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A RESPONSE TO STATUTORY OBSOLESCENCE: THE NONPRIMACY OF STATUTES ACT

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INTRODUCTION

The rules of our society come from a variety of lawmaking institutions which stand in a hierarchy of lawmaking authority.[1] This means the rules made by each branch of government are open or closed to change by another branch according to the relative hierarchical rank of each. Thus, the rules of administrative agencies can be modified by the agency itself, by the courts,[2] or by the legislature. Legal rules derived from judicial precedent can be changed by both courts and legislatures, but not by agencies. Higher still in the order of legal primacy are rules derived from legislative enactment, for they can be changed only by the legislature.[3] Highest are constitutional law doctrines which, although enunciated by judges, derive their legal supremacy from the underlying authority of a written constitution.[4]

The problem of statutory obsolescence[5] arises primarily from

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1. *See* C. BREITEL, LEGAL INSTITUTIONS TODAY AND TOMORROW (1959).

2. Subject, of course, to administrative law doctrines of primary jurisdiction, exhaustion, ripeness, scope of review, and standing.

3. As long as constitutional limitations are not exceeded, the legislature is of supreme authority; and the courts as well as all others must obey. State v. Birmingham So. Ry., 182 Ala. 475, 479, 62 So. 77, 79 (1913). The constitutional power of the courts is limited to construing legislation as it stands. State v. Harris, 343 Mo. 252, 262, 121 S.W.2d 141, 147 (1938). *See generally* Pederson v. East Cent. Electrical Ass'n, 281 Minn. 424, 426, 161 N.W.2d 615, 616 (1968).

4. State as well as federal courts thus have the power to avoid statutes which are contrary to constitutional law doctrines. L. MAYERS, THE AMERICAN LEGAL SYSTEM 316-37 (1963).

5. That statutory obsolescence creates serious problems has been adequately demonstrated elsewhere and is simply assumed in this article. *See* G. GILMORE, AGES OF AMERICAN

the relative rank of judicial and legislative branches which gives to the legislature the exclusive power to redo its own work. One way to attack statutory obsolescence is to put a limit on the time during which enactments of the legislative branch are immune from the lawmaking and law-changing authority of the judicial branch.[6] The legislature can do this, in the exercise of its law making authority, by creating an age of "semi-retirement" for its enactments.

This idea is embodied in a Nonprimacy of Statutes Act I have drafted and introduced for adoption by the Minnesota legislature.[7]

LAW 95-97 (1977); Gilmore, *On Statutory obsolescence*, 39 U. COLO. L. REV. 461 (1967); Berry, *Spirits of the Past—Coping With Old Laws*, 19 U. FLA. L. REV. 24 (1966).

6. *See* text accompanying notes 7-9 *infra*.

7. The 1979 bill is Senate File 557, House File 1437. The text, as introduced, is:

A BILL FOR AN ACT

relating to legislation; providing that selected statutes shall be subject to judicial modification as is common law; amending Minnesota Statutes 1978, Chapter 645, by adding a section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1978, Chapter 645, is amended by adding a section to read:

[645.073] [JUDICIAL MODIFICATION OF STATUTORY LAW.] Subdivision 1. To reduce the potential for obsolescence in the law and to serve justice, courts adjudicating cases and controversies may modify and overrule statutes described in subdivision 2 in the manner they modify and overrule principles and precedents of common law.

Subd. 2. Subdivision 1 applies to a statute: (1) that has been in effect for more than 20 years prior to the event or transaction to which it is being applied, and (2) that imposes rules of private, rather than public, law.

Subd. 3. The 20 year period begins on the effective date of an act. An amendatory act also begins a new 20 year period as to the statute amended if the amendment significantly alters the substantive policy of the statute. An amendatory act does not start a new period as to the statute amended if the amendment is technical or stylistic, a recodification, or focused entirely on aspects of the statute not at issue in the case or controversy.

Subd. 4. For the purposes of this section, private law includes, but is not limited to, rules relating to: contracts, torts, property, commercial transactions, marriage and dissolution, partnerships, associations, corporations, principal and agent, trusts, civil procedure, administrative procedure, evidence, limitations, remedies, conflict of laws, unfair competition and trade practices, creditors and debtors rights, environmental rights, labor relations, and probate. Rules excluded from private law include, but are not limited to, rules relating to: taxes, criminal procedure, crimes, elections, local government, government structure; programs of education, corrections, welfare, and transportation; regulation of financial institutions, insurance companies, and securities. Rules regulating eligibility for workers compensation, unemployment

Under this bill each statute matures, twenty years after its enactment, into something comparable to a principle of common law. The bill declares legislative enactments at their twenty year "maturity" to be subject in litigated cases to the judicial scrutiny accorded judicial precedents; that is, they can be limited, extended, qualified, and even overruled by courts. Freed from the doctrine of legislative primacy, courts will be expected to respond both to the demands of justice presented by litigating advocates, and to authority drawn from other legislation, from judicial precedents, from scholarly studies, and from Brandeis briefs. Courts are asked to do justice for the litigants guided by general legal principles and by the facts of the case. The court will also follow the statute in issue to the extent it continues to have logical legitimacy. In the adjudication of a case, when a court finds it necessary to modify a statute pursuant to the Nonprimacy of Statutes Act, the court's decision becomes a precedent in the common law tradition. The law, though enacted as legislation, is changed by the court's decision.

Under the Nonprimacy of Statutes Act, each legislative enactment goes through three phases. In its first twenty years, an act is treated as legislation is today. It enjoys primacy because the constitution endows each bill passed by the legislature with primacy to all other law except the constitution and any legislation on the same topic subsequently adopted. The second phase, beginning at the end of twenty years, introduces a significant change. The legislature, by passing the Nonprimacy of Statutes Act, would withdraw primacy from enactments which are more than twenty years old. A twenty-year old statute will no longer carry the shield of legislative primacy which had placed it beyond the reach of the judicial branch.[8] De-

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compensation and similar programs shall be classified as private law, but rules setting the level of benefits shall be classified as public law.

Subd. 5. This section may be cited as "The Nonprimacy of Statutes Act."

The bill as proposed has limitations which for the present discussion should be viewed as tactical. The first implementation of this idea by a legislature must be upon terms dictated by legislative expediency. The bill proposed in Minnesota is being modified as this article is written. It will change more as my legislative colleagues impart their wisdom and demands. For example, during the preparation of this article, the bill was amended by deleting the final sentence of subdivision 4 and adding the following sentence: "[t]his Act does not authorize the modification of any number in a statute." This addition was a response to the "certainty/uncertainty" of law issue.

8. Legislative primacy has prompted responses such as the following from courts faced with outdated legislation;

spite the end of primacy, statutes will probably not drop into equality with judge-made law. Habit and the traditions of representative democracy are likely to keep statutes "more equal" than common law. But with primacy terminated, the opportunity to repair, reform, and redirect legislation by judicial decision will become an aspect of that part of statutory law which is more than twenty years old.

The third phase, the phase of reformation, arises when a court changes a statute after termination of primacy. The law becomes the statute *as modified by the judicial holding.* This third phase is likely to end when the legislature, responding to judicial reformation of the old statute, again steps into the field by either confirming, modifying, or rejecting those policies reflected in the judicial actions. Periodic legislative recodification will likely be employed as an editorial mechanism to make the law in statute books accurately reflect judicial decisions.[9]

I. Birth of the Bill

The idea of nonprimacy might be more fully appreciated if the propitious circumstances of its birth were described. The idea's gestation in my mind began in 1959 when my service as a legislator began. Nearly a decade and a half of teaching law further increased my sensitivity to statutory obsolescence. But the birth came in the classic manner approved by the law of patents—as a flash of insight—during a reading of Mr. Justice John Harlan's masterful concurring opinion in *Welsh v. United States.*[10]

Welsh was a conscientious objector during the Viet Nam war.

> The General Assembly of this state will convene in a few months. This section has stood without amendment so far as concerns the part under construction here for over 60 years. The primitive ideas of insurance existing more than 90 years ago have been carried into the present statute. If the legislature see fit to clarify it they may do so. The constitutional power of this court is limited to construing it as it stands.

State v. Harris, 343 Mo. 252, 262, 121 S.W.2d 141, 147 (1938).

9. The judicial opinions may be phrased in terms such as "The statute from now on should be interpreted as if it read: '. . .'." Thus the court will provide a first draft for an amendment to the statute.

10. 398 U.S. 333, 344 (1970).

He could not, however, bring himself to sign the standard selective service conscientious objector application, so he did some painfully sincere editing. Welsh struck the italicized words from the following statement in the application: "I am, by reason of *my religious training and* belief conscientiously opposed to participation in war in any form."[11] The congressional language establishing the conscientious objector exemption read:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[12]

Four members of the court, in an opinion by Mr. Justice Black, twisted this congressional language to extend conscientious objector status to Welsh. Three other members, in an opinion by Mr. Justice White, rigidly embraced the congressional language, which undeniably limited escape from the draft to the religious, which Welsh was not. Mr. Justice Harlan, writing for himself alone, found both positions untenable. Rising to the challenge, Harlan extended the draft exemption to Welsh, not on the basis of convoluted statutory interpretation, but rather by what he called a "patchwork of judicial making."[13]

Mr. Justice Harlan, with intellectual integrity and statesmanship, reconciled legislative policy and the demands of justice. First, he found in the statutory language a requirement of "theistic" religion for conscientious objector status.[14] Second, he found that this requirement violated the establishment of religion clause, making the exemption fatally underinclusive.[15] Third, Harlan found the

11. *Id.* at 336-37.
12. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612 (1948).
13. United States v. Welsh, 398 U.S. 333, 366-67 (1970) (Harlan, J., concurring).
14. *Id.* at 348-54.
15. *Id.* at 356-64.

congressional policy of granting conscientious objector exemptions to those with an intensity of belief against war to be a more deeply rooted policy than the congressional limitation of the exemption to those with religious belief.[16] Thereupon, using the statute, the Constitution, judicial precedent, and the dictates of justice as to Mr. Welsh (and making a good guess as to what Congress would have enacted if the underinclusive statute had been invalidated), Mr. Justice Harlan repaired, and thus salvaged, the 1948 version of a statute traceable to colonial times.[17] As I finished reading the opinion, I asked why we should have to depend on the genius of a Mr. Justice Harlan to escape old legislative language which gets in the way of fundamental and obvious objectives of law. A court, confronted with the fact of Welsh's sincere belief that participation in war was unthinkable for him, was well equipped to decide whether the exemption should include Welsh. It certainly was better equipped than Congress had been twenty-two years earlier when it enacted just two sentences to divide all those within from all those without the exemption.

Mr. Justice Harlan was pressed to his decision in *Welsh* by finding the statute unconstitutionally underinclusive. Absent that prod, he might not have been so bold. Furthermore, four judges chose contorted statutory interpretation over Harlan's inspired thrust.[18] The idea of termination of statutory primacy occurred to me as a middle ground upon which Harlan and the four contortionists would have been secure. The three dissenting justices might also have found Welsh's petition compelling had not the statutory words and the legitimate doctrine of legislative primacy barred them from an open-minded weighing of the policy Welsh urged the court to adopt.[19]

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16. *Id.* at 365-66.

17. *See* Hamilton v. Regents, 293 U.S. 245, 266-67 (1934); Macintosh v. United States, 42 F.2d 845, 847-48 (2d Cir. 1930), *rev'd* 283 U.S. 605 (1931).

18. Mr. Justice Black, writing for the majority, concluded that Section 6(j) of the Selective Service Act of 1948 "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." 398 U.S. at 344.

19. Mr. Justice White, dissenting, noted that:

> Our obligation in statutory construction cases is to enforce the will of Congress, not our own; and as Mr. Justice Harlan has demonstrated, construing

This then was the context in which the idea of terminating primacy was born.

II. Two Legislative Episodes: The Need for a Nonprimacy Statute

Now, with statutory nonprimacy in mind, I look back on many experiences in the legislature that prepared the way for the idea. But two incidents stand out especially. They also illustrate in different ways the flexibility nonprimacy will give to statutory law. In 1971 a Minnesota statute[20] going back to territorial days stood in the way of judicial creation of any implied warranties in real estate sales. Appellate courts in other states were beginning to impose implied warranties of fitness, so it seemed wise to free the Minnesota court to move in that direction.[21] It was suggested[22] that the words "of title" be added to the appropriate section of the statute so the statute would only bar implied warranties *of title.* The bill passed easily, removing statutory law from the path of common law development.[23] The bar to judicial change, based on the primacy of statutory law over judge-made law, was lifted.

Minnesota Statutes, the official compilation of the state's permanent and general legislative law, now runs 6,700 pages in four volumes. It is beyond count how many provisions in those pages close off growth of common law as did old section 507.16.[24] For the legislature to modify those sections and subsections one by one is

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§ 6(j) to include Welsh exempts from the draft a class of persons to whom Congress has expressly denied an exemption.

For me that conclusion should end this case.

398 U.S. at 367-68.

20. Minn. Stat. Ann. § 507.16 (West 1947).

21. This common law movement is recounted in Clark, *Washington's Implied Warranty of Habitability: Reform or Illusion?*, 14 Gonz. L. Rev. 1 (1978) and Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S. Ill. U.L.J. 178.

22. The suggestion came from Professor Robert A. Stein of the University of Minnesota Law School.

23. Minn. Stat. Ann. § 507.16 (West 1947) was amended by 1971 Minn. Laws, ch. 922, § 1, eff. June 8, 1971.

24. A survey of every fiftieth page of the 1978 Minnesota Statutes revealed that ten percent still included statutory sections enacted before adoption of the Revised Laws of 1905.

utterly impractical. But the Nonprimacy of Statutes Act, with one clean stroke, will open—or reopen—the way for judicial modification.

The second experience involves legislative refusal to repair a statute which exempts the entire homestead of a debtor from the claims of creditors. The supreme court has asked the legislature, in cases seventy-eight years apart, to place some dollar limit on the exemption.[25] In each case it was clearly inequitable to preserve for a judgment debtor a large equity in homestead real estate while the judgment creditor went unpaid. In *Jacoby v. Parkland Distilling Co.*,[26] Justice Mitchell said, "Unfortunately our statute fixes no limit as to value upon a homestead exemption. It must be confessed that such a law may be greatly abused, and permit great moral frauds; but this is a question for the legislature, and not for the court."[27] In *O'Brien v. Johnson*,[28] Justice Otis stated: "[F]or over one hundred years we have deplored the injustices which have arisen from the application of our statutory exemptions. . . . Nevertheless, the law is so well settled that however distasteful it may be, we feel reluctantly compelled to apply it."[29]

Twice in a decade, a corrective bill has moved to the senate floor, only to be defeated.[30] Each time, the opposition raised a flurry of "horrible hypotheticals," all involving widows and orphans as the debtors and holding company banks as the creditors. So far, our responsive hypotheticals involving fast talking real estate and stock promoters as the protected debtors (and widows and orphans as shortchanged creditors) have not prevailed. The Nonprimacy Act, by permitting the issue to be addressed in litigation, will take the debate away from senate hypotheticals to the facts of an actual case. In court, the harsh edges of the old statute can be carved back partially case by case.[31] In the judicial process, allowances can be

25. O'Brien v. Johnson, 275 Minn. 305, 148 N.W.2d 357 (1967); Jacoby v. Parkland Distilling Co., 41 Minn. 227, 43 N.W. 52 (1889).

26. 41 Minn. 227, 43 N.W. 52 (1889).

27. *Id.* at 231, 43 N.W. at 53.

28. 275 Minn. 305, 148 N.W.2d 357 (1967).

29. *Id.* at 310, 148 N.W.2d at 361 (footnotes omitted).

30. S. File 82 (1971 Sess.); S. File 1815 (1973-74 Sess.).

31. Once a statute is enacted by the legislature, it is rigid. The rule prescribed by it cannot be changed, except by subsequent action of the legisla-

made for crop failures, for mortgages quickly paid off to build equity safe from creditors and other sharp dealing, for family needs, and for a multitude of other situations. This is a problem better suited to case by case legal development than to legislation because the broad strokes of legislative acts cannot state all the safeguards necessary to protect against absurd application of the exemption.

Were the homestead exemption modified pursuant to the Nonprimacy Act, the legislature could reject the judicial policy and reinstate the total exemption, of course. But that would be an unlikely response because court modification of the statute would arise from precise holdings in specific cases. The common law process would allow gradual reformation of the statute in accordance with the compelling facts of specific cases. This process of reformation is not likely to stir the community to demand a return to the old statute with its inequities. The exemption law illustration suggests that it may be reasonably easy to reform law judicially, step by step, even when it would be difficult to do so by a legislative act which abruptly turns the law in a sharply different direction.

III. Common Law Flexibility

The price in injustice and inefficiency paid by society as a consequence of an obsolete rule does not depend upon which legal institution first propounded it nor upon which legal institution has left the rule in place beyond its appointed hour. But whether a price for obsolescence must be paid at all does depend to a major extent on the source of the rule.

Overall, rigidity is not a serious problem in that part of the law which is of judicial origin.[32] Those who find themselves dissatisfied with a common law rule may step forward to seek modification of

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> tive body. By contrast the common law has the virtue of flexibility and capacity for continuous adjustment to shifting conditions and changing needs. Judges have it in their power by judicial decision in individual cases to make necessary modifications as time progresses.

Holtzoff, *The Vitality of the Common Law In Our Time,* 16 Cath. U.L. Rev. 23, 25 (1966) [hereinafter cited as Holtzoff].

32. Holtzoff, *supra* note 31, at 25-26; Leflar, *The Great and Common Law,* 30 Ark. L. Rev. 395, 397-400 (1977).

the law in either of two well-known arenas, the courts or the legislature. The opportunity for law reform by litigation is available through cases arising either naturally from day to day economic and social life or from sought-out test cases. Many lawsuits ask that a legal rule be changed, and in these days the doctrine of *stare decisis* seldom stays the hand of judges presented with clear advocacy which makes a good case for a new tack in the course of the common law.[33] Courts use their law reforming power.

Without diminishing this power of the judiciary, the legislature also holds full authority to replace policy judgments of the judicial branch with policies of its own, subject only to principles of constitutional law. Not only may the legislature boldly uproot major common law doctrines, but it may also reform and repair judge-made law down to its smallest details. The volume of legislation shows that this legislative power is used.[34] Each of the great lawmaking machines—judicial and legislative—are available to repair and reform the common law where the need arises; and, in fact, they constantly do so.

The availability of two alternative forums multiplies the effective capacity for updating law. First, an interested petitioner may achieve success because he shrewdly selects the more promising arena, bypassing the one in which a failure is likely. This factor alone more than doubles the odds on achieving reform. Second, if the wrong forum is chosen, the rebuffed petitioner can shift his effort; a loss in the first does not prevent recourse to the second forum. Third, with legislature and court both empowered to give relief, a seeker of law reform may, without thought of tactical advantage, blunder into the only arena he ever enters and be lucky enough to win.[35]

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33. *See, e.g.*, Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254, 1255-59 (1966). Through judicial modification, the common law is kept in harmony with the mores of society. *See* Clark, *The New Marriage*, 12 WILLAMETTE L.J. 441, 445-46 (1976) [hereinafter cited as Clark].

34. For example, the 1919 Wisconsin Statutes were 2,423 pages long; 56 years later, the 1975 Wisconsin Statutes were 4,575 pages long.

35. The "arena" is almost invariably the judicial branch. The minds of most lawyers have never been darkened by the thought of legislative lobbying. Even so, these lawyers play a significant role in the reform of law—but only of that part which is common law.

IV. Legislative Law Rigidity

The ability of our legal system to reform judge-made law is impressive. In contrast, a description of the machinery available to reform legislative enactments is grim. The three interrelated reasons why this is so are: primacy of legislation; the rule of legislative nonretroactivity; and the partiality of lawyers toward litigation.

A. *Primacy*

When a law problem arises from a defective statute, the judicial branch is faced with the principle of representative democracy which gives lawmaking primacy to the legislative branch. The great adjudicating machine—the judicial branch—runs into a "no trespassing, no lawmaking" sign where the legislature has spoken.[36] Even the most effective advocacy (in theory, at least) ought not to persuade a court to put its policy judgments in place of legislative policy. *Legislative law, enjoying primacy, is supposed to be immune from tampering and policy repair by the judiciary.*[37]

The rule of legislative primacy has far-reaching consequences which only come into focus with an examination of how practicing lawyers operate. When a client tells a story which stirs his lawyer's sense of injustice, the lawyer asserts with some confidence that he can prepare for the client a complaint "stating a claim upon which relief can be granted." Though confronted with a prominent precedent, or a Prosser or Corbin text, or a restatement rule adverse to his client, the lawyer will challenge the proposition if the equities—and the price—are right. When the adverse rule is statutory, however, the client must be dismissed without judicial remedy, comforted only by the availability of the legislative institution as a handy scapegoat. The mechanism of law reformation through adjudication practically drops from the picture once the legislature acts on a body of law. What vanishes is the *power* to appeal to the judiciary for legal change.[38] This power is vital. What also vanishes are the more favorable odds on successful law reform that accompany a tactical

36. *See* note 3 *supra.*

37. *See* note 31 *supra.*

38. *See* text following note 47 *infra.* The exceptions for which adjudication retains utility are when the statute is vulnerable to constitutional attack and when the court is moved by the equities of the case to engage in evasive statutory construction.

selection of forum and the opportunity for a second effort in a second forum.

B. *Nonretroactivity of Legislation*

The obsolescence problem arising from legislative primacy is compounded by the doctrine of nonretroactivity of legislative acts.[39] As with primacy, the adverse consequences of nonretroactivity show up most dramatically in lawyers' offices. When a citizen suffers harm from a defective rule of law, he goes to see his lawyer, not a judge or a legislator. For this reason it is the practicing lawyer who first realizes there is a problem with a legal rule; and it is the lawyer's client, acting in his enlightened self-interest, who pays the lawyer to do something about the problem. The client, of course, wants the problem of a defective law solved, not prospectively, but retroactively so the change in the law will benefit him. Unfortunately, if the rule which needs correction is statutory, the doctrine of nonretroactivity of legislation prevents the lawyer from helping his client by working for legislative action to change the statute. A bill may achieve law reform; but, because the change will only apply prospectively, it will not help the client.

In the lawyer's office the impact of legislative nonretroactivity contrasts sharply with the retroactive effect given judicial decisions. What the lawyer can do for the client, if anything, is dictated by whether the legal change must be statutory and subject to the doctrine of nonretroactivity of legislation, or whether it may be judge-made and subject to the doctrine of retroactivity of judicial decision.

The pervasive impact of nonretroactivity can be illustrated by assuming first that the rule with harmful consequences confronting a lawyer is a relic derived from an opinion of a pioneer appellate court. Assume also that numerous existing legal relationships have

39. Nonretroactivity may be imposed as a matter of state constitutional law. *See, e.g.*, COLO. CONST. art. 2, § 11; MO. CONST. art. 1, § 13; N.H. CONST. PART FIRST, art. 23; OHIO CONST. art. 2, § 28; TENN. CONST. art. 1, § 20; TEX. CONST. art. 1, § 16. More commonly, specific state statutes prohibit retroactive application absent a clear legislative intent. *See, e.g.*, ARIZ. STAT. ANN. § 1-244 (West 1974); CAL. CIV. CODE § 3 (Deering 1954); GA. CODE ANN. § 102-104 (1968); MINN STAT. ANN. § 645.21 (West 1947). *See generally* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

been structured in reliance on this old rule. The lawyer notes that the rule is judge-made, that it is being relied on by many persons, and that it has had harmful consequences generally and has now harmed his client in particular. The lawyer also notes that if he persuades a court to change the defective rule he will be rewarded with victory, *notwithstanding that the other party may have knowingly relied on the rule.*[40] Retroactive change by judicial decision is justified as an inducement to litigators to challenge established rules which ought to be changed.[41] If the judicial branch instead applied a rule of nonretroactivity, making its overruling of old law prospective only, the chief incentive to battle in the courtroom against defective rules would be destroyed. A claimant, barred by nonretroactivity from receiving the fruit of victory, would not press a new theory of recovery. A defendant would settle, rather than assert a new defense, if advocacy could in no event bring a judgment for the defense. It is the prospect of winning a money judgment or equitable relief or of defeating a claim that makes it economically sensible to litigate against an established rule of law.

Paul Rubin makes this point in a recent article.[42] Rubin observes that the injustice or the inefficiency of a legal rule provokes litigation focused on that law question. Until the rule is reformed, new litigants will continually appear to renew the challenge to it. A challenge finally will win, and the rule will be reformed. This removes the inducement supplied by injustice and inefficiency, so litigation stops and society accepts the reformed rule without further challenge. Rubin concludes that the development of efficient legal rules results from selective litigation more than any other factor.[43] In other words, there must be the prospect of a reasonable return on the investment which goes into litigation before the in-

40. The retroactive application of judicial decisions is the norm rather than the exception. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 534-36 (1977).

41. *See, e.g.*, Warring v. Colpoys, 122 F.2d 642, 645 (D.C. Cir. 1941), *cert. denied*, 314 U.S. 678 (1941), wherein Judge (later Justice) Vinson observed, "In one respect the new law is applied to an old set of facts. Traditionally, he who questioned the law or the best evidence of it is given the benefit of the new law or the better evidence of it."

42. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

43. "In short, the efficient rule . . . is due to an evolutionary mechanism whose direction proceeds from the utility maximizing decisions of disputants rather than from the wisdom of judges." *Id.* at 51.

vestment will be made. The general benefit to society from improved rules of law does not motivate a client and his lawyer to battle to the highest court. The motivation is the money at stake in their case, though law reform may be a byproduct of victory. They pursue economic benefit and achieve law reform.

Examine now the impact in the ordinary law office of the rule that legislation is not applied retroactively. Assume that, instead of a judicial relic, the lawyer's client has run afoul of an obsolete statute. Because of the primacy of statutory law, the lawyer cannot openly challenge the wisdom of the statute by a lawsuit asking a court to reform the legal rule. He may ask a court to interpret the statute so as to escape its true intent, thus evading legislative primacy while pretending to follow it;[44] or the lawyer may raise constitutional points upon which the court can nullify the legislative policy.[45] But he cannot make a straightforward case that the statute no longer makes sense, that in the interest of justice and social efficiency the rule should be changed by the court, and that his client should be given a judgment for the relief he asks. To do so would be asking the court to violate the principle of legislative primacy.

Resort to the legislature would also prove unprofitable to the lawyer and his client. If the lawyer brings the story of his case to the legislature, it may understand the need to change the obsolete rule and may amend the law. But the amendment will apply prospectively and therefore will give no relief to his client. The client

44. *See, e.g.*, Friends of Mammoth v. Board of Super. of Mono City, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (California Environmental Quality Act held to apply to private development despite clear language to the contrary); Bruce v. Gregory, 65 Cal. 2d 666, 423 P.2d 193, 56 Cal. Rptr. 265 (1967) (statute granting citizens unqualified right to examine tax records judicially limited); Community Consol. School Dist. No. 210 v. Mini, 55 Ill. 2d 382, 304 N.E.2d 75 (1973) (judicial "deletion" of approximately 109 words from school district statute). California courts have, according to one commentator, circumvented the legislative intent to abolish common law marriage by intervening in property separation disputes between unmarried cohabiting couples. *See* Clark, *supra* note 33 at 449.

45. For example, in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the United States Supreme Court struck down an old Florida vagrancy statute. The Court was moved to its decision by the fact that the conduct proscribed by the statute was neither harmful nor offensive. The Court justified its decision, however, by finding that the statute's vague language and intent were beyond the comprehension of the people who would fall within its scope, and subject to grave abuse by enforcement authorities. *See* Comment, *The Challenge of Obsolete Penal Statutes*, 65 J. CRIM. L. & CRIMONOLOGY 315, 320-21 (1974).

will be unwilling to pay a fee to the lawyer for no benefit. Knowing a fee will not be earned by carrying the message of injustice to the legislature, lawyers do not undertake the task. Legislative advocacy is more straightforward than conventional wisdom assumes, but it usually takes more than mailing a few letters to pass a bill.[46] Unfamiliarity with the legislative institution and its processes, geographic separation of lawyers from state and national capital cities, other responsibilities carried by lawyers, and the rule of nonretroactivity which eliminates the potential to earn fees all combine to minimize the amount of single-client law reform lobbying.[47]

The rule of legislative nonretroactivity cannot be abandoned, though it deprives the legislature of lawyers' advocacy against bad laws which have adversely affected their clients. The rule is essential to preserve the integrity of an institution which is not designed to make adjustments regarding past events. The legislature is designed, rather, to make rules to regulate legal relationships arising in the future. Were a legislature allowed to change rules after the fact, it would become an alternative to the judicial system as a forum for resolving disputes. This would violate the doctrine of separation of powers which assigns adjudication of existing rights to the

46. *See* Gale & Gale, *The Volunteer Lobbyist in the State Legislature,* 52 ORE. L. REV. 69, 74-84 (1972).

47. The economics of test case litigation are much like the economics of lobbying. Parties to test cases judge whether the litigation is worth the cost. An illustration is consumer lawsuits in which defendant retailers and lenders routinely cave in before a judicial decision is rendered because the cost of paying 100 percent to the test case plaintiff is less than the expected cost of doing business under a reformed rule on holder in due course, collection practices, referral sales, delinquency charges or prepayment penalties. Confronted by this tactic, consumer lawyers turned to class actions and punitive damage claims to raise the cost of settling the lawsuit so high that defendants were forced to contest the law reform litigation all the way to an appellate court decision.

At about the time test case litigation in the consumer law field started to work as a law reform device, legal aid and OEO Legal Services lawyers discovered the legislature. Because their objective often is not victory for single clients, but rather changed legal rules, they find the legislative institution a promising forum for lawyer advocacy. As a result the volume of consumer protection legislation in the past decade has been astounding, measured against any previous decade. The situation of these lawyers, salaried and responsible for improving the future lot of one class of citizens, differs markedly from ordinary private practice lawyers, however. For most lawyers representing most clients on most problems, both test cases of prospective impact and legislative lobbying are too expensive. *See* Schrag, *Bleak House 1968: A Report on Consumer Test Litigation,* 44 N.Y.U.L. REV. 115 (1969).

judicial branch.[48] It would also corrupt the legislative institution, which is inherently responsive to those petitioning for help and is not experienced in coping with the kind of adversary process familiar to judges. Furthermore, it would bring so many petitioners to the legislature that the institution would collapse under the burden.[49]

The rule of nonretroactivity of legislative acts is not justified by any difference between statutory rules and judge-made rules. For generations courts have made changes in statutory law through the use of statutory interpretation and constitutional adjudication and allowed the change to be effective retroactively. This demonstrates that the source of the rule does not determine whether retroactive modification is appropriate. Rather, the legitimacy of retroactive change depends upon the institution making the reform. Because of their nature, legislatures cannot make *ad hoc* rule changes applicable to commercial and social "games" already played.[50] Courts, in their job of adjudicating cases and of creating the common law, must do so.

The Nonprimacy of Statutes Act frees the judicial branch to act on the great body of statutory law and to act retroactively. Under it the judiciary may rework twenty-year-old statutes without being limited, as it is today, to dubious stretching of legislative intent or to using constitutional law doctrines. If the judiciary is free to act, and to act retroactively, lawyers will start lawsuits on behalf of their clients. A valuable dividend yielded by these lawsuits will be law reform. The Nonprimacy of Statutes Act directly attacks the most significant cause of statutory obsolescence, the fact that when the judiciary is cut out of the business of law repair the capacity for legal

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48. Broadly speaking,

> [a] judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . 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.

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908).

49. Approximately 16,500 civil actions were filed in Minnesota district courts during 1978.

50. *See, e.g.*, Warring v. Colpoys, 122 F.2d 642, 646 (D.C. Cir. 1941), wherein Judge (later Justice) Vinson observed, "If instead of a court changing the construction of a statute, the legislature passes a new act which in effect repeals the old one, there would be little doubt that the old act was the law until the new one was enacted."

reform is lessened by much more than half. This loss occurs today whenever the source of a legal rule shifts from judiciary to legislature, primarily because of legislative primacy and nonretroactivity.

C. *Lawyers' Litigation Bias*

A further factor to be considered when weighing the attributes of the approach in the Nonprimacy Act is a pervasive attitude in the legal profession that courtrooms are the workplaces for lawyers and that legislative offices, hearing rooms, and lobbies are not.[51] With lawyers trained primarily in litigation[52] and with the pervasive tilt toward litigation in our legal system, it is costly to eliminate courtroom attack as an effective weapon against a great number of unjust legal rules. For many lawyers litigation is the only strategy of law reform they know or trust. Legislative change is left by them to a band from the French foreign legion called lobbyists.[53] A major segment of lawyer manpower is thus immobilized when the law to be reformed is derived from statutes. The reduced capacity to repair, reform and redirect legislative law makes statutory obsolescence a more persistent and serious problem than obsolescence of the common law. The capacity to change obsolete statutory law through the judicial machinery is essential, and this is what the Nonprimacy of Statutes Act will bring to our legal system.

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51. Lawyer neglect of the legislative institution is apparent from the fact that of approximately 9,200 attorneys registered to practice law in the State of Minnesota less than 300 are registered as legislative lobbyists. Some 1,200 lobbyists file with the State Ethical Practices Board under Minnesota's mandatory registration law.

52. A study conducted through the American Bar Foundation summarized the attention given legislative drafting and lobbying by American law schools as follows:

> [M]ost law schools offer at least basic instruction in legal research and writing; . . . some offer more specialized training in the drafting of legal instruments; . . . a large number of schools offer at least one course on legislation; but . . . only a minority offer specialized instruction in the political dynamics of the legislative process or in legislative drafting (a field combining skills and understandings from all the previous areas). Most courses titled "legislation" or "legislative process" deal mainly with such traditional law school concerns as the constitutional setting and limitations of the legislature and the role of administrative agencies and courts in the interpretation of statutes. Only a minority of the courses give substantial attention to other factors that interest present-day political analysts . . . .

B. LAMMERS, LEGISLATIVE PROCESS AND DRAFTING IN UNITED STATES LAW SCHOOLS 4, 7 (1977).

53. *See* note 51, *supra*.

V. Would Legal Stability Be Lost?

Legislative law, tersely written in bold, black letters, gives the impression of certainty.[54] To know the law for certain has great attractiveness to everyone, including lawyers and judges.[55] Nonprimacy will allow courts to erase some of those black letters and, in the process, to wipe out some "known" law. Statutes appear to be more certain than they are, however, for courts engage in flexible interpretation when confronted with a statute suffering from obsolescence.[56] Certainty is lost because judges stretch and squeeze aged legislative words with quite different degrees of deference to legislative policy and varying amounts of determination to do justice in the case before them.[57] The consequence is rather random adherence

54. The illusion quickly fades, however, when one considers the multitude of questions which might legitimately be raised about the meaning of even a short statute. For example, the Minnesota disorderly conduct statute (Minn. Stat. Ann. § 609.72 (West Supp. 1978)), which is approximately 106 words long, has been interpreted by 20 Minnesota Supreme Court decisions.

55. As the American Law Institute observed:

> The two chief defects in American Law are its uncertainty and its complexity. These cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense.
>
> When the law is doubtful most persons are inclined to adopt the view most favorable to their own interests; and many are willing if necessary to test the matter in court while those willing to over-reach their neighbors are encouraged to delay performing their obligations until some court has passed on all the novel legal theories which skilled ingenuity can invent to show that they need not be performed. In either case litigation is carried on, which but for the law's uncertainty would be avoided. . . .
>
> Furthermore, injuries caused by uncertainty are not confined to situations in which controversies have arisen so that rights claimed must be either compromised or referred to other courts for their decision. Though one function of the law is to provide rules by which disputes may be settled, its other function is to provide rules of action. Because of existing uncertainty in the law those who turn to it for guidance in conduct often find that it speaks with a doubtful voice.

1 Am. L. Inst. Proceedings 3 (1923).

56. *See* notes 10-18 *supra*, and text accompanying.

57. For example, *In re Raynolds' Estate*, 219 Minn. 449, 18 N.W.2d 238 (1945), the Minnesota Supreme Court "found" in a statute the language it needed to achieve a just result, holding:

> It is obvious that the purpose of enacting the state law was identical with that of the federal statute; namely, to prevent double taxation on property passing to spouse and children within five years. In order to effectuate this intention of the Legislature, the statute must be given a construction as broad as the

to legal stability on one hand and to law reform on the other. When judges free themselves from a faithful reading of a statute, the common practice is to camouflage the fact and thus to deny to the community candid precedents that explain how and to what extent the statute has been modified. Successive cases become *ad hoc* adjustments to the statute because each court conceals, rather than reveals, the extent to which it has changed black letter legislative law. No pattern of reform is laid out to enable the law to develop in the usual common law system of analogy and synthesis. There is loss of certainty.

More to the point is that certainty of law, to the extent achieved with statutes, leads inevitably to rigidity of law and to statutory obsolescence. Stable law appears to be good, but it disguises the dangerous reality of stultified and aging law. The best legal structure maintains a balance between change and stability.[58] With common law rules, the system of judicial lawmaking achieves that bal-

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> intention itself. If we were to adopt appellant's construction, it seems to us the purpose of the legislation would be circumvented. The exemption would be narrowly limited so that it would apply only to specific property transferred from prior decedent. After property is transferred to heirs under a decree of distribution, it often becomes necessary to change the form of investments in order to safeguard the interests of the legatee. If this were done, the exemption would not apply under appellant's interpretation of the statute. We do not believe the Legislature intended such a result.

Id. at 454, 18 N.W.2d at 241.

Two justices, however, were not convinced. Dissenting, they urged deference to the language of the statute:

> We are . . . asked to so construe the language employed by the Legislature as to include that which is not covered by the terms of the statute. . . . That would not be statutory construction: it would be legislation. . . . [I]t is not for us to legislate. Apparently, if the members of this court had been in the Legislature, a majority of them would have voted to include the words of the federal act which were by our Legislature omitted; but the Constitution places legislative power exclusively in the Legislature and forbids it to the courts.

Id. at 459-60, 18 N.W.2d at 243 (quoting Guear v. Stechschulte, 119 Ohio St. 1, 6, 162 N.E. 46, 48 (1928)).

58. Five considerations support the need for stability in the law: "The need for certainty; fairness to those who have relied upon the extant rule; the efficiency of following precedent; the need for continuity in the law; and the equality of treating similar cases similarly." Bayles, *On Legal Reform: Legal Stability and Legislative Questions*, 65 KY. L.J. 631, 637 (1977). At the same time, however, the common law is gradually changing with each new decision to accommodate the perceived needs of society. *See* notes 31-33 *supra*, and text accompanying. *See generally* Shapiro, *Stability and Change in Judicial Decision Making: Incrementalism Or Stare Decisis*, 2 L. IN TRANSITION Q. 134 (1965).

ance through case by case testing of the precedents from which rules are derived. The Nonprimacy of Statutes Act will not upset the healthy balance achieved through the judicial process. It simply hitches statutory law to a mechanism which is working now in the common law, in constitutional law, and in the interpretation of broadly drafted statutes like the Uniform Commercial Code.[59] The Nonprimacy Act creates for statutory law exactly the same opportunity for courts to adhere to established rules or to make necessary modifications as exists throughout our legal system, no more and no less. If the judicial branch does reasonably well as the guardian both of stability and of evolutionary change in other bodies of law, it should do as well with legislative law. Even if the judiciary is occasionally too eager or too reluctant to cast aside old law, the power to do so rests comfortably on judicial shoulders.[60] Though the judiciary has experienced periods of immoderate activism and periods of excessive conservatism, on the average America has received from its judges an acceptably paced evolution of law. To fear statutory nonprimacy on the assumption that it will cause instability of law is to deny the success of the common law system as both a stabilizer and a reformer of the legal system.

VI. Nonprimacy and Legislative Power

Making statutes subject to judicial modification twenty years after passage in no way dissipates legislative power; rather it increases the effectiveness with which inherent legislative power is exercised. It is essential to note a basic point: *the "last word" power of the legislative branch is undiminished.* The legislature may always dissent prospectively from any judicial reformation; that is, it may reenact the modified statute in original form, adopt a halfway

59. *See* McDonnell, *Purposeful Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. Pa. L. Rev. 795 (1978).

60. Justice Roger Traynor has commented on the self-restraint with which appellate judges act in departing from established rules, noting that when a reasoning judge "has encountered endless chaos in his long march on a given track, the most cautious thing he can do is to take a new turn. He does so though he knows that ours is a profession that prides itself on not throwing chaos lightly to the winds." Traynor, *The Limits of Judicial Creativity*, 63 Iowa L. Rev. 1, 6 (1977). Similar restraint in throwing chaos to the winds should be employed in deciding the fate of 20-year-old statutes under the Nonprimacy of Statutes Act.

position on the disputed issue, or deal with the question through a new statutory formula contrary both to the old legislative policy and to the new judicial policy. Further, the terms upon which statutes become subject to nonprimacy are within legislative control. The legislature will write the Nonprimacy of Statutes Act, and the modification authority it grants to the judiciary may be expanded or contracted as the legislature wishes. The twenty years before primacy is terminated can be made thirty years—or ten years. For some fields the period of legislative primacy may be made longer or shorter than the standard period.[61] Criminal law will likely never be included, but other fields of statutory law may be excluded or included at the will of the legislature. The legislature may adopt a policy of promptly codifying judicial modifications, or of inserting comments in statute books to note changes, or of responding by reworking the aged statute to correct its other obsolete provisions after one of them has been reformed under the Nonprimacy Act.

A critical factor in passing the Nonprimacy of Statutes Act will be legislators' perception of whether or not it diminishes their power. To allow the judicial branch to update legislative enactments after twenty years should not be viewed by legislators as relinquishing authority. Most legislators, asked if the legislative product is made for the ages, would likely blanch—or laugh. Usually bills are designed as an immediate response to some existing defect of law, and little thought is given to whether or not they will be appropriate a generation hence. Termination of primacy in twenty years is no threat to the power of legislators busy coping with today's problems. When the issue is explained, legislators will understand that the present perpetual primacy of enacted bills is an inevitable problem for later eras, just as the statutes of yesteryear are a problem today. Authority to legislate with legal primacy for a score of years is in fact more power than any legislature holds now, for the lawmaking mandate runs out when a successor legislature convenes.

61. After this article was written, I stumbled upon a 1958 Leo Levin and Anthony Amsterdam article which suggests that the primacy of legislative acts relating to judicial procedure terminate six years after enactment. I yield some claim to having had an original thought, and seize upon the 21-year-old Levin and Amsterdam suggestion as an exciting endorsement for my Nonprimacy Act. Levin and Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 40 (1958).

Each piece of legislative work is an available target for a later legislature.[62]

Judicial precedents are also targets for legislative action, though legislators generally ignore them unless some group stirs things up. Usually, legislators are neither antagonistic to nor protective of old common law. Legislators view most twenty-year-old statutes with the same absence of proprietary interest. The parallel to old case law is enlightening. Legislators do not want courts to transfer responsibility to repair bad common law to the legislative branch. Legislators are otherwise engaged in tax and spending issues, in regulation of commerce, and in structuring social service programs.[63] They want courts to correct judicial mistakes to relieve the legislature of that burden.[64] Legislative interest in the task of repairing old statutes which have, more or less, become part of the common law is just as low. Shifting a portion of the job to the judiciary should be attractive to legislators.

VII. The Separation of Powers Issue

The Nonprimacy of Statutes Act enlarges the judicial lawmaking role. Under the Act the legislature authorizes courts to override clearly stated and constitutionally valid legislative policy. This shift in lawmaking authority may cause concern that the Nonprimacy Act entails a separation of powers problem.[65] Clearly, the Nonprimacy of Statutes Act does not involve legislative or executive violation of the separation of powers doctrine, for under it those branches can do only what they do now. The Act extends new authority to

62. The typical judicial formulation of this rule is that no legislature may bind its successor. *See, e.g.*, Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 208 (1850); Village of North Atlanta v. Cook, 219 Ga. 316, 320-21, 133 S.E.2d 585, 589 (1963); Frost v. State, 172 N.W.2d 575, 583 (Iowa 1969); Harsha v. City of Detroit, 261 Mich. 586, 590, 246 N.W. 849, 850 (1933).

63. *See* H. Hart & A. Sacks, The Legal Process, Basic Problems in the Making and Application of Law 725 (1958); B. Heineman, *A Law Review Commission for Illinois*, 1942 U. Ill. L.F. 697, 701.

64. In countless cases, courts defer to a pseudo-legislative primacy based on *inaction* by legislatures. These cases demonstrate the endemic failure of judges (and advocates and law professors) to understand legislative dependence on other institutions to point out the proper path for the law. It is rare for law reform to emerge as a self-started legislative undertaking. Therefore, judicial deference to legislative inaction is absurd.

65. *See generally* Green, *Separation of Governmental Powers*, 29 Yale L.J. 369 (1920).

the judiciary alone. As to the judiciary, it involves nothing more than a wider freedom to perform the oldest court function—to decide cases and to create case-law precedents. The court is not asked to step out of character or beyond its expertise, which are the evils curbed by proper application of the separation of powers doctrine. Termination of primacy allows the judiciary to decide cases using the full measure of its talent for administering justice. It exploits judicial strength, which makes it consistent with the objectives of a separation of powers.[66]

The separation of powers issue has a second aspect. When a statute has aged twenty years and its primacy is withdrawn, the role of the courts in that area of law *reverts* to what it was when there was no legislative intrusion and the rules were judge-made.[67] After primacy ends, the judiciary is restored to its previous lawmaking role, except that it is obligated to accord respect to the persuasive, though no longer binding, authority of a legislative act. Termination of primacy thus recaptures some of the legal contours of a more normal common law landscape, which hardly violates the separation of powers doctrine.[68]

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66. Each of the three departments exists to help, according to its own function, in the general work of government. It may properly be used to carry out any measures for which it is adapted, and it is for the law making power to decide to what extent to use it. . . . The doctrine is not that no two of them may include any common ground, but that none of them may pass without its own boundaries and intrude upon territory belonging solely to another.

Id. at 375 (footnotes omitted).

67. Termination of primacy by the legislature is similar to putting an expiration date in an act. If it is constitutional for the legislature to make statutes self-destructing (and it clearly is), then it must be constitutional for the legislature to put into its enactments a limitation on applicability which is less far-reaching than an expiration date. Termination of primacy can be characterized as a legislative "repeal" of the act coupled with a savings clause which says: "If any part of this statute is still good after twenty years, society is authorized to keep using it."

68. A question of delegation of power might also be raised. The policy underlying the rule against delegation of power is to prevent the loss of political accountability that occurs when legislators pass off decision-making to nonelected administrative agencies. Nonprimacy does not involve this evil. Clearly legislators face political accountability during the first few years after a statute is enacted. Nonprimacy two decades hence will not mitigate current political repercussions. Although some might view nonprimacy as partial abandonment of a legal field, it merely frees the law from statutory shackles. It is not a delegation to an agency of a job the legislature should do itself.

VIII. Compromise and the Period of Primacy

If terminating statutory primacy has merit after twenty years, why not accelerate the end of primacy to ten years—or to one year? I chose twenty years by guessing where legislative compromise will finally set the figure. Also, I think two decades of primacy will not stir significant emotional resistance to the idea.

Moving beyond tactical to logical considerations, I believe statutory primacy for a significant period is essential to preserve the vigor of the legislative process. When it is working right, that process involves careful attention to the details of drafting and policy.[69] Some intensity in this effort might be lost if judicial repair were immediately available, though twenty years of primacy is more than enough to keep the legislature and the lobbying interests attentive to detail. Another part of legislative life is listening to and responding to the competing voices speaking on each bill.[70] The response to those voices is compromise, a qualification of the bill which takes the sting out of it.[71] When the sting has been removed, it is good form for opponents to withdraw their objections and even to join in support of the cleaned-up proposal.[72] In all legislatures, most bills pass nearly unanimously after consensus-building adjustments, not by narrow margins after knockdown power struggles. Whether compromise produces broad agreement or a bare majority, the details of these adjustments must be accorded primacy for a significant period after passage. The interest groups that modified their competing positions need to be assured that the policies they agreed to will have some permanence. Twenty years is an adequate period to preserve the vitality of legislative bargaining. It is long enough to make each legislative compromise a matter of substance but does not deprive the system of the major benefits of termination of primacy.

The problem addressed by this proposal is, after all, statutory obsolescence, not legislative fallibility.[73] Obsolescence, by defini-

69. *See* R. Dickerson, Legislative Drafting 3-8 (1954).

70. J. Davies, Legislative Law and Process in a Nutshell 46-49 (1975).

71. *Id.* at 56, 60-61.

72. *Id.* at 58, 71-72.

73. Deficiencies in the laws which legislatures enact reflect a much broader failure than

tion, requires the passage of time. Furthermore, a recently passed act is proof of a current legislative focus on its subject matter. Shortly after any significant piece of legislation is adopted, and before attention shifts from it, legislatures routinely adopt technical amendments to clean up defects discovered by those who finally realize they have to live with the new enactment. When a statute is young, the need for judicial modification is not great because repair of the statute by the legislature itself is more likely to occur early in its life than later.[74]

IX. Critique of Other Responses to Statutory Obsolescence

The reactions of the legal profession to the problem of statutory obsolescence have been: (1) to condemn legislation—new and old—because hardened arteries are inevitable; (2) to criticize legislatures for failing to keep their product current; (3) to suggest that statutes be written in a new way (the civil law style) that allows them to remain forever young and pliable; (4) to urge that the fallibility of legislatures be conceded and that courts use whatever guile, license, and chicanery is necessary to avoid the defects of legislation and to achieve the perfection of judge-made law; and (5) to create judicial primacy through expanded doctrines of constitutional law, thereby substituting judicial wisdom for legislative shortsightedness.

The obsolescence problem cannot be significantly reduced by these approaches, even if they could be made legitimate. Some other response must be developed, for what has happened in the past will happen in the future: statutes will be passed in great number; lawyer advocates will not appear to urge updating; and legislatures will neglect repair. Legislation will continue to be written as detailed rules vulnerable to the ravages of time; courts will

that of elected representatives. Society receives from its legislatures what it puts in by way of wisdom, information, imagination, work and integrity.

74. The editor in chief of West Publishing Company says his knowledgeable company frequently postpones preparing the replacement volume of annotated statutes after a new act makes extensive changes in an existing body of legislation. It relies upon a pocket part instead. The replacement volume is then prepared after the succeeding legislature has had an opportunity to review and amend the new act.

be reluctant to adjust statutory law to new days and new problems; and courts that do act creatively will raise the spectre of a willful judiciary paying inadequate attention to legislative lawmaking supremacy. Further, resort to constitutional law to correct legislative error creates a legal rigidity that is worse than statutory obsolescence. The rigidity of constitutional law is more serious because the means to change it are even more limited and because resort to constitutional doctrine to nullify statutory law undermines representative democracy by shifting *ultimate* lawmaking authority from its rightful place in the legislative branch. Judges making constitutional law decisions can claim no popular mandate, for they are not subject to the great check on power arising from those vital confrontations with the citizenry called elections.[75] Statutory nullification based on constitutional law must be viewed as part of the problem of law rigidity, not as part of the solution.

Much comment on statutory obsolescence, scholarly and otherwise, reveals a misunderstanding of the basic nature of the legislative institution and process. The fundamental fact about any legislature is that it responds rather than leads. In reality (and in fairness), legislative initiative is not the responsibility of elected representatives and senators. The population statistics from my own reasonably typical state illustrate why. Minnesota has 201 legislators—but it has 3,400,000 other citizens. These citizens produce such an outpouring of requests for public spending and other legisla-

75. United States Supreme Court justices are nominated by the President, U.S. CONST. art. II, § 2, cl. 2, and hold office during good behavior, U.S. CONST. art. III, § 1. They nevertheless wield tremendous power to shape the law according to their own predilections. Raoul Berger, commenting on the United States Supreme Court's expansive interpretation of the 14th amendment as a tool for eliminating racial discrimination, poses the following question:

> Given the clarity of the framers' intention [to exclude sufferage and segregation from the reach of the amendment] it is on settled principles as good as written into the text. To "interpret" the [fourteenth] [a]mendment in diametrical opposition to that intention is to rewrite the Constitution. Whence does the Court derive authority to revise the Constitution?. . . The sufferage-segregation decisions go beyond the assumption of powers "not warranted" by the Constitution; they represent the arrogation of powers that the framers plainly *excluded*. The Court, it is safe to say, has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design: to leave sufferage, segregation, and other matters to State governance.

R. BERGER, GOVERNMENT BY JUDICIARY 407-08 (1977).

tive action that legislators can do little more than review the petitions, many of which are horrendously bad in substance or form, or both. With so many pleadings to dispose of, legislators do not have the time, energy, or intellectual resources to diagnose legal problems and to construct solutions. If no one asks for action on a problem, the legislature rarely addresses the issue on its own. Obsolete and misconceived statutes stay on the books because no one requests that they be removed.

The responsive nature of legislatures also causes statutes to be written, not broadly in the civil law style, but in such detail that eventual obsolescence is inevitable.[76] Petitioners—successful petitioners—come to the legislature with precise responses to specific problems, not with vague schemes to cure society's great ills. On the day a statute is enacted, it usually meets someone's specific need, and also includes protective details to prevent it from offending most others. Thus, the responsive nature of the legislative process insures that new statutes will be so detailed that their obsolescence, barring later amendment, is nearly inevitable. Responsiveness also keeps the legislature fully occupied with tasks other than cleaning up old statutes. The point is that other institutions—specifically the judiciary and the litigating bar—must somehow be harnessed to assist the legislature with the job of updating statutes.

X. Conclusion

Obsolete statutes represent a great failure of the legal system. The cause of statutory obsolescence, seldom diagnosed, is the scarcity of resources available to repair and reform statutory law. Defective statutes stay on the books because lawyers acquiesce, *neither lobbying nor litigating against them.* It might take a century—or

76. A civil law approach would theoretically alleviate problems of statutory obsolescence by enabling courts to read statutes broadly and flexibly. Under a civil law approach:

> The courts look to the legislative source for solutions and for guidance; there [is] . . . no history of jealousy and struggle between the judiciary and the legislature. The broad concepts and language of the civil code necessarily depend upon the courts for interpretation and application. Accordingly, the attitude of the courts toward a civil code is one of liberal construction, including extension by analogy or by principle.

Dainow, *The Civil Code and the Common Law,* 51 Nw. U.L. Rev. 719, 724 (1957).

longer—of lawyer reeducation to mobilize the legal profession to an appropriate level of legislative lobbying. But to expose statutes to reformation through the machinery of litigation requires no reeducation of lawyers; it will immediately unleash massive law reforming resources.

Therefore, the legislature should adopt an act which makes statutes, twenty years after their adoption, subject to modification by courts, as are common law precedents. While preserving legislative lawmaking supremacy, the Nonprimacy of Statutes Act will strip away many obstacles to repair of legislative law. It will turn the courtroom into a forum in which old and unjust statutes can be updated, thus capitalizing on the litigation mindset of lawyers. It will make both legislative and judicial forums available to reformers. It will allow citizens to obtain retroactive judicial relief from out-of-date legislative law, thus inducing and enabling them to compensate attorneys for reforming efforts. It will give the advocate seeking reform of legislative law two extra weapons of persuasion: the vivid facts of specific cases and the obligation of the court to decide cases justly.

For decades prominent legal scholars have recognized that much wisdom can be found in legislation and have pleaded with courts to use statutes as a guide for judicial decisions in the same way they use judicial precedents. What I propose may be viewed as a variation of that old insight. What Stone,[77] Pound,[78] Landis,[79] Traynor,[80] and others have sought is a better lawmaking partnership between courts and legislatures. They identified an underutilization of partnership strengths because lawyers and judges disdained the legislative product. There has been, of course, considerable progress in getting courts to recognize and use legislative strengths, to mine the lode of intelligence and insight found in legislative enactments.[81]

77. *See* Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-16 (1936).

78. *See* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 386-88 (1908).

79. *See* Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934), *reprinted in* 2 HARV. J. LEGIS., 7, 12-23 (1965).

80. *See* Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1 (1977).

81. *See, e.g.*, Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution*, 82 YALE L.J. 258 (1972), recounting two cases, one of which was Welsh v. United States, 398 U.S. 333 (1970), in which Justice Harlan employed civil law reasoning, beginning his analysis with a legislative enactment.

The effort should now begin on the opposite side of the coin—to persuade legislatures to adjust our legal system so it more fully exploits *judicial* strengths.[82] Legislatures must be educated to the genius of the common law method and persuaded that the Nonprimacy of Statutes Act will exploit that method to improve the whole body of law in a nation which makes such extensive use of statutory law. Both great lawmaking branches must recognize their respective short and long suits; each branch can then adjust the system to build the most effective partnership attainable.

82. *See* notes 31-33 *supra*, and text accompanying.