select guidelines which will disrupt the program as little as possible. This will, in most cases, require that the statutory scheme remain in effect until the legislature acts. Together, these standards outline a program of judicial restraint in the use of unconstitutionality in futuro. They minimize the intrusion of the courts into the legislative and administrative processes and so protect the courts' legitimacy by keeping them within the bounds of their competence. The standards also implicitly recognize the fact that all courts will more frequently be confronted with litigation requiring them to fashion remedies responsive to interests beyond those of the parties directly involved in the suit.

3. Lack of Technical Expertise—The necessity of digesting the large amount of technical data present in complex public law litiga-

tion conflicts necessarily with the time constraints placed on any lawsuit. Judges have neither the time nor the resources to make in-depth sociological or statistical studies to help them reach a decision. Thus, there are time limits to the court's ability to make and implement policy decisions within the framework of litigation.[89] By the use of unconstitutionality in futuro, courts guarantee a deep and time-consuming involvement with complex and technical issues and with the critical evaluation of various legislative or executive attempts to remedy the statute or statutory scheme. As the *Robinson* cases demonstrate, one legislative attempt to remedy a statute or statutory scheme and one critical evaluation by the court may not be sufficient.[90]

In addition to the time constraints which work against any court involved in complex litigation and contemplating the use of a holding of unconstitutionality in futuro, courts also lack adequate information-gathering apparata.[91] Unlike legislatures, which have comparably more time to act on a given proposal and greater access to needed information through specialized committees and legislative staffs, courts have traditionally been at the mercy of the parties for fact and issue development,[92] and have not had the resources or personnel at their disposal for an elaborate analysis of information.[93] The lack of information-gathering apparata and the presence of time constraints have led courts to regard a single case as an adequate representative of all cases in the area. Courts may thus be tempted to treat a case as representative when the entire thrust of the case is to the contrary.[94]

To some extent, legislatures are faced with the same problem:

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[89] D. HOROWITZ, THE COURTS AND SOCIAL POLICY 298 (1977). Horowitz states the problem informatively:

> It may be the limited scope of consultation, or the inability of courts to see how their policies work out, or the difficulty of dealing with unusually fluid or broad problems in an episodic and narrow framework, that stamps the judicial process as more limited for some policy problems than other institutions are.

[90] *See* note 39 and accompanying text *supra*.

[91] *See* D. HOROWITZ, *supra* note 89, at 277-78. Horowitz considers the reliance which the Supreme Court placed on empirical aids in formulating its opinion in *Miranda*, noting that the decision has been criticized by police officers because it relied too heavily on information contained in police manuals advocating extreme interrogation practices. Horowitz states that the Court inferred the existence of a widespread practice on the basis of advice given by the manuals, and as a result treated that issue in a vulnerable and uninformed fashion. *Id.* He concludes that sources of judicial information can affect both the soundness of a decision and its legitimacy and impact: "A decision out of touch with the reality familiar to the specialized functionaries affected by the decision may inspire resistance rather than respect." *Id.* at 278.

[92] Chayes, *supra* note 3, at 1283.

[93] *See* D. HOROWITZ, *supra* note 89, at 279.

[94] Goldstein, *supra* note 76, at 45-46.

the input they receive can be as unrepresentative of a given area as a case may be. The difference is that legislators have control over the weight given input from certain interest groups, while courts are usually more dependent on the parties to the lawsuits before them for determining the scope of issues presented.[95]

4. Administrative Shortcomings—The nature of the traditional role of the courts in fashioning remedies tends to render courts incompetent to deal with on-going situations which demand flexible plans and day-to-day attention to the subject matter of the litigation. When it issues a holding of unconstitutionality in futuro, a court retains jurisdiction and frequently reviews the situation. This automatically involves the court in the day-to-day operation of activities for which it has no formal training and little knowledge, taking it beyond the bounds of its competence and taxing its legitimacy in the eyes of the public.[96]

Competence encompasses much more than familiarity with the subject matter of a statute or social program, such as the Michigan Supreme Court had with the No-Fault Act. It includes having access to a wide range of informational resources, a willingness and capacity to deal with far-reaching problems outside the narrow and episodic framework of the traditional case, and the tools to insure that the court-fashioned policies will be put into practice.[97]

Courts which employ holdings of unconstitutionality in futuro must be prepared for long-term administration and frequent re-

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[95] *Id.* at 45-47. This dependency is mitigated to some degree by the use of amicus curiae briefs and court-appointed masters.

[96] Use of the equitable decree enables a court to be involved in "a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer," and it prolongs rather than terminates the court's role in the subject matter of the litigation. Chayes, *supra* note 3, at 1298. *See generally* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957), where the authors state:

> The point is that the courts will draw from a body of experience not germane to the problem they will face. Given their limited means of informing themselves and the episodic nature of their efforts to do so, they will only dimly perceive the situations on which they impose their order. Even if they do perceive, they will necessarily come too late with a pound of "remedy" where the smaller measure of prevention was needed. Their rules, tailored to the last bit of trouble, will never catch up with the next and different dispute. They will allow or forbid and be wrong in either event, because continuous, pragmatic, and flexible regulation alone can help. They will on most occasions naturally shy away from basing their judgments on what they are accustomed to regard as "political" factors incompatible with their disinterestedness, although these may form the only sensible context of questions before them. And they will thus find themselves resting judgment on trivia or irrelevancies. All this will not only, by its sheer volume, divert the energies of the courts from their proper sphere but will also tend to bring the judicial process into disrepute by exposing it as inadequate to a task with which it should never have been entrusted.

Id. at 25.

[97] *See* note 89 and accompanying text *supra*.

views of the process of compliance.[98] In most cases, they will lack the capacity, tools, time, and therefore the competence to do an effective job as an administrator. Even in such fundamental areas as school desegregation[99] and school financing,[100] — areas in which the courts have had substantial experience — courts have not had the anticipated success in administering the remedies they have mandated because the necessary degree of compliance from legislatures and administrative agencies has not been forthcoming.[101] There is no reason to believe, in the light of the *Shavers* and *Robinson* cases, that holdings of unconstitutionality in futuro will induce greater or more immediate compliance than will prospective holdings. This lack of willing compliance, if it continues for a long period or is within a highly visible public concern, will tend to exacerbate a court's loss of legitimacy in the eyes of the public. Any court which contemplates employing a holding of unconstitutionality in futuro should be alerted to the fact that its holding will be carefully scrutinized not only for its immediate effects but also for the court's ability to secure future compliance.

C. Separation of Powers

1. Nature of the Doctrine—The separation of powers doctrine is closely allied with the concerns of judicial legitimacy and competency. It will serve to limit a court's decision to implement a program after holding a statute unconstitutional in futuro.

The federal version of this doctrine generally forbids the courts from interfering with the operations of the other two branches by trying to correct defects in statutes or by replacing statutes with rules of their own.[102] Many state constitutions contain a clause

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[98] This statement also holds true for rulings which are applied prospectively.

[99] *See* Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968); Brown v. Board of Educ. (*Brown I*), 347 U.S. 483 (1954).

[100] Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976 (1973).

[101] For an interesting account of one court's attempt to administer changes which it had ordered in a state's mental institutions, see Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

[102] Labine v. Vincent, 401 U.S. 532, 537 (1970), *rehearing denied*, 402 U.S. 990 (1970) (the Court is not constitutionally empowered to overturn a state's legislative choice under the guise of constitutional interpretation because the Justices believe they can provide better rules); Winningham v. United States Dep't of Housing & Urban Dev., 371 F. Supp. 1140 (S.D. Ga. 1974), *aff'd*, 512 F.2d 617 (5th Cir. 1975) (Article III of the Constitution does not confer the power on federal courts to correct the shortcomings and asperities of statutes by what amounts to judicial legislation); Holmes v. Government of the Virgin Islands, 370 F. Supp. 715 (D.V.I. 1974) (the judicial branch may not encroach on or interfere with the proper exercise of the powers which have been lawfully delegated to the legislative branch); Protestants and Other Americans United for Separation of Church & State

similar to the one in the Michigan Constitution, "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch, except as expressly provided in this constitution."[103]

The line between permissible judicial interpretation and impermissible judicial legislation is acknowledged to be narrow.[104] But contrary to the traditional view, which sharply distinguished between the legislative and judicial functions,[105] the contemporary view is that the separation of powers doctrine is contravened only by the degree of involvement which one branch has in another branch's affairs,[106] and is thus not to be regarded as an absolute prohibition on that involvement.[107] The separation of powers doctrine is viewed as a general principle applied to maintain checks and balances between the three governmental branches.[108] In slightly different terms, it is directed not at the danger of "blended

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v. O'Brien, 272 F. Supp. 712 (D.D.C. 1967) (courts may not control or supervise the operations of the other two branches of government).

[103] MICH. CONST. art. 3, § 2. *See also* ALA. CONST. art. 3, § 43; ARIZ. CONST. art. 3; ARK. CONST. art. 4, § 2; CAL. CONST. art. 3, § 3; COLO. CONST. art. 3; CONN. CONST. art. 2; FLA. CONST. art. 2, § 3; GA. CONST. art. 1, § 2, ¶ 4; IDAHO CONST. art. 2, § 1; ILL. CONST. art. 2, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art 3, § 1; KY. CONST. §§ 27 & 28; LA. CONST. art. 2, §§ 1 & 2; ME. CONST. art. 3, §§ 1 & 2; MD. CONST. art. 8; MASS. CONST. pt. 1, art. 30; MINN. CONST. art. 3; MISS. CONST. art. 1, §§ 1 & 2; MO. CONST. art. 2, § 1; MONT. CONST. art. 4; NEB. CONST. art. 2; NEV. CONST. art. 3, § 1; N. C. CONST. art. 1, § 6; N. H. CONST. pt. 1, art. 37; N. J. CONST. art. 3; N. M. CONST. art. 3, § 1; OKLA. CONST. art. 4; ORE. CONST. art. 3, § 1; R. I. CONST. art. 3; S. C. CONST. art 1, § 8; S. D. CONST. art. 2; TENN. CONST. art. 2, §§ 1 & 2; TEX. CONST. art. 2, § 1; UTAH CONST. art. 5, § 1; VT. CONST. ch. 2, § 5; VA. CONST. art. 1, § 5; W. VA. CONST. art. 5, § 1; WYO. CONST. art. 2, § 1. The states whose constitutions do not contain a provision relating to the separation of powers are: Alaska, Delaware, Hawaii, Kansas, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, Washington, and Wisconsin.

[104] *See* United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 202 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968) (courts must be careful so as not to cross the "gossamer line which sometimes separates proper judicial interpretation from judicial usurpation of the legislative function").

[105] *See* note 57 *supra*.

[106] A. COX, *supra* note 47, at 99.

[107] United States v. Solomon, 216 F. Supp. 835, 840 (S.D.N.Y. 1963). The court stated:

> Chief Justice Vanderbilt of the Supreme Court of New Jersey, in 1953 wrote: "*The division of government into three branches does not imply*, as its critics would have us think, *three watertight compartments*. Montesquieu, as we have seen, knew better; the three departments, he said, must move 'in concert.' " (Emphasis supplied) . . . . The isolation of these powers is not intended and any complete division between departments is impossible.

(footnote omitted).

[108] *See* Robinson v. Cahill (*Robinson IV*), 69 N.J. 133, 174, 351 A.2d 713, 735, *cert. denied*, 423 U.S. 913 (1975) (Mountain, J., dissenting). In his dissenting opinion with Justice Clifford, Justice Mountain stated:

> Clearly today the doctrine of the separation of powers cannot be said to require a complete compartmentalization along triadic lines. More and more courts have come to recognize that where a practical necessity exists, a blending of powers will be countenanced, *but only so long as checks and balances are present to guard against abuses.*

Id. at 178, 351 A.2d at 737 (emphasis in original).

power'' but at the danger of ''unchecked power.''[109]

General standards which determine when one branch has impermissibly interfered with another branch's internal affairs have been established. For example, federal courts may not interfere with the management of the internal affairs of either house of Congress, nor may they judge the qualifications of its members.[110] Federal courts may not control or supervise the management or operations of departments or agencies of the executive branch.[111] More generally, federal courts may not interfere with powers that have been lawfully delegated to the legislature,[112] nor may they supply missing portions of statutes which are under-inclusive in their scope.[113] Michigan state courts are guided by a separation of powers standard which displays the same spirit as the federal standards. While they may pass upon the constitutional validity of statutes and ordinances, Michigan state courts cannot compel legislative bodies to act in one way or another, as when they try to compel members of a city council to amend an ordinance.[114] New Jersey state courts have a duty to say what the law is and not what they think it should be, as in the case of the legislature's failure to remove an unemancipated child's immunity from tort suit.[115]

These standards require courts to make judgments of degree. The question of degree can be analyzed into two separate questions: (1) How much should a court limit constitutional adjudication to cases and remedies which have traditionally been the province of judicial determination or, how much should it expand judicial intervention into the affairs of the other branches? (2) To what extent should a court's decisions and orders be guided by considerations of policy taken independently of existing law, and to what extent by the law as it stands or by criteria and standards which a court considers binding even though it would reach another conclusion if it were not bound by the law?[116]

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[109] K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 1.09 at 68 (1958). *See also* Myers v. U.S., 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Justice Brandeis, dissenting, stated:

> The doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

[110] Protestants and Other Americans United for Separation of Church & State v. O'Brien, 272 F. Supp. 712, 715 (D.D.C. 1967).

[111] *Id.*

[112] Holmes v. Government of the Virgin Islands, 370 F. Supp. 715, 723 (D.V.I. 1974).

[113] Winningham v. United States Dep't of Housing & Urban Dev., 371 F. Supp. 1140, 1151 (S. D. Ga. 1974), *aff'd*, 512 F.2d 617 (5th. Cir. 1975).

[114] Randall v. Meridian Township Bd., 342 Mich. 605, 608, 70 N.W.2d 728, 729 (1955).

[115] Bush v. Bush, 95 N. J. Super. 368, 231 A.2d 245 (1967).

[116] A. Cox, *supra* note 47, at 99. In Shavers v. Attorney General, 402 Mich. 554, 267 N.W.2d 72 (1978), Justice Ryan remarks:

> Our stated and restated deference to the legislative function, as embodied in the

2. Substance/Procedure Distinctions—If a court holds a statutory scheme void as of the date of its opinion, no violation of the separation of powers doctrine is likely to be found, since it has long been accepted that it is within the judicial function to suggest approaches which would remedy constitutional deficiencies to the legislature and to retain jurisdiction to monitor the effect of any remedy given.[117] Unconstitutionality in futuro, in contrast, allows a court to consider independent policy factors and thus dangerously encroach on the provinces of the other branches through the interaction of the factors of delayed timing and suggested guidelines.

In analyzing the appropriate use of unconstitutionality in futuro, one factor which arguably should influence the freedom with which a court may consider independent policy issues is whether the court is dealing with a procedural or substantive problem. Arguably, the dangers inherent in holdings of unconstitutionality in futuro may be greater when they are used to compel changes in substantively defective statutes than when they are used in an attempt to correct procedurally deficient statutes. In the former case, the court is more likely to intrude on the public policy and political sphere, which have traditionally been deemed within the province of the legislature.[118] When correcting procedural defects, the court

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> familiar doctrine of presumptive constitutional validity, is no mere verbalism. Its source is the doctrine of separation of powers and its lifeblood is judicial self-restraint. We are not free to strike down this revolutionary new concept of compensation for motor vehicle caused injury and damage because we may think it to be unwise or even at odds with our personal notions of what is fair. We test for constitutional collision. If there is none, like it or not, we ought to decline to disturb the legislative will. Stated otherwise, our review and judgment must be such as to not unduly hamper the Legislature's freedom to experiment and innovate by superimposing our judgment as to the expediency or wisdom of the legislation over theirs. This necessary policy of deference affords the Legislature ample scope for putting its prophesies to the test of proof.

Id. at 664-65, 267 N.W.2d at 118 (Ryan, J., dissenting).

[117] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Brown v. Board of Educ. (*Brown I*), 347 U.S. 483 (1954).

[118] *See* Jaffe, *Impromptu Remarks*, 76 HARV. L. REV. 1111, 1112 (1963). *See also* Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1186-87 (1977). Professor Sandalow writes concerning the process by which legislation is legitimized through enactment by Congress:

> That process confers legitimacy upon the decision not merely because it registers consent in some abstract way but, as I have urged elsewhere, because political responsibility is crucial to the democratic ideal that governmental policies ought to respond to the wishes of the citizenry . . . First, it provides a means by which government is made more sensitive to the impact of a policy upon the various segments of the society and thereby contributes to the calculation of gains and losses resulting from that policy. Second, since an appraisal of the consequences of policy involves not merely a measurement of gains and losses, but a judgment of what is to

is less likely to override policy decisions made by the legislature or the executive by instituting a court-generated rule which merely effectuates the goal of the substantive rule.

It is a close question whether the *Shavers* court violated the separation of powers doctrine as it is presently conceived. The list of minimum due process guarantees which the court suggested fall within the area of recognized judicial competence and so the risk of the court imposing its own arbitrary and subjective policy goals in place of fully researched and debated legislative policy goals is small. *Robinson,* however, violates the separation of powers doctrine. In ordering that the funds for the 1976-77 school year be allocated under an "incentive equalization aid formula" instead of the formula under existing statutes, the court arguably took for itself the power of appropriation, which the New Jersey Constitution places squarely in the hands of the state legislature.[119] When the power to appropriate funds, which is constitutionally and traditionally a legislative power, is taken by a court, there is a much greater danger of judicial incompetence and hence arbitrariness than when a court, for example, sets minimum due process standards. There is far less assurance that the power to appropriate funds will be controlled or checked in the way that the separation of powers doctrine contemplates. This would indicate that there is less reason to object on separation of powers grounds to the use of unconstitutionality in futuro in a *Shavers*-type case than in a *Robinson*-type case.

3. Judicial Responses—Unconstitutionality in futuro also raises separation of powers concerns since it creates an odd and disquieting amalgam of judicial restraint and activism, in which the court on the one hand defers to the legislative will but on the other strongly suggests the desired response. For example, the judicial approach to due process has traditionally been either to read due process requirements directly into the procedurally vague sta-

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> count as a gain or loss and how these shall be balanced, political responsibility helps ensure that governmental policy will not depart too far from the values of the citizenry. Finally, the political responsibility of the legislature creates an incentive for compromise and accommodation that facilitates developments of policies that maximize the satisfaction of constituents' desires. A consensus achieved through a broadly representative political process is, thus, as close as we are likely to get to the statement of a norm which can be said to reflect the values of the society.

Id. at 1187 (citation omitted).

[119] The New Jersey Constitution requires the New Jersey Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N. J. CONST. art. 8, § 4, ¶ 1.

tute[120] or to strike the statute down immediately,[121] depending on the extent of its vagueness. But in *Shavers,* the court chose neither of these alternatives. Instead, it required legislative action to accomplish what it could have accomplished itself, though it left the legislature with a clear idea of what an acceptable solution would be.

The same amalgam of judicial restraint and activism is present in the *Robinson* cases. In *Robinson I* the guidelines consisted of the mandate to define the state's obligation to provide a thorough and efficient system of free public schools.[122] The court presented the legislature with a choice between imposing a statewide property tax, in which case it must tax all the taxable property in the state, or assigning the taxing function to local government, in which case the tax must fall uniformly upon all taxable property within the county or municipality.[123] Two years later, when *Robinson* was again before it, the New Jersey Supreme Court was reluctant to go further than the issuance of a provisional remedy for the 1976-77 school year because "it would [have been] premature and inappropriate for the Court at the present posture of this complex matter to undertake, *a priori,* a comprehensive blueprint for 'thorough and efficient' education, and seek to impose it upon the other Branches of government."[124] Yet, in deciding to order that funds for the school year 1976-77 should not be disbursed as provided under then-existing statutes, the court characterized itself as "the designated last-resort guarantor of the Constitution's command."[125]

The *Shavers* and *Robinson* courts are engaging in both judicial

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[120] *See, e.g.,* United States v. Petrillo, 332 U.S. 1 (1947), in which the Court held that the due process requirement is complied with by a statute whose language marks sufficiently distinct boundaries for judges and juries to administer the law in accordance with the legislative will. In United States v. Harriss, 347 U.S. 612 (1954), the Court, citing *Petrillo,* remarked that if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be imagined where doubts might arise. *Id.* at 618. For a recent example of a court's reading standards into a vague statute, see People v. Neumayer, No. 59093 (Mich. Sup. Ct., Feb. 5, 1979), in which the court read into the Michigan criminal obscenity statute, MICH. COMP. LAWS ANN. 750.343a-.343b (1970), the standards announced by the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973). The court held that, as it stood, the Michigan criminal obscenity statute lacks the specificity required of a statute which seeks to regulate speech or expression.

[121] *See, e.g.,* Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961) (a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at the meaning and differ as to its application violates the first essential of due process); United States v. Petrillo, 332 U.S. 1 (1947).

[122] 62 N.J. at 519, 303 A.2d at 297.

[123] *Id.* at 502-03, 303 A.2d at 288.

[124] Robinson v. Cahill (*Robinson IV*), 69 N.J. at 144, 351 A.2d at 718.

[125] *Id.* at 154, 351 A.2d at 724.

and legislative functions.[126] Their judicial function consists in their ruling on the constitutionality of two statutory schemes.[127] They have also undertaken, through the use of delayed timing, suggested guidelines, and retention of jurisdiction, to define broad policy objections and to move the legislature to directed action. The presence of judicial activism and restraint in the same litigation produces a dynamic which alternately pushes the court ahead to provide temporary remedies and holds it back from fashioning a final solution. As the case is prolonged, however, the pressure on the court may force it to take drastic steps, such as the *Robinson VI* court took in issuing the injunction against further spending for public education.[128] This dynamic inevitably prolongs the court's role in the litigation and may in the long run exacerbate the problem. In *Robinson,* what began as an exercise in extreme judicial restraint became in the end a clear example of judicial activism and an intrusion on the legislative function. Thus, the postponement of the effect of a holding of unconstitutionality in futuro will tend to produce an effect opposite to the one hoped for by the court. Instead of a legislature quickly acting to remedy a constitutionally deficient statute or statutory scheme, it may fail altogether to act out of a "despairing willingness . . . to dump its problems upon the court."[129] Furthermore, because the judicial exercise of the legislative function is delayed and is conditioned upon the legislative or executive branch's failure to act, healthy criticism of the court's action is rendered premature and hence less effective.

The problem of degree which inheres in the contemporary doctrine of the separation of powers is not confined to holdings of unconstitutionality in futuro, but affects all judicial activity in the realm of public law litigation. Whenever statutory schemes of great social importance come before a court novel remedies are called for, some of which may unavoidably require the judicial branch to perform functions which belong to the other branches. This is especially true if, as occurred in *Brown* and *Robinson,* and as yet may occur in *Shavers,* the legislature refuses to comply with judi-

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[126] *Id.* at 154-55, 351 A.2d at 724. The court stated:

> This Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government. And while the court does so, when it must, with restraint and even reluctance, there comes a time when no alternative remains. That time has now arrived.

(citation omitted).

[127] *But see* note 69 and accompanying text *supra.*

[128] 70 N.J. 155, 358 A.2d 457 (1976).

[129] A. Cox, *supra* note 47, at 95.

cially suggested guidelines. The question whether the judiciary has an affirmative duty to compel compliance by the other branches when it determines that the Constitution demands it has been called "the next great challenge of American constitutionalism."[130] It often happens that the choice is between the court doing the best job it can and no one doing it at all.[131] Courts have already been forced to choose between permitting an unconstitutional scheme to continue and acting themselves to remedy the situation.[132] Such acts should not be undertaken lightly, however,

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[130] *Id.* at 98.

[131] Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 5-6 (1968).

[132] For an example of when it was deemed necessary and proper for a court to so act, see Reynolds v. Sims, 377 U.S. 533 (1964). In affirming the district court's order for temporary reapportionment of the Alabama Legislature for the 1962 general election, the Court stated that the district court had "acted wisely in declining to stay the impending primary election . . . and properly refrained from acting further until the Alabama Legislature had been given the opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action." *Id.* at 586. The Court remanded the case to the district court "[s]ince the District Court evinced its realization that its ordered reapportionment could not be sustained as the basis for conducting the 1966 election of Alabama legislators, and avowedly intends to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim . . . ." *Id.* at 587. *Reynolds* clearly shares many features in common with holdings of unconstitutionality in futuro. The main difference is that the district court did not postpone the effect of its holding to a future date. Sims v. Frink, 208 F. Supp. 431 (M.D. Ala. 1962) (the district court decisions in the *Reynolds* controversy are reported *sub nom.* Sims v. Frink). The Supreme Court stated, in effect, that this was a case in which the judiciary had to act: "No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists under Alabama law." 377 U.S. at 553 (footnote omitted).

For a recent Supreme Court decision which provided a solution similar to the one provided in *Reynolds*, see Buckley v. Valeo, 424 U.S. 1 (1976). *Buckley* was an action against the Federal Election Commission and various government officials which challenged certain provisions of the Federal Election Campaign Act of 1971 (2 U.S.C. §§431-455, 18 U.S.C. §§ 591-607) and the provisions of Subtitle H of the Internal Revenue Act of 1954 (I.R.C. §§ 9031-9042) for public financing of Presidential election campaigns. The plaintiffs also contended that the method of appointment of members of the Federal Election Commission violated the principle of the separation of powers. 2 U.S.C. § 437c(a)(1) provides that two of the six voting members are to be appointed by the President *pro tempore* of the Senate, two are to be appointed by the Speaker of the House, and two are to be appointed by the President, with all six members being subject to confirmation by the majority ofboth Houses. In a per curiam opinion, the Court held, *inter alia*, that the method of appointment of the members of the Federal Election Commission violated the principle of separation of powers insofar as the Commission performed rulemaking, adjudicatory, and enforcement powers under the statutes, although the Commission, as it was then constituted, could properly exercise investigative powers. But in fashioning a remedy, the Court stated:

> It is also our view that the Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administration of those provisions, upheld today, authorizing the public financing of federal elections. The past acts of the Commission are therefore accorded de facto validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan. We also draw on the Court's practice in the apportionment and voting rights

for each bold decision brings the court into the political arena, where its legitimacy can be questioned.[133]

IV. CONCLUSION

Unconstitutionality in futuro is likely to present the problem of judicial encroachment on the functions of the other two branches and the dilemma between judicial restraint and activism in every case in which it is employed. Because of its three features of the delayed effect of the holding, suggested guidelines, and retained jurisdiction, it is an attractive remedy and has the unique capability to ensure that courts will undertake the challenge to do what no one else will do. But because of the judiciary's demonstrated lack of competence in overseeing long-term remedies and in setting adequate standards for and limits on further intervention, unconstitutionality in futuro also ensures that this task will most often be done poorly.

The short-term difficulties which accompany holdings of unconstitutionality in futuro, and which were highlighted in *Robinson,* certainly deserve close scrutiny. But even more important are the long-term adverse effects, the erosion in a court's legitimacy and its effectiveness, which a court risks if it employs unconstitutionality in futuro without first measuring the demands of the specific situation against a set of established judicial standards and considering the utility of other less drastic solutions.

—*Philip H. Hecht*

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cases and stay, for a period not to exceed 30 days, the Court's judgment insofar as it affects the authority of the Commission to exercise the duties and powers granted to it under the Act. This limited stay will afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act.

Id. at 142-43 (citations omitted).

[133] Jaffe, *supra* note 118, at 1112.