Constitutional Remedies For Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews

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CONSTITUTIONAL REMEDIES FOR UNDERINCLUSIVE STATUTES: A CRITICAL APPRAISAL OF HECKLER V. MATHEWS

Bruce K. Miller*

Introduction

The power of the federal courts to remedy injuries caused by constitutional violations is a fundamental assumption of our constitutional scheme. The Supreme Court's equal protection decisions of the past generation illustrate the extent to which we take this power completely for granted. When confronted with a statute that denies a litigant's fifth or fourteenth amendment right to equal treatment, the Court has rarely limited itself to a simple declaration that the statute is unconstitutional. Such declarations, rather, have been routinely accompanied by awards of often substantial relief to the persons injured by the unconstitutional inequality.¹

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¹ See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (sustaining order authorizing enrollment of male applicant in state nursing school that had previously admitted only women); Plyler v. Doe, 457 U.S. 202 (1982) (affirming award directing school district to provide free public education to undocumented alien children); Califano v. Goldfarb, 430 U.S. 199 (1977) (affirming judgment awarding spouses' benefits to male dependents of female wage earners previously denied such benefits under Social Security Act); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (affirming judgment awarding benefits to male survivors of female wage earners previously denied such benefits under Social Security Act); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (affirming judgment awarding federal food assistance to households containing one or more unrelated persons without regard
Brown v. Board of Education\(^{2}\) exemplifies the modern judicial response to unconstitutional positive law. The Court did not just declare that laws which segregated public school students by race were unconstitutional; it ordered school systems operating under such laws to desegregate "with all deliberate speed."\(^{3}\) A decade and a half later, the Court reaffirmed the centrality of the grant of relief to the process of constitutional adjudication when it upheld a district court order requiring large-scale busing of pupils in order to achieve desegregation.\(^{4}\) Similarly, in one of its most important public assistance decisions, Shapiro v. Thompson,\(^{5}\) the Court did not limit its role to declaring that durational residency requirements for the welfare benefits at issue were an invalid restraint on the right to interstate travel; it also ordered payment of benefits to applicants whose claims otherwise would have been denied because they could not satisfy the unconstitutional residency rules. More recently, in Califano v. Goldfarb\(^{6}\) and Jimenez v. Weinberger,\(^{7}\) Social Security claimants who were denied benefits by statutory classifications which discriminated on account of sex or children's legitimacy received more from the Court than a judgment that such classifications were unconstitutional; they also received orders directing payment of the benefits they sought.

In none of these decisions did the Court discuss, much less purport to justify, its authority to remedy constitutional wrongs to statutory ban on their eligibility); Frontiero v. Richardson, 411 U.S. 677 (1973)(plurality opinion)(granting dependent's benefits to married female Air Force officer on same basis as similarly situated male officer); Graham v. Richardson, 403 U.S. 365 (1971)(affirming award of welfare benefits to aliens without regard to statutory ban on their eligibility); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)(affirming district court-devised remedies, including busing of pupils, to eliminate unconstitutional public school segregation); Shapiro v. Thompson, 394 U.S. 618 (1969)(affirming awards of welfare benefits to new residents of states without regard to statutory requirement of one year residency before application); Brown v. Board of Educ., 347 U.S. 483 (1954)(Brown I), 349 U.S. 294 (1955)(Brown II)(ordering desegregation of public schools segregated by race).


\(^{3}\) Brown II, 349 U.S. at 301.


as a matter apart from its authority to identify them. This should come as no surprise. The Supreme Court, like other American courts, derives its authority to declare what the law is from its role as an arbiter of concrete disputes. This traditional role includes the power and, this Article will argue, the responsibility to ensure that a party who is wronged receives some form of practical relief from that wrong. Since *Marbury v. Madison*, the Constitution has been thought of as a special species of law, the Supreme Court’s elaboration of which occurs in the course of resolution of specific controversies. It is to put the controversy to rest, rather than to vindicate constitutional values, that some kind of relief generally accompanies a judgment that a particular statute or practice is unconstitutional.

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8 Article III of the Constitution provides in part that “[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution . . . and to controversies to which the United States shall be a party.” U.S. Const. art. III, § 2.

9 5 U.S. (1 Cranch) 137 (1803).

10 Chief Justice Marshall’s justification for judicial review in *Marbury* rests in large part on this proposition. “Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void. . . . It is emphatically . . . the duty of the judicial department, to say what the law is.” *Id.* at 177. In The Federalist No. 78, Alexander Hamilton argued that the “constitution is, in fact, and must be regarded by the judges, as a fundamental law.” The Federalist No. 78, at 467 (A. Hamilton)(Mentor ed. 1961). For a more contemporary examination of the Constitution as a species of law, see generally J.H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); R. Dworkin, Taking Rights Seriously 131-49 (1977); *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. Rev. 259 (1981).

11 The notion that the purpose of judicial review is to resolve concrete disputes rather than to elaborate constitutional values was recently underscored by Justice Rehnquist’s opinion for the Court in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). That opinion provides in part:

To the extent the Court of Appeals relied on a view of standing under which Art. III burdens diminish as the “importance” of the claim on the merits increases, we reject that notion. The requirement of standing “focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” [citing *Flast v. Cohen*, 392 U.S. 83 (1968)] . . . [W]e know of no principled basis on which to create a hierarchy of
One notable recent exception, however, has arisen to this general tendency to ground the authority to grant constitutionally adequate remedies in the judicial function itself. That exception has grown out of litigation which challenges the constitutionality of a statute on the ground that it is underinclusive. Although the most common sources of such litigation are public benefits programs containing classifications which are alleged to violate the equal protection guarantee, the problem of unconstitutional underinclusiveness has also arisen in connection with criminal statutes, the first amendment prohibition of establishment of religion, and state alimony and child support laws. In all of these areas, upon finding the classification at issue unconstitutional, the Court is faced with one of two questions. If the classification has conferred a benefit upon an unconstitutionally favored class, should that benefit be nullified entirely, or should it be extended to members of the disfavored class? Conversely, if the classification has imposed an unconstitutionally underinclusive burden, should that burden be lifted from the party asked to bear it, or should it be extended to additional classes to ensure that it is applied with constitutionally sufficient evenhandedness?

In cases presenting these questions, the Court has opted, often without much discussion, for a remedial choice which ensures tangible relief to the litigant before it. In the few constitutional values or a complementary "sliding scale" of standing which might permit respondents to invoke the judicial power of the United States.

Id. at 484 (footnote omitted).

12 See, e.g., Califano v. Westcott, 443 U.S. 76 (1979); see also cases cited supra note 1; Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301, 310–12 (1979).


decisions in which the Court has discussed its authority to grant such relief, however, it has generally explained its remedial choices in terms of fealty to legislative purposes rather than as an exercise of its own article III remedial powers.\(^{17}\) This explanation is deficient in at least three respects. First, it does not adequately account for the Court's actual remedial choices for correcting unconstitutional underinclusiveness. Second, it is incapable of principled application in the great majority of cases because the legislature has not anticipated the possibility that a particular classification may be held unconstitutional and accordingly has not specified a preferred remedy. In the few cases where the legislature has anticipated this possibility, the Court may easily identify and adhere to the prescribed remedy. This leads, however, to the third, and by far the most important, problem: A judicial posture of complete deference to legislative remedial choices carries a dangerous potential for immunizing unconstitutional classifications from judicial review, thereby undercutting the most important function of the federal courts in our constitutional scheme.

The Supreme Court's recent decision in *Heckler v. Mathews*\(^{18}\) provides disturbing evidence of the immediacy of this danger. *Mathews* concerned a provision of the 1977 Social Security amendments which granted to certain dependent women an exception from an offset of other retirement benefits against Social Security spousal benefits, but denied that exception to identically situated men.\(^{19}\) The exception provision was accompanied by a remedial clause which directed nullification of the exception in the event that the gender classification was held unconstitutional.\(^{20}\)

Justice Brennan's opinion for a unanimous Supreme Court not only sustained the classification, but also rejected a chal-


lence to the nullification clause. Mathews argued that the clause foreclosed a reviewing court from granting any relief for the injury caused him by the allegedly unconstitutional statute. This withdrawal of remedial authority, he maintained, amounted to an impermissible attempt to curtail federal jurisdiction over his constitutional claim by withdrawing his standing to sue. Justice Brennan’s opinion rejected Mathews’ argument at its first premise. Resting on the Court’s previous examinations of the remedial issues posed by unconstitutional underinclusiveness, Justice Brennan held that Congress’ command that the exception be nullified if unconstitutional did not deny Mathews a remedy for an unconstitutionally inflicted injury. If the gender classification was unconstitutional, its very eradication (whether by extension or by nullification of the offset exception) provided a sufficient remedy, since such eradication ended the stigmatization and stereotyping inherent in sex discrimination.\(^{21}\)

Justice Brennan’s analysis of the nullification provision fundamentally misapprehended and seriously underestimated the importance of the problems it presented. In order to illustrate these problems, Part I of this Article will review the approach to the extension/nullification problem fashioned by the Court in two cases which provide much of the grounding for the Mathews opinion: \textit{Califano v. Westcott}\(^{22}\) and \textit{Welsh v. United States}.\(^{23}\) Part II will scrutinize the case of \textit{Heckler v. Mathews}, which demonstrates the inadequacy of the strict adherence to legislative remedial directions suggested by those cases. Part III will offer an alternative account of a reviewing court’s responsibilities in cases involving successful claims of unconstitutional underinclusiveness. This alternative account, rooted in the responsibilities of an article III court, minimizes the danger that harms caused by unconstitutional legislation will go unchecked, without, as shown in Part IV, undermining the ultimate authority of the legislature to effect its own prospective remedy for a classification found to be unconstitutionally underinclusive.

\(^{21}\) Mathews, 104 S. Ct. at 1395.

\(^{22}\) 443 U.S. 76 (1979).

I. The Doctrinal Background of *Heckler v. Mathews*

A. Califano v. Westcott

1. The Remedial Decision

*Califano v. Westcott*\(^{24}\) concerned a provision in the Aid to Families with Dependent Children (AFDC) Program of the Social Security Act.\(^{25}\) The provision at issue authorized benefits to families whose dependent children had been deprived of parental support because the father was unemployed, but authorized no benefits for identically situated families in which the mother was unemployed.\(^{26}\) All nine justices agreed that this sex-based classification violated the equal protection guarantee of the fifth amendment due process clause.\(^{27}\) Only five justices, however, voted to extend the "unemployed father" benefits to families with unemployed mothers.\(^{28}\) The remaining four justices rejected extension on the ground that it amounted to a use of the Court's remedial powers "to circumvent the intent of the legislature."\(^{29}\) The dissenters would have instead equalized treatment of the two classes of families by nullifying the statutory authorization of benefits to families with unemployed fathers.\(^{30}\) This (non)remedy was, in the dissenters' view, the only one which was consistent with "the duty and function of the Legislative Branch to review its . . . program in light of our decision [on the merits] and make such changes therein as it deems appropriate."\(^{31}\)

The majority view that the statutory benefits at stake ought to be extended rather than extinguished also rested on a perception (albeit very different) of the legislative will.\(^{32}\) It saw

\(^{24}\) 443 U.S. 76 (1979).
\(^{27}\) *Westcott*, 443 U.S. at 83–89, 93.
\(^{28}\) *Id.* at 93–94.
\(^{29}\) *Id.* at 94.
\(^{30}\) *Id.*
\(^{31}\) *Id.* at 95.
\(^{32}\) *Id.* at 89–93.
extension as most consistent with "congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." Both the majority and the dissenters in Westcott thus saw the remedial question as one of statutory interpretation. Neither side expressed concern that basic questions of federal judicial authority to resolve cases and controversies or to grant relief to litigants aggrieved by unconstitutional legislation might be at stake.

2. The Difficulty of Uncovering Legislative Remedial Intent

The Court's division over the remedy in Westcott may leave one wondering which of the two interpretations of legislative intent is the better one, and by what standards its superiority is to be determined. An examination of the background of the classification at issue reveals that such questions are not readily answerable, if indeed they are answerable at all. The analytic approach suggested by the Court—scrutiny of legislative purpose—lacks practical utility and may serve only to mask other motives for its remedial choices.

The AFDC program from which the Westcott claims arose is a jointly financed public assistance program operated by the states under federal statutory standards. The purpose of the program is to provide a minimum income to families with needy dependent children. From 1935, when the program was established, to 1961, a family's eligibility for AFDC benefits was contingent upon the death, absence, or incapacity of a parent of either sex; a parent's unemployment did not qualify a family for benefits.

Twice during the early 1960's, Congress temporarily extended AFDC benefits to families whose children were deprived

33 Id. at 90.
of support because a parent was unemployed. These temporary amendments, like the original eligibility rules, were drafted in gender-neutral terms. In 1968 this extension of eligibility to families impoverished by unemployment was permanently incorporated into the Social Security Act. At the same time, however, Congress introduced the sex classification that eventually became the subject of the Westcott litigation. A dependent child, for purposes of AFDC eligibility, included a "needy child . . . who has been deprived of parental support or care by reason of the unemployment . . . of his father." The express purpose of the benefit extension was twofold. Most directly the amendment rectified the injustice of "denying to the child of the unemployed parent the food that you give to the child of the parent who deserts or is absent or dead." No less important was the goal of curbing the program's structural inducement to parental desertion. So long as a family could gain eligibility for AFDC benefits if deprived of parental support because of the "continuing absence from the home . . . of a parent" but not because of a parent's unemployment, the rational solution for an unemployed breadwinner was to desert or pretend to desert his family.

The foregoing use of "his" is, of course, intentional, for Congress deliberately elected to withdraw the incentive only from unemployed fathers. The gender limitation was part of a more general objective of the 1968 amendments to the Social Security Act to "tighten standards for eligibility and reduce program costs." In support of this cost-cutting effort, Congress noted that under the temporary amendment enacted during the

41 Id. (emphasis supplied).
42 Hearings on H.R. 3864 and 3865 Before the House Committee on Ways and Means, 87th Cong., 1st Sess. 102 (1961) (statement of Abraham Ribicoff, Secretary, HEW). See also Califano v. Westcott, 443 U.S. at 85–86.
44 Westcott, 443 U.S. at 87.
early 1960's, some states had made "families in which the father is working but the mother is unemployed eligible for assistance. The [1968] bill would not allow such situations. Under the bill the program could apply only to the children of unemployed fathers."\textsuperscript{45}

Congress was plainly concerned with preventing AFDC benefits from flowing to families in which the father was present and working. Just as plainly, Congress was indifferent to the employment status of the mother in families in which the father was unemployed. The 1968 amendments did not restrict eligibility for AFDC benefits to families in which the unemployed father was also the family's principal wage earner. On the foregoing evidence, the Supreme Court, when faced with the \textit{Westcott} challenge to the gender limitation, unanimously found that Congress,

\begin{quote}
with an image of the "traditional family" in mind, simply assumed that the father would be the family breadwinner, and that the mother's employment role, if any, would be secondary. In short, the available evidence indicates that the gender distinction was inserted to reduce costs and eliminate what was perceived to be a type of superfluous eligibility for AFDC-UF [unemployed fathers] benefits.\textsuperscript{46}
\end{quote}

On this basis, the Court found that the classification was not substantially related to the goal of reducing a father's incentive to desert his family. The Court noted the absence of evidence "in the legislative history or elsewhere, that a father has less incentive to desert in a family where the mother is the breadwinner and becomes unemployed than in a family where the father is the breadwinner and becomes unemployed."\textsuperscript{47} Accordingly, the classification was held to violate the equal protection guarantee of the due process clause of the fifth amendment.\textsuperscript{48}

\textsuperscript{46} \textit{Westcott}, 443 U.S. at 88.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 89.
Congress did not anticipate that its restriction of AFDC unemployed parent benefits to families with unemployed fathers might be held unconstitutional, and thus offered no direct remedial guidance to the Court.\footnote{Congress did, however, place "a strong severability clause" in the Social Security Act. \textit{Id.} at 90 (citing 42 U.S.C. § 1303 (originally enacted as Act of Aug. 14, 1935, ch. 531, Title XI, § 1103, 49 Stat. 648)). Section 1303 provided as follows: "If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." 443 U.S. at 90, n.8.} The legislative history reviewed above seems to point with equivalent strength in opposing directions. Not surprisingly, these directions reflect the competing purposes which the unconstitutional gender classification was intended to serve. On the one hand, the majority was correct in viewing the purpose of the AFDC unemployed father program as providing "aid to children deprived of basic sustenance because of a parent's unemployment."\footnote{\textit{Id.} at 90.} It was equally correct in noting that nullification of the program "would impose hardship on beneficiaries whom Congress plainly meant to protect."\footnote{\textit{Id.} at 90.} On the other hand, the dissenters were equally persuasive when they pointed to the more general cost-cutting purposes of the 1968 amendments to the AFDC statute. After all, Congress made clear its goal of awarding benefits only to children of unemployed fathers by expressly precluding assistance to families in which the father was working but the mother was not.\footnote{\textit{Id.} at 94-95 (Powell, J., concurring in part and dissenting in part).}

The foregoing illustrates the probable futility of searching for the enacting legislature's remedial preference when an underinclusive statute is held unconstitutional. It also suggests that...
the legislative preference "discovered" by a judge in such a case
is likely to be based on little more than her personal assessment
of the relative worth of social welfare legislation compared to
the demands for fiscal frugality—in other words, on the partic­
ular judge's political and social philosophy. A court asked to
divine the remedial intent of a silent legislature cannot expect
to find reliable moorings. A legislature which has enacted an
underinclusive classification ultimately found unconstitutional
has often acted years, and in Westcott more than a decade,53
before the challenging litigation. If, as in Westcott, the legisla­
ture has enacted no statutory language prescribing a remedy in
the event of the classification's unconstitutionality, it most likely
never considered the possibility of invalidation during its delib­
erations on the measure. Under these circumstances, the legis­
native history will rarely reveal anything helpful in choosing the
"preferred remedy" years later when a court invalidates the
classification.

Justice Powell's dissent in Westcott further suggests that
previous legislative history may somehow reflect the remedial
wishes of the legislature sitting at the time the classification is
before the court for review.54 This view has been trenchantly
and quite properly criticized by Dean LaFrance:

Divining the reasoning of a past legislature—in itself
no easy task—to predict the mood of a present or future
one is simply an exercise in reading political tea leaves.
In this sense the Westcott dissent was arrogating to
itself legislative prerogative in presuming to be able to
divine not only past but present and future legislative
sentiments.55

LaFrance accordingly concluded that "legislative intent then
becomes largely irrelevant except as a possible response to

53 The unemployed father provision challenged in Westcott was enacted
in 1968; the case was decided in 1979.
54 Westcott, 443 U.S. at 96.
55 LaFrance, Problems of Relief in Equal Protection Cases, 13 Clearing­
house Rev. 438, 440 (1979). But see Ginsburg, supra note 12, at 316 (arguing
that the probable will of the legislature ought to determine the remedy for
unconstitutional underinclusiveness).
judicial relief not—as the Westcott dissents suggested—as a precondition.”

B. Welsh v. United States

If an attempt to discover possibly unconsidered remedial wishes of a silent legislature is unlikely to bear fruit, it is reasonable to ask why the justices in Westcott unanimously felt obliged to conduct such a search. The major source of the Westcott Court’s approach to the extension/nullification problem was Justice Harlan’s concurring opinion in Welsh v. United States. Justice Harlan’s Welsh concurrence contains the Court’s only reasonably contemporary examination of the issues facing a court asked to fashion a remedy for an unconstitutionally underinclusive classification.

Welsh concerned an appeal from the criminal conviction of a conscientious objector who refused induction into the military on ethical grounds of a secular rather than a religious nature. 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. A majority of the Supreme Court rejected this construction and reversed Welsh’s conviction on the statutory ground that the exemption encompassed his ethically rooted, but not traditionally religious, scruples.

Justice Harlan could not accept the majority’s reading of the statute and was thus forced to reach the constitutional issue, which he resolved by finding that the statutory distinction between religious and secular beliefs amounted to an establishment of religion, in violation of the first amendment. This disposition of Welsh’s appeal brought Justice Harlan face-to-face with the

56 LaFrance, supra note 55, at 440.
58 Id. at 337.
60 Welsh, 398 U.S. at 341–43.
61 Id. at 356 (Harlan, J., concurring in result).
extension/nullification problem. He began the remedial portion of his opinion by noting:

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 exclusion. 62

Justice Harlan then observed that because Welsh’s challenge to the conscientious objection classification occurred in the context of a criminal appeal, a court which agreed with the merit of his claim was “mandated by the Constitution” to extend the statutory benefit of conscientious objector status to him. 63 This result was required because extension was the only basis for reversal of Welsh’s conviction, and without such a reversal Welsh would be required to “go remediless,” 64 an outcome not only unsatisfactory to Welsh but inconsistent with the Court’s constitutional duty.

In a lengthy dictum, Justice Harlan explained that this same remedial result, extension of conscientious objector status to persons opposed to war on secular grounds, would have also been the proper approach had the question of the statute’s constitutionality been presented in a civil action for declaratory judgment. 65 In this part of his opinion, however, Justice Harlan, like the Westcott Court after him, relied not on the inherent remedial power of the Supreme Court, but rather on his interpretation of Congressional remedial intent. Pointing to the “broad severability clause” 66 in the Selective Service statute and the “intensity of [legislative] commitment to the residual

62 Id. at 361.
63 Id. at 362-63.
64 Id. at 362.
65 Id. at 363-67.
66 Id. at 364 (citing Universal Military Training and Service Act Amendments, ch. 144, § 5, 65 Stat. 88 (codified at 50 U.S.C. App. § 451(n) (1982))).
policy" of honoring conscientious objection to war, Justice Harlan concurred in the extension of exemption as a necessary "patchwork of judicial decision making that cures the defect of underinclusion." The classification under review in Welsh provided as follows:

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.

In light of this statutory language, Justice Harlan’s reliance on congressional policy as the basis for extending conscientious objector status to nonreligious objectors is as problematic as the Westcott majority’s analogous attempt to derive authority for extension of AFDC unemployed parent benefits to families with unemployed mothers. Justice Harlan was undoubtedly correct in emphasizing that “the policy of exempting religious conscientious objectors is one of longstanding tradition and accords recognition to . . . the important value of reconciling individuality of belief with practical exigencies whenever possible.” Nevertheless, in light of the statutory language which emphasized “religious training and belief,” defined as “belief in relation to a Supreme Being,” and which deliberately excluded recognition of “essentially political, sociological, or philosoph-

67 Id. at 365.
68 Id. at 366–67.
70 Welsh, 398 U.S. at 365–66 (Harlan, J., concurring in result).
71 Id. at 365.
72 Id.
ical views, or a merely personal moral code,\textsuperscript{73} it is difficult to deny the force of the contrary argument expressed in Justice White's dissenting opinion:

Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. . . . If it is contrary to the express will of Congress to exempt Welsh, as I think it is, then there is no warrant for saving the religious exemption and the statute by redrafting it in this Court to include Welsh and all others like him.\textsuperscript{74}

In sum, Welsh, no less than Westcott, illustrates the proposition that when two or more competing goals motivate passage of an underinclusive statute, it is difficult at best for a reviewing court to ascertain which of the policies was more important to the enacting legislature.

The epistemological difficulty inherent in trying to discover unstated legislative remedial intent is not, however, the most serious problem with a posture of complete judicial deference to the exercise of legislative remedial power. As Heckler v. Mathews\textsuperscript{75} illustrates, the most serious problem is the threat to the effective exercise of judicial review presented by a crystal clear legislative remedial preference.

II. Heckler v. Mathews

A. The Statutory Background: The Pension Offset Scheme of the 1977 Social Security Amendments

The Federal Old Age, Survivors and Disability Insurance Benefits Program of the Social Security Act\textsuperscript{76} has long provided spousal benefits for the wives, husbands, widows, and widowers

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.} at 368 (White, J., dissenting).

\textsuperscript{75} 104 S.Ct. 1387 (1984).

\textsuperscript{76} 42 U.S.C. §§ 401–33 (1982).
of retired and disabled wage earners.\textsuperscript{77} Until March of 1977, when the Supreme Court decided \textit{Califano v. Goldfarb}, \textsuperscript{78} men seeking these benefits were required by statute to demonstrate dependency on their wives for at least one half of their support.\textsuperscript{79} Women, however, qualified for spousal benefits without regard to dependency on their husbands.\textsuperscript{80} In \textit{Goldfarb}, the Supreme Court held that the one-half support requirement applied to applicants for widowers' benefits violated the equal protection guarantee of the due process clause of the fifth amendment.\textsuperscript{81} Three weeks later, the Court summarily affirmed two district court decisions invalidating the dependency requirement for husbands' benefits.\textsuperscript{82} In all three of these cases, the victorious challengers were awarded the Social Security benefits they sought.\textsuperscript{83} None of the decisions discussed Congress' remedial intentions or the remedial powers of the federal courts.

In December 1977, Congress amended the Social Security Act. One of the amendments, known as the Pension Offset Provision, required that spousal benefits be reduced by the amount of certain federal or state government pensions received by otherwise eligible claimants.\textsuperscript{84} Although the offset generally applied to benefits payable to applicants who filed in or after December 1977,\textsuperscript{85} its effects were mitigated by an exception. Under this exception, those spouses becoming eligible for a government pension prior to December 1982 and who also qualified for Social Security spousal benefits under the act "as it was in effect and being administered in January 1977" (prior to \textit{Gold-
were permanently exempted from the offset. The effect of the exception was thus to re-enact the classification held unconstitutional in Goldfarb, albeit for the purpose of allocating the burden of a benefit offset rather than ascertaining basic eligibility.

Anticipating the possible unconstitutionality of the pension offset exception, Congress added a reverse severability clause which provided that “if any provision of this subsection . . . is held invalid, the remainder of the section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.” The operation of this severability provision was plain enough: If the exception (“this subsection”) to this offset was held unconstitutional, it would simply be nullified, leaving the offset scheme (“this section”) applicable to all claimants. Thus, the unambiguous legislative remedial intent, in the event that the exception was held to violate the equal protection guarantee, was that it be nullified rather than extended to include those injured by its unconstitutional underinclusiveness.

B. The Practical Impact of Anticipatory Nullification

The offset exception and its accompanying reverse severability clause had the effect, therefore, of re-enacting an argu-

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88 Social Security Amendments of 1977, 42 U.S.C. § 402(n) (1982). The legislative history of the clause indicates that it was enacted “so that if [the pension offset exception] is found invalid the pension offset . . . would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it.” H.R.
ably unconstitutional classification and simultaneously precluding a reviewing court from granting any tangible relief to persons harmed by it. This combination raises a number of practical problems with the Westcott-Welsh approach to the extension/nullification dilemma.

The problems begin with the impact on the litigation process itself. The non-dependent men who lose Social Security benefits because of the underinclusiveness of the offset exception are left remediless, in the same position in which Elliott Welsh would have found himself had the Supreme Court cured the underinclusiveness of the conscientious objector statutes by nullifying them, leaving Welsh's conviction intact. Indeed, the men injured by the offset provision are, in a sense, worse off than Welsh. Unlike him, they know in advance of litigation that a successful constitutional challenge to the statutory source of their injury will be fruitless. The unmistakable clarity of Congress' preferred remedy as expressed by the severability clause leaves no doubt that these men can vindicate their constitutional right to equal treatment only by causing others (many no doubt needy and deserving) to forfeit benefits on which they have relied. Precious few will be so committed to the principle of equality, or so callous about the consequences of their "success," to pursue this sort of abstract and ambiguous vindication of their rights. Moreover, even fewer lawyers will be enthusiastic about litigating claims which hold no promise of any tangible return.89

Assume however, that a litigant clears these formidable hurdles and files a lawsuit challenging the exception's unconstitutionality. Assume further that the federal district judge hearing the suit agrees with the challengers' arguments and holds that the exception constitutes impermissible sex discrimination in violation of the equal protection guarantee of the fifth amendment. How is the judge to give effect to this holding? Forbidden to grant any relief to the "victorious" plaintiffs, the judge must order the Department of Health and Human Services to stop paying benefits to the women and dependent men favored by the exception; but can a single federal judge properly issue an order cutting off federal benefits to thousands of people throughout the United States when none of those people have had an opportunity to be heard? Justice Harlan's Welsh concurrence implies not, and Dean LaFrance has argued that members of the favored class at least must be afforded an opportunity to intervene before a nullification order can issue. Regardless of how these questions might ultimately be answered, most federal judges would be reluctant to strip away the benefit entitlements

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) ¶ 14,313 (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.

91 LaFrance, supra note 53, at 440 (arguing that nullification of a benefit

would... deny due process to those who were in the favored class but who are to lose their benefits because of the 'success' of the excluded class in persuading the court to deny benefits to all. Those originally favored would not have been heard. Perhaps they might have intervened; perhaps they might have been ably represented by the government. Perhaps not.)

Contra Ginsburg, supra note 12, at 321-22 (arguing that since no tenable constitutional objection could likely be raised to a complete repeal of a benefit program, neither can quasi-legislative judicial nullification of a benefit program be challenged, at least to the extent it operates prospectively). Judge Ginsburg also points out, however, that the absence of at least some judicial remedial power "would immunize from judicial review statutes that confer benefits unevenly. The legislature would have power, unchecked by the judiciary, to contract the equal protection principle in a significant class of cases." Id. at 303.
of large numbers of innocent recipients because of the success of another claimant's constitutional argument.\footnote{See, e.g., Rosofsky v. Schweiker, 523 F. Supp. 1180 (E.D.N.Y. 1981), \textit{prob. juris noted}, 456 U.S. 959, \textit{appeal dismissed}, 457 U.S. 1141 (1982), in which the district court, after holding the pension offset provision unconstitutional and acknowledging the limits imposed by the severability clause, neither extended nor nullified the exception, thus giving no effect at all to the judgment of unconstitutionality. 457 U.S. at 1187–88.}

Even if a nullification order were issued by a court, or by the Department of Health and Human Services following an adjudication of the exception's unconstitutionality, it is not at all clear how broadly the policy of nullification must extend. It would presumably apply to all future benefits, but might the order not also have to require recoupment of all benefits previously paid to the favored class? After all, sovereign immunity,\footnote{Federal sovereign immunity has been held to bar the award of damages in the form of retroactive benefits against the United States. United States v. Testan, 424 U.S. 392 (1976).} as well as the severability clause itself, would appear to bar an award of retroactive benefits to the "successful" members of the class disfavored by the exception. The goal of equal treatment apparently could be achieved, therefore, only by such retrospective recoupment. Can a court, though, properly inflict this severe hardship on recipients whose benefits turn out to be contingent on the constitutional claims of others? These questions present problems that most reviewing courts will properly feel ill-equipped to resolve and thus anxious to avoid. Furthermore, the unattractive consequences of a declaration of unconstitutionality might tilt the judgment of some judges in favor of sustaining the underlying classification.

Despite these obstructive effects on the exercise of constitutional judicial review, the Supreme Court unanimously upheld the constitutionality of the offset exception severability clause in \textit{Heckler v. Mathews}.\footnote{104 S. Ct. 1387 (1984).} Indeed, the practical impact of the clause received no mention in Justice Brennan's opinion for the Court. The decision to ignore this impact permitted the Court to avoid directly facing a troubling set of theoretical problems. An examination of Justice Brennan's \textit{Mathews} opinion, however, will show that this avoidance rests on a fiction which
entails equally serious problems of its own. Once this fiction is identified, the clause proves to be unconstitutional on a number of alternative grounds. An examination of these grounds will in addition illuminate the proper roles of legislative discretion and judicial responsibility in remedying unconstitutionally underinclusive classifications.

C. The Decision

1. The District Court Opinion

Robert Mathews, a retired postal worker, challenged the constitutionality of both the Social Security pension offset exception and the accompanying severability clause in a class action complaint filed in the United States District Court for the Northern District of Alabama. District Judge Guin certified a nationwide class composed of “all applicants for husband’s insurance benefits . . . whose applications . . . have been denied . . . solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits.” Judge Guin then held both the offset exception and the severability clause unconstitutional. He rested his invalidation of the exception on Craig v. Boren and Califano v. Goldfarb, finding that the reenactment of the Goldfarb classification was not substantially related to the achievement of any important governmental objective.

Judge Guin viewed the severability clause as an improper congressional curtailment of article III jurisdiction over a constitutional claim, because it was “an adroit attempt to discourage the bringing of an action by destroying standing.” The clause destroyed standing with its effort

\[\text{to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a}\]


\[\text{\footnotesize 96 1982 Unempl. Ins. Rep. (CCH) at 2406–08.}\]

\[\text{\footnotesize 97 Id. at 2408.}\]
challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception.\textsuperscript{98}

This kind of "'in terrorem' approach insulates the legislative work product from judicial review, in violation of the doctrine of separation of powers."\textsuperscript{99} It therefore amounted to "an unconstitutional usurpation of judicial power."\textsuperscript{100}

2. The Supreme Court Decision

On direct appeal, the Supreme Court unanimously reversed each of Judge Guin's holdings. Because of its jurisdictional implications, Justice Brennan's opinion for the Court first addressed the severability clause. Justice Brennan found that the clause did not undermine Mathews' standing to sue or threaten the exercise of article III jurisdiction, because the right asserted by the Mathews class was not the right to Social Security benefits but rather the right to a benefit distribution scheme that was free of unconstitutional sex discrimination.\textsuperscript{101}

Justice Brennan maintained that the Court had "never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class."\textsuperscript{102} Citing Califano v. Westcott\textsuperscript{103} and Justice Harlan's concurring opinion in Welsh v. United States,\textsuperscript{104} he 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

\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Heckler v. Mathews, 104 S. Ct. at 1394–96.
\textsuperscript{102} Id. at 1394.
\textsuperscript{103} 443 U.S. 76, 89–91 (1979).
\textsuperscript{104} 398 U.S. 333, 344, 351 (1970) (Harlan, J., concurring in result).
to include those who are aggrieved by the exclusion.\textsuperscript{105} The availability of these alternatives demonstrated that

the right to equal treatment . . . is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, . . . discrimination itself, 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.\textsuperscript{106}

Justice Brennan then referred to Justice Brandeis' opinion for the Court in Iowa-Des Moines National Bank \textit{v.} Bennett,\textsuperscript{107} reading that opinion to stand for the proposition that when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by the extension of benefits to the excluded class."\textsuperscript{108}

For Justice Brennan, therefore, the injury inflicted by the Social Security pension offset exception was not the denial of the Social Security benefits sought by Robert Mathews and his class, but rather the stigmatization or stereotyping inherent in the sex classification under which those benefits were withheld. Since the stigma would be removed by a decision declaring the exception unconstitutional and discontinuing payment of benefits to similarly situated women, the injury suffered by Mathews and his class would be redressed by a favorable disposition of their constitutional claim, notwithstanding the severability clause. For this reason, the clause did not withdraw Mathews' standing to sue and presented no threat to the Court's assumption of jurisdiction to decide his suit.\textsuperscript{109}

\textsuperscript{105} Heckler \textit{v.} Mathews, 104 S. Ct. at 1394.
\textsuperscript{106} \textit{Id.} at 1395.
\textsuperscript{107} 284 U.S. 239 (1931).
\textsuperscript{108} Heckler \textit{v.} Mathews, 104 S. Ct. at 1395.
\textsuperscript{109} \textit{Id.} at 1395-96.
In a footnote, Justice Brennan cited Justice Powell's statement in dissent in *Califano v. Westcott* that a "court should not, of course, 'use its remedial powers to circumvent the intent of the legislature.'"\(^{110}\) He noted that the severability clause clearly expressed Congress' "preference for nullification, rather than extension, of the pension offset exception in the event it is found invalid."\(^{111}\) Justice Brennan then acknowledged the possibility that legislative withdrawal of a court's authority to remedy constitutional violations would itself violate the Constitution. This issue was not, however, presented by the pension offset exception severability clause, since, by Justice Brennan's reasoning, the clause did not foreclose judicial redress for the injuries asserted by Mathews and his class.\(^{112}\)

Justice Brennan then turned to the merits of Mathews' challenge to the pension offset exception. He based his judgment that the exception did not violate the equal protection guarantee on a finding that the re-adoption of the pre-*Goldfarb* classification, instead of reflecting the stereotypic assumptions which animated its original enactment, was substantially related to the achievement of the "important governmental objective"\(^{113}\) of protecting the reliance interests of those who expected to receive the benefits provided under the original enactment.\(^{114}\)

### III. *Heckler v. Mathews* and the Threat to Judicial Review: A Dangerous Fiction and Three Unresolved Problems

Part II above suggested that Justice Brennan's validation of the pension offset severability clause in *Heckler v. Mathews* was based on a fiction. The fiction is that the injury inflicted by an unconstitutionally underinclusive statute is not the denial of the benefit (or imposition of the burden) distributed by that statute, but is instead something more intangible, like the infliction of stigma or the legislative endorsement of archaic stereo-
types. Legislative stigmatization and stereotyping may be good reasons for remedying the injury caused by a statutory classification, but, at least in the case of an underinclusive classification, they are not themselves the injury. By assuming that they are, Justice Brennan's opinion for the Court in *Heckler v. Mathews* manages to avoid facing at least three thorny constitutional issues presented by the severability clause. First, if enforced, the clause would abridge the constitutional right of the *Mathews* class to a remedy for the injury inflicted on them by the underinclusiveness of the pension offset exception. Second, by foreclosing the award of any remedy to the *Mathews* class, the severability clause removes their standing to challenge the constitutionality of the offset exception, which amounts to an improper attempt to curtail the jurisdiction of the federal courts to hear and decide constitutional claims. Finally, this same foreclosure of judicial relief undercuts the *Mathews* class' first amendment right to petition the courts for redress of grievances.

This Section will show that the court's evasion of these issues in *Heckler v. Mathews* did not succeed in making them disappear. They remain because Justice Brennan's fiction—that stigma is the injury at stake in *Mathews*—fails to address the very practical problem that unifies all three issues: Anticipatory nullification clauses threaten judicial review of unconstitutional classifications by removing the incentive of persons harmed by such classifications to dispute them in court.

**A. The Constitutional Right to a Remedy**

1. **Historical and Doctrinal Underpinnings**

The most obvious problem with the pension offset exception severability provision is the one that concerned Justice Harlan in his *Welsh* concurrence:115 By directing that the benefit conferred by an underinclusive classification be nullified in the event the underinclusiveness is held unconstitutional, the clause deprives members of the excluded class of any tangible remedy for violation of their constitutional rights. For the Court in *Mathews*, the eradication of the assumed injuries of stigma and

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115 *Welsh*, 398 U.S. at 344, 362 (Harlan, J., concurring in the result).
role-typing are a constitutionally sufficient substitute. Justice Brennan’s resolution of *Mathews* is seriously flawed, however, if (1) a person injured by a violation of the Constitution is entitled to an adequate remedy for the injury and (2) nullification of the authority to confer benefits on the class favored by an unconstitutionally underinclusive statute is not constitutionally adequate, even though such nullification cures the unconstitutional underinclusiveness. The premises that underlie the Supreme Court’s development of constitutional remedies establish the validity of each of these propositions.

Justice Brennan’s opinion in *Heckler v. Mathews* specifically declines to address the question whether Congress may thwart a court’s ability to remedy a constitutional violation. Still, as the introduction to this article suggested, the notion that persons injured by unconstitutional government action are entitled to a remedy is well established. The roots of the proposition that 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*.\(^\text{117}\)

The Supreme Court’s landmark 1946 decision in *Bell v. Hood*\(^\text{118}\) underscores the importance of the remedial powers of

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\(^{116}\) In the *Commentaries on the Laws of England*, Blackstone wrote:

> [I]t 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. . . . [I]t is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it’s (sic) proper redress.


\(^{117}\) Chief Justice Marshall relied on Blackstone’s summation for his statement in *Marbury*:

> The very essence of civil liberty certainly consists in the right of every 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 deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.


\(^{118}\) 327 U.S. 678 (1946).
a federal court 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, the Court, speaking through Justice Black, noted:

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 14th 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 so as 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 general right to sue for that invasion, federal courts may use any available remedy to make good the wrong done.\(^\text{119}\)

Six years later, in the Steel Seizure case,\(^\text{120}\) the Court applied these principles to sustain a district court’s issuance of a 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 of the injunction on its finding that “equity’s extraordinary . . . relief”\(^\text{121}\) was the only means of ensuring the threatened companies an adequate remedy for unconstitutionally inflicted injuries.

The notion that the remedial power of the federal courts is inherent, and not therefore subject to congressional curtailment, draws further support from decisions of the Supreme Court sustaining the power of Congress to withdraw particular remedies from the judicial arsenal on condition that other constitutionally adequate forms of relief remain available to persons

\(^{119}\) Id. at 684.  
\(^{120}\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).  
\(^{121}\) Id. at 584.
claiming injury from unconstitutional government action. These decisions, as well as "reasons of principle," formed the basis for Professor Henry Hart's conclusion, in his famous dialogue on congressional power to limit federal court jurisdiction, that Congress does not have the power to withdraw all remedies for constitutional wrongs.

Moreover, the fact that some kind of remedy may be available may not be sufficient to satisfy the requirements of article III. If the only avenue of redress available to a victim of unconstitutional government action is so excessively narrow, burdensome or risky as to operate as a significant deterrent to the commencement of challenging litigation, its very restrictiveness may violate the Constitution. This notion dates from such early rate regulation cases as *Ex parte Young*, which invalidated a state regulatory scheme that precluded judicial review of rate orders except as a defense to criminal prosecution. More recently, it has been applied in decisions establishing a limited right to pre-injunction judicial review of claims of clear departure by the selective service system from statutory and consti-

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122 Yakus v. United States, 321 U.S. 414 (1944) (sustaining the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23. The Act provided that wartime price regulations could be invalidated only by the Emergency Court of Appeals created by the Act, or by the Supreme Court on review of that court's judgments. This restriction was upheld on the basis of the constitutional adequacy of the separate procedure. *Id.* at 444); Cary v. Curtis, 44 U.S. (3 How.) 236, 250 (1845) (sustaining Congress's power to withdraw a right of action against a collector of customs for duties claimed to have been exacted illegally so long as claimants were left with "other modes of redress," such as replevin or detinue to recover goods seized for nonpayment of assessed duties or trover upon payment of that amount of duty admitted to be due); see also Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498, 524-32 (1974). See generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366-67 (1953).

123 Hart, *supra* note 122, at 1370.

tutional limitations.  

The principle underlying these cases, that a legislature may not enact remedial schemes which seriously dissuade persons with constitutional claims from seeking judicial review, would seem directly applicable to the Social Security pension offset exception severability clause at issue in *Heckler v. Mathews.*

The propositions that vindication of a constitutional right includes an adequate remedy, and that Congress may not deprive the federal courts of the power to fashion such a remedy, have been reaffirmed by the Supreme Court’s recent line of decisions grounding the requirement of an adequate remedy for a constitutional violation in the article III powers of the federal courts and in the necessary implications of the right violated. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* the Court sustained a claim for damages against federal agents for the injuries caused by a warrantless search and arrest in violation of the fourth amendment. Although no federal statute authorized such a claim, the damage award was properly within the power of a federal court, because of the principle announced in *Bell v. Hood* that “where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief.” The *Bivens* Court then emphasized that an effective remedy for its violation was inherent in the protection afforded by the fourth amendment:

[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


128 327 U.S. at 684.'
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 view of Congress.\textsuperscript{129}

\textit{Bivens} thus acknowledges the primary responsibility of Congress to provide remedies for injuries inflicted by the unconstitutional conduct of federal officials, but it also underscores the power of the federal courts to afford constitutionally sufficient relief in the event Congress fails to carry out that responsibility.

In \textit{Davis v. Passman},\textsuperscript{130} the Court extended the \textit{Bivens} principle to fifth amendment equal protection rights of the kind raised by the pension offset exception. \textit{Davis} involved a claim by a congressional staff member that she had been discharged on the basis of her sex.\textsuperscript{131} Again the Court sustained a damages remedy, this time emphasizing that because the employer was no longer a member of Congress, no other form of relief, such as an injunction requiring reinstatement, was available. For Ms. Davis, it was “damages or nothing.”\textsuperscript{132} \textit{Davis} takes on additional significance for purposes of evaluating the offset exception severability clause, because the damage remedy was upheld despite Congress’s deliberate decision to exempt its members from the employment discrimination remedies made available to executive branch employees through Title VII of the Civil Rights Act of 1964.\textsuperscript{133} Congress’ decision to foreclose all statutory remedies to Ms. Davis did not preclude a federal court from vindicating her right to an adequate constitutional remedy.

\textit{Carlson v. Green},\textsuperscript{134} decided one year after \textit{Davis}, involved a claim that the failure of federal prison officials to provide medical care to the plaintiff’s son had caused his death in violation of the eighth amendment protection against cruel and unusual punishment.\textsuperscript{135} The Court again sustained a claim for

\begin{footnotes}
\item[129] 403 U.S. at 397.
\item[130] 442 U.S. 228 (1979).
\item[131] Id. at 231.
\item[132] Id. at 245.
\item[134] 446 U.S. 14 (1980).
\item[135] Id. at 16.
\end{footnotes}
damages. As in *Davis* (but unlike *Bivens*), the Court did not adjudicate against a background of congressional silence on the type of remedy to be made available to persons in Ms. Carlson's situation. After *Bivens*, Congress had amended the Federal Tort Claims Act to allow recovery against the United States for constitutional torts of the kind at issue in both *Bivens* and *Carlson*. The Court nevertheless rejected the argument that this amendment superseded a damages remedy against the officials under the Constitution. Congress had provided no indication that the amendment was intended to substitute for a *Bivens* remedy. More important, because of its relative ineffectiveness in comparison to a damage action, the Federal Tort Claims Act remedy was "not a sufficient protector of the citizens' constitutional rights."

Finally, in *Bush v. Lucas*, the Supreme Court affirmed the dismissal of a damages claim by a federal employee demoted by his superiors, allegedly in violation of his first amendment rights. This time the Court held that the comprehensive remedies available to the plaintiff under Civil Service Commission regulations, including retroactive reinstatement, back pay, and retroactive seniority, were adequate to vindicate his first amendment claim. The Court reiterated, however, that the federal courts' power to grant relief not authorized by Congress is firmly established and that this power includes the authority to provide a remedy to enforce constitutional rights.

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2. The Remedial Inadequacy of Nullification

From *Marbury v. Madison* down through the 1982-83 term, then, the Supreme Court's examination of the remedial

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139 *Carlson*, 446 U.S. at 23.
141 Id. at 2406.
142 Id. at 2414-16.
143 Id. at 2409-11.
144 In his brief on behalf of Secretary Heckler in *Heckler v. Mathews*, the
phase of constitutional litigation underscores the proposition that a person injured by unconstitutional government action is

Solicitor General argued that the *Bivens* line of authority does not support the proposition that a person injured by unconstitutional government action is entitled to an adequate remedy for the injury. The Solicitor maintained that the judicially fashioned relief granted in *Bivens* and the cases following it was constitutionally authorized only because none of these cases was a suit against the federal government, therefore raising no issue of sovereign immunity. Appellant's reply brief at 16 n.15, *Heckler v. Mathews*, 104 S. Ct. 1387 (1984). The Solicitor's implication is that the availability of a sovereign immunity defense against unconsented suits against the federal government shows that there are indeed situations in which no relief may be granted for an unconstitutionally inflicted injury.

The doctrine of sovereign immunity, however, will not support this claim. To begin with, the relief sought in *Mathews, Westcott*, and other constitutional relief cases arising in the context of public benefit programs is not damages against the United States, a remedy that is indeed precluded by sovereign immunity, *United States v. Testan*, 424 U.S. 392, 399–407 (1976); cf. *Edelman v. Jordan*, 415 U.S. 651 (1974) (rejecting an award of money damages against a state government as contrary to the Eleventh Amendment), but rather declaratory and injunctive relief against the enforcement of an unconstitutionally underinclusive eligibility rule. Any monetary benefits sought in such cases are prospective only and flow directly from such declaratory and injunctive relief. Sovereign immunity does not bar these remedies. *Testan*, 424 U.S. at 399–407; *see also* *Weinberger v. Salfi*, 422 U.S. 749, 760–61 (1975). As Professor Sager has pointed out,

The power of the federal courts to grant equitable relief to protect claimants has always been assumed, and the federal courts have been willing to go to great lengths to make such relief possible. *See, e.g.*, *Ex Parte Young*, 209 U.S. 123 (1908); *Osborn v. President of The Bank of The United States*, 22 U.S. (9 Wheat.) 738 (1824). Recent controversies over the Court's authority to issue remedies for constitutional violations have assumed the propriety and importance of anticipatory relief; any debate has concerned damages.


Professor Sager's point additionally survives the Court's recognition of the immunity of certain federal and state officials from damage actions. The decisions establishing official immunity acknowledge the availability of alter-
entitled to adequate relief from the injury. Still, the question remains whether nullification of the award of benefits to the class favored by an unconstitutionally underinclusive statute provides such relief to members of the disfavored class. The most fully developed argument that it does not is, perhaps ironically, Justice Harlan's concurring opinion in *Welsh v. United States.*

In situations, therefore, in which the doctrine of official 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,* 287 U.S. 378, 397-98 (1932). In the absence of such power "it is manifest that the fiat of [a public official] would be the supreme law of the land; that the restrictions of the federal Constitution upon the exercise of [governmental] power would be but impotent phrases . . . ." *Id.* at 397; *See also* General Oil v. Crain, 209 U.S. 211, 236 (1908).

Professor Sager has reached a similar conclusion in the course of his analysis of the scope of Congress' constitutional power to limit the jurisdiction of the federal courts:

If . . . a constitutional claimant has a right to have his or her claim heard in a court capable of fairly and independently adjudicating it, then the court in question must be empowered to grant relief that is at least reasonably effective. Otherwise, the right to a judicial hearing would be meaningless. Remedies for constitutional wrongs, like other legal remedies, chiefly involve measures either to prevent or terminate the wrong or to redress the harm caused by past unconstitutional conduct. Hobbling the judiciary by denying it all reasonably effective remedies is as fatal to a litigant's effort to vindicate constitutional rights as is flatly denying the litigant a judicial forum.

Sager, supra note 154, at 85; *see also* Crowell v. Benson, 285 U.S. 22, 60 (1932); Hill, *Constitutional Remedies,* 69 Colum. L. Rev. 1109, 1112-18 (1969); Eisenberg, supra note 122, at 530-32.

*398 U.S. 333, 344-45 (1970).*
Justice Harlan’s *Welsh* concurrence has served as the cornerstone for virtually all subsequent discussion of the extension/nullification problem, including, as seen above, that in *Heckler v. Mathews*. While his discussion in dicta of how he would dispose of a civil case challenging the constitutionality of the conscientious objection classification provides obvious support for Justice Brennan’s validation of the pension offset exception severability clause, Justice Harlan’s view of the proper holding in the case actually before him rests on two other propositions that point in a very different direction. The first of these propositions is that the federal courts have inherent authority to extend the coverage of a federal statute. In light of the numerous cases in which the Supreme Court has routinely and without discussion approved extension, this may not appear to be a terribly significant point. Justice Harlan’s persuasive affirmation of this authority does, however, effectively refute the occasional suggestion in earlier opinions and in lower court decisions that extension is a forbidden remedy because it amounts to “judicial legislation.” For purposes of a case like *Califano v. Westcott*,

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148 See e.g., *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (declining to sever unconstitutional provision of federal wagering tax statute because court “would be required not merely to strike out words, but to insert words that are not now in the statute”); *National Life Ins. Co. v. United States*, 277 U.S. 508, 522, 534-35 (1928)(Brandeis, J., dissenting)(suggesting that court has no power to extend unconstitutionally underinclusive tax deduction); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (holding that savings clause
where the remedial intent of the legislature is uncertain or ambiguous, Justice Harlan's recognition that nullification, by requiring that "benefits not extend to the class that the legislature intended to benefit," entails just as much interference with expressed legislative will as does extension of benefits to the class not included,149 has provided the basis for a general consensus that "there is no necessary reason for choosing the intent to exclude one group over the intent to include another."150 Even in a case like Mathews, where the legislature has directed a particular remedy, Justice Harlan's emphasis on the inherent powers of the federal courts underscores the notion that the ultimate responsibility for assuring the adequacy of constitutional remedies is judicial, not legislative.

The second proposition of Justice Harlan's Welsh concurrence is that the injuries caused by underinclusive statutory classifications are tangible and concrete and that these injuries call for correspondingly tangible and concrete remedies. Prior to Heckler v. Mathews, this may have seemed even less controversial than the notion that courts may extend the coverage of underinclusive statutes. The Mathews decision, however, demonstrates the importance of this proposition to a proper understanding of the responsibility of an article III court in constitutional litigation.

... does not authorize judicial "amendment" of unconstitutional classification by inserting limitations which it does not contain); Davis v. Wallace, 257 U.S. 478, 484-85 (1922)(holding that unconstitutionality of exception from taxing statute required invalidation of statute in its entirety); Sprague v. Thompson, 118 U.S. 90, 95 (1886)(holding that unconstitutionality of exceptions from harbor pilot statute required invalidation of statute in its entirety); United States v. Reese, 92 U.S. 214, 221 (1876)(holding that it "is no part of [this Court's] duty . . . to limit [a] statute in [such a way as] to make a new law [rather than] enforce an old one."); Robinson v. Cahill, 70 N.J. 155, 159-60, 358 A.2d 457, 459-60 (1976)(directing, on theory that court cannot provide remedy requiring expenditure of funds, that no state, county or local official was to expend any moneys for free public schools until legislature appropriated funds for all schools in constitutional manner).


In *Welsh*, the unconstitutionality of Welsh’s injury plainly could have been remedied by nullifying the exemption granted to religious objectors. As Justice White pointed out in dissent, Welsh had no constitutional claim to exemption independent of the fact that it had been granted to others.\(^{151}\) Nevertheless, nullification was inadequate as a constitutional remedy. The reason, for Justice Harlan and implicitly for Justice White, was that while nullification would correct the unconstitutionality of the statutory exemption scheme, it would not touch the injury suffered by Welsh—the conviction for refusing induction and the 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 beliefs.

The distinction is critical: 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. Justice Harlan’s concurring opinion in *Welsh* does not explain his unwillingness to extend this principle to injuries beyond those stemming from criminal prosecution and conviction.\(^{152}\) Yet the distinction he draws between the correction of unconstitutionality and the redress of the injury caused by that unconstitu-

\(^{151}\) *Welsh*, 398 U.S. at 368–69 (White, J., dissenting).

\(^{152}\) The Supreme Court’s development of the “unconstitutional conditions” doctrine as a tool for analyzing unconstitutional restrictions on the enjoyment of public benefits strongly suggests that a distinction between criminal sanctions and civil penalties on the exercise of constitutional rights is no longer tenable. In 1892, Justice Holmes could perhaps state with confidence that a “petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892). But contemporary decisions such as *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981)(holding unconstitutional the discontinuance of unemployment insurance to worker who refused on religious grounds to work in armaments production) rest firmly on the notion that “a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program.” 450 U.S. at 716. *See also* *Sherbert v. Verner*, 374 U.S. 398 (1963)(holding unconstitutional the denial of unemployment benefits to Seventh Day Adventist refusing to work on the Sabbath); Van Alstyne, *The Demise of the Right/Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).
tionality was anticipated a generation earlier in a decision written by Justice Brandeis in a state tax case, *Iowa-Des Moines National Bank v. Bennett.* More recently, the Court's treatment of the injury-in-fact element of article III standing in *Orr v. Orr,* a sex discrimination case challenging an underinclusive state alimony scheme, makes clear its understanding prior to *Heckler v. Mathews* that vindication of an abstract right to equal treatment through the denial of benefits to others constitutes no relief at all.

Justice Brandeis' decision in *Iowa-Des Moines National Bank v. Bennett* was, ironically, used by Justice Brennan as though it supported his analysis in *Heckler v. Mathews.* *Bennett* involved a mandamus action in the state courts of Iowa to compel a refund of taxes paid by out-of-state banks. The banks claimed that the taxes violated the equal protection clause of the fourteenth amendment because they were assessed at a rate substantially higher than that paid by competing domestic corporations. Although they prevailed on the merits, the banks were denied relief by the Supreme Court of Iowa. That court held that the appropriate remedy was to await action by the taxing authorities to collect the taxes now due from the banks' competitors, or alternatively, to initiate new proceedings to compel such collection.

The Supreme Court reversed, holding that the banks were constitutionally entitled to the refund they sought. Justice Brandeis' opinion began by noting that the simple unconstitutionality of the injury suffered by the banks could be remedied simply by collecting additional taxes from their competitors: "By such collection, the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will

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155 284 U.S. 239 (1931).
157 *Iowa-Des Moines Nat'l Bank,* 284 U.S. at 240.
158 *Id.* at 242-44.
159 *Id.* at 243-44.
160 *Id.* at 247.
be obtained if either their competitors' taxes are increased or their own reduced.”¹⁶¹ It is this portion of the *Bennett* decision that Justice Brennan cites approvingly in *Mathews*.

Remedying the unconstitutionality of the assessment scheme at issue in *Bennett*, however, did not remedy the injury itself—the collection of discriminatory taxes. Justice Brandeis thus went on to complete the task of judicial review by directing the appropriate relief:

> A taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative . . . . The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.¹⁶²

The important distinction between judicial correction of an unconstitutional classification and judicial relief for an unconstitutional injury was thus spelled out well in advance of *Welsh* and was applied in a purely civil context, to an injury far less severe than a criminal conviction and incarceration. Justice Brennan’s opinion in *Heckler v. Mathews* does not refer to this concluding portion of Justice Brandeis’ opinion for the Court in *Bennett*.

The standing discussion in *Orr v. Orr*¹⁶³ underscores the notion that the constitutional injury requiring a remedy is the denial of the benefit (or infliction of the burden) caused by an underinclusive classification. As a standing decision, *Orr* has little importance, merely applying the standards for interpreting the “case or controversy”¹⁶⁴ requirement of article III developed by the Court in the mid and late 1970’s. Under these standards, a litigant seeking to challenge the constitutionality of govern-

¹⁶¹ *Id.*

¹⁶² See also, Ginsburg, supra note 12, at 306–07.


¹⁶⁴ *Id.* at 271–73.
ment action must show that the action of which she complains causes a "distinct and palpable injury" which "is likely to be redressed by a favorable decision." This requirement is intended to ensure that a party who seeks the aid of a federal court "stand[s] to profit in some personal interest, else the exercise of judicial power would be gratuitous." Against this backdrop, Orr v. Orr concerned a challenge by a divorcing husband to the constitutionality of an Alabama statute which required him to pay alimony to his wife, but did not require identically situated divorcing wives to pay alimony to their husbands. Justice Rehnquist, joined in dissent by Chief Justice Burger, would have dismissed Orr's appeal for lack of standing. Justice Rehnquist's opinion rested on the proposition that "in order to satisfy the injury-in-fact requirement of Article III standing, a party claiming that a statute unconstitutionally withholds a particular benefit must be in line to receive the benefit if the suit is successful." In Justice Rehnquist's view, Mr. Orr could not meet this requirement because he would not "benefit from a sex-neutral alimony statute." Justice Rehnquist's conclusion assumed that such a statute would extend alimony obligations to divorcing wives rather than repeal them entirely; but his larger point—that standing turns on the existence of a tangible injury redressable by a tangible remedy—flows directly from the Court's previous standing decisions. Moreover, it rests on the same account developed by Justice Brandies in Bennett, and by Justice Harlan in Welsh, of the nature of, and remedy for, the injury caused by an underinclusive classification. For Justice Rehnquist, the injury suffered by Mr. Orr was the court order requiring him to pay alimony, and the only proper remedy for that injury (as opposed to a remedy

166 Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976); see also Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72 (1978) (to satisfy the constitutional requirement of standing, a party must have suffered "injury in fact" which can be redressed by the court's remedial powers).
167 Simon, 426 U.S. at 39.
168 Orr, 440 U.S. at 271.
169 Id. at 293 (Rehnquist, J., dissenting).
170 Id. at 295.
for the underlying unconstitutional inequality) was an order from a higher court relieving him of that obligation.

The majority in *Orr*, speaking through Justice Brennan, held that Mr. Orr did have standing to challenge the Alabama alimony classification.\(^{171}\) Justice Brennan’s approach to the issue, however, did not differ in any important way from that of Justice Rehnquist. In Justice Brennan’s view, Justice Rehnquist’s anticipation of the relief question unnecessarily put the cart before the horse. Justice Brennan conceded that if alimony obligations were extended to wives, Mr. Orr would gain nothing from his lawsuit.\(^ {172}\) This possibility, though, could not serve as a basis for holding that he had no standing to sue. It was also possible that Orr’s constitutional challenge could relieve him of his alimony obligations, since the remedial issue would arise only after the statute was declared unconstitutional.\(^ {173}\) Justice Brennan thus concluded: “[U]nless we are to hold that underinclusive statutes can never be challenged because any plaintiff’s success can theoretically be thwarted, Mr. Orr must be held to have standing here. . . . [H]is constitutional attack holds the only promise of escape from the burden that derives from the chal-

\(^ {171}\) *Orr*, 440 U.S. at 271–73.

\(^ {172}\) Justice Brennan also acknowledged that Mr. Orr might enjoy some tangible relief if alimony responsibilities were imposed on divorcing wives:

Even if Alabama chooses to burden both men and women with alimony requirements in appropriate circumstances, Mr. Orr argues that a gender-neutral statute would result in lower payments on his part. He argues that the current statutes award alimony to wives based not solely upon need or comparative financial circumstances, but also upon gender related factors, e.g., the State’s view that a man must maintain his wife in the manner to which she has been accustomed . . . . He also argues that alimony agreements are not automatically incorporated into court decrees, but rather are usually first reviewed as to their fairness to the wife but not to the husband . . . .

*Id.* at 273, 274 n.3. Justice Brennan’s reference to these possibilities underscores, of course, the point urged in the text: For a unanimous *Orr* court, constitutional injuries lie not in the abstract wrong of unequal treatment, but in the concrete denial of tangible benefits (or imposition of tangible burdens).\(^ {173}\) *Id.* at 272.
lenged statutes."\textsuperscript{174} For the Brennan majority no less than for Justice Rehnquist and Chief Justice Burger in dissent, the injury suffered by Mr. Orr as a result of Alabama's underinclusive alimony scheme was the obligation to make payments to his estranged wife. The remedy for this injury was not to impose this burden on others (though this would plainly correct the unconstitutionality of the underlying classification) but to relieve Mr. Orr of its weight.

\textit{Orr} thus confirms the premises of Justice Harlan's Welsh concurrence: (1) that the injury inflicted by an unconstitutionally underinclusive classification is not the abstract wrong of unequal treatment, but the concrete denial of the benefit it authorizes, or imposition of the burden it inflicts; and (2) that extension of the burden or nullification of the benefit created by an underinclusive classification affords no remedy to those injured by it. Under these premises, contrary to Justice Brennan's analysis in \textit{Heckler v. Mathews}, the pension offset exception severability clause precludes the award of a constitutionally sufficient remedy to persons injured by the offset exception. Incorporating the more fundamental proposition developed above, that article III judicial review and the nature of constitutional rights themselves require adequate relief for a person suffering from an unconstitutional injury, leads to the conclusion that the severability clause is unconstitutional. The possible relevance of the analysis of constitutional injuries in \textit{Orr v. Orr} receives no mention in Justice Brennan's opinion in \textit{Heckler v. Mathews}.

Justice Brennan suggests, however, that a number of other decisions support his conclusion that the injury caused by the pension offset exception is the perpetuation of "'archaic and stereotypic' notions" or the imposition of stigma on a class.\textsuperscript{175} An examination of these decisions, however, reveals that the injuries claimed by the challenging plaintiffs (and remedied by the Court) included harms more tangible than any stigmatization caused by the classification at issue. Where judicial relief has been limited to the eradication of stigma alone, the classification triggering the relief has been found constitutionally deficient.

\textsuperscript{174} \textit{Id.} at 272-73 (emphasis by Justice Brennan).

\textsuperscript{175} \textit{Heckler v. Mathews}, 104 S. Ct. at 1395.
because it is improperly overinclusive, rather than underinclusive.\textsuperscript{176} Unconstitutional overinclusiveness raises different remedial issues from those posed by underinclusiveness. These issues are susceptible of resolution by awards of relief directed solely at the eradication of such intangible harms as governmentally inflicted stigma or role-typing.

Justice Brennan begins with Mississippi University for Women \textit{v. Hogan}.	extsuperscript{177} Hogan, however, underscores the importance of tangible judicial relief for tangible injuries caused by the denial of equal treatment. Joe Hogan was denied admission to the baccalaureate nursing program at the Mississippi University for Women (MUW) solely because of his sex. The state of Mississippi offered co-educational baccalaureate nursing programs, for which Hogan presumably could have qualified, at two other campuses, but Hogan lived and worked in Columbus, Mississippi, where MUW was located. As Justice Powell pointed out in dissent, the injury suffered by Joe Hogan was the inconvenience and expense of being required to travel to the state-supported nursing schools that were open to him, a burden not imposed on similarly situated women.\textsuperscript{178} For Justice Powell, this injury bore no relationship whatever to the "sex-stereotyping" reasoning upon which the Court majority rested its judgment that the refusal to admit Hogan to MUW was unconstitutional.\textsuperscript{179}

One need not accept Justice Powell's assessment of the connection between stereotyping and Hogan's injury in order to agree with his characterization of the harm which brought about his suit (and which the success of that suit remedied). Justice O'Connor's opinion for the court held that MUW's policy of excluding males from admission to its school of nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allot more openings in its state-supported nursing

\textsuperscript{176} See Norwood \textit{v. Harrison}, 413 U.S. 455 (1973); \textit{see also infra} text accompanying notes 183–98.

\textsuperscript{177} 458 U.S. 718 (1982).

\textsuperscript{178} \textit{Id.} at 736 (Powell, J., dissenting).

\textsuperscript{179} \textit{Id.}
schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.  

This role-typing, however, was not the injury suffered by Joe Hogan, but was rather the reason why the injury he did suffer (denial of admission to MUW's nursing school) demanded a remedy.  

The other decisions relied on by Justice Brennan in footnotes are in much the same vein.  

180 Mississippi Univ. for Women, 458 U.S. at 729–30 (footnote omitted).  

181 The following cases were cited by Justice Brennan as supporting the proposition that the infliction of stigma alone constitutes a constitutional injury that can be relieved by an end to preferential treatment for others: Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983)(sustaining denial of tax-exempt status to racially discriminatory schools on ground that pervasive influence of discriminatory treatment on educational process is contrary to public policy); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)(sustaining standing of black "tester" to seek statutory relief from discriminatory housing practices on basis of defendant's withholding of truthful information concerning housing availability); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) (sustaining standing of village and its residents to seek statutory relief from housing discrimination on basis of damage to property values and loss of social and professional benefits of integration caused by racial steering); Gilmore v. City of Montgomery, 417 U.S. 555 (1974)(sustaining injunction against city's exclusive grant of access to parks and recreational facilities to segregated organizations); Frontiero v. Richardson, 411 U.S. 677 (1973)(plurality opinion granting dependent's benefits to married woman Air Force officer on same basis as similarly situated male officer on ground that statute denying such benefits unconstitutionally discriminated on account of sex); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)(sustaining standing of tenants to seek statutory relief from housing discrimination by landlord on ground that such discrimination deprived them of social and professional benefits of integration and caused economic damage as well as "stigmatization"); Sierra Club v. Morton, 405 U.S. 727 (1972) (denying standing of conservation organization to challenge national forest development, but noting that injuries to aesthetic and environmental well-being could lay the basis for standing); Griffin v. County School Bd., 377 U.S. 218 (1964)(sustaining injunction against county aid to private segregated schools and directing district court to consider ordering reopening of public schools in order to vindicate plaintiffs' constitutional right to a desegregated public education); Brown v. Board of Educ.,
judicial relief was sought were tangible, if sometimes non-economic, and the remedy granted redressed the injuries claimed. Where the remedy was limited to directing “an end to preferential treatment for others,” that remedy nevertheless had the purpose and effect of relieving an injury beyond any stigma or stereotyping inflicted by the existence of such treatment.

The only case that approaches Justice Brennan’s paradigm—that the only injury inflicted by a denial of equal treat-

347 U.S. 483 (1954)(ordering desegregation of public schools on ground that separation of children on basis of race denied black children equal educational opportunity, even though physical facilities and other tangible factors were equal); Heckler v. Mathews, 104 S. Ct. at 1395 nn. 7, 8.


In the text of his opinion in Mathews, Justice Brennan further contended that the Court has “frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute’s benefits from both the favored and the excluded class.” Id. at 1395. In support of this proposition he cited Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Kahn v. Shevin, 416 U.S. 351 (1974); and Stanton v. Stanton, 421 U.S. 7 (1975). The conclusion drawn from these cases by Justice Brennan is discussed infra notes 259–63 and accompanying text.

A decision not mentioned by Justice Brennan but which might appear to support his reasoning in Heckler v. Mathews is Taxation with Representation v. Regan, 676 F.2d 715, 742–44 (D.C. Cir. 1982), rev’d on other grounds, 103 S. Ct. 1997 (1983). In Regan, the U.S. Court of Appeals for the District of Columbia Circuit held that statutory preferential treatment of lobbying by tax-exempt veterans organizations violated the equal protection rights of other tax-exempt organizations and then remanded the issue of relief to the district court. Nullification of the preference (had it been ordered) might appear to be an example of compensating “the victims of a discriminatory government program ... by an end to preferential treatment for others.” Heckler v. Mathews, 104 S. Ct. at 1395 n.8. The injury suffered by the disadvantaged organizations encompassed more, however, than just the loss of the economic value of tax-exemption. It also included denial of access to the political process as compared to the veterans organizations, an injury to which nullification of the veterans organizations’ advantage would be responsive. Regan, 676 F.2d at 721–22. The relief issue in Regan was, however, rendered moot by the Supreme Court’s reversal on the merits of the decision of the court of appeals.

Mathews, 104 S. Ct. at 1395 n.8.
ment is the ascription of stigma, which may be removed by ending benefits to others—is *Norwood v. Harrison.*\(^{183}\) The persuasive force of this decision was, as will be seen, seriously undermined by the Supreme Court's (post-*Mathews*) standing decision in *Allen v. Wright.*\(^{184}\) The plaintiffs in *Norwood* were black parents from Mississippi whose children were parties to a school desegregation order. They sought an injunction against the use of Mississippi's private school textbook lending program to provide textbooks to students attending schools which excluded pupils on the basis of race. The parents alleged that supplying textbooks to these students amounted to direct, unconstitutional state aid to racially segregated education. They further claimed that the textbook aid program impeded the process of fully desegregating Mississippi's public schools in violation of their children's constitutional rights. The Supreme Court sustained both claims and directed the federal district court in Mississippi to issue an injunction withdrawing textbook aid from discriminatory private schools.\(^{185}\)

The Court's opinion, by Chief Justice Burger, did not discuss the nature of the injury suffered by the challenging parents and children. The opinion noted, however, that a state may not "grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce and support private discrimination."\(^{186}\) At the same time, the Chief Justice accepted the district court's factual finding that there had been no showing that "any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools."\(^{187}\) The Court thus could not "know . . . whether state textbook assistance is the determinative factor in the enrollment of any students in any of the private schools in Mississippi."\(^{188}\) These findings arguably undermined the challenging parents' claim that the textbook

\(^{183}\) 413 U.S. 455 (1973).
\(^{185}\) *Norwood,* 413 U.S. at 461–71.
\(^{186}\) Id. at 466.
\(^{187}\) Id. at 465 (quoting *Norwood v. Harrison,* 340 F. Supp. 1003, 1013 (N.D. Miss. 1972)).
\(^{188}\) Id.
program impeded their children's right to a desegregated education, implying that the only injury suffered by the Norwood parents was the stigmatic denigration of their race by governmental support of racial discrimination. This injury could be redressed by denial of participation in the textbook program to discriminatory schools. Even understood in this way however, Norwood does not support Justice Brennan's approach in Heckler v. Mathews. One reason is the Court's decision in Allen v. Wright, and another more important reason lies in the difference between overinclusive and underinclusive legislative classifications.

The plaintiffs in Allen v. Wright were a national class of parents of black public school children enrolled in school districts undergoing desegregation. They sought to enforce the obligation of the Internal Revenue Service (IRS) to avoid aiding private schools that practice racial discrimination by granting such schools tax-exempt status. In holding that the plaintiffs did not have standing to sue, Justice O'Connor's opinion for the Court specifically denied that a claim of stigmatic injury alone could provide the basis for standing. Rather, resting chiefly on Heckler v. Mathews, Justice O'Connor found that the infliction of stigma "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." On this reasoning, the

189 Wright, 104 S. Ct. at 3327.
190 Id. (quoting Heckler v. Mathews, 104 S. Ct. at 1395 (1984))(emphasis supplied). The stigmatic injury suffered by the Mathews class was personal because of the presence of a "concrete interest with respect to which [they were] personally subject to discriminatory treatment." Id. at 3328 n.22. That interest was the Mathews class' claim for Social Security benefits. For standing purposes, then, the distinction between Wright and Mathews appears to be that while the Wright plaintiffs were found to suffer only stigmatic injury, which is not judicially cognizable, the Mathews plaintiffs were found to suffer stigmatic injury plus the deprivation of a concrete interest, which is judicially cognizable. If this is indeed why Wright and Mathews are different, it is reasonable to ask why the full injury which affords the basis for standing in Mathews, stigmatic harm plus the denial of Social Security benefits would not, if unconstitutionally inflicted, require a correspondingly full, constitutionally sufficient remedy. In short, Justice O'Connor's attempt to rely on Heckler v. Mathews to defeat standing in Allen v. Wright reveals the artificial narrowness of Justice Brennan's articulation of the injury at issue in Mathews.
"abstract" stigmatic injury at issue in Wright and, according to the reading offered above, in Norwood as well, is not judicially cognizable.\textsuperscript{191}

Justice O'Connor's Wright opinion did not purport to overrule Norwood v. Harrison, but rather distinguished Norwood on the ground that the plaintiffs there were parties to a specific school desegregation order. Through the desegregation decree, they had acquired a personal interest in requiring the state of Mississippi to avoid perpetuation of the racially dual school system it had sponsored. An analogous personal interest was, for Justice O'Connor, absent in Wright since the Wright plaintiffs sought relief against the IRS, not against a state school system subject to a pre-existing injunctive decree.\textsuperscript{192}

This attempt to distinguish Norwood may well be strained. It certainly did not persuade the Wright dissenters, who thought Norwood required a finding that the Wright plaintiffs did have standing to sue.\textsuperscript{193} But even if Norwood has not been effectively overruled by Allen v. Wright, it survives in a form that provides no support for Justice Brennan's opinion in Heckler v. Matthews.\textsuperscript{194} As interpreted by Justice O'Connor, the injury remedied by the Court in Norwood was not naked racial denigration, but interference with the concrete interest of the plaintiffs' children in a desegregated public education.

One need not embrace Justice O'Connor's standing analysis in Allen v. Wright to reject Justice Brennan's approach in Heck-
lær v. Mathews. Wright could have been decided in favor of the challenging plaintiffs with standing predicated on stigmatic racial denigration alone, without suggesting either that the injury in Mathews was gender denigration, or that the proper remedy there was eradication of the stigma through denial of benefits to others. Among the many differences between the cases, perhaps the most significant is that in Allen v. Wright (and Norwood v. Harrison), the classification at issue was challenged on the ground that it was improperly overinclusive, while in Heckler v. Mathews the challenge was based on a claim of unconstitutional underinclusiveness.

An overinclusive classification is one which is unconstitutional because it treats similarly groups which ought to be treated differently. In the case of an overinclusive burden (e.g., a statute which punishes shoplifters and murderers alike by death), the injury is the imposition of the burden, and the remedy is relief from that burden. The result of a convicted shoplifter’s successful challenge to this hypothetical statute would be avoidance of the death penalty.

A classification which confers a benefit on an inappropriately overinclusive class presents a different remedial problem. In Norwood, none of the plaintiffs claimed to have been improperly denied the benefit of Mississippi’s school textbook program. The constitutional flaw in the program was that it included schools which practiced racial discrimination among those who could receive that benefit. Leaving aside Justice O’Connor’s revision in Allen v. Wright, the injury caused by this improper inclusion was the inherent racial insult in granting this benefit. If state aid to discriminatory schools necessarily inflicts unconstitutional injury on black parents and children, certainly a court-ordered cessation of the aid affords a constitutionally adequate remedy for that injury.

This approach to the remedy problem will not suffice if the injury is caused by an unconstitutionally underinclusive classification, that is, one which treats differently groups which ought to be treated the same. Elliott Welsh, for example, suffered no injury from Congress’ decision to exempt religiously motivated conscientious objectors from military service. The grant of exemption itself denied him nothing of tangible value, nor did it inflict intangible harm of the sort leveled against black parents
and children by the Mississippi textbook program at issue in Norwood. Unlike the Norwood plaintiffs, Elliott Welsh's constitutional injury would have evaporated only if he had been extended the benefit provided to others. The injury lay in the denial of his application for conscientious objector status and in his sentence to a term in federal prison for refusing induction into the military service. Unlike the injuries at issue in Norwood, these harms cannot be remedied by withdrawing benefits that have been granted to others.

Heckler v. Mathews is directly analogous to Welsh v. United States,195 not to Norwood v. Harrison or Allen v. Wright.

195 398 U.S. 333 (1970). It may be objected that it is inaccurate to describe Welsh's injury as being of the same character as the injury suffered by the Mathews class. The constitutional norm violated in Welsh was, by Justice Harlan's hypothesis, the prohibition against the establishment of religion; in Mathews it was the equal protection guarantee. According to this objection, every equal protection violation necessarily inflicts the injury of stigmatization over and above any other more particular, tangible harms it might cause. Transgressions of the establishment clause, on the other hand, do not inherently stigmatize anyone. As Justice O'Connor recently emphasized, however, a principal purpose of the establishment prohibition is to prevent government endorsement of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch v. Donnelly, 104 S. Ct. 1355, 1366 (1984) (O'Connor, J., concurring). Such stigmatization of "non-adherents" is indistinguishable from the labeling as "less worthy participants in the political community" found by Justice Brennan's Mathews opinion to be the evil inherent in discrimination prohibited by the equal protection guarantee. Heckler v. Mathews, 104 S. Ct. at 1395. The distinction between Welsh and Mathews is rather that in the establishment clause context, this evil alone has never been held to constitute a constitutional injury sufficient to confer standing to sue on a recipient of the allegedly stigmatic message. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 483–85 (1982).

On a more practical level, the best test for the presence of stigma as an independent injury is whether persons supposedly suffering from the stigma will sue to relieve it when the available relief is limited to the withdrawal of a benefit from, or infliction of a burden on, someone else. In Califano v. Westcott, 443 U.S. 76 (1979), like Mathews an equal protection case, there is little reason to think that working women would have brought suit simply to deprive families of working men of AFDC benefits, despite the undeniable presence of stigmatizing reasons for the exclusion of these families from the
Robert Mathews and his class were not injured, stigmatically or otherwise, by Congress' award of an exemption from the pension offset against Social Security benefits to women with identical work histories. They were injured, rather, by Congress' failure to provide a similar exemption to them. Nullification of the exemption provides no relief from this injury.

The distinction between overinclusive and underinclusive classifications suggested by a comparison of *Norwood* and *Wright* on the one hand, with *Welsh* and *Mathews* on the other, underscores the practical threat to effective exercise of article III judicial power presented by Justice Brennan's opinion for the Court in *Mathews*. More than two decades ago, Brennan himself reminded us that "[a] federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" This standing requirement, Brennan pointed out, forced the challengers of a statute to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions."

By approving the remedy of anticipatory nullification for unconstitutionally underinclusive classifications, Justice Brennan's *Mathews* opinion authorizes Congress preemptively to remove that "concrete adverseness" from a broad class of challenges to its work product. Again the litigation postures

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AFDC-UF program. *See supra* text accompanying notes 24-56; *see also infra* text accompanying note 199.

197 *Id.*  
198 *Id.*  
199 Similarly, the Court's decision in *Allen v. Wright* may well have insulated overinclusive classifications which cause unconstitutional stigmatic injuries from judicial review, save in the limited instances where taxpayer standing is available. *See* Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 489-90 n.26 (1982). *But see also* Flast v. Cohen, 392 U.S. 83 (1968)(granting taxpayer standing to challenge the constitutionality of federal funding of religious and sectarian schools' purchase of educational materials).
of the *Norwood* parents and Elliott Welsh may be contrasted. If the remedy for the unconstitutional inclusion of racially discriminatory schools in Mississippi's textbook program is a decree withdrawing the benefits of the program from offending schools, will the *Norwood* parents file a lawsuit challenging the overinclusive classification? They will, because the remedy is directly responsive to the harm they suffer, i.e., the racial denigration inherent in governmental aid to the educational programs of racist schools. On the other hand, if the remedy for the failure to allow an exemption from military service for secular conscientious objectors is a decree withdrawing the exemption from religious objectors, will Elliott Welsh seek judicial relief from Congress' underinclusive classification? He probably will not. Few, if any, persons in his situation will feel a "personal stake" in the prospect of causing others to forfeit the benefit of objector status.

Just as it would be erroneous to assert that Welsh's injury consisted of stigmatization, Justice Brennan's characterization of the injury suffered by the challengers in the analogous case of *Heckler v. Mathews* as stigmatization or stereotyping is plainly a fiction, albeit a convenient one. Its creation permitted the Supreme Court to avoid facing a collision with Congress over the power to fashion constitutional remedies. The argument in this Article implies that this collision is unavoidable. The question, then, is how to resolve it.

3. The Remedial Responsibilities of Legislatures and Courts

The foregoing criticism of the remedial analysis in *Heckler v. Mathews* suggests a number of conclusions about the constitutional responsibilities of legislatures and courts in providing remedies for underinclusive classifications. Initially (and notwithstanding the examples provided by *Orr, Welsh, and Bennett*), the argument does not require that an enacting legislature invariably provide for the extension of the benefit (or nullification of the burden) created by an underinclusive classification in the event that classification is held unconstitutional. For instance, Congress could have authorized a damage remedy to compensate recipients for the loss of expected Social Security
benefits. Alternatively, Congress might have ordered restitution of a portion of the Social Security taxes paid by (or on behalf of) the spouses of these recipients. The doctrinal premises establish only that a legislature is obligated to afford an adequate remedy for unconstitutional under inclusiveness, and that nullification alone (in the case of an under inclusive benefit) does not satisfy the obligation.\textsuperscript{200} The lesson of the Court's \textit{Bivens} line of decisions is not that the best possible remedy must be made available to victims of unconstitutional government action, only that some constitutionally adequate form of relief be provided.

In contrast, a reviewing court faced with a legislative failure to meet its remedial obligations probably has a limited number of options. In theory, a court asked to repair the harm caused by an unconstitutionally under inclusive statute must (under \textit{Bivens} and its progeny) provide a constitutionally sufficient (also not necessarily the best) remedy. In the absence of legislative authorization, however, constitutionally adequate remedies other than extension (in the case of a benefit) or nullification (in the case of a burden) may be difficult to frame. In the case of the pension offset exception, for example, sovereign immunity would almost certainly bar a judicially imposed damages remedy against the United States.\textsuperscript{201}

A damages remedy against the Secretary of Health and Human Services and/or Social Security Administration officials charged with administering the statute would not, as \textit{Bivens}

\begin{quote}
200 Professor Sager has underscored both the centrality of Congress' duty to afford adequate remedies for injuries to constitutional rights and the difficulty of ascertaining, in particular instances, whether that duty has been met:

To be sure, measuring the effectiveness of remedies for constitutional wrongs is not an easy or uncontroversial business. And our legal tradition cedes to Congress considerable discretion in selecting among remedial mechanisms. But where constitutional rights are at stake and where Congress leaves the federal courts with authority to grant only plainly inadequate relief, it has set itself against the Constitution.

Sager, \textit{supra} note 144, at 88.

\end{quote}
shows, present sovereign immunity problems, but would none­
etheless fail in the face of the secretary's legitimate claim that in
implementing the offset (and its exception), she was simply
carrying out a constitutional obligation to execute the laws en­
acted by Congress. Consequently, if in Heckler v. Mathews
the Supreme Court had found the offset exception to be discrim­
inatory on account of sex and therefore unconstitutionally un­
derinclusive, the argument advanced here suggests that the only
appropriate remedy would have been an extension of the benefit
of the exception to the Mathews class.

B. The Severability Clause as an Impermissible Curtailment
of Article III Jurisdiction

This Article has argued that Justice Brennan's opinion for
the Court in Heckler v. Mathews wrongly identified the injury
cased by the pension offset exception of the 1977 Social Se­
curity amendments as the infliction of stigma or the perpetuation
of "archaic and stereotypic" notions. Though gender stigma­
tization may well have influenced the enactment of the exception
(an influence which should have weighed heavily against its
constitutionality), the injury it caused was the denial of Social
Security benefits to those men from whom the exception was
withheld on account of their sex. The severability clause which
accompanies the pension offset exception plainly precludes the
award of judicial relief from this injury. Thus, the further impact
of the severability clause is to withdraw the standing of Robert
Mathews and the class he represents to challenge the constitu­
tionality of the pension offset exception. Such a legislative with­
drawal of standing constitutes, as Judge Guin pointed out, an
impermissible use of the exceptions clause of article III of the

202 See Butz v. Economou, 438 U.S. 478 (1978)(affording qualified im­
munity from damage liability for official acts to federal executive branch
officials acting in good faith and with reasonable grounds for their belief);
for official acts to state executive branch officials who act reasonably and with
a good faith belief in light of all the circumstances). See also supra note 144.
203 Mathews, 104 S. Ct. at 1395.
Constitution to preclude federal judicial review of an arguably unconstitutional statute. 204

Justice Brennan's opinion in *Heckler v. Mathews* concedes that the challengers' standing to sue depends on the availability of a constitutionally adequate remedy for the injury they suffer. 205 Brennan parts company with the Court's previous standing decisions only in his disregard of the teaching of *Orr v. Orr* 206 that the injury caused by an underinclusive classification is the concrete denial of the benefit it authorizes. Only through this unexplained abandonment of *Orr* can he escape the conclusion that the severability clause immunizes the pension offset exception from judicial review—not only in the practical sense that no one has a tangible interest in challenging it, but also in the theoretical sense that no one has standing to undertake such a challenge.

Justice Brennan properly notes that standing to sue is a prerequisite to the assertion of jurisdiction over a claim by an article III court. 207 If the severability clause deprives persons who suffer injury from unconstitutional government action of standing to challenge that action, it thereby deprives all federal courts of jurisdiction to hear and decide the constitutional claims of these persons. Although the point has never been finally settled by the Supreme Court 208 and is explicitly avoided in *Mathews*, Professors Sager, 209 Eisenberg, 210 and Rotunda 211 each have argued that the "exceptions" clause of article III 212 cannot be employed to frustrate the exercise of judicial review in this

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205 Heckler v. Mathews, 104 S. Ct. at 1394.
209 Sager, *supra* note 144.
210 Eisenberg, *supra* note 122.
212 U.S. Const. art. III, § 2, ¶ 2.
manner. While their arguments need not be repeated here, it may be noted that they all rest on the principle urged in the discussion of constitutional remedies above,\textsuperscript{213} that the basic "plan" of the Constitution\textsuperscript{214} and the effective execution of the judicial power granted by article III entail the availability of federal judicial review to persons claiming injury from unconstitutional acts of government.\textsuperscript{215}

Even if the severability clause is not seen as a congressional withdrawal of article III jurisdiction, it has been well established since the Supreme Court's decision in \textit{United States v. Klein}\textsuperscript{216} more than a century ago that Congress may not formally permit the assumption of jurisdiction over a constitutional claim only to hamstring the exercise of judicial review by seeking to direct the resolution of that claim.\textsuperscript{217} In \textit{Klein}, the Supreme Court invalidated a statute purporting to withdraw jurisdiction from the court of claims and, on appeal, from the Supreme Court, over certain cases seeking indemnification for property confiscated during the Civil War. The attempted curtailment of jurisdiction was conditional, triggered only by a finding in either court that the claim was based upon the claimant's receipt of a presidential pardon for having participated in the war on the side of the Confederacy. Because of its conditional nature, the statute could not be sustained as a legitimate exercise of the "exceptions" power. It was rather "a means to an end," designed to direct the courts to deny effect to a presidential pardon in precisely those indemnification cases which depended on such

\textsuperscript{213} See \textit{supra} text accompanying notes 116–45.

\textsuperscript{214} Hart, \textit{supra} note 122, at 1365.


\textsuperscript{216} 80 U.S. (13 Wall.) 128 (1872).

\textsuperscript{217} \textit{Id.} at 145. See also Sager, \textit{supra} note 144, at 70–77.
a pardon.\textsuperscript{218} Such a direction improperly intruded on the exercise of article III judicial power.\textsuperscript{219}

By forbidding federal courts from granting a remedy to persons injured by the underinclusiveness of the offset exception, the \textit{Mathews} severability clause may run afoul of the principle of judicial independence articulated in \textit{Klein}. That is, the clause may improperly encourage reviewing courts to uphold the pension offset exception against constitutional attack. Recall the uncertain (but plainly unappealing) consequences posed by a judgment that the exception is unconstitutional if the severability clause is then given effect.\textsuperscript{220} Benefits will be cut, reliance interests will be disregarded, the living standard of people in need will be eroded. Retrospective recoupment of previously paid benefits may ensue. Satellite litigation over the scope of this negative relief will almost certainly commence. None of this amounts to an explicit directive from Congress to a reviewing court to sustain the constitutionality of the pension offset exception. Still, in a close case, these consequences might understandably influence a conscientious judge who is not impervious to the human impact of her decisions. \textit{Heckler v. Mathews} was not a close case, but one can only speculate whether it might have been closer in the absence of the long shadow cast on the Court's remedial power by the severability clause. Seen in this light, it may not matter whether the clause amounts to a formal curtailment of federal jurisdiction, for its predictable effects may, in any event, conflict with the \textit{Klein} principle.\textsuperscript{221}

The inability of Congress to render unconstitutional injuries non-justiciable was also the basis of the Supreme Court's decision in \textit{United States v. Lovett}.\textsuperscript{222} \textit{Lovett} concerned an appropriations act rider\textsuperscript{223} which specifically prohibited payment of

\begin{itemize}
\item \textsuperscript{218} \textit{Klein}, 80 U.S. at 145.
\item \textsuperscript{219} \textit{Id.} at 146-48.
\item \textsuperscript{220} \textit{See supra} text accompanying notes 89-93.
\item \textsuperscript{221} \textit{See supra} text accompanying notes 89-93.
\item \textsuperscript{222} 328 U.S. 303 (1946).
\item \textsuperscript{223} Act of July 12, 1943, ch. 218, § 304, 57 Stat. 431, 450.
\end{itemize}
the salaries of three named government employees found by Congress to have engaged in "subversive activities." The three employees successfully challenged the prohibition on a number of constitutional grounds in a suit for compensation filed in the Court of Claims. On appeal, the special counsel appointed to represent the Congress argued that as an appropriation measure the restriction lay within Congress' exclusive power under Article I, § 9 cl. 7 of the Constitution. For this reason, the argument continued, the employees' challenge to its constitutionality did not present a justiciable issue. The Supreme Court, speaking through Justice Black, rejected the argument, noting that the purpose and effect of the prohibition was to bar the employees from government employment. Such a bar plainly "stigmatized their reputation and seriously impaired their chance to earn a living." If the employees' suit were not justiciable the legality of these injuries could never be challenged in any court. ... To quote Alexander Hamilton: "... [A] limited Constitution ... [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all of the reservations of particular rights or privileges would amount to nothing." Federalist Paper No. 78.

224 Lovett, 328 U.S. at 311.
225 Id. at 305–06. The employees argued that the restriction showed a congressional purpose to exercise the power to remove executive employees, a power conferred on the executive branch by article I, §§ 1–4 of the Constitution, that it was a bill of attainder, in violation of article I, § 9, cl. 3 of the Constitution, and that it deprived them of liberty and property in violation of the due process clause of the fifth amendment. U.S. Const. amend. V, cl. 4.
226 Lovett, 328 U.S. at 306.
227 Id. at 307.
228 Id. at 313.
229 Id. at 314.
230 Id. The Lovett decision ought to put to rest the contention, rarely
Klein, Lovett, and Federalist 78 are not cited to imply that the Constitution requires that someone be afforded standing to challenge every instance of its violation, else that violation go unreviewed. They are not cited for even the more limited claim that all violations of the individual rights guaranteed by the Bill of Rights and the fourteenth amendment must be susceptible of judicial correction. The point is rather that when such violations cause specific persons to suffer "actual or threatened injury," any attempt by Congress to preclude the award of a remedy for the injury, and thus to deny these persons standing to sue, constitutes an improper exercise of the exceptions power of article III to frustrate the vindication of constitutional rights by rendering them non-justiciable. The Supreme Court’s failure, in Heckler v. Mathews, to recognize the pension offset exception severability clause as just such an attempt sanctions a serious threat to the independent exercise of federal judicial power.

C. The First Amendment Right to Petition the Courts for Redress of Grievances

The chilling impact of the offset exception severability clause on the litigation process may violate the constitutional advanced since Westcott, that judicial extension of the coverage of a public benefit program, even to vindicate constitutional rights, conflicts with Congress' constitutional power over the appropriations process. U.S. Const. art. I, § 9, cl. 7. See, e.g., Doe v Mathews, 420 F. Supp. 865, 870–72 (D.N.J. 1976). At least when the program in issue has been supported by an appropriation of general applicability, a conclusion that such an extension is precluded is "excluded by the nature of constitutional government." McRae v. Califano, 491 F. Supp. 630, 729 (E.D.N.J. 1980), rev’d on other grounds sub nom., Harris v. McRae, 448 U.S. 297 (1980). See generally, Ginsburg, supra note 12, at 303.

231 See Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227 (1974)(stating that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."); see also United States v. Richardson, 418 U.S. 166 (1974).

232 See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 483–84 (1982)(rejecting proposition that there is a hierarchy of constitutional values or a "sliding scale" of standing that would diminish article III burdens when a personal constitutional right is at stake).


234 U.S. Const. art. III, § 2, ¶ 2.
rights of persons harmed by the exception in yet another respect not addressed by the Supreme Court in Heckler v. Mathews. By purporting to prevent the injured class, in advance of litigation, from securing relief from the injury, the clause undermines their first amendment right\textsuperscript{235} to petition the courts for redress of grievances. The right to petition "the government for a redress of grievances"\textsuperscript{236} plainly protects the right of access to the courts.\textsuperscript{237} Moreover, in a number of opinions protecting the associational interests of attorneys and clients, the Supreme Court has underscored the crucial role of the litigation process as a form of political expression aimed at vindicating other constitutional rights.\textsuperscript{238} The landmark decision in \textit{NAACP v. Button},\textsuperscript{239} for example, stands for the proposition that "litigation is not [merely] a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local . . . ."\textsuperscript{240}

The Court has also made clear that in evaluating claims of legislative interference with access to the litigation process, it will focus on the legislation's impact on that process rather than on the aims of the legislative body which enacted it.\textsuperscript{241} The possibility that the purposes of the severability clause were wholly benign would not save it if the clause inhibited the exercise of first amendment rights. Implicit in this emphasis on impact is the notion that the restraint on access to the courts need not be direct or formal in order to run afoul of the first

\textsuperscript{235} U.S. Const. amend. I, cl. 3.
\textsuperscript{236} Id.
\textsuperscript{239} 371 U.S. 415 (1963).
\textsuperscript{240} Id. at 429.
\textsuperscript{241} United Mine Workers v. Illinois Bar Ass'n., 389 U.S. 217, 222 (1967); see also Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).
amendment. As the Court noted in *United Mine Workers v. Illinois*, the amendment would “be a hollow promise if it left government free to erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such.”

If the most striking effect of the severability clause is to deter litigation by making its futility clear in advance to potential challengers, then surely the clause should be vulnerable to a first amendment attack under the principles that emerge from the Court’s “petition” cases. A recent decision of the U.S. Court of Appeals for the Third Circuit illustrates the applicability of these principles to legislative attempts to prescribe nullification of a benefit program in the event that the classifications on which it is based are held unconstitutional.

*Brookins v. O'Bannon* concerned a set of amendments to Pennsylvania’s welfare program. The amendments were designed to redistribute some assistance from all eligible recipients to a sub-class designated by the amendments as “chronically needy.” The redistribution was accomplished by defining the remaining recipients as “transitionally needy” and limiting their eligibility for benefits to one ninety day period each year. This new classification was accompanied by a five percent increase in benefits to both “chronically” and “transitionally” needy families of three persons or more, with funding for the increase expected to come from savings attributable to the ninety day annual eligibility limitation for the “transitionally needy.” A third provision made the grant of the five percent increase dependent on the constitutionality of the ninety day limitation, directing that “if the department is prevented by court order from implementing [the ninety day eligibility limitation],

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242 389 U.S. at 222.
243 699 F.2d 648 (3d Cir. 1983).
245 *Id.*
246 *Id.* § 10(iii).
the provisions of this section shall be suspended and shall not take effect until [that limitation is] implemented."

The last of these provisions was challenged by an organization of Philadelphia welfare recipients whose membership included both "chronically" and "transitionally" needy people under the new scheme. The Philadelphia Welfare Rights Organization (WRO) claimed that the conditional suspension of the increase deterred the organization and its members from challenging the constitutionality of the ninety day eligibility limitation in violation of their first amendment right to petition the courts for redress of grievances. Both the U.S. District Court for the Eastern District of Pennsylvania and the court of appeals acknowledged the protected status of the right, but held that it was not violated by the "conditional suspension" provision.

For the court of appeals, the validity of WRO's claim turned on whether either "chronically" or "transitionally" needy recipients could fairly be said to be prevented or deterred from challenging the ninety day rule. As to the "chronically" needy, the answer was plainly no; since they were only benefited by the amendments, they would have no interest in challenging any of them, and thus could not be harmed by a provision which purportedly deterred such a challenge.

With respect to the "transitionally" needy, the problem was somewhat more complex. The "transitionally" needy were, unlike the "chronically" needy, plainly injured by the ninety day rule, and a successful constitutional challenge to the rule would nullify the five percent increase in benefits which they would otherwise enjoy. Nevertheless, the "transitionally" needy were not deterred from challenging the constitutionality of the ninety day limitation, because a successful outcome to their challenge would restore the status quo ante. The elimination of the rule would, despite suspension of the benefit increase, restore their eligibility for benefits on the same year-round basis enjoyed by

250 Brookins v. O'Bannon, 699 F.2d at 651.
252 Brookins v. O'Bannon, 699 F.2d at 653-54.
253 Id.
the "chronically" needy. The "transitionally" needy were not denied a remedy for the potentially unconstitutional injury inflicted on them by the amendments, and they were therefore not chilled in the exercise of their first amendment right to seek judicial review.\textsuperscript{254}

Notwithstanding its failure to award relief, the \textit{Brookins} court's analysis plainly supports the argument advanced here: A provision which deters litigation of a constitutional issue by denying relief to the challenging party violates the first amendment. The \textit{Brookins} result indicates that, if faced with a remedial directive which in fact did forestall the award of any relief to the injured class, the court of appeals would strike the clause as a violation of the right of effective access to the courts. The Supreme Court was able to avoid addressing such a violation in \textit{Heckler v. Mathews} because of its fiction that the injury inflicted by the pension offset severability clause is not the denial of Social Security benefits but the abstract imposition of sex-based stigmatization.

\textbf{IV. The Compatibility of Judicial Remedial Responsibility and Legislative Discretion}

This article argues that a very recent, unanimous, and seemingly uncontroversial decision of the Supreme Court is completely wrong and potentially very dangerous. Such an argument must necessarily be received with caution, if not outright skepticism, on pragmatic grounds alone. Still, if the argument is at all persuasive, it is because it fits accepted notions about the role of judicial review in our constitutional scheme, notions which were too easily passed over in \textit{Heckler v. Mathews}. The proposition that statutes which preclude the award of a remedy for unconstitutionally inflicted injuries are themselves unconstitutional is essential to the effective enforcement of constitutional limitations on government. If the argument is rejected—if legislatures may, in advance of litigation, prevent persons harmed by an unconstitutionally underinclusive classification from securing any tangible relief from a successful challenge to that

\textsuperscript{254} \textit{Id.} at 654.
classification—the legislatures have a formidable weapon for fending off judicial scrutiny of the statutes they enact.

The argument not only entails a wholesale rejection of *Heckler v. Mathews*, but also provides a limited modification of the well established tradition of judicial deference to legislative remedial choice in constitutional cases. It is fair to ask just how "limited" this modification is and what remains of the important legislative prerogative to specify the means for curing unconstitutional underinclusiveness.

The answer begins with a review of what the Supreme Court has done (as opposed to what it has said) when asked to exercise its inherent power either "to declare [an underinclusive statute] a nullity . . . or . . . extend the coverage of the statute to include those who are aggrieved by the exclusion."255 In choosing between these alternatives, the Court invariably has given effect to an identified legislative preference when that preference directs that some form of relief be granted the aggrieved class (*Welsh*,256 *Westcott*257). In the absence of an identifiable legislative preference, the Court has either provided relief tacitly by way of extension258 or has permitted lower courts to fashion a remedy following an adjudication of unconstitutionality (Orr *v.* Orr,259 Stanton *v.* Stanton,260 Wengler *v.* Druggists Mutual Ins. Co.261). The Court, however, has never fashioned or sustained a remedial directive which denies relief for the injury caused by an unconstitutionally underinclusive classification. On the contrary, even in cases which significantly predate *Welsh*, where the inherent judicial power either to extend or nullify was first

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256 Id.


258 See cases cited supra note 16; see also Ginsburg, supra note 12, at 310–12.


260 421 U.S. 7, 17–18 (1975) (remanding question whether parent's obligation to support children of both sexes ends at age 18 or 21 for resolution by state courts).

261 446 U.S. 142, 153 (1980) (remanding question whether to nullify worker's compensation dependency presumption or extend it to widowers for resolution by state court). See infra note 263.
articulated by Justice Harlan, the Court took pains to underscore the fundamental premise that a person harmed by unconstitutional government action is constitutionally entitled to a remedy for that harm.\textsuperscript{262}

Not even the result in \textit{Heckler v. Mathews} stands against this history, for in \textit{Mathews} the constitutionality of the underlying classification, the pension offset exception, was sustained. There was thus no unconstitutional government action and no occasion for the exercise of judicial remedial power.

The Court's record in remediying unconstitutional under inclusiveness is therefore consistent with the argument advanced here, even if the language of its opinions is not.\textsuperscript{263} Moreover,

\textsuperscript{262} Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931); United States v. Lovett, 328 U.S. 303, 314 (1940).

\textsuperscript{263} The cases in which the court has discussed the effect to be given to severability clauses and/or the extension/nullification problem generally can be divided into two general groupings. The first consists of decisions in which the court has given effect to severability clauses which provide relief to the injured parties, or which otherwise preserve the remainder of a statutory scheme when a portion of it is held unconstitutional. See, e.g., INS v. Chadha, 103 S. Ct. 2764, 2774-76 (1983)(finding unconstitutional one-house veto provision severable from general grant of authority of attorney general to suspend deportation of alien); Califano v. Westcott, 443 U.S. 76, 89 (1979)(discussed \textit{supra} text accompanying notes 24-56); Buckley v. Valeo, 424 U.S. 1, 108-09 (1976)(per curiam opinion holding statutory provision for public financing of campaigns severable from unconstitutional limits on candidate campaign expenditures); United States v. Jackson, 390 U.S. 570, 585-86 (1968) (holding unconstitutional capital punishment clause severable from remainder of kidnapping statute); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 283 (1960) (relying on statutory severability clause as basis for severing unconstitutional authorization of court martial from remainder of statute); Watson v. Buck, 313 U.S. 387, 395-97 (1941) (relying on severability clause to preserve parts of state antitrust statute which are complete in themselves even if other parts of statute are unconstitutional); Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938)(relying on severability clause to sustain enforcement of constitutional provisions of Public Utility Act while reserving questions as to validity of other provisions of Act); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932) (sustaining enforcement of constitutional state statute prohibiting waste of petroleum on ground that it was severable from arguablyinvalid accompanying price regulation statute). \textit{But see} Davis v. Wallace, 257 U.S. 478, 484-85 (1922); Sprague v. Thompson, 118 U.S. 90, 95 (1886). \textit{See also supra} note 148.
both the record and the argument leave ample room for legislative remedial discretion. Most significantly, a legislature retains the authority prospectively to abolish or otherwise alter a program of statutory benefits or burdens subsequent to a reviewing court's decision.\textsuperscript{264} Nothing in this argument, for example, would preclude Congress from responding to a decision that the pension offset exception was unconstitutional by completely repealing it. 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 the litigation process by purporting to foreclose any remedy in advance of its commencement.

Any legislative remedy prescribed in advance of litigation of the constitutional merits of an underinclusive classification must also be given effect so long as it vindicates the right of the class harmed to some form of constitutionally adequate relief. As noted in the discussion of constitutional remedies above,\textsuperscript{265} this remedy need not be extension in the case of a benefit, or nullification in the case of a burden, although in many situations it may be difficult to fashion a constitutionally adequate alter-

\begin{thebibliography}{99}
\item The second category of decisions concerns underinclusive state statutory classifications in which remedial responsibility was remanded either to the state courts in which the case arose or to the state legislature. See, e.g., Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152-53 (1980); Orr v. Orr, 440 U.S. 268, 282-83 (1979); Craig v. Boren, 429 U.S. 190, 210 n. 24 (1976)(authorizing state legislature to define cutoff age for purchase of 3.2 beer in gender-neutral fashion); Stanton v. Stanton, 421 U.S. 7, 17-18 (1975); Skinner v. Oklahoma, 316 U.S. 535, 543 (1942)(remanding issue of severability of unconstitutional exception for embezzlers from statute calling for sterilization of habitual criminals); Dorcy v. Kansas, 264 U.S. 286, 290 (1924) (remanding issue of severability of criminal sanctions imposed by state labor statute from invalid compulsory arbitration provision for resolution by state court); see also, Welsh v. United States, 398 U.S. 333, 344, 362-63 n.15 (Harlan, J., concurring in result), in which Justice Harlan suggests that the Supreme Court enjoys wider discretion to extend federal than state law "even as a constitutional remedy." But see Iowa-Des Moines Nat'1 Bank v. Bennett, 284 U.S. 239, 247 (1931), supra text accompanying notes 155-62. See also supra text accompanying notes 259-61. See generally Ginsburg, supra note 12 at 312-14.
\item See LaFrance, supra note 55, at 439.
\item See supra text accompanying notes 193-95.
\end{thebibliography}
A reviewing court must assume affirmative remedial responsibility only if it cannot discern a preferred legislative remedy from the language and history of the statute, or if the preferred remedy is inadequate to relieve the injury inflicted by the classification. Under these circumstances the reviewing court must perform the traditional task of judicial review by granting relief to the aggrieved litigants before it. The allocation of remedial responsibility for constitutionally defective underinclusiveness envisioned by this Article thus places only modest limits on the legislative role, limits which are essential to the effective operation of judicial review.

The intrusion on legislative remedial discretion entailed by a decision to disregard a severability clause, such as the one at issue in Heckler v. Mathews, may, perhaps paradoxically, be more artificial than real. Although the legislative history is silent on this point, any member of Congress who considered the likely impact of the clause would probably have seen (as we have) that its most immediate and predictable effect would be to stifle the incentive, and possibly the standing, of men denied benefits to challenge its constitutionality. Such a disincentive would thus work to ensure that the harsh remedial option envisioned by the severability clause, nullification of the exception, would never be invoked.

These circumstances make it much more problematic to describe the severability clause as a reliable indication of Congress's remedial intention in the event the exception were declared unconstitutional. In a sense, the clause is purely hypothetical, in contrast, for example, to a repeal of the exception enacted after adjudication of its unconstitutionality or a direc-

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266 See Crowell v. Benson, 285 U.S. 22, 60 (1932) (stating that "in cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.") Id.

267 Judge Guin's opinion in Mathews v. Heckler, invalidating the 1977 Social Security Pension Offset Exception Severability Clause, suggests that he shares this skepticism. "The Court is convinced ... that the severability clause is not an expression of the true congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing." 1982 Unempl. Ins. Rep. (CCH) ¶ 14,313, at 2408 (N.D. Ala. Aug. 24, 1982), rev'd 104 S. Ct. 1387 (1984).
tion that the constitutionality of the exception be ensured by extending the benefit it confers. Each of the latter prescriptions takes seriously the legislature’s primary role as a dispenser of constitutional remedies. The offset severability clause, on the other hand, may 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 danger to the effective exercise of judicial review.

A second paradoxical point raises a problem that may at first appear more threatening to the argument of this Article, but the contradiction it suggests can be resolved within the argument’s terms. Throughout this discussion, it has been assumed that only one class of potential litigants may seek to challenge an unconstitutionally underinclusive classification. This has been an easy assumption to posit, both because it helps illustrate the problems raised by complete judicial deference to legislative remedial choices, and because it matches the factual settings of Mathews, Westcott, and Welsh. Some underinclusive classifications, however, may well be challenged by two classes with interests directly opposed to one another.

The alimony scheme at issue in Orr v. Orr\textsuperscript{268} provides one example. Although the requirement that men (and not women) pay alimony to their divorced spouses was in fact challenged by a male seeking relief from the obligation,\textsuperscript{269} the challenge could conceivably have come from an impecunious divorcing husband seeking an order requiring alimony payments from his wife. While the actual Orr petitioner could, as the Court pointed out, only benefit from nullification of all alimony obligations, the hypothetical challenger could just as obviously benefit only from the extension of the obligation to women. How can the interests of these two classes of men possibly be reconciled under the principle advanced here—that every person injured by an unconstitutionally underinclusive statute has a right to a tangible remedy for that injury?

Obvious they cannot, but this irreconcilability does not necessarily subvert the validity of the underlying principle. The

\textsuperscript{268} 440 U.S. 268 (1979).

\textsuperscript{269} Id. at 271.
resolution lies in the common understanding of the meaning of "tangible remedies" reflected in the opinions of both Justices Brennan and Rehnquist in the Orr case itself. Given the directly opposed interests of the two classes of men disfavored by the Orr classification, there is probably no sex-neutral (and thus constitutionally permissible) alimony scheme that would satisfy the interests of both of them. If so, it makes no sense to describe both of them as simultaneously entitled to a remedy for the injury inflicted by the unconstitutional underinclusiveness of the classification under challenge. Since as a matter of logic (rather than, as in the pension offset exception situation, a matter of legislative fiat) the disfavored classes cannot each benefit from a cure for the underinclusiveness, it is fair to describe the members of one or the other of the classes as presenting no claim of entitlement to a constitutional remedy for the injury they have suffered.

The distinction is not merely semantic. While courts can legitimately be asked to correct legislative failures to provide remedies for unconstitutionally inflicted injuries, neither courts nor legislatures can be expected to relieve disadvantages inherent in the very logic of legislative classification. Even granting, however, that only one of two opposed classes disfavored by an underinclusive classification can secure tangible relief from the harm caused by the exclusion, it must be asked how a reviewing court should manage the remedial stage of litigation such as Orr v. Orr. To begin with, the court might be fortunate enough to find the very sort of severability clause that was improperly appended to the pension offset exception enacted by the Social Security Amendments of 1977. When attached to an underinclusive classification that disfavors two classes with opposite and irreconcilable interests, such a provision does not deny standing to a party suffering unconstitutional injury nor

270 Id. at 268, 290.
271 But see supra note 172. Justice Brennan's hypothesis that Mr. Orr might enjoy constitutionally sufficient, tangible relief even if alimony responsibilities were imposed on divorcing wives would, if correct, show that Orr v. Orr does not present a situation of the sort described in the text. 440 U.S. at 274 n.3. The discussion in the text assumes that this hypothesis is false.
272 See supra note 88 and accompanying text.
otherwise deter challenging litigation by purporting to forbid the court from granting a remedy for such injury. Instead, a clause which directs either extension or nullification in the event the classification is held unconstitutional simply makes a choice that is inevitable: it specifies which of two disfavored classes will receive relief from their injuries when only one can.

In *Orr*, if the Alabama Legislature had, in advance of the litigation, specified the remedial intent ascribed to it by Justice Rehnquist—to extend the obligation to pay alimony to women in the event its imposition on men alone was held unconstitutional—the effect of such a specification would have been to preclude the reward of a remedy to Mr. Orr. Following the legislature’s direction here, however, would not present the problems inherent in the severability clause at issue in *Heckler v. Mathews*. On the contrary, men denied the benefit of alimony by virtue of the legislature’s failure to impose the corresponding burden on women would enjoy a clear, legislatively mandated remedy in the event a reviewing court found that failure unconstitutional. More than this cannot be achieved from a system of judicial review.

If the court is not lucky enough to find its remedial task anticipated by the legislature, its responsibility becomes less clear. It is free, of course, to do what the Justices tried to do in *Westcott* and *Welsh* to search the deliberations of a legislature that never considered the problem for evidence of a preferred remedy. For the reasons described in the above discussion of the Court’s efforts in those cases, the conclusions yielded by such an enterprise will seldom be convincing. A more straightforward alternative (which probably describes more accurately what was actually done in *Westcott* and *Welsh*) would simply be to prescribe the remedy which seems more preferable on policy grounds. Among the more obvious factors a court

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276 See *supra* text accompanying notes 24–74.
might consider in determining whether it is better to extend the benefit or nullify the burden of a particular underinclusive classification are the size of the classes which would benefit from each choice (in most instances, the smaller the better), the relative cost of each alternative (to either public treasuries or private parties), and the extent to which either choice might threaten the ability of a class previously favored by the classification to meet the necessities of life.\textsuperscript{277} In \textit{Orr}, for example, the first and third of these factors point fairly clearly toward extension of the alimony obligation to women (the option assumed by Justice Rehnquist) rather than nullification of the burden imposed on men.

A court which opts for candid acknowledgement of its lawmaking role in fashioning the remedy for an unconstitutionally underinclusive statute may expect to encounter charges of improper usurpation of legislative power. Such charges are easily deflected by the recollection that the ultimate remedy for legislative underinclusion by definition remains with the enacting legislature. No part of the argument here requires a legislature to retain a program of benefits or burdens that it comes to disfavor in the wake of judicial correction of the program's underinclusiveness. A legislature has only the obligation to avoid intrusion on the corrective process.\textsuperscript{278}

\textsuperscript{277} See, e.g., Taxation with Representation v. Regan, 676 F. 2d 715, 742-45 (D.C. Cir. 1982), rev'd on other grounds, 103 S. Ct. 1997 (1983); see also supra note 181. For a general discussion of considerations relevant to the quasi-legislative policy choice between extension and nullification, see Ginsburg, supra note 12, at 318-24 (recommending, in addition to the factors listed in the text, that a court consider whether the classification imposes a burden or confers a benefit, and the nature and extent of the impact of extension or nullification on persons not before the court). See also Note, \textit{Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative}, 12 Colum. J.L. & Soc. Prob. 115 (1975).

\textsuperscript{278} My choice of the problems presented by the Supreme Court's decision in \textit{Heckler v. Mathews} to illustrate the issues addressed in the paper has pointed the discussion toward the responsibility of the federal courts to provide a remedy to persons injured by unconstitutionally underinclusive federal statutes. The points made apply with equal force to underinclusive state statutes, regardless of whether the challenge to the underinclusiveness is heard by a federal or state court. The power and responsibility of the federal courts to provide equitable remedies to persons harmed by official enforcement of
Conclusion

On its face, the standing decision in *Heckler v. Mathews* may seem unobjectionable. Justice Brennan's opinion for the Court applies two well established doctrinal lines of authority—those pertaining to article III standing and to legislative remedial supremacy—in a straightforward, internally consistent manner to produce what may appear to be an enlightened result. After all, the opinion affirms the *Mathews* class' standing to challenge the Social Security pension offset exception and thus reinforces the Court's willingness to entertain constitutional claims based on non-economic injuries.

unconstitutional state statutes has a longer and, if anything, clearer history than does the analogous responsibility over federal officials. See, e.g., *Ex parte Young*, 209 U.S. 123 (1908). See also *Sager*, *supra* note 144, at 85 n. 214. This power is limited only by considerations of comity, see, e.g., *Younger v. Harris*, 401 U.S. 37 (1971), and by the eleventh amendment, see, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974), not at issue here. It is equally plain that the exercise of this power cannot, consistent with the supremacy clause, *U.S. Const.*, art. VI, § 2, be obstructed by state statutes that would curtail the jurisdiction of the federal courts over constitutional claims. Thus, a federal court could not give effect to a state's attempt to withdraw standing to challenge state laws by precluding the award of any remedy for injuries from those laws.

The obligation of state courts to enforce federal constitutional rights violated by the enforcement of state statutes or policies is equally long and well established. See *Testa v. Katt*, 330 U.S. 386 (1947). This obligation includes a duty to provide a constitutionally adequate remedy for injuries caused by the violation. 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). The Supreme Court's decisions (in cases such as *Wengler*, *Orr*, *Craig v. Boren*, and *Stanton*) to remand the question of relief from unconstitutionally underinclusive state statutes for initial resolution by state courts (or legislatures) are in no way contrary to this proposition. If, on remand, the remedy afforded by the state were constitutionally insufficient, *Bennett* teaches that the Supreme Court would direct that an adequate form of relief be provided. 284 U.S. at 247. See *supra* notes 153–62, 200–02, 259–63 and accompanying text. Finally, it is axiomatic that the protection of access to the courts (whether state or federal) afforded by the first amendment is incorporated and made applicable to the states by the due process clause of the fourteenth amendment. See, e.g., *Bridges v. California*, 314 U.S. 252 (1941); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. New York*, 268 U.S. 652 (1925).
This appearance, however, is highly deceptive. The practical impact of *Heckler v. Mathews* on the accessibility of judicial review to unconstitutionally injured litigants is anything but expansive. The convergence of the *Westcott* principle of deference to legislative remedial choice with the requirement of a judicially remediable injury as a predicate to standing will, unless checked by the Supreme Court, permit both Congress and state legislatures\(^{279}\) to prevent judicial review of unconstitutionally underinclusive statutes through the device of inverse severability clauses such as that in *Mathews*. Justice Brennan's response to this problem—to define the injury in *Mathews* as sex-based stigma—confuses the actual injury (denial of Social Security benefits) with the reason why that injury might be constitutionally impermissible. The result is approval of congressional power to withdraw all remedies for the actual injury.

In the long run, our constitutional scheme cannot sustain such a sweeping grant of power to the legislative branch. The *Mathews* decision cuts against such basic principles as the right of persons injured by unconstitutional government conduct to an adequate remedy for that injury, the power of the federal courts to hear and adjudicate constitutional claims, and the first amendment right of litigants to petition the courts for redress of their grievances. Above all, the decision impairs the litigation process itself by advising those who would use it that their efforts will succeed only in harming others.

Correction of the dangers presented by *Heckler v. Mathews* requires no radical alteration in the balance of remedial responsibilities between legislatures and courts. The judicial responsibility is limited to a single function, that of ensuring that an unconstitutionally injured litigant receives an adequate remedy for the harm actually suffered. In *Heckler v. Mathews*, Justice Brennan failed to recognize that the pension offset exception severability clause threatened this function. When faced with a similar severability clause in combination with an unconstitutional underlying classification, it can only be hoped that the Court will reach a remedial result that is more consistent with our constitutional tradition.

\(^{279}\) See supra note 278.