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# Constitutional Rights Without Remedies: Judicial Review of Underinclusive Legislation

Bruce K. Miller

Neal Devins

*William & Mary Law School*, [nedevi@wm.edu](mailto:nedevi@wm.edu)

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# Constitutional rights without remedies: judicial review of underinclusive legislation

*When a law treats differentially groups that ought to be treated identically, courts can invalidate the statute or expand it to include the formerly excluded. The result, the authors say, can be the affirmation of a right—without a remedy for the plaintiff.*

By Bruce K. Miller and Neal E. Devins

On the face of it, the recent decisions of *People v. Liberta*<sup>1</sup> from the New York Court of Appeals, and *Heckler v. Mathews*<sup>2</sup> from the United States Supreme Court, have nothing in common. One is a rape appeal, the other a Social Security case; one is a landmark, rightly celebrated in the popular press,<sup>3</sup> the other a doctrinally insignificant approval of a temporary statute that has already expired; one is expansive in its reading of the equal protection guarantee, the other cautious, consolidating in tone. *Liberta* and *Mathews* converge only in their similar treatment of the apparently mundane question of how a court ought to go about remedying an impermissibly underinclusive statutory classification, that is, a law which treats differently people or groups which ought to be treated the same. By approaching this question in a manner that ignores the realities of the litigation process, the two decisions have together articulated a doctrine that threatens our most fundamental assumptions about judicial review in constitutional cases.

## *People v. Liberta*

Until 1984, a New York statute<sup>4</sup> exempted from prosecution husbands who raped their wives if the spouses were living together at the time of the rape. Because Mario Liberta was not living with his wife when he sexually assaulted her in 1981, he was prosecuted and convicted of raping her. He appealed his conviction, arguing that the marital exemption was unconstitutional and that New York's rape statute could not therefore be enforced against him.

In a unanimous, landmark decision, the New York Court of Appeals agreed with Mr. Liberta that the marital rape exemption was invalid. Judge (now Chief Judge) Wachtler's opinion for the court affirmed the right of a married woman to control her body,<sup>5</sup> thereby underscoring the willingness of our judiciary to protect an indispensable condition of human freedom. In this respect, the decision honors the most basic aspirations of our legal system.

But after holding the marital exemption unconstitutional, the court of appeals nonetheless allowed Mario Liberta's rape conviction to stand. Proceeding from the premise that "when a statute is constitutionally defective because of underinclusion, a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded,"<sup>6</sup> Judge Wachtler saw the court's remedial task as "to discern what course the legislature would have chosen to follow if it had foreseen our conclusions as to underinclusiveness."<sup>7</sup> Not at all surprisingly, "the inevitable conclusion [was] that the legislative would prefer to eliminate the [mar-

ital] exemptions and thereby preserve the [rape] statutes."<sup>8</sup> Accordingly, since the statutes under which Mr. Liberta "was convicted [were] not being struck down, his conviction"<sup>9</sup> was affirmed.

## *Heckler v. Mathews*

The Social Security Act has long provided spousal benefits for the wives, husbands, widows, and widowers of retired and disabled wage earners. Spousal benefits are based on the earnings of the retired or disabled wage earner.<sup>10</sup> Prior to December, 1977, the Act demanded that men seeking spousal benefits demonstrate dependency on their wage-earner wives for one half of their support. Women, on the other hand, could qualify for benefits without having to make a similar demonstration of dependency on their husbands.

In March, 1977, the Supreme Court, in *Califano v. Goldfarb*,<sup>11</sup> held this gender-based dependency test unconstitutional under the Equal Protection Clause of the Fifth Amendment. The Court concluded that the male-only dependency test resulted in the work of females (whose husbands had to prove dependency) providing less protection to their families in the form of benefits than the work of males (whose wives automatically received the government pension). To eliminate this inequity, the Court invalidated the male-only proof-of-dependency requirement.

In response to this decision, Congress, in December, 1977, amended the Social Security Act. First, Congress eliminated the male-only dependency test. Second, Congress enacted a "pension offset" provision which required that spousal benefits be reduced by federal/state govern-

Substantial portions of the discussion of *Heckler v. Mathews* in this essay are drawn from a previously published article by one of the authors. Miller, *Constitutional Remedies for Underinclusive Statutes*, 20 HARV. C.R.-C.L. L. REV. 79 (1985). The editors of that journal have graciously consented to the authors' republication of excerpts from that article.

1. 64 N.Y.2d 152, 485 N.Y.S. 207 (1984).

2. 465 U.S. 728 (1984).

3. N.Y. TIMES, Dec. 21, 1984, at 1.

4. N.Y. Penal Law §§130.00, subd. 4, 130.35 (McKinney 1984).

5. 64 N.Y.2d at 164, 485 N.Y.S. at 213.

6. *Id.* at 170, 485 N.Y.S. at 218.

7. *Id.* at 171, 485 N.Y.S. at 218.

8. *Id.* at 171-72, 485 N.Y.S. at 218.

9. *Id.* at 172, 485 N.Y.S. at 219.

10. 42 U.S.C. §§402(b), (c), (e), (f) (1982).

11. 430 U.S. 199 (1977).

ment pensions. This offset provision was designed to rectify the substantial increase in Social Security payments caused by the elimination of the dependency test. Third, apparently concerned about the effect of the new offset provisions on those persons (women and men who could prove dependency) who had planned their retirements on the assumption that they would receive full unreduced spousal benefits, Congress chose to exclude this group of individuals from the pension offset requirement for a five-year grace period. In order to effectuate this result, Congress incorporated into the offset exception the dependency test found unconstitutional in *Goldfarb*. Fourth, Congress, recognizing that the dependency test might be invalidated, included a severability clause in the legislation. This provision would have nullified the "pension offset" exception, if the dependency test were found unconstitutional in this context.<sup>12</sup>

After retiring from his job with the Post Office, Robert Mathews applied for Social Security husbands' benefits under the 1977 Amendment on the basis of his wife's earnings record. But because he could not satisfy the pre-*Goldfarb* dependency test, Mathews' Social Security entitlement was entirely offset by his federal pension. He then filed a lawsuit challenging the constitutionality of both the "pension offset" exception and the severability clause. Mathews maintained that the offset exception was an improper reenactment of the gender classification held unconstitutional in *Califano v. Goldfarb*. His challenge to the severability clause had two elements. First, the severability clause, by nullifying rather than extending the offset exception, denied him an adequate remedy for an unconstitutionally inflicted injury. In other words, "men [could] vindicate their constitutional right to equal protection only by causing others to forfeit benefits they have been previously entitled to."<sup>13</sup> Second, the severability clause was an improper curtailment of federal court jurisdiction, since by prohibiting a reviewing court from granting adequate relief to Mathews, it in effect eliminated his standing to maintain the suit.<sup>14</sup>

The Supreme Court unanimously rejected both arguments. The severability clause, according to Justice Brennan's opinion for the Court, did not under-

mine Mathews' standing to sue and thereby threaten the Court's power to correct constitutional violations, because the right claimed by Mathews was not the right to Social Security benefits but rather the right to a benefit distribution scheme that was free of unconstitutional gender discrimination.<sup>15</sup>

Like the New York Court of Appeals in *People v. Liberta*, Justice Brennan pointed out that a court which sustains a claim of unconstitutional underinclusiveness "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'"<sup>16</sup> A court should not, however, make this choice in a way that "circumvent[s] the intent of the legislature."<sup>17</sup> Because the severability clause clearly expressed Congress' "preference for nullification rather than extension of the pension offset exception in the event it is found invalid,"<sup>18</sup> the proper remedy was obvious. That remedy did not, however, have to be implemented in Mr. Mathews' case because of Justice Brennan's finding that the pension offset exception did not violate the equal protection guarantee. The temporary reenactment of the pre-*Goldfarb* classification was permissible because it was substantially related to the goal of protecting the reliance interests of those who expected to receive benefits under the pre-*Goldfarb* rules.<sup>19</sup>

### Impact on judicial review

The *Liberta* and *Mathews* decisions are two prominent recent examples of a disturbing willingness of our most prestigious courts to entertain constitutional challenges to statutes without granting relief to the litigants who brought those challenges forward. The remedial ap-

proach taken in the two cases is most visibly troubling because it moves the courts away from their traditional and most important role as arbiters of concrete disputes. The New York Court of Appeals used *Liberta's* appeal as the occasion to end New York's marital rape exemption, but its decision had no bearing on whether his rape conviction stood or fell. Similarly, the Supreme Court used Mathews' claim for Social Security benefits as the vehicle for resolving the constitutionality of the pension offset exception, but the resolution did not affect his entitlement to the benefits he sought.

But on another level, one step removed from the immediate interests of *Liberta* and Mathews, the decisions are even more disquieting. If taken seriously as a guide to lower court judges on how to think about remedying unconstitutionally underinclusive classifications, *Liberta* and *Mathews* could quickly cripple the process that brings such classifications to light.

It is a truism of our adversarial judicial system that courts do not declare statutes unconstitutional on their own initiative. They act only when asked to do so by a person claiming to be harmed by such a statute.<sup>20</sup> Thus the question of the constitutionality of New York's marital rape exemption was before the court only because *Liberta*, or, more precisely, his lawyer, Barbara Howe of the Buffalo Legal Aid Society, raised the issue.

Howe argued that because New York's rape law arbitrarily exempted some husbands, but not *Liberta*, from prosecution for raping their wives, the statute violated the constitutional guarantee of equal protection of the laws. Because the rape statute was invalid, she contended, *Liberta* could not properly be convicted under it.

Howe did not challenge the marital rape exemption in order to reform the

12. Social Security Amendments of 1977, Pub. L. No. 95-216, §§334(a)(2), (b)(1), (b)(2), (d)(1), (f), (g), 42 U.S.C. §§402(b)(4)(A), (c)(1)(C), (c)(2)(A), (h)(1)(D), (n).

13. Appellee's Brief at 42, *Heckler v. Mathews*, 104 S.Ct. 1387 (1984).

14. *Mathews v. Heckler*, 1982 Unempl. Ins. Rep. (CCH) ¶14,313 at 2408 (N.D. Ala. Aug. 24, 1982), *rev'd*, 104 S.Ct. 1387 (1984). The district court sustained both of Mathews' arguments, holding the offset exception unconstitutional and then labeling the severability provision as an "adroit attempt to discourage the bringing of an action by destroying standing." The clause sought to "mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge

fruitless. This kind of 'in terrorem' approach insulates the legislative work product from judicial review, in violation of the doctrine of separation of powers." It was therefore "an unconstitutional usurpation of judicial power." *Id.*

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

16. *Id.* at 788.

17. *Id.* at 739, n.5 (quoting *Califano v. Westcott*, 443 U.S. 76, 93-94 (Powell, J., concurring in part and dissenting in part)).

18. *Id.*

19. *Id.* at 744-51.

20. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484 (1982).



law, to assure that husbands who rape their wives be brought to justice, or to protect the autonomy and bodily integrity of married women. Rather, as a properly diligent criminal defense attorney, she was doing her best to secure the reversal of her client's conviction. By voiding the marital exemption while at the same time affirming *Liberta's* conviction for rape, the court of appeals assured that Howe won the battle but lost the war.

It may be tempting at first glance to view this outcome as justice triumphant. The court's judgment both assures that a rapist receives the punishment he deserves and removes an oppressive anachronism from the statute books. But we cannot long have it both ways. The court of appeals' message to lawyers such as Howe is, in effect, "Don't bother challenging unconstitutionally narrow criminal laws. You may be right, but it won't do your client any good. Because of public policy and legislative intent favoring punishment of the guilty, his conviction will stand anyway." The simple fact is that if it does the client no good, if the conviction stands anyway, the lawyer will not assert the claim. And in the case of a criminal statute, if the defense attorney does not raise a constitutional claim, there is no one else in our system of justice who will, because there is no one else who can.

Neither a victim of marital rape, nor the government, acting as prosecutor in her behalf, could have done anything to prompt judicial review of the marital exemption. Any attempt to prosecute a husband for raping his wife without a statute making that act a crime would quickly (and properly) have been rebuffed as a violation of due process and of the constitutional prohibition of *ex post facto* laws.<sup>21</sup> In short, we depend on lawyers such as Howe to point up the

constitutional flaws in our statutory law, or we depend on no one.

For Mathews, the stakes are certainly less serious than for *Liberta*, but the principle is exactly the same. So long as the pension offset exemption nullification clause is enforceable, Mathews and his lawyers know that a lawsuit challenging the exception as unconstitutional holds no promise of securing the Social Security benefits he seeks. He can vindicate his constitutional right to equal treatment only by causing other, wholly innocent, female recipients of Social Security spouse's benefits to forfeit their entitlements. Few men in Mathews' position will be so committed to the abstract principle of gender equality or so callous about the consequences of a constitutional "victory" to challenge the offset exception in the face of these realities. Even fewer lawyers will be anxious to litigate claims which hold no promise of tangible return to their clients.<sup>22</sup>

The *Liberta* and *Mathews* courts obviously did not intend their decisions to obstruct access to judicial review. Rather, in their zeal to defer to legislative remedial preferences and, in *Liberta* at least, to fashion the most obviously just long-term result, both courts neglected a first principle of American law: at least where the Constitution is concerned, if there's a right, there's a remedy.

The importance of this principle is underscored if we assume its opposite—that the *Mathews* and *Liberta* courts were correct in denying a meaningful remedy to the litigants before them. Under this assumption, there is substantial reason to doubt whether the proper conditions for adjudicating a constitutional challenge were met in either case. Perhaps, contrary to Justice Brennan's view, neither Mathews nor *Liberta* had standing to raise his claim. In any event, by failing to address the harms suffered

by the parties, both decisions begin to resemble advisory opinions more than adjudications of real controversies.

## Right to a remedy

The roots of the proposition that the fashioning of a remedy for a constitutional wrong is essential to the process of judicial review can be traced at least as far back as Blackstone and, through him, to *Marbury v. Madison*.<sup>23</sup> In the *Commentaries on the Laws of England*, Blackstone wrote:

It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.... It is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.<sup>24</sup>

In a similar vein, Chief Justice Marshall wrote in *Marbury*:

The very essence of civil liberty lies in the right of the individual to claim the protection of the laws whenever he receives an injury.... The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to observe this high appellation if the laws furnish no remedy for the violation of a vested legal right.<sup>25</sup>

More recently, the Supreme Court's landmark 1946 decision in *Bell v. Hood*<sup>26</sup> underscored the centrality of a court's remedial power to the exercise of the judicial function. In holding that a damage action against FBI officers for violations of the Fourth and Fifth Amendments was within the federal question jurisdiction granted to district courts, the Court, speaking through Justice Black, noted that:

It is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a central right to sue for that invasion, federal courts may use any available remedy to make good the wrong done.<sup>27</sup>

Six years later, in the *Steel Seizure* case,<sup>28</sup> the Court applied these principles to sustain a district court's issuance of a

21. U.S. Const., art I, §9, cl. 3.

22. The constitutionality of the pension offset exception was challenged in seven cases, all but one filed *pro se*. *Webb v. Schweiker*, 701 F.2d 81 (9th Cir. 1983), cert. granted, vacated and remanded for consideration in light of *Heckler v. Mathews* sub nom. *Heckler v. Webb*, 104 S.Ct. 1583 (1984); *Rosofsky v. Schweiker*, 523 F.Supp. 1180 (E.D.N.Y. 1981), prob. juris. noted, 456 U.S. 959, appeal dismissed, 457 U.S. 1141 (1982); *Miller v. Dep't of Health and Human Services*, 517 F.Supp. 1192 (E.D.N.Y. 1981); *Caloger v. Harris*, 1981 Unempl. Ins. Rep. (CCH) ¶17,754 (D. Md. Mar. 25, 1981); *Duffy v. Harris*, 1979 Unempl. Ins. Rep. (CCH) ¶16,906 (D.N.M. Oct. 23, 1979); *Wachtell v. Schweiker*, No. 80-8022 (S.D. Fla.

Jan. 26, 1982), appeal filed, No. 82-5552 (11th Cir. Apr. 30, 1982). The single case in which the plaintiff was represented by counsel was *Mathews v. Heckler*, 1982 Unempl. Ins. Rep. (CCH) ¶14,513 (N.D. Ala. Aug. 24, 1982), rev'd 104 S.Ct. 1387 (1984), where, of course, the constitutionality of the severability clause was also challenged.

23. 5 U.S. (1 Cranch) 137 (1803).

24. 3 W. Blackstone, *Commentaries*, \*23, \*109.

25. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

26. 327 U.S. 678 (1946).

27. *Id.* at 684.

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

preliminary injunction restraining enforcement of President Truman's order directing the Secretary of Commerce to take control of most of the nation's steel mills. The Court based its affirmance on its finding that "equity's extraordinary...relief"<sup>29</sup> was the only means of assuring the threatened companies an adequate remedy for unconstitutionally inflicted injuries, despite the gravity of its interference with the conduct of executive power in time of war.

Similarly, school desegregation litigation since the Supreme Court's second *Brown* decision<sup>30</sup> has centered largely on remedial issues and has been premised on the idea that the constitutional right to be free from officially imposed racial segregation includes an adequate remedy for the injury such separation inflicts. In *Green v. New Kent County School Board*, for example, the Court invalidated ineffective, voluntary freedom-of-choice plans and demanded that school boards come forward with a plan "that promises realistically to work now."<sup>31</sup> Three years later, in *Swann v. Charlotte-Mecklenburg County Board of Education*,<sup>32</sup> the Court upheld the use of mandatory busing as a desegregation remedy, acknowledging that in order to eliminate all vestiges of an unconstitutional dual school system, the necessary remedies may be "administratively awkward, inconvenient, and even bizarre."<sup>33</sup>

The proposition that vindication of a constitutional right includes an adequate remedy has been confirmed more recently by the Supreme Court's line of decisions, beginning with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,<sup>34</sup> grounding the availability of an adequate remedy for constitutional violation in the Article III powers of the federal courts. In *Bivens*, the Court sustained a claim for damages against federal agents for injuries caused by a warrantless arrest and search in violation of the Fourth Amendment. There was no federal statute authorizing such a claim. Nevertheless, the damage award was properly within the power of a federal court, because of the principle announced in *Bell v. Hood*, i.e., that "where legal rights have been invaded...courts will...grant the necessary relief."<sup>35</sup> The Court then emphasized that an effective remedy was inherent in the protection afforded by the Fourth Amendment:

**From the earliest days of the republic, it has been fundamental that an injured person is entitled to relief from that injury.**

[W]e cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover damages from the agents, but must instead be remitted to another remedy, equally effective in the eyes of Congress.<sup>36</sup>

*Bivens* thus acknowledges the primary responsibility of Congress over remedies for injuries inflicted by the unconstitutional conduct of federal officials, but also underscores the power of the federal courts to afford constitutionally sufficient relief in the event Congress fails to carry out that responsibility.<sup>37</sup>

The duty of the federal courts to provide relief for unconstitutional injuries is in no way incompatible with a broad reading of Congress' power, under the "exceptions" clause of Article III of the Constitution, to regulate the subject matter jurisdiction of the federal courts. Even if the exceptions power authorizes

Congress to exempt particular classes of constitutional claims from federal review, it cannot, consistent with the separation of governmental powers, be read to permit Congress formally to grant the power of review over such claims while, at the same time, withdrawing the authority of a reviewing court to provide relief to the injured claimant. As Professor Laurence H. Tribe has pointed out:

Congress may not so truncate the jurisdiction of an Article III court as to empower it to 'decide' a legal controversy while denying it any means to effectuate its decision.... Congress' broad authority to regulate the panoply of available remedies, in other words, stops short of the power to reduce an Article III court to a disarmed, disembodied oracle of the law lacking all capacity to give tangible meaning to its decisions.<sup>38</sup>

If the federal courts are required to provide adequate remedies for the violation of constitutional rights, the duties of the state courts, under the supremacy clause, cannot be any less. Nearly 40 years have passed since the Supreme Court confirmed, in *Testa v. Katt*,<sup>39</sup> the general obligation of state courts to enforce federal constitutional rights violated by state policies or statutes. And long before *Testa*, it was clear that such enforcement entailed a duty to provide a constitutionally sufficient remedy for injuries caused by the violation.<sup>40</sup> From the earliest days of the republic, then, a fundamental assumption of our legal order has been the proposition that a person injured by unconstitutional government action is entitled to judicial relief from that injury.<sup>41</sup>

### A crucial distinction

Judge Wachtler's opinion for the New York Court of Appeals in *Liberta* did not address the question of *Liberta*'s right to

service commission regulation were constitutionally adequate).

38. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C. R.-C.L.L. Rev. 129 (1981).

39. 330 U.S. 386 (1947).

40. See, e.g., *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Ward v. Love County*, 253 U.S. 17 (1920); *General Oil Company v. Crain*, 209 U.S. 211 (1908).

41. The general availability of a sovereign immunity defense to unauthorized damage suits against federal and state governments does not undercut this principle. In situations where sovereign immunity precludes an award of monetary relief, the power of the federal courts to provide constitutionally adequate alternative remedies becomes an integral element of the "paramount authority of the Federal Constitution." *Sterling v. Constantin*, 387 U.S. 378, 397-98 (1932); see also, *General Oil v. Crain*, 209 U.S. 211, 236 (1908).

29. *Id.* at 384.

30. *Brown v. Board of Education*, 349 U.S. 294 (1955).

31. 391 U.S. 430, 439 (1968).

32. 402 U.S. 1 (1971).

33. *Id.* at 28.

34. 403 U.S. 388 (1971).

35. 327 U.S. at 684.

36. 403 U.S. at 397.

37. The Supreme Court has reaffirmed the *Bivens* principle on three occasions since announcing it in 1971. See *Davis v. Passman*, 442 U.S. 228 (1979) (authorizing damage remedy for congressional staff member unconstitutionally discharged on the basis of gender); *Carlson v. Green*, 446 U.S. 14 (1980) (authorizing damage claim for parent of federal prisoner whose death was caused by official failure to provide medical care); *Bush v. Lucas*, 462 U.S. 367 (1983) (affirming dismissal of federal employee's damage claim for violation of First Amendment rights, on ground that remedies provided by civil



a remedy. Presumably, this omission was prompted by *Liberta's* unambiguous guilt of the act of rape, regardless of the constitutionality of the marital rape exemption. But *Liberta's* guilt does not alter the fact that in the case before the court of appeals, the appeal of his conviction, it was he and only he who was injured by the exemption. Unless his injury can fairly be described as something other than the conviction itself, there is no escaping the conclusion that the court failed to perform its constitutional duty to provide him a remedy.

Justice Brennan, on the other hand, did consider *Mathews'* right to a remedy. He found, however, that *Mathews'* right could be satisfied equally by either extension or nullification of the pension offset exception. The reason either remedy was equally effective was that in Brennan's view, the injury suffered by *Mathews* was not the denial of the Social Security benefits he sought, but was instead the gender "discrimination itself."<sup>42</sup> Such discrimination,

by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community...can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.<sup>43</sup>

An adequate remedy for this injury could, of course, "be accomplished by withdrawal of benefits for the favored class as well as by the extension of benefits to the excluded class."<sup>44</sup>

This equation of the injury caused *Mathews* by the pension offset exception with the possible unconstitutionality of the exception itself is, however, a transparent fiction. Its transparency is revealed by applying Brennan's methodology in *Mathews* to *Liberta's* appeal. For Brennan, the injury suffered by *Liberta* would not be his rape conviction,

but rather the New York legislature's denial of his right to a statute criminalizing rape that is free of irrational distinctions based on the marital relationship of the victim and perpetrator. Such distinctions themselves, by "perpetuating archaic notions" and "stigmatizing members of the disfavored group"<sup>45</sup> cause serious injuries to the members of that group.

To describe *Liberta's* injury in this way is, of course, absurd. It is married women raped by their husbands, not rapists who are not married to their victims, who are stigmatized by the marital rape exemption and thereby labeled as less worthy participants in the political community. This dehumanization of women because they are married is the reason why the marital exemption was rightly eliminated by the *Liberta* court, but it is not, in any sense, the injury which prompted *Liberta's* appeal. That injury remains his conviction for the crime of rape.

The inadequacy of Brennan's characterization of *Mathews'* injury is confirmed by the opinion that provided the foundation for the remedial dispositions in both *Mathews* and *Liberta*: Justice Harlan's concurring opinion in *Welsh v. United States*.<sup>46</sup> *Welsh* concerned an appeal from a criminal conviction by a conscientious objector whose opposition to war was based on ethical beliefs of a secular rather than a religious nature.<sup>47</sup> The statute authorizing exemption from military service for conscientious objectors had been construed by selective service officials to limit objector status to those whose opposition to war was grounded in formal religious training and belief.<sup>48</sup> A majority of the Supreme Court rejected this construction and reversed *Welsh's* conviction on the ground that the statute was broad enough to encompass his ethically rooted, but not traditionally religious, conscientious scruples.<sup>49</sup> Harlan

could not accept the majority's reading of the statute and was thus compelled to reach the constitutional issue, which he resolved by finding that the statutory distinction between religious and secular beliefs amounted to an unconstitutional establishment of religion, in violation of the First Amendment.<sup>50</sup>

Harlan's disposition of the merits of *Welsh's* appeal forced him to address the question of the appropriate constitutional remedy. He began by stating the proposition that was to serve as the starting point for both Judge Wachtler in *Liberta* and Justice Brennan in *Mathews*:

Where a statute is defective because of underinclusion, there exist two remedial alternatives; a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.<sup>51</sup>

The unconstitutionality of *Welsh's* injury could plainly have been remedied by nullifying the exemption granted to religious objectors. Nevertheless, nullification was, in Harlan's view, inadequate as a constitutional remedy. The reason was that while nullification would correct the unconstitutionality of statutory exemption scheme, it would not touch the injury suffered by *Welsh*—the conviction for refusing induction and corresponding prison sentence. This injury could be redressed only by extending the benefit of conscientious objection to *Welsh* and others whose moral opposition to participation in war was grounded in secular rather than religious belief.<sup>52</sup>

The distinction is a critical one: When confronted with an injury that is created by an unconstitutionally underinclusive statutory classification, the responsibility of a federal court is not simply to correct the unconstitutionality but to remedy the injury. In *Liberta's* case, this means reversing the conviction. In *Mathews'*, it means directing payment of his Social Security benefits.<sup>53</sup>

### Costs of a remedy

If, as we have argued, the non-remedies dispensed by the *Mathews* and *Liberta* courts indeed threaten the tradition of judicial review of unconstitutional government action, it is only fair that we acknowledge the far from trivial conse-

42. *Heckler v. Mathews*, 465 U.S. 728, at 739.

43. *Id.* at 739-40.

44. *Id.* at 740.

45. *Id.* at 739.

46. 398 U.S. 333, 344 (1970). Both the *Mathews* and *Liberta* opinions invoke Justice Harlan's *Welsh* concurrence as the starting point for their remedial analysis. *Heckler v. Mathews*, 465 U.S. at 738; *People v. Liberta*, 64 N.Y.2d at 170, 485 N.Y.S. at 218.

47. *Id.* at 337.

48. 50 U.S.C. app. §456(—) (Supp. IV 1964); *Welsh*, 398 U.S. at 336.

49. *Welsh*, 398 U.S. at 341-43.

50. *Id.* at 356 (Harlan, J., concurring in result).

51. *Id.* at 301.

52. *Id.* at 362-63.

53. *Welsh* was, of course, a criminal appeal. It might, for this reason, be argued that Justice Harlan's concurring opinion, while supporting *Liberta's* argument for reversal of his conviction, is of no help in *Heckler v. Mathews*, a civil case. But the proposition that a reviewing court's task is not complete until it has remedied the injury caused by an unconstitutional governmental action has long been commonplace in civil cases. See, e.g., *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

quences of our belief that the only justifiable decisions were extension of Social Security benefits in *Mathews* and nullification of New York's rape statutes in their entirety in *Liberta*. *Mathews* is, of course, the easier case. Congress obviously would retain the authority to respond to a Supreme Court decision extending the pension offset exception to *Mathews* by prospectively repealing the exception entirely. Such a prospective repeal would neither interfere with a reviewing court's ability to grant relief to the litigants before it nor obstruct access to judicial review by foreclosing any relief in advance of the filing of a lawsuit.

Paradoxically, it is at least possible that a decision to disregard the *Mathews* severability clause would entail very little intrusion on the legitimate exercise of legislative power. Though the legislative history is silent on the point, it is not unreasonable to assume that any member of Congress who considered the likely impact of the clause would have seen that its most immediate and predictable effect would be to stifle the incentive—and possibly the standing—of men denied benefits because of the underinclusiveness to challenge the constitutionality of the sex discrimination effected by the exception. Such a disincentive would thus work to assure that the harsh remedial option—nullification of the exception—envisioned by the clause would never have to be invoked.

Under these circumstances, it becomes much more problematical to describe the severability clause, despite its facial clarity, as a reliable indication of Congress' remedial intention in the event the exception were declared unconstitutional. The clause was, in a very real sense, purely hypothetical, in contrast to, for example, a repeal of the exception enacted *after* adjudication of its unconstitutionality or a direction (regardless of when enacted) that the constitutionality of the exception be assured by extending the benefits it confers. Each of these latter prescriptions takes seriously the legislature's primary role as a dispenser of constitutional remedies. The offset severability clause (along with other provisions like it, which purport to deny all remedies for constitutional injuries) may, on the other hand, quite plausibly be viewed as a legislative bluff. Bluffs of this sort should be called. The price, in

terms of legislative prerogatives, is small, especially in light of the countervailing danger to the effective exercise of judicial review.

The short-term consequences of nullifying New York's rape statutes are obviously more serious than those presented by a decision to disregard the *Mathews* severability clause. Judge Wachtler feared that a judicial invalidation of the government's authority to prosecute rapists would have "catastrophic effects."<sup>54</sup> Not only would *Liberta* have to be released, but perhaps all persons ever arrested or convicted for rape in the state of New York might be entitled to dismissal of the charge or reversal of the conviction.<sup>55</sup>

It is at least conceivable, however, that the consequences of granting relief to *Liberta* might not have been so dire. The hiatus created by invalidating the rape statute would surely have been hastily repaired by the legislature. And United States Supreme Court precedents offer substantial leeway for limiting the retroactive application of a constitutional principle in order to avoid reopening criminal convictions.<sup>56</sup>

Even so, it would be unfair to minimize the costs of reversing *Liberta*'s conviction. If New York's rape statute had been held to be unenforceable, prosecutions of men awaiting trial on charges of rape, many of them surely guilty, would have to have been dropped. *Liberta* himself, already found guilty of rape, would indeed have gone free. No one could responsibly argue that these are consequences we should accept easily or blithely.

But the price of allowing the guilty to go free is one our society has been willing to pay before (most notably in the case of the rule excluding illegally secured evidence from admission at trial)<sup>57</sup> in order to assure constitutional government. We believe it is a price that should have been paid in the *Liberta* case. By affirming his conviction, the New York Court of Appeals undermined the only process that could have opened the way for its historic elimination of the marital rape exemption. If there are other unconstitutionally underinclusive statutes buried in New York's criminal code, we wonder whether, after *Liberta*, they will reach the court's docket.

## Conclusion

On the face of it, the remedial decisions

in *People v. Liberta* and *Heckler v. Mathews* may seem unobjectionable. In each case, the court approached the task of correcting an unconstitutionally underinclusive statute by deferring to the presumed wishes of the enacting legislature. In each case, the legislative preference was accurately gauged and unproblematically applied. And in *Liberta*, where the court's remedial choice was actually carried out, the result—extension of liability for rape to all husbands—was plainly the only tolerable legislative policy choice.

This appearance, however, is highly deceptive. The practical impact of *Liberta* and *Mathews* is to advise persons injured by unconstitutionally underinclusive statutes that corrective litigation cannot help them but can only harm others. This message effectively chokes off the litigation process and thereby threatens to immunize such statutes from judicial scrutiny. The remedial approach of the *Liberta* and *Mathews* courts consequently undermines the power of courts to hear and decide constitutional claims, a result that is plainly inconsistent with the traditional goal of limiting government through law.

If this practical impediment is taken to mean that litigants such as *Mathews* and *Liberta* do not have standing to present their constitutional challenges, it will present a formal bar to adjudication as well. Many underinclusive statutes will be theoretically as well as practically immune from challenge. The *Liberta* and *Mathews* decisions thus fail to mask a genuine dilemma: either there is a right to a constitutional remedy or the Constitution does not really reach the issues the two cases purported to resolve. □

54. *People v. Liberta*, 64 N.Y.2d at 171, 485 N.Y.S.2d at 218.

55. *Id.* at 173, 485 N.Y.S.2d at 320.

56. See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965); *Adams v. Illinois*, 405 U.S. 278 (1972); *Griffin v. California*, 380 U.S. 609 (1965); *Johnson v. New Jersey*, 384 U.S. 319 (1966); *United States v. Wade*, 388 U.S. 218 (1967).

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

BRUCE K. MILLER is a professor of law at Western New England College, and served as co-counsel for respondent in *Heckler v. Mathews*.

NEAL E. DEVINS is assistant general counsel, U.S. Commission on Civil Rights. The views expressed are the author's and do not necessarily represent the opinions of the Commission.