# Remedial Discretion in Constitutional Adjudication

JOHN M. GREABE†

## INTRODUCTION

Three Terms ago, in *Brown v. Plata*, the Supreme Court upheld an injunction ordering the State of California to release approximately 46,000 convicts within two years.[1] The injunction rested on a determination that overcrowding was causing two classes of California inmates with serious health issues to be deprived of the constitutionally adequate health care guaranteed by the Eighth and Fourteenth Amendments.[2] The Court was bitterly divided over the propriety of the injunction; separate dissents by Justices Scalia (joined by Justice Thomas) and Alito (joined by Chief Justice Roberts) blasted the majority for, as Justice Scalia colorfully put it, failing to "bend every effort to read the law in such a way as to avoid that outrageous result."[3] But none of the dissenting Justices took issue with the premise that relief was obligatory once the plaintiffs had established an ongoing constitutional violation.[4]

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† Professor, University of New Hampshire School of Law. I am grateful to the faculty of the University of Virginia School of Law, and especially to Professor John Jeffries, Jr., for inviting me to present this paper as part of its faculty workshop series. I also am grateful to Toby Heytens and Lawrence Rosenthal for extremely generous comments and suggestions on an earlier draft. Many thanks as well to Jordan Budd, Calvin Massey, Margaret Sova McCabe, Leah Plunkett; to all those UNH Law colleagues who commented on this paper at my works-in-progress lunch; and to Brooke Lovett Shilo for excellent research assistance. Finally, I am grateful to Toby Heytens, Richard Fallon, Daniel Meltzer, and Kermit Roosevelt for the extraordinary scholarship on which this paper aspires to build. Sincere thanks to Paul Bartlett and the staff of the *Buffalo Law Review* for excellent editorial assistance.

1. 131 S. Ct. 1910, 1923, 1928 (2011).

2. *See id.* at 1922.

3. *Id.* at 1950 (Scalia, J., dissenting); *see also id.* at 1959 (Alito, J., dissenting).

4. The majority repeatedly noted the necessity of an award of relief in such circumstances. *See id.* at 1923, 1928-29, 1937, 1939, 1941-42, 1946-47. Justice

The absence of disagreement over this premise is interesting. Most would view a prisoner release as harmful to the public interest, and courts have historically exercised a broad discretion to withhold equitable remedies that threaten the public interest.[5] Indeed, the Supreme Court and Congress—but the Court in particular—have developed a number of doctrines that, in the name of the public interest, withhold remedies from persons who have asserted justiciable and meritorious claims of constitutional right. Think here of the various non-retroactivity doctrines that the Court formerly applied in both the criminal[6] and civil contexts.[7] Or of the *Teague v. Lane* doctrine[8]—a rule still unhelpfully described in terms of non-retroactivity[9]—which severely limits the availability of relief on collateral review

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Scalia proceeded from the same assumption, but only if an individual prisoner were to establish that he is "suffering from a violation of his constitutional rights, and that his release, and no other relief, will remedy that violation." *Id.* at 1957-58 (Scalia, J., dissenting). Justice Alito, like Justice Scalia, assumed that relief should follow so long as the remedial order is exactly tailored to a proven constitutional violation. *See id.* at 1960 (Alito, J., dissenting).

5. *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803, 1816 (2010); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-13 (1982).

6. *See, e.g.*, Johnson v. New Jersey, 384 U.S, 719, 732 (1966) (declining to apply retroactively the holdings of Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966)); Linkletter v. Walker, 381 U.S. 618, 639-40 (1965) (declining to apply retroactively the holding of Mapp v. Ohio, 367 U.S. 643 (1961)). Criminal non-retroactivity doctrine has been moribund on direct review since the Court decided *Griffith v. Kentucky*, 479 U.S. 314 (1987).

7. *See, e.g.*, Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 178-83 (1990) (O'Connor, J., plurality opinion). Civil non-retroactivity doctrine has been moribund since the Court decided *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993).

8. 489 U.S. 288 (1989).

9. *See, e.g.*, Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013) (holding that, under "principles set out in *Teague*," a recent decision extending the scope of the Sixth Amendment "does not have retroactive effect."). The Court should stop using the rhetoric of "non-retroactivity," which implies (incorrectly) that current constitutional understandings do not "apply" on collateral review. *See infra* Part I.A. Instead, it should describe *Teague* in terms of how it functions: as a defense available to the government that limits the availability of remedies on collateral review. *See infra* notes 187-88 and accompanying text.

pursuant to groundbreaking decisions that have expanded criminal constitutional rights.[10]

Or think of those civil rights plaintiffs whose claims of constitutional infringement have succumbed to a qualified immunity defense because the law in question was not "clearly established" at the time of the challenged conduct.[11] Or of those criminal defendants denied suppression pursuant to one of many good-faith exceptions to the exclusionary rule.[12] Or of the many parties victimized by constitutional trial errors but denied redress on appeal or collateral review under harmless-error doctrines.[13] In fact, in rare circumstances, the Court has even blessed what might fairly be characterized as a withholding of remedies for ongoing constitutional violations of the type alleged in *Brown v. Plata*. Think here of cases applying statutory preclusion[14] or the various abstention doctrines[15] to redirect claimants to alternative forums from which to seek relief.

To understand why the Justices correctly assumed that relief was mandatory once the plaintiffs in *Brown v. Plata* had proved their claim—and the assumption was correct—we must have theories of (1) when and (2) how courts may withhold remedies for justiciable, properly raised, and

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10. *See Teague*, 489 U.S. at 305-14 (O'Connor, J., plurality opinion); *see also* 28 U.S.C. § 2254(d) (2012) (codifying a relitigation bar that is similar to, but distinct from, the *Teague* rule).

11. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (elaborating and refining the qualified immunity defense).

12. *See, e.g.*, United States v. Leon, 468 U.S. 897, 913, 926 (1984) (requiring the admission of evidence obtained by police officers who reasonably rely on a faulty search warrant).

13. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Chapman v. California, 386 U.S. 18, 23-24 (1967).

14. *See, e.g.*, Elgin v. Dep't of the Treasury, 132 S. Ct. 2126, 2130-31, 2140 (2012) (holding that a federal employee must assert a claim for ongoing injury under the Fifth Amendment's equal protection guarantee within a specified statutory scheme and not as a freestanding constitutional claim); Smith v. Robinson, 468 U.S. 992, 1009-13 (1984) (similar, with respect to handicapped children asserting claims for ongoing injury under the Equal Protection Clause).

15. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 49 (1971).

meritorious claims of constitutional right.[16] Unfortunately, the Supreme Court has not spoken with clarity on either of these important questions. This lack of rationalization has left the Court's doctrines for withholding constitutional remedies open to charges of incoherence from prominent and influential critics. The editors of the great Hart and Wechsler federal courts casebook imply, for example, that the Court has improperly discriminated in favor of property rights by mandating just compensation for takings[17] and remedies for the imposition of unconstitutional taxes,[18] while simultaneously developing remedy-limiting doctrines such as qualified immunity that operate to withhold relief for invasions of liberty interests.[19] Similarly, and for similar reasons, they suggest that, in *Reynoldsville Casket Co. v. Hyde*, the Court arbitrarily denied a civil tort plaintiff the benefit of an unconstitutionally generous statute of limitations on which the plaintiff reasonably had relied before the Court struck it down on dormant commerce clause grounds.[20] Why, they ask, did the Court view it as impermissible to withhold from a *defendant* the benefit of a

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16. Of course, one may defend the outcome in *Brown v. Plata* on the ground that the obligation to provide a remedy for proven constitutional violations is *always* binding. Many commentators have expressed some variation of this view. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987). While that is not how I see things, I do not in this Article engage this normative claim. Rather, I simply take as a given the legitimacy of what has become a common practice—courts withholding constitutional remedies—and seek to rationalize the practice within the context of what courts actually do.

17. *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 316 n.9 (1987).

18. *See* Reich v. Collins, 513 U.S. 106, 109-10 (1994).

19. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM, 741 (6th ed. 2009) [hereinafter FALLON ET AL., HART AND WECHSLER] (questioning the coherence of these rulings); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1827-28 (1991) [hereinafter Fallon & Meltzer, *New Law*] (making the argument explicitly).

20. *See* 514 U.S. 749, 753 (1995); FALLON ET AL., HART AND WECHSLER, *supra* note 19, at 722-23.

constitutional right that was not clearly established at the time the parties acted, given that courts regularly withhold from civil rights *plaintiffs* the benefits of constitutional law that was not clearly established at the time of the challenged conduct?[21]

In a previous paper, I sought to answer the "when" question (when do courts withhold relief for constitutional violations?) through a descriptive analysis that took as its point of entry a *functional* account of constitutional remedies, and not the historical legal/equitable paradigm that courts and commentators ordinarily use.[22] I demonstrated that the Supreme Court has limited its development of doctrines that withhold constitutional relief to claims for the sub-constitutional remedies that function as *substitutes*—i.e., damages, suppression, and the vacatur of judgments—for the life, liberty, or property interests irretrievably lost as the result of *wholly concluded* constitutional wrongs.[23] But when faced with justiciable, properly raised, and meritorious claims for *specific* remedies to ameliorate *ongoing* constitutional harms rooted in government custom or policy (as was the case in *Brown v. Plata*), the Court has behaved quite differently. It has regarded *some* form of relief as obligatory unless the case is a rare one calling for redirection of the claimant to an alternative forum.[24] I also preliminarily hypothesized that the Court's differential treatment of claims for substitutionary and specific remedies was appropriate in view of separation-of-powers concerns.[25]

In this Article, I address the "how" question (how should courts withhold constitutional remedies?) and develop my defense of the Supreme Court's approach to withholding constitutional remedies. I do so by responding to calls for a revival of a strand of the Warren Court's non-retroactivity

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21. *See* FALLON ET AL., HART AND WECHSLER, *supra* note 19, at 722-23.

22. *See* John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857 (2013) [hereinafter Greabe, *Constitutional Remedies*].

23. *See id.* at 863-92.

24. *See id.*; *see also supra* notes 14-15 and accompanying text.

25. *See* Greabe, *Constitutional Remedies*, *supra* note 22, at 892-96.

jurisprudence known as selective prospectivity, and to the charges of current doctrinal incoherence that serve as a backdrop to these calls.[26] I reject non-retroactivity and defend the Court's de facto, but untheorized, adoption of a purely remedy-limiting method for sometimes withholding relief for properly raised and meritorious assertions of constitutional rights. A purely remedy-limiting framework better rationalizes recent developments in constitutional lawmaking, allows for a contextual balancing of remedial interests in all cases where such balancing is appropriate, precludes such a balancing in all cases where it is inappropriate, and furthers separation-of-powers and federalism interests. A purely remedy-limiting framework thus provides concrete guidance on when courts may withhold relief from parties who have established constitutional injury, and when they may not. Crucially, it also accords respect to Article III limits on the judicial power—limits that non-retroactivity doctrines exceed.

I present my argument by considering how the Supreme Court should withhold constitutional remedies to manage the costs of constitutional innovation. I argue within this context for two reasons. First, the importance of managing the costs of constitutional innovation serves as the principal premise underlying Professor Toby Heytens' recent calls for a revival of non-retroactivity doctrine.[27] Second, I wholeheartedly agree with Professor Heytens' premise; the Court certainly should not generate and apply remedy-withholding doctrines in a manner that stifles constitutional development.[28] But as

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26. *See* Fallon & Meltzer, *New Law*, *supra* note 19, at 1733-38; Toby J. Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 596-97 (2012) [hereinafter Heytens, *Framework(s)*]; Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 972 (2006) [hereinafter Heytens, *Managing Transitional Moments*].

27. *See* Heytens, *Framework(s)*, *supra* note 26, at 621-25; Heytens, *Managing Transitional Moments*, *supra* note 26, at 972-93. In so arguing, Professor Heytens joins distinguished company. *See* Fallon & Meltzer, *New Law*, *supra* note 19, at 1811-12.

28. Indeed, I have previously written in support of this precise argument. *See* John M. Greabe, Mirabile Dictum!*: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999) [hereinafter Greabe, Mirabile Dictum!] (arguing that courts should be careful to avoid too frequently bypassing the merits of the pleaded constitutional claim and

I shall explain, a purely remedy-limiting framework adequately permits courts to manage the costs of constitutional change.

That said, my proposal does not merely seek to justify the episodic withholding of remedies to facilitate the continued development of constitutional law. Rather, it constitutes a general theory of when and how courts may withhold constitutional remedies—one that the Court has been effectively practicing since interring its non-retroactivity jurisprudence and should now formally recognize. It thus seeks to operationalize Professors Fallon and Meltzer's influential and convincing (although general) theory of constitutionally necessary remedies: that there should be a strong but not always unyielding presumption in favor of individually effective relief for every constitutional violation, and that there must exist a sufficient scheme of available remedies to ensure that constitutional rights do not become nullities.[29]

My argument proceeds as follows. The Supreme Court has permissibly fashioned doctrines that sometimes operate to withhold substitutionary remedies for wholly concluded constitutional wrongs.[30] Such doctrines are both necessary *and* sufficient to manage the costs of innovation, and for all other purposes that may serve as legitimate bases for withholding constitutional remedies. But the Constitution forbids similar remedy-limiting lawmaking—including the use of non-retroactivity doctrines—when courts face claims for specific constitutional remedies to ameliorate ongoing constitutional wrongs that are grounded in unlawful government custom or policy.[31] When such claims satisfy judicial entrance requirements and are meritorious, they should always yield, at the very least, a judgment that declares the underlying custom or policy unconstitutional and prospectively establishes the rights and duties of the

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thereby "freezing" constitutional law in civil rights cases involving meritorious assertions of the qualified immunity defense).

29. *See* Fallon & Meltzer, *New Law*, *supra* note 19, at 1788-89.

30. *See* Greabe, *Constitutional Remedies*, *supra* note 22.

31. *See infra* note 133 and accompanying text.

parties.[32] And they ordinarily should yield relief that goes beyond mere declaration.

The Article develops and defends this argument in three parts. Part I tells what on the surface appears to be a story of doctrinal chaos: over the past half-century, the Supreme Court has, without trans-substantive rationalization, variously employed non-retroactivity, forfeiture, and remedy-limiting doctrines to withhold constitutional remedies and thereby to manage the costs of constitutional change. Part II retells the messy story told in Part I as a comparatively coherent account of how, during the same time period, the Court has developed doctrines that operate to withhold substitutionary constitutional remedies for wholly concluded constitutional wrongs, but not specific remedies directed at ongoing constitutional violations. Part III argues that, although the individual doctrines that operationalize the Court's withholding of substitutionary constitutional remedies are in need of reform, a purely remedy-limiting *framework* is superior to non-retroactivity as a means for withholding constitutional remedies. Part III also defends the Court against the charges of incoherence that have been directed at its development and deployment of doctrines that withhold constitutional remedies, and that ground calls for a revival of non-retroactive constitutional rulings.

## I. MANAGING THE COSTS OF CONSTITUTIONAL INNOVATION: A CHAOTIC STORY OF NON-RETROACTIVITY, FORFEITURE, AND REMEDY-LIMITING DOCTRINES

When a court contemplates overruling a constitutional precedent or issuing a path-breaking constitutional decision, it also must consider how the ruling should affect similar cases commenced, or similar actions taken, prior to the decision's announcement. Constitutional innovation can be disruptive and costly. When the change expands constitutional protections—the messier scenario—it may call into question the fairness of pending and completed judicial

32. *See id.*

proceedings,[33] invalidate entrenched regulatory systems,[34] or condemn as unlawful government conduct for which compensation is authorized.[35] But even when the change contracts constitutional protections and makes way for more regulation, it may unsettle reliance interests.[36] Certainly, constitutional innovation would be more infrequent if judges lacked doctrinal tools to manage its costs.[37]

The decades since Earl Warren's chief justiceship have seen much in the way of constitutional innovation. Not coincidentally, and despite *Marbury*'s famous dictum that

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33. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (holding inadmissible evidence obtained from an interrogation inconsistent with specified procedures designed to protect the Fifth Amendment's privilege against self-incrimination and the Sixth Amendment's right to counsel); Mapp v. Ohio, 367 U.S. 643, 653-56 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949), and holding that state courts must exclude evidence seized in violation of the Fourth Amendment's ban on unreasonable searches and seizures).

34. *See, e.g.*, United States v. Booker, 543 U.S. 220, 248-49 (2005) (holding that the mandatory nature of the United States Sentencing Guidelines violates the Sixth Amendment's jury-trial right); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment requires the jury to make nearly all factual findings that increase the penalty for a crime beyond the statutory maximum).

35. *See, e.g.*, Davis v. Mich. Dep't of the Treasury, 489 U.S. 803, 817-18 (1989) (holding that a state violates the constitutional doctrine of intergovernmental tax immunity when it taxes retirement benefits paid by the federal government but exempts retirement benefits paid by the state or its political subdivisions); Owen v. City of Independence, 445 U.S. 622, 650-53 (1980) (holding that a city's failure to grant a former employee a hearing to clear his name violated the Fourteenth Amendment's Due Process Clause and exposed the city to monetary liability).

36. *Cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878-79 (1992) (narrowing the scope of the right to terminate a pregnancy protected by the Fourteenth Amendment's Due Process Clause but citing institutional and reliance interests in support of continuing to recognize the core of the right).

37. *See, e.g.*, John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 271-75 (2000) (explaining that there would be less constitutional reform without doctrines limiting the costs of such reform); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90-91 (1999) [hereinafter Jeffries, *Right-Remedy Gap*] (observing that immunity doctrines in constitutional tort cases reduce the costs of constitutional innovation).

rights-violations require remedies,[38] they also have seen significant experimentation in the creation and refinement of doctrines that operate to withhold relief from parties with well-founded and properly preserved constitutional claims. In a pair of excellent recent articles, Professor Toby Heytens has classified these doctrines into three overarching categories—"non-retroactivity," "forfeiture," and "remedy-limiting;"[39] showed that the Court has not adequately rationalized them; and joined Professors Richard Fallon and Daniel Meltzer in arguing for a revival of non-retroactivity doctrine to deal with the costs of disruptive change worked on direct review of criminal convictions.[40]

In Part III, I respond to the calls for a reinvigoration of non-retroactivity jurisprudence that Professors Heytens, Fallon, and Meltzer have advanced. But before doing so, I contextualize the argument by sketching the chaotic doctrinal backdrop from which it has emerged. For Professor Heytens is entirely correct: the Supreme Court has variously invoked non-retroactivity, forfeiture, and remedy-limiting doctrines to manage the costs of constitutional change without linking them or seeking to rationalize them in light of their common purposes.[41] Consequently, Part I unfolds as a story of messy and incomplete doctrinal development.

### A. *Non-Retroactivity*

Constitutional innovation within the American system principally occurs through path-breaking judicial rulings. As

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38. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

39. *See* Heytens, *Framework(s)*, *supra* note 26, at 603-10.

40. *See id.* at 625; Heytens, *Managing Transitional Moments*, *supra* note 26, at 993-94; *see also* Fallon & Meltzer, *New Law*, *supra* note 19, at 1811-12 (arguing that the Supreme Court should use selective prospectivity as a technique for withholding constitutional remedies).

41. *See* Heytens, *Framework(s)*, *supra* note 26, at 605-10. Professor Heytens focuses on constitutional change worked on direct review of criminal convictions. But his taxonomy quite helpfully organizes the Supreme Court's approach to managing the costs of constitutional change in all contexts—criminal and civil, and direct and collateral review.

previously explained, such rulings may be disruptive and costly. But prior to the 1960s, the Supreme Court never claimed a power to manage the costs of constitutional change by issuing a non-retroactive ruling—i.e., a ruling that would not apply to similar cases commenced, or similar actions taken, prior to its announcement. Indeed, for most of its history, the Court has taken the retroactive application of judicial rulings as a given.[42]

An early Supreme Court case, *United States v. Schooner Peggy*, shows the assumption of retroactive law-application in action.[43] The case interpreted a treaty provision that required the United States to return French vessels that had been captured but not "definitively" condemned as of the treaty date.[44] The question was whether the provision should apply to a French vessel that had been captured and condemned by a lower court judgment that was on appeal to the Supreme Court when the treaty became effective.[45] The Court held the provision operative and ordered that the ship be returned.[46] In the process, the Court rejected the argument that it should apply the law in effect at the time of the lower court judgment because an appellate court's role is to set aside only "erroneous" decisions.[47] (All agreed that the lower court decision was not "erroneous" when entered). The Court responded that it was under an obligation to enforce the provision and reverse the judgment because a court's role is to apply all binding law that is in effect when the court rules—as the treaty provision was when the Court addressed its applicability.[48]

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42. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

43. *See* 5 U.S. (1 Cranch) 103 (1801).

44. *Id*. at 109-10.

45. *Id.*

46. *Id*. at 108.

47. *Id*. at 108-10.

48. *See id*. at 110. If the treaty had specified that it should have only prospective effect, then the Court presumably would have so applied it. *See*

This answer reflected the then-prevalent understanding that judging does not involve lawmaking; it involves mere declaration of what the law *is*. To be sure, the Court struggled at times to abide strictly by this conception. For example, in a series of late-nineteenth and early twentieth century cases dealing with breaches of various contractual obligations, the Court declined to follow recent, law-changing state supreme court decisions making relief unavailable to the plaintiffs on state law grounds—federal courts usually followed such decisions even during the era of *Swift v. Tyson*[49]—and instead held that the plaintiffs were entitled to invoke the law in effect at the time of the underlying transaction in federal court.[50] But in doing so, the Court did not say that it was declining to apply "decision-time" law or treating the intervening decisions as prospective rulings inapplicable to prior transactions.[51] Rather, the Court invoked the *Swift* fiction, explained that it was applying what *it* saw as the governing law,[52] and carved out exceptions from its ordinary practice of deferring to state decisional law on state law questions where the state's decisional law was not "settled" in favor of the defendants at the time the Court addressed the issue.[53]

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Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1083 (1999).

49. 41 U.S. (16 Pet.) 1, 19 (1842) (holding that the common law decisions of state tribunals are only evidence of what the law is and not law themselves).

50. *See, e.g.*, Kuhn v. Fairmont Coal Co., 215 U.S. 349, 369-70 (1910); Burgess v. Seligman, 107 U.S. 20, 33-34 (1883); Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 205-06 (1863).

51. *See* Roosevelt, *supra* note 48, at 1080 (differentiating between the "decision-time result" and the "transaction-time result" in describing non-retroactivity jurisprudence). Professor Roosevelt's superb article provides a detailed account of these municipal bond default cases, *see id.* at 1084-87, and, more generally, the trajectory of non-retroactivity jurisprudence in American law. *See generally id.* at 1080-103.

52. *See* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 540-41 (1941) (describing *Burgess* and *Kuhn* as relying on federal independence and not non-retroactivity); *Gelpcke*, 68 U.S. at 206-07 (reasserting federal independence from state decisional law).

53. *See Burgess*, 107 U.S. at 32-34; *see also* Roosevelt, *supra* note 48, at 1086-87.

In the twentieth century, the Supreme Court moved beyond Blackstonian notions of law and the judicial function and acknowledged that judging involves law creation.[54] This acknowledgment opened the door to the possibility of rulings that would apply "transaction-time" law, instead of "decision-time" law, in situations where application of transaction-time law seemed more equitable or practical.[55] In 1932, the Supreme Court recognized the constitutionality of the practice when undertaken by state courts.[56] But throughout the 1940s and 1950s, the Court itself continued to follow the approach of *Schooner Peggy* and apply decision-time law when confronted with the question whether it should apply law-changing legislation[57] or judicial decisions[58] to cases commenced, or events occurring, under earlier legal regimes. Indeed, in 1940, the Court went so far as to repudiate earlier decisions to the contrary[59] and to hold that federal courts "should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."[60]

As Professor Kermit Roosevelt has put it, while "[t]here were flickers of [federal non-retroactivity following *Erie*'s repudiation of *Swift*], . . . it was not until the late 1960s that

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54. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938) (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), and its conception of law as a "brooding omnipresence").

55. *See* Roosevelt, *supra* note 48, at 1078.

56. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 366 (1932). *But see* James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062, 1065-66 (1984) (arguing that *Sunburst* should be read to authorize only prospective, law-changing state court rulings on statutory and common law issues, but *not* constitutional issues).

57. *See, e.g.*, Carpenter v. Wabash Ry. Co., 309 U.S. 23, 29 (1940).

58. *See, e.g.*, Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 541-43 (1940).

59. *See supra* note 50 and accompanying text.

60. *Vandenbark*, 311 U.S. at 543. The repudiation here was not of prospective rulings; it was of *Burgess* and *Kuhn*'s use of the *Swift* fiction to treat the intervening, law-changing decision as prospective. *See supra* notes 49-53 and accompanying text.

these sparks found tinder. It was then that the Court found a need to engage in prospective overruling; [and] . . . the question of retroactivity truly emerged."[61] By the late 1960s, the Warren Court's overhauling of the law of constitutional criminal procedure was well underway. In 1961, in *Mapp v. Ohio*,[62] the Supreme Court had overruled its earlier decision in *Wolf v. Colorado*[63] to hold that state courts must exclude evidence seized in violation of the Fourth Amendment.[64] In 1965, in *Linkletter v. Walker*,[65] the Court considered whether *Mapp* should lead it to set aside on collateral review a pre-*Mapp* state court decision involving a pre-*Mapp* search.[66] The Court declined to vacate the judgment. Instead, it applied a three-factor test that looked to the purpose of the new *Mapp* rule, reliance interests, and the practical effects of retroactive law application.[67] The Court held that *Mapp* should not operate retroactively on cases "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for a petition for certiorari had elapsed before . . . *Mapp*."[68]

*Linkletter* provoked a firestorm of commentary and criticism[69]—especially with respect to its unexplained

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61. Roosevelt, *supra* note 48, at 1089 (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring) and Mosser v. Darrow, 341 U.S. 267, 275 (1951) (Black, J., dissenting)).

62. 367 U.S. 643, 655 (1961).

63. 338 U.S. 25, 33 (1949).

64. *Mapp*, 367 U.S. at 660.

65. 381 U.S. 618, 621-22 (1965).

66. *See id.* at 619-20.

67. *See id*. at 637-38.

68. *Id.* at 622 n.5.

69. *See, e.g.*, Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1565-66 (1975); Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 201-04 (1965); James B. Haddad, *"Retroactivity Should be Rethought": A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L. & CRIMINOLOGY 417 (1969); Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 763 (1966).

distinction between cases on direct and collateral review[70]—but non-retroactivity analysis quickly became the Warren Court's principal method for managing the costs of its rights-expanding changes to the law of constitutional criminal procedure.[71] In *Stovall v. Denno*, the Court reformed its approach to hold that rulings establishing new rights must apply to the parties in the cases in which they are announced.[72] But their application to all *other* cases—whether arising on direct or collateral review—were to be judged by *Linkletter*'s purpose-reliance-effect test.[73] The result was a rule of "selective prospectivity" that integrated the treatment of cases on direct and collateral review but discriminated between otherwise identically situated defendants on a seemingly more arbitrary ground: whether the defendant happened to be the party in whose case the new rule was announced.[74]

The *Stenno* selective prospectivity regime did not sit well with Justice Harlan, who in a series of concurrences and dissents[75] developed an entirely different approach. Starting from the premise that courts *always* should decide cases according to their best understanding of the law, Justice

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70. *See* Roosevelt, *supra* note 48, at 1090 (noting that the unexplained distinction between direct and collateral review drawn in *Linkletter* led to a denial of Linkletter's habeas petition even though the unlawful search he endured occurred *after* the search in *Mapp*, whose fruits were suppressed).

71. Heytens, *Framework(s)*, *supra* note 26, at 605 (explaining how the Warren Court used non-retroactivity doctrine to manage the costs of its law-changing rulings in Miranda v. Arizona, 384 U.S. 436 (1966), Katz v. United States, 389 U.S. 347 (1967), United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967)).

72. 388 U.S. 293, 301 (1967).

73. *Id.* at 296-301. This reform ameliorated the perceived unfairness in applying *Mapp* to searches challenged on direct review but not to later-occurring searches challenged on collateral review. *See supra* note 70 and accompanying text.

74. *See* Roosevelt, *supra* note 48, at 1092-93.

75. *See* Williams v. United States, 401 U.S. 646, 675 (1971) (Harlan, J., dissenting); Elkanich v. United States, 401 U.S. 646, 675 (1971) (Harlan, J., concurring); Mackey v. United States, 401 U.S. 667, 675-81 (1971) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256-58 (1969) (Harlan, J., dissenting).

Harlan thought it clear that path-breaking constitutional rulings must apply to *all* cases on direct review.[76] But he also thought it permissible for the Court to differentiate between cases arriving on direct and collateral review because the principal purpose of collateral review—deterring trial and appellate courts from ignoring established constitutional standards—was not ordinarily served by the application of decision-time law.[77] In Justice Harlan's view, only path-breaking constitutional rulings that held previously punishable conduct to be constitutionally protected, or that recognized a new right of procedure that is implicit in the concept of ordered liberty, should give rise to relief on collateral review; otherwise, the interest in the finality of state-court judgments should prevail.[78]

Over time, the Supreme Court came to accept Justice Harlan's positions. In 1987, in *Griffith v. Kentucky*, the Court held that all new rules of constitutional criminal procedure must apply retroactively on direct review.[79] The ruling rested on two "basic norms of constitutional adjudication."[80] First, "the nature of judicial review" strips the Court of the quintessentially "legislative" prerogative of making rules prospective only.[81] Second, the "selective application of new rules violates the principle of treating similarly situated [parties] the same.[82] In 1989, in *Teague v. Lane*, the Court effectively accepted Justice Harlan's formulation with respect to collateral review as well.[83] Thus, since the late

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76. *Mackey*, 401 U.S. at 679 (Harlan, J., concurring) ("Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from th[e] model of judicial review [requiring courts to decide cases according to their best understanding of the law].").

77. *See Desist*, 394 U.S. at 260-63 (Harlan, J., dissenting).

78. *Mackey*, 401 U.S. at 692 (Harlan, J., concurring).

79. *See* 479 U.S. 314, 320-28 (1987).

80. *Id.* at 322.

81. *Id.*

82. *Id.* at 323.

83. *See* 489 U.S. 288, 305-13 (1989) (O'Connor, J., plurality opinion) (reformulating Justice Harlan's second exception into one holding that a court on

1980s, non-retroactivity doctrine has played no role on direct review of criminal convictions. But the Court continues its unhelpful[84] use of the rhetoric of "non-retroactivity" and "prospectivity" to describe the limited availability of relief on collateral review under law-changing, rights-expanding decisions.[85]

Non-retroactivity doctrine experienced a somewhat similar rise and fall in the context of civil litigation. In 1971, in *Chevron Oil Co. v. Huson*, the Supreme Court adopted a tripartite non-retroactivity test similar to the *Linkletter* framework and used it to relieve the plaintiff from the effect of an intervening Court decision that otherwise would have rendered his claim—which was timely under circuit precedent on the date it was filed—outside of the applicable statute of limitations.[86] The Court applied the *Chevron Oil* rule throughout the 1970s and 1980s.[87] And, as late as 1990, in *American Trucking Ass'ns v. Smith*, a Court plurality invoked the rule to limit a state's liability for an unconstitutional tax to the period following the date on which the Court issued a decision (in a different case) making apparent the tax's unconstitutionality.[88] But, in 1993, in *Harper v. Virginia Department of Taxation*, a Court majority

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collateral review may apply a new rule that implicates the fundamental fairness of the trial and is necessary to prevent a serious diminishment of the likelihood of an accurate conviction). Since *Teague*, Supreme Court majorities have repeatedly endorsed Justice O'Connor's plurality opinion and thereby made its proposed standard binding law. *See* FALLON ET AL., HART & WECHSLER, *supra* note 19, at 1242.

84. *See supra* note 9 and accompanying text.

85. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, which imposed a re-litigation bar that is similar to but distinct from the *Teague* rule. *See* 28 U.S.C. § 2254(d) (2012) (codifying re-litigation bar); *see also* Horn v. Banks, 536 U.S. 266, 272 (2002) (per curiam) (observing that the statutory and *Teague* inquiries are distinct).

86. *See* 404 U.S. 97, 106-08 (1971), *abrogated by* Harper v. Va. Dep't of Taxation, 509 U.S. 86 (1993).

87. *See, e.g.*, Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

88. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 178-83 (O'Connor, J., plurality opinion). Justice Scalia supplied the fifth vote for the case's non-retroactive result because he did not believe the tax in question to be unconstitutional. *See id.* at 202-04 (Scalia, J., concurring in the judgment).

repudiated *Chevron Oil*'s non-retroactivity principle in the civil context under reasoning that closely tracked the analysis employed in *Griffith*.[89] And, in 1995, in *Reynoldsville Casket Co. v. Hyde*, the Court unambiguously reiterated that *Harper* had abrogated *Chevron Oil*.[90]

B. *Forfeiture*

As Professor Heytens has observed, rights-expanding criminal constitutional rulings did not end with the Warren Court.[91] Yet the demise of non-retroactivity doctrine forced the Supreme Court to find other ways to manage the costs of constitutional innovation. In the context of direct review of criminal convictions, one vehicle that the modern Court has put to energetic use has been the "forfeiture" principle grounded in the "plain-error" doctrine. The plain-error doctrine finds its roots in the Court's 1896 decision in *Wiborg v. United States*.[92] In that case, the Court reversed the convictions of two criminal defendants for evidentiary insufficiency even though the defendants had not raised sufficiency challenges at trial. The Court asserted a power to notice a "plain error" in such circumstances because the "matter [was] so absolutely vital to defendants."[93]

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89. *See Harper*, 509 U.S. at 94-99.

90. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995).

91. *See* Heytens, *Managing Transitional Moments*, *supra* note 26, at 931-40. Professor Heytens discusses United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Crawford v. Washington, 541 U.S. 36 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000); and United States v. Gaudin, 515 U.S. 506 (1995). *Gaudin* held that the Constitution requires the jury to determine materiality in prosecutions for perjury and false statements. *Apprendi* held the Constitution requires the indictment to charge all facts and the jury to make nearly all factual findings that increase the penalty for a crime beyond the statutory maximum. *Crawford* held that the Constitution bars the use of out-of-court testimonial statements used for their truth value against the defendant. *Blakely* and *Booker* held that the *Apprendi* rule invalidates state and federal guidelines sentencing schemes insofar as they mandate certain sentencing outcomes on the basis of required judicial fact-finding.

92. *See* Wiborg v. United States, 163 U.S. 632, 659 (1896).

93. *Id.* at 658-59. Professor Heytens' article on managing transitional moments provides a more detailed account of the development of the criminal plain-error

The authority to vacate criminal judgments on the basis of a plain error to which no objection was raised is now expressed in Federal Rule of Criminal Procedure 52(b).[94] The Rule confers on the federal courts an entirely discretionary power: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[95] In 1993, in *United States v. Olano*, the Supreme Court explained how courts should decide whether to notice a Rule 52(b) error.[96] First, there must have been an error, which is defined as "[d]eviation from a legal rule."[97] Second, the error must have been "plain," meaning "clear" or "obvious."[98] Third, the error must have "affected substantial rights," meaning "prejudicial."[99] Finally, the error must have "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[100]

The *Olano* Court reserved the question of how plain-error review should be conducted in a context where the governing law changed after entry of the lower court's judgment, but the defendant had failed to object and preserve the issue for appellate review.[101] Four years later, in *Johnson v. United States*,[102] the Court took up this problem. The question in *Johnson* was whether the Eleventh Circuit had erred in declining to exercise its Rule 52(b) authority to notice *Gaudin* error—failure to submit the issue of materiality to the

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doctrine. *See* Heytens, *Managing Transitional Moments*, *supra* note 26, at 945-53.

94. *See* FED. R. CRIM. P. 52(b). In 2003, a court's authority to notice plain error was also expressly recognized by the Federal Rules of Civil Procedure. The relevant provision, FED. R. CIV. P. 51(d)(2), authorizes courts to notice plain error in civil jury instructions "if the error affects substantial rights." The provision was written to conform to FED. R. CRIM. P. 52(b). *See* FED. R. CIV. P. 51(d) advisory committee's note.

95. FED. R. CRIM. P. 52(b).

96. *See* 507 U.S. 725, 731-37 (1993).

97. *Id.* at 732-33.

98. *Id.* at 734 (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985)).

99. *Id.*; *see also* FED. R. CRIM. P. 52(b).

100. *Id.* at 736 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

101. *See id.* at 734.

102. 520 U.S. 461 (1997).

jury[103]—in a federal perjury prosecution tried before *Gaudin* was decided.[104] The Court unanimously held that the Eleventh Circuit had not erred.[105] In reaching this conclusion, the Court agreed with the defendant that there had been a "plain" error: "In a case . . . where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration."[106] But even on the assumption that the error had affected Johnson's "substantial rights" and thus caused her prejudice, it had not "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[107] The reason? The evidence against the defendant had been overwhelming, and the materiality issue had been essentially uncontested at trial and on appeal.[108]

The Supreme Court has used a similar approach to manage the fallout from two other recent decisions that worked massive changes in constitutional criminal procedure. In 2002, in *United States v. Cotton*, the Court reversed the Fourth Circuit's decision to notice *Apprendi* error—failure of the indictment to charge and the jury to find facts that increased the defendants' sentences beyond the statutory maximum[109]—to which no objection was lodged during the trial of a large federal criminal drug conspiracy that concluded before *Apprendi* was decided.[110] The Court disagreed with the lower court's determination that the error had affected the fairness, integrity, or public reputation of judicial proceedings because, again, the evidence supporting the findings was overwhelming and essentially

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103. United States v. Gaudin, 515 U.S. 506, 522-23 (1995).

104. *Johnson*, 520 U.S. at 464.

105. *Id.* at 463.

106. *Id.* at 468. Last Term, in *Henderson v. United States*, the Court extended this rule so that it now also covers situations in which the law was unsettled at the time of trial. *See* Henderson v. United States, 133 S. Ct. 1121, 1125-31 (2013).

107. *Johnson*, 520 U.S. at 469 (internal quotation marks omitted).

108. *Id.* at 470.

109. *See supra* note 91 and accompanying text.

110. *See* United States v. Cotton, 535 U.S. 625, 629 (2002).

uncontested.[111] And, in 2005, in *United States v. Booker*—which held unconstitutional the statute that had made the Federal Sentencing Guidelines mandatory[112]—the Court effectively admonished lower courts to follow the example set in *Cotton* and to "apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test."[113]

### C. *Remedy-Limiting Doctrines (Part I)*

Professor Heytens uses the Supreme Court's 2011 decision in *Davis v. United States*[114] to exemplify the third method within his taxonomy of approaches that the Supreme Court has used to manage the costs of constitutional change—those cases in which the Court has developed doctrines to limit remedies in the wake of a path-breaking constitutional ruling.[115] Until 2009, lower courts had widely held that police officers are entitled to search the entire passenger compartment of a vehicle whose driver has been lawfully arrested.[116] But in *Arizona v. Gant*, the Court held that such searches are permissible only in circumstances where the arrestee is within reach of the compartment at the time of the search or where there is a reasonably held belief that the vehicle contains evidence of the offense that spurred the arrest.[117]

The question in *Davis* was whether to require the suppression of evidence obtained pursuant to a pre-*Gant* search in a case pending on direct review at the time *Gant* was decided.[118] Forfeiture was not an available ground for denying relief because the defendant's attorney had anticipated the Supreme Court's ruling in *Gant* and, on that

111. *Id.* at 633.

112. *See supra* text accompanying note 91.

113. *See* 535 U.S. 220, 268 (2005).

114. 131 S. Ct. 2419 (2011).

115. *See* Heytens, *Framework(s)*, *supra* note 26, at 607-08.

116. *See Davis*, 131 S. Ct. at 2424.

117. *See* 556 U.S. 332, 351 (2009).

118. *See Davis*, 131 S. Ct. at 2428.

basis, moved to suppress the evidence seized from the defendant's car.[119] But the Court still refused to set aside the judgment of conviction. Relying on three lines of precedent holding that there is no constitutional right to the exclusion of evidence obtained in violation of the Fourth Amendment,[120] that the sole purpose of exclusion is deterrence,[121] and that the exclusion remedy should be ordered only when a court believes that its deterrence benefits outweigh its costs,[122] the Court concluded that exclusion is unwarranted in circumstances where a search is conducted in objectively reasonable reliance on a binding judicial precedent.[123] The Court's decision in *Davis* thus joins lines of authority from across remedial contexts authorizing courts to withhold remedies for violations of constitutional rights.[124] I shall have more to say about these lines of authority—which, in addition to criminal procedure cases, also arise from cases sounding in constitutional tort, appellate procedure, and the procedures governing collateral review—in Part II.

## II. THE STORY RETOLD: A FUNCTIONAL ACCOUNT OF CONSTITUTIONAL REMEDIES

Part I tells the story of a Supreme Court engaged in inconsistent and badly theorized experimentation as it seeks to identify a principled approach to managing the costs of constitutional innovation that is consistent with Article III and the presumption that rights-violations ordinarily require remedies.[125] Part II looks at the Court's behavior from a different perspective. Employing a functional account of constitutional remedies instead of the usual law/equity paradigm, Part II canvasses the circumstances in which the Court has created remedy-limiting doctrines to advance the

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119. *Id.* at 2426.

120. *See* Stone v. Powell, 428 U.S. 465, 486 (1976).

121. *See* Herring v. United States, 555 U.S. 135, 141 & n.2 (2009).

122. *See id.* at 141.

123. *See Davis*, 131 S. Ct. at 2426-28.

124. *See infra* Part II.

125. *See supra* note 29 and accompanying text.

perceived public interest—a practice that I call "public interest balancing."[126]

This overview will demonstrate that the Court has limited itself to withholding remedies through public interest balancing only when the claimant seeks a substitute for a constitutionally protected interest irretrievably lost as a result of a wholly concluded violation. By contrast, when the claimant seeks a specific remedy to ameliorate an ongoing constitutional harm rooted in government custom or policy (which pretty much describes the entire universe of situations in which specific relief is available), the Court has regarded *some* form of relief as obligatory, even though it has sometimes redirected the claimant to an alternative forum with instructions to seek relief there.

To be sure, the Court has never sought to explain or justify its change-management techniques through such a functional account of constitutional remedies. But it should. The Court's actual creation of doctrines that withhold remedies—to reduce the costs of constitutional innovation or for any other purpose—fits snugly within this retold story. Moreover, as Part III shows, the Court's behavior has been both respectful of constitutional boundaries and suggestive of a workable framework for the creation and modification of remedy-limiting doctrines in those circumstances—but *only* those circumstances—where courts may appropriately apply such a doctrine. The Court should rationalize and provide a trans-substantive defense of what it has in fact been doing.

### A. *Why a Functional Account?*

Lawyers usually classify remedies in historical terms—as either "legal" or "equitable." Unfortunately, speaking of remedies in law/equity terms often obscures the realities of modern practice. For example, the conventional account of our remedial tradition holds that courts may exercise their equitable powers to withhold remedies that undermine the

126. In Part II, I distill the comprehensive account of the Supreme Court's approach to public interest balancing that I provided in a recent paper. *See* Greabe, *Constitutional Remedies*, *supra* note 22, at 863-92. Readers interested in greater detail should consult this earlier work.

public interest.[127] And a court's equitable powers are most commonly associated with the issuance of *specific* remedies.[128] Yet the practice of public interest balancing should not be associated with the Court's issuance of specific *constitutional* remedies. For the Court's practice has been routinely to award relief responsive to ongoing unlawful government custom or policy—and not to engage in public interest balancing—when specific relief is available to redress meritorious claims of constitutional right brought at a proper time and in a proper forum.[129] Indeed, the modern Court has used public interest balancing *exclusively* in the context of developing remedy-limiting doctrines applicable to claims for *substitutionary* relief—a form of relief most commonly associated with a court's *legal* powers.[130] As a consequence, the conventional account of our remedial tradition has things backwards when it comes to constitutional remedies.[131]

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127. *See, e.g.*, Salazar v. Buono, 130 S. Ct. 1803, 1816 (2010); Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 373-75 (2008); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-13 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 327-30 (1944); Greathouse v. Dern (*ex rel.* Dern), 289 U.S. 352, 360-61 (1933).

128. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 6 (4th ed. 2010) (noting that "most equitable remedies are specific").

129. *See infra* Part II.B.

130. *See infra* Part II.B; *see also* LAYCOCK, *supra* note 128, at 6 (noting that "[m]ost legal remedies are substitutionary" but also observing that "there are . . . exceptions in both directions" that make the law/equity distinction an inadequate proxy for the substitutionary/specific distinction).

131. Professor Laycock has provided a succinct explanation of why the law/equity distinction confuses more than it clarifies:

> The line between law and equity is largely the result of a bureaucratic fight for turf; each set of courts [i.e., the separate law and equity courts that existed both in England and throughout the United States prior to last century's merger of law and equity] took as much jurisdiction as it could get. Consequently, the line is jagged and not especially functional; it can only be memorized. Damages are the most important legal remedy; in general, compensatory and punitive damages are legal. Injunctions and specific performance decrees are the most important equitable remedies; some of the specialized coercive remedies, such as mandamus, prohibition, and habeas corpus, are legal. Declaratory judgments were created by statute after the merger, so they are not classified either way; most of the older, more specialized declaratory remedies are equitable.

In the context of constitutional litigation, it is far less confusing to use functional terms, rather than law/equity labels, to analyze the Supreme Court's creation and use of remedy-limiting doctrines to protect the public interest. Functionally speaking, "[t]he most fundamental remedial choice is between substitutionary and specific remedies."[132] And in the context of constitutional remedies, the difference between the two is as follows. Specific constitutional remedies "permit a right-holder to halt an ongoing, or avoid an imminent, unconstitutional deprivation of life, liberty, or property; in other words, they provide or restore to the right-holder the very freedom, interest, or thing that the Constitution promises."[133] Substitutionary constitutional

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Restitution was developed independently in both sets of courts; some restitutionary remedies are legal, some equitable, and some both.

LAYCOCK, *supra* note 128, at 6.

132. *Id.* at 5 (quoting DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 12-13 (Oxford Univ. Press 1991)).

133. Greabe, *Constitutional Remedies*, *supra* note 22, at 866. I constructed this definition on the foundation provided by Professor Colleen Murphy's instrumental definition of the general difference between specific and substitutionary remedies: "[S]pecific remedies provide the original thing or condition to which the [claimant] was entitled, while substitutionary remedies provide something else." Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119, 126 (2006); *see also* JAMES M. FISCHER, UNDERSTANDING REMEDIES § 2.2, at 4 (2d ed. 2006) ("A substitutional remedy is something other than a specific remedy."). Of course, there are situations in which a claimant securing a judgment ordering a specific remedy will still suffer the lingering effects of the unconstitutional custom or policy at which the remedy is directed. The Court's desegregation cases, starting with *Brown v. Board of Education*, and its famous remedial directive that the school defendants need only desegregate "with all deliberate speed," provide examples of cases where plaintiffs were able to secure a declaration of unconstitutionality, but little else in terms of on-the-ground change. 349 U.S. 294, 301 (1955) ("*Brown II*"). *Brown v. Plata* provides another example with respect to those convicts whose sentences expired before any actual relief from overcrowding was achieved. *See* Brown v. Plata, 131 S. Ct. 1910 (2011); *supra* notes 1-4 and accompanying text. Yet these cases differ materially and significantly from those cases where courts deny substitutionary remedies altogether under doctrines such as qualified immunity, exceptions to the exclusionary rule, and harmless-error principles. For cases such as *Brown II* and *Plata* declare unconstitutional and render prospectively illegal—and subject to enforcement through the court's contempt power—a custom or policy that had been affirmatively causing the claimant an ongoing Article III injury up to the time of judgment. Some would say that this is not much, and many would say that it is not enough. But at a minimum, such a judgment delivers to the claimant

remedies, on the other hand, "provide something else to victims of constitutional violations—usually . . . because the violation is wholly realized by the time it is raised in court and therefore cannot be headed off, halted, or undone."[134] As we shall see, the contrast between the Supreme Court's willingness to develop remedy-limiting doctrines to advance the public interest in connection with claims for substitutionary constitutional remedies, and its refusal to do so in connection with claims for specific constitutional remedies, is telling.[135]

An additional prefatory comment also is warranted. Readers should not misread the account that follows as one that ascribes constitutional significance to remedial *labeling*—i.e., whether a remedy is classified as "substitutionary" or "specific." Of course, the labeling does not do the constitutional work; rather, it is how the remedy *functions*. Other distinctions focusing on function—for example, one that distinguishes between whether a litigant is attempting to deploy a constitutional right as either a "sword" or a "shield" in service of a request for relief[136]—might serve to illustrate my principal point nearly as well. I have elected to focus on the Supreme Court's differential treatment of substitutionary and specific constitutional remedies because the distinction quite helpfully illuminates a boundary that, I suggest, *is* of constitutional dimension: that between, on the one hand, the concluded constitutional wrongs, typically worked by individuals exercising discretionary government power, for which courts may provide the victim only with some sub-constitutional *substitute* for the irretrievably lost interest; and, on the other

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a statement of prospective rights and duties between the parties that can serve as the basis for additional, future relief from the court. This is not wholly without value.

134. Greabe, *Constitutional Remedies*, *supra* note 22, at 866 (internal quotation marks and footnote omitted); *see also* Murphy, *supra* note 133, at 137-38 & n.111 (explaining that remedies for harms that have accrued prior to the judgment date are usually substitutionary).

135. *See infra* Parts II.C and III.

136. *See* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

hand, ongoing constitutional wrongs, typically rooted in government custom or policy, for which courts often have the capacity to *provide or restore* to the victim that which has been, or imminently will be, unlawfully compromised.[137]

## B. *Substitutionary Versus Specific Constitutional Remedies*

The paradigmatic substitutionary remedy is a monetary damage award. Indeed, remedies treatises often speak as though this is the *only* substitutionary remedy.[138] Certainly, a judgment directing the defendant to pay money damages to the victim of a constitutional wrong is a prototypical substitutionary constitutional remedy. Such judgments almost always run against individual defendants who have misused government power—under the causes of action authorized against federal defendants by *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*[139] and state defendants by 42 U.S.C. § 1983[140]—because sovereign immunity shields the federal government from damages claims[141] and the states themselves are not "person[s]" subject to suit under Section 1983.[142]

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137. *See infra* Part III; *see also supra* notes 133-34 and accompanying text.

138. *See, e.g.*, FISCHER, *supra* note 133, § 2.2, at 4; ROBERT N. LEAVELL ET AL., EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 1 (7th ed. 2005) ("Substitutionary relief substitutes money for the specific relief.").

139. 403 U.S. 388 (1971).

140. In relevant part, the statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation or any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2012).

141. *See* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994).

142. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989). Municipalities also are "person[s]" suable under Section 1983 and, in relatively rare circumstances, have been held liable in damages for harm caused by their unlawful customs or policies. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 700-01 (1978). Indeed, municipalities are the *only* government entities subject to damages judgments for constitutional violations. But municipal "custom or

Yet in the constitutional context, two other substitutionary remedies also are common. The first is a judicial order excluding at trial evidence obtained as the result of a prior, wholly concluded constitutional violation—e.g., violations of the Fourth Amendment and certain violations of the Fifth and Sixth Amendments.[143] The second is a judicial order invalidating a judgment infected by any constitutional error other than a previous failure to nullify an unconstitutional statute or regulation by which the government has brought, or seeks to bring, an enforcement action.[144] With respect to exclusion, one must distinguish between orders that provide substitutionary relief because they "remediate" earlier, wholly concluded constitutional violations, and those that merely vindicate constitutional *trial* rights in present time and therefore are not properly viewed as "remedies" at all.[145] And with respect to the invalidation of judgments, we must bear in mind that the

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policy" liability has been defined so narrowly that it is exceptionally difficult to establish. *See, e.g.*, Jeffries, *Right-Remedy Gap*, *supra* note 37, at 93. Thus, as noted in the text, damages awards for constitutional torts almost always run against individuals.

143. *See* Kansas v. Ventris, 556 U.S. 586, 590-92 (2009) (observing that violations of the Fourth Amendment and certain Fifth and Sixth Amendment rights are wholly concluded prior to trial, and holding that the same is true with respect to violations of the Sixth Amendment right to counsel recognized in Massiah v. United States, 377 U.S. 201 (1964)); *see also* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989).

144. A ruling in favor of the subject of an enforcement action that the statute authorizing the action is unconstitutional—whether facially or as-applied and whether rendered by a trial or a reviewing court—is perhaps the most fundamental of *specific* remedies; it restores to its beneficiary the liberty or property right that is being wrongfully deprived by the enforcement action. *See* FALLON ET AL., HART & WECHSLER, *supra* note 19, at 718; John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1391-92 (2007).

145. I place the word "remediate" in quotation marks because the purpose of exclusion is deterrence and not to compensate the victim for the right-violation. *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 & n.2 (2009).

order of invalidation may come from a trial judge,[146] on direct review of the judgment,[147] or on collateral review.[148] But both types of order—exclusion and vacatur—often only supply substitutionary remedies; both often provide only "something else" in response to a prior, wholly realized deprivation of an interest protected by the Constitution.[149]

There also are a number of specific constitutional remedies—remedies that provide or restore the very freedom, interest, or thing that the Constitution promises to the right-holder. The most fundamental specific remedy—a ruling in favor of the subject of an enforcement action that the statute authorizing the action is unconstitutional on its face or as applied (and the concomitant dismissal or enjoinment of the enforcement action)—already has been mentioned.[150] Other

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146. *See, e.g.*, FED. R. CIV. P. 59 (new trial or alteration or amendment of a judgment); FED. R. CIV. P. 60 (relief from judgment or order); FED. R. CRIM. P. 29 (acquittal); FED. R. CRIM. P. 33 (new trial).

147. *See, e.g.*, 28 U.S.C. § 1291 (2012) (authorizing appeals from final decisions of federal district courts); 28 U.S.C. § 1292 (2012) (authorizing appeals from some interlocutory decisions of federal district courts).

148. *See, e.g.*, 28 U.S.C. § 2254 (2012) (authorizing collateral attacks on state court judgments); 28 U.S.C. § 2255 (2012) (authorizing collateral attacks on federal court judgments).

149. Courts also have issued a fourth type of non-specific constitutional remedy: a provision of a structural reform injunction that outruns the underlying constitutional violation that justified judicial intervention in the first instance. *See, e.g.*, LAYCOCK, *supra* note 128, at 311 (observing that the remedial decree upheld in Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971), contained provisions that far exceeded the scope of the constitutional violation); *id.* at 330 (similar, with respect to a remedial decree, upheld in Hutto v. Finney, 437 U.S. 678 (1978), that prohibited Arkansas prisons from placing inmates into punitive isolation for more than 30 days); Jeffries & Rutherglen, *supra* note 144, at 1387. In recent years, however, the Supreme Court has emphasized that structural reform injunctions should be entirely restorative. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1929 (2011) (recognizing the authority of courts to enter orders limiting prison populations when "necessary to ensure compliance with a constitutional mandate"); *id.* at 1940 (observing that the Court has "rejected remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution"); *id.* at 1944 ("Of course, courts must not confuse professional standards with constitutional requirements."). So it is at the very least doubtful that this final type of non-specific constitutional remedy still passes constitutional muster.

150. *See supra* note 144 and accompanying text.

specific constitutional remedies are provided through injunctions, declarations, or judicial rulings that proscribe ongoing or imminent violations of individual rights other than unconstitutional enforcement actions;[151] the provision of access to a judicial officer through the Great Writ of habeas corpus (so long as Congress has not lawfully suspended its availability);[152] just compensation for takings;[153] and the guarantee of an effective remedy for the coercive collection of an unconstitutional tax, duty, or fee.[154]

Note the fundamental difference between those constitutional violations that typically give rise to a substitutionary remedy and those that typically give rise to a specific remedy. Situations calling for the imposition of substitutionary constitutional remedies typically involve

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151. *See, e.g.*, Plata, 131 S. Ct. (seeking specific relief responsive to allegedly unconstitutional prison overcrowding); Webster v. Doe, 486 U.S. 592 (1988) (seeking specific remedy of reinstatement to federal employment for claimed unlawful discharge on the basis of unconstitutional sexual orientation discrimination). I here emphasize "individual rights" because the Supreme Court recently has shown a discomfort with at least some claims seeking to enforce structural provisions of the Constitution, such as the Supremacy Clause. *See* Douglas v. Indep. Living Ctr. of S. Cal., 132 S. Ct. 1204 (2012); Stephen I. Vladek, Douglas *and the Fate of* Ex Parte Young, 122 YALE L.J. ONLINE 13 (2012), http://www.yalelawjournal.org/forum/douglas-and-the-fate-of-ex-parte-young.

152. *See* Boumediene v. Bush, 553 U.S. 723 (2008). Contrast this most elemental and specific form of habeas corpus, presently available through 28 U.S.C. § 2241 (2012), with the collateral review habeas corpus mechanisms provided by 28 U.S.C. §§ 2254, 2255 (2012), which are vehicles for providing *substitutionary* relief.

153. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (noting that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation"). Recently, the Supreme Court reiterated that the obligation to provide just compensation for a taking is a "categorical duty." Ark. Game and Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012) (citations and internal quotation marks omitted).

154. *See* Reich v. Collins, 513 U.S. 106, 109-10 (1994) (stating that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.") (internal citations omitted). The specific post-deprivation remedy protected by due process can be: (1) a refund of the unconstitutional tax, *see, e.g.*, Ward v. Love Cnty., 253 U.S. 17 (1920); (2) the retroactive imposition of an equalizing tax on similarly situated taxpayers who were unconstitutionally favored, *see, e.g.*, McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990); or (3) some combination of the two, *see id.* at 39-41.

actions challenging the completed acts of persons wielding governmental authority—executive-branch officials, judicial officers, judicial branch employees, or private citizens exercising government authority pursuant to the state-action doctrine—who exercise discretion and act in dynamic contexts.[155] Such discretionary acts usually cannot be challenged in real time or in advance of their occurrence; they typically are over and done with by the time a court has the opportunity to pass on their constitutionality and consider whether and how to remedy them.[156] Therefore, we may generalize that substitutionary constitutional remedies are usually the *only* means available to courts to respond to completed government "conduct" originating with the discretionary acts of individuals exercising government power—and to try to influence similar conduct in the future—that has unconstitutionally infringed (past tense) the constitutional interests of a right-holder with standing.

Situations calling for the imposition of specific constitutional remedies, by contrast, almost invariably involve actions challenging something more than an exercise of discretion by an individual government actor. Specific constitutional remedies are typically directed at ongoing government *policies or customs* (broadly defined)—statutes, rules, regulations, informal or unwritten understandings, or

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155. A judgment for money damages under Section 1983 against a municipality for harm caused by an unconstitutional custom or policy—which may well be ongoing—is an exception to this generalization. Also, courts sometimes reverse judgments of conviction after holding unconstitutional trial procedures that were required by government custom or policy and were not the product of discretionary judgments. *Cf.* United States v. Booker, 543 U.S. 220 (2005) (holding that the mandatory nature of the United States Sentencing Guidelines violates the Sixth Amendment's jury-trial right); Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that the Sixth Amendment requires the jury to make nearly all factual findings that increase the penalty for a crime beyond the statutory maximum).

156. Standing limitations make anticipatory and generalized challenges to such acts by *individual* plaintiffs nearly impossible. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (denying standing to the victim of an allegedly unconstitutional police chokehold to bring a prospective and generalized challenge to the legality of the practice because the plaintiff had not established a likelihood of being subjected to such a chokehold again). *But cf.* 42 U.S.C. § 14141 (2012) (authorizing the Attorney General to sue for equitable and declaratory relief for a pattern or practice of misconduct by state or local law enforcement agencies).

the decisions of those who function as government policymakers—which stand behind and guide the enforcement agent who has acted (or imminently will act) upon the person asserting constitutional injury. Such actions often can be brought during the pendency of the constitutional violation; indeed, it is the *ongoing* nature of the violation that makes specific relief available in fact. Therefore, we may generalize that specific constitutional remedies are the means by which courts declare unconstitutional and prospectively terminate the operation of "laws" (again, broadly defined to encompass not only statutes, rules, regulations, etc., but also those acts that operationalize the decisions of government agents who function as policymakers) that are unconstitutionally infringing (present tense) the constitutional interests of a right-holder with standing.

### C. *Remedy-Limiting Doctrines (Part II)*

When we classify constitutional remedies in terms of how they function, we quickly see that the Supreme Court has developed remedy-limiting doctrines designed to protect the public interest from the costs that a more liberal allowance of substitutionary constitutional remedies otherwise might engender. Such doctrines frequently operate to withhold remedies from victims of wholly realized constitutional violations that have been properly raised and advanced by means of a justiciable claim. But we also see that the Court has *not* used public interest balancing to develop remedy-limiting doctrines that withhold specific remedies from victims of ongoing constitutional violations rooted in governmental custom or policy. Instead, the Court has routinely granted some form of relief in circumstances where the relief is sought by means of a meritorious claim that otherwise satisfies judicial entry requirements: one that is justiciable and has been properly and timely raised in a proper forum against a proper defendant.

Substitutionary monetary damages awards are far from freely available. As explained above, most constitutional claims for money damages target individuals who exercise

government power.[157] When the individuals in question exercise federal power, any claim against them must proceed under the *Bivens* doctrine.[158] Since 1980, however, the Court has severely curtailed the availability of relief pursuant to *Bivens*.[159] The Court also has created an "absolute immunity" under *Bivens* and Section 1983 that cloaks legislators acting in a legislative capacity,[160] judges acting in a judicial capacity,[161] prosecutors acting in a prosecutorial capacity,[162] grand jurors,[163] and witnesses,[164] and renders them free from both liability and the burdens of trial.

Moreover, all government actors not protected by absolute immunity are entitled to a qualified immunity from suit and damages liability under the *Bivens* doctrine and Section 1983.[165] As presently formulated, the qualified immunity doctrine protects conduct that was objectively reasonable in light of "clearly established" law at the time the

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157. *See supra* notes 139-42 and accompanying text.

158. *See supra* note 139 and accompanying text.

159. *See* Minneci v. Pollard, 132 S. Ct. 617, 621-23 (2012) (describing the historical trajectory of *Bivens* litigation and emphasizing the limited circumstances in which liability under *Bivens* may lie—Fourth Amendment violations, gender discrimination, and deliberate indifference to the medical needs of prisoners).

160. *See* Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

161. Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

162. Imbler v. Pachtman, 424 U.S. 409, 417-20 (1976).

163. *Id*. at 423 n.20.

164. Rehberg v. Paulk, 132 S. Ct. 1497, 1510 (2012) (grand jury witnesses); Briscoe v. LaHue, 460 U.S. 325, 335 (1983) (trial witnesses).

165. The Supreme Court has suggested, although it has not yet held, that private parties who sometimes face constitutional claims under *Bivens* or Section 1983 under the state-action doctrine may be entitled to assert a "good-faith" defense that would overlap substantially, if not replicate, the qualified immunity that protects individual government actors. *See* Richardson v. McKnight, 521 U.S. 399, 413-14 (1997); Wyatt v. Cole, 504 U.S. 158, 163-69 (1992); *see also* Filarsky v. Delia, 132 S. Ct. 1657, 1666-68 (2012) (noting the distinction between those who work for the government and private individuals subject to liability under *Bivens* and Section 1983, and according an expansive reading to the former category).

conduct was undertaken.[166] The doctrine principally seeks to avoid the over-deterrence of government actors,[167] although Professor John Jeffries, Jr., has persuasively demonstrated that it also effectively functions as a safety valve that enables legal development in the realm of constitutional tort without the threat of burdensome damages judgments.[168] Recent Court decisions have repeatedly emphasized the doctrine's wide protective scope[169] and insisted that courts define rights at a very high level of specificity in ascertaining whether they are "clearly established."[170] They also have acknowledged that the doctrine is a judicial creation whose contours have been developed—and will continue to evolve—with an eye towards protecting the public interest.[171]

The story is similar with respect to the substitutionary constitutional remedies of exclusion and the invalidation of judgments; the availability of each type of remedy is significantly circumscribed by judicially created doctrines that can reduce the costs of constitutional innovation. As to exclusion, one doctrine that limits the operation of the

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166. Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982) (holding that qualified immunity extends to all government "officials performing discretionary functions . . . . insofar as their conduct does not violate clearly established . . . . constitutional rights of which a reasonable person would have known.").

167. *See id.* at 814-18 (explaining that the doctrine seeks to secure quicker dismissals of doomed civil rights lawsuits so that officials will not be dissuaded from vigorous performance of their duties by burdensome litigation).

168. *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013) [hereinafter Jeffries, *Constitutional Torts*] (summarizing arguments developed in John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 78-81 (1998), and Jeffries, *Right-Remedy Gap*, *supra* note 37, at n.121).

169. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

170. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 639-40 (1987).

171. *See, e.g.*, *Wyatt v. Cole*, 504 U.S. 158, 163 (1992) (acknowledging that qualified immunity is not derived from the text of Section 1983 and that policy considerations have shaped its development and implementation); *Anderson*, 483 U.S. at 644-45 (denying that the contours of the doctrine "can and should be slavishly derived" from historical practices and understandings).

remedy—the holding in *Davis v. United States*[172] prohibiting the exclusion of evidence obtained from unconstitutional searches conducted in objectively reasonable reliance on binding judicial precedent—already has been discussed.[173] To similar effect are the rulings in *United States v. Leon*,[174] *Illinois v. Krull*,[175] *Arizona v. Evans,*[176] *Hudson v. Michigan*,[177] and *Herring v. United States*,[178] all of which held that the likely deterrent benefits of exclusion were outweighed by its very significant social costs.[179] Also, in *Stone v. Powell*, the Court held that Fourth Amendment violations cannot support the reversal of state criminal judgments on collateral review where there was a full and fair opportunity to litigate the claim in state court.[180] Again, the Court reasoned that any deterrent effect of exclusion was outweighed by the costs of extending it to collateral review.[181]

As to the invalidation of judgments, the harmless-error rule significantly limits the availability of relief for a properly preserved claim of constitutional trial error advanced on direct review. The doctrine insulates from invalidation judgments shown by the government to have been unaffected

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172. 131 S. Ct. 2419 (2011).

173. *See supra* Part I.C.

174. 468 U.S. 897 (1984) (requiring admission of evidence obtained by police officers who reasonably rely on a faulty warrant).

175. 480 U.S. 340 (1987) (requiring admission of evidence obtained by police officers who reasonably rely on a subsequently invalidated statute).

176. 514 U.S. 1 (1995) (requiring admission of evidence obtained by police officers who reasonably rely on erroneous database information maintained by judicial employees).

177. 547 U.S. 586 (2006) (requiring admission of evidence obtained by police officers in violation of the "knock and announce" rule).

178. 129 S. Ct. 695 (2009) (requiring admission of evidence obtained by police officers through a merely negligent disregard of Fourth Amendment rights and limiting exclusion to police conduct that is deliberate, reckless, or grossly negligent—or that is traceable to recurring or systemic negligence—with respect to Fourth Amendment rights).

179. *See id.* at 700-02; *Hudson*, 547 U.S. at 591-94; *Evans*, 514 U.S. at 14-16; *Krull*, 480 U.S. at 352-53; *Leon*, 468 U.S. at 922.

180. 428 U.S. 465, 494-95 (1976).

181. *Id*. at 489-95.

by most constitutional errors identified by a reviewing court.[182] Moreover, if the litigant did not raise and properly preserve the claim—a common scenario when the law is settled against the defendant prior to a rights-expanding constitutional ruling—the claim is forfeit and reversal is only available pursuant to the discretionary and demanding plain-error standard.[183] These doctrines combine to provide the judiciary with plenty of flexibility to advance legal frontiers in the area of constitutional criminal procedure without emptying the nation's prisons.

On collateral review, the invalidation of a judgment on the ground of constitutional trial error is even more difficult. A person collaterally attacking a state court conviction on the basis of a claim adjudicated on the merits in state court must establish that the decision denying the claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[184] or "based on an unreasonable determination of the facts in light of the evidence presented."[185] The claimant must also establish that the error had a "substantial and injurious effect or influence in determining the jury's verdict."[186] And to the extent that a person seeks to bring a collateral challenge to a conviction on the basis of favorable "new law"—i.e., a rights-expanding decision that was handed down after the underlying conviction became final—he or she must establish either that the rule holds previously punishable conduct to be

182. Chapman v. California, 386 U.S. 18, 24 (1967) (holding that there should be no reversal if the government establishes "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."). Subsequent Court rulings have made clear that *Chapman*'s harmless-error rule applies only to constitutional "trial error"—which describes most errors—and not to structural error. *See* Arizona v. Fulminante, 499 U.S. 279, 306-10 (1991).

183. *See supra* Part I.B.

184. 28 U.S.C. § 2254(d)(1) (2012).

185. *Id.* § (d)(2).

186. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

constitutionally protected,[187] or that it implicates the fundamental fairness of the trial and is necessary to prevent a serious diminishment of the likelihood of an accurate conviction.[188] Obviously, all of these rules seek to promote interests in efficiency, the finality of judgments, and (in the case of collateral review) federalism in circumstances where, in the view of the Supreme Court or Congress, such interests outweigh the interests the underlying constitutional rights seek to protect.

Contrast all of these doctrines applying public interest balancing to limit the availability of substitutionary constitutional remedies for wholly concluded constitutional wrongs with what we see when we look at how the Supreme Court has treated justiciable and properly raised claims for *specific* constitutional remedies. With respect to such claims, the Court has simply not developed remedy-limiting doctrines rooted in public interest balancing. In fact, the *only* limits the Court has recognized on the availability of specific constitutional remedies are rooted in competing *structural* imperatives of a constitutional dimension—those underlying, for example, sovereign immunity,[189] federalism based limits on the federal judicial power,[190] and the deference the Court

187. Note that this exception preserves the right to seek the one form of specific relief available on collateral review. *See supra* notes 144 & 150 and accompanying text.

188. *See* Teague v. Lane, 489 U.S. 288, 305-14 (1989) (O'Connor, J., plurality opinion); *supra* note 83 and accompanying text.

189. Governmental immunity merely requires most plaintiffs to use a legal fiction when a seeking a specific constitutional remedy for a justiciable and meritorious claim: the "official capacity" claim. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910 (2011) (entertaining action for specific relief on the basis of allegedly unconstitutional prison overcrowding by state officials); Webster v. Doe, 486 U.S. 592 (1988) (entertaining action for specific relief on the basis of allegedly unconstitutional discrimination by federal officials). A notable exception involves claimants under a state contract that has been modified in violation of the Contracts Clause, U.S. CONST. art. 1, § 10, who are not entitled to bring an official capacity claim seeking specific performance of the contract. *See* LAYCOCK, *supra* note 128, at 476. But such claimants are not left without a remedy; damage caused by government impairment of a contract constitutes a taking for which just compensation is required. *See, e.g.*, Lynch v. United States, 292 U.S. 571, 579 (1934).

190. Judicial federalism doctrines are grounded in both statutory and case law. Examples of statutes enforcing judicial federalism principles include: the Tax

shows to congressional prerogative with respect to remedies[191]—that *sometimes* justify redirecting federal court claimants with meritorious claims to alternative forums. Indeed, in explaining its willingness to recognize such structural limits on the availability of specific remedies with respect to otherwise justiciable claims for relief from ongoing constitutional harm, the Court has been at pains to emphasize that "serious constitutional concerns" would be raised if relief were unavailable from the alternative forum.[192]

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Injunction Act of 1937, 28 U.S.C. § 1341 (2012) (limiting federal court authority to issue injunctions staying the collection of state taxes); the Johnson Act of 1934, 28 U.S.C. § 1342 (2012) (limiting federal court authority to restrain operation of public utility rates); and the Anti-Injunction Act, 28 U.S.C. § 2283 (2012) (limiting federal court authority to issue injunctions staying state court proceedings). Examples of judicially created judicial federalism doctrines include *Pullman* abstention, *see* R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) (limiting federal court authority to pass on the constitutionality of state enactments in certain circumstances), and *Younger* abstention, *see* Younger v. Harris, 401 U.S. 37 (1971) (limiting federal court authority to decide constitutional challenges that can be raised in a pending state criminal prosecution).

191. The Supreme Court has recognized congressional authority to divert otherwise justiciable claims for specific constitutional relief into alternative statutory or administrative enforcement regimes. *See, e.g.*, Elgin v. Dep't of the Treasury, 132 S. Ct. 2126 (2012) (holding the Civil Service Reform Act, 5 U.S.C. § 1101, provides the exclusive avenue to judicial review to a federal employee challenging an adverse employment action on constitutional grounds); United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008) (detailing how a taxpayer precluded from bringing a pre-enforcement challenge to a tax under the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), and forced to pay an unlawful federal tax must seek a refund administratively before suing the government under the Tucker Act); Smith v. Robinson, 468 U.S. 992 (1994) (holding that the Education of the Handicapped Act (now known as the Individuals with Disabilities Education Act), 20 U.S.C. § 1400, provides the exclusive avenue to specific relief for allegedly unconstitutional discrimination); Yakus v. United States, 321 U.S. 414 (1944) (upholding statute prohibiting a criminal defendant from seeking nullification of law authorizing prosecution where he had opportunity to challenge the law in a prior administrative proceeding).

192. *Plata*, 131 S. Ct. at 1937 (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (observing that legislation precluding judicial review of a challenge seeking to strike down an allegedly unconstitutional Medicare statute would raise a "serious constitutional question") (collecting supportive authority)); *see e.g.*, *Smith*, 468 U.S. at 1012 n.15 (emphasizing that the statutory remedy simply replaced the constitutional remedy and stating that "[t]here is no issue here of Congress' ability to preclude the federal courts from granting a remedy for a constitutional deprivation"); *cf. Plata*, 131 S. Ct. at 1947 (stating that the ongoing violation of prison overcrowding "requires a remedy").

In other words, the Court has all but held that a claimant's entitlement to a remedy for an ongoing constitutional wrong is itself of constitutional magnitude, and can only be trumped when the underlying claim implicates competing structural concerns that are also constitutional in dimension.

## III. THE CASE FOR A PURELY REMEDIAL FRAMEWORK

Part II describes a pattern of judicial behavior implying that the Constitution permits lawmakers to engage in public interest balancing to create doctrines that limit the availability of substitutionary, but not specific, constitutional remedies. Part III defends this proposition normatively and urges the Supreme Court to embrace it as a prescriptive framework to guide Congress and the lower courts in deciding whether and when it is appropriate to withhold constitutional remedies. Part III then argues that the framework is sufficient—and superior to the use of non-retroactivity doctrines—for managing the costs of constitutional innovation. Finally, Part III contends that the framework explains why the Court correctly reached two conclusions that have been criticized by the prominent and influential commentators who edit the Hart & Wechsler federal courts casebook: first, that just compensation for takings and relief for the imposition of unconstitutional taxes are constitutionally required, even though invasions of liberty interests often go without a remedy; and second, that the ban on prospective constitutional rulings established in *Reynoldsville Casket Co. v. Hyde*[193] coheres with doctrines, such as qualified immunity and the rule of *Teague v. Lane*,[194] that make legal novelty a legitimate basis for denying relief to victims of unconstitutional conduct.

### A. *A Justifiable Distinction*

The Supreme Court's differential treatment of substitutionary and specific constitutional remedies in fashioning remedy-limiting doctrines rests on firm

193. 514 U.S. 749 (1995).

194. 489 U.S. 288 (1989).

constitutional footing and tracks an appropriate constitutional boundary.[195] Substitutionary constitutional remedies—i.e., damages, the exclusion of evidence, and the invalidation of tainted judgments—are pervasively and properly conceptualized as both sub-constitutional and contingent. To the extent that they are not rooted in statutes or rules,[196] they derive from judicial lawmaking with no clear or inevitable link to the text or structure of the Constitution.[197]

To be sure, substitutionary constitutional remedies are central components of our constitutional order; their wholesale elimination without replacement certainly would yield an undesirable level of constitutional under-enforcement.[198] But by their very nature, substitutionary constitutional remedies are highly imperfect stand-ins. They typically apply only to the wholly concluded discretionary actions of those individuals to whom a modern society must entrust the complex operation of government;[199] they fail to halt, prevent, or undo the constitutional harms to which they

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195. *See* Greabe, *Constitutional Remedies*, *supra* note 22, 892-96 (previewing this argument).

196. *See, e.g.*, 42 U.S.C. § 1983 (2012).

197. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975) (positing the existence of "constitutional common law," described as a "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions"). Professor Monaghan regarded as constitutional common law the exclusionary rule, *see id.* at 3-10, the implied *Bivens* damages remedy, *see id.* at 23-24, and the *Chapman* harmless-error rule, *see* Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195, 200 n.30. Other prominent commentators agree. *See, e.g.*, Jeffries, *Constitutional Torts*, *supra* note 168, at 242-43 (describing constitutional tort remedies as sub-constitutional); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 29-34 (1994) (comparing the *Chapman* rule with the *Bivens* rule and arguing that both are at least partially sub-constitutional). Needless to say, I agree with these characterizations.

198. For this reason, I have argued for a conception of substitutionary constitutional remedies that regards them as "integral as a class" but "individually contingent" and "susceptible to legislative or judicial expansion, contraction, or replacement as the perceived public interest dictates." Greabe, *Constitutional Remedies*, *supra* note 22, at 893.

199. *See supra* Part II.B.

respond;[200] and, most importantly—and this is unique to substitutionary constitutional remedies—they can generate significant and controversial collateral costs that must be borne *entirely* by third parties whose only link to the case is that they live within or near the polity that employed the offending government agent.[201] If the whole of the law of remedies is "a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy,"[202] the imperfections and costs of judicial remedies are perhaps most prominently on display when the only remedy available for a constitutional infraction is some form of substitutionary relief.

Specific constitutional remedies for rights-invasions are of a materially different, and less problematic, character. By their very nature, they provide more narrowly tailored relief in that they provide or restore to the right-holder the precise interest that the government has wrongly compromised. Their links to the text and structure of the Constitution are more direct, for they are more conceptually necessary to the maintenance of a federalist structure with a Supremacy Clause[203] and government power separated into three coequal federal branches including a judicial department entrusted with judicial review.[204] The Constitution explicitly

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200. *See supra* Part II.B.

201. *Cf.* People v. Defore, 150 N.E. 585, 587 (1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered."). The problem of transferred costs to innocent third parties is not confined to the costs borne by crime victims and communities when the exclusionary rule operates to free a criminal defendant. Innocent third parties who merely live within the polity also ultimately bear the costs for both damages judgments imposed for constitutional torts and repeating judicial proceedings tainted by constitutional trial error. Little wonder, then, that substitutionary constitutional remedies are less popular outside of the legal academy than inside.

202. Paul Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983).

203. U.S. CONST. art. VI, § 2.

204. Recently, the Supreme Court has reminded us that the use of judicial review to enforce constitutional structure is necessary to protect individual liberty. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.") (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)). But we must not

contemplates habeas corpus petitions and the provision of just compensation for takings,[205] and other specific constitutional remedies are all but logically compelled once we recall that they ameliorate ongoing unconstitutional conduct at the *lawmaking* level[206] and accept that the judiciary should—when faced with a justiciable and properly raised claim challenging an unconstitutional law—exercise its power to keep the coordinate federal branches and the States within constitutional bounds.[207]

A prescriptive framework for withholding constitutional remedies, grounded in constitutional structure and limits, thus emerges. The Supreme Court and Congress are free, in the exercise of their sub-constitutional lawmaking powers,[208] to take the perceived public interest into account to fashion, alter, and (hopefully) improve those doctrines—immunity rules, exceptions to the exclusionary rule, harmless-error rules, and limitations on the availability of collateral relief—that operate to withhold substitutionary constitutional remedies for wholly concluded constitutional wrongs. The power to generate and modify such remedy-limiting doctrines is a lesser-included component of the broader lawmaking power by which the Court and Congress create substitutionary constitutional remedies in the first place.

Yet, the Court and Congress are *not* free to withhold specific constitutional remedies that invalidate unconstitutional laws (broadly defined to include all

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lose sight of the converse proposition: that the use of judicial review to enforce individual rights also is necessary to enforce appropriate constitutional structure.

205. *See* U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

206. *See supra* Part II.B.

207. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("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."); *id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

208. *See supra* note 197 and accompanying text.

unconstitutional government custom and policy) through properly raised, justiciable, and meritorious claims that are filed in a proper forum against a proper defendant. The availability of specific constitutional remedies to ameliorate ongoing constitutional violations is critical to the judiciary's role in maintaining our separation of powers and enforcing federalism values. Judgments ordering specific constitutional remedies are the principal means by which the judiciary keeps the political branches at the federal and state levels within constitutional limits with respect to lawmaking. Judges should not view themselves as free to withhold such judgments out of concerns about how they might affect the public interest. Unconstitutional laws should be struck down, either facially or as applied, *whenever* challenged by means of an otherwise justiciable and proper claim brought in an appropriate forum.

### B. *The Sufficiency and Superiority of a Purely Remedy-Limiting Framework*

Professor Heytens has joined Professors Fallon and Meltzer and twice called for a revival of non-retroactivity jurisprudence—specifically, selective prospectivity—to serve as a vehicle by which courts should manage the costs of legal change on direct review of criminal convictions.[209] In his first paper, Professor Heytens contrasts the relative virtues of selective prospectivity with the formalism and arbitrariness of the Court's forfeiture doctrine, which places nearly dispositive weight on whether a criminal defendant has objected—and thus preserved appellate rights—with respect to the issue on which the law has changed.[210] In his more recent paper, Professor Heytens expands his analysis to include consideration of a remedy-limiting approach.[211] But in the end, he concludes that such an approach—while

209. *See* Heytens, *Framework(s)*, *supra* note 26, at 621-25; Heytens, *Managing Transitional Moments*, *supra* note 26, at 983-90; *see also* Fallon & Meltzer, *New Law*, *supra* note 19, at 1807-13 (arguing for the use of selective prospectivity to manage the costs of legal change on direct review of criminal convictions).

210. *See* Heytens, *Managing Transitional Moments*, *supra* note 26, at 979-90.

211. *See* Heytens, *Framework(s)*, *supra* note 26, at 610-21.

superior to the use of forfeiture—is inadequate to help courts manage of the costs of legal change in all direct review cases.[212]

This conclusion is informed by an understanding that, even with all of its warts,[213] selective prospectivity is available in all circumstances to ameliorate the costs and disruption of a law-changing decision.[214] By contrast, Professor Heytens argues, a remedy-limiting approach of the sort employed in *Davis v. United States*,[215] is only available in cases where the requested remedy (the exclusion of evidence at trial) is separable from the underlying right (freedom from a wholly concluded unreasonable search) that has been violated.[216] To be sure, Professor Heytens recognizes that there are *other* remedy-limiting doctrines, such as harmless error, that can operate to withhold remedies[217] even for constitutional trial rights where some specified procedure *is* part and parcel of the right.[218] But, he says, "any expansion of the remedy-limiting approach [to cover all situations involving constitutional criminal procedure rights] would require the Court to think hard about the relationship—and the distinction—between various 'rights' and 'remedies,' as

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212. *See id.* at 614-21.

213. *See supra* notes 79-83 and accompanying text (summarizing the Supreme Court's view, expressed in Griffith v. Kentucky, 479 U.S. 314 (1987), that selective prospectivity is both unconstitutionally "legislative," *id.* at 322, and violates the norm that similarly situated parties be treated similarly, *id.* at 323).

214. *See* Heytens, *Framework(s)*, *supra* note 26, at 621-24.

215. 131 S. Ct. 2419 (2011); *see supra* Part I.C.

216. *See* Heytens, *Framework(s)*, *supra* note 26, at 614-21 (arguing that Fourth Amendment cases and cases like Miranda v. Arizona, 384 U.S. 436 (1966), involving merely "prophylactic" constitutional rules, are the only situations in which the Court has authorized the separation of right and remedy in right-specific contexts).

217. *See id.* at 616 (acknowledging that the harmless-error doctrine relies on a distinction between rights and remedies).

218. *See id.* at 619 (listing the rights to exclusion of out-of-court "testimonial" statements, *see* Crawford v. Washington, 541 U.S. 36 (2004), and to a jury determination of facts that raise the penalty above the statutory maximum, *see* Apprendi v. New Jersey, 530 U.S. 466 (2000), as examples of rights that carry along certain procedural guarantees that, unlike Fourth Amendment rights, must be vindicated at trial).

well as the source and scope of its discretion to grant or withhold certain remedies."[219]

I fully agree with the quoted statement. But I think that it would be better for the Supreme Court to think these issues through—and to explain the source and scope of judicial discretion to grant and withhold some but not all constitutional remedies—than for it to resort to the acknowledged lesser evil[220] of reviving the strand of non-retroactivity jurisprudence known as selective prospectivity. For the problems with selective prospectivity are significant indeed.

One does not need to be a Blackstonian to believe that the Court enhances both its stature as a legal institution and the legitimacy of its constitutional rulings by treating its acts of constitutional judging as declarations of its best understanding of what the Constitution "means," and not as mere acts of constitutional lawmaking emanating from the persons who then happen to hold commissions as Supreme Court justices. As Professor Roosevelt has explained, under a declaratory theory, the Court commands obedience to "the law." But under the Justices-as-sources-of-law theory, on which non-retroactivity jurisprudence depends,[221] the Court only commands obedience to, at best, an institution and, at worst, a collection of individuals who presently hold judicial power.[222] Moreover, the differential treatment of identically situated individuals occasioned by selective prospectivity disregards one of most basic imperatives of justice—that identically situated individuals be treated equally under the law.[223] For both of these reasons, the Court has quite properly

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219. *Id.* at 616.

220. *See id.* at 621 (admitting "that a nonretroactivity approach is [not] without its problems").

221. *See supra* Part I.A.

222. *See* Kermit Roosevelt III, *A Retroactivity Retrospective, with Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CAL. L. REV. 1677, 1680-83 (2007).

223. *Id.* at 1685 n.48 (quoting Benjamin N. Cardozo, The Method of Philosophy, Address Delivered in the William L. Storrs Lecture Series Before the Law School of Yale University (1921), *in* THE NATURE OF THE JUDICIAL PROCESS, Dec. 1921, at 33 ("It will not do to decide the same question one way between one set of

characterized the issuance of non-retroactive constitutional rulings as doubly incompatible with the norms of adjudication under Article III.[224]

In contrast, a framework that differentiates between claims for substitutionary and specific constitutional remedies permits the Court to use public interest balancing to generate and refine remedy-withholding doctrines in *all* circumstances that the Constitution permits, but in *only* those circumstances that the Constitution permits—i.e., in connection with all properly preserved and advanced claims for substitutionary constitutional remedies to address wholly realized constitutional wrongs, but not in connection with claims for specific constitutional remedies to ameliorate ongoing constitutional violations rooted in government custom or policy.[225] Non-retroactivity doctrines such as selective prospectivity contain no such limiting principle. Theoretically, such doctrines could be applied to withhold the specific constitutional remedies that are ordinarily necessary: those sought in connection with ongoing wrongs rooted in government custom or policy.[226]

All of this is not to say, of course, that the Supreme Court has gotten everything right with respect to the metes and bounds of the remedy-limiting doctrines that it has developed and applied to claims for substitutionary constitutional relief. Indeed, in the past I have argued that the Court should embrace less capacious concepts of harmless error with respect to instructional errors that interfere with the jury's fact-finding function,[227] and of "good faith" in formulating

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litigants and the opposite way between another.")); *see, e.g.*, *id.* at 1684 (expressing "surprise[] that *Stovall*'s 'selective prospectivity' is not more widely considered an abomination").

224. *See* Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987) (explaining that prospective rulings are quintessentially legislative and violate the principle of treating similarly situated parties the same).

225. *See supra* Part III.A.

226. *See supra* note 192 and accompanying text.

227. *See* John M. Greabe, *Spelling Guilt Out of a Record? Harmless-Error Review of Conclusive Mandatory Presumptions and Elemental Misdescriptions*, 74 B.U. L. REV. 819 (1994).

exceptions to the exclusionary rule.[228] I also have argued that the Court should reform its qualified immunity doctrine in a number of respects,[229] and I agree with Professor John Jeffries, Jr., that constitutional tort law should be re-rationalized and revamped with an eye towards enhancing context-specific functionality.[230] Finally, I believe that there is much to commend in Professor Heytens' argument that the Court should improve upon its approach to cases involving direct review of criminal convictions infected by constitutional errors to which defendants' counsel—relying on the soundness of law that became obsolete on appeal—did not interpose objections at trial and thus preserve their appellate rights.[231] My point is simply that the Court should use a purely remedial framework—and not selective prospectivity or any other non-retroactivity doctrine—to

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228. *See* John M. Greabe, *Objecting at the Altar: Why the* Herring *Good Faith Principle and the* Harlow *Qualified Immunity Doctrine Should Not be Married*, 112 COLUM. L. REV. SIDEBAR 1 (2012), http://www.columbialawreview.org/wp-content/uploads/2012/01/1_Greabe.pdf.

229. *See* John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189 (2009); John M. Greabe, Iqbal*,* al-Kidd *and Pleading Past Qualified Immunity: What the Cases Mean and How They Demonstrate a Need to Eliminate the Immunity Doctrines from Constitutional Tort Law*, 20 WM. & MARY BILL RTS. J. 1 (2011); Greabe, Mirabile Dictum!, *supra* note 28.

230. *See* Jeffries, *supra* note 168, *passim* (arguing for the pruning of absolute immunity with an eye to the availability of alternative remedies, the elimination of strict municipal liability, and the reform of qualified immunity to make immunity less robust and liability more routine).

231. *See* Heytens, *Managing Transitional Moments*, *supra* note 26, at 955-59. My own preliminary view is that courts ordinarily should exercise their Federal Rule of Criminal Procedure 52(b) discretion to reverse the convictions of defendants who, on direct review, can establish the harmfulness under ordinary harmless-error principles of an error whose existence only became apparent after a post-conviction change in the law. Shifting the burden of persuasion from the government to defendants who have not preserved the issue fairly differentiates between those who have preserved their rights and those who have not. Moreover, establishing the harmfulness of an error under standard harmless-error review—which requires raising a reasonable doubt that the verdict would have been different but for the error, *see, e.g.*, Neder v. United States, 527 U.S. 1, 18 (1999)—is no mean feat. Such a rule would result in the vacatur of judgments only in those cases where the trial's outcome was quite possibly affected by the error. This would doubtless be a small minority of cases under prevailing harmless-error principles.

protect the public interest from the costs of constitutional innovation.

A final point should be addressed. One might ask if it matters whether courts explicitly claim a power to issue non-retroactive rulings. So long as courts do not withhold remedies from parties who establish an ongoing constitutional violation rooted in unlawful custom and policy by means of a proper and justiciable claim—and this Article shows that they in fact do not—why should we care whether courts use a non-retroactivity doctrine or a remedy-limiting approach in those cases where they do (properly) withhold remedies? In other words, why should we care about the justification courts provide for withholding remedies in circumstances where a remedy is not constitutionally required?

The answer is that, if we care about the rule of law, both the means and ends must matter when courts exercise the profound, counter-majoritarian power of judicial review. The rule of law is why it is unconstitutional to maintain an at-large election district with discriminatory effects on election outcomes for discriminatory purposes,[232] but constitutional to maintain such a district for non-discriminatory purposes.[233] Similarly, the rule of law is why a state may constitutionally decline to apply the wrongful death statute of a sister state in a particular case, but may not adopt a blanket rule stating that it will never enforce the wrongful death statutes of other states.[234] In short, the rule of law requires that we care about more than the constitutionality of outcomes of government actions. The rule of law also demands that those outcomes be reached by constitutionally permissible means.

As explained above, the issuance of non-retroactive rulings through a regime of selective prospectivity is more akin to the creation of legislation than it is to a judicial pronouncement on the meaning of a legal text. Moreover, the issuance of non-retroactive rulings through a regime of selective prospectivity results in similarly situated litigants

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232. Rogers v. Lodge, 458 U.S. 613, 616-617 (1982).

233. City of Mobile v. Bolden, 446 U.S. 55, 62-66 (1980), *superseded by statute*, Pub. L. No. 97-205, 96 Stat. 131.

234. Hughes v. Fetter, 341 U.S. 609, 611 (1951).

being treated differently without an adequate justification. Both reasons are sufficient to justify a prohibition on the practice as a means for reducing the costs of constitutional innovation.

### C. *The Coherence of the Supreme Court's Approach*

As mentioned in the Introduction, the editors of the Hart & Wechsler federal courts casebook have suggested that the Supreme Court has acted inconsistently in developing doctrines that operate to withhold constitutional remedies.[235] They imply that the Court has improperly discriminated in favor of (less important) property rights by mandating just compensation for takings,[236] and remedies for the imposition of unconstitutional taxes,[237] while simultaneously developing remedy-limiting doctrines—e.g., qualified immunity, exceptions to the exclusionary rule, and harmless-error principles—that operate to withhold relief for invasions of (more important) liberty interests.[238] But as should by now be clear, this criticism overlooks the fact that, unlike damages for the invasion of a liberty interest, just compensation for a taking and relief for the imposition of an unconstitutional tax are *specific* remedies that provide or restore to the right-holder the very interest against which the Constitution serves as a shield. The necessity of a constitutional remedy has never turned on the perceived importance of the right that has been compromised; as explained above, it has turned on the nature of the constitutional deprivation—ongoing or wholly concluded—and a court's capacity to provide an appropriate remedy for the violation. Courts cannot undo the past.

Similarly, and for similar reasons, it is perfectly coherent for the Court to reject non-retroactivity doctrines while at the

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235. *See* FALLON ET AL., HART AND WECHSLER, *supra* note 19 at 741.

236. *See* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 316 n.9 (1987).

237. *See* Reich v. Collins, 513 U.S. 106, 109-11 (1994).

238. *See* FALLON ET AL., HART AND WECHSLER, *supra* note 19, at 741; *see also* Fallon & Meltzer, *New Law*, *supra* note 19, at 1827-28 (making the argument explicitly).

same time enforcing other remedial doctrines—e.g., qualified immunity and the rule adopted in *Teague v. Lane*[239]—that make legal novelty a basis for denying relief.[240] Because this is precisely what the Court did in *Reynoldsville Casket Co. v. Hyde*,[241] I shall re-rationalize the holding in that case in terms of the framework for withholding constitutional remedies that this Article proposes.

*Reynoldsville Casket* involved whether the Ohio Supreme Court lawfully applied an unconstitutional state "tolling" statute in favor of a plaintiff who sued after the statute of limitations had run, but before the United States Supreme Court struck down the tolling statute on dormant commerce clause grounds.[242] The Ohio Supreme Court applied the tolling statute—notwithstanding its unconstitutionality—in a cryptic decision that relied on the Ohio Constitution to hold that the United States Supreme Court decision declaring the statute unconstitutional "may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that decision."[243] The United States Supreme Court reversed, holding that the obligation to apply constitutional rulings retroactively is enforceable through the Supremacy Clause.[244] Further, it also unambiguously reiterated that law-changing rulings should not be given merely prospective effect in pending cases.[245]

For present purposes, what is most interesting is how the Supreme Court disposed of the plaintiff's "ingenious[]" argument[246] that the non-retroactivity principle adopted by

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239. 489 U.S. 288 (1989).

240. *See* FALLON ET AL., HART & WECHSLER, *supra* note 19, at 721-23.

241. 514 U.S. 749 (1995).

242. In Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 894 (1988), the Supreme Court struck down the statute because it effectively gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants.

243. *Reynoldsville Casket*, 514 U.S. at 751-52 (quoting the syllabus of the Ohio Supreme Court's decision).

244. *See id.* at 751.

245. *See id.* at 752-53.

246. *Id.* at 752.

the Ohio Supreme Court could and should be characterized as a mere remedy-limiting doctrine—analogous to qualified immunity and the rule adopted in *Teague v. Lane*—that lawfully could apply because the plaintiff had filed suit in reliance on the tolling statute.[247] The Court rejected the argument by stating that qualified immunity and the *Teague* principle are animated by concerns unrelated to mere reliance interests: the over-deterrence of police officers in the case of qualified immunity,[248] and a limitation inherent in retroactivity itself—one based in special concerns about the finality of criminal convictions—in the case of *Teague*.[249]

The editors of the Hart & Wechsler federal courts casebook make an excellent point in asking whether the Supreme Court has adequately explained itself.[250] After all, to the extent that avoiding the over-deterrence of police officers and preserving the finality of all but the most troubling state criminal convictions serve to justify the Court's creation of the remedy-withholding qualified immunity and *Teague* doctrines, why should the reliance interest to which the Ohio Supreme Court pointed not similarly suffice to justify the creation of a similar "reliance" doctrine to benefit the *Reynoldsville Casket* plaintiff? The Court provides no convincing answer to this question.

But the framework proposed by this Article supplies the missing rationale and establishes the correctness of the *Reynoldsville Casket* holding. The key is to understand that the rule adopted by the Ohio Supreme Court would have withheld from the defendant a *specific* constitutional remedy addressed to a violation of law rooted in unlawful custom or policy: dismissal of the lawsuit on grounds of the defendant's ongoing entitlement not to be treated in an unconstitutionally discriminatory manner with respect to application of the state's statute of limitations.[251] The opponent's reliance interests simply should not trump a party's entitlement to specific relief from the burdens of a

247. *See Reynoldsville Casket*, 514 U.S. at 757-58.

248. *See id.*

249. *See id.* at 758.

250. *See* FALLON ET AL., HART AND WECHSLER, *supra* note 19, at 721-23.

251. *See Reynoldsville Casket*, 514 U.S. at 750-53.

law, rooted in custom or policy, that is unconstitutional either on its face or as applied to an appropriate claimant.

## CONCLUSION

It is telling to take a functional look at what the Supreme Court has done in developing and refining doctrines that withhold remedies for justiciable and meritorious constitutional claims. The Court's de facto but unrationalized approach has been to limit itself to the development and modification of doctrines that withhold only substitutionary remedies for those constitutional interests irretrievably lost through wholly concluded constitutional violations. But when a specific constitutional remedy is available, and when a party seeks such a remedy by means of a properly raised, justiciable, and meritorious claim filed against a proper defendant in a proper forum, the Court has regarded the provision or restoration of the compromised interest as mandatory.

This is as it should be. As I have explained, the Supreme Court's remedy-limiting approach traces an appropriate constitutional boundary and supplies a workable framework that courts can use to decide whether and when it is appropriate to protect the public interest by withholding a constitutional remedy. And unlike non-retroactivity doctrines—the principal theoretical competitors when it comes to techniques that the Court has used to withhold remedies from parties with properly preserved and advanced constitutional claims—a purely remedy-limiting approach honors the requirements of Article III and otherwise serves structural values. Although the Court should take a hard look at the scope and breadth of its various remedy-limiting doctrines, it should continue to use a purely remedy-limiting framework to withhold remedies—to manage the costs of constitutional innovation or for any other purpose. But it is high time for the Court to explain what it has been doing.